

Majority, Exclusivity and the “Right to Work”: The Legal Incoherence of Ontario Bill 64

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1. INTRODUCTION – THE IDEA OF A SYSTEM OF REPRESENTATIVE DEMOCRACY

For almost the first time in recent Canadian history,¹ so-called “right to work” laws that would do away with the Rand formula have been put on the table by mainstream conservative parties (in the federal jurisdiction² and in Saskatchewan³). In Ontario as well, the opposition Progressive Conservative (PC) Party has garnered significant attention by putting forward

¹ The exception was in 1995, when the Alberta government briefly studied and abandoned the idea. Alberta Federation of Labour, “What We Do,” online: <<http://www.afl.org/index.php/About-AFL/aboutafl.html>>.

² Conservative MP Pierre Poilievre has championed such laws in the federal sector, pointing to donations made by the Public Service Alliance of Canada to the separatist Parti Québécois in Quebec’s 2012 provincial election. Tim Harper, “Pierre Poilievre wants to bring right-to-work legislation to Canada,” *The Toronto Star* (20 December 2012), online: <http://www.thestar.com/news/canada/2012/12/20/tim_harper_pierre_poilievre_wants_to_bring_righttowork_legislation_to_canada.html>. At the Conservative Party of Canada’s 2013 policy convention, a resolution stating that “[t]he Conservative Party believes that mandatory union membership and forced financial contributions as a condition of employment limit the economic freedom of Canadians and stifle economic growth” was adopted by a vote of 611 to 400. Canadian Labour Congress, “2013 Conservative Party Convention – Insider’s Report,” *Canadian Labour Congress* (3 November 2013), online: <<http://www.kpretfo.ca/sites/default/files/Nov2013/ConservativeConvention-Rpt-2013-11-06-EN.pdf>>.

³ Saskatchewan, Ministry of Labour Relations and Workplace Safety, *A Consultation Paper on the Renewal of Labour Legislation in Saskatchewan* (Regina: Ministry of Labour Relations and Workplace Safety, 2012), which asked whether there were “any instances where union dues should not be collected in a situation where the employee has opted out.” Right-to-work provisions were not included in the Saskatchewan government’s eventual labour law reforms, but the option remains on the table. Jennifer Brown, “Testing the climate for worker-choice laws,” *Canadian Lawyer Magazine* (9 September 2013), online: <<http://www.canadianlawyermag.com/4808/testing-the-climate-for-worker-choice-laws.html>>.

proposals for what it calls “right to work” or “worker choice” or “employees’ rights” reforms.⁴

On the basis of the belief that these proposals mirror American-style right to work laws, they have been quite rigorously critiqued by unions,⁵ labour law academics,⁶ law students⁷ and pundits⁸ alike, mainly on the ground that allowing individuals to opt out of paying the union dues which make possible the benefits of collective bargaining would allow those individuals to “free ride” on dues-paying members.

However, free-rider critiques completely miss the mark on the Ontario PC proposals. What those proposals are really calling for is something quite different and much more dramatic than American-style right to work. They are calling for the abolition of the principles of majoritarianism and exclusivity, which are key underpinnings of the Canadian system of labour law. More specifically, on May 1, 2013, Randy Hillier, a member of the Ontario legislature who was PC labour critic at the time, introduced Bill 64, entitled *Defending Employees’ Rights Act*

⁴ *Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2013* (Bill 64) (First Reading, 1 May 2013). In two other private members’ bills also introduced on 1 May 2013, the Ontario PCs have proposed a host of other reforms that would take away the power of the OLRB to set its own practices and procedures, take away card-based certification in the construction industry, repeal the preamble to the *OLRA*, and introduce stringent financial reporting requirements for unions. *Defending Employees’ Rights Act (Certification of Trade Unions), 2013* (Bill 62); *Labour Relations Amendment Act (Ontario Labour Relations Board), 2013* (Bill 63).

⁵ See, for example, Bruce Thomas, “No Free Ride” (20 March 2013), online: Ontario Public Service Employees Union <<http://www.opseu.org/news/press2013/march-20-2013.htm>>.

⁶ David Doorey, “Would American Style ‘Right to Free Ride’ Laws Violate the Canadian Charter?” *The Law of Work* (11 December 2012), online: <<http://lawofwork.ca/?p=5987>>.

⁷ Josh Mandryk, “Right-to-work would be wrong for Ontario,” *The Toronto Star* (29 May 2012), online: <http://www.thestar.com/opinion/editorialopinion/2012/05/29/righttowork_would_be_wrong_for_ontario.html>.

⁸ Martin Regg Cohn, “Arguments against unions are ideological, not empirical,” *The Toronto Star* (5 September 2013), online: <http://www.thestar.com/news/queenspark/2013/09/05/arguments_against_unions_are_ideological_not_empirical_cohn.html>.

(Collective Bargaining and Financial Disclosure by Trade Unions), 2013.⁹ Section 45(1) of the Ontario *Labour Relations Act (OLRA)* now states that a union which is a party to a collective agreement must be recognized in the agreement “as the exclusive bargaining agent of the employees in the bargaining unit defined therein.” Bill 64 would amend that language to read that “[e]very collective agreement shall be deemed to provide that the trade union that is a party to the agreement is recognized as the exclusive bargaining agent of . . . *the employees in the bargaining unit defined in the agreement who are members of the union, but not employees who are not members of the union . . .*”¹⁰ As for section 56 of the *OLRA*, which now makes a collective agreement “binding upon the employer and upon the trade union that is a party to the agreement . . . and upon the employees in the bargaining unit defined in the agreement,” Bill 64 would change the latter part of that language to say that only “*employees in the bargaining unit defined in the agreement who are members of the union*” are bound by the collective agreement, “*but not employees who are not members of the union . . .*”¹¹ Therefore, Bill 64 would not merely allow employees to opt out of paying union dues, but would allow them to opt out of the collective agreement in its entirety and make individual contracts of employment with the employer. Importantly, it would also allow the employer to directly hire non-union employees into the bargaining unit under such contracts.

It is true that this radical new approach would have no “free rider” problem, as non-members could not claim any rights under the collective agreement. However, it would have

⁹ 2d Sess, 40th Leg, Ontario, 2013 (First Reading, 1 May 2013). A year earlier, Hillier had introduced a bill with the same title and content: *Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions)*, 2012 (Bill 78), 1st Sess, 40th Leg, Ontario, 2012 (First Reading, 1 May 2012). Bill 78 died when the legislature was prorogued in October 2012.

¹⁰ *Supra* note 4, clause 2 [emphasis added].

¹¹ *Ibid*, clause 6 [emphasis added].

other very large problems — and they are *legal* problems. In this essay, we will not consider the constitutionality of these provisions of Bill 64 under the *Canadian Charter of Rights and Freedoms*, their fairness or unfairness, or their impact on workers and labour organizations. Rather, we seek to contribute to the discourse in Canada on opt-out laws (including right to work laws) by making what can be called a “legal structural” argument — an argument about the possible coherent structures that our law of workplace association can take. Our current law, as set out in Wagner-model legislation across Canada, now has a coherent legal structure. There are other possible structures for the legal regulation of workplace association — structures that are very different from ours but still coherent — such as those in use in European countries. In contrast, the proposals in Bill 64, we argue, fall into the territory of legal incoherence because they attempt to mix elements of radically different systems. Our point is that, whatever else may be said about those proposals, they are *legally* unfortunate, and this legal unfortunateness will lead to some quite remarkable and (we are sure) unforeseen consequences.

The key idea is this: we have a coherent legal system of employee freedom of association, or workplace democracy, involving a series of complex tradeoffs of preexisting rights and freedoms of both employees and employers¹². The crucial word is *system*. As every legal system must, it yields answers to all of our legal questions. Its parts interrelate in complex ways, but it is coherent, comprehensive and carefully constructed. Because it is a system, if one of the parts is removed, other parts will have to be adjusted to avoid system failure. In other words, politicians and judges cannot simply cherry-pick the parts they like. This is what it means for Wagner-model statutes such as the *OLRA* to constitute a system and not merely a list of separate legal rules (as is the case with the Ontario *Employment Standards Act*). The *OLRA*

¹² One of us is working on a paper elaborating on this idea: Brian Langille and Benjamin Oliphant, “The Legal Structure of Freedom of Association in Canada.”

pursues in a coherent and complete legal manner a certain (and very familiar) vision of representative democracy. It is thus in the nature of things that those who believe they can simply do away with the Rand formula, or with any other seemingly severable part of the system, will be signing up for more change than they bargained for. And this is a “hard” legal point — not an appeal to some non-legal theory, whether of games or democracy, located in some other literature or set of concerns.

In Part 2, this essay outlines the basic principles of representative democracy which structure our political practices — principles which our Wagner-model laws have mapped onto our system of workplace democracy. Part 3 explains the idea of legal coherence. Part 4 explains, very briefly, how doing away with the Rand Formula is an attack on the coherent system of which it is an integral part. Part 5 demonstrates that the same can be said for other, much more radical, changes suggested to other parts of the system by the Ontario PC proposals, and explores some of the unanticipated consequences which, legally, would flow from those changes.

2. THE SYSTEM OF POLITICAL AND WORKPLACE DEMOCRACY WE HAVE NOW

In following the Wagner model of labour relations, Canada opted for a system of workplace representation and workplace democracy premised on certain principles. These are the same basic principles we deploy in our system of political democracy. Because they are so obvious, they are not often debated, and it is not hard to lose sight of them (or at least for some politicians to hope that some of the people, some of the time, will lose sight of them).

What are those principles?

First is majoritarianism, and its core idea of “one person, one vote.” If we are to have representative democracy, rather than direct democracy, we must have this idea in place to

ensure equality of representation rights. We may need other elements to have true democracy — such as provision for equal rights (constraints upon the majority, as in the *Charter*) — but equal representation is bedrock to our democratic thinking.

Second, it is a conceptual truth, and not simply an empirical observation or a good policy idea, that to have a majority there must be “something to have a majority of.” In other words, we need the idea of the “constituency”; some group of us is to be “represented.”

Third, this constituency must, “in the nature of things,”¹³ be defined in advance and by an authority other than the voters themselves as they vote. As the Ontario Labour Relations Board (OLRB) has put it: “A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what this Board determines is an appropriate unit.”¹⁴ If any group could come along and simply show that it has a majority in a constituency which it happens to have self-defined, we would not have majoritarianism but merely an endless number of possible self-defined minorities. The *reductio ad absurdum* would be obvious: each individual is a constituency. Direct democracy may or may not be a good idea — but it is not representative democracy. This point can be made another way: if, say, the Liberal Party knew that everyone on Smith Street would vote for it, that party would self-define Smith Street as the constituency.¹⁵ But in a system of representative majoritarianism, this would be pure

¹³ *Michelin Tires (Canada) Ltd and United Rubber Workers, Local 1028*, [1979] 3 Can LRBR 429 (NSLRB), where Chair Innis Christie said: “This North American notion of ‘exclusivity’ of bargaining agents necessarily involves determination of the appropriate bargaining unit, the constituency by whom and for whom the selection of the bargaining agent is made. This determination must, in the nature of things, be made by a neutral third party on the basis of something other than the wishes of the employees or the employer involved.”

¹⁴ *Canadian Union of Public Employees v Hospital for Sick Children*, [1985] OLRB Rep (February) 266, 1985 CanLII 899 at para 15.

¹⁵ If it is smart, the Liberal Party will look around for another street, say Jones Street, with all Conservative voters — but with one less voter — and claim that it has a majority in the combined Smith and Jones Streets constituency.

gerrymandering. Constituencies must be set in advance, and by someone other than the contending parties. Some public authority must do it.¹⁶

Fourth, when a majority in a constituency selects a representative, that representative represents everyone in the constituency, not just those who voted for him or her. You may or may not have voted for the current Member of Parliament (MP) for your constituency, but that person is still your MP. As we have seen, this is inherent in the very idea of majoritarianism. It is the first part of the idea of “exclusive” representation: other possible representatives are excluded. The majority selects for the whole, not for itself. This is why it is possible to win or to lose elections. The loser does not represent the minority. The winner does.

Fifth, winners not only have the right, but also the duty, to represent everyone. You do not lose your public medical coverage because you voted for the loser. You are not seen as “opted out” or “off the field.” This is what majoritarian representative democracy is.

Sixth, there is a conceptual flip side: you cannot “opt yourself out.” You cannot say: “I didn’t vote for Mayor Rob Ford,¹⁷ so I won’t pay my property taxes.” Nor can Rob Ford say: “You didn’t vote for me, so I won’t pick up your garbage.” This is Principle Five, above. And you cannot say: “I do not like my MP, so I will go to Ottawa and sit as my own representative.” Any of these things would be incoherent within a system of majoritarian representative democracy. They are not possible if we accept the idea of representative democracy.

Those six principles are a package deal — the very package deal that our Wagner-model laws put into place as our system of workplace democracy.¹⁸ All six principles are in place:

¹⁶ *Michelin Tires*, *supra* note 13.

¹⁷ The still current — as of November 2013 — and very controversial mayor of Toronto.

¹⁸ The union certification vote itself is more akin to a constitutional referendum on moving from direct democracy to representative democracy than it is to a general election, given that one is

- (1) We have majority rule (certification by majority vote).
- (2) We have the idea of a constituency (the bargaining unit).
- (3) The constituency is determined, as it has to be, not by the parties themselves but by a public authority — the Labour Relations Board.
- (4) The union that wins the vote has the exclusive right to represent all in the constituency (this is exclusivity, part 1: there is no other representative).
- (5) On the other side of that legal coin, the union has the duty to represent all in the constituency, not just those who voted for it (the duty of fair representation).
- (6) In a democratic majoritarian regime, not only can no one be treated as opted out, no one can decide to opt out (this is exclusivity, part 2). You cannot represent yourself (under the Wagner model, there is no individual bargaining). Libertarian individualism and our model of representative democracy do not mix. It is inherent in the very idea of representative democracy that no one represents himself or herself. That is, in a very important sense, the whole point.

This coherent package of ideas is very familiar to North American labour lawyers. We have mapped our ideas of representative political democracy directly onto our system of workplace democracy. We did not have to do this. We could have constructed what might loosely be called a more “European-style” system — one which would have none of those ideas in place, and would be quite amenable to the idea of “minority unions” and many other ideas that are impossibilities in the system we did opt for. But that new system would still have to be a legal system, just a different one from what we now have. It would have to hang together in its own legally coherent way, as “European-style” systems do.

3. THE IDEA OF LEGAL COHERENCE

not choosing between various representatives but is choosing whether to be represented at all. Nonetheless, the same six principles outlined above apply.

Not everyone lies awake at night worrying that there is not enough legal coherence in the world. But it would be a good thing if more lawyers did.

Conceptual coherence — a state of affairs where the parts of the system call out for each other, in the name of having a legal system at all — has been attained directly and beautifully in the elaboration of the Wagner model. We can see this most dramatically in the realization of point 5, above — the creation of the duty of fair representation. Derek Bok points to the basic idea in play here, in his examination of the unique characteristics of American labour law.¹⁹ In Bok’s words, “the duty of fair representation can be regarded as an outgrowth of the provisions making the union an exclusive bargaining agent for all the employees in the appropriate unit.”²⁰ This is absolutely right. We will pause to unpack the point because it is so significant.

The union’s duty of fair representation came into legal being seventy years ago in the United States Supreme Court decision in *Steele v. Louisville & Nashville Railroad Co.*²¹ The Brotherhood of Locomotive Firemen & Enginemen (the union representing the railway workers of the Louisville & Nashville Railway Co.) negotiated collective agreement provisions explicitly capping the percentage of work that could be assigned to black workers (whom the union did not admit as members), and giving the Brotherhood’s (white) members access to the better jobs out of line with seniority. In *Steele*, an African American locomotive fireman successfully challenged these discriminatory provisions. It is important to recognize that a decision falling on the side of racial justice was by no means inevitable: *Steele* was decided in 1944, a decade before *Brown v. Board of Education*²² and two decades before the *Civil Rights Act of 1964*²³ — a time

¹⁹ Derek C Bok, “Reflections on the Distinctive Character of American Labor Law” (1971) 84:6 Harv L Rev 1394.

²⁰ *Ibid* at 1398.

²¹ 323 US 192 (1944).

²² 347 US 483 (1954).

when segregation and overt racism of this sort were commonplace and widely accepted. We cannot grasp the true significance of the decision unless we realize that it was rooted not in a distaste for racial discrimination but in basic ideas about law and legal coherence. These ideas were brought to bear on ideas already rooted in the statute — in the Wagner model’s commitment to representative democracy. *Steele* was simply a case of statutory interpretation. Its logic was that if the other components of a particular system of representative democracy were in place (Principles One to Four, and Principle Six), then the other necessary part of the system (Principle Five, the duty to represent all in the constituency) must be there as well, even though the statute was “silent” on its face.

Steele is a stunningly beautiful legal decision. The Court said:

*The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.*²⁴

The Court went on to make clear that the union had a duty to represent non-members and non-supporters fairly and in good faith:

While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.²⁵

²³ Pub L No 88-353, 78 Stat 241 (1964).

²⁴ *Steele*, *supra* note 21 at 202 [emphasis added].

²⁵ *Ibid* at 204.

We seldom see a legal decision of this strength and character — one that goes so directly to the heart of the very idea of law and legality.²⁶ *Steele* is significant not only for what it said about the duty of fair representation and about the fact that the different components of the Wagner model interrelate, but also for what it said about *how* they interrelate. They are locked together by a legal logic that is demanded of any legal system. You cannot have the right to represent all without having the duty to represent all. That is a *legal* point. It is what makes our statutory regime a legal system of labour relations, not simply a collection of separate and arbitrary rules. We have a coherent legal system creating a system of workplace democracy. And the system that the Wagner model puts in place is our general system of representative democracy, with all that this entails.

4. THE RAND FORMULA

Having gone through these basic legal ideas, we can see the Rand formula debate in a new light. The Rand formula is part of the package of concepts which constitute our idea of representative democracy. It is Principle Six: no one can opt out or “be opted out.” In other words, you cannot refuse to pay your property taxes because you did not vote for Rob Ford. This is the flip side of Principle Five — the union’s duty to fairly represent all bargaining unit employees (everyone in the constituency). You cannot have Principle Five or Principle Six without the other. Ivan Rand put it as follows in the famous arbitration award in which he devised what became known as the Rand formula:²⁷ “I consider it entirely equitable . . . that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden

²⁶ A few other such cases, decided in Canadian courts, are mentioned below at notes 35-38.

²⁷ *Ford Motor Co of Canada v International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW – CIO)*, [1946] OLAA No 1 (QL).

along with the benefit.”²⁸ The argument to the contrary, he went on to say, “is really one for a weak union.”²⁹

These are good points, but the point we are making is quite a different one — in our view, a more basic and legal one. It is that the right to represent and the duty to represent go hand-in-hand, and that in any system of representative, majority-based democracy, no one can opt out and no one can be forced out. This is another point Rand could have made. You do not have to join the winning party, but a member of that party is your representative, whether you like it or not.

5. BEYOND THE RAND FORMULA: THE INCOHERENCE OF THE PROPOSALS IN BILL 64

The Canadian model of labour relations is a comprehensive system. It is intended to completely exclude the common law of individual bargaining. As arbitrator and later Chief Justice Bora Laskin put it, the common law becomes “a world which has ceased to exist”³⁰ once one enters the world of collective bargaining. Majoritarianism, bargaining units, labour boards, exclusivity and the Rand formula are interlocking parts. Conceptually, they demand each other and depend on each other as parts of the whole. That whole is our unique system — our Wagner model. This is what *Steele*, Rand, and Laskin all tell us.

So, anyone who seeks to cut out only some of the core elements of Canadian labour law should proceed with caution. When you play with one principle, you play with the rest. The consequences may be large, and only partly visible in advance.

²⁸ *Ibid* at para 26.

²⁹ *Ibid* at para 28.

³⁰ *Peterboro Lock Manufacturing Co and United Electrical, Radio & Machine Workers of America, Local 527* (1954), 4 LAC 1499 at 1502.

When one turns an eye to what the Ontario PCs are proposing in Bill 64, it becomes even clearer that we need to pay close attention to the kind of analysis set out above, which shows how undoing the Rand formula would undo our principles of representative democracy. As noted at the outset of this paper, the Ontario PCs are proposing something that is quite distinct from American-style right to work, and goes well beyond it. They are not simply trying to undermine the Rand formula — a step which would in itself be incoherent from a legal point of view — but are taking aim at the very bedrock of the Wagner model and the system of representative democracy it embodies. They are playing fast and loose — and incoherently — with all of six of our basic principles.

Observers with an understanding of comparative labour law cannot help but notice that when the Ontario PCs and their leader, Tim Hudak, discuss labour law reform, they refer loosely to foreign experience, especially European experience. For instance, a 2012 White Paper claims that an Ontario PC government would “[f]ollow the example of jurisdictions from Scandinavia to New Zealand to the United States by offering worker choice reforms that put power and choice back in the hands of unionized employees.”³¹ Noteworthy here is the framing of those reforms as “worker choice” rather than right to work. This is consistent with Hudak’s subsequent statements to the press. The *Toronto Sun* reports him as saying that “[m]ost of the countries we are going to compete with for future jobs, they already have worker choice in their systems.”³² In the same vein, *CBC News* quotes him as saying: “What people often lose track of, too, is that it’s not just

³¹ Ontario Progressive Conservative Caucus, *Paths to Prosperity: Flexible Labour Markets* (2012), online: <<http://timhudakmpp.com/wp-content/uploads/Flexible-Labour-Markets.pdf>>, at 12.

³² Galen Eagle, “Tim Hudak Pushes U.S.-Style Anti-Union Laws,” *The Toronto Sun* (7 January 2013), online: <<http://www.torontosun.com/2013/01/07/tim-hudak-pushes-us-style-anti-union-laws>>.

the States. In the United Kingdom, most of Europe, Australia, New Zealand, they allow workers to choose whether they want to be in a union or not”³³

These claims are very misleading. It is true that in most countries outside North America, a worker is not compelled to pay union dues when his or her co-workers choose to unionize. But we also know that another crucial part of the package deal almost everywhere else in the world is that workers who *do* want to try their hand at collective bargaining can do so without needing prior approval from a majority of their co-workers; there is no majoritarianism, and no exclusivity. Nor are there bargaining units, certification votes, a duty of fair representation or a duty to bargain, in anything like the way they are understood in the Canadian and American systems of workplace democracy. This is not to say that those other countries do not have a system of labour law. They do. Each of their systems, like ours, has a number of basic legal parts that fit together into a coherent legal whole — but it is, in every case, a very different legal whole than ours. There are complex social, economic, historical, ideological and industrial relations reasons why they have what they have, and why we have what we have. This is the important story that Derek Bok sought to tell in his famous article cited above: how we arrived at the model we have in North America. Our project here is not to retell that story. It is simply to present the reality that there are different systems — but that they are *systems*. Each one fits together in its own way. Just as you cannot cherry-pick within the North American model, you cannot cherry-pick within European models, or within models from Australia or New Zealand or anywhere else. They too are package deals. If your system doesn’t have majoritarianism and exclusivity, you don’t need the Rand formula or the duty of fair representation — but you do

³³ *CBC News*, “Hudak Tells Windsor-Essex He Has Plan for Auto Industry,” *CBC News* (18 January 2013), online: <<http://www.cbc.ca/news/canada/windsor/story/2013/01/18/wdr-hudak-auto-industry.html>>.

need to put up with what we would regard as the “chaos” of multiple, often amorphous constituencies of workers, and ever-shifting coalitions of “minority” unions.³⁴

Bill 64 would do away with exclusivity to the extent that workers who opted out of collective bargaining would be allowed to deal individually with their employers, but it would maintain exclusivity to the extent of prohibiting workers who did not join the majority union from having any form of collective representation at all. There would be no minority unions, only minority non-unions. This attempt to exclude the minority from any form of representation is something that no system — whether in North America, Europe or anywhere else — does, or could do, without abandoning any coherent theory of representative democracy. Incoherent law is not law. The law will provide a comprehensive and coherent set of legal rules one way or another; that is its job. Attempts to create an incoherent and internally inconsistent system of representative democracy are bad not just as a matter of political theory, but as law. Altering one part of a system will force changes elsewhere — by interpretation, as in *Steele*, if necessary. Law will out — as it did in *Steele*.

Here, one might face an objection along the following lines. Who cares about legal coherence? If we have the votes in the legislature, we can pass any law we want. Coherence is no big deal. What matters is attaining our political goals. Let’s get the lawyers out of the way, and get on with the cherry-picking in the name of those goals.

³⁴ That the Ontario PC references to European labour law are in fact half-truths based on half-comparisons is made even clearer by an analogy from employment law. Norway, Denmark and Sweden — Scandinavian countries — do not have a statutory minimum wage. Wage rates are collectively bargained at the sectoral level, so those systems deliver the same protections and social benefits as our minimum wage aims to deliver, but through other mechanisms. Let us suppose that an Ontario political party adopted as a policy position the repeal of the minimum wage, on the argument that Ontario should follow the lead of those countries — and ended the comparison there, full-stop. This would obviously be totally misleading. Supporting Bill 64 by arguing that Scandinavian countries do not force workers to pay dues or join a union is no less misleading.

Assume for a moment that our politics have sunk so low that it is *politically* safe for legislatures to ignore basic ideas of the rule of law, legal coherence, right/duty, power/responsibility, equality and so on. What then? Well, it will not be *legally* safe. The law does not work like that. It will have something to say. That is the lesson of *Steele*. Although we do not know it as a fact, let us imagine (not unrealistically, perhaps) that in the drafting of the statute at issue in *Steele*, legislators had intentionally omitted an explicit duty to represent all in the unit (even while granting the power to represent all) because they were of the view that racial discrimination should be permitted. But it turned out that the law did not permit that duty to be overlooked. As we have seen, the logic of *Steele* was not the logic of racial equality but the logic of law — of basic legal thinking. Given that the other parts of the system in place clearly created the right to represent all, the duty to represent all had to be “read in” as a matter of law — as part of our commitment to the very idea of a legal order.

Then one might say: well, courts may be able to read things into the law, as they did in *Steele*, but they can’t read things out. The response is that they can, they should, they do and they will. Legality and legal coherence will make their own demands. Seminal case after seminal case in the Canadian courts — among them, *Roncarelli v. Duplessis*,³⁵ *Smith and Rhuland Ltd. v.*

³⁵ [1959] SCR 121. Premier Maurice Duplessis had instructed the Quebec Liquor Commissioner to revoke the liquor licence of Roncarelli, a restaurateur, in retaliation for his having provided bail for a number of Jehovah’s Witnesses. The governing Act said that the “Commission may cancel any permit at its discretion.” The Supreme Court of Canada held that Roncarelli’s licence had wrongly been revoked. Rand J. said: “In public regulation of this sort there is no such thing as absolute and untrammelled ‘discretion,’ that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator [T]hat an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.”

Nova Scotia,³⁶ *Greenberg v. Meffert*,³⁷ and *Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour)*³⁸ — speaks to the limits of untrammelled discretion, whether statutory or contractual. Such cases are instructive of the type of legal thinking which would be brought to bear upon the provisions of Bill 64, if it were enacted.

Let us look at some examples of how Bill 64 would call for that sort of legal thinking by those responsible for applying the *OLRA*.³⁹ Under our current, coherent scheme, the union owes a duty to fairly represent all in the unit, and the Ontario PC reform proposals do not mention repealing or restricting that duty. But how can a duty to fairly negotiate or administer a collective agreement apply to workers to whom the agreement does not apply? It cannot. That is a legal impossibility. You cannot have the duty without the right. So if Bill 64 is passed, the OLRB will have to read the duty of fair representation out of the statute for non-members of the union. That

³⁶ [1953] 2 SCR 95. The Nova Scotia Labour Relations Board had refused to certify a union because its secretary-treasurer was a Communist. The Supreme Court of Canada held that the Board had acted on an irrelevant consideration and had therefore gone beyond the limits of its statutory discretion.

³⁷ (1985), 50 OR (2d) 755, 18 DLR (4th) 548 (CA). A clause in a contract of employment gave the employer the “sole discretion” to determine whether a salesman whose contract of employment had been terminated would receive commissions to which he would have been entitled had he not been terminated. The employer refused to pay the plaintiff a commission he had earned but not received before he was terminated. In holding for the plaintiff, the Ontario Court of Appeal said: “To construe the discretionary power as the company urges it should be construed, the clause would mean no more than ‘we will pay you your commission only if we feel like it.’ That construction renders the clause meaningless, indeed, illusory.”

³⁸ 2003 SCC 29, [2003] 1 SCR 539. CUPE challenged the Minister of Labour’s appointment of retired judges who lacked labour relations expertise as interest arbitrators under the *Hospital Disputes Labour Arbitration Act*, which provided (in section 6(5)) that “the Minister shall appoint . . . a person who is, in the opinion of the Minister, qualified to act.” The Supreme Court of Canada held the appointments to be patently unreasonable, as the Minister had not taken into account the implicitly essential criteria of labour relations expertise and general acceptability in the labour relations community.

³⁹ Some of these examples we can anticipate in advance. There will be many more points of tension which will only become apparent as the dysfunctional system generates them over time.

is, it will interpret the provision “down” to cover only members, despite the fact that “on its face” it covers all. This will be *Steele* in reverse. As it should be.

Another example. Could a union which did not represent all employees insist on an all-employee seniority list in order to protect its members against having their seniority rights ignored? Could it insist that its members have superseniority over other workers? Why not? It is hard to imagine that unions would not see it as vital to their members’ interests to make such demands. Thus, minority workers would inevitably be a target of the union’s bargaining strategy — but they would have no right to participate in framing that strategy, or to invoke any duty of fair representation to protect them. Such targeting is now forbidden as part of our coherent scheme: the union represents all, no one can opt out or be opted out, and so on. It all makes sense. But under Bill 64, it would become legal nonsense — and the OLRB would have to correct it, as a matter of law.

Even worse, the PC reform proposal would, unwittingly it seems, undermine the basic features of representative democracy embodied in Principles One, Two, and Three (majority rule, the idea of a constituency, and delineation of that constituency by an adjudicative body).⁴⁰ Under current, coherent law the OLRB has to set the constituency. Otherwise, there would be a free-for-all of multiple units, self-defined by who had organized whom. That would make a

⁴⁰ Here is a very large point, though it is not the *legal* point we make in this essay. From the standpoint of political morality, the gravamen of the objection to the PC proposal is obvious. The proposal is unfair and unbalanced; it loads the dice. In an *OLRA* certification vote, the basic question is this: do you want representative democracy or direct democracy? As we have said, this is like a constitutional referendum. Bill 64 gives more rights to those who favour one side in the referendum — the side that wants direct democracy. They cannot lose, because if the majority opts for representative democracy, anyone who wants direct democracy can simply opt out. But because they are in the bargaining unit for the purpose of the vote, they can help to inflict defeat on the other side. This would be a critical fault in any election system.

mockery of representative democracy (the point Innis Christie made so well in *Michelin Tires*).⁴¹ The OLRB now has a coherent, public-policy-based approach to setting unit boundaries: it tries to decide which employees can and should bargain together. The Board does not (and could not, coherently) define the unit on the basis of whom the union has signed up. As Paul Weiler put it when he was Chair of the British Columbia Labour Relations Board, “when the first group of employees in an enterprise turns its mind to collective bargaining, its wishes cannot predominate in the decision about its own bargaining unit. The choice it makes has too much impact on the options of other interested parties.”⁴² But under Bill 64, all of this is lost — indeed, it is all turned on its head. The degree of organization would inevitably become the bargaining structure, because the union would represent only its members. One might respond that the OLRB could still set the unit boundaries exactly as it does now for the purposes of the vote, even though those boundaries would not be reflected in the bargaining structure. But the OLRB is not staffed by legal incompetents; it would precisely not do that. Legal reasoning would prevail, as it did in *Steele*. The Board would see that it must shape the rest of the scheme of industrial democracy to fit the new reality — that its public policy role under Principle Two (determining the was gone, and that in the nature of things, the only way to make legal sense of the new reality would be to hold that the unit is whatever the union proposes. And unions would quickly learn that they should propose units that consist only of their own members. The current standard objection — that this would be self-serving gerrymandering — would no longer be available, because unions would have neither the right nor the duty to bargain for anyone who was not a member. That is to say, what the PC proposals do is to declare (inadvertently, we are sure) that “degree of

⁴¹ *Supra* note 13.

⁴² *Insurance Corp of British Columbia and CUPE*, [1974] 1 Can LRBR 403 at 406-407.

organization,” which under our current system is the “anti-principle” for bargaining unit determination, is to be the new statutory criterion for that purpose.

When you think about it, the PC reforms would bring remarkable changes to our system. They would mean the end of majoritarianism, and a move to minoritarianism, with multiple unions defining their own constituencies and looking out only for the interests of their members. Seen through the lens we are accustomed to — a lens shaped by the six principles of representative democracy set out above — that outcome would be legally unacceptable. But seen through very different lens, the system that the PC reforms would create would not look like minoritarianism but simply like “unionism” — and it would be closer to the idea of unionism that prevails outside North America. And there would be no legal objection to it, as there is under our current system. This would be unanticipated law reform — big time.

5. CONCLUSION

To sum up, only in a legal fantasy world can one think that it would be possible to have it both ways — to have majoritarianism for some, and minoritarianism for others. You can’t do that. Legally. What you end up with is minoritarianism for all. If the Ontario PCs come into office, they should proceed cautiously with labour law reform. Playing around with bits of a system and ignoring the rest of it is simply not a good legal idea. Reforms that attack the core principles of our system will certainly wind up giving politicians much more than they bargained for.