BACKGROUNDER
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THE PRESSING CASE FOR PRIORITIZING THE PUBLIC INTEREST IN CANADIAN LABOUR RELATIONS

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Executive Summary

"... binding arbitration is justified in defending the public interest when industries crucial to the national interest are threatened...

This study examines the growing danger of labour-related work stoppages across Canada. These stoppages refer to both employer-initiated lockouts and worker-led strikes. It argues that Canada has been dealing with an increasing frequency of national work stoppages that can harm the economy and negatively affect the livelihood of Canadians. In the recent rail strike, for example, the federal government has imposed binding arbitration on both parties to pre-emptively thwart, or at least slow-down, paralyzing the country. Both unions and the union-friendly NDP, have criticized the government's move to force binding arbitration on both sides. Nevertheless, this study argues that binding arbitration is justified in defending the public interest when industries crucial to the national interest are threatened with work stoppages.

The author argues that an adversarial model of labour relations has affected the government's ability to articulate a public interest clearly. The author also notes how judicial activism has "constitutionalized" some elements of the labour relations system—including the 'right' to strike—which creates difficulties for the government to use its authority to end strikes. In this study, the author compares Canadian unionization rates to that of the United States.

The study documents that previously both the United States and Canada had a much more conciliatory labour relations model that quite clearly emphasized avoiding work stoppages. The author makes a plea to return to such a model while recognizing the changing policy environment in Canada. Finally, the study concludes with a few recommendations that could re-orient our labour relations system so that the public interest has a higher priority.

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Introduction

In response to a recent Federal Cabinet decision to force a labour dispute in railways into binding arbitration to prevent paralyzing the Canadian economy, Federal NDP Leader Jagmeet Singh put the interest of his union allies over the interest of his country.

When asked whether he would risk advancing a no-confidence motion against the Liberal government over this matter, Singh responded: "Whether it's a confidence motion or not, I don't care."[1] It is jarring to hear a leader of a national federal political party, a person who aspires to become prime minister, place his party's partisan interest above those of other Canadians who would undoubtedly suffer during a national rail strike.

This study examines the issue of work stoppages involving either union-led strikes or employer-initiated lockouts. These stoppages are strictly related to the labour relations system that has been set up in our country. Some economists have said that a major work stoppage involving Canada's two national railways would create havoc for the economy by disrupting the movement of products. Canadians would feel the pain of upward inflationary pressures and not being able to obtain goods that they require or want.[2] The Railway Association of Canada estimated that the two Canadian railways, the Canadian National and the Canadian Pacific, transport up to $1 billion dollars' worth of goods daily, representing about 80 per cent of the goods transported by all railways in the country.[3] Thus, the Association reports that the cost of a work stoppage on Canada's economy would be about $341 million a day.[4] This represents about four percent of Canada's gross domestic product (GDP).[5]

Thus, apparently the NDP would be cavalier in supporting strike action that would cause such economic hardship on a working-class population that is already facing a financial crunch. Moreover, the railroad workers' unions filed a petition supporting binding arbitration.[6]

Pollsters tell us Canadians are generally supportive of unions and their right to strike, but they are becoming increasingly concerned about the economic consequences of protracted strikes.[7] Recently, Canadians have been dealing with an upswing in debilitating work stoppages. In May 2023, for example, the federal government struck a deal with 120,000 federal workers, ending the largest public sector strike in Canada's history. Many Canadians said they were concerned that the federal bureaucracy had become big and bloated during the pandemic and was costing citizens too much anyways.[8] The citizens were correct, and over the last decade the Liberal government had added about 100,000 new

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federal employees to the civil service. As well, salaries of these employees increased[9] over 52 percent between 2015 and 2021.[10]

Federal civil servants were already receiving more compensation and had better working conditions compared to their private sector counterparts. As well, they already threatened a labour disruption because the government was requiring them to work three days a week in their offices, and only two days in their homes or at a coffee shop.[11] Last summer, Public Service Alliance of Canada workers walked off the job, affecting thousands of Canadians who needed to access public services.[12] Finally, a B.C. port strike involving the International Longshore and Warehouse Union paralyzed supply chains across the country and needed the intervention of the federal labour minister and the Canada Industrial Relations Board.[13]

Is there a way to avoid these debilitating work stoppages that likely affect the Canadian economy while ensuring that the interests of both workers and management are considered? This study examines this issue and proposes a few recommendations that could improve labour relations. But, before doing that, I examine the union landscape in Canada.

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The Canadian Union Landscape

In Canada, private sector unionization rates are at about 14 percent, down from about 19 percent in 1997.[14] Overall, union membership has been on a downward trajectory. In fact, from 1981 to 2022, unionization membership rates fell from 38 percent to 29 percent.[15] Some of this trend is due to a shift away from manufacturing to service industry employment.[16] An important twist on this statistical change is that there is a gender dimension to unionization because union membership rates have plummeted for men but remained relatively stable for women.[17] However, this is likely the result of the different sectors of the economy in which men and women tend to be employed.

Public sector unionization rates are much higher than private sector unionization rates, at about 74 percent in 2023, up from about 70 percent in 1997.[18] As a result, in Canada, unionization is much more a public sector phenomenon. For a comparison, United States Bureau of Labor Statistics reports that private sector unionization in the US was about 6 percent in 2023 and the public sector unionization rate was about 33 percent. Over the past quarter century, unionization rates in Canada have been about 15 percent higher than it was in the United States.

The Canadian Union of Public Employees (CUPE)—and a few other public sector unions—are our country's largest unions. These large public sector unions tend to be the most militant in their approach to dealing with management and governments. This militant stance, of course, tends to increase the likelihood of strike action.

But Canadians are increasingly realizing how certain labour disputes can affect their lives and seriously threaten Canada's economy. Federal government data reveals that since 2021, more than 1.4 million unionized workers in Canada have been involved in more than 1,100 strikes and lockouts.[19] In 2023 alone, there were 745 work stoppages (either strikes or lockouts).[20] One strike involving unionized workers with the Public Sector Alliance of Canada (PSAC) saw more than 15,500 federal workers walk off the job.[21]

Larry Savage—a labour specialist at Brock University—attributed this heightened work stoppage activity to a period of heightened inflation coming out of the pandemic in mid-2020.[22] The pandemic interrupted global and local supply chains, and, of course, the war in the Ukraine pushed up inflation peaking in late 2022. Many collective agreements came up for renewal at about the same

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time leading unions to demand salary-raises to cover the inflationary costs.

Unfortunately, some economists are saying that even with inflationary pressures decreasing, they still expect strong union pressure which will likely mean more long and protracted strikes and lockouts over the next few years. Moshe Lander, for example, an economics professor at Concordia University, says that after one union goes on strike, it creates an incentive for others to push for similar benefits, which results in a vicious cycle of demands.[23]

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Work Stoppages and the Public Interest

The issue of work stoppages and the public interest is not just about the NDP's support of labour unions. Arguments over political leaders placing certain interests ahead of the national interest, or the "public good," is not new. Of course, Canadians want their political parties to advance policies that advantage the entire country and not just for the interests of unions, business owners, or crown corporations. In fact, the federal *Conflict of Interest Act* exists because we do not want elected representatives advancing their own interests at the expense of advancing the public good. Public service unions and crown corporations must be held to account.

"This study … aims to place the public interest at the centre of labour relations law and procedures in Canada.

Unfortunately, our existing labour relations system often allows labour disputes to seriously affect the public. In fact, that is the reason public sector unions threaten to go on strike or that managers threaten to lock union members out. Critics sympathetic to organized labour will say withdrawing their work is the only way workers can have leverage in relations with their more powerful employers. They argue that the right to strike is the best way to challenge this power imbalance. However, unions today are larger and better organized than they were in the past. In fact, today unions can advance their economic interests through their links to sympathetic political parties, like the NDP.[24] Also, large public sector unions often have large war chests that can sustain members through long and protracted labour disputes.

Unfortunately, the more militant unions can constrain governments from acting in the public interest. CUPE, for example, called the recent rail arbitration decision "the government doing corporate Canada's dirty work."[25]

When one hears political arguments over labour relations, the discussions tend to centre on how "balanced" the labour relations really are. The arguments seem to be fixed on whether the laws and processes are pro-management or pro-union. Surprisingly, a recent report by the left leaning Canadian Centre for Policy Alternatives calls for more balance between unions and their employers.[26] Not surprisingly, the libertarian leaning Fraser Institute also calls for more balance.[27]

In these discussions, however, no one seems to champion the needs and interests of the Canadian public who ultimately bear the costs of both public sector strikes and lockouts. This study, by contrast, aims to place the public interest at the centre of labour relations law and procedures in Canada. It is recognized that the "public interest" can be a nebulous notion. Nevertheless, legal and political

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scholars often use the term "the public interest" to refer to what is good for the whole country. For this reason, this study uses the definition in administrative law, which is that "The concept of 'public interest' refers to the idea that government actions must prioritize the well-being and welfare of the public."[28]

Thus, I draw on research showing that the impact of strikes and lockouts on economic activity can cause considerable harm to the public, such as access to food, fuel, and jobs. If one were to speak of a power imbalance, it could easily be argued that it is the public that is most imbalanced because the public is most often damaged by these disputes.

Perhaps we are focusing too much on who has more power in the bargaining relationship. The adversarial nature of our labour relations system may be leading us astray. Rather, we should look to find fair and reasonable reconciliation between both workers and management in gaging policy success. In other words, governments should define success as avoiding labour disruption.

If labour peace is the goal, Canada can look to Germany and other European countries who have worker's councils that reconcile the interests of both sides in potential labour disputes.[29] Nordic countries, especially Sweden, are highly unionized, but Swedish unions and management work collaboratively to reduce strikes and lockouts.[30] Likewise, Japan and other Asian countries have a much more co-operative workplace culture.[31] Canadians should look to these countries for insights.

While encouraging fair negotiations, it is reasonable to recognize that there may be circumstances where governments need to pass laws that force unions and management into arbitration and, indeed, to force unionized workers back to work and to force corporations, both private and public, to open their doors for workers so they can work. In fact, the federal legislation applied this notion during the recently pending rail strikes by giving the minister the authority to have the Canadian Industrial Relations Board intervene to resolve the impasse.

Canadians should insist that governments not relinquish this power to pass laws that advance the rights of all Canadians. Both management and unions would be wrong to say that labour disputes do not affect the Canadian public. So, why does Canada's government often promote labour conciliation? For this, we need to summarize a key point from Canada's labour history.

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Canadian Labour Relations History

Canadians may be surprised to know that the dominance of the adversarial model in labour-management relations was not always the strategy in Canadian history. Canadians began to see a marked rise in adversarial unions and strikes in the late 19th century. To address this growth, the federal government passed two laws, both in 1872: The *Trade Unions Act* and *An Act to Amend the Criminal Law Relating to Violence, Threats, and Molestation.* These new laws provided increased protections for unions and their members from heavy-handed corporations. These two laws, in fact, were Canada's first step into labour relations law.

With this beginning, parliament became much more active in labour relations in the first decade of the 20th century. A few laws were passed that were designed to control strikes and lockouts. Between 1900 and 1907, the federal government passed three laws to help resolve disputes between employers and unions: the *Conciliation Act, 1900,* the *Railway Labour Disputes Act, 1903,* and the *Industrial Disputes Investigations Act, 1907* (IDIA).

"Between 1900 and 1907, the federal government passed three laws to help resolve disputes between employers and unions…

The aim of these laws was to prevent strikes and lockouts if possible. This legislation aimed primarily at reconciling worker and management interests. These laws were passed well before any formal collective bargaining process had been set up. As Canadian legal scholars Judy Fudge and Eric Tucker put it:

> The government was not interested in regulating collective bargaining between trade unions and employers, in managing the collective bargaining process or in dictating the content of collective agreements. Consequently, early legislation did not establish any means through which a trade union could be certified as the bargaining agent for a group of employees. Nor did it lay down any rules designed to maintain a productive collective bargaining relationship, such as a duty to bargain in good faith or the prohibition of unfair labour practices. Rather, those early laws were aimed almost exclusively at assisting and encouraging the parties to reach agreement to avoid disruptive work stoppages. In other words, until 1907, voluntarism was the governing principle in the collective bargaining context.…[32]

In fact, the government introduced a neutral conciliation board in the *Conciliation Act* of 1900. Governments gave these boards the authority to encourage both sides to reach a settlement without striking or locking employees out. The government thought this new law would reduce mistrust and animosity between

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workers and management.[33] But the government's conciliation boards had a fatal flaw. They were only formed when both sides voluntarily agreed to let them intervene. Unfortunately, one side in the dispute often refused to agree, which ended the conciliation effort.[34]

A few years later, parliament passed two more labour laws—the 1903 *Railway Labour Disputes Act* and the 1907 *Industrial Disputes Investigation Act.* Under these laws, the government would not permit a strike or lockout until the two parties tabled their final proposals to a three-person conciliation and investigation board. However, the law did not allow the conciliation board to impose an agreement on the parties. At least the *Conciliation Act* required the parties to participate.[35]

During the interwar period, growing labour unrest led government authorities to worry about the fragility of the social order.[36] In response, Parliament created a Royal Commission on Labour Relations in 1919, not surprisingly, during the period of the famous Winnipeg General Strike. The Commission recommended changes that were sympathetic to the labour movement and called for recognition of unions and collective bargaining rights.[37] Nevertheless, Canada's labour policy throughout this period focused on voluntarism as a way of preventing work stoppages.[38] And, surprisingly, it would be changes in United Stated labour relations that led to a dramatic shift in Canada's labour relations.[39]

During the 1920s and 1930s, rising unemployment caused great economic distress in both the United States and Canada. Starting in 1933, the Democratic President Roosevelt, with the help of a Democratic Congress, passed the New Deal legislation that aimed at ensuring industrial stability and redistributing wealth more fairly. Roosevelt's New Deal, in fact, set up rules that were designed to ensure an unambiguous collective bargaining relationship between unions and management.

In 1935, Congress passed the highly influential *National Labour Relations Act* establishing the adversarial labour relations model into law and practice. Senator Robert Wagner of New York, who was a strong union supporter, was the leading force behind the law earning the law the title of the "*Wagner Act.*" The law also created the National Labour Relations Board (NLRB) which was an independent, administrative tribunal that would administer labour relations disputes.

At the time, the *Wagner Act* would outlaw a more cooperative system in the United States even though many workplaces had co-operative arrangements called employer-employee representation plans or so-called "company unions""[40] which differed from adversarial unions in many ways. First, corporate unions limited union membership to employees of a single employer. Nor did they allow outside unions to act as negotiators in disputes. The employee representatives met with company managers to discuss wages, grievances, and working conditions, but they also agreed on ways of improving production and making the business more profitable. Finally, the employer often, though not always, held veto power over suggestions that were advanced.[41]

The Wagner model would eventually outlaw options for worker-management co-operation Even when there is evidence that cooperation often led to increased productivity and employee satisfaction.[42] Those defending this model believed that the interests of unions and management

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are inherently in conflict, and that collective bargaining was the best way of achieving fair working relationships. The parties—not the state—would defend their own interests. Thus, to achieve fair and just working relationships, both parties must be strictly separated.[43]

While the Wagner model took root in America in the 1930s, it did not take root in Canada until the 1950s. As a result, labour boards became more prominent after Canadian labour leaders demanded the Wagner model. However, even before the 1950s, labour leaders in at least one province, Ontario, pressed the provincial government to adopt Canada's first law modelled after the *Wagner Act:* the 1943 *Collective Bargaining Act.*[44]

The Liberal government of Mackenzie King slowly introduced aspects of the Wagner model into federal law and soon Canada labour law had shifted to a system based on conciliation.[45] Since then, the federal, provincial, and territorial governments have set up Wagner-like systems, creating labour relations boards. And legislative attempts to change this system have had only limited success in Canada, but in the United States governments have been more successful in challenging this model. We now examine the last few decades to see how labour relations have evolved into more difficult decisions for the government and more important for the public.

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Recent Federal Labour Relations Policy

> ***"Significantly, the federal government also passed legislation banning the use of replacement workers...***

Throughout Canada's 150-year history, Canadian governments have had to impose settlements or force unionized workers back to work because work stoppages were damaging the economy. For instance, Conrad Black mentioned how the first railway strike in Canadian history was in 1950 where 124,000 railway workers were able to stop rail operations across the country having disastrous effects on supply of goods, especially food.[46] The Louis St. Laurent government introduced strike-ending legislation after only nine days.

More recently, under the Conservative government, Prime Minister Harper imposed back to work legislation several times, including labour disputes involving Canadian Pacific Railway Workers, but also in disputes at Air Canada and Canada Post. That Conservative government seemed much more willing to pass back to work laws in the public interest than earlier governments. Although the Harper Conservatives did not erode the collective bargaining model, the government did not hesitate to act in the public interest when faced with labour disputes that affected the national economy. As an aside, the Conservative government was also more intentional in imposing transparency requirements on unions. In this respect, the Canadian employment lawyer Brian W. Burkett wrote that the Conservative government introduced back to work legislation four times in a twelve-month period during the years 2011 and 2012. The federal government had, in fact, passed more back to legislation in this brief period than any government had in the history of Canada."[47]

Today the current Liberal government has been willing to pass back to work legislation and has pushed the parties to resolve labour disputes. But the Trudeau government has tended to allow work stoppages to drag on before intervening. Significantly, the federal government also passed legislation banning the use of replacement workers (pejoratively called 'scabs') in federally regulated businesses.[48] This bill passed unanimously in the House of Commons, including with support from the Conservatives.

Even so, Conservative Leader Pierre Poilievre has been building bridges with working class voters, including unions. However, this ban by the federal government could allow labour disputes to drag on longer than they had previously. Hub journalist Geoff Russ wrote that the Conservatives overtures to organized labour may come at the expense of resistance to so-called back to work legislation which Poilievre may soon want.[49]

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Poilievre's decision to support a federal ban on replacement workers may prove to be unwise because it places union interests above the public interest. Over the years, government legislation designed to limit union activity and legislate in the public interest has often ended up in the courts. This is where we turn as we look at how judicial decisions have affected the government's ability to act in the public interest.

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The Constitutionalization of Strikes

> ***"The framers, they argued, intended these Charter rights to be individual rights.***

The constitutionality of this issue is relevant because, as mentioned earlier, labour unions have filed constitutional challenges over the government's ability to impose binding arbitration. This is based on the court's reading of Section 2 (d) of the *Charter,* the freedom of association.

In 1987—only several years from the *Charter's* introduction—the Supreme Court of Canada released three judgments on the same day, referred to as the "labour trilogy" because they all dealt with the Section 2 (d) freedom of association in the *Charter of Rights and Freedoms.* One of those cases—the Alberta reference case—is the most important for this present discussion.

The Alberta government had tried to remove collective bargaining and the right to strike from some public servants.

Alberta unions alleged these measures were too restrictive and that freedom of association included a right to collective bargaining and the right to strike. The majority disagreed with the unions, arguing for a more limited reading of Section 2 (d). But the court agreed with the Alberta government's arguments that the right to strike was a new "right" and was a statutory or legislative right, not a constitutional right. The first majority opinion also said that reading more broadly the proposed "right" would turn the legislation into a collective right, rather than an individual right. The framers, they argued, intended these *Charter* rights to be individual rights.[50]

Justices in the second minority dissenting group rested on deferential grounds. They argued that the balancing act required the crafting of labour law as a task best left to elected legislatures, not courts.[51] However, it only took a few years before lower courts—moving in an increasingly activist direction—began adding more union-friendly dimensions to the freedom of association. Various courts also began to consider international labour conventions that Canada had signed into Canadian labour law. After over a decade of legal challenges, a Supreme Court ruling in 2007 began to erode the finding of the "Labour Trilogy" rulings.[52]

The *BC Health* ruling reversed 20 years of the highest court's own jurisprudence and ruled that freedom of association in section 2(d) of the *Charter* "protects the capacity of labour unions to engage in collective bargaining on workplace issues." The ruling found that collective bargaining had only a limited protection under the *Charter.* It also found that section 2(d) of the *Charter* did not guarantee

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employees a specific "model" of collective bargaining or access to a particular labour relations regime.

But the Supreme Court reversed itself in its 2015 *Saskatchewan Federation of Labour vs. Saskatchewan* ruling. It expanded its right of collective bargaining from the *BC Health* judgment to include a free-standing "right to strike." It also added important reasoning on the power imbalances between union and management. This ruling dealt with challenges to Saskatchewan's *Public Service Essential Services Act (2008)* and *The Trade Union Amendment Act (2008).*

The bills also expanded the definition of essential workers in the public sector and denied these essential workers access to any mechanisms for resolving disputes. The majority of the judges found that the law was extreme in comparison with similar laws in other provinces. Thus, they ruled it was unconstitutional. Using the Section 1 *Oakes* test to assess justifiable limits to *Charter* rights, the judges ruled the law could not be "minimally impairing" on the rights to collective bargaining and to strike action under Section 2 (d).

The majority opinion compared the law to those in other provinces that limit right to collective bargaining and strikes for public sector workers and found the Saskatchewan law was the most far-reaching in denying this right. The majority opinion also criticized the government for unilaterally naming certain jobs as essential and relied on the International Labour Organization's definition of "essential workers."

But both Justices Rothstein and Wagner were blistering in their dissents, arguing that the majority had constitutionalized a statutory right and effectively read the Wagner model into the Canadian constitution. They also argued the ruling enshrined clauses that favoured employees and unions over managers and over the public interest.

Or as the dissenting justices wrote:

> Constitutionalizing a right to strike enshrines a political understanding of the concept of "workplace justice" that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally entitled to justice: true workplace justice looks at the interests of all implicated parties.[53]

Thus, they argued that it was the job of legislatures to find the right balance between all the competing interests. In the end, apparently the ruling has left legislatures with latitude in restricting the rights of collective bargaining and strikes if there are reasonable ways to mediate labour impasses.

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Conclusion

"...governments should be able to clearly articulate a public interest when it comes to labour-related work stoppages.

It seems clear that Canada must find a way towards a more conciliatory, less adversarial labour relations system. This does not mean we have to return to the 1900s, a time when Canada had a more conciliatory labour relations policy framework. Canadians are, of course, supportive of the right of unions to represent the collective interests of workers. So, some elements of the U.S. *Wagner* model may endure in Canada.

However, governments should be able to clearly articulate a public interest when it comes to labour-related work stoppages. Canadian governments could more carefully articulate a public interest in labour relations without the Supreme Court reversing its recent rulings or a constitutional amendment. Governments should also designate occupations as essential services and limit or prohibit them from strikes.

In short, policy makers must reorient the system towards more conciliatory relationships. This would mean that governments would prioritize labour and management working together in non-adversarial ways to resolve disputes. Labour relations policy, at both the federal and provincial/territorial levels, should aim at reducing or ending work stoppages, as our late 19th century pre-Wagner legislative framework did. Governments could use labour boards because, generally, they are neutral in taking a variety of interests into consideration and delivering just and fair decisions. Finally, governments should ultimately impose binding arbitration on labour disputes. Governments should move away from strikes and lockouts which hurt the Canadian public.

A few policy suggestions flow from this analyses:

1. The Federal parliament should repeal the ban on using replacement workers in federally regulated workplaces.
2. As evident in European countries, organized labour in Canada should be encouraged to emphasize collaboration and consensus. Legislation at both the provincial/territorial and federal levels should be used to move unions and employers away from adversarial approaches.
3. Governments should take steps to limit judicial activism in labour disputes. Even now, governments can invoke the Section 33 "notwithstanding clause" to allow them to decide the occupations that are essential services. As well, governments should expand the definition of "essential services" beyond those affecting health and safety to those that broadly affect the Canadian economy.

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4. The federal, provincial and territorial governments should declare railways an essential service.
5. Governments at all levels need to dismantle government monopolies over essential public services (health, education, and social services) so that citizens are not vulnerable to work stoppages caused by large public sector unions.
6. Legislation that would prod judges to show judicial restraint in their rulings should be passed.

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