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Extending Mike Zimmer's Cross-border Comparative Work: The Role Of Property Rights In U.S. And Canadian Labo(u)r Law

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EXTENDING MIKE ZIMMER’S CROSS-BORDER
COMPARATIVE WORK: THE ROLE OF PROPERTY RIGHTS
IN U.S. AND CANADIAN LABO(U)R LAW

BY
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I. INTRODUCTION

Throughout his academic career, Michael Zimmer had a well-deserved reputation as one of the leading scholars in employment discrimination law. In the latter part of his career, Mike branched into international and comparative labor and employment law and developed an equally strong reputation as a teacher and a scholar. Most visible is his path-breaking casebook, *The Global Workplace*.¹ In this essay, I will attempt to extend Mike’s scholarship on one aspect of comparative labor law – the flow of policy and scholarship across the United States-Canada border. In a 2012 article coauthored with Susan Bisom-Rapp, Mike explored the interplay between the U.S. and Canadian labor law systems and the impact in Canada of U.S.

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1. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES AND MATERIALS* (2d ed. Wolters Kluwer/Aspen 2012) (2007).

reformers borrowing from Canada in promoting their reforms. In particular, he observed that when advocates of the Employee Free Choice Act pointed to the Canadian experience as a model, opponents marshalled scholarly research attacking the Canadian experience. This led to a swift response by Canadian scholars defending the Canadian law, concerned that rather than see the U.S. move toward the Canadian model, the critical scholarship might prompt Canada to move toward the U.S. model.²

Part II of this essay summarizes the Zimmer-Bisom-Rapp article. Part III extends their cross-border scholarship by focusing on the different roles played by property rights in U.S. and Canadian labor law. Part IV examines a key feature of the Employee Free Choice Act that was borrowed from Canada, a provision for arbitration where negotiations fail to result in an initial collective bargaining agreement. It situates the different approaches in the U.S. and Canada with respect to intervening in the collective bargaining process as a consequence of the different roles of property rights in the two countries.

II. NORTH AMERICAN BORDER WARS

In *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*,³ Zimmer and Bisom-Rapp traced the developments during and following World War II which resulted in Canada adopting from the United States the Wagner Act model featuring majority rule, exclusive representation, and a mandate that the employer bargain in good faith with the exclusive representative.⁴ They observed that Canadian jurisdictions “tinker[ed]” with the Wagner Act model, particularly by providing for card check certification, a feature that has come and gone depending on the political party in power, and first contract arbitration, a feature that has been more stable.⁵

Zimmer and Bisom-Rapp attributed a look northward in the U.S. for labor law reform to the work of Paul Weiler, the first chairman of the British Columbia Labor Relations Board and later

2. Michael J. Zimmer & Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LAB. & EMP. L.J. 1 (2012).

3. 30 HOFSTRA LAB. & EMP. L.J. 1 (2012).

4. *Id.* at 6-8.

5. *Id.* at 8-9.

professor at Harvard law School.⁶ They chronicled the influence of Weiler's work on the work of the Dunlop Commission during the administration of President William Clinton and the Commission's recommendations for reform.⁷ They then turned their attention to the proposed Employee Free Choice Act (EFCA) and its provisions for card check certification and first contract arbitration. They observed that whereas supporters pointed to the Canadian experience, opponents of EFCA focused on a scholarly critique of the Canadian experience written by economist Ann Layne-Farrar. Relying on data from Canada, Layne-Farrar predicted that if enacted, EFCA would increase union density and for every 5 percent increase in union density there would be an increase of 1.49 to 1.77 percentage points in the unemployment rate, resulting from a loss of 0.55 to 0.95 million jobs.⁸

Zimmer and Bisom-Rapp observed that Layne-Farrar's critique was met by a flurry of Canadian scholarship responding and defending the Canadian system. This included a special issue of the journal, *Just Labour: A Canadian Journal of Work and Society*.⁹ Zimmer and Bisom-Rapp concluded that the flurry of scholarly response was not aimed at the debate in the U.S. Rather it was directed at preserving the Canadian refinements of the Wagner Act model:

One should not assume that the Canadian scholars were attempting primarily to affect the outcome of the debate over EFCA. While certainly they may have had some sense of solidarity with the American supporters of EFCA, their response is best understood as an attempt to prevent spillover effects from the EFCA debate that might undermine the Canadian model by misrepresenting its labor market outcomes. Since Canada's labor laws are sensitive to political change, Layne-Farrar's work represented a significant threat – or at least a risk that needed to be neutralized quickly. Setting the record straight was a strategic maneuver meant to safeguard the Canadian approach from business interests, Canadian and American, intent upon initiating greater convergence of the Canadian regime to the U.S. model.¹⁰

Card check certification and first contract arbitration are two of many subtle differences between Canadian and U.S. labor law. Most of these differences stem from the different role of property rights in

6. *Id.* at 9-16.

7. *Id.* at 19.

8. *Id.* at 21-22.

9. *Id.* at 22-24.

10. *Id.* at 25-26 (footnotes omitted).

the two legal regimes. Part III explores these differences.

III. PROPERTY RIGHTS IN U.S. AND CANADIAN LABOR LAW¹¹

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person may be deprived of life, liberty, or property without due process of law.¹² The comparable provision of the Canadian Charter of Rights and Freedoms protects against deprivation of life, liberty, and security of person in accordance with principles of fundamental justice.¹³ As I have observed elsewhere, the Charter's omission of any express protection for property rights was deliberate, reflecting a concern that the Charter not be a vehicle for invalidating economic regulation or disturbing Canada's recognition that property rights were subject to the democratic will.¹⁴ In the U.S., with a seemingly limitless frontier and the absence of a landed aristocracy, property rights have a Lockean nature derived from the individual's labor to appropriate from the common stock rather than from a grant from the state, and, therefore, are to be protected from government interference. The emphasis on protection from government interferences is part of a general distrust of state authority that may be traced to the country's birth by a revolution against England. In Canada, with a history of elite development and corporate rule, the government retained control over natural resources even when land became privately owned leading to a softer version of property rights more accepting of accompanying obligations.¹⁵

This does not mean that the law in Canada does not protect property rights. For example, property rights are protected in Canada

11. Before comparing U.S. and Canadian labor law, a preliminary observation is in order. In the U.S., most of the private sector is governed by the National Labor Relations Act, a federal statute. In Canada, federal jurisdiction extends to only a few industries considered national in scope, so most of the private sector is governed by provincial law. See Zimmer & Bisom-Rapp, *supra* note 2, at 5. But unlike the U.S. where the highest court of a state is the highest authority with respect to that state's law, in Canada the Supreme Court of Canada is the highest authority with respect to the law of each province. See Supreme Court Act, R.S.C. 1985, c S-26 ss 35-40 (Can).

12. U.S. CONST. amends. V, XIV, § 1.

13. Canadian Charter of Rights and Freedoms s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K).

14. See Martin H. Malin, *Collective Representation and Employee Voice in the US Public Sector Workplace: Looking North for Solutions?*, 50 OSGOODE HALL L. J. 903, 923-24 (2013); see also R. v. Layton, 2009 SCC 36, para. 30 (Can. Ont. Prov. Ct. 1986) (opining that the Charter does not protect property rights per se as "this was expressly rejected by the drafters").

15. See Malin, *supra* note 14, at 923.

under the common law of trespass.¹⁶ A 1996 task force commissioned by the Minister of Labour recounted:

Some of our basic rights, like freedom of association and expression and equality before the law, are enshrined in the constitutional documents. Other fundamental soci-economic values, such as property laws and the right to safe and equitable working conditions, are important, although they lack constitutional status.¹⁷

Although some critical legal scholars have maintained that the National Labor Relations Act (NLRA) was a radical piece of legislation that made major inroads on employer property rights,¹⁸ as I have observed elsewhere, the NLRA is a relatively conservative piece of legislation. It was part of the congressional response to the Great Depression that was designed to more equitably distribute wealth and income. Rather than having the government dictate wages and working conditions, Congress opted to provide workers a means, though self-organization and exclusive representation, to reduce the disparities in bargaining power between workers and their employers and leave it to the parties to set terms and conditions of employment.¹⁹ Consequently, property rights continue to play a major role in U.S. labor law. As the Supreme Court stated in *NLRB v. Babcock & Wilcox*, “[o]rganization rights are granted to workers by the same authority, the National government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”²⁰ Interestingly, Canadian authorities have at times quoted the

16. See, e.g., *Harrison v. Carswell*, [1976] 2 S.C.R. 200 (Can.) (pre-Charter decision upholding conviction for trespass of striking union member picketing her employer in a shopping mall in which the employer was a tenant); *RMH Teleservices Int’l, Inc. v. B.C. Gov’t & Serv. Emps.’ Union*, 2003 BCSC 278 (Can.) (enjoining union under common law of trespass from distributing literature in employee parking lot on employer’s premises). But see *R. v. Layton*, 38 C.C.C. (3d) 550 (Can. Ont. Prov. Ct. 1986) (holding Trespass to Property Act as applied to union organizer distributing literature to employees of store in a shopping mall violates the Charter’s guarantees of free speech and free association).

17. ANDREW C. L. SIMS ET AL., *SEEKING A BALANCE: REVIEW OF PART I OF THE CANADA LABOUR CODE* 33 (1996).

18. See, e.g., ELLEN DANNIN, *TAKING BACK THE WORKERS’ LAW* (2006); Christopher David Ruiz Cameron, *All Over but the Shouting? Some Thoughts About Amending the Wagner Act by Adjudication Rather than Retirement*, 26 *BERKELEY J. EMP. & LAB. L.* 275 (2005); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Consciousness*, 62 *MINN. L. REV.* 265 (1978).

19. See Martin H. Malin, *The Canadian Auto Workers – Magna International, Inc. Framework of Fairness Agreement: A U.S. Perspective*, 54 *ST. LOUIS U.L.J.* 525, 549 (2010); Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 *KANSAS L. REV.* 1, 5 (2000).

20. 351 U.S. 105, 112 (1956).

Babcock & Wilcox declaration.²¹ However, as detailed below, in many areas, the preservation of employer property rights plays a more prominent role in U.S. labor law than it does north of the border.

A. Access to Workers on the Employer's Premises

Babcock & Wilcox concerned an employer who refused to allow union organizers who were not that employer's employees to come onto the parking lot to distribute literature urging workers to join the union.²² The NLRB had held that the denial of access interfered with, restrained or coerced employees' NLRA rights in violation of section 8(a)(1) of the Act.²³ In so doing, it followed the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*,²⁴ which upheld the NLRB's approach that rules prohibiting employees from soliciting their coworkers for union membership during non-working time were presumptively invalid. The *Babcock* Court, however, distinguished employees soliciting their coworkers on employer property from non-employees seeking to come onto employer property to carry out the solicitation. It regarded the distinction as "one of substance."²⁵ Employees soliciting their coworkers were already on the property by employer invitation when they engaged in the solicitation whereas non-employee organizers were trespassers whom an employer "may validly post his property against . . . if reasonable efforts by the union through other available channels of communication will enable it to reach the employees."²⁶ In *Lechmere, Inc. v. NLRB*,²⁷ the Court reaffirmed *Babcock* and its basis in protecting the employer's property right to exclude those it does not want on the property. The Court opined that the Board has no authority to sanction "reasonable trespass,"²⁸ but may intrude on employer property rights only where the employees "by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society,"²⁹ such as mining camps and resort mountain hotels where employees live on

21. See, e.g., *Teamsters Local 31 v. Brewery Creek Mine*, 47 C.L.R.B.R. 2d 85, para. 9 (Can. L.R.B. 1998); *U.S.W.A. v. Adams Mine Cliffs of Can., Ltd.*, [1982] O.L.R.B. Rep. 1767, para. 21 (Can. Ont. L.R.B.).

22. *Babcock & Wilcox Co.*, 351 U.S. at 107.

23. *Id.* at 107-08.

24. 324 U.S. 793 (1945).

25. *Babcock & Wilcox Co.*, 351 U.S. at 113.

26. *Id.* at 112.

27. 502 U.S. 527 (1992).

28. *Id.* at 537.

29. *Id.* at 540.

the premises.³⁰

As Professor Cynthia Estlund has demonstrated, the licensee-trespasser distinction that the Court has drawn ignores the common law which regards a licensee who exceeds the scope of the license, such as an employee who violates an employer's no solicitation rule, as a trespasser.³¹ The property right, however, that the Court in *Babcock* and *Lechmere* held sacrosanct was the property owner's basic right to determine who may enter the property, *i.e.* the naked right to exclude others from the property for whatever reason the property owner may offer. The employer who invites employees onto the property to work has exercised that right and once having extended the invitation may not unlawfully interfere with their exercise of their section 7 right to organize their coworkers. "In other words, the law does not impose access requirements on the employer/property owner; the employer/property owner imposes them upon itself by deciding whom to invite onto the property."³²

At first glance, Canadian labour law would appear to have codified the approaches of *Republic Aviation*, *Babcock*, and *Lechmere*. For example, the Ontario Labour Relations Act declares, "Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union."³³ Similarly, the British Columbia Labor Relations Code provides, "Except with the employer's consent, a trade union or person acting on its behalf must not attempt, at the employer's place of employment during working hours, to persuade an employee of the employer to join or not join a trade union."³⁴ Professor Patrick Macklem has summarized the Canadian labour boards' interpretations of these provisions in a way that echoes the approach of *Republic Aviation*:

Although all jurisdictions provide that the statutory rights of self-organization do not operate to permit anyone to attempt to persuade an employee to become (or to refrain from becoming) a member of a union at the workplace during working hours, such activity, generally speaking, is protected if it occurs during an employee's free time. If, however, an employer can show that such

30. *Id.* at 539.

31. Cynthia Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 312, 323 (1994).

32. Malin & Perritt, *supra* note 19, at 43.

33. Ontario Labour Relations Act, s 77, S.O. 1995, c 1, sched A, s 77 (Can.).

34. British Columbia Labour Relations Code, s 7(1), R.S.B.C. 1996, c 244, s 7 (Can.).

organizing activity occurred during working hours, then employer interference with such activity is, prima facie, shielded from the unfair labour practice provisions of the legislation.³⁵

With respect to non-employee organizer access to the employer's property, the Canada Labour Code empowers the Canada Industrial Relations Board (CIRB) to, upon application of a trade union, order an employer to provide the union with access to employees on employer property where the employees live in an isolated location owned or controlled by the employer.³⁶ The Ontario Labour Relations Act and the British Columbia Labour Relations Code similarly empower the respective provincial labour relations boards to require an employer to give a union access where the employees reside on the employer's property.³⁷ By implication, these statutes reflect a regime where "property rights are the norm, and statutory rights are the exception. . . . [S]ince the statute infringes property rights in cases where employees reside on the employer's premises, the statute does not infringe property rights in cases where employees do not live on the employer's premises"³⁸ Thus, it would appear that Canadian labour relations statutes, as interpreted by the relevant authorities, echo the approach of the U.S. Supreme Court in *Babcock* and *Lechmere*.

But the echo has its distortions. Whereas *Babcock* and *Lechmere* have erected almost impenetrable protection of employer non-discriminatory prohibitions of solicitation by non-employees on their property, there has been some denting in the Canadian armor. In *Cadillac Fairview Corp. v. R.W.D.S.U.*,³⁹ a union was seeking to organize the employees of Eaton's, a department store in The Eaton Center in Toronto. Cadillac Fairview was a 60 percent shareholder of

35. Patrick Macklem, *Property, Status and Workplace Organizing*, 40 U. TORONTO L.J. 74, 82-83 (1990).

36. Canada Labour Code, s 109, R.S.C. 1985, c L-2, s 109. The Code also empowers the CIRB to order an employer to provide a union with the names and addresses of employees who do not reside on the premises where "the Board is of the opinion that such communication is required for purposes relating to soliciting trade union memberships, the negotiation or administration of a collective agreement, the processing of a grievance or the provision of a trade union service to employees." *Id.* s 109-1. In contrast, the NLRB has denied a union claim that an employer was obligated to furnish the names and addresses of employees the union was seeking to organize even though all employees worked out of their homes and did not report to fixed work locations. Tech. Servs. Sols., 324 N.L.R.B. 298 (1997).

37. Ontario Labour Relations Act, s 13, S.O. 1995, c 1, sched A, s 13 (Can.); British Columbia Labour Relations Code, s 7(2), R.S.B.C. 1996, c 244, s 7 (Can.).

38. Macklem, *supra* note 35, at 81.

39. [1985] O.L.R.B. Rep. 941, 10 C.L.R.B.R. (N.S.) 289, 1985 CarswellOnt 1251 (Can. Ont. L.R.B.).

the company that owned the mall and managed the mall pursuant to a contract with that company. Among other things, union organizers sought to solicit and distribute literature to persons, presumably employees, entering the store at the “two below” level of the mall, where there was an entrance that was close to an entrance to the subway. During the morning prior to the store’s opening to the public, there was a sliding glass door which was closed except for an opening the width of a narrow doorway. Employees and others with passes entered through the opening, and their identification and passes were checked by security guards. The Ontario Labour Relations Board (OLRB) rejected Cadillac Fairview’s assertion that its property right to exclude the union organizer trespassers was absolute because the employees did not reside on the employer’s premises. The union already had Eaton’s employees organizing their coworkers. Such a fact, in the U.S., would have been decisive as it would have been impossible for the union to argue that it lacked reasonable alternative methods of communicating its message to the employees. But, the OLRB saw it differently:

The prospect of a Labour Relations Board, however, in effect forcing employees wishing to exercise their section 3 rights to engage in overt union activity in the face of their employer, when the use of professional organizers on the other side of the doorway would be more natural, more constructive from the section 3 point of view, and, if anything, *less* disruptive of any competing commercial interests of the respondents, seems difficult to justify.⁴⁰

Cadillac Fairview appealed but the Ontario Court of Appeal dismissed the appeal. It too rejected Cadillac Fairview’s assertion that its property rights were absolute except to the extent that the statute required that they yield where employees reside on the premises.⁴¹

To a similar effect is the decision of the Canada Labour Relations Board, the predecessor agency to the CIRB, in *National Association of Broadcast Employees and Technicians and CFTO-TV Ltd.*⁴² At issue was the employer’s refusal to allow a non-employee union representative access to the property to meet with employees who the union represented. The employer argued that the statute authorized the board to require access only where employees resided on the property. The board rejected that position, reasoning that

40. *Id.* para. 67.

41. *Cadillac Fairview Corp. v. R.W.D.S.U.*, 1989 CarswellOnt 936, [1989] O.L.R.B. Rep. 1292, [1989] O.J. No. 2291, 18 A.C.W.S. (3d) 928, 36 O.A.C. 179, 42 Admin. L.R. 214, 64 D.L.R. (4th) 267, 71 O.R. (2d) 206, 90 C.L.L.C. 14,003 (Can. Ont. App.).

42. 95 C.L.L.C. 220-045, 97 di 35, 1995 CarswellNat 1592 (Can. L.R.B.).

section 109 is not a complete code of access to employer premises since it deals only with access to employees *living in a isolated location on premises owned or controlled by their employer or another person, . . .* This section is only directed to premises on which employees live, not to premises where they work.⁴³

The Board found that the exclusion of the union representative from the property illegally interfered with the administration of the union and, therefore, the employer's property rights had to yield.⁴⁴ Thus, while there is substantial overlap between U.S. and Canadian law concerning union access to employer property, employer property rights are not as absolute in Canada as they are in the U.S.

Property rights are not limited to the right to control access to the property. They also include the right to determine how to use the property. Employers' rights to decide what use to make of their property may be referred to as managerial or entrepreneurial rights.⁴⁵ There is even greater divergence between U.S. and Canadian labor law when it comes to employer entrepreneurial rights. This divergence is found in how the two countries treat the scope of mandatory bargaining, successorship, and the exclusion from collective bargaining rights of common law independent contractors. These areas are explored below.

B. The Scope of Mandatory Bargaining

A major difference between the labor law of the U.S. and the labour law of Canada concerns the scope of mandatory bargaining. In the U.S., subjects of bargaining are divided into mandatory and permissive. With respect to mandatory subjects, bargaining is required, and a party may not make unilateral changes prior to impasse. With respect to permissive subjects, bargaining is not required, a party may act unilaterally, and a party may not insist on its position to the point of impasse. The distinction was first recognized in *NLRB v. Wooster Division of Borg-Warner Corp.*⁴⁶ The employer insisted that the union agree that prior to calling a strike, the union would submit the employer's last best offer to a membership vote. If the membership rejected the offer, the employer would have seventy-two hours to submit a revised offer on which the union membership

43. *Id.* para. 47.

44. *Id.* paras. 54, 55.

45. See Malin & Perritt, *supra* note 19, at 7.

46. 356 U.S. 342 (1958).

would vote.⁴⁷ The employer also insisted on substituting the local union as the recognized representative for the international union which had been certified by the NLRB.⁴⁸ The Court held that the duty to bargain in good faith was limited to wages, hours and terms and conditions of employment. “As to other matters, . . . each party is free to bargain or not to bargain and to agree or not to agree.”⁴⁹ Observing that the employer had bargained in good faith with respect to mandatory subjects, the Court continued, “that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining.”⁵⁰

Although *Borg-Warner* involved an employer insisting on proposals that concerned the operation of the union, most litigated disputes over the scope of bargaining concern employer decisions to make basic changes in the business. In *First National Maintenance Corp. v. NLRB*,⁵¹ the employer, a provider of janitorial and maintenance services to commercial customers,⁵² decided to drop one of its customers following a dispute over fees.⁵³ The Court labelled the decision at issue as a decision to close part of the employer’s business.⁵⁴ It made clear that it believed mandating bargaining would intrude on employer property rights:

[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place.⁵⁵

Compelling bargaining over such a decision would intrude on employer unilateralism, i.e., on employer control over what it may do with its property. The Court opined that “[t]his decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all,”⁵⁶ and that “[m]anagement

47. *Id.* at 346.

48. *Id.* at 345.

49. *Id.* at 349.

50. *Id.*

51. 452 U.S. 666 (1981).

52. *Id.* at 668.

53. *Id.* at 669.

54. *Id.* at 667.

55. *Id.* at 676.

56. *Id.* at 677.

must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.”⁵⁷ Although the Court recognized that the decision would eliminate some employees’ jobs, the Court made clear that the presumption rested with protecting employer rights to do with their property as they see fit over employee rights to bargain over job security.

[I]n view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.⁵⁸

“[F]or Canadian labour law, the mandatory/permissive distinction is the path not taken.”⁵⁹ In an opinion by then-Chairman Paul Weiler, the British Columbia Labour Relations Board expressly rejected the U.S. approach of dividing subjects into mandatory and permissive. The Board reasoned:

The whole point of a system of *free* collective bargaining is to leave it to the parties to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or by the union. And in the final analysis, the test of whether a particular objective is sufficiently pressing to one party to have moved into the area of mutual agreement is the price that the party is willing to pay for such a move, either by concessions elsewhere in the contract or by the losses inflicted by a work stoppage. The wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern.⁶⁰

The Supreme Court of Canada’s decision in *United Food and Commercial Workers Local 503 and Wal-Mart Canada Corp.* graphically illustrates the different results that are attained north and south of the border.⁶¹ The United Food and Commercial Workers was certified as exclusive bargaining representative for the employees of Wal-Mart’s store in Jonquière, Quebec. During the process of negotiating a first collective bargaining agreement, Wal-Mart closed

57. *Id.* at 678-79 (footnote omitted).

58. *Id.* at 679.

59. Brian A. Langille, “*Equal Partnership*” in *Canadian Labour Law*, 21 OSGOODE HALL L.J. 496, 503 (1983).

60. *Pulp & Paper Indus. Relations Bureau v. C.P.U.*, [1977] B.C.L.R.B.D. No. 60, 1 Can L.R.B.R. 60, 77 C.L.L.C. 16,109 (Can. B.C. L.R.B.).

61. *United Food & Commercial Workers Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45.

the store.⁶² Quebec, like most Canadian jurisdictions, freezes the status quo during negotiations.⁶³ Although no similar statutory “freeze” exists in the National Labor Relations Act, the U.S. Supreme Court has held that an employer may not make a unilateral change in a mandatory subject of bargaining prior to the reaching of impasse in negotiations.⁶⁴ Since the decision to close part of an operation is not a mandatory subject of bargaining under *First National Maintenance*, had Wal-Mart’s actions occurred in the U.S., there would have been no statutory violation. In contrast, the Supreme Court of Canada (SCC) upheld proceedings below which found Wal-Mart in violation of the statutory freeze.

Under the Quebec Labour Code, alleged violations of the statutory freeze are considered grievances and are submitted to arbitration.⁶⁵ The SCC held that finding a violation did not require proof of anti-union motive behind the store’s closing.⁶⁶ In contrast to the U.S. Supreme Court’s holding in *First National Maintenance*, the SCC opined that “the condition of employment concept is a flexible one that encompasses anything having to do with the employment relationship on either an individual or a collective level.”⁶⁷ The SCC observed that the statutory freeze “by imposing a *duty* on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive *right* to the maintenance of their conditions of employment during the statutory period.”⁶⁸ For the closing of a facility and resulting terminations of employment not to constitute a change in conditions of employment prohibited by the statutory freeze, “it must be consistent with the employer’s normal management practices.”⁶⁹ A change is consistent with the employer’s normal management practices if it is consistent with the employer’s actual past practices or, if failing that, if it is a decision that a reasonable employer would have made under the circumstances.⁷⁰

62. *Id.* paras. 1, 4-5.

63. Section 59 of the Quebec Labour Code provides, “From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.” Quebec Labour Code, s 59, CQLR, c C-27, s 9 (Can.).

64. *NLRB v. Katz*, 369 U.S. 736 (1962).

65. See *United Food & Commercial Workers Local 503*, 2014 SCC para. 61.

66. *Id.* para. 38.

67. *Id.* para. 41 (internal quotations and citations omitted).

68. *Id.* para. 37.

69. *Id.* para. 45.

70. *Id.* paras. 55-57.

The SCC found the arbitrator's conclusion that the closure of the store was not consistent with Wal-Mart's normal management practices to be reasonable.⁷¹ The court relied on Wal-Mart's not having told anyone of a plan to go out of business and its having indicated that the store was performing well, its objectives were being met and bonuses would be paid.⁷²

C. Successorship

Successorship is another area where property rights drive the law in the United States in contrast to the law in Canada. In *NLRB v. Burns International Security Services, Inc.*,⁷³ the union represented the employees employed by Wackenhut Corporation providing security services at a Lockheed plant.⁷⁴ When Wackenhut's contract with Lockheed expired, Lockheed rebid the work and awarded a contract to Burns.⁷⁵ Burns hired twenty-seven of the Wackenhut employees and brought in fifteen of its employees from other locations.⁷⁶ The NLRB held that Burns was a successor to Wackenhut, was required to recognize the union that had represented the Wackenhut employees, and was bound by the Wackenhut collective bargaining agreement.⁷⁷

The Supreme Court upheld the NLRB's ruling that Burns was bound to recognize the union, in light of the continuity of the bargaining unit and Burns' hiring a majority of its employees from the Wackenhut workforce.⁷⁸ But, the Court held that the NLRB erred in holding Burns bound by the Wackenhut collective bargaining agreement. It distinguished the two issues:

Burns had notice of the existence of the Wackenhut collective-bargaining contract, but it did not consent to be bound by it. The source of its duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and allowing the Board to compel agreement when the parties themselves are

71. *Id.* paras. 94-96.

72. *Id.* para. 95.

73. 406 U.S. 272 (1972).

74. *Id.* at 274.

75. *Id.* at 275.

76. *Id.*

77. *Id.* at 276.

78. *Id.* at 280-81.

unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.⁷⁹

The Court made clear that it viewed the employer's unilateral right to determine how to use its property was at stake:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.⁸⁰

The Court also expressed concern that binding the successor to the predecessor's collective bargaining agreement would impede the successor from hiring its own workforce.⁸¹ In a subsequent decision, the Court made clear that a successor has a right to hire whoever it desires.⁸²

The U.S. law of successorship, thus, enshrines employer unilateralism in deciding how to use its property. Successor employers are free to hire whoever they please, to structure their workforce as they see fit, and to set whatever initial terms of hire they deem appropriate. It is only after the successor exercises these rights that the NLRB may examine the result of the successor's actions to determine whether sufficient continuity exists to require the successor to recognize the predecessor's union. The U.S. approach to successorship thus values employer unilateralism comparably to its approach to the scope of mandatory bargaining.

Canadian law rejects such employer unilateralism. The Canadian jurisdictions bind a successor employer to the predecessor's collective agreement.⁸³ For example, the Canada Labour Code provides that where there is a sale of a business, the buyer is bound by any collective agreement to which the seller was a party and was in effect on the date of the sale.⁸⁴ The British Columbia Labour Relations

79. *Id.* at 287.

80. *Id.* at 287-88.

81. *Id.* at 288.

82. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261-72 (1974).

83. *See C. MICHAEL MITCHELL & JOHN C. MURRAY, ONTARIO MINISTRY OF LABOUR, CHANGING WORKPLACES REVIEW, SPECIAL ADVISORS' INTERIM REPORT 83 (2016)* ("Labour relations legislation in all Canadian jurisdictions protects successor rights where there is a sale of a business.").

84. Canada Labour Code, s 44(2)(c), R.S.C. 1985, c L-2, s 44.

Code binds a purchaser, lessee, or transferee of a business to the predecessor's collective agreement.⁸⁵ The Ontario Labour Relations Act provides:

Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.⁸⁶

The Ontario Labour Relations Board has the power to determine conclusively whether there has been a sale of a business.⁸⁷ The OLRB has read the term "sale" broadly. For example, it has found a sale where a predecessor company closed a store and the successor leased the store from the landlord and purchased some of the predecessor's assets.⁸⁸ It has suggested that where "individuals who are so important to a business that they are in effect the personification of the business" move to a new business, there has been a sale of the old business to the new one.⁸⁹ The OLRB has explained:

[A] "business" is a concept which does not lend itself to precise definition. Rather, a business is an economic activity (whether for profit or not) which can be conducted through a variety of legal vehicles or arrangements. It is the activity, not its form, which give rise to employee-employer relationships which are regulated by the Act and to which bargaining rights attach. Consequently, under the Labour Relations Act, bargaining rights attach to an activity as an employer rather than to a particular employer name or form of employer, and so long as that activity continues bargaining rights continue to exist.⁹⁰

85. B.C. Labour Relations Code, s 35(2), R.S.B.C. 1996, c 244, s 35 (Can.).

86. Ontario Labour Relations Act, s 69(2), S.O. 1995, c 1, sched A, s 69(2) (Can.).

87. *Id.* s 69(12).

88. U.F.C.W. Local 409 v. Canada Safeway, Ltd., [1986] O.L.R.B. Rep. 1498 (Can. Ont. L.R.B.).

89. C.J.A. Local 18 v. Stewart & Hinan Contractors Ltd., [1994] O.L.R.B. Rep. 152, para. 8 (Can. Ont. L.R.B.).

90. Ottawa-Carleton Pub. Emps. Union, Local 503 v. Ottawa-Carleton (Regional Municipality), [1992] O.L.R.B. 1211, para. 7 (Can. Ont. L.R.B.).

D. Coverage of Independent Contractors

As originally enacted, the NLRA contained no express exclusion for independent contractors. In *NLRB v. Hearst Publications, Inc.*,⁹¹ the Court rejected the argument that the NLRA's coverage turned on whether workers were, under common law principles, employees or independent contractors. Rather, the Court focused on whether "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation"⁹² In reaction to the *Hearst* decision, Congress amended the NLRA in 1947 to expressly exclude independent contractors.⁹³

A series of cases involving taxi drivers who rent their cabs from the taxi companies illustrates the technical nature of the U.S. exclusion of independent contractors from coverage. A leading case involved taxi drivers in Chicago where in the mid-1970s, Yellow and Checker taxi companies began switching from a commission system to a leasing system for their drivers.⁹⁴ Commission drivers were required to account to the companies for their fares and were paid a percentage of those fares whereas lessees paid a fixed rental and retained all fares that they earned.⁹⁵ The NLRB held that the lessee drivers were employees. It relied on thirteen factors: 1. The drivers had no investments in their cabs, 2. goodwill inured to the companies' benefit rather than the drivers who operated in the name of the companies, 3. the drivers' work was an essential part of the companies' business, 4. the leases were short term and renewable at the companies' discretion, 5. the companies unilaterally set the lease terms, 6. the drivers were required to comply with pervasive municipal regulations, 7. subleasing was prohibited, 8. the companies could discipline drivers by threatening city action, 9. drivers were subject to reference checks at the time of hire, 10. the companies determined fault in accidents, 11. the companies imposed a 250-mile limitation on use of the cabs, 12. the companies imposed dress restrictions, and 13. the companies arguably provided workers' compensation insurance.⁹⁶ To the NLRB, to find the drivers to be

91. 322 U.S. 111 (1944).

92. *Id.* at 128.

93. 29 U.S.C. § 152(3) (2012).

94. *Local 777, Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 866-67 (D.C. Cir. 1978).

95. *Id.* at 868.

96. *Id.* at 873 n.25.

independent contractors would ignore economic reality because the drivers had no real economic independence.⁹⁷

The D.C. Circuit Court of Appeals reversed the Board. To the court, the controlling factor was that the drivers did not account to the companies for their fares or for how they went about performing their jobs. Once the drivers paid the rental, the companies had no reason to assert control over the drivers' performance of their work.⁹⁸ In a different case, however, where a taxi company required its drivers to keep trip sheets and adjusted rental rates based on the amount of activity shown on the trip sheets such that it appeared that the company was controlling how much money a driver could net, the D.C. Circuit held the drivers to be employees, even though they leased their cabs.⁹⁹

The determination in U.S. labor law of whether workers are employees or independent contractors is another example of the law's deference to employers' unilateralism in how they use their property. In the U.S., it is the employer, in the first instance, who decides which, if any, of its workers will have rights to organize and bargain collectively. The employer controls this determination by controlling the way in which it structures its workforce. The law takes that structure as a given and applies established legal rules to determine whether the workers are covered by the statute. Such coverage does not depend on the workers' economic independence. Consequently, professional athletes who have considerable individual bargaining power have collective bargaining rights while most taxi drivers do not.

In Canada, by contrast, the labour relations board rather than the employer determines in the first instance who will have collective bargaining rights. This is quite clear in Saskatchewan, which defines employee to include "any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor."¹⁰⁰ Other

97. *Id.* at 873.

98. *Id.* at 879.

99. *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980).

100. Saskatchewan Employment Act, s 6-1(1)(h)(iii), S.S. 2013, c S-15.1, s 6-1 (Can.); see also Manitoba Labour Relations Act, s 1, R.S.M. 1987, c L10, s 1 (Can.) ("[E]mployee . . . includes any person designated by the board as an employee for the purposes of this Act, notwithstanding that the person to whom the employee provides services is not vicariously liable for the employee's acts or omissions.").

Canadian jurisdictions define “employee” to include individuals having the status of “dependent contractors.” For example, Ontario defines dependent contractor as:

a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.¹⁰¹

Under definitions like this one, it remains the labour relations board that determines in the first instance which, if any, of an employer’s workers will have collective bargaining rights. The employer’s structure of its workforce yields to the board’s determination “whether, like employees, they are dependent upon their employer in the manner akin to employees, and so should enjoy the opportunity and benefits of collective bargaining.”¹⁰²

U.S. labor law, thus, is built on a foundation of respect for employer property rights. An employer’s unilateral determination of how it will use its property is taken as a given. The law is then applied to that determination to decide what, if any, rights, the employer’s workers will have.

Taxi companies unilaterally decide how they will use their property, i.e. the taxi cabs. If they decide to hire workers to drive them on commission, then those workers will have collective bargaining rights. But if they decide to lease the cabs to workers and not require the workers to account for their trips and their fares, then those workers will have no collective bargaining rights regardless of whether they are as dependent on the companies as commission drivers.

Employers unilaterally decide which individuals to invite onto their premises. It is only those individuals, absent the atypical situation where the workers are completely isolated, who have the right to solicit others for or against a union on the premises.

Successor employers unilaterally decide who to hire and how to structure their workforces. How they exercise their rights determines

101. Ontario Labour Relations Act, s 1(1), S.O. 1995, c 1, sched. A, s 1(1) (Can.).

102. *Comm’ns, Energy & Paperworkers Union of Can. Local 87-M v. Toronto Star Newspapers Ltd.*, [2001] O.L.R.B. Rep. 168, 67 C.L.R.B.R. (2d) 161, para. 17 (Can. Ont. L.R.B.).

whether their workers will continue to be represented by the union that represented them with the predecessor. Even then, the successor is bound by the predecessor's collective bargaining agreement only if the successor voluntarily agrees to assume it.

The U.S. further safeguards employer property rights by ensuring that employers' basic decisions as to how to use their property are to be bargained only at the option of the employer. Such monolithic protection of employer property rights stems from the Lockean nature of property rights in the U.S. In Canada, where Lockean values do not prevail and property rights are not constitutionalized, property rights are important but are not as monolithic as in the U.S. The next section examines the consequences of these different approaches to the role of property rights for each country's regulation of the collective bargaining process and, in particular, their positions on first contract arbitration.

IV. REGULATING THE BARGAINING PROCESS AND FIRST CONTRACT ARBITRATION

A key feature of the Employee Free Choice Act borrowed from Canada and discussed by Zimmer and Bisom-Rapp is first contract arbitration (FCA). FCA is common across Canadian jurisdictions.¹⁰³ Where a newly certified or newly recognized union and an employer are unable to reach agreement on a contract, FCA may come into play and an arbitrator may impose terms on the parties. The presence of FCA in Canada and its rejection in the U.S. reflects the countries' difference in regulating the bargaining process which, in turn, reflects the different roles of property rights in the two nations.

Section 8(a)(5) of the NLRA declares it an unfair labor practice for an employer to "refuse to bargain collectively" with its employees' exclusive bargaining representative.¹⁰⁴ Section 8(d) defines to bargain collectively as the obligation to "meet at reasonable times and confer in good faith . . . but . . . does not compel either party to agree to a proposal or require the making of a concession . . ."¹⁰⁵ The Supreme Court has interpreted these provisions as incorporating the "fundamental premise" of "private bargaining under governmental supervision of the procedure alone, without any official compulsion

103. See MITCHELL & MURRAY, *supra* note 83, at 81.

104. 29 U.S.C. § 158(a)(5) (2012).

105. *Id.* § 158(d).

over the actual terms of the contract.”¹⁰⁶

As the Court made clear in *Burns*, the NLRA empowers the NLRB to regulate the process of collective bargaining but not the outcome.¹⁰⁷ The only duty imposed that the NLRB may enforce is the duty to bargain in good faith. “[A]part from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.”¹⁰⁸

The line between policing good faith in bargaining and regulating the substantive solutions of the parties’ differences blurs considerably when the NLRB is asked to infer subjective bad faith from the substantive positions taken by a party at the bargaining table. All agree with the basic proposition that a party may engage in hard bargaining but may not engage in surface bargaining, i.e., just going through the motions of bargaining without any intent of reaching agreement. But authorities disagree over whether the NLRB should find surface bargaining based solely on the content of the employer’s proposals in negotiations.¹⁰⁹ If an inference of surface bargaining is to be drawn from an employer’s proposals in negotiations, the proposals must be dramatically extreme.¹¹⁰ Regardless of how extreme the employer’s bad faith, the NLRB lacks authority to impose a contract provision on the parties.¹¹¹

The NLRA’s emphasis on freedom of contract reflects the statutory foundation of respect for property rights and protection of those rights from government interference. It is generally understood in U.S. labor relations that employers enjoy all rights to direct their workforce and manage their business except to the extent limited by the collective bargaining agreement.¹¹² Just as employers determine

106. H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

107. See *supra* note 79 and accompanying text.

108. NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 488 (1960).

109. Compare *Mid-Continent Concrete*, 336 N.L.R.B. 258 (2001), *enfd.*, NLRB v. Hardesty Co., Inc., 308 F.3d 859 (8th Cir. 2002), with *id.* at 263 (Hurtgen, Member, concurring).

110. See *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir. 1984) (“The Board correctly inferred bad faith from the Company’s insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable. They would have left the Union and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the Union’s certification.”) (citation omitted).

111. H. K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970).

112. Collective bargaining agreements commonly contain management rights clauses that recognize management’s right to direct the workforce subject to the limitations imposed by the contract. See Gladys W. Gershenfeld, *Management Rights: Common Issues*, in *LABOR AND EMPLOYMENT ARBITRATION* § 11.B.02 (Mark Bornstein et al. eds., 2d ed. 2016).

which workers will have organizing and collective bargaining rights by the manner in which they structure their workforces and determine which individuals will have rights to organize on employer premises by deciding whom to invite onto their property, and just as employers determine whether a predecessor's union will continue to have bargaining rights by the workers they hire and whether they keep them as a distinct bargaining unit, so too employers decide what terms of employment will bind them by deciding what to bargain for, what to agree to, and what to reject. Freedom to contract and freedom to not be bound by any term one does not agree to protects employer rights to decide how to use their property from intrusion by the government.

Canadian authorities generally agree with U.S. authorities on the distinction between permissible hard bargaining and illegal surface bargaining. The Nova Scotia Labour Relations Board has opined:

It is important, in the context of free collective bargaining, however, to draw the distinction between "surface bargaining" and hard bargaining. The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone, to allow the Board to draw an inference of "surface bargaining". This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of "surface" bargaining can be made.¹¹³

Like the NLRA, Canadian statutes impose a duty to bargain in good faith, but they also impose a duty to make every reasonable effort to reach agreement.¹¹⁴ The duty to make every reasonable effort

113. *Nova Scotia Government & Gen. Emps. Union v. Cape Breton Reg. Municipality*, Decision # LRB-6012, 2005 CarswellNS 760, para. 30(b) (Can. N.S. L.R.B.); *see also* *U.S.W.A. v. Plaza Fibreglas Mfg. Ltd.*, [1990] O.L.R.B. Rep. 192, 6 C.L.R.B.R. (2d) 174 at para. 19 (Can. Ont. L.R.B.) ("Either party may . . . resort to economic sanction to achieve the collective agreement it wants, if it has the strength to do so or is prepared to accept the cost Accordingly, the Board will be circumspect in finding surface bargaining based solely on the positions taken at the bargaining table.") (internal quotations, citations, and emphasis omitted).

114. *See, e.g.*, Canada Labour Code, s 50(a)(ii), R.S.C. 1985, c L-2, s 50; B.C. Labour Relations Code, s 11(1), R.S.B.C. 1996, c 244, s 11 (Can.); Ontario Labour Relations Act, s 17, S.O. 1995, c 1, sched A, s 17 (Can.). *But see* Saskatchewan Employment Act, s 6-7, S.S. 2013, c S-15.1, s 6-7 (Can.) (imposing duty to bargain in good faith without mentioning duty to make

has enabled Canadian authorities to intervene in the substance of negotiations in ways that the NLRA and the U.S. courts would never contemplate where the substance negatively affects the bargaining process. In *Royal Oak Mines v. Canada Labour Relations Board*, the parties reached tentative agreement on April 18, 1992, but the union membership rejected the agreement and a strike ensued.¹¹⁵ The strike lasted eighteen months and was marred by many acts of violence.¹¹⁶ The employer terminated forty-nine employees for strike misconduct.¹¹⁷ The employer insisted that it would not consider any process that would allow the terminated employees to grieve and arbitrate their dismissals.¹¹⁸ The Supreme Court of Canada (S.C.C.) upheld the finding of the Canada Labour Relations Board that in so doing, the employer breached its duty to make every reasonable effort to reach agreement. The court reasoned:

Section 50(a)(ii) requires the parties to “make every reasonable effort to enter into a collective agreement”. It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of “reasonable effort” must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith.¹¹⁹

The S.C.C. made clear that the duty to make every reasonable effort to reach agreement does regulate the terms the parties may offer at the bargaining table:

A refusal to include such basic and standard terms in an agreement as a requirement of a just cause for dismissal clause, or a refusal to negotiate about pensions, or as in this case, a refusal to consider a grievance arbitration clause, leads to the inference that despite any “sincerely and deeply held” beliefs the party claims to have, by taking a rigid stance on such a widely accepted condition, it becomes apparent that the party (here the employer) has no real intention of reaching an agreement. In other words, the employer is breaching the duty to “make every reasonable effort to enter into a collective agreement”.

every effort to reach agreement).

115. *Royal Oak Mines, Inc. v. Can. Labour Relations Bd.*, [1996] 1 R.C.S. 369, 381 (S.C.C.).

116. *Id.* at 382.

117. *Id.*

118. *Id.*

119. *Id.* at 397.

If a party proposes a clause in a collective agreement, or conversely, refuses even to discuss a basic or standard term, that is acceptable and included in other collective agreements in comparable industries throughout the country, it is appropriate for a labour board to find that the party is not making a “reasonable effort to enter into a collective agreement”. If reasonable parties have agreed to the inclusion of a grievance arbitration clause in their collective agreement, then a refusal to negotiate such a clause cannot be reasonable. The grounds on which an employer may dismiss an employee is of fundamental importance for any association of employees. For an employer to refuse an employee a grievance procedure or some form of due process, by which the employee can challenge his or her dismissal on the ground that it was not for just cause, is to deny that employee a fundamental right. In those circumstances it would be reasonable for a board to infer that no reasonable union would accept a collective agreement which lacked a grievance arbitration clause and that the employer’s failure to negotiate the clause indicated a lack of good faith bargaining.¹²⁰

As a remedy for its finding that the employer had breached its duty, the Canada Labour Relations Board required the employer to offer the April 18, 1992 tentative agreement together with a three-year duration and a return-to-work protocol that included an expedited grievance and arbitration process for the terminated employees, but excluding four items on which the employer’s position had changed, so that the union could vote to ratify it. With respect to the four items excluded from the offer, the Board ordered the parties to negotiate for thirty days and, if no agreement were reached, enter into mediation to finality.¹²¹ In contrast to the U.S. Supreme Court which held that the principle of free collective bargaining precluded the NLRB from ever imposing a term on parties,¹²² the S.C.C. upheld the Board’s order. The court opined:

As important as free collective bargaining is, it is not the only factor the Board must consider in fashioning a remedial order. It cannot be said that the Board ignored the principle of free collective bargaining. The dispute had dragged on for 18 months while a conciliator, two specially appointed mediators, and commissioners tried to assist the parties to reach their own settlement through free collective bargaining. All efforts had proved futile. The Industrial Inquiry Commission twice asked the appellant to outline in writing what its position was with respect to the outstanding issues, rather than forcing a position on them. Yet, the appellant refused to provide the requested information. Certainly, free collective

120. *Id.* at 398.

121. *Id.* at 388.

122. *See supra* note 106 and accompanying text.

bargaining had been given every opportunity to function over 18 long months. By then, this approach had taken such a grave toll on the Yellowknife community, that the Board had a responsibility to take into account the interests of others. And so it did, with the result that it imposed what appears to be a fair and equitable order which was successful in resolving the dispute. This exceptional situation called for exceptional measures.¹²³

Similarly, in *U.S.W., Local 6500 v. Vale Inco Ltd.*, the employer fired a number of employees for strike misconduct.¹²⁴ The employer refused to consider reinstating the fired strikers or allowing them to grieve and arbitrate their discharges.¹²⁵ In finding that the employer breached its duty to make every reasonable effort to reach agreement, the OLRB rejected the employer's contention that only a patently unreasonable employer position in negotiations could yield such a finding.¹²⁶ The Board opined:

A position maintained to impasse on a matter which, viewed objectively, a party knows or ought to know is of fundamental significance to the other party is one which attracts the scrutiny of the Board, not its automatic censure. . . . A contrary position with respect to an issue of fundamental significance may be maintained only if the party maintaining that position has compelling grounds for doing so.¹²⁷

The OLRB accepted that the employer had fulfilled its duty to bargain in good faith with respect to the issue of reinstatement of the fired strikers.¹²⁸ To the Board, however, that was not the relevant issue. Rather, the relevant issue was whether the employer had fulfilled its duty to make every effort to reach agreement.¹²⁹ After finding that the employer had breached that duty,¹³⁰ the OLRB, as a remedy, ordered the parties to arbitrate the discharges on a just cause standard.¹³¹

Mandatory first contract arbitration takes many forms in Canada. Professor Sara Slinn has identified four models: fault, no fault, automatic access, and mediation-intensive.¹³² The fault model treats

123. *Royal Oak Mines*, [1996] 1 S.C.R. at 413-14.

124. *U.S.W., Local 6500 v. Vale Inco Ltd.*, [2012] O.L.R.B. Rep. 251, 206 C.L.R.B.R. (2d) 80, paras. 10, 17 (Can. Ont. L.R.B.).

125. *Id.* para. 24.

126. *Id.* para. 94.

127. *Id.* paras. 94-95.

128. *Id.* paras. 128-29.

129. *Id.* para. 130.

130. *Id.* para. 143.

131. *Id.* para. 144.

132. Sara Slinn, *Collective Bargaining* 41 (Ont. Ministry of Labour Commissioned Reports & Studies Paper No. 178, 2015).

an order of FCA as a remedy for bad faith bargaining or an irreparable breakdown in negotiations.¹³³ The no fault model requires a finding that negotiations have not succeeded and statutory conditions have been met, but does not require a finding of bad faith.¹³⁴ Automatic access imposes FCA where a specified amount of time has elapsed and the conciliation process has been exhausted.¹³⁵ The mediation-intensive model provides for the appointment of a mediator who, if unsuccessful in bringing the parties to a resolution, recommends how to proceed such as mediation-arbitration, FCA, or allowing the parties to strike or lockout.¹³⁶

A primary justification for requiring FCA is that its potential serves as a deterrent to employer opportunism and encourages good faith bargaining and the reaching of agreement.¹³⁷ Viewed in this way, mandated first contract arbitration is consistent with the limited encroachments on a system of free collective bargaining present in the statutory duty to make every reasonable effort to reach agreement. It is, however, completely inconsistent with the absolutist approach to free collective bargaining found in the U.S.

The differences between the U.S. and Canadian approaches to the collective bargaining process reflect the differences between the countries' views of property rights. In the U.S. property rights are Lockean in nature – rights to control access to and use of one's property free from government interference. In Canada's softer version of property, the right of control is accompanied by obligations and is subject to the democratic will. The U.S. labor law regime does not tell employers how to control or use their property. When EFCA was under congressional consideration, many management lawyers told me off the record that their clients could live with mandatory card check recognition but were very upset over the prospect of mandated FCA. According to these lawyers, their clients did not want the government or a government-appointed arbitrator telling them what they had to agree to. They were voicing an absolutist view of free collective bargaining which reflected a Lockean view of property rights. The government could foist a process on them but could not mandate the outcome of that process where such an outcome dictated

133. *Id.*

134. *Id.* at 41-42.

135. *Id.* at 42.

136. *Id.* at 43.

137. See PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 54-55 (1980).

how they were to use their property, i.e. to run their businesses. In Canada, however, FCA is consistent with the recognition that contract rights are accompanied by obligations and do not always trump other social values and democratic will.

EFCA's borrowing from the Canadian model of labour law did, as Zimmer and Bisom-Rapp so ably related, set off a cross-border skirmish over the economic impact of the Canadian approach. However, beyond that empirical dispute, the more fundamental issue raised by EFCA's borrowing of a key component of Canadian labour law, first contract arbitration, was over whether the U.S. view of property rights would be infected by a subtly but significantly different Canadian view. Given the strength of property rights in U.S. labor law and in the U.S. generally, it is not surprising that Congress rejected FCA.

V. CONCLUSION

The approaches to worker collective representation taken in the U.S. and Canada share a common model: majority selection of an exclusive representative who bargains with the employer on behalf of the workers. There are, however, numerous differences in how the two countries have refined that model. Zimmer and Bisom-Rapp demonstrated how efforts to borrow from the Canadian model by reformers in the U.S. set off a cross-border skirmish over empirical questions regarding the effects of the Canadian model on the Canadian economy. This essay has expanded the Zimmer and Bisom-Rapp analysis by demonstrating that much of the difference between U.S. and Canadian labor law doctrine may be traced to differences in the role that employer property rights plays in each system. In the U.S., property rights are Lockean in nature and are to be protected against government interference. Consequently, the U.S. system gives wider birth to employer unilateralism. Employers decide, free from labor board dictate, how to use their property, and the rights available to their workers flow directly from those decisions. In Canada, the statute or the labour board is more likely to impose worker rights despite how the employer has decided to use its property.

Both countries strongly favor free collective bargaining and oppose labor board or other third party imposition of terms on the parties. In the U.S., however, owing to the strength of property rights in the U.S. system, the prohibition of labor board or other third party

imposition of terms is absolute. In Canada, in some cases the interests in free collective bargaining may be outweighed by other interests. Provisions for first contract arbitration represent a determination in Canada that in some circumstances, freedom of contract must yield. That determination is inconsistent with the U.S. approach of absolute protection for freedom of contract. The EFCA reformers' attempt to import first contract arbitration from Canada was inconsistent with the overall approach of the NLRA to employer property rights and the collective bargaining process. It is not surprising that it engendered significant opposition and not surprising that it failed to be enacted.