

5-1-1997

Protecting the Golden Goose: Canadian Union Security Agreements and Competitiveness in the Age of NAFTA

John H. Taylor III

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Taylor, John H. III (1997) "Protecting the Golden Goose: Canadian Union Security Agreements and Competitiveness in the Age of NAFTA," *Penn State International Law Review*: Vol. 15: No. 3, Article 8.
Available at: <http://elibrary.law.psu.edu/psilr/vol15/iss3/8>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Protecting the Golden Goose: Canadian Union Security Agreements and Competitiveness in the Age of NAFTA

On January 1, 1994, the North American Free Trade Agreement¹ (NAFTA) between the United States, Canada and Mexico took effect, eliminating most tariffs between the three countries, and effectively stripping away economic protectionism for each nation's domestic interests.² The United States and Canada had already entered into the Free Trade Agreement in 1988, beginning a process of elimination of tariff barriers between the two nations, which eventually culminated in the NAFTA accord.³ The destruction of economic borders has increased competition as each province and state tries to attract new and better jobs to employ its citizens. In the Southeastern United States and Mexico, businesses have been increasingly attracted by the prospect of "right-to-work" laws. Right-to-work laws prevent union security clauses from becoming part of a collective bargaining agreement, even if freely negotiated between the employer and the union.⁴

Presently, no Canadian provinces have enacted right-to-work laws; most employers must provide mandatory dues check-off⁵ for all employees within a unionized bargaining unit, effectively mandating agency shops.⁶ In fact, Canadian legislatures, both

1. Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403 (1995).

2. *Id.*

3. Bruce Campbell, *Free Trade: Year 3*, CANADIAN DIMENSION, Jan.-Feb. 1992, at 5, available in WESTLAW, TRD&IND Library.

4. Susan Nokes, *Special Report: Doing Business in the USA: South Carolina a Magnet for Business*, FIN. POST, Sept. 28, 1996, at 35. See also Campbell *supra* note 3.

5. See *infra* text accompanying note 44. A dues check-off provision in a collective bargaining agreement requires the employer to withhold union dues for all employees within the bargaining unit irrespective of which employees are union members; those employees who refuse to authorize the employer to withhold the dues must be terminated. See *Milltronics Ltd. v. U.E.*, Local 567 [1980] 27 L.A.C. (2d) 349 (Ont.).

6. Neville Nankivell, *'Right to Work' Laws Should be Introduced in Canada: Flexible Labor Regimes Create Jobs*, FIN. POST, Mar. 2, 1996, at 18 [hereinafter

provincial and federal, have passed laws making closed-⁷ and union-shops⁸ legal as well.⁹ In addition, the Supreme Court of Canada has approved the use of such security agreements as not conflicting with the Charter of Rights and Freedoms.¹⁰

The strict union security clauses legally employed in Canada place its businesses at a disadvantage when competing with U.S. and Mexican firms in the North American Free Trade Zone.¹¹ As a result, it is the contention of this Comment that Canadian provinces are experiencing, and will continue to experience, a severe decline in manufacturing jobs and production as employers flee to a more business-friendly atmosphere, spurring those provinces to do through political means what could not be achieved through Canadian courts: legislate right-to-work laws and end the closed- and union-shops.

This Comment will discuss in Part I the legal aspects of both Canadian and American security agreements, including past legislative and judicial alterations of the enforcement of these agreements. Part II will discuss the changes Canadian labor unions have undergone as a result of the Free Trade Agreement with the United States and the NAFTA Accord with the United States and Mexico. Finally, Part III will consider the political changes occurring on the Canadian political landscape that may signal the end of the exceptionally permissive nature of Canadian labor law on this issue.¹²

'Right to Work' Laws]; Neville Nankivell, *Tilting Towards Unions Will be Costly: Growth Depends on Less Power for Labor*, FIN. POST, Sept. 5, 1996, at 13 [hereinafter *Tilting Towards Unions*]. An agency shop is one where a mandatory dues check-off is part of the collective bargaining contract. See *Milltronics Ltd. v. U.E. Local 567* [1980] 27 L.A.C. (2d) 349 (Ont.).

7. A closed-shop agreement is one in which any person hired by the employer into the bargaining unit must, at the time of hiring, be in good standing with the union which represents that bargaining unit. See *Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407 (1976).

8. A union-shop agreement requires that the employer may hire nonmembers, but after some specified period of time, the worker must become a member of the representative union. *Id.*

9. See *infra* text accompanying notes 17-26.

10. *Lavigne v. Ontario Pub. Serv. Employees Union* [1991], 81 D.L.R. (4th) 545.

11. See Nankivell, *Tilting Towards Unions*, *supra* note 6.

12. This Comment will focus primarily on what Leo Troy calls "Old Unionism," that is, private sector unionism. Leo Troy, *Big Labor's Big Problems*, 87 BUS. SOC'Y REV. 49 (1993). Mr. Troy believes that, when compared, Canadian private sector union density parallels the decline of American private union density, but with a lag time. See Leo Troy, *Market Forces and Union Decline: A*

I. Comparative Treatment of Union Security Provisions in Canada and the United States

Unions seek to maintain their existence against a myriad of obstacles, including lack of employee solidarity, rival unions, and employer resistance. To meet these challenges, unions strive to achieve 100% membership of the employees in represented bargaining units.¹³ Unions long ago recognized that in order to achieve a high level of membership, some kind of employer cooperation must be in place to ensure that, at the very least, it can receive dues from a significant portion of a bargaining unit; optimally, the union seeks to require membership as a condition of employment.¹⁴ Such clauses within collective bargaining agreements constitute security agreements.

A. Canada

Canadian labor law is largely controlled by the provinces, with the exception of a small percentage of workers in government-regulated industries¹⁵ and the influence of the federally proposed Industrial Relations and Disputes Investigation Act.¹⁶ Each of the provinces has enacted a union security provision: Alberta,¹⁷ British Columbia,¹⁸ Manitoba,¹⁹ New Brunswick,²⁰ Ontario,²¹ Saskatchewan,²² Newfoundland,²³ Prince Edward Island,²⁴ Nova

Response to Paul Weiler, 59 U. CHI. L. REV. 681 (1992). It is the contention of this Comment that this "lag time" is not due to shifts in industry makeup, as Mr. Troy suggests, but rather shifts in public perception, which set in motion legislative changes altering the legality of closed and union shops.

13. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 1064 (12th ed. 1996).

14. *Id.*

15. Dennis R. Maki, *Canada's Labor Laws: Where Do We Stand?* (Visited Dec. 3, 1996) <<http://www.fraserinstitute.ca/Events/RightToWork/maki.html#Top>>.

16. Todd A. Smith, *A Comparative Analysis: The Effect of American and Canadian Labor Laws and Economic Conditions on Union Participation*, 24 GEO. WASH. J. INT'L L. & ECON. 691, 698-99 (1991).

17. *Alberta Labour Act*, R.S.A., ch. 167, § 80(2) (1955).

18. *British Columbia Labour Relations Act*, R.S.B.C., ch. 212, § 9(1)(a) (1979).

19. *Manitoba Labour Relations Act*, R.S.M., ch. 75, § 68(3) (1972).

20. *New Brunswick Labour Relations Act*, R.S.N.B., ch. 124, § 5(1) (1952).

21. *Ontario Labour Relations Act*, R.S.O., ch. 228, §§ 46(1)(a), 137-51 (1980).

22. *Trade Union Act*, S.S., ch. 259, § 36(1) (1978). In Saskatchewan, some employers must include a security agreement in all collective bargaining agreements. See also E. E. Palmer, *Union Security and the Individual Worker*, 15 U. TORONTO L.J. 336 (1963-64).

23. *Newfoundland Labour Relations Act*, NFLD. R.S. ch. 258, § 5(1) (1952).

Scotia,²⁵ and Quebec.²⁶ Each of these statutes provides that employers may enter into enforceable security agreements with unions, either of the closed- or union-shop type.²⁷

Some union shops have been mandated by provincial governments; for example, membership in the Ontario Teacher's Federation (OTF) is mandated by the Teaching Profession Act.²⁸ The Act requires all Ontario teachers to become a member in, and pay dues to, one of the five affiliated associations grouped under the OTF; refusal to join one results in discharge.²⁹

The closed shop agreement has been challenged by Canadian workers as violating Section 2(d) of the Charter of Rights and Freedoms (Charter), which guarantees the right of free association to all Canadians.³⁰ In *Re Tomen et al. and Federation of Women Teachers' Associations of Ontario (Tomen)*, an Ontario teacher, Margaret Tomen, was required, by the standing collective bargaining agreement, to join the Federation of Women Teachers' Association of Ontario (FWTAO), one of the five associated unions of the OTF.³¹ In a consolidated case, John Snow was likewise required to join the Ontario English Catholic Teacher's Association (OECTA).³² Both teachers refused to join, and appealed to the Ontario High Court of Justice, despite the fact that since 1944 Section 4 of the Teaching Profession Act of Ontario has required teachers to be a member of one of the five affiliated unions.³³ While much of Judge Ewaschuk's decision concerned which of the five affiliates Ms. Tomen and Mr. Snow were required to join, essential to the decision was the Judge's conclusion that, while membership in the OTF and one of the five affiliated organizations is mandated by the legislature, this does not subject

24. *Prince Edward Island Labour Relations Act*, STATS. R.S.P.E.I., ch. 18, § 7 (1962).

25. *Trade Union Act*, R.S.N.S., ch. 475, § 14 (1989).

26. *Quebec Labour Code*, R.S.Q., ch. C-27 (1977).

27. See, e.g., *Arlington Crane Serv. Ltd. v. Ontario (Minister of Labour)* [1988] 56 D.L.R. (4th) 209, 67 O.R. (2d) 225, 13 A.W.C.S. (3d) 168; *Re Bhindi* [1986] 29 D.L.R. (4th) 47. In January, 1988, 1.4 percent of all employees covered by agreements of 500 employees or more in Canada were covered under closed shop provisions. See Maki, *supra* note 15.

28. *Teaching Profession Act*, R.S.O., ch. 495, § 4 (1980) [hereinafter *Teaching Profession Act*].

29. *Id.*

30. *Re Tomen and Federation of Women Teachers' Associations of Ontario* [1987] 43 D.L.R. (4th) 255, 6 A.W.C.S. (3d) 177, 61 O.R. (2d) 489.

31. *Id.*

32. *Id.*

33. *Id.*; *Teaching Profession Act*, *supra* note 28.

the internal operations of those organizations to the Charter of Rights of Freedoms.³⁴ Instead, despite the presence of the closed-shop, the workings of the mandated organization was deemed to be outside the scope of the government and therefore beyond the reach of the Charter of Rights and Freedoms.³⁵

Closed shops have also been attacked because they violate religious freedoms guaranteed by the Charter of Rights and Freedoms. In *Re Bhindi*, the British Columbia Court of Appeals considered a religious objection to the payment of union dues under a closed-shop provision within a collective bargaining agreement.³⁶ The court held that the inclusion of such a provision in a collective bargaining agreement was considered private action, and therefore the Charter did not apply to the parties.³⁷ A similar pre-Charter case involved a union-shop provision where, after eighteen months of refusing to join the International Association of Machinists, the employee was fired by the employer.³⁸ The employee then claimed a religious exemption to the requirement.³⁹ The court in *Mostert v. International Association of Machinists* ruled that the employee was bound by the collective agreement, and the discharge was proper.⁴⁰

In British Columbia, union-shops have even been created by judicial caveat. In *Re K Mart Canada Ltd. and U.F.C.W., Loc. 1518*, a union sought mediation between itself and the employer when negotiations over the inclusion of a union-shop provision reached an impasse culminating in a strike.⁴¹ The employer was prepared to provide a check-off provision conforming to the Rand Formula,⁴² but not to a union-shop provision requiring all new employees to join the union.⁴³ The mediator, Judge V. L. Ready, ruled that because the union demonstrated its resoluteness after

34. *Re Tomen*, 43 D.L.R. (4th) 255.

35. *Id.*

36. *Re Bhindi* [1986] 29 D.L.R. (4th) 47.

37. *Id.* But see *Vandermeulen v. Manitoba (Manitoba Labour Board)* [1988] 48 D.L.R. (4th) 714, 9 A.C.W.S. (3d) 27 (providing that legislation which specifically provides an exemption for employees refusing to pay dues on religious grounds must be enforced—*Manitoba Labour Relations Act*, R.S.M., ch. 75, § 68 (1972)).

38. *Mostert v. International Ass'n of Machinists Vancouver Lodge 692* [1968] 1 D.L.R. (3d) 191.

39. *Id.*

40. *Id.*

41. *Re K Mart Ltd. and U.F.C.W., Loc. 1518* [1993] 37 L.A.C. (4th) 412.

42. See *infra* text accompanying notes 45-51.

43. *Re K Mart Ltd.*, 37 L.A.C. at 415.

fourteen months of striking to include the provision, under B.C. law he was bound to rule that the inevitable outcome of negotiation would have been the inclusion of the union-shop provision as proposed by the union.⁴⁴ Thus, the union-shop provision was mandated as part of the collective bargaining agreement. The employer argued that such a mandate would breach Section 2(d) of the Charter.⁴⁵ The judge held, however, that since both the union and the employer "agreed to the process of mediation/arbitration, it is not open to the employer to say that what they have agreed to do by way of private agreement is unconstitutional."⁴⁶ Again, the contractual nature of the collective bargaining agreement was held to be outside the protection of the Charter.

A check-off provision in a collective bargaining agreement provides the union with a steady source of revenue without regard to the actual union membership level in a given bargaining unit.⁴⁷ The union dues collected under such an agreement may be expended by the union on whatever operating and discretionary costs it incurs.⁴⁸ In Manitoba⁴⁹ and Quebec,⁵⁰ union check-off clauses (agency shops) are mandated for all employees who opt not to join a certified union, regardless of the desires of the union, employer, or employee. In Saskatchewan,⁵¹ Newfoundland⁵² and Ontario,⁵³ agency shops may be created and enforced at the unilateral request of the union, without entering into the bargaining process.⁵⁴ All other provinces permit such clauses to be included in a collective bargaining agreement; if not included in the collective bargaining agreement, union dues check-off is voluntary only.⁵⁵

Because of the coercive nature of closed- and union-shops, and agency shops created by a mandatory dues check-off provision, several challenges have been made to the existing security agree-

44. *Id.*

45. *Id.*

46. *Id.*

47. *Milltronics Ltd. v. U.E. Local 567* [1980] 27 L.A.C. (2d) 349 (Ont.).

48. *See Re Treasury Board and Public Service Alliance of Canada* [1987] 28 L.A.C. (3d) 38.

49. *Manitoba Labour Relations Act*, R.S.M., ch. 75, § 68(3) (1972).

50. Permitted by judicial decision first in *Price Bros. v. Letarte*, [1953] Que. Q.B. 307.

51. *Trade Union Act*, S.S., ch. 259, § 36(1) (1978).

52. *Newfoundland Labour Relations Act*, NFLD. R.S., ch. 258, § 5(1) (1952).

53. *Ontario Labour Relations Act*, R.S.O., ch. 228, §§ 46(1)(a), 137-51 (1960).

54. *Id.*

55. *See Maki*, *supra* note 15.

ment regime. The first of these challenges produced the so-called "Rand Formula," named for Judge Ivan Rand, who authored the opinion affirming the legality of the agency shop, and requiring nonmembers to pay dues regardless of the collective bargaining agreement.⁵⁶ The Rand Formula attempted to strike a balance between the economic necessity of the unions and the rights of association of the workers.⁵⁷ In doing so, the Formula squeezes out the opportunity for individual negotiation between the employee and the employer, funneling these issues through the union.⁵⁸

It is important to note that, although nonmembers must pay union dues under the Rand Formula, nonmembers may ignore union directives, such as an order not to cross a picket line, with impunity.⁵⁹ Proponents of the Rand Formula (and of security provisions in general) argue that the system of collective bargaining increases the power and influence of the individual worker by permitting collective action;⁶⁰ the check-off provision merely assures that there is no "free lunch," and ensures that the union has sufficient economic resources to carry out the bargaining and grievance processes.⁶¹ Thus, since 1946, agency shops have been a part of the Canadian landscape: mandated in most provinces, legal in all.

The most significant legal attack on the Rand Formula since it was created occurred in 1986. Ontario engineering instructor and former political candidate Mervyn Lavigne challenged the Ontario Public Service Employees Union (OPSEU) on the grounds that mandatory union dues check-off, where OPSEU expends those dues supporting political causes opposed to the employee's personal beliefs, violates Section 2(d) of the Charter of Rights and Free-

56. Re Ford Motor Co. of Canada and the Int'l Union U.A.A. & A.I.W. of America (U.A.W.-C.I.O.) [1946] 1 CCH Lab. Law Rep. ¶ 2150. Note that all provinces have not adopted the Rand Formula as mandated nor have all adopted the discretion of the union alone; the Formula must be statutorily or judicially adopted to become binding. See Maki, *supra* note 15.

57. Diane Francis, *Rand Formula Wreaks Havoc on Canadian Workers*, FIN. POST, May 26, 1994, at 17; Palmer, *supra* note 22, at 337-39.

58. See Palmer, *supra* note 22, at 337.

59. See Maki, *supra* note 15, at 1.

60. *Id.*

61. *Id.*; Vicki Barnett, *Lower Wages Feared From Work-Rights Law*, CALGARY HERALD, May 2, 1995, at B4, *A Bombshell for Organized Labour: Alberta's Unions Battle for Survival Against Right-to-Work Legislation*, W. REP., SEPTEMBER 4, 1995, AT 16, available in WESTLAW, CBCA LIBRARY.

doms.⁶² Mr. Lavigne crossed a picket line during a strike in 1984. Because of the collective bargaining agreement, his employer could not pay him, and, because he was not a union member, he did not qualify for strike pay.⁶³ Backed by a conservative group, the National Citizen's Coalition (NCC), Mr. Lavigne sued, arguing that the \$338 per year in union dues which he paid included almost \$2 which went to political causes he opposed—namely, the New Democratic Party (NDP), striking British coal miners, and women's rights groups.⁶⁴ The Ontario Supreme Court agreed with Mr. Lavigne in an opinion by Justice John White.⁶⁵ The Judge indicated that OPSEU contributed at least \$1.8 million to the NDP, \$81,800 to disarmament groups and \$3100 to pro-choice groups.⁶⁶ Judge White held that contributions to these groups violated Mr. Lavigne's right of association guaranteed by Section 2(d) of the Charter.⁶⁷

The Supreme Court of Canada granted *certiorari* and ruled that the Charter did not prevent unions from using compulsory dues of its members for causes to which those employees object.⁶⁸ The Supreme Court first ruled that, because the payment of dues was mandated by government legislation, action by a private union could still constitute government action, and therefore the protection of the Charter applied.⁶⁹ The support of causes outside the bargaining relationship was also held to be a violation of Mr. Lavigne's freedom of association (or rather, his freedom not to associate) under Section 2(d) of the Charter.⁷⁰ However, Justice Gerald LaForest wrote that the limitation on Mr. Lavigne's

62. *Lavigne v. Ontario Pub. Serv. Employees Union* [1991] 81 D.L.R. (4th) 545. Kevin Scanlon, *Challenging a Union Tradition*, MACLEAN'S, July 21, 1986, at 43.

63. *Id.*

64. *Id.*; *Canada: Debate on Rights of Unions to Decide Use of Dues Reopens*, FIN. POST, June 9, 1989.

65. *Lavigne v. Ontario Pub. Serv. Employees Union* [1986], 86 C.L.L.C. 14,036, 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (H.C.).

66. *Id.*

67. *Id.* The Ontario High Court of Appeals reversed the trial court's decision; Mr. Lavigne appealed to the Supreme Court of Canada.

68. *Lavigne v. Ontario Pub. Serv. Employees Union* [1991], 91 C.L.L.C. 14,029, 3 O.R. (3d) 511, 81 D.L.R. (4th) 545, 126 N.R. 161, 4 C.R.R. (2d) 193, 48 O.A.C. 241 (S.C.C.), *affirming (sub nom. O.P.S.E.U. v. Lavigne)* [1989], 89 C.L.L.C. 14,011, 31 O.A.C. 40, 67 O.R. (2d) 536, 56 D.L.R. (4th) 474, 37 C.R.R. 193.

69. *Lavigne v. Ontario Pub. Serv. Employees Union* [1991] 27 A.C.W.S. (3d) 795.

70. *Id.*

freedom of association was justified under Section 1 of the Charter, and was “rationally connected to the goals of permitting unions to participate in the broader political, economic, and social debates of society” at large, and contributed to furthering democracy in the workplace.⁷¹ The court held that adding support to the NDP was “relevant” to the union’s obligation to support its members.⁷² The court decided the impairment on Mr. Lavigne’s freedom was minimal, while the “opting-out formula” would cause serious damage to the financial base and spirit of solidarity requisite to the functioning of unionism.⁷³ Thus, Mr. Lavigne’s appeal was dismissed, and the Rand Formula had been affirmed as the appropriate method to protect unionism in Canada.⁷⁴

Predictably, the reaction to the decision in *Lavigne v. OPSEU* was mixed. Some commentators expressed alarm and disappointment; a spokesman from the NCC, the group that sponsored Mr. Lavigne in his lawsuit, told reporters that, “The highest court [in Canada] thinks it’s quite all right if a union forces workers against their will to support political causes and parties they disagree with.”⁷⁵ Nancy Riche, spokeswoman for the Canadian Labour Congress, said the court had ruled that unions were free to use dues to promote social causes.⁷⁶ Viewed in either way, the Supreme Court of Canada has ruled that the Rand Formula, however applied by provincial law, is safe from attack on constitutional grounds.

Overall, it is clear that the availability of the Rand Formula, used in many instances against the will of both employers and non-union employees, and the legality of closed- and union-shop provisions, serve to protect union membership levels and decrease competitiveness in labor costs across the Canadian provinces. Within Canada, little opportunity exists for employers to lower the cost of labor through relocation or individual bargaining in order to bring down domestic or export prices. Until 1988, tariffs allowed Canadian firms to compete against one another in an effectively closed system. How this labor regime works in the NAFTA era is

71. *Lavigne v. Ontario Pub. Serv. Employees Union* [1991] 27 A.C.W.S. (3d) 795.

72. *Id.*

73. *Id.*

74. *Id.*

75. Laurie Watson, *Court Upholds Use of Union Dues for Political Causes*, U.P.I., June 27, 1991.

76. *Id.*

a question of extreme importance to the economies of all the Canadian provinces.

B. The United States

Unlike Canada, the United States has experienced a gradual chipping away of the legality of union security provisions. When the original Wagner Act of 1935 was passed, the language of Section 8(a)(3) of the Act specifically made the closed- and union-shop a legal provision of a collective bargaining agreement.⁷⁷ However, after World War II ended, Congress felt the need to curb some of the abuses (and some of the legitimate power) of the unions.⁷⁸ To do so, the Taft-Hartley amendments of 1947 were passed.⁷⁹ Among the changes enacted was a prohibi-

77. 29 U.S.C.S. § 158(a)(3) (1935).

78. See COX, *supra* note 13, at 85.

79. *Id.* at 86; 29 U.S.C.S. § 158 as amended.

tion on the use of the closed-shop.⁸⁰ The union-shop and agency-shop remained legal, but not for long.

In *National Labor Relations Board (NLRB) v. General Motors Corporation*,⁸¹ the Supreme Court stated that, “[t]he prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to Section 8(3) [sic] covered both the closed and union shop. . . . The National Labor Relations Board construed the proviso as shielding from unfair labor practice charge less severe forms of union-security arrangements than the closed or the union shop.”⁸² Essentially, the Court ruled that, though an agreement could require “membership” in a union, “the burdens of membership upon which the employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. . . . Membership is whittled down to its financial core.”⁸³

80. Compare the wording of the original § 8(a):

It shall be an unfair labor practice for an employer- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective-bargaining unit covered by such agreement when made.

29 U.S.C.S. § 158(a) (repealed 1947) (emphasis in original). As revised, § 8(a) reads:

It shall be an unfair labor practice for an employer- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later*, if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective-bargaining unit covered by such agreement when made.

29 U.S.C.S. § 158(a) (emphasis in original).

81. *National Labor Relations Bd. (NLRB) v. General Motors Corp.*, 373 U.S. 734 (1963).

82. *Id.* at 739.

83. *Id.* at 742.

Hence, following *NLRB v. General Motors*, only the agency shop and "fair share" arrangements were available to unions wishing to maintain their membership rosters and financial resources.

The agency shop remained an enforceable and viable practice in the United States until, arguably, 1988. In that year, *Communications Workers of America v. Beck*⁸⁴ severely limited the enforceability of the agency shop; its effects are still being debated.⁸⁵ In an opinion authored by Justice Brennan, the Court held that the "financial core" protected by the language Section 8(a)(3) and *NLRB v. General Motors* referred only to union activities "germane to collective bargaining, contract administration, and grievance adjustment."⁸⁶ The Court analogized to its 1961 decision in *Machinists v. Street*,⁸⁷ which concerned Section 2 of the Railway Labor Act (RLA).⁸⁸ In *Machinists v. Street*, the Court had ruled that Section 2, identical in all material respects to Section 8(a)(3) of the National Labor Relations Act (NLRA), prevented the use of union dues of nonmembers beyond the core functions of the union.⁸⁹ The core functions were those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."⁹⁰ The Court applied its reasoning and holding to agency shops under the NLRA as well as the RLA,⁹¹ with the effect of preventing unions from collecting mandatory dues from nonmembers and spending those dues on any activity outside the sphere of collective bargaining or grievance arbitration.⁹²

The effects of *Beck* are not immediately appreciable. On remand, Mr. Beck was refunded 100 percent of his dues paid plus interest, and was released from making any further dues payments.⁹³ To date, no bright-line rule or percentage has been established to determine the legal liability nonmembers have to

84. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

85. Cf. Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51 (1990).

86. *Beck*, 487 U.S. at 745.

87. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

88. 45 U.S.C. § 152 (1988).

89. *International Ass'n of Machinists v. Street*, 367 U.S. at 764.

90. *Beck*, 487 U.S. at 752 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435 at 447-48 (1984)).

91. *Id.* at 746-47.

92. *Id.* at 762-63.

93. See Raymond J. LaJeunesse Jr., *Unions Dues and Politics: What the Courts Ruled*, WALL ST. J., Nov. 7, 1996, at A23.

unions protected by a valid agency shop security clause.⁹⁴ Regardless of post-mortems, the effect of the *Beck* decision has been to further weaken the use of security clauses in American collective bargaining agreements, leaving only “fair share” security clauses—which require the employer to withhold a proportionate amount of wages corresponding to “core” union dues from nonmember paychecks, to be kept by the employer.⁹⁵

Unions in the United States face a further barrier in attaining 100% membership: right-to-work laws. Section 14(b) of the NLRA states that, “nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”⁹⁶ Before the Taft-Hartley Amendments outlawed the use of security agreements which compelled union membership or required the payment of dues, twelve states had enacted right-to-work laws.⁹⁷ Today, twenty-one states have right-to-work laws.⁹⁸ In these twenty-one states, containing one-third of the population of the United States,⁹⁹ no union security agreement, from closed shop to fair share, can be enforced. The constitutionality of right-to-work laws was upheld by the Supreme Court in *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*,¹⁰⁰ and the ability of state courts to enforce the provisions of their own right-to-work laws was affirmed in *Retail Clerks v. Schermerhorn*.¹⁰¹

As a result of the enactment of right-to-work laws in twenty-one states, and the progressive weakening of the enforceability of security agreements throughout the United States, American unions are at a substantial disadvantage to their

94. *Id.*

95. *Id.*

96. 29 U.S.C.S. § 164(b) (1988).

97. COX, *supra* note 13, at 1090; *see also* Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 373 U.S. 746 (1963) (prohibiting the agency shop under right-to-work legislation).

98. Those states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

99. *See* Neville Nankivell, *Labour Codes Stifle Business Flexibility: Right-to-Work Rules Gain Popularity*, FIN. POST, Sept. 14, 1995, at 15.

100. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

101. *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963).

Canadian counterparts in achieving 100% union membership (or even 100% dues collection). While this results in a significant hampering in the organizational ability of the labor movement in America, many see this as a development that has enabled the United States, and the right-to-work states in particular, to compete more successfully for new and relocating businesses.¹⁰² Following the signing of the NAFTA agreement, this competitiveness in the American South, and the corresponding inability to compete experienced by Canadian firms, may force Canadian legislatures to take action.

II. Canadian Labor in the Era of Free Trade

The passage of NAFTA, and the Free Trade Agreement before it, was a difficult and contentious matter in both the United States and Canada.¹⁰³ While one of the express goals of the NAFTA accord was the protection, enhancement, and enforcement of basic worker rights,¹⁰⁴ NAFTA also had the effect of creating the largest free-trade area in the world, and one which, it was contended, would lead to job losses to Mexico. Export production of the Canadian gross domestic product has risen from twenty-four percent in 1991 to thirty-seven percent last year.¹⁰⁵ Canadian and U.S. trade has risen seventy-five percent since the implementation of the Free Trade Agreement.¹⁰⁶ Steven Krug, general manager of a Canadian-owned plant in Georgia claims, "There is little doubt that the growing integration of the North American Market under NAFTA has also had a large impact. . . . It's as if the border doesn't exist."¹⁰⁷ Following the NAFTA accord's inception, Canadian and Mexican two-way trade soared from \$2714 billion to \$4218 billion.¹⁰⁸ Although Canadian exports soared under both NAFTA and the Free Trade Agreement, many jobs were lost to

102. See *infra* notes 109-14.

103. For an interesting account of NAFTA passage in the United States, see Ken Jennings & Jeffrey W. Steagell, *Unions and NAFTA's Legislative Passage: Confrontation and Cover*, 21 LAB. STUD. J. 61 (1996).

104. Murphy, *supra* note 1, at 404 (quoting North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296, at preamble).

105. Stephen Dale, *Canada-Globalization: Chretien Joins Chorus of Naysayers*, INTER PRESS SERVICE, May 26, 1996, available in WESTLAW, INTERPS Library.

106. Fazil Mihlar, *Student Question of the Month, August 1996* (visited Dec. 3, 1996) <<http://www.fraserinstitute.ca/student/qmonth.html#Top>>. Canadian trade with the rest of the world increased only ten percent during this same period. *Id.*

107. Peter Morton, *Down South in Dixie: Canadian Companies in Atlanta*, FIN. POST, Mar. 9, 1996, at 6.

108. Mihlar, *supra* note 106.

the United States and Mexico, even during the recession of 1988-1992.¹⁰⁹

A. The Impact of the Free Trade Agreement and NAFTA

The Free Trade Agreement and NAFTA have made it possible for businesses to take advantage of both cheaper export markets and cheaper labor markets of the right-to-work states in the American Southeast. Canada is ranked fourth among foreign nations in number of headquarters based in the Southeast.¹¹⁰ The *Financial Post* reported this year that Canadian firms have flocked to the Southeastern United States, lured in part because of the right-to-work laws found in those states.¹¹¹ The *Post* describes the seven states of the U.S. Southeast¹¹² as having a more "pro-business attitude" and as actively luring Canadian companies.¹¹³

Though most authorities agree that businesses are moving out of Canada to the United States and Mexico, disagreement exists as to why this phenomenon has occurred. James Bursey, a consultant in the "metal-bashing" business, claims that these companies are moving not because of the ability to do so created by the Free Trade Agreement, but to escape the restrictive Canadian labor laws.¹¹⁴

In an era in which international competitiveness, not just intraprovincial competitiveness, is required, closed and union shops in Canada are at a significant disadvantage. Nonunionized manufacturing businesses in Canada experienced a 3.7 percent per year advantage in job growth over their nonunionized counterparts in the period from 1980 to 1985.¹¹⁵ Nonunionized companies in

109. See Diane Francis, *Salinas Keeps Stiff Upper Lip on Trade Deal*, FIN. POST, May 15, 1993, at S3. Bruce Campbell of Canadian Dimension reports that over 90,000 jobs were lost over the first thirty months after the Free Trade Agreement went into effect. Campbell, *supra* note 3, at 5, 6.

110. Britain, Japan, and Germany rank above Canada. Morton, *supra* note 107.

111. *Id.*

112. Georgia, North Carolina, South Carolina, Florida, Mississippi, Tennessee, and Alabama. *Id.*

113. *Id.*

114. Diane Francis, *Union, Government Greed Wreak Economic Havoc*, FIN. POST, Nov. 14, 1992, at S3. *Id.* Mr. Bursey gave various accounts of businesses moving specifically to avoid further "union problems," specifically from Ontario and B.C. *Id.*

115. Richard J. Long, *The Effect of Unionization on Employment Growth of Canadian Companies*, 46 INDUS. & LAB. REL. REV. 691 (1993). Mr. Long found a similar "growth gap" for both manufacturing and nonmanufacturing companies.

nonmanufacturing businesses reported 3.9 percent greater employment growth over unionized companies in the same period.¹¹⁶ This “growth gap” is the result of the lower overall productivity caused by higher union wages and the goal of union members to maximize short-term gains.¹¹⁷ Industry organizations acknowledge that the fate of unionized companies may be much worse than slow growth. In a brief to the Canadian government, the Grocery Products Manufacturers of Canada stated that some product sectors are simply at a disadvantage with their American equivalents because comparative U.S. industries were “not as unionized.”¹¹⁸ Some sources, however, note that while some jobs and some businesses are relocating because of the lower labor costs in the United States and Mexico, overall equity investment in Canada is increasing, indicating that NAFTA and free trade promote greater efficiency through increased competition and productivity.¹¹⁹

Financial experts are quick to point to the success of the American right-to-work states as evidence that union security agreements are a serious threat to competitiveness.¹²⁰ Neville Nankivell of the *Financial Post* states that about three-quarters of all new high-paying manufacturing jobs created in the U.S. between 1988 and 1993 (the height of the recent recession) were created in the 21 right-to-work states, despite those states containing only thirty-five percent of the U.S. population.¹²¹ Mr. Nankivell notes that those twenty-one states attracted fifty-seven percent of investment dollars in new and expanding business facilities.¹²² Many businesses hinge their relocation decisions on state or provincial labor laws: in a survey conducted by the Fantus Company, a large industrial relocation firm, half of all businesses surveyed seeking to relocate stated that they would not even consider moving to a state unless it had passed a right-to-work law.¹²³

The results of his study also confirmed that older firms, rather than larger firms, tended to experience a greater productivity disadvantage when unionized. *Id.*

116. *Id.*

117. *Id.* at 701.

118. John Ferri, *Labor Fears Free Trade to Bring Union-Busting Push from U.S.*, *TORONTO STAR*, Mar. 6, 1988, at A12.

119. Mihlar, *supra* note 106, at 2.

120. See Neville Nankivell, *supra* note 99.

121. *Id.*

122. *Id.*

123. David Kendrick, *Economic Development and Right to Work- Case Study: Idaho* (visited Dec. 3, 1996) <<http://www.fraserinstitute.ca/RightToWork/Kendrick->

Other sources challenge the positive impact of NAFTA and the access to right-to-work labor markets. Unions argued that the original Free Trade Agreement would undermine the legal framework that encouraged collective bargaining in Canada.¹²⁴ Canadian employers, it was contended, would try to equalize labor relations with those in the United States.¹²⁵ Andrew Jackson, a senior economist with the Canadian Labor Congress, believes that the labor costs in Canada, including those incurred because of strictly enforced security agreements, no longer hurt Canadian competitiveness since most labor-intensive industries have already “died” under the NAFTA regime.¹²⁶ Jackson maintains that Canada remains competitive despite its labor costs, due to a devalued Canadian dollar and recent technological investments.¹²⁷ Naturally, with the prevailing wage about \$8.25 per hour, workers in the right-to-work states cannot be considered as loyal as their Canadian counterparts.¹²⁸ Jackson believes Canada simply cannot compete with Mexico for lower wages, and so it is unsound for Canada to do so, thus implicitly arguing for maintaining wages that are uncompetitive with nonunionized Mexican and American businesses.¹²⁹

B. Public Discourse in Canadian Politics on Union Security Agreements

Like any issue so fundamental as employment and the economy, statutory protection of the ability of unions to bargain for strict union security agreements has sparked intense debates in Canada. As Canada continues to live and work under NAFTA, this debate will likely grow in intensity.

Many sources, particularly within the financial community, have called for the end of the Rand Formula and the enactment of

2.html#TOP>. A similar study found that 91.3% of businesses reported that the presence of right-to-work laws have a positive impact on a business looking to relocate. *Id.*

124. Ferri, *supra* note 120, at A12.

125. *Id.*

126. Dale, *supra* note 105.

127. *Id.*

128. Morton, *supra* note 107, at 6.

129. Dale, *supra* note 105. In so arguing, Jackson may ignore some facts about Mexican wage rates. Though Mexican workers do receive lower hourly wages, when greater fringe benefits, profit-sharing and productivity levels are entered into the equation, Mexico presents only a thirty-four percent labor cost advantage. Francis, *supra* note 109. The rapid expansion of businesses is expected to push this wage rate up further. *Id.*

right-to-work laws. Some argue that certification without a vote, by simply acquiring a majority of union authorization cards, is a "backward" practice, for it then binds all employees to become union members if and when a security agreement is placed into the collective bargaining agreement.¹³⁰ Right-to-work laws could provide a free market for labor, allowing employees to join those unions providing the best deals and refusing to join unions which employees perceive to have a negative effect on their employment.¹³¹

The case of New Zealand is a frequently cited example in Canadian reflections. In 1991, New Zealand passed the Employment Contracts Act (ECA), which forbade union security agreements as well as all forms of compulsory unionism.¹³² In the first forty-two months following the passage of the ECA, union membership experienced a decline of forty-one percent.¹³³ Supporters of this type of legislation link this decrease in membership to New Zealand's corresponding drop in unemployment over this period from eleven percent to seven percent, reversing the pre-ECA employment trend of increasing unemployment.¹³⁴ Economic analysis indicates that employment grew fastest in industries where union membership dropped most rapidly.¹³⁵ Canadian analysts see this evidence, coupled with the New Zealand government's fiscal rebound from a large budget deficit to a predicted surplus in the future, as evidence of the positive effects of right-to-work legislation.¹³⁶

The debate has heated up in several major Canadian provinces:

130. Garth Turner, *Playing Monopoly with Workers' Jobs*, CANADIAN BUS., Dec. 1995, at 15, available in WESTLAW, TRD&IND Library. It has been hypothesized that it is this certification process, in which authorization cards may serve to certify a union in Canada, which creates the greater union representation in Canada. Smith, *supra* note 16, at 700.

131. Turner, *supra* note 130, at 15.

132. *Id.* Thus, individual employees may select any person or group to represent their individual employment interests, and there are no representatives required to represent an entire bargaining unit. Additionally, there is no duty upon the employer to bargain in good faith with a bargaining agent. Tim Maloney, *Has New Zealand's Employment Contracts Act Increased Employment and Reduced Wages?* (visited Dec. 3, 1996) <<http://www.fraserinstitute.ca/Events/RightToWork/maloney.html#Top>>.

133. Maloney, *supra* note 132.

134. *Id.*; Turner, *supra* note 130.

135. Maloney, *supra* note 13.

136. Turner, *supra* note 130.

1. *Alberta*.—Alberta, with the lowest unionized workforce in Canada,¹³⁷ became the first testing ground for right-to-work legislation in Canada. Because Alberta does not require the Rand Formula to be in place for all employers, a right-to-work law would have the effect of requiring open shops.¹³⁸ In 1995, Provincial Premier Ralph Klein set up a committee, chaired by former Conservative labor minister Elaine McCoy, to examine the potential effects of right-to-work legislation in this province.¹³⁹ The committee reported to the Alberta Economic Development Authority that there would be no economic advantage in promulgating right-to-work legislation.¹⁴⁰ The committee suggested that unions tend to raise, rather than lower, productivity.¹⁴¹ The committee found that right-to-work laws have “little or no impact on wages and income levels, unemployment rates, or the incidence of strikes or lockouts.”¹⁴² It also found that right-to-work laws might cause labor strife in an otherwise peaceful labor-management relations atmosphere.¹⁴³

Indeed, the possibility of this legislation being introduced alone has caused division.¹⁴⁴ Right-to-work legislation has been called a “politician’s nightmare.”¹⁴⁵ Many groups, especially the unions themselves, have been stridently against the legislation.¹⁴⁶ Unions

137. *Alberta Task Force Finds No Benefit to Right-to-Work Laws*, FIN. POST, Dec. 1, 1995, at 19 [hereinafter *Alberta Task Force*]. Only twenty-four percent of Alberta’s workforce is unionized, with thirteen percent unionization in the private sector. *Id.*

138. See Christopher Serres, *A Bombshell for Organized Labour: Alberta’s Unions Battle for Survival Against Right-to-Work Legislation*, W. REP., Sept. 4, 1995, at 16, available in WESTLAW, CBCA Library.

139. *Alberta Task Force*, *supra* note 137, at 19.

140. *See Id.*

141. *Id.*

142. *Id.*

143. *Id.* “As the committee found no evidence of economic advantage to right-to-work legislation, and as such legislation may well disrupt Alberta’s strong labour relations, it recommends against passing a RTW bill.” *Id.*

144. See Tom Arnold, *Two Sides Split on Right-to-Work Legislation*, EDMONTON J., Aug. 17, 1995, at A7.

145. Serres, *supra* note 138, at 16.

146. Opposed groups include: the Alberta Federation of Labor. Duncan Thorne, *Small Firms Want Right to Hire Outside Unions; 84% Surveyed Support End to Closed Shops*, EDMONTON J., Sept. 8, 1994, at C4 (“It is beyond me why anyone would support such legislation . . . It’s like throwing down the gauntlet to every union,” states AFL President Linda Karpowich); the Alberta Union of Provincial Employees, Arnold, *supra* note 145; the provincial Liberal Party, *Id.* (“In reality there aren’t the great economic spinoffs the right-to-work proponents propose,” stated Karen Leibovici, Liberals’ labor critic); and, the Calgary Labor

argue the measure would mean the complete destruction of the fifteen percent of Albertan workforce that is unionized.¹⁴⁷ "It is the most dangerous attack on working people in Alberta in the twenty-five-year history of the Tory government," argued Gordon Christie, executive secretary of the Calgary Labour Council.¹⁴⁸ Right-to-work laws are seen as violating the right to contract.¹⁴⁹ For others, while the economic case for right-to-work laws in Alberta may seem compelling, such legislation is viewed as too radical a solution.¹⁵⁰ The Alberta Chamber of Commerce, though philosophically in favor of the right to work, opposed the proposed right-to-work legislation.¹⁵¹

While many groups argue that a need to reform exists, and right-to-work laws are apparently not the favored remedy for many such groups, the public may support right-to-work legislation. The Calgary-based Canadians Against Forced Unionism (CAFU) and the Canadian Federation of Independent Business led, and continue to lead, the campaign to promote right-to-work legislation.¹⁵² CAFU's polling indicates that roughly seventy percent of the Albertan population favors labor law reform.¹⁵³ These organizations cite the right of the individual worker to choose to belong to a union as the primary reason for supporting such legislation, rather

Council, Vicki Barnett, *Lower Wages Feared from Work-Rights Law*, CALGARY HERALD, May 2, 1995, at B4.

147. Serres, *supra* note 138.

148. Barnett, *supra* note 146. Mr. Christie indicated that the 21 right-to-work states in the United States suffered below average wages, lower unemployment benefits, lower numbers of people receiving workers' compensation, and lower workers' compensation payments. *Id.* But see *infra* text accompanying notes 210-14.

149. Serres, *supra* note 138. Edmonton labor lawyer Bob Blakely states that the union security clause is one negotiated privately between the employer and the employees' representative, the union. Outlawing these kinds of agreements, according to Mr. Blakely, would be a "socialist" intervention by government into private affairs. *Id.*

150. Lorne Gunter, *Push Comes to Shove*, CALGARY HERALD, Feb. 28, 1996. Mr. Gunter suggests efforts to make unions more democratic, such as financial disclosure and reforming decertification procedures serve as better alternatives over right-to-work laws. *Id.*; *Oh to Be Rid of That Last 15%: Right-to-Work is Stalled in Alberta, and Could Remain That Way*, W. REP., Oct. 30, 1995, at 19, available in WESTLAW, CBCA Library [hereinafter *Oh to Be Rid*]. The Christian Labour Association of Canada supports union reform, but opposes right-to-work legislation. *Id.*

151. *Alberta Task Force*, *supra* note 137.

152. See *Oh to Be Rid*, *supra* note 150; See Thorne, *supra* note 146.

153. *Lumps for Labour: An NCC Off-shoot Takes on Forced Unionism*, W. REP., Mar. 20, 1995, at 19, available in WESTLAW, CBCA Library.

than appealing to greater economic productivity or competitiveness.¹⁵⁴

The Fraser Institute, a Vancouver-based think tank, has taken a different view by creating a strong economic argument for right-to-work legislation by comparing the economies of Alberta and Idaho, a right-to-work state.¹⁵⁵ The Fraser Institute found that more than 100,000 non-agricultural jobs had been created since Idaho passed its right-to-work law in 1986.¹⁵⁶ Idaho has enjoyed growth in virtually all major areas of business, with over 5000 new businesses starting since 1987.¹⁵⁷ Idaho's growth in manufacturing jobs grew at a pace that was the third fastest in the nation, compared to a drop in manufacturing jobs for a similar period before the passage of the right-to-work law.¹⁵⁸ In this same period, Idaho's personal income growth rate was 71.7 percent, the highest in the United States and well over the average in non-right-to-work states at 57.1 percent.¹⁵⁹ The Director of Idaho's Department of Commerce, as well as the Fraser Institute and many in Alberta and Canada, attributes these economic gains to the right-to-work legislation passed in Idaho.¹⁶⁰

2. *Ontario.*—Under the Conservative majority of Mike Harris, Ontario has also begun exploring alternatives to current labor laws as part of its "Common Sense Revolution."¹⁶¹ The Conservative government maintains that some economic reform is necessary to keep Ontario competitive in the "global competition for investment."¹⁶² Already, the previous administration's Bill 40,

154. Thorne, *supra* note 146, at C4; Rob Anders of Canadians Against Forced Unionism: "Nobody should be forced to join a union." Barnett, *supra* note 146, at B4.

155. Arnold, *supra* note 144, at A7.

156. *Id.* This research has been attacked, notably by Tom Fuller, a researcher with the Alberta Union of Provincial Employees, as "shabby." Mr. Fuller argues that Idaho is, in addition to being overwrought with white supremacists, 45th of 50 states in annual pay, 39th of 50 in average personal income, 49th of 50 in educational investment per student, and 31st of 50 in population health ranking. *Id.*

157. Kendrick, *supra* note 123. Construction jobs in Idaho increased 101% between 1987 and 1994, compared to a national job growth rate in non-right-to-work states of just 3.5%. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Safe Delivery*, TORONTO SUN, Oct. 6, 1995, at 1; See also Nankivell, *supra* note 99.

162. Dale, *supra* note 105.

which banned the use of temporary replacement workers during strikes, has been repealed.¹⁶³ Bill 7, which was incorrectly characterized as a "right-to-work" law by some labor supporters, sparked protests across Ontario.¹⁶⁴ The bill proposed to eliminate the ban on replacement workers introduced by Bill 40, required unions to achieve over fifty percent support, by secret ballot, for certification or calling a strike, and clarified the decertification procedures.¹⁶⁵ Reportedly, even some corporate CEOs campaigned against the provisions of Bill 7, thinking this bill scaled back workers' rights too far.¹⁶⁶ Ontario Labour Minister Elizabeth Witmer stated that the government has no plans to introduce genuine right-to-work legislation, and the elimination of the Rand Formula is outside the authority of the provincial parliament.¹⁶⁷ Some writers, however, maintain that right-to-work legislation is in the Conservative's future plans,¹⁶⁸ and labor union bosses have promised more unrest to follow.¹⁶⁹ However, it seems public support for unions is low in Ontario.¹⁷⁰

3. *British Columbia.*—In British Columbia, Liberal Premier Gordon Campbell has promised to change the province's labor laws to "restore the balance" in labor relations and to improve the province's economy.¹⁷¹ His party has released a statement of policy, similar to Mike Harris', called "The Courage to

163. Jason Ziedenberg, *The Counter Revolution: Is Mike Harris Helping Regenerate the Ontario Left?*, CANADIAN DIMENSION, Apr. 1996, at 6, available in WESTLAW, TRD&IND Library. Bill 40 banned the use of replacement workers only when a strike vote achieved over sixty percent support. Geoffrey Scotton, *Canada: The Reality of Bill 40 - Ontario's New Labor Law is All Set to Roll*, FIN. POST, Oct. 19, 1992, at 11.

164. Mr. Ziedenberg characterizes Bill 7 as a right-to-work law. *Id.* He reports that on December 11, 1995, 10,000 people took place in a protest in London, Ontario organized by the Ontario Federation of Labour. *Id.* On January 13, 1996, 30,000 Catholic school teachers marched on Queen's Park in a similar protest. *Id.*

165. See *Safe Delivery*, *supra* note 161.

166. See Ziedenberg, *supra* note 163. One is at a loss, however, to explain why corporate CEOs could not simply extend the same protections of Bill 40 through private arrangement in a collective bargaining agreement.

167. *Safe Delivery*, *supra* note 161.

168. Geoff Bickerton, *Ontario: Conflict Growing*, CANADIAN DIMENSION, Aug./Sept. 1995, at 24, available in WESTLAW, TRD&IND Library.

169. Brad Evenson, *Volatile Labor Climate 'Means Strife' in 1996*, VANCOUVER SUN, Mar. 4, 1996, at A3.

170. See *Id.*

171. *Id.*

Change.”¹⁷² This policy statement was intended to be tough on unions, by restoring secret ballots for certification votes, ending some closed shop public works, allowing replacement workers during strikes, and banning secondary boycotts.¹⁷³ Union leaders have promised to fight the changes, claiming they would upset the peaceful nature of B.C.’s labor relations.¹⁷⁴ Organizations such as the Fraser Institute have been vocal in pushing for a more radical change in the province’s laws, with a particular focus on legislating right-to-work laws.¹⁷⁵ The Fraser Institute is troubled by the rapid increase in union certifications in British Columbia,¹⁷⁶ and claims that without ambitious reforms, B.C. will become less competitive and future job growth will slow.¹⁷⁷

4. *Quebec*.—Quebec is among a minority of provinces to require the Rand Formula as a minimum level of union security if the union unilaterally requests this protection. This security need not be won in the bargaining process. Quebec also prevents employers from hiring permanent or temporary replacement workers during a strike or lockout.¹⁷⁸ Until recently, all construction workers were required to join a union or obtain a work permit, which were reportedly difficult to obtain.¹⁷⁹ Wage rates were set by the provincial government.¹⁸⁰

Jocelyn Dumais, a Quebec-based, nonunionized contractor, organized the Right to Work Association to combat the existing labor regime.¹⁸¹ Through public protests, unsuccessful court challenges, and drawing media attention to his campaign, Mr.

172. *The Looming Labour-Policy Showdown: NDP and Liberal Pre-Election Statements Point to Areas of Conflict*, B.C. REP., Mar. 11, 1996, at 8, available in WESTLAW, CBCA Library [hereinafter *Looming Labour-Policy Showdown*].

173. *See Id.*

174. *See Id.*

175. Evenson, *supra* note 171. “[Right-to-work laws] will send a signal that B.C. is open for business,” says Fazil Mihlar, an analyst for the Fraser Institute. *Id.* *Looming Labour-Policy Showdown*, *supra* note 172.

176. *Id.* According to Fazil Mihlar of the Fraser Institute, 78% of the certifications granted in 1995 were granted to companies with 30 employees or less. *Id.*

177. *Id.*

178. *See Nakivell, Tilting Towards Unions*, *supra* note 6.

179. Diane Francis, *Civil Libertarians Where Are You?*, FIN. POST, Aug. 3, 1993, at 9.

180. Bert Hill, *Jocelyn Dumais Proves One Man Can Make a Difference*, OTTAWA CITIZEN, Dec. 28, 1993, at C10.

181. *Id.*

Dumais sought a deregulation of the Quebec construction industry.¹⁸² The Quebec government, under intense pressure from the Ontario government (which was upset at the minimal number of permits issued to Ontario contractors), relented, and deregulated the construction industry along the lines Mr. Dumais had advocated.¹⁸³

5. *Saskatchewan*.—Last summer, fifteen Conservative members of the Saskatchewan Parliament introduced several pro-business bills, including right-to-work legislation.¹⁸⁴ Premier Roy Romanow called this an attempt to turn Saskatchewan into an “Alabama North.”¹⁸⁵ Conservative minority leader Bill Boyd instead called this an attempt to reproduce the success of Alberta in Saskatchewan by improving the climate for job creation.¹⁸⁶ The measures have not been adopted as of December 1996.

6. *Manitoba*.—Manitoba has long had some of the strongest pro-union labor laws in Canada.¹⁸⁷ Since winning re-election in 1995, however, the provincial Conservatives have introduced measures aimed at limiting the ability of unions to collect dues from non-member employees.¹⁸⁸ The Labour Relations Act has already been amended to increase the percentage of union authorization cards to sixty-five percent to qualify for automatic certification without a vote.¹⁸⁹ Very recently, the majority introduced Bill 26 — The Labour Relations Amendment Act.¹⁹⁰ This Act would require a certification vote in all circumstances, regardless of the number of authorization cards collected.¹⁹¹ The Act would also require strike votes, when requested by the employer, to be conducted by the Minister of Labour, in order for

182. *Id.*

183. *Id.* The Ontario government had threatened to close the entire province to all Quebec builders if Quebec did not change its restrictive policies permitting construction firms. *Id.*

184. *See Tories Want to Turn Saskatchewan Into Alberta*, CANADIAN PRESS NEWSWIRE, Mar. 2, 1996, available in WESTLAW, CBCA Library.

185. *Id.*

186. *Id.*

187. *See supra* notes 47-55; Nankivell, *Tilting Towards Unions*, *supra* note 6.

188. *See* Errol Black, *The Manitoba Government Declares War on Workers and Trade Unions*, CANADIAN DIMENSION, Sept. 19, 1996, at 18, available in WESTLAW, TRD&IND Library.

189. *Id.*

190. *Id.*

191. *Id.*

a union to strike.¹⁹² Unions would also be requested to disclose their financial statements to nonmembers and the employer.¹⁹³ No union would be required to disclose this information to nonmembers, but *if the union chose not to comply with such a request, it would lose the right to unilaterally impose the Rand Formula on the nonmembers.*¹⁹⁴ Bill 26 would require unions to consult with each employee in every workplace to explain to the employees how, and if, union dues are used for political purposes.¹⁹⁵ If the employee objected to the use of his or her dues for these political purposes, the employees would have the right to divert that portion of his or her dues to a charity instead.¹⁹⁶

Critics of Bill 26 claim that it attempts to emulate the results in the *Beck* decision, and has been heavily influenced by consultants based in U.S. right-to-work states.¹⁹⁷ The fate of Bill 26 is yet undecided. This bill is undoubtedly a response to growing nationwide discontent with the ability of unionized firms to compete with companies based in other jurisdictions in North America. As a result, Bill 26 focuses on the ability of unions to enforce membership as a target of reform.

III. The Outlook for the Future of Union Security Agreements in Canada

It certainly appears that the legal efficacy of closed and union shops and the Rand Formula in Canada will not be altered by judicial action for some time. Their use has been defended against legal attacks based on the Charter's guaranteed right to associate¹⁹⁸ and the right of freedom of religion¹⁹⁹ across Canada. It seems unlikely that constitutional challenges will become more successful in the future.

192. *Id.* Both members and nonmembers could participate in these strike votes, and ratification votes of collective bargaining agreements. *Id.*

193. Black, *supra* note 188. Unions would be required to disclose all financial statements, including compensation statements of its officers, to the Minister of Labour. *Id.*

194. *Id.* (emphasis added).

195. *Id.*

196. *Id.* Political purposes would include not only donations to established parties, but also expenses incurred in any form of advertising connected with an election. *Id.*

197. *Id.*

198. *See cf.* *Lavigne v. Ontario Pub. Serv. Employees Union; Canada (Treasury Board) v. Public Service Alliance of Canada* [1987] 28 L.A.C. (3d) 38 (Can.).

199. *See supra* notes 28-37 and accompanying text.

Politically, however, the landscape of Canadian labor law appears fluid, particularly at the provincial level where changes are often rapid and substantial.²⁰⁰ While the federal government governs only a small portion of the country's union workers, its policies often provide a signal to both foreign investors and provincial governments.²⁰¹ For now, the federal Liberals seem intent on pursuing a pro-union agenda, opposed to the notion of right-to-work laws or any other labor law reform.²⁰² This course, some predict, will inevitably lead to an increase in the cost of doing business across Canada and therefore create a strong disincentive to invest in Canada.²⁰³ Curbing union power is seen by many as the only way to increase Canadian competitiveness.²⁰⁴

Provincial change seems more imminent. Canadian labor lawyer Michael Lynk has attempted to predict the future of Canadian labor law in the Free Trade Era.²⁰⁵ Mr. Lynk believes that state-against-state "bidding wars," now common in America, will spread to the Canadian provinces, as those provinces attempt to lure investment and jobs by providing "an attractive business market."²⁰⁶ Provincial leaders, accustomed to economic competition between Canadian provinces, must now begin trying to compete with American and Mexican states. Labor laws, which have been largely equalized between provinces, allowing no one province to enjoy a significant edge over the others, are suddenly placing all the Canadian provinces at a competitive disadvantage with many other states in North America.²⁰⁷ In order to compete, political, business, and intellectual leaders will increasingly push to equalize their own province's labor laws with the rest of North America. This movement is already beginning in Nova Scotia, British Columbia, Alberta and Saskatchewan.²⁰⁸

The prospect for future changes is boosted by studies that indicate that adjusted income in right-to-work states in the U.S. is

200. See Maki, *supra* note 15.

201. See Nankivell, *Tilting Towards Unions*, *supra* note 6.

202. *Id.*

203. *Id.*

204. *Id.*

205. See Ferri, *supra* note 120.

206. *Id.*

207. See Nankivell, 'Right to Work' Laws, *supra* note 6.

208. See Ferri, *supra* note 120. Mr. Lynk also predicts that the minimum wage will fall across Canada as those provinces compete with U.S. states for capital investment. *Id.*

higher than the adjusted income in non-right-to-work states.²⁰⁹ The public fear of right-to-work legislation derives primarily from the possibility of lower wages in the sectors in which unions now collectively negotiate on behalf of individual employees; Alberta NDP Leader Ross Harvey claims right-to-work laws mean “a lower standard of living for the worker and everyone else.”²¹⁰ Wages in right-to-work states do average CDN \$1.45 per hour less than wages in non-right-to-work states; some authors argue this wage break amounts to a government subsidy for businesses in right-to-work states.²¹¹ However, in a study conducted recently by economic professor James T. Bennett of all Standard Metropolitan Statistical Areas (SMSA) in the United States, families residing in SMSAs located in right-to-work states actually enjoyed a 2852 dollar advantage in average yearly income over families living in SMSAs in non-right-to-work states.²¹² The Fraser Institute and other right-to-work lobby groups point to evidence such as this as supporting the notion that economic competitiveness benefits all members of society, not just big business and capitalists.²¹³

IV. Conclusion

As the pace of North American economic integration quickens, competitive forces will become an increasingly powerful influence over state and provincial economic performance. Those economies that include the optimum mix of legislative protections and economic freedoms will not only allow their indigenous businesses to outperform businesses located in other states or provinces, but will also attract businesses looking to relocate from unsatisfactory conditions elsewhere. Thus, the “laboratory of the states” will take

209. James T. Bennett, *The Right to Work for Less?: Evidence From the U.S.* (visited Dec. 3, 1996) <<http://www.fraserinstitute.ca/Events/RightsToWork/bennett.html#Top>>.

210. *The Benefits of Right-to-Work*, WESTERN REP., May 22, 1995, at 7.

211. Campbell, *supra* note 3. The Canadian Centre for Policy Alternatives suggests Canada should place a ten percent duty on all imports of American manufactured goods to compensate for this “social dumping.” Morton, *supra* note 107.

212. Bennett, *supra* note 209. Mr. Bennett arrived at the “yearly average income” figure by subtracting state and local taxes from the absolute average income for each of the 311 SMSAs, then factoring in the cost-of-living index (calculated by the U.S. government and higher in virtually all non-right-to-work states) for each SMSA. *Id.* The 129 SMSAs in right-to-work states averaged \$36,540 per year in family income, as opposed to a yearly family income of \$33,688 for the 182 non-right-to-work SMSAs. *Id.*

213. *Id.*

on a continental meaning, pitting Manitoba against Nevada and Quebec against Ixtapa. And, as argued above, those Canadian provinces protecting closed and union shops, and either mandating the Rand Formula or permitting unions to unilaterally impose it, will be placed at a competitive disadvantage to their counterparts in right-to-work states, forcing existing Canadian businesses to scale back operations or relocate entirely. As observers, legislators, and the public recognize this trend, more and more calls for right-to-work laws, and other forms of labor law reform, will be heard across Canada. Were one Canadian province to institute a right-to-work law, the resulting boom in that province's economy, similar to that experienced by Idaho, would cause a domino effect in Canada, driving provincial parliaments throughout the country to dismantle and abandon the current labor law regime and its misguided protections for unions and their dues. The future of Canadian labor laws is surging towards a relaxation of artificial union protectionism, as all capitalist economies gradually return to the competitive conditions that allowed the Industrial Revolution to occur centuries ago.

Geoffrey S. Kerckmar