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vidual savings, as for example in Quebec or New Zealand, to complete income replacement. The progressive point of view would be to improve the retirement system with workplace pensions in order to increase the percentage of workers covered, but not the same kind of collective pensions. Many models already exist in several countries including Canada: sectoral or professional workplace pensions, mandatory insurance funds in case of employer's financial difficulties, individual accounts in collectively negotiated pension plans.

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### **Unions in Court: Organized Labour and the Charter of Rights and Freedoms**

By Larry Savage and Charles W. Smith (2017)  
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In 2016, Julius Getman published a book where he documented how the United States of America's Supreme Court had gutted the 1935 *National Labor Relations Act 1935* (USA) which promoted workers' freedom of association rights to form unions and engage in collective bargaining, including the right to strike.<sup>1</sup> In 1982, Canada finally achieved 'constitutional' separation from the United Kingdom when the latter's Parliament passed the *Canada Act 1982* (UK). Contained in that Act was *The Canadian Charter of Rights and Freedoms*, which provided Canada with a new constitutional regime. Three provisions of the *Charter* are relevant for the contested terrain known as industrial relations. They are:

Section 1: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 2: Everyone has the following fundamental freedom [...], such as] (d) freedom of association.

Section 15: (1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Inevitably, cases concerning industrial relations found their way to the Supreme Court of Canada. While there have been some cases which have gone against unions, the general trajectory of the Court's decisions, over the last three and half decades, has been one of recognising that unions have a constitutional right to engage in collective bargaining, including strike action. In contrast to the situation on the other side of the International Boundary, Canadian judges, especially in the last two decades, have been more positive in their attitude to unions, collective bargaining and the right to strike.

The direction of the cases that have recognised/granted such rights were generally mounted by unions in response to 'anti-union' provincial and federal government legislation. According to the Canadian Foundation for Labour Rights, between 1982 and 2016, federal and provincial governments enacted 218 laws that impinged negatively on the collective bargaining rights of Canadian workers.<sup>2</sup> The *Charter* held out a prospect of redress. Moreover, relying on political action, in the form of the New Democratic Party to be elected and if elected to enact 'supportive' legislation was regarded by most Canadian unions as little more than a waste of time and scarce resources.

Larry Savage and Charles Smith in *Unions in Court: Organized Labour and the Charter of Rights and Freedoms* provide a lively and illuminating account

of the evolution of Canadian labour law, with a particular focus on the various cases adjudicated by the Canadian Supreme Court following the introduction of the *Charter*. Their account provides a mixture of broader historical, political and legal insights coupled with in depth examinations of respective cases and interactions between unions, employers, governments, regulatory bodies and other interest groups in respective struggles.

They provide an historical chapter going back to the Nineteenth Century and taking readers through major developments up until the adoption of the *Charter*. Unions were wary of Courts and judges because of biases against unions, wedded in common law decisions of British judges in the Nineteenth Century. Judges in Canada followed this tradition and interpreted rights in individual rather than collective terms, which placed limits on trade union action. The general union position in the discussions leading up to the introduction of the *Charter* was to adopt a low profile and not push a 'labour rights' agenda for fear that such rights would either be 'constitutionally' constrained and a belief that judges would undermine them anyway, as in the past. Savage and Smith's examination of the cases in the *Charter* era is straightforward and accessible to those without a legal background. They put the respective cases into context; present the positions of the respective parties and intervenors, the reasoning of the judges (both majority and minority positions), the caveats and qualifications in decisions that 'create' new legal dilemmas and questions and the responses of the parties, activists, academics and others.

In the final chapter Savage and Smith, while recognizing the need of unions to have fought such cases and the importance of these legal victories, simultaneously criticise unions and their leaders in that legal actions 'chill' activism amongst

rank and file workers and the transformative capacity of unions to engage in class struggle against capitalism. This chapter is an exercise in polemics, which will either warm the cockles of one's heart or leave one going home humbled.

Canadian unions were forced to mount legal action to protect themselves from legislative changes mounted by federal and provincial governments, which placed 'severe', if not 'fundamental' restraints on their ability to operate. To have not mounted such cases, especially where there was a *Charter* which apparently protected rights which legislatures wanted to extinguish, would have resulted in the death knell of Canadian unions. The unions had little choice other than to mount such actions. The Canadian Supreme Court in protecting unions from domination by the legislature, following Alexis de Tocqueville, has acted to 'form the most powerful...counterpoise to the democratic element'.<sup>3</sup> Whether or not Canadian unions will achieve the transformative destiny that Savage and Smith envisage is, like all propositions, something that can be empirically tested. The evidence so far, not only in Canada but across the Western world, is not encouraging. *Unions in Court: Organized Labour and the Charter of Rights and Freedoms* provides a more than useful account of legal developments in Canadian industrial relations.

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#### **Notes**

- 1 Getman, J. G. (2016), *The Supreme Court on Unions: Why Labor Law Is Failing American Workers*, Ithaca and London: Cornell University Press.
- 2 Canadian Foundation for Labour Rights (2016), *Restrictive Labour Laws in Canada*.
- 3 de Tocqueville, A. (1835, 1966 Edition), *Democracy in America*, Volume 1, New York: Alfred A. Knopf, p. 278.