

PLANT CLOSINGS AND WORKERS' RIGHTS

Michael J. MacNeil*

I. INTRODUCTION

The clarion call has gone out for the reindustrialization of America.¹ In a seminal article, *Business Week* magazine pointed to the wave of plant closings across the continent as the most vivid manifestation of the loss of competitiveness of the North American economy.² It called for a new social contract in which all elements of society, especially labor, government, minorities and public interest groups recognize that their common interest in returning the country to a path of growth overrides other conflicting interests.³ However, government must avoid the danger of translating reindustrialization into saving obsolete jobs and companies from bankruptcy because they are too inefficient to compete in world markets.⁴ In order to protect the interests of workers and gain their co-operation, government and business must ensure that reindustrialization creates new jobs and that adequate provision is made for helping workers in dying industries.⁵

One of the problems of implementing a program of change is that there are individuals who legitimately suffer when projects are undertaken in the general interest.⁶ Their only recourse, where no other measures are taken to reduce their loss, is to stop the economic progress which threatens them.⁷ If more economic change is desirable, a good system of transitional aid to individuals that does not lock us into current actions or current institutions would be desirable.⁸

Those who suffer localized costs that generate universal benefits are going to have to be compensated. But this is also likely to make a change in the mixture of the mixed economy, since government will undoubtedly be called upon to decide what constitutes compensation and how the necessary revenue should be collected. If we cannot develop better compensation systems, then

* Department of Law, Carleton University.

¹ *Revitalizing the U.S. Economy*, *BUS. WEEK*, 30 Jun. 1980, at 56.

² *Id.*

³ *Id.* at 86.

⁴ *Id.* at 56.

⁵ *Id.* at 88.

⁶ L. THURLOW, *THE ZERO-SUM SOCIETY* 208 (1980).

⁷ *E.g.*, this problem plagued the early 19th century skilled workers in the British woollen industry, who were rapidly being replaced by machines. The response, known as Luddism, was to destroy the machinery that was displacing their jobs. H. PELLING, *A HISTORY OF BRITISH TRADE UNIONISM* 28 (2d ed. 1971).

⁸ L. THURLOW, *supra* note 6, at 88.

recommendations to end protection, subsidies and price controls are useless. Individuals want economic security, and to simply recommend that they give it up is to shoot at the wind.⁹

Among the approaches that can be followed to ensure the economic security of workers are measures to structure large firms on a conglomerate basis which could efficiently allocate funds to maximize productive capacity. Such firms would be encouraged to move into new areas and out of old ones only on the understanding that they would be expected to take their workers, as well as their managers, with them. Secondly, a safety net which would cushion economic shocks for individuals could be created through the social welfare system; the provision of generous aid for retraining, relocating and ensuring economic stability during a period of unemployment would allow the rate of economic change to be accelerated, more than making up for the generous rate of compensation.¹⁰

Others see great dangers in the presently "accelerating and often heedless speed of capital mobility in today's economy".¹¹ The fundamental issue is not how to stop capital mobility but rather how to ensure that the transfer of capital from one location to another will not ride roughshod over the needs of the people and community involved.¹² The difficulties with a welfare solution to the problem include its inadequacy in relation to the magnitude of the harm, its attempt to deal with what is basically an allocation issue by simple government redistribution, and its lack of disincentives against moving a plant even if the social costs outweigh private gain by a wide margin.¹³

The decade of the 1970's has seen a great deal of concern about the problem of plant shutdowns.¹⁴ A host of legislative provisions directed to dealing with specific problems have been proposed, although so far few

⁹ *Id.* at 209.

¹⁰ *Id.* at 210.

¹¹ B. BLUESTONE & B. HARRISON, *CAPITAL AND COMMUNITIES: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT* ii (1980).

¹² *Id.*

¹³ *Id.* at v.

¹⁴ In addition to texts already noted, see J. ELEN & A. BERNADINE, *SHUTDOWN: THE IMPACT OF PLANT SHUTDOWN, EXTENSIVE EMPLOYMENT TERMINATIONS AND LAYOFFS ON THE WORKERS AND THE COMMUNITY* (Ontario Federation of Labor 1971); B. PORTIS & M. SUYS, *THE EFFECT OF ADVANCE NOTICE IN A PLANT SHUTDOWN: A STUDY OF THE CLOSING OF THE KELVINATOR PLANT IN LONDON, ONTARIO* (1970); *ECONOMIC DISLOCATION, PLANT CLOSINGS, PLANT RELOCATIONS AND PLANT CONVERSION, JOINT REPORT OF LABOUR UNION STUDY TOUR PARTICIPANTS* (1979).

have been enacted.¹⁵ There are two major areas of concern: controls on the making of a decision, and measures to deal with the effects of a decision. These are in no way mutually exclusive. If methods of dealing with effects are of prime concern from the beginning, it will to a great extent affect the how and when of making a decision to close down. If the company must bear a portion of the costs of adjustment, for either the workers, community or both, the external costs of the decision are to some extent internalized and the most economically efficient option is more likely to be chosen.¹⁶ Another option for government involvement is the requirement that before any decision is implemented, it must be justified to and receive the approval of a government agency or tribunal.¹⁷ This route requires extensive government involvement at all stages of the process and goes far beyond anything to which North American employers and employees are accustomed.

The debate rages about whether government policy should concentrate on saving jobs, on creating new jobs, or on assisting employees in adjusting to change. In order for any adjustment technique to be effective, there must be jobs available for the displaced workers. The danger in attempting to save jobs is that it may be more inefficient for the economy. Yet, there are many situations in which profitable branch plants are closed, especially by large conglomerates.¹⁸ It is possible that these plants should be allowed to close down because the company may make more productive and efficient use of the capital elsewhere.¹⁹ However, if the plant can operate at a profit, legislation could assist local communities and workers in taking over the still viable industry.²⁰

¹⁵ E.g., three bills were introduced during the 96th Congress: National Employment Priorities Act of 1979, S. 1608, 96th Cong., 2d Sess. § 8 (d)(1) (1979); Community Protection and Community Stabilization Act of 1979, S. 1609, 96th Cong., 2d Sess. § 8 (h)(2) (1979); Employment Maintenance Act of 1980, S. 2400. A number of state legislatures also have introduced bills: e.g., Ohio, 112 Ge. Ass., Reg. Sess., S. 337 (1977-78); Massachusetts, S. 96 (1980); An Act to Mitigate the Effects of Mass Unemployment and Economic Hardship from Mass Termination of Employees by Providing for Advance Notification and Assistance to Affected Communities and Employees; proposed legislation of a number of other states is summarized in B. BLUESTONE & B. HARRISON, *supra* note 11, Appendix. In Canada less sweeping changes were being proposed: Ontario, Bill 191, An Act to Amend the Employment Standards Act, 1974.

¹⁶ Herman & Strong, *Is There a Case For Plant Closing Laws?*, [1980] NEW ENGLAND ECON. REV. 34, at 36 (Jul.-Aug.).

¹⁷ E.g., in France, where employees are dismissed for economic reasons, the employer must obtain prior authorization from the Government Labour Inspectorate. See *France Industrial Relations in Context, Part 2: Individual Rights*, 74 EUROPEAN INDUS. REL. REV. 18, at 20 (1980). See also *France*, 4 INT'L ENCYCLOPEDIA FOR LAB. L. & INDUS. REL. (1979).

¹⁸ Bluestone & Harrison, *Why Corporations Close Profitable Plants*, 7 WORKING PAPERS FOR A NEW SOCIETY 15 (No. 3, 1980).

¹⁹ Herman & Strong, *supra* note 16; L. THUROW, *supra* note 6.

²⁰ This is done to a limited extent in one of the congressional bills. See National Employment Priorities Act of 1979, S. 1608, 96th Cong., 2d Sess. § 18 (1979).

This paper, in concentrating on the rights of employees upon plant shutdowns, will address some of the methods by which workers are able to become involved in decision-making and some of the schemes and compensative measures which are used during the transition. The reasons for concentrating on the mass displacement rather than the individual displacement are several. Where there are greater numbers of workers displaced at the same time there are likely to be increased periods of unemployment for those affected. More significant is that the long-term employee will not be safe from the economic consequences. His or her seniority offers little or no protection when a plant shuts down. It has been documented that the greatest economic impact is felt by a "long term employee, middle aged or beyond, who is the primary breadwinner, whose education or technical training is outdated and who lacks mobility because of commitments undertaken in becoming part of an established community".²¹

The effects felt are not merely economic. Physical and mental health of individuals also deteriorates²² and in a community where the industry closing down or moving employed a large segment of the local work force, the resulting social problems can be enormous. In Canada, where in 1971 there were 811 single industry communities,²³ a plant shutdown often threatened the survival of the community.

Government reaction to the problem of community survival can vary.

Traditionally, the government has focused much of its resources on localities, in part because of growing political demands of jurisdictions undergoing traumatic change and in part because it is politically safer to aid places (and their political leadership) than people directly.²⁴

²¹ REPORT OF THE COMMISSION OF INQUIRY INTO REDUNDANCIES AND LAYOFFS 38 (A. Carrothers Chairman 1979) [hereafter cited as the CARROTHERS REPORT].

²² *Id.* at 39. See also Mick, *Social and Personal Costs of Plant Shutdowns*, 14 INDUS. REL. 203 (1975), which gives a large number of references to literature dealing with the economic, social, physical and mental hardships occasioned by unemployment resulting from plant shutdowns.

²³ *I.e.*, those in which 30% or more of the employment is directly or indirectly related to the production of a large firm or group in a particular industry. See CARROTHERS REPORT, *supra* note 21, at 42.

²⁴ REPORT OF THE PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES 69 (1980) suggests that government resources would be better used in planning for the future and helping people to adjust to new imperatives rather than attempting to halt the inexorable transformation taking place with the decline of older urban centers in North-Central and North East United States and the corresponding growth of cities in the Sunbelt regions of the South and South West. Evidence of Canadian government policy can be seen from its program of aid announced in Jan. 1981, which concentrates on aid to workers and businesses in communities particularly affected by layoffs. The aid includes special grants to local business, training programs for workers, community employment programs, wage subsidies for older workers, relocation assistance and early retirement assistance. Only a limited number of communities are named. The emphasis is not merely on maintaining jobs in the community, but also on encouraging movement.

However, others have argued that the concentration should be on moving people to where jobs are being created and that aid to retain obsolescent or inefficient businesses in communities is not the best solution.²⁵

Whether government policy encourages the movement of capital or encourages the retention of jobs in the same area, there nevertheless will be a continuing spate of plant closings even in healthy industries. Hence, there must be a comprehensive system to ensure that workers are protected throughout the process. Growth in industry and productivity alone are not sufficient to overcome the problems created for workers.²⁶

The context in which labor force adjustment takes place during cutbacks, shutdowns and relocations is not necessarily the same as that when the change is induced by technological modifications in the workplace. A decision to introduce technological change is a voluntary one on the part of the employer. This allows greater flexibility in handling manpower adjustment:

The significance of the firm's market situation for the process of redundancy obviously depends on whether the reason for redundancy is technological change or changes in the level of demand for the goods produced. Where changes in demand for labor are due to technological change, manpower planning can be integrated into an overall development, and to some extent insulated from uncertainties especially where closure is sectional rather than unit. Wastage, early retirement, stoppage of recruitment, and other practices can be used to avoid redundancy. . . . Where changes in the need for labor are the result of changing market preferences there is less room for management to manoeuvre, and market restraints are the most salient and pressing.²⁷

Other factors are also of great importance in determining the incidence of labor adjustment problems. For example, where labor adjustment is necessitated by inter-firm competition, workers can move to expanding firms within the same industry.²⁸ On the other hand, if the adjustment is necessitated by a change in consumer demands, some employees will have to change occupations as well as jobs.²⁹ The result is that while the right to transfer within an industry could be a useful adjustment measure for workers in the first case, in the latter it would be of little advantage, while retraining assistance could be of great use. Thus, there must be flexible means of developing the appropriate relief in a particular situation.

²⁵ Address by L. Thurow, J.F. Kennedy School of Government Forum, Reindustrialization and Jobs: Save the Plant or the Economy, 29 Sep. 1980.

²⁶ Beatty, *Labour is Not a Commodity*, in *ESSAYS ON THE LAW OF CONTRACT* 313 (J. Swan & B. Reiter eds. 1980).

²⁷ R. MARTIN & R. FRYER, *REDUNDANCY AND PATERNALISTIC CAPITALISM* 102 (1973).

²⁸ *UNEMPLOYMENT AND STRUCTURAL CHANGE* 19 (I.L.O. Studies & Reports: New Series, No. 65, 1962).

²⁹ *Id.*

The traditional method by which employees have been permitted to be actively involved in the decision-making process in North America has been through collective bargaining. Some consideration will be given in this paper to the extent to which workers may and do bargain about job security concerns in the plant closing and relocation situations. Another alternative, which until recently has not been utilized in North America but is much more common in Europe, is co-determination. There are two aspects of the co-determination process: worker councils through which consultation can take place and worker representation on the company board of directors.

A standing works council was recommended in the Carrothers Report as a desirable institution for continuous joint manpower planning.³⁰ When an employer intended to institute a change which would result in layoffs, a standing committee which had been meeting on a regular basis could be more useful than an ad hoc committee in instituting joint consultation to develop an adjustment plan.³¹ Where the adversary nature of the collective bargaining process has become an embedded feature of the North American industrial relations field, it is not evident that a process of joint consultation is likely to achieve more than bargaining itself. However, the opportunity to increase the amount of information available to the employer before instituting a change decreases the likelihood of decisions being made based on an incomplete understanding of the problems being created by the change.

An alternative method of co-determination is through worker representation on the company board of directors. This system, extensively in use in Germany and with variations in other European countries,³² has until recently been foreign to the North American system of industrial relations. Co-determination in this form would be desirable to the extent that it would enable labor to influence corporate policy in areas which cannot be effectively covered by collective bargaining. It would also present a means for promoting managerial responsibility to social goals other than profit-making. The presence of labor representatives on the board, who would have greater knowledge than shareholders

³⁰ *Supra* note 21, at 259.

³¹ *Id.* The main recommendation of the CARROTHERS REPORT (at 257-59) was that decisions about change should remain the role and responsibility of management, but that there should be a procedure whereby all parties directly affected could express their objections and concerns. Hence, the employer would be required to give notice of intent to introduce a change following which "effective joint consultation" would take place. If the consultation failed to come up with an adjustment plan, *ad hoc* intervention by government authorities would be used. Only when an adjustment plan had been formulated would a notice of group layoff be given, with shorter time periods than now contained in the Canada Labour Code. The consultative process is not a bargaining one, and should be required even where no union is representing the employees.

³² *Note, Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. ON LEG. 947 (1977).

of conditions inside the plants and yet operate from an independent power base, would counterbalance managerial control.³³

For the present, in North America experimentation with employee directors represents the most realistic approach. The appointment of the President of the United Auto Workers Union to the board of Chrysler Corporation will provide a useful precedent to examine. The extent to which such representation on the board gives the union a useful voice in policy-making respecting decisions vital to the direction of the enterprise may be difficult to disentangle from the worker's role in obtaining concessions through collective bargaining. This paper will leave to others the task of establishing the effectiveness of labor representatives on corporate boards as a means of responding to the special problems of shutdowns. The focus will be on collective bargaining and legislation as means of providing greater security against, and cushioning the shock of, job displacement.

II. COLLECTIVE BARGAINING

A. *United States*

The National Labor Relations Act³⁴ governs the process of collective bargaining in the United States, and in its opening section³⁵ declares that its policy is to protect the free flow of commerce by encouraging collective bargaining and to protect the right of employees freely to choose representatives of their own to negotiate terms and conditions of employment.

Once the employees have a representative chosen in accordance with the Act, it is an unfair labor practice for an employer to refuse to bargain collectively with the representative.³⁶ The subjects about which the employer is required to bargain are those relating to wages, hours and other terms and conditions of employment.³⁷ The obligation does not compel either party to agree to a proposal or require the making of a concession.³⁸ This leaves economic sanctions as the ultimate weapon where an impasse has been reached. The Norris-LaGuardia Act of 1932³⁹ sheltered peaceful strikes, picketing and boycotts against injunctions issued by the federal court.

For the purpose of determining the rights of employees with respect to plant shutdowns, it is necessary to consider both the scope and the

³³ *Id.* at 995.

³⁴ 29 U.S.C.A. § 151-68.

³⁵ 29 U.S.C.A. § 151.

³⁶ 29 U.S.C.A. § 158(a)(5).

³⁷ 29 U.S.C.A. § 158(d).

³⁸ 29 U.S.C.A. § 158(d).

³⁹ 29 U.S.C.A. § 101-15.

consequences of the duty to bargain. These questions have been considered by a plethora of articles and comments;⁴⁰ this paper will merely outline these issues and look at some of the recent developments.

The distinction which has developed between mandatory and permissive subjects of bargaining is crucial in determining the collective bargaining framework in the United States. This distinction, crystallized in *N.L.R.B. v. Wooster Division of Borg — Warner Corp.*,⁴¹ makes it an unfair labor practice for one party to insist upon a clause as a condition precedent to accepting a collective agreement if the clause is not a mandatory subject of collective bargaining. To insist upon such a clause is in effect a refusal to bargain upon those subjects which are within the scope of mandatory bargaining.

Although permissive subjects of bargaining are not unlawful, they cannot be a pre-condition to accepting the whole agreement; only if both parties are willing to agree to them could they become a part of the collective agreement and thereby enforceable. This becomes particularly relevant with respect to the union's ability to have clauses inserted in the collective agreement dealing with its right to receive notice of, and be consulted about, a decision to close a plant or part thereof. As will be demonstrated, the decision to close a plant has traditionally been considered by the courts to be one of management prerogative and not within the mandatory scope of the duty to bargain.⁴²

Where there is a duty to bargain about a particular matter, it will be an unfair labor practice for the employer to implement unilaterally a change respecting that matter.⁴³ It amounts to a circumvention of the duty to bargain and thus frustrates the objectives of section 8(a)(5) in much the same manner as does a flat refusal to bargain. Thus, were the courts

⁴⁰ Goetz, *The Duty to Bargain About Changes in Operations*, [1964] DUKE L.J. 1; *Comment, Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964); Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968); Schwarz, *Plant Relocation or Partial Termination — The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970); Goldman, *Partial Terminations — A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089 (1967); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971); Rabin, *The Decline and Fall of Fibreboard*, 24 PROC. N.Y.U. ANN. CONF. ON LAB. 237 (1972); R. SWIFT, *N.L.R.B. AND MANAGEMENT DECISION MAKING* (1974); Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133 (1974); Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm: Litton's Shutdown of Royal Typewriter*, 29 IND. & LAB. REL. REV. 3 (1975); *Comment, Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. N.L.R.B.*, 92 HARV. L. REV. 768 (1979); Morales, *The Obligation of a Multiplant Employer to Bargain on the Decision to Close One of its Plants*, 30 LAB. L.J. 709 (1979); *Note*, 47 GEO. WASH. L. REV. 679 (1979).

⁴¹ 356 U.S. 342 (1958).

⁴² An argument may be made that although there is no duty to bargain at the time a decision is made, there is still a duty to bargain about such issues at the time negotiations take place for the collective agreement. See note 72 and accompanying text *infra*.

⁴³ *N.L.R.B. v. Katz*, 369 U.S. 736 (1962).

to find that decisions to shut down plants were a mandatory subject of bargaining, any implementation of the employer's desires would have to await either an impasse in bargaining or an agreement with the union, unless the union waives its right to bargain about the issue.⁴⁴ Where the subject is not a mandatory area of bargaining the employer may then institute the change unilaterally without any consultation about the decision. With respect to plant closings, though, there will still be a duty to bargain over the effects of the unilateral move on the employees.⁴⁵

The process of defining the scope of the duty to bargain with respect to decisions about closings, partial closings, relocations and subcontracting begins with three United States Supreme Court decisions in the 1960's. In *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*⁴⁶ an interstate railway sought permission from the commission of public utilities to close a number of small railway stations. The union demanded that the railway bargain about a proposal which would prohibit the abolition of positions without union approval. In response to a threatened strike by the union, the railroad sought an injunction to enjoin such action permanently. In finding that the Court had no jurisdiction to grant the injunction, the Supreme Court held that the case involved or grew out of a labor controversy as that term is used in the Norris-LaGuardia Act.⁴⁷ It was clearly a "controversy concerning terms or conditions of employment"⁴⁸ and it was normal to negotiate about conditions which affect the permanency of employment.

This decision was used as precedent for the finding in *Fibreboard Paper Products Corp. v. N.L.R.B.*⁴⁹ that the subject of contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform, was a dispute well within the literal meaning of the phrase "terms or conditions of employment". Given that such a dispute is within the literal meaning of that phrase, it would be difficult to imagine a dispute, whether about a decision to close down a plant or about relocating part or all of the tasks performed at one plant to another site, which does not come within the scope of the operative phrase. Thus, it

⁴⁴ Note: *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, at 932 (1974).

⁴⁵ *N.L.R.B. v. Die Supply Corp.*, 393 F. 2d 462 (1st Cir. 1968); *Morrison Cafeterias Consol. Inc. v. N.L.R.B.*, 431 F. 2d 254 (8th Cir. 1970); *Royal Typewriter Co. v. N.L.R.B.*, 533 F. 2d 1030 (8th Cir. 1976); *N.L.R.B. v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (3rd Cir. 1965); *N.L.R.B. v. Amoco Chems. Corp.*, 529 F. 2d 427 (5th Cir. 1976); *N.L.R.B. v. North Carolina Coastal Motor Lines, Inc.* 542 F. 2d 637 (4th Cir. 1976); *Frazer & Johnston Co. v. N.L.R.B.*, 469 F. 2d 1259 (9th Cir. 1972). Rarely is an issue raised concerning the duty to bargain about the impact of a decision; rather, the question is more likely to be whether such bargaining took place.

⁴⁶ 362 U.S. 330 (1960).

⁴⁷ 29 U.S.C.A. § 104.

⁴⁸ 29 U.S.C.A. § 113(c).

⁴⁹ 379 U.S. 203 (1964).

becomes necessary to delineate the limitations put on the employees' right to demand that the employer bargain about a particular matter.

First, Chief Justice Warren in *Fibreboard* was careful to point out that the decision in this case "need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy".⁵⁰ Hence, subsequent decisions at first tended to require mandatory bargaining only where there would be a replacement of employees in an existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment. Further limitations on the possibly wide scope of the rule could be found in the Court's reliance on the fact that subcontracting is often dealt with by collective agreements. In particular, bargaining could be fruitful because the high cost of labor was put forward as the reason motivating the subcontract.⁵¹

A second major restriction on what could otherwise be a widely applied duty to bargain is found in the concurring opinion of Stewart J., who stated:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of s. 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of the corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.⁵²

No explanation was given as to why these decisions, fundamental to the management prerogative of directing the corporate enterprise, precluded bargaining where the issues were also fundamental to employee job security. Bargaining does not require that agreement be reached, and it is not clear why interests of management must predominate over those of employees. Nevertheless, Stewart J.'s *dicta* have received considerable attention in subsequent cases.

This approach of preserving a core of entrepreneurial control for unilateral management action was further embedded in *Textile Workers Union v. Darlington Manufacturing Co.*⁵³ The issue there was whether the employer had violated section 8(a)(3) of the Act by closing down its plant where it was motivated by discriminatory reasons. Although not considering the duty to bargain issue, the Court stated that "when an

⁵⁰ *Id.* at 215.

⁵¹ It has been suggested that a finding that the subject of negotiation must relate to bargaining unit inefficiency or labor cost and a finding that the management decision results in a substitution of employees are prerequisites to enforcing a duty to bargain. See Note 47 GEO. WASH. L. REV., *supra* note 40, at 700.

⁵² *Supra* note 49, at 223.

⁵³ 380 U.S. 263 (1965).

employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice".⁵⁴

Due to the chilling effect which discriminatorily motivated partial closings may have on the remaining employees of the employer, a partial closing could be treated differently for the purposes of section 8(a)(3) and an unfair labor practice was found to exist. This distinction between total and partial closings has crept into the Board's considerations of the duty to bargain under section 8(a)(5),⁵⁵ although it is not at all clear that the distinction makes any sense where the partial closing is necessitated by economic circumstances rather than by a desire to avoid dealing with the union.

The approach developed by the National Labor Relations Board to plant closings and relocations after these decisions was to minimize the importance of entrepreneurial control and to concentrate on the significance of the management decision to employees. This is best exemplified by *Ozark Trailers Inc. v. Allied Industrial Workers Union, Local 770*, in which the Board stated:

[W]e do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" change in the nature of the employer's business. . . . For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.⁵⁶

Until recently, the Circuit Courts of Appeal have refused to require decision bargaining in situations other than those with facts substantially similar to *Fibreboard*. The emphasis has been on managerial prerogative and entrepreneurial control.⁵⁷ However, there have been a number of cases where the courts have found a duty to bargain where plants have relocated, rather than subcontracted work, and continued to carry on

⁵⁴ *Id.* at 273-74.

⁵⁵ *See, e.g.,* *Ozark Trailers Inc. v. Allied Indus. Workers Union, Local 770*, 161 N.L.R.B. 561 (1966); *Burroughs Corp. v. Graphic Arts Int'l Union, Local 162-B*, 214 N.L.R.B. 571 (1974).

⁵⁶ *Id.* at 566.

⁵⁷ *See, e.g.,* *Royal Plating & Polishing Co.*, *supra* note 45; *N.L.R.B. v. Adams Dairy, Inc.*, 350 F. 2d 108 (8th Cir. 1965); *N.L.R.B. v. Thompson Transp. Co.*, 406 F. 2d 698 (10th Cir. 1969); *N.L.R.B. v. Transmarine Navigation Corp.*, 380 F. 2d 933 (9th Cir. 1967); *Die Supply Corp.*, *supra* note 45; *N.L.R.B. v. Dixie Ohio Express Co.*, 409 F. 2d 10 (6th Cir. 1969); *Morrison Cafeterias Consol.*, *supra* note 45; *N.L.R.B. v. Acme Indus. Products, Inc.*, 439 F. 2d 40 (6th Cir. 1971); *Royal Typewriter Co.*, *supra* note 45; *Local 777, Democratic Union Organizing Comm. v. N.L.R.B.*, 603 F. 2d 862 (D.C. Cir. 1978).

business in substantially the same manner as before. In *N.L.R.B. v. Triumph Curing Center*⁵⁸ the employer transferred the work to another plant to avoid further bargaining with the union. Although no finding was made that the effect was to chill unionism,⁵⁹ there still was a violation of section 8(a)(5).

A similar runaway plant situation occurred in *International Ladies' Garment Workers Union v. N.L.R.B.*⁶⁰ where the employer informed the union that it intended to liquidate, but actually only relocated its operation to another state. Rather than concentrating on the employer's desire to avoid the union, the court focused on the similarities to *Fibreboard*. The desire for relocation was motivated by long-standing dissatisfaction with labor costs. The scope of the enterprise was not affected; it continued to lease premises, manufacture the same product with the same equipment and sell to the same customers. Thus it was held that the decision to relocate was a mandatory subject of bargaining and that the union should be given an opportunity to meet the employer's legitimate concerns about labor costs before employees lost their jobs.

A number of recent cases have moved beyond *Fibreboard* in abolishing the distinction between partial closings and subcontracting, and in developing tests for determining whether a duty to bargain exists which do not depend on whether the capital structure or scope of the enterprise is being changed. The Third Circuit Court of Appeal started the trend in *Brockway Motor Trucks, Division of Mack Trucks, Inc. v. N.L.R.B.*⁶¹ After the expiration of a three year collective agreement and while the union was on strike, Brockway gave notice that it was closing down the plant. No advance notice was given of, and no bargaining took place over, the decision to close down. Since the closing was likely to lead to a termination of employment, the court considered it just as much a "condition of employment" as a decision to subcontract. The court found a presumption, based on the purpose and language of the statute, that a partial closing was a mandatory subject of bargaining.

However, it is still necessary to focus on the facts of each case to balance the interests of employers against those of employees. Among the points to consider in achieving the balance is that the union may make a useful input into the decision-making process. Even if it cannot make concessions to keep the plant open or forcefully argue that the cost of keeping the plant open is less than that of closing it, the union might make suggestions about the timing and implementation of the decision.

The Court also stated that it is not, however, enough merely to say that the employees have a strong interest in the decision and that bargaining may well be effective. Although it directed one to look at an employer's countervailing interests, it rejected the argument that

⁵⁸ 571 F. 2d 462 (9th Cir. 1978).

⁵⁹ As required by *Darlington* for an unfair labor practice charge under s. 8(a)(3).

⁶⁰ 463 F. 2d 907 (D.C. Cir. 1972).

⁶¹ 582 F. 2d 720 (3rd Cir. 1978).

imposing a duty to bargain would strip the employer of its managerial prerogative. The duty is only to bargain, not to agree, and in the absence of agreement after bargaining has taken place, the employer remains free to implement any decision it wishes. To overcome the presumption in favor of bargaining, the employer must support its "economic" argument by establishing a factual record which demonstrates that it would be unduly constrained by bargaining.

That the *Brockway* decision will lead to an expanded number of cases of bargaining is evident in *Electrical Products Division of Midland-Ross Corp. v. N.L.R.B.*⁶² where the economic justification argued by the employer was the unprofitability of the company. The Third Circuit Court of Appeal rejected this as a ground for dispensing with bargaining over the decision. The evidence did not establish that the plant was so unprofitable that bargaining was unnecessary.

The Court refused to base its stand on whether the decision affected the capital structure or scope of the enterprise. However, other courts continue to give undue weight to such a factor, as illustrated by *N.L.R.B. v. International Harvester Co.*⁶³ The company altered its marketing structure by transferring responsibility for fleet sales from its branch offices to separate administrative structures in the company. This resulted in a number of branch offices being closed. This was viewed by the Court as a management decision fundamentally altering the direction of the enterprise involving a considerable reallocation of capital generally. Although the effect on conditions of employment may have been profound, there was no duty to bargain.⁶⁴

The force of the reasoning in *Brockway* is, however, affecting decisions in other courts. In *Davis v. N.L.R.B.*,⁶⁵ the Seventh Circuit Court agreed that the distinction between partial closings and subcontracting was no longer valid. The Court also noted that the "record show[ed] no evidence that Davis was faced with a situation so severe and immediate that bargaining about the decision to convert the restaurant would have been fruitless".⁶⁶ Because the owner had been suffering losses for ten months, and had been considering making changes for several months before actually doing so, he could not argue that there was no time to bargain. Further, there was clear evidence that negotiating with the union would not have impaired the owner's arranging a take-over with a third party.

Despite all these considerations, the Court based its conclusion that there was a duty to bargain on its finding that the conversion from a full service restaurant to a cafeteria arrangement neither involved a major capital investment or disinvestment nor altered the underlying nature of

⁶² 617 F. 2d 977 (3rd Cir. 1980).

⁶³ 618 F. 2d 85 (9th Cir. 1980).

⁶⁴ *Local 777*, *supra* note 57.

⁶⁵ 617 F. 2d 1264 (7th Cir. 1980).

⁶⁶ *Id.* at 1270.

the business. Nevertheless, the way is still open for courts to decide that even where major capital change or alterations in the nature of the business occur, the *Brockway* balancing approach could be utilized.

Another very recent decision by the Second Circuit Court, in *N.L.R.B. v. First National Maintenance Corp.*,⁶⁷ adopted the *Brockway* approach in establishing a presumption that a duty to bargain existed. However, the court disagreed with the *Brockway* approach of determining whether a duty to bargain existed by balancing the respective interests of the employer and employee in bargaining. Instead, the presumption of the duty to bargain "may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain".⁶⁸ Rather than enumerating the instances where this would be so, the Court offered as examples situations where bargaining would be futile because it is clear that the employer's decision could not be changed, where the decision is due to emergency financial circumstances and where the custom of the industry, shown by the typical absence of such an obligation from the collective agreement, is not to bargain over such decisions. Finally, if the vitality of the business as a whole would be threatened by requiring bargaining, this possibly being of greater significance where the number of workers laid off in comparison to the remainder is small, then it would not further the purposes of the Act to require bargaining.

Here, a mere assertion that the defendant, a cleaning and maintenance company, was losing money at one site where it had a contract was no reason for it to discontinue operations there without first consulting the union. Although the losses could not be attributable to labor costs, the union could still effectively negotiate by offering to accept reduced wages or layoffs of some of the employees. In expressly rejecting the notion that the duty to bargain implicitly depends on the economic losses being the result of labor costs, the majority expanded the scope of areas where bargaining could still be seen to be effective.

Both *Brockway* and *First National* are concerned with imposing a duty to bargain only where it is likely to be of some use. If the union makes concessions or increases or clarifies the information available to the employer, the decision to close down may be avoided. Even where it cannot be avoided, if the union becomes involved at an early stage, the interests of the employees in obtaining transfer rights, severance benefits and other job security related claims can be better represented. The development of the trend in *Brockway* and *First National* should lead to somewhat greater involvement of employees in decisions so vitally

⁶⁷ 627 F. 2d 596 (2nd Cir. 1980).

⁶⁸ *Id.* at 601.

affecting them, and less reliance on managerial prerogatives as the decisive factor.⁶⁹

The decisions discussed have raised the question of whether there is a duty to bargain about the decision at the time the decision is being made. More important may be the question of whether there is a duty to bargain over clauses concerning plant shutdowns and relocations at the time the collective agreement is being negotiated. One commentator has suggested that voluntary agreement in these areas should be encouraged so that the Board or a court does not decide the question of whether managerial prerogative should outweigh the interests of employees in job security.⁷⁰ The fact that a significant number of collective agreements do contain provisions explicitly stating the rights of management and employers in making the decision on a plant closing is evidence that bargaining in the collective agreement context can provide security for employees.⁷¹

A variety of clauses may be included in the collective agreement to delineate the manner in which a plant closing or relocation decision is handled. They may range from requirements of giving notice that such a decision is to be made,⁷² to requiring consultation, or even requiring union agreement before a decision can be made. There may even be an outright prohibition on plant closing during the term of the collective agreement. Such a prohibition would confine bargaining about any

⁶⁹ *First Nat'l*, in fact, left open the question of whether in the case of a complete closing, as opposed to a partial closing, bargaining could still be required. *Brockway* has been followed in several more recent decisions: *Equitable Gas Co. v. N.L.R.B.*, 637 F. 2d 980 (3rd Cir. 1981); *ABC Trans-Nat'l Transp., Inc. v. N.L.R.B.*, 642 F. 2d 675 (3rd Cir. 1981).

⁷⁰ Rabin, *Limitations*, *supra* note 40, at 157.

⁷¹ *Id.* See, e.g., *Local 783, Allied Indus. Workers of America v. General Electric Co.*, 471 F. 2d 751 (6th Cir. 1973) where "a clause of the collective agreement provided that [t]here [could] be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant". The Court of Appeals ordered that a trial be held to determine whether the collective agreement was violated when the company moved equipment from the plant covered by the collective agreement to a plant in Singapore. Because the clause was clear and unambiguous, no evidence of bargaining history was admissible to determine whether the clause excluded transfer of equipment and work to another plant owned by the employer.

⁷² One such clause states:

In the event that circumstances require the company to close a plant with the resulting cessation of cigarette manufacturing operations, the Company agrees to give the Union eighteen (18) months' notice of any plant closing.

The Company shall enter into formal negotiations with the Union immediately after such notification on all terms and conditions as they affect the employees covered in the Agreement.

Should it become necessary to completely eliminate a shift, the

Company shall give the Union six (6) months' advance notice

Collective agreement between Brown & Williamson Tobacco Corp. and Locals 178 and 187, Tobacco Workers Int'l: INDUSTRIAL RELATIONS, para 53, 048 35

decision to close to the time that the entire collective agreement is up for renegotiation.

There are no cases considering whether there is a duty to bargain over clauses which would restrict the rights of management to decide unilaterally to shut down or relocate a plant.⁷³ However, the courts' reliance on the fact that such clauses are contained in collective agreements to impose a duty to bargain about the decision during the term of the collective agreement probably implies a duty to bargain at the time the collective agreement is being negotiated.⁷⁴

Given that employees may have and quite often do have the right to bargain about plant closings, it still is far from a sufficient means of ensuring that the interests of employees are effectively protected. First, the courts are willing to accede to the bargaining process in part because the ultimate control of the employer to implement the decision is not reduced. In bargaining about the effects of the closing, the union will have little power. Its right to strike will be of much diminished value, although a strike may hinder the orderly transfer of business from one site to another or disrupt the employer's actions in selling valuable machinery or inventory located on the site.⁷⁵ Many employees will be precluded from instituting any effective action to block an employer's moves in the duration of a collective agreement because of a no-strike clause. Hence, arbitration may be the only route. However, unless the collective agreement guarantees jobs, the arbitrator is unlikely to sustain a grievance based on worker displacement due to such employer decisions.⁷⁶

One commentator has suggested that the lack of involvement of employees in the whole process of layoffs and redundancies is attributable to an inequality of bargaining power:

It cannot be a question of the union's failure to foresee the importance of the issue, nor of their willingness to concede to the employers' interest on these issues in the expectation of securing some other reward. The interest at stake is the very status of citizenship in the society and nothing can be more basic than that. All of the other benefits are conditional on the employee's preserving this status. And surely, the fact that on issues such as these, or others like the quality of working life in general or occupational health and safety in particular, the unions ultimately turn to other instruments, to

⁷³ See Lynd, *Investment Decisions and Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396, at 423 (1978-79) where it is suggested that this would be a permissive, rather than a mandatory, subject of bargaining.

⁷⁴ In *Order of R.R. Telegraphers*, *supra* note 46, the Court found that the demand for this type of clause was a labor dispute so that the union did have the right not to be enjoined from striking to enforce its demand to bargain. This is the only case encountered coming close to dealing with the issue.

⁷⁵ Lynd, *supra* note 73, at 426 suggests that strikes could make the cost of shutting down a plant prohibitively expensive and thus deter the company from implementing the decision to close down.

⁷⁶ Manson, *Technological Change and the Collective Bargaining Process*, 12 WESTERN ONT. L. REV. 173, at 187 (1973).

legislative alternatives, belies completely any suggestion that the employees have participated in and consented to these outcomes in the bargaining process.⁷⁷

In particular, multinationals and conglomerates have the capacity under certain conditions to make the institutionalized bargaining system an ineffective method of resolving industrial disputes.⁷⁸

Further problems for employees in the bargaining process may arise from their lack of expertise and the unwillingness of the union to negotiate about termination rights of employees. Expertise is a particular problem in evaluating the employer's arguments for introducing radical change in the enterprise. The unwillingness of the union to negotiate about termination rights stems from its perception that such negotiation amounts to a concession to the employer's decision to close down. Thus the union will continue to insist on negotiating about that which the employer has already determined must go ahead. By so doing, the union may fail to achieve the best package of termination rights for its members.

As a consequence, although bargaining in many instances can achieve useful results, there are many situations where the interests of unionized employees will not be protected. Further, large numbers of unorganized workers have nothing to rely on but the largesse of their employers in many cases where the employer decides to go ahead with a shutdown or relocation. This leads one to consider the possibility of introducing minimum legislative standards, regarding both the mechanisms by which a shut down can take place and the transitional rights of employees.

Before doing so, however, the collective bargaining regime in Canada insofar as it affects the rights of Canadian employees to bargain about those issues addressed herein, and the protection the employees may have when bargaining is taking place will be considered.

B. Canada

The bargaining rights of Canadian employees under the varying applicable statutes are somewhat different from those of their American counterparts. Canadian statutes, other than Saskatchewan's, formulate a concept of closed contract whereby there is no duty on either party to bargain during the term of the contract.⁷⁹ Strikes are generally prohibited during the term.⁸⁰ A number of jurisdictions have specific exceptions for

⁷⁷ Beatty, *Ideology, Politics and Unionism* 46, at 46-47 (unpublished paper presented at the Labour Law Seminar 1980).

⁷⁸ Craypo, *supra* note 40, at 19.

⁷⁹ Mitchell, *The Problem Posed by Technological Change to Industrial Change* *Freedman v. The Canada Labour Code*, 18 MCGILL L.J. 592 (1972)

⁸⁰ See, e.g., Labour Relations Act, R.S.O. 1980, c. 228, s. 42

issues arising out of technological change.⁸¹ Under the Canada Labour Code⁸² and in Manitoba⁸³ the definition of technological change is quite narrow, covering basic changes in operation only if they result from the introduction of material and equipment of a different kind than that previously utilized. This would not cover cutbacks, shutdowns or relocations resulting from decisions made because of decreases in demand, rationalization of production methods, import competition and loss of profitability.⁸⁴

Section 43(1) of Saskatchewan's Trade Union Act⁸⁵ uses a broader definition of technological change, defining the term to include "the removal by an employer of any part of his work, undertaking or business". An employer proposing to implement a technological change affecting terms, conditions or tenure of a significant number of employees is required by section 43(2) of that Act to give at least ninety days' notice to the trade union before implementing such change. The union, under section 43(8), is then entitled to serve a demand on the employer to bargain to revise the collective agreement concerning terms, conditions or tenure or to include new provisions relating to such matters to assist the employees affected by the technological change to adjust to the effects. Section 43(9) exempts the employer from the duty to bargain where he has given notice of proposed changes before the collective agreement was signed or where the collective agreement contains provisions by which these issues can be negotiated and finally settled during the term of the agreement. Otherwise, section 43(10) denies the introduction of change until an agreement is reached or an impasse has been reached and the Minister of Labour given notice.

⁸¹ Labour Code, R.S.B.C. 1979, c. 212, ss. 74-78; The Labour Relations Act, S.M. 1972, c. 75, ss. 72-75; The Trade Union Act, R.S.S. 1978, c. T-M, s. 43; Canada Labour Code, R.S.C. 1970, c. L-1, ss. 149-53, *as amended by* S.C. 1972, c. 18, s. 1.

⁸² R.S.C. 1970, c. L-1, s. 149, *as amended by* S.C. 1972, c. 18, s. 1. Technological change is defined as:

(a) the introduction by an employer into his work, undertaking or business of equipment or material of a different nature or kind than that previously utilized by him in the operation of the work, undertaking or business; and
(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material.

⁸³ The Manitoba definition is substantially the same as that in the Canada Labour Code. See The Labour Relations Act, S.M. 1972, c. 75, s. 1(w).

⁸⁴ A discussion of the technological change provisions of the Canada Labour Code may be found in Manson, *supra* note 76, at 175. It is interesting to note the wide scope he gives to the term technological change for the purpose of his article: "changes in production methods, transfers of operations, new raw materials and power sources, and permanent shifts in product markets". It includes just about everything but cutbacks due to declining market demand. Further discussion of technological change legislation may be found in Mitchell, *supra* note 79 and Christie, *The Trade Union Act, 1972, and the Technological Change Rationalization Act, 1972: A New Law for Labour in Saskatchewan*, 37 SASK. L. REV. 136 (1972).

⁸⁵ R.S.S. 1978, c. T-17.

In British Columbia the definition of technological change in section 78 of the Labour Code⁸⁶ is also quite broad:

- (a) the introduction by an employer of a change in his work, undertaking or business, or a change in his equipment or material from the equipment or material previously used by the employer in his work, undertaking or business; or
- (b) a change in the manner an employer carries on his work, undertaking or business related to the introduction of that equipment or material

All collective agreements in the province are required by section 74 of the Code to contain provisions for final and conclusive settlement without stoppage of work of all disputes relating to adjustment of technological change. Where the parties fail to include such provisions, section 75 empowers the Minister of Labour to prescribe by order provisions for that purpose. Section 76(1) entitles either party to refer to arbitration the question whether the employer has introduced or intends to introduce a technological change that affects the terms, conditions or security of employment of a significant number of employees. If it significantly alters the basis on which a collective agreement was negotiated, under section 77(2) the arbitrator may in his sole discretion, among other things, order the parties to bargain. If this order is made, then the bar to strikes and lockouts during the term of a collective agreement does not apply.⁸⁷ The broad definition of technological change makes possible a right for employees in British Columbia to negotiate about plant shutdowns and relocations. The additional remedial powers of the arbitrator to order re-instatement of dismissed employees and a delay of ninety days in implementing a change should give employees sufficient time to bargain.

The types of matters which the legislation foresees as properly within the scope of the collective bargaining process can be gleaned from section 74 which states that the collective agreement may include provision for notice of intention to introduce the technological change, opportunities for retraining or transfer of employees, and severance wages for employees displaced by the change. Thus the concern is directed primarily towards the effects rather than the making of the decision itself. However, nothing explicitly precludes bargaining about the decision to introduce the change. Nevertheless, the emphasis is on terms dealing with adjustment to technological change and where collective bargaining is ordered it is to negotiate provisions "to assist the parties affected by the technological change to adjust to its effects".⁸⁸ What is promoted by the legislation is impact bargaining along the lines

⁸⁶ R.S.B.C. 1979, c. 212.

⁸⁷ S. 77(2). In the first five years after this provision was introduced, no union ever made use of this mid-contract right to strike. This legal reform has been termed as "largely a symbolic response to the issue." P. WEILER, *RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW* 108 (1980).

⁸⁸ S. 77(1).

of those required in the United States even where no duty to bargain about the decision has been found.

Even where the collective agreement contains provisions limiting the right of the employer to lay off employees because of a technological change, the workers are not entitled to continue their employment until the matter of whether there is indeed a technological change is settled by arbitration.⁸⁹

Given that there is no duty to bargain about plant shutdowns or relocations during the term of the collective agreement in the majority of jurisdictions and that the technological change provisions are of limited scope, what are the rights of employees in negotiating these issues during the open period when bargaining is permitted?

The statutes of the various jurisdictions outline the duty to bargain in various terms. In the Canada Labour Code⁹⁰ it is as follows:

Where notice to bargain collectively has been given under this Part,

- (a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
 - (i) meet and commence or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
 - (ii) make every reasonable effort to enter into a collective agreement. . . .

In Ontario:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.⁹¹

Unlike the National Labor Relations Act, no attempt is made to spell out the terms or matters which may be bargainable. Although insisting on terms which are contrary to statute may amount to a refusal to bargain in good faith,⁹² the dichotomy between mandatory and permissive areas of bargaining has not developed.⁹³ Thus, if the union brings up the topic of plant closings or relocations, the employer's duty to bargain in good faith does not necessarily require that the employer discuss this particular issue. Rather, the legal duty imposed is a "single, global obligation to

⁸⁹ *Canadian Newspapers Co. v. Vancouver Typographical Union, Local 226*, [1980] 3 Can. L.R.B.R. 435, 81 C.L.L.C. 16, 064 (B.C.L.R.B.).

⁹⁰ R.S.C. 1970, c. L-1, s. 148, *as amended by* S.C. 1972, c. 18, s. 1.

⁹¹ Labour Relations Act, R.S.O. 1980, c. 228, s. 15.

⁹² *T. Barbisen & Sons v. Operative Plasterers & Cement Masons, Local 345*, [1960] Ont. L.R.B.R. 80.

⁹³ If a party insists on making a matter about which the other party has no power to negotiate a precondition to reaching agreement, that may amount to a failure to bargain on issues over which the parties by statute are required to bargain. *See Western Wholesale Drug Ltd. v. Retail, Wholesale & Dep't Store Union, Local 580*, [1971] 4 W.W.R. 207 (B.C.S.C.); *Otis Elevator Co. v. Union of Elevator Constructors, Local 82*, [1973] 4 W.W.R. 355, 35 D.L.R. (3d) 566 (B.C.C.A.).

negotiate a settlement of an entire collective agreement".⁹⁴ The employer is legally entitled not to discuss a particular issue which would leave it up to the union membership to decide whether provisions regarding plant closings are so vital to their conditions of employment that they should take strike action in order to change the employer's mind.⁹⁵ The likelihood of obtaining agreement in such situations is much the same as in the United States.

If bargaining is taking place, the company may be prevented from making a unilateral decision to close or relocate. The Canada Labour Code specifically states in section 148(b) that an employer, once notice to bargain collectively has been given,

shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit or any right or privilege of the bargaining unit until the requirements of paragraphs 180(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such right or privilege.

Section 180 sets out the situation when the employer may declare a lockout, or the employees a strike. In interpreting the effect of section 148(b) on the right of employers to act during this time, two different panels of the Canada Labour Relations Board have taken radically different approaches. One held that the employer was virtually prohibited from making any business decision affecting employment conditions or employee rights without the consent of the union. In *Bank of British Columbia v. Union of Bank Employees, Local 2100*, the Board made it clear that there was no statutory exemption allowing management to make decisions as before, so that the employer could not

dismiss, lay off, transfer or discipline without union consent. Hours of work, vacation, coffee break, holidays etc. could not be changed without union consent. Technological innovation, job description, work functions and any other bargainable issue sought to be negotiated could not be altered without the union's consent. The union is an equal partner until the rules of employment and, in fact rights or management are established in a collective agreement.⁹⁶

The argument is that making the union and management act as if they were co-partners during the bargaining period encourages management to negotiate and creates a position of equality during this time from which each could protect its interests. Whether this does accomplish what the Board intended is not essential to the issue here.⁹⁷ Rather, what it does make clear is that for a possibly very brief period of time the advantage that the employer had in making a decision was taken away.

⁹⁴ *Pulp & Paper Ind. Rel. Bureau v. Canadian Paperworkers Union*, [1978] Can. L.R.B.R. 60, at 80, 77 C.L.L.C. 16,109, at 16,779 (B.C.L.R.B. 1977).

⁹⁵ *Id.*

⁹⁶ [1980] 2 Can. L.R.B.R. 441, at 450, 80 C.L.L.C. 16,032, at 14,312.

⁹⁷ See Lennon, *Organizing the Unorganized: Unionization in the Chartered Banks of Canada*, 18 OSGOODE HALL L.J. 177 (1980).

The Canada Labour Relations Board clearly foresaw a situation in which section 148(b) could be a useful tool for employees where a cutback or major change in an employer's operation is contemplated. If employees have reason to fear such an event,

they may join a union and seek to bargain with the employer about the change and its consequences. That is, and in a real sense should be, their right. It is no translation of their right into practical effect if, notwithstanding certification and notice to bargain, the employer may do what he planned without their agreement and if he may use collective bargaining and other procedures to delay a collective agreement until he has done what caused the employees to choose a union to negotiate with him. The inability to act without union consent is a real incentive to the employer to recognize and deal with the union.⁹⁸

Whether employees could act with sufficient dispatch to organize and present a certification petition before an employer carried out its intentions to effect dismissal or large scale organizational changes is not clear. However, the period of notice required by section 60 of the Canada Labour Code before a mass redundancy can take place varies between eight and sixteen weeks, depending on the number of employees terminated. During this time a certification campaign conceivably could be undertaken for the sole purpose of gaining the right to bargain about a decision to close down, but only if the employer chose to give the notice rather than wages in lieu thereof.

In the event that a bargaining agent was certified, because the employer's hands would be completely tied during the period, there may indeed be an impetus for concessions in bargaining in order to get it over with quickly. Thus, even if no agreement can be reached with respect to the decision itself, the union's position in bargaining for greater adjustment benefits is significantly enhanced.

The opposing viewpoint is apparent in the decision of a panel of the Board, otherwise constituted, in *Retail Clerks' International Union v. Bank of Nova Scotia*.⁹⁹ Again the issue was whether the bank was required to implement a general wage increase announced for all its branches, but withheld from one for which the complainant unit had been certified. This panel rejected the idea that once section 148(b) was applicable, the union effectively became a partner with the employer in exercising managerial rights:

We do not think that by enacting section 148(b) and the certification procedure, the Canadian Parliament wished to make the employer share its property and management rights, which it had held up to that time, equally with the union. If there is to be such a partnership, it must arise from the consent of the parties involved.¹⁰⁰

⁹⁸ *Union of Bank Employees, Local 2100 v. Bank of B.C.*, [1980] 3 Can. L.R.B.R. 576, at 582, 81 C.L.L.C. 16,068, at 14,611.

⁹⁹ [1981] 2 Can. L.R.B.R. 365, 81 C.L.L.C. 16,110.

¹⁰⁰ *Id.* at 377, 81 C.L.L.C. at 14,936.

The earlier interpretation by the Board meant that the employer could not hire, dismiss or lay off without the consent of the bargaining agent for what may be a considerable period of time if the settlement of the first collective agreement is delayed. From a practical viewpoint this panel of the Board was concerned that it had

a situation in which the employer must make concessions solely in order to be able to manage in the interim. Even if the bargaining agent wanted to consent to the work changes, it could not do so legitimately since it is not familiar with the needs of the enterprise to which it has just *inherited* half rights. Such an interpretation is likely to lead to devastating effects on enterprise and, as a result, on the employees involved.¹⁰¹

While the Board seemed to operate from the premise that the needs of the enterprise were paramount to the needs of workers, it nevertheless underscored the radical approach adopted by the earlier interpretation. The Board invited the parties to use the review procedure so that the contradictory interpretations of section 148(b) could be dealt with by an enlarged panel of the Board.¹⁰²

This latter approach of the Canada Labour Relations Board parallels the approach of the Ontario Board in interpreting that province's legislation.¹⁰³ The Ontario statute has two separate subsections prohibiting the employer, without union consent, from altering working conditions either where an application for certification has been made or where notice to bargain is given.¹⁰⁴ However, the Board refuses to distinguish between the two situations and applies the "business as before" test to both.¹⁰⁵ In particular, where the Board was faced with the question of whether the statutory freeze prevented an employer from laying off employees once a union had served notice to bargain, it held that it was a term of the employment contract that the workers could be laid off if there were a lack of work.¹⁰⁶ Since the right to lay off is part of the status quo, and the statutory freeze preserves the status quo by preserving the terms of the employment relationship, the employer was not prevented by the statute from laying off the employees.

The "business as before" approach leaves the employer with the right to continue to manage his business as before. Thus the employer would probably have the right to close down or relocate without consultation with the union even during the statutory freeze. Only where it can be established that the change was induced by anti-union animus

¹⁰¹ *Id.* at 376-77, 81 C.L.L.C. at 14,935.

¹⁰² In *Bank of N.S. v. Retail Clerks' Int'l Union* (as yet unreported, Can. L.R.B. 29 Jan. 1982) (Decision No. 367), the C.L.R.B. decided to follow the practice in Ontario of interpreting s. 148(b) in accordance with the "business as before" approach.

¹⁰³ *Spar Aerospace Products Ltd. v. Spar Professional & Allied Technical Employees Ass'n*, [1979] Ont. L.R.B.R. 700, [1979] 1 Can. L.R.B.R. 61.

¹⁰⁴ Labour Relations Act, R.S.O. 1980, c. 228, s. 79(1) and (2).

¹⁰⁵ *Supra* note 103.

¹⁰⁶ *Canadian Gen. Electric Co. v. Union of Operating Engineers, Local 101*, [1965] Ont. L.R.B.R. 649.

will the union be entitled to a remedy.¹⁰⁷ Thus, the only union interest protected by the statutory freeze is the maintenance of the existing employment conditions.

In addition to the lack of constraint on the employer instituting a decision to shut down or move during the bargaining period, under the Ontario Labour Relations Act there is no duty on the employer to notify the union that the decision is being contemplated.¹⁰⁸ Only if the union specifically asks whether the employer has plans which are likely to affect significantly the bargaining unit is there a duty on the employer to supply the information. The duty to bargain in good faith also requires the employer, on his own initiative, to inform the employees if such a decision has already been made.

The reason for not requiring the employer to give notice that this type of decision is being considered is said to be that notice would be of marginal benefit to the trade union and would only serve to distort the bargaining process. The Board seems misguided in its approach. Firstly, it is acting upon the assumption that the union has and should have no say in the decision-making process. Secondly, it fails to see that rather than distorting the bargaining process, such information rationalizes the process. Both parties should bargain from positions where they each can at least understand the goals and limitations of the other. The bargaining process is distorted if this information is known by only one party. Furthermore, even if the union cannot by reason of inexperience effectively provide useful input into the decision-making process, it will have a greater opportunity to protect the interests of its members by including provisions in the agreement to help through the transition process. By forcing the employer clearly to realize its duty toward the employees that will be affected by a decision to alter operations, the union can help internalize the social costs of the decision.

Where, however, the company decision to terminate operations is partly motivated by anti-union bias, the labor statute will restrict the employer's right to act. The Ontario Labour Relations Board has rejected the "predominant motive" test and has chosen to look to see if management action is even partially motivated by anti-union bias.¹⁰⁹ Where no imminent financial crisis exists, the fact that a move would result in projected productivity improvement or projected increased

¹⁰⁷ *Burlington Carpet Mills Can. Ltd. v. Labourers' Int'l Union, Local 183*, [1980] Ont. L.R.B.R. 1361, 81 C.L.L.C. 16,069.

¹⁰⁸ *Westinghouse Can. Ltd. v. United Electrical, Radio & Machine Workers, Local 504*, [1980] Ont. L.R.B.R. 577, 80 C.L.L.C. 16,053, *aff'd* 80 C.L.L.C. 14,062 (Ont. Div'l. Ct. 1980). In determining whether there was an unfair labor practice, the Board refused to apply a "predominant" motive test. Employer actions that are only partly motivated by anti-union intentions are in violation of the Act. Furthermore, the Board refused to accept the position of the U.S. Supreme Court in the *Darlington* case that an employer may with impunity close down a plant completely: *Academy of Medicine v. Communications Workers of Canada*, [1977] Ont. L.R.B.R. 783.

¹⁰⁹ *Westinghouse Can. Ltd.*, *id.*

return on investment resulting from the relocation of a unionized plant does not establish the absence of anti-union motive.

In conclusion, the Canadian collective bargaining scene does not guarantee employees any more substantive power to control their fate in a plant shutdown or relocation than their American counterparts. With the contract normally closed during its term, and technological change provisions of a fairly narrow scope except in two provinces, it is primarily when negotiating for the collective agreement that the union can insist on provisions concerning plant shutdowns or transition relief. The employer may not be required to discuss the particular issue, but the union can insist on the matter to the point of going on strike.

If provisions are included in the collective agreement, or even in the absence of provisions, if the union challenges an employer decision, the ultimate resolution of the dispute will be left to arbitration. One commentator summed up the likely approach of arbitrators thus:

Even though there is some rejection of the traditional residual rights theory, it is improbable that arbitrators would exercise their powers in order to impede management's right to innovate.

Arbitrators will not likely sustain the grievance of an employee displaced by technological change, unless there is a specific contractual provisions [*sic*] establishing his right to assistance.¹¹⁰

The same conclusion is reached here that was set out in the review of the American developments. Collective bargaining can be a useful tool but it does not provide complete protection.

III. LEGISLATION

Statutory innovation can take many forms. Two issues will be concentrated upon here: severance pay and advance notice as important components of an adjustment procedure. Brief consideration will be given to proposals for ensuring workers' pension benefits and for measures to protect workers' entitlements to wages and other benefits during bankruptcy and insolvency. These are offered as an attempt to demonstrate the usefulness of legislative schemes and to raise some of the problems that must be addressed in designing statutory solutions.

A. *Severance Pay*

Severance pay is a form of compensation payable to employees who have been severed or terminated from their jobs. It may be called by a variety of other names such as dismissal pay, layoff pay, termination pay or redundancy pay. The term sometimes is used for pay that a worker

¹¹⁰ Manson, *supra* note 76, at 194

receives in lieu of statutorily required notice.¹¹¹ However, it is best to keep the two distinct, because there may be situations where a worker is entitled to both,¹¹² or to one and not the other. As well, severance pay and payment in lieu of notice may be treated differently in considering entitlement to unemployment insurance benefits.¹¹³ Severance pay has been statutorily authorized as an adjustment technique only in a few jurisdictions, including Canada,¹¹⁴ the state of Maine,¹¹⁵ Great Britain,¹¹⁶ and very recently the province of Ontario.¹¹⁷ A number of other European countries also provide for severance pay in situations of redundancy, although the emphasis is on statutory procedure with sizable payments if the procedures for lay off and termination are not handled in the proper form.¹¹⁸

Severance pay provisions also are quite extensive in collective bargaining agreements,¹¹⁹ with a wide variety of plans in effect. When a company unilaterally shuts down or relocates, it often will provide severance pay¹²⁰ although there is no legal duty to do so. Severance pay is not a bold new adjustment technique, but one that until now has been somewhat limited in North America and is deserving of closer scrutiny to determine if it should be available to a much wider segment of the working force.

A distinct feature of severance payments is that they do not normally depend on whether the worker is unemployed; otherwise, they would be

¹¹¹ E.g., the Employment Standards Act, S.B.C. 1980, c. 10, s. 42.

¹¹² *Re Telegram Publishing Co. & Zwelling*, 11 O.R. (2d) 740, 67 D.L.R. (3d) 404 (C.A. 1975).

¹¹³ Unemployment Insurance Regulations, C.R.C., c. 1576, s. 57(1).

¹¹⁴ An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 60.4(1)(a)).

¹¹⁵ 26 Me. Rev. Stat. Ann., s. 625-B.

¹¹⁶ The Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 81.

¹¹⁷ Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(1) (*amending* R.S.O. 1980, c. 137, by adding s. 40(a)).

¹¹⁸ Denmark, France, Greece and Italy have some form of severance pay requirement: *Dismissal and Redundancy Pay in 10 Countries*, 75 EUROPEAN INDUS. REL. REV. 14 (1980).

¹¹⁹ Of major collective agreements in Canada (those governing 500 or more employees), 49.1% contained provisions for severance pay alone or severance pay and supplementary unemployment benefits: LABOUR CANADA, PROVISIONS IN MAJOR COLLECTIVE AGREEMENTS COVERING EMPLOYEES IN CANADIAN MANUFACTURING INDUSTRIES (1979). In the United States, in 1975, 39% of a large sample of collective agreements contained such provisions (45% for the manufacturing sector): BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 42 (8th ed. 1975).

Of major collective agreements covering 1000 or more workers in the U.S. on 1 Jan. 1980, 500 of 1536 agreements contained severance pay provisions while in the manufacturing sector 319 of 770 collective agreements contained such provisions: U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1978 101 (Bull. 2065, 1980).

¹²⁰ Lipsky, *Interplant Transfer and Terminated Workers: A Case Study*, 23 IND. & LAB. REL. REV. 191 (1970).

merely a form of supplementary unemployment insurance. Thus, if a worker meets the requisite conditions of employment and termination, he may be entitled to the payment although he has another job.¹²¹ This may be regarded by some as a windfall, especially if the tendency is to regard the payment as a form of income maintenance or an unemployment-related benefit. However, justifications for severance pay can be founded on other bases which do not mandate the restriction of severance payments only to those workers who become unemployed as a result of termination.

Workers develop expectations associated with their jobs. These expectations are understandable and justified. Working at a particular job confers status on the employee and this is enhanced by the seniority developed.¹²² The expectations become closely related to notions of security. A worker must provide for both present needs and wants as well as prepare for retirement. While the present social welfare state provides subsistence at stages when the worker is no longer able to provide for himself by working, it falls far short of meeting the legitimate expectations which a worker develops. Further, work is more than a mere means of livelihood. It is a means of fulfilling basic desires for self-expression, utilization of skills and talents, creativity and teamwork.

While many of these interests can be met by assuring that the employee has access to some job¹²³ rather than to a particular job, there are a number of important expectations that are closely linked to a particular job. Furthermore, the goal of full employment seems extremely elusive, and even if obtained according to economic standards of measurement, would leave substantial numbers unemployed at a particular time. Certain benefits relating to a job cannot be transferred to a new workplace. Many of these accrue over the length of time the employee is associated with a particular job or employer. Seniority, control over shift selection and job assignment, pension benefits, longer vacation periods and accumulated sick leave are all fringe benefits which may result in significant loss if the employee is forced to move from one job to another. If the employee loses his seniority rights, he will have less security at a new job because those with less seniority are likely to be let go earlier in cases of cutbacks. Unless there are arrangements for full portability of pension plans, losses may result from having pensions from two or more employers rather than a single continuous plan. It is clear

¹²¹ E.g., one collective agreement provision was interpreted as requiring the selling company to pay severance to all its employees even though they were all hired by the purchasing company and the plant was kept running without missing a day: *Olin Corp., Pasadena Fertilizer Plant*, 12 PERSONNEL MANAGEMENT INDUS. REL. NO. 2, at 5 (1980).

¹²² MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY 16 (1964), P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 203 (1969).

¹²³ Cohen, *Property in Work versus Property in Jobs: A Comment*, 16 IND. & LAB. REL. REV. 281 (1963).

that an employee suffers substantial losses of both economic and social benefits when terminated from a job.

Given that workers have these job-related expectations and do suffer losses when their employment is terminated, the question becomes whether they should be compensated when such losses occur. Not all workers or individuals in general receive or should receive compensation when their expectations are not fulfilled. Why should the public institutions controlling the redistribution of resources respond to these particular claims of the worker?

Part of the answer stems from the extent to which there is common recognition of the legitimacy of this particular claim. Seniority guarantees in collective agreements, provisions prohibiting unjust dismissal and legislative guarantees of no dismissal without cause as long as the job exists,¹²⁴ are all indicative of the importance of seniority and job security to the worker and of the interests of both private and public institutions in protecting them. This, combined with the inclusion of severance pay provisions in collective agreements and in the statutes mentioned earlier, and the willingness of employers unilaterally to pay severance benefits in cases of shutdown, is strong evidence of the legitimacy of compensation for loss of work.

Another part of the answer must stem from the recognition that mass layoffs, plant shutdowns and relocations are a necessary feature of an industrialized society adapting to changes in technology, consumer demand, competition from imports and other economic fluctuations. Since society as a whole benefits from the shutdowns, it is only fair that the costs be distributed more widely rather than have them borne by the displaced workers. Attempted analogies to property rights do little to clarify principles.¹²⁵ These rights of employees are in a class of their own. One should not treat compensation for lost jobs as if it were a payment for an expropriation. Similarly, to classify the employment relationship as merely contractual out of which no rights such as these can grow is to apply a conceptual framework which obfuscates the question of whether the legitimate expectations of workers and the losses they incur should achieve recognition and compensation.

¹²⁴ See, e.g., The Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 54(1): "In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer"; An Act to Amend the Canada Labour Code, S.C. 1977-78, c. 27, s. 21 (amending R.S.C. 1970, c. L-1, by adding s. 61.5); An Act to Amend the Labour Standards Code, S.N.S. 1975, c. 50, s. 4 (amending S.N.S. 1972, c. 10, by adding s. 67A).

¹²⁵ MEYERS, *supra* note 122; P. SELZNICK, *supra* note 122; Rottenberg, *Property in Work*, 15 IND. & LAB. REL. REV. 402 (1962); Cohen, *supra* note 123; Stein, *Property Right in Work: A Comment*, 16 IND. & LAB. REL. REV. 279 (1963); McClintock, *Enterprise Labour and the Developing Law of Employee Job Rights — Part One*, 8 GONZ. L. REV. 40 (1972); Looney, *Expected Continued Employment as a Protected Property Right*, 22 LOY. L. REV. 884 (1976); Levine, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973).

The argument that workers could develop property rights in jobs has received little support in the courts. Although one early decision in the United States suggested that seniority, as defined by collective agreement, could become a vested right,¹²⁶ subsequent cases have been unanimous in rejecting the argument that such employee rights are anything other than contractual.¹²⁷ One of the most recent decisions considering the matter was *Local 1330, United Steelworkers of America v. United States Steel Corp.*¹²⁸ where the employees, union and other interested persons were attempting to prevent the shutdown of two large steel mills. The argument took a slightly different approach when the contention was put forth that a property right had arisen from the long established relation between the community and the employer which the Court could enforce. In rejecting the argument, the Court repeated the statement it had made in an earlier case making it clear that the courts would not of their own accord begin enforcing such a property right:

Article V of the Constitution, of course, makes no mention of employment. But it (and the Fourteenth Amendment) does prohibit deprivation of property without due process of law. Thus appellant's assumption submits the fundamental question of whether or not there is a legally recognizable property right in a job which has been held for something approaching a lifetime.

The claim presented by this appellant brings sharply into focus such problems as unemployment crises, the mobility of capital, technological change and the right of an industrial owner to go out of business. See *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263, 85 S. Ct. 994, 13 L.Ed. 2d 827 (1965). Thus far federal law has sought to protect the human values to which appellant calls our attention by means of such legislation as unemployment compensation, 42 U.S.C. §. 1400-1400v (1964), and social security laws, 42 U.S.C. ch. 7 (1964), as amended (Supp. III, 1965-67). These statutes afford limited financial protection to the individual worker, but they assume his loss of employment.

Whatever the future may bring, neither by statute nor by court decision has appellant's claimed property right been recognized to date in this country. The closest approach in case law is the now overruled *Zdanok* case. But even it was founded upon a construction of the labor-management contract which is not available in the instant case. And even the most enthusiastic supporters of the *Zdanok* decision rely upon the labor-management agreement as the source of legal authority for seniority rights. See, e.g., Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 Minn. L. Rev. 505 (1963). Needless to say, if the United States Supreme Court wishes now to reconsider and expand the view of seniority which it expressed in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953), this case offers a vehicle.¹²⁹

¹²⁶ *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961).

¹²⁷ *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir. 1962); *Local 1251, Auto. Workers v. Robertshaw Controls Co.*, 405 F. 2d 29 (2d Cir. 1968); *Charland v. Borg-Warner Corp.*, 407 F. 2d 1062 (6th Cir. 1969); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (D. Mich. 1974).

¹²⁸ 631 F. 2d 1264 (6th Cir. 1980).

¹²⁹ *Charland*, *supra* note 127, at 1065.

The Court's reasoning assumed that the formulation of public policy on the issues involved in plant closings was clearly the responsibility of the legislatures.

In Great Britain, where an extensive system of severance payments was introduced in the 1960's, the judiciary developed a rationale for the payments contained very much within a property rights framework.¹³⁰ Although that may not have been the motivating factor for introducing the redundancy payment legislation, it has had the subsidiary effect of changing, to some extent, the courts' view of the employment relationship.¹³¹

For those unwilling to concede that a property right justification alone is a sufficient reason for using severance pay as an adjustment technique, there are a host of supporting justifications. First, workers can be expected to resist vigorously the introduction of change into the work place if it results in the loss of jobs. If society is to maintain reasonable standards of living, rates of productivity and economic well-being, there must be a continuing adaptation of its industry to rid itself of obsolescent equipment, to cater to new consumer demands, to substitute more energy efficient methods of production and to respond to international competition. To induce the cooperation of workers and make the stress of coping with change more palatable, severance pay can be seen "as just one lubricant of this particular unavoidable component in the process of adaptation to the larger changes rolling relentlessly forward".¹³²

A very different explanation for severance pay comes from those arguing that it can serve at worst as a disincentive and at best as a means of internalizing the true costs of a shutdown into the decision-making process.¹³³ Due to the large one-time cost involved¹³⁴ employers may find it too expensive to relocate or close. This has been a strong motivating factor for workers to seek inclusion of severance payment provisions in collective agreements as a means of helping achieve job

¹³⁰ This is most clearly seen in the decision by Lord Denning M.R. in *Lloyd v. Brassey*, [1969] 1 I.R. 100, at 101 (C.A.), where he stated:

[A] worker of long standing is now recognized as having an accrued right in his job; and his right gains in value with the years. So much so, that if the job is shut down, he is entitled to compensation for loss of a job — just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat "not". Even if he gets another job straight away, he is nevertheless entitled to full redundancy payment. It is in a real sense, compensation for long service.

¹³¹ C. GRUNFELD, *THE LAW OF REDUNDANCY* 6 (2nd ed. 1980).

¹³² *Id.* at 2. Another less noble view of the reasons why management agrees to severance pay is stated by Berkowitz, *Economic Aspects of Employer Security Plans*, 21 *PROC. N.Y.U. ANN. CONF. ON LAB.* 428 (1969).

¹³³ UAW SUBMISSION TO SELECT COMMITTEE 6 (1981); Daniels, *The High Price of Redundancy Payments*, [1976] *PERSONNEL MANAGEMENT* 16 (Sep.).

¹³⁴ A. FREEDMAN, *SECURITY BARGAINS RECONSIDERED: SUB, SEVERANCE PAY, GUARANTEED WORK* 37 (1978).

security. It is also the reason for opposition by industry to the statutory imposition of a duty to make severance payments.¹³⁵

Severance payments serve as an additional source of income for workers who are terminated. For those unemployed, it helps to maintain, for a period, a level of income nearer to that to which they had been accustomed while working. Because unemployment insurance benefits do not fully compensate for income lost, severance payments help to fill the gap. However, an increase in the level of income maintenance could be more efficiently achieved through a change in the scale of compensation under the unemployment insurance legislation or by implementing a supplementary compensation scheme. This would alleviate the inefficiencies of using severance payments which are even received by those workers who have suffered no unemployment, and therefore no wage loss between jobs.

Where the level of income maintenance is nearly the full amount of income loss, the employee will have less incentive to search for work. Studies have been inconclusive¹³⁶ in determining whether severance pay actually is a deterrent to work. Although there is generally a positive relationship between the size of severance payments and duration of post-termination unemployment, this appears to derive largely from the common association of each of these variables with the age and length of service.¹³⁷ Although the work disincentive argument for denying severance pay should not receive great weight, income maintenance alone may be better achieved through other mechanisms.

Several other rationales have also been used to justify severance payments, one being that it promotes labor mobility.¹³⁸ By giving the employee a lump sum to do with as he or she pleases, the worker is expected to invest it in job searching, retraining or relocation.¹³⁹ By giving the individual the choice, the option most suitable for his or her level of skill, age and location may be chosen more efficiently.¹⁴⁰

Severance pay cannot be viewed as an adjustment technique in isolation from other adjustment procedures. For example, if longer notice periods are required, employers will worry about maintaining a working staff while the operations are being wound down because workers will leave to find new jobs. Thus, employers are willing to introduce severance payments unilaterally as an enticement to workers to

¹³⁵ CANADIAN ORGANIZATION OF SMALL BUSINESS, BRIEF TO THE SELECT COMMITTEE OF THE ONTARIO LEGISLATURE ON PLANT SHUTDOWNS AND EMPLOYEE ADJUSTMENT 17 (1980).

¹³⁶ *Lipsky, supra* note 120, at 200.

¹³⁷ I. WELTON, REDUNDANCY AND RE-EMPLOYMENT SUCCESS 11 (Ontario Ministry of Labour, Employment Information Series, No. 11 (1975)).

¹³⁸ C. GRUNFELD, *supra* note 131.

¹³⁹ Berkowitz, *supra* note 132, at 430.

¹⁴⁰ But see Stromsdorfer, *Labor Force Adjustment to Structural Displacement in a Local Labor Market*, 18 IND. & LAB. REL. REV. 151 (1964), who suggests that the workers' perceptions of risks may be incorrect so that they will choose not to make an investment although by societal standards the investment would be worth it.

remain until the end of the notice period.¹⁴¹ This may place older workers at a disadvantage because they will have more to lose by giving up their severance pay. They will stay to the end while younger workers will be more willing to move, taking any available jobs and making it even more difficult for the older workers to find employment later.¹⁴²

If the dangers of severance pay causing longer periods of unemployment are to be attributed to the employee becoming overselective because of the economic cushion he has during the search period,¹⁴³ this can be lessened if the severance pay is only part of a re-adjustment program where the employer, government and employee representatives cooperate with advice and resources to aid in a job search.

Severance pay therefore has a wide variety of justifications. Some conflict; some could be better served by other transition mechanisms. The interests put forth by the "property in job" rationale are not guaranteed by other means, and although severance pay falls short of guaranteeing job security, it does provide a means of compensating the worker for benefits lost when termination occurs.

Statutorily created schemes could take a wide variety of approaches. Based on those already in effect and the experience developed out of plans included in collective agreements, it is possible to articulate the issues that must be faced. The essential concerns are in determining the subjects, the timing and the amount of entitlement.

Under the Canada Labour Code the entitlement to severance pay does not depend on a plant closing or mass layoff or termination taking place. Rather, any employee who has completed five consecutive years of employment with an employer is entitled on termination (other than for just cause) to a severance payment of two days wages for each year worked up to a maximum of forty days.¹⁴⁴ An employee who is laid off is deemed to be terminated¹⁴⁵ except where: the layoff is the result of a strike or lockout; the term of the layoff is less than three months; the layoff is more than three months but the employee is notified at or before the date of the layoff that he will be recalled to work at a fixed date within six months and the employee is so recalled; the employer continues to pay the employee during the layoff or continues to make payments on his behalf to a registered pension plan; the employee receives supplementary unemployment benefits; or the layoff is mandatory under a provision of a collective agreement.¹⁴⁶ An employee entitled to a pension upon

¹⁴¹ B. PORTIS & M. SUYS, *supra* note 14, at 27.

¹⁴² R. FRYER & R. MARTIN, *supra* note 27, at 173.

¹⁴³ I. WELTON, *supra* note 137, at 29.

¹⁴⁴ An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 61(1)).

¹⁴⁵ An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 61(2)(a)).

¹⁴⁶ Canada Labour Standards Regulation, C.R.C., c. 986, s. 30. These same restrictions on layoffs which are deemed to be a termination apply to the individual and group notice requirements.

termination is deemed not to have been terminated and hence will not be entitled to a severance payment.¹⁴⁷ The length of service and wage rate determine the amount of severance pay to which an employee may be entitled. The five year working requirement and forty day maximum severely limit the number of eligible employees and the amount to which they will be entitled.

The redundancy payment scheme in Great Britain has a wider scope than the Canadian provisions, and has given rise to a number of cases attempting to illuminate the complexities of the provisions. Like the Canadian scheme, the payments are not limited to mass termination situations. Unlike the Canada Labour Code, however, the payments are not for all terminations other than those for just cause. They are limited to terminations by reason of redundancy, which is defined as those dismissals attributable wholly or mainly to:

- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.¹⁴⁸

An employee must have been in continuous employment for two years to qualify for a payment.¹⁴⁹ The amount of compensation depends on three factors: the wage rate, the length of service and the age of the employee. Thus, for every year worked after the employee is forty-one years of age, he is entitled to one and a half week's wages; one week's wages for each year worked between twenty-two and forty-one years of age; and one half week for each year worked while the employee was less than twenty-two years of age.¹⁵⁰ The bow to the prerogatives and needs of the older worker recognizes the peculiar problems they face on a lay-off.

An important element in the British scheme is the establishment of a Redundancy Fund.¹⁵¹ It is funded by a surtax on social security premiums paid by the employer. If the employer fails to make the payment required by the Act, the employee can look to the fund for payment. Employers who have made the payment as required are entitled to a rebate from the Fund, presently forty-one percent of the payment made.¹⁵² This provision alleviates the problems caused when an employer goes bankrupt. If there

¹⁴⁷ An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 61(2)(b)).

¹⁴⁸ The Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 81(2).

¹⁴⁹ S. 81(4).

¹⁵⁰ S. 81(4).

¹⁵¹ S. 103.

¹⁵² C. GRUNFELD, *supra* note 131, at 9.

is no insurance-type fund to which the employee can turn, then he must stand in line in the hope that there will be assets to cover the amounts owed to him. If the severance pay mechanisms were to be confined to situations of plant closings and mass terminations in which no funding arrangement were required, there would be a significant number of cases where the employees would not be able to obtain their severance benefits.

For severance plans set up under collective agreements, there is seldom a funding arrangement.¹⁵³ This may be because the plans are primarily designed for single terminations, with little thought given to the effect and consequences of the plan where plant closings or mass permanent layoffs occur. It may be further due to confidence in the workers that the employer will be able to honour its commitments.

In Maine, any employer who terminates or relocates an establishment which employed 100 or more employees in the preceding twelve months is required to make a severance payment of one week's pay for every year worked by an employee.¹⁵⁴ No liability to make such payment exists under the statute when the termination or relocation is necessitated by physical calamity, if the employee is covered by a contract for severance pay, if the employee accepts employment with the employer at a new location or if the employee has been employed by that employer for less than three years.¹⁵⁵

A provision of the Maine statute exempts employers who are bound by a collective agreement providing for severance pay, apparently even if the contract provides for less than the statutory minimum. In contrast, under the Canada Labour Code, the sections apply notwithstanding "any other law, or any custom, contract or arrangement"¹⁵⁶ except that terms more favorable to the employee are not derogated from by the Act, and regulations may be made for methods to determine whether severance benefits provided under a plan established by an employer are equivalent to benefits required to be paid under the Act.¹⁵⁷

The newly introduced sections of the Ontario Employment Standards Act require an employer to make severance payments where fifty or more employees have been terminated within a six month period and the cause is a permanent discontinuance of all or part of the employer's business at an establishment.¹⁵⁸ Only employees who have worked five or more years are entitled. They receive one week's wages for each year worked up to a maximum of twenty-six weeks — considerably more generous than the Canada Labour Code. Under section 40a(3), a number

¹⁵³ A. FREEDMAN, *supra* note 134, at 37.

¹⁵⁴ 26 Me. Rev. Stat. Ann., s. 625-B(2).

¹⁵⁵ S. 625-B(3).

¹⁵⁶ Canada Labour Code, R.S.C. 1970, c. L-1, s. 28.

¹⁵⁷ An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 61.1(c)).

¹⁵⁸ Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(1) (*amending* R.S.O. 1980, c. 137, by adding s. 40a(1)).

of categories of employees are specifically exempted from the right to receive severance pay under the Act: (1) employees who refuse to accept or to exercise their seniority rights to obtain reasonable alternative employment with the employer; (2) employees who refuse to waive any right to be recalled for employment; (3) employees who upon termination retire with full pension benefits; (4) employees in the construction industry; and (5) employees who work under an arrangement whereby they may elect to work or not when requested to do so. Another subsection clarifies the relation between severance payments and other benefits. Under section 40a(4) any supplementary unemployment benefit payable to an employee may be set off against the severance payment, but otherwise the payment is in addition to any other payment required by the Act or the contract of employment.

The Act raises a number of technical problems. First, how does one determine whether a permanent discontinuance of the business has taken place? The employer may make the layoffs with the intention of recalling the employees, but at some indeterminate future date. Similar phraseology used in the regulations with respect to notice periods was held by the Ontario High Court not to apply to indefinite layoffs lasting more than thirteen weeks. No objective standard was set for determining when the discontinuance had become permanent.¹⁵⁹

A transitional provision in the statute introducing this new section of the Employment Standards Act exempts from its application employers who became bankrupt or insolvent and whose assets were distributed to creditors before the Act received royal assent.¹⁶⁰ This means that for bankruptcies after that date, this provision clearly applies. Severance pay is included in the definition of wages and the special mechanisms under the Act for collecting wages owed to workers are available. However, no attempt is made to set up a guaranty fund on the British model.

In Britain employers argue that they are finding the costs of making employees redundant prohibitive because, in order to show good faith and make redundancies palatable, they are having to make payments higher than the statutory minimum.¹⁶¹ Thus, the severance payments serve, when statutorily based, only as a minimum. Extensive collective agreement provisions may afford employees greater economic security as well as an effective means of reducing the number of layoffs and terminations.

Another issue which should be clearly addressed in legislation is the effect of the provisions where a successor employer takes over the business entity. British redundancy payments need not be made where a change of ownership of a business occurs and the new owner offers to

¹⁵⁹ See note 206 and accompanying text *infra*.

¹⁶⁰ S.O. 1981, c. 22, s. 2(3).

¹⁶¹ Daniels, *supra* note 133.

renew the employee's contract of employment within four weeks,¹⁶² provided that in those cases where the employee refuses the offer the provisions of the contract as renewed concerning the capacity and the place in which the worker would be employed would not differ substantially from the former contract.¹⁶³

Where a business is transferred by sale, lease, merger or otherwise, the employment of the employee before and after the transfer is deemed by section 45 of the Canada Labour Code¹⁶⁴ to be continuous with one employer. It appears that no termination takes place and there is no entitlement to severance pay.

In the United States, arbitrators have had to interpret collective agreements providing for severance pay on termination of employment. The National Labor Relations Act¹⁶⁵ has no successorship provision. If the term "termination" has not been defined in the collective agreement, the sale or transfer of a company may result in the transferring company having to make severance payments even where all the employees are hired by the transferee on the same terms and without any loss of work.¹⁶⁶ This is a technical application of contractual principles to the employment relationship. Other arbitrators have developed a more realistic policy, finding that employees will be entitled to severance pay only where the change in the employment relationship fails to preserve all the rights and benefits for which the union had negotiated with the predecessor employer.¹⁶⁷ Where a job offer is extended to the employee by a successor, but the employee refuses to accept it because it is not "suitable employment under a comparable wage schedule", he is entitled to the severance payment.¹⁶⁸ Where the union agrees that the successor is now a party to the collective agreement,

arbitrators will generally look to substance instead of form and will ask whether the change in employment relationship protects and preserves intact all of the rights and benefits for which the Union has negotiated at the bargaining table. If such rights are placed in jeopardy, even potentially, the employment is considered to have terminated; but if the change has no more effect on the employees than the sight of a new sign on the plant gate, then there is no real interruption of employment.¹⁶⁹

¹⁶² The Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 94.

¹⁶³ S. 82(5).

¹⁶⁴ R.S.C. 1970, c. L-1.

¹⁶⁵ 29 U.S.C.A. § 151-68.

¹⁶⁶ *Supra* note 121, at 5.

¹⁶⁷ *Sacramento Foods, Former Division of Borden Foods*, 11 PERSONNEL MANAGEMENT INDUS. REL. No. 23, at 6 (1979). One case went further, holding that even where there was some loss of seniority, the employee was not entitled to the severance benefit: *Rodgers & McDonald Publishers Inc.*, 70-2 ARB para. 8694 (1970).

¹⁶⁸ *Lahaina Light & Power Co.*, 69-1 ARB para. 8289 (1969).

¹⁶⁹ *Amdel, Inc. Division of Am. Petrofina, Inc.*, 74-2 ARB para. 8610, at 5283 (1975).

These cases are a sample of the trend in arbitration awards, not a complete treatment of the subject. It becomes clear that severance pay is seen as compensation for lost employment rights. Where employment is continued at less than the preceding level of benefits, only specific contract language will justify withholding severance pay. Where the merger or transfer takes place without receiving prior union agreement, there may be a duty to make severance payments even though employment benefits and rights are maintained as before. Any legislative provision should allow severance payments where there is a loss of seniority or accrued benefits. If the purpose of severance pay is mainly to compensate for lost rights, no compensation should be due if the employee has not really lost anything.

Severance pay should be viewed as compensatory, not merely as an income maintenance technique. The loss incurred increases with the seniority of the employee and should be measured by the number of years worked. To ensure that severance pay is based on a compensatory rationale, legislation should clearly relieve employers of the obligation to make payments where successor employers keep the employees on with the same seniority and other fringe benefits. The greater problems for older employees in finding employment are better handled through other measures such as additional early retirement rights and possibly job support programs subsidized by government.

Severance payments also serve to internalize some of the social costs incurred in a plant shutdown or relocation decision. Therefore any funding arrangement of an insurance variety should be available only where an employer is simply unable to pay.

B. Notice

The requirement that an employer give notice to the employee before he or she is dismissed has been recognized as an implied term in contracts of employment for a considerable time in Canadian law. Where there is no written contract of employment specifying the term, there is a presumption of indefinite hiring subject to termination upon reasonable notice.¹⁷⁰ The considerations used in determining the amount of reasonable notice indicate the policy underpinning the requirements. The often quoted standard is that set out by McRuer C.J. in *Bardal v. Globe & Mail Ltd.*:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.¹⁷¹

¹⁷⁰ I. CHRISTIE, EMPLOYMENT LAW IN CANADA 238 (1980).

¹⁷¹ [1960] O.W.N. 253, at 255, 24 D.L.R. (2d) 140, at 145 (H.C.).

Although these factors are not limiting,¹⁷² they do give an idea of the concerns being addressed by the courts. By relating the notice period to character of employment, length of employment, and skills the courts recognize the job identification which the employee has developed and which should not be suddenly ended without notice. By recognizing age and availability of similar employment, the courts recognize the use of the notice period as a time in which the employee is given an opportunity to seek new employment. The more difficult that is likely to be, the greater the notice required.

Canadian legislatures also recognize the desirability of notice periods or payment of wages in lieu of notice. With the exception of New Brunswick, every Canadian jurisdiction provides for some form of notice period for an employee before he is dismissed, provided the qualifying conditions are met.¹⁷³ The periods of notice required are minimal, ranging from one week to a maximum of eight weeks for employees in British Columbia, Ontario, Nova Scotia and Saskatchewan. These are treated by the courts as only minimum standards that do not prevent the courts from declaring a longer period reasonable in the circumstances of a particular case.¹⁷⁴

Some legislatures have gone further and recognized the special problems created when groups of employees are laid off at the same or nearly the same time. A number of jurisdictions have provisions for longer notice periods to employees and for notice to unions and government officials when a group termination is about to take place.¹⁷⁵ Ontario provisions are typical, with notice periods of eight weeks required where fifty to 200 employees are terminated, twelve weeks for 200 to 500 employees, and sixteen weeks if more than 500 employees are let go.¹⁷⁶ An employer required to give notice to employees must give

¹⁷² I. CHRISTIE, *supra* note 170, at 344.

¹⁷³ The Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 38(1); Employment Standards Act, S.B.C. 1980, c. 10, s. 42; The Employment Standards Act, R.S.M. 1970, c. E110, s. 35; The Labour Standards Act, S.N. 1977, c. 52, ss. 47-52; Labour Standards Code, S.N.S. 1972, c. 10, s. 68; Employment Standards Act, R.S.O. 1980, c. 137, s. 40; Labour Act, R.S.P.E.I. 1974, c. L-1, s. 79; QUE. CIV. CODE, art. 1668 (1981-82); Labour Standards Act, R.S.S. 1978, c. L-1, s. 44; An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 60.4).

¹⁷⁴ See *Erlund v. Quality Communications Products Ltd.*, 29 D.L.R. (3d) 476 (Man. Q.B. 1972); *O'Donovan v. Burns Foods Ltd.*, [1977] 3 W.W.R. 206, 73 D.L.R. (3d) 321 (Sask. C.A.), *aff'd* 61 D.L.R. (3d) 766 (Q.B. 1975).

¹⁷⁵ The Employment Standards Act, R.S.M. 1970, c. E110, s. 35.1 (*as amended* by S.M. 1972, c. 52, s. 5; S.M. 1976, c. 33, s. 4); The Labour Standards Act, S.N. 1977, c. 52, s. 53; Labour Standards Code, S.N.S. 1972, c. 10, s. 68; Employment Standards Act, R.S.O. 1980, c. 137, s. 40(2); An Act Respecting Manpower Vocational Training and Qualification, R.S.Q. 1977, c. F-5, s. 45; An Act to Amend the Canada Labour Code, R.S.C. 1970 (2d Supp.), c. 17, s. 16 (*amending* R.S.C. 1970, c. L-1, by adding s. 60(1)). British Columbia, Alberta, Prince Edward Island and Saskatchewan have no group termination provisions.

¹⁷⁶ R.R.O. 1970, Reg. 251, s. 3.

similar notice to the Minister of Labour¹⁷⁷ and is required to cooperate with the Minister during the period of notice in any action or program intended to facilitate the re-establishment in employment of the employees who have lost their jobs.¹⁷⁸

A startling limitation was placed on the group notice provision by a decision of the Ontario Supreme Court in Bankruptcy which held that what is now section 40 does not apply to termination of employment caused by bankruptcy of the employer.¹⁷⁹ This conclusion was drawn from the wording of the statute requiring the employer to cooperate and not to alter terms and conditions of employment once notice was given. This the Court perceived as indicating a legislative intent that the notice provisions were to apply only to an ongoing employment relationship. However, the Court failed to consider section 40(7) of the Act which requires payment where notice is not given, and hence where the employment relationship does not continue.¹⁸⁰ If employees in the drastic situation where insolvency occurs are left without protection, much greater hardship will occur than where the company continues to operate and be involved in the employee adjustment process. To deny employees payment in lieu of notice, in addition, imposes a double hardship.

In addition to notice requirements implied in the contract of employment and statutorily required notice periods, collective agreements often provide for notice periods before layoffs can take place. These vary from the statutes in that they often apply to temporary layoffs whereas the statutes exclude temporary layoffs. In 1979, sixty-five percent of all major collective agreements covering employees in Canadian manufacturing industries required some sort of notice.¹⁸¹ The notice period requirements tended to be rather short, however, with only three percent of the agreements requiring ten or more days' notice. One might conclude from this that these notice provisions are not really intended to deal with permanent plant shutdowns, relocations or cutback decisions.

A substantially longer notice period is required if employees are to take action to find new employment when there are mass terminations. The notice should serve more than to give the interested groups — employees, union, government and community — time to set up a program before the worker is displaced. Whether it will have been to find

¹⁷⁷ R.R.O. 1970, Reg. 251, s. 6.

¹⁷⁸ Employment Standards Act, R.S.O. 1980, c. 137, s. 40(5).

¹⁷⁹ *Re Malone Lynch Sec. Ltd.*, [1972] 3 O.R. 725, 17 C.B.R. (N.S.) 105, 29 D.L.R. (3d) 387 (S.C. Bank.).

¹⁸⁰ I. CHRISTIE, *supra* note 170, at 422.

¹⁸¹ LABOUR CANADA, PROVISIONS IN MAJOR COLLECTIVE AGREEMENTS COVERING EMPLOYEES IN CANADIAN MANUFACTURING INDUSTRIES Table 16, at 20-21 (1979). In the United States, of 1,536 collective agreements covering 1,000 or more workers, 669 required advance notice of layoffs, 160 required advance notice of plant shutdown or relocation and 171 required advance notice of technological change. U.S. DEP'T OF LABOR, *supra* note 119, at 100.

new employment, a training program, a scheme of early retirement or mobility assistance, there should be no delay between the time the employee is out of work and the time when he can take advantage of these alternatives.

The management argument that prolonged notice is impractical or would place a severe hardship on employers is not borne out.¹⁸² Evidence indicates that in many shutdowns, the move is being considered a substantial period in advance.¹⁸³ Where, because of unpredictable circumstances, the employer cannot foresee the need to shut down within the required notice period, it could be relieved of its obligation if it satisfies either a government official or tribunal that it could not give the required notice.¹⁸⁴

Another concern is that longer notice periods produce problems of workforce morale, leading to reduction in productivity and a loss of skilled and semi-skilled employees.¹⁸⁵ The younger and skilled workers will be able to find new employment more easily than others, and with the notice of termination hanging over them will have little hesitation in leaving during the notice period.¹⁸⁶ The problems of maintaining a satisfactory workforce throughout the period, however, is one of the costs the employer should have to bear. Otherwise, the employees will have to bear the social and economic costs of dislocation which are magnified if the employee has not had sufficient opportunity to consider alternatives before he is terminated.

The *Carrothers Report* rejected the notion that the length of notice should be uniformly increased.¹⁸⁷ It agreed that the sole purpose of notice

¹⁸² See B. PORTIS & M. SUYS, *supra* note 14, at 27; SCHULTZ & WEBER, STRATEGIES FOR THE DISPLACED WORKER 18 (1966).

¹⁸³ SELECT COMMITTEE INTERIM REPORT (1980). See also B. BLUESTONE & B. HARRISON, *supra* note 11, at D-4.

¹⁸⁴ Senate Bill 1609: Employee Protection and Stabilization Act 1979 proposes a one year notice requirement. Where the intent to terminate or transfer operations has not been formed that early, there is a duty of prompt notice (s. 4(a)). This seems to leave great discretion with the employer, depending on the meaning of intent. If intent to transfer is synonymous with "final decision" to do so, then the employer may only have to give notice when he is in a position to implement the decision.

An alternative means of limiting the employer's discretion in the matter is that suggested in the National Employment Priorities Act (H.R. 76, 94th Cong., 1st Sess.) (1975) which would dispense with the two year notice period required there only if the Secretary of Labor finds that the business, in good faith, could not predict the closure.

¹⁸⁵ One experience by a union official involved at the closing process at Houdaille Industries of Canada Ltd. in Oshawa disenchanted him with the idea of a six months' notice period supported by the U.A.W. "The tension is too draining. It's like a doctor saying you've got six months to live or a dentist extracting a tooth in slow motion." The Globe and Mail (Toronto), 31 Oct. 1980, at 8. See also R. FRYER & R. MARTIN, *supra* note 27, at 173.

¹⁸⁶ One of the reasons that employers are unwilling to implement severance payment plans unilaterally upon the announcement of a plant shutdown is to entice workers to remain until the end of the notice period. B. PORTIS & M. SUYS, *supra* note 14, at 27.

¹⁸⁷ CARROTHERS REPORT, *supra* note 21, at 198.

requirements was not merely to allow a sufficient period of time to attempt to locate alternate employment, but was also meant to ensure that there is sufficient time to carry out a program aimed at avoiding or reducing lay offs. However, the presently mandated requirements are arbitrary in that they are not directed toward the peculiar circumstances in each case: employability of the workforce affected, characteristics of the local labor market, location, industry and so on. The report suggests that the notice periods should be relaxed, but that there must instead be a notice of intent following which joint consultation, research and adjustment planning would take place.¹⁸⁸

The unions have pushed for longer notice periods not merely to facilitate the adjustment process, but also to create an opportunity to reverse the decision that would create the job loss.¹⁸⁹ The unions also argue that the procedure cannot be left to collective bargaining because large numbers of workers are not covered and the union has little bargaining power when a plant is being closed down.¹⁹⁰

In Europe, members of the European Economic Community are obliged by Directive Number 75/129 of 17 February 1975 to establish procedures which are to be followed before the implementation of mass terminations.¹⁹¹ These primarily require notice to be given and consultation to take place. The suggested minimum is thirty days' notice which can be shortened or prolonged in exceptional cases. In Great Britain, an employer is required to consult with the trade union about redundancies after having given notice of at least ninety days where 100 or more employees are to be dismissed, and promptly in all other situations.¹⁹² The employer is required to disclose in writing the reason for the proposed terminations, the number and description of classes of employees to be dismissed, the method of selecting employees to be dismissed and the method of carrying out the dismissal.¹⁹³ Where there has been a failure to comply with the notice and consultation requirements, a complaint may be made to an industrial tribunal. If the employer is unable to show that there are special circumstances rendering it impractical to comply with the requirements and that he took all steps towards compliance as were reasonable, then he may be ordered to pay a protective award to affected employees.¹⁹⁴ Although similar in nature to a payment in lieu of notice as is required under Canadian statutes, the award is related to a protected period of such length as is equitable and

¹⁸⁸ *Id.* at 196.

¹⁸⁹ SUBMISSION TO THE SELECT COMMITTEE ON PLANT CLOSURES AND EMPLOYEES' ADJUSTMENT 2 (U.A.W. 1981).

¹⁹⁰ *Id.* at 5.

¹⁹¹ Schnorr, *European Communities*, 1 INT'L ENCYCLOPEDIA FOR LAB. L. & INDUS. REL. 73 (1980).

¹⁹² The Employment Protection Act 1975, U.K. 1975, c. 71, s. 99.

¹⁹³ S. 99(5).

¹⁹⁴ S. 101.

just having regard to the employer's default. However the award is not to exceed, in any case, the notice period.¹⁹⁵

In Germany, notice of dismissal cannot be given until there has been a hearing of the works council. A notice of dismissal given without such a hearing is invalid. The basic notice period on individual termination of manual workers is only two weeks. However, for workers over thirty-five years of age, it is extended to one, two or three months for five, ten or twenty years' service respectively.¹⁹⁶

As well, in Germany, where there is a collective dismissal (a dismissal for "urgent operating requirements" affecting: six workers in firms employing twenty-one to forty-nine workers, ten percent of the workforce, more than twenty-five workers in firms employing fifty to 449 workers, or fifty or more workers in firms employing 500 or more workers), there must be consultation with the works council and notification to the local labor office.¹⁹⁷ The termination cannot go into effect until at least thirty days after notification. This waiting period may be extended by the labor office where a special committee considers that the interests of those involved would otherwise be prejudiced.¹⁹⁸

It becomes quite apparent that the goal of the European approach is to have the employers and employees arrive at agreements both to reduce the number of terminations necessary and to mitigate the effects on employees. This emphasis on saving jobs even encompasses denying the right to terminate without approval in some countries.¹⁹⁹ The notice period does provide time for employees, acting on their own or with the help of government placement services, to look for new employment and to arrange financial affairs for any expected period of unemployment.

A number of problems arise from the interpretation of notice provisions. For instance, the group notice requirements in the Ontario Employment Standards Act²⁰⁰ do not apply where less than ten percent of the workers are terminated in an establishment employing fifty or more workers unless "the termination is caused by the permanent discontinuance of all or part of the business".²⁰¹ In interpreting this provision, it was held²⁰² that a shutdown for an indefinite period beyond thirteen weeks²⁰³ did not constitute a permanent discontinuance. Thus if an

¹⁹⁵ S. 101(5).

¹⁹⁶ Ramm, *Federal Republic of Germany*, IV INT'L ENCYCLOPEDIA FOR LAB. L. & INDUS. REL. 135 (1979).

¹⁹⁷ 75 EUROPEAN INDUS. REL. REV. (1980).

¹⁹⁸ *Id.*

¹⁹⁹ *Supra* note 17.

²⁰⁰ R.S.O. 1980, c. 137.

²⁰¹ R.R.O. 1970, Reg. 251, s. 4(1).

²⁰² *Re Falconbridge Nickel Mines Ltd. & Simmons*, 19 O.R. (2d) 448, 85 D.L.R. (3d) 297 (Div'l Ct. 1978).

²⁰³ An employee laid off for more than thirteen weeks is deemed to be terminated unless he continues to receive benefits from the employer: Termination of Employment Regulation, R.R.O. 1970, Reg. 251, s. 1(a) and (b).

employer has an indeterminate intention of reactivating a plant, employees can be laid off under that particular provision without the notice required for group layoffs. The court, in coming to that conclusion, failed to consider the purpose of the section and left the decision as to whether notice is required to the subjective opinion of the employer. If the employer does not consider the layoffs to be permanent, no notice need be given.

If the employer gives the notice required by the Act for group termination with the statement that he intends to recall employees but later decides to close down permanently while the workers are on layoff, is it then required that he give a new notice (and employment during the notice period) or wages in lieu thereof? No case has yet decided the question and the answer is not obvious. If the first notice has been effective in terminating the employment relationship, then the Act may not apply as it is difficult to conceive of terminating a relationship that does not exist. However, section 1(c) of the Ontario statute includes in the definition of "employee" a "person who was an employee". Furthermore, if the first notice is given with the declaration that the layoff is not permanent and that a recall is intended, then it is possible to treat the employment relationship as continuing.²⁰⁴ If the latter interpretation were adopted, the employer should be required to give the second notice. The statute should clearly indicate that notice of a temporary layoff (even beyond the thirteen weeks) should not be a sufficient substitute for a notice of permanent termination.

When notice is required, there can be problems in defining the rights of employees to payment in lieu of notice or severance pay where the employee leaves to take new employment before the notice period ends. Under redundancy pay legislation in Britain, if the employee gives notice that he will be leaving before the end of the notice period given by the employer, he foregoes his right to redundancy pay if the employer requests that he remain and he refuses to do so.²⁰⁵ However, the employee may appeal to a tribunal, which will weigh the case in favour of the employee's departure against the employer's reasons for having him remain. If the tribunal considers it just and equitable, it may order the employer to pay all or part of the redundancy payment.²⁰⁶ Thus, the employer's interest in maintaining a sufficient number of employees to continue operations during the notice period is given some regard. In turn, the employee is given the option of immediately accepting any employment offers or waiting for the redundancy payment. The result seems to be a fair trade-off.

²⁰⁴ Where the layoff is clearly temporary within the limits set in the regulations (s. 1(a)) the employment relationship continues and the employee is entitled to notice. I CHRISTIE, *supra* note 170, at 431.

²⁰⁵ The Employment Protection (Consolidation) Act 1978, U K 1978, c 41, s. 85.

²⁰⁶ S. 85(4).

Rather than resolving all the complexities of notice provisions, this section has attempted to promote the use of notice as an adjustment technique. In combination with consultation mechanisms, bargaining, severance pay and placement services, notice can become an integral part of the adjustment process.

C. Pensions

Entitlement to pension plan benefits will often be crucial to the worker adjusting to a termination of employment resulting from the shutdown or relocation of an establishment. For older workers who are close to retirement age, the manner in which retirement benefits become payable may make the difference between a decent standard of living and economic hardship. When a plant shutdown occurs, a wide range of concerns about pension plans arise. Are they fully funded? When do the employee's rights vest? When can an employee retire early? At what pension rate can the employee transfer pension credits to the plan of a new employer?

A number of provinces have pension benefit acts which require the registration of pension plans.²⁰⁷ Before the plan can be registered, the statute normally will require that the plan provide for the vesting of rights in an employee who has worked ten years and reached the age of forty-five.²⁰⁸ This means that if the employee qualifies under the "ten and forty-five rule", he is entitled, upon termination of employment prior to retirement age, to a deferred life annuity at his normal retirement age at a rate equal to the pension benefits provided for under the terms of the plan. As well, the plan must provide for the employee's contributions to be locked in at the time his rights under the plan become vested.²⁰⁹ This prevents the employee from withdrawing, at the time his employment terminates, any part of his contributions. Instead, these contributions must be applied, under the terms of the plan, toward the deferred life annuity required by the vesting provision. Pension plans may, of course, provide for vesting and locking in before the employee has reached forty-five or where he has less than ten years' service.²¹⁰ Furthermore, a pension plan may provide for a deferred life annuity which is reduced by reason of early retirement.²¹¹

The vesting provisions particularly affect employees who have not met the required service standards, and in many plants this will include a

²⁰⁷ The Pension Benefits Act, R.S.A. 1970, c. 272; The Pension Benefits Act, S.M. 1975, c. 38; Pension Benefits Act, S.N.S. 1975, c. 14; Pension Benefits Act, R.S.O. 1980, c. 373; An Act Respecting Supplemental Pension Plans, R.S.Q. 1977, c. R-17.

²⁰⁸ *E.g.*, Pension Benefits Act, R.S.O. 1980, c. 373, s. 20(1)(a).

²⁰⁹ *E.g.*, Pension Benefits Act, R.S.O. 1980, c. 373, s. 20(1)(c).

²¹⁰ *E.g.*, Pension Benefits Act, R.S.O. 1980, c. 373, s. 20(3)(a).

²¹¹ *E.g.*, Pension Benefits Act, R.S.O. 1980, c. 373, s. 20(5)(a).

significant number of employees. One of the recommendations of the Ontario Commission on the Status of Pensions is to provide for earlier vesting of employee pensions.²¹² Under the U.S. Employee's Retirement Income Security Act²¹³ (ERISA) a plan must provide for vesting under one of three schemes: 100 percent of plan benefits to vest after ten years' service; twenty-five percent after five years' service, rising to 100 percent after fifteen years; or fifty percent of plan benefits to vest where the worker has five years' service and the sum of both his age and number of years' service equals or exceeds forty-five, rising to 100 percent of plan benefits after ten years' service with sum of age and years of service equaling fifty-five or more.²¹⁴ Although these schemes provide somewhat greater flexibility than the vesting arrangements under the Ontario statute, many employees are still without or with significantly reduced pension rights when they are terminated with less than ten years' service.

Plans are required to be funded in accordance with tests for solvency prescribed by regulations.²¹⁵ This does not require that the plan be fully funded.²¹⁶ In cases of "flat benefit" plans, the amount of the benefit to be received by an employee is fixed and does not vary with wages earned.²¹⁷ An unfunded liability may arise with these plans if new benefits have been added or where actuarial assumptions upon which the funding is based are in error. In the first instance, the improvement must be fully funded within fifteen years.²¹⁸ Thus, if a plant closed five years after the liability arose, only one-third of the required funds for the improvement would have been provided. This is a great concern in industries where plant shutdowns are taking place; indeed, it is of particular concern in Ontario where major unions which are representing automobile, steel and rubber workers have plans of the "flat benefit" type.²¹⁹

A recent amendment to the Ontario legislation introduced a guarantee fund arrangement.²²⁰ A fund administered by the Pensions Commission is set up to ensure payment of benefits when a pension plan is wound up. The fund is entitled to receive loans from the Consolidated Revenue Fund of the province. When the Commission makes payments out of the fund and into a pension plan because the assets of that pension plan are not sufficient to provide the benefits guaranteed by the Act, the

²¹² SECOND REPORT OF THE ROYAL COMMISSION ON THE STATUS OF PENSIONS IN ONTARIO 314 (1980).

²¹³ 29 U.S.C.A. § 1001-1381.

²¹⁴ S. 1053.

²¹⁵ Pension Benefits Act, R.S.O. 1980, c. 373, s. 21.

²¹⁶ R.R.O. 1970, Reg. 654, s. 7.

²¹⁷ Fichaud, *Pensions: A Primer for Lawyers*, 2 DALHOUSIE L.J. 369, at 373 (1976).

²¹⁸ R.R.O. 1970, Reg. 654, s. 2(3)(b)(ii).

²¹⁹ SELECT COMMITTEE INTERIM REPORT 23.

²²⁰ Pension Benefits Act, R.S.O. 1980, c. 373, s. 30.

Commission obtains a lien on the assets of the employer for the amount of the payment.²²¹

A similar arrangement exists in the United States under the aegis of ERISA. A Pension Benefit Guaranty Corporation is established²²² which guarantees the payment of all nonforfeitable benefits under a single-employer plan which has been terminated.²²³

Another concern to employees whose jobs are terminated is the portability of their pension plans. Portability is the facility to transfer credit for service with a previous employer to a new employer's pension plan.²²⁴ One advantage to a worker of a portable pension plan is that it provides easier access to information regarding the plan because he will be working for the employer responsible for it. More importantly, the sum of several fragments of vested retirement income is often less than if all the rights accrue in the same plan.²²⁵ Furthermore, an employee may be unaware of his vested rights when they are spread among several plans, and thus may not apply to receive them. Finally, without the right to transfer service credits from one employer to another, an employee may have difficulties in ever acquiring vested pension rights. The type of pension where portability is particularly valuable is where the amount of the benefit is based on the worker's five year earning average before retirement or on the best five years of earnings.

Portable pension arrangements can be made voluntarily within an industry.²²⁶ The desirability of promoting labor mobility and the protection of employee interests combine to make portable pension plans an important element in the extension of adjustment assistance on plant shutdowns. However, particular problems exist in Canada in developing a concept of portability by way of statutory enactments because of the number of legislative jurisdictions involved. In addition to the Canada Pension Plan and Old Age Pensions which are under federal jurisdiction, provincial legislatures have legislative authority over the majority of private pension plans. Effective portability legislation would probably require uniform or reciprocal legislation across the country, although it may be an important step to make it applicable within a province.

D. Trade Adjustment Assistance

The federal government, through its trade policy, is able substantially to affect the viability of certain domestic industries. By lowering

²²¹ S. 33.

²²² 29 U.S.C.A. § 1302.

²²³ § 1322.

²²⁴ Breithaupt, *Resolving the Portability Problem*, 17 CAN. BUS. REV. 46 (1980).

²²⁵ Phillips & Fletcher, *The Future of the Portable Pension Concept*, 30 INDUS. & LAB. L. REV. 197 (1976-77).

²²⁶ Breithaupt, *supra* note 224, at 47, describes the agreement made among the insurance companies in Canada.

tariff barriers, manufacturing sectors which have hitherto been protected in the domestic market may be suddenly faced with keen competition from imports. This often results in the dislocation of workers, possibly in large numbers. Because the reduction in tariffs is seen to be beneficial for the overall economy, the disruption caused by the lowering of trade restrictions should not be borne by the workers alone. This rationale has led to the introduction of trade adjustment assistance legislation. The United States first introduced such provisions in 1962 with the implementation of the Trade Expansion Act.²²⁷ The wording and subsequent interpretation of the relevant provisions for assistance were so narrowly construed that until 1969 there was not a single instance in which assistance was granted under the Act.²²⁸ The 1965 U.S.-Canadian Automotive Trade Products Agreement²²⁹ incorporated adjustment assistance provisions as part of U.S. commercial policy for a three year period. Similar programs were instituted in Canada. With funds supplied by the federal government, workers displaced because of competition were eligible to receive up to sixty-five percent of income for a maximum of fifty-two weeks. Workers enrolled in retraining programs were entitled to an additional twenty-six weeks of benefits in order to enable them to complete the program, and a worker over the age of sixty could receive an additional thirteen weeks. Furthermore, a relocation allowance including moving expenses and a lump sum payment to cover "start-up" costs were made available.

The acceptability of the Auto Pact and the adjustment program is attributable to a number of factors such as the homogeneity of the industry in Canada and the United States and acceptance of the scheme in the long run interests of employees by the UAW which represented employees in both countries. Costs of assistance were small because of the favourable overall economic conditions at the time the program was in effect.²³⁰

The United States Trade Act of 1974²³¹ introduced a package of reforms increasing benefits for workers under the program, lowering eligibility criteria and streamlining the procedure for applying for benefits.²³² Workers may petition the Secretary of Labor for a certification of eligibility to apply for adjustment assistance either as a group or through their union or other authorized representatives. Eligibility depends on finding that a significant number or proportion of workers in the firm have or are threatened with total or partial separation; that sales or production in the firm has decreased absolutely; and that

²²⁷ Pub. L. No. 87-794, 76 Stat. 872.

²²⁸ Cprek, *infra* note 232, at 595.

²²⁹ Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016

²³⁰ Jonish, *Adjustment Assistance Experience Under the U.S.-Canadian Automotive Agreement*, 23 INDUS. & LAB. REL. REV. 553, at 559 (1970)

²³¹ 19 U.S.C. § 2251-2394 (1978).

²³² Cprek, *Worker Adjustment Assistance: Black Comedy in the Post Renaissance*, 11 LAW & POL'Y IN INT'L BUS. 593 (1979).

increases of imports of articles like or directly competitive with articles produced by the workers' firm contributed greatly to such partial or total separation and to such decline in sales or production.²³³

Trade readjustment allowances payable to an adversely affected worker for a week of unemployment are seventy percent of his average weekly wage reduced by fifty percent of the amount of remuneration for services performed during the week²³⁴ and by any unemployment benefits received in the week. To be eligible the employee must have worked twenty-six of the fifty-two weeks preceding the total or partial separation at wages of thirty dollars or more per week.²³⁵ The payments can last for up to fifty-two weeks, with an additional twenty-six weeks for those enrolled in a training program and for persons who are sixty years of age or more at the time of termination.²³⁶

Additional assistance is available in the form of placement services, testing and counselling provided under other federal laws,²³⁷ supplementary housing expenses,²³⁸ job search allowances²³⁹ and relocation allowances.²⁴⁰

In addition to providing aid to workers, firms can become entitled to assistance in the form of loans or guarantees of loans²⁴¹ if in the judgment of the Secretary of Commerce they will materially contribute to the adjustment of the firm. Furthermore, a community may, upon a finding of eligibility, become entitled to assistance in the form of loan guarantees provided under the Public Works and Economic Development Act of 1965 and additional loan guarantees under the Act.²⁴² Where a corporation in a community applies for a loan guarantee under these provisions, preference will be given to those establishing an employee stock ownership plan.²⁴³

Canada has also provided adjustment assistance benefits, but only to workers in the selected industries of clothing, textile,²⁴⁴ footwear and tanning.²⁴⁵ The type of assistance given is primarily a pre-retirement benefit. However, a bill passed by Parliament in the spring of 1982 proposes to expand the scope of the program providing adjustment

²³³ 19 U.S.C. § 2272 (1978).

²³⁴ 19 U.S.C. § 2292(a) (1978).

²³⁵ 19 U.S.C. § 2291(2) (1978).

²³⁶ 19 U.S.C. § 2293 (1978).

²³⁷ 19 U.S.C. § 2295 (1978).

²³⁸ 19 U.S.C. § 2296 (1978).

²³⁹ 19 U.S.C. § 2297 (1978).

²⁴⁰ 19 U.S.C. § 2298 (1978).

²⁴¹ 19 U.S.C. § 2344 (1978).

²⁴² 19 U.S.C. § 2373 (1978).

²⁴³ 19 U.S.C. § 2373(f) (1978).

²⁴⁴ Adjustment Assistance Benefit Regulations (Clothing and Textile Workers), C.R.C., c. 316.

²⁴⁵ Adjustment Assistance Benefit Regulations (Footwear and Tanning Workers), C.R.C., c. 317.

benefits.²⁴⁶ The Act would authorize the Governor General in Council to designate an industry under the Act.²⁴⁷ Workers employed in such an industry may then become entitled to benefits. Before being designated, an industry must be undergoing significant economic adjustment of a non-cyclical nature by reason of import competition or industrial restructuring pursuant to a federal government program encouraging such restructuring. The industry would be designated only if the economic adjustment were resulting in a significant loss of employment. The designation may be general, in which case it is in effect for three years, or with respect to a particular region, in which case it is in effect for one year. Limited extensions are possible.²⁴⁸

For an employee to receive benefits pursuant to the Act, he must first be certified as eligible to apply for benefits by a Labour Adjustment Review Board. It must be established that: (1) he was laid off; (2) the establishment from which he was laid off was in a designated industry; (3) the number of employees at the establishment was reduced as a result of layoffs in the preceding twelve month period by at least ten percent or fifty employees, whichever is the lesser; and (4) his layoff resulted from an economic adjustment which was the reason for designating the industry in the first place.²⁴⁹

Having gone through all this procedure, the unemployed worker has only established a preliminary eligibility for benefits. With certificate in hand, he then must go to the Canada Employment and Immigration Commission and actually apply for the benefits. Once again there are a number of criteria to guide the Commission's determination of the employee's entitlement to benefits. These are: (1) that he is a Canadian citizen or a permanent resident in Canada; (2) that he was employed for at least ten of the past fifteen years in the designated industry of which the establishment from which he was laid off was a part; (3) that he was at least fifty-four years old and no more than the earliest age at which a retirement pension could be paid him under the Canada or Quebec Pension Plan; (4) that he has exhausted all unemployment insurance benefits to which he is entitled; (5) that he is not receiving a pension under the Canada or Quebec Pension Plan and that; (6) he has no present prospect of employment, whether with or without training or relocation assistance, or has accepted employment with earnings less than his average weekly insurable earnings as determined under the Unemployment Insurance Act, 1971.²⁵⁰ Some latitude is permitted if an employee

²⁴⁶ Labour Adjustment Benefits Act, S.C. 1980-81-82, c. 89. As well, applications for benefits formerly made under s. 21 of the Textile and Clothing Board Act, S.C. 1970-71-72, c. 39, and under the regulations set out in notes 244 and 245 *supra* would be made under this Act.

²⁴⁷ S. 3(1).

²⁴⁸ S. (2)-(8).

²⁴⁹ S. 11.

²⁵⁰ S. 13(1).

does not meet requirements (2) and (3) above and can demonstrate that he would suffer severe financial hardship if he were not to receive benefits.²⁵¹ The Commission is required to review the circumstances of the employee receiving benefits at least once every six months to determine if he continues to meet the requirements.²⁵²

The amount of the benefit to which the employee is entitled, once certified by the Board and declared eligible by the Commission, is sixty percent of his average weekly insurable earnings. This may be reduced by any other employment income or income from business, pension benefits, training allowance, or severance pay that he receives after the benefits have been commenced.²⁵³

It is evident that the Act sets up an extremely complex administrative framework and strictly controls who will be entitled to benefits. Its ultimate aim is not to help employees adjust to a new employment situation, but rather is to give a minimum level of income security to those who are not able to adjust. It is, in effect, an early retirement benefit which ends when the employee becomes entitled to a Canada or Quebec Pension benefit. The scope of industries designated is a discretionary decision of the Cabinet, and this designation may be more a bow to political pressure than a dispassionate assessment of economic need. Nevertheless, it is a preliminary response to dislocation caused by changes in government economic policy or by import competition and may serve as a model for the proposition that those whose policy and planning are the cause of economic disruption have a duty to help affected workers adjust to the new economic order.

The United States trade adjustment assistance for workers has two aims: income maintenance and preparing workers for new jobs. The income maintenance is primarily intended to supplement unemployment insurance benefits by raising the percentage of the worker's income which is maintained²⁵⁴ and by increasing the length of time to which the worker is entitled to the benefits.²⁵⁵ The Canadian assistance concentrates on those older workers who are unable to find employment and whose unemployment insurance benefits have run out. The narrow scope of the Canadian program may in part be attributable to the belief that for other than older workers, the present unemployment insurance system and manpower adjustment services provide adequate protection.

²⁵¹ S. 13(2).

²⁵² S. 13(3).

²⁵³ S. 17.

²⁵⁴ The amount of benefits to which an employee is entitled varies from state to state, but as a percentage of income is almost always less than two-thirds of his employment income. See *All State Charts*, 1B UNEMPL. INS. REP. para. 3001 (CCH 1981).

²⁵⁵ Forty-one states pay benefits for a maximum of 26 weeks only. See *All State Charts*, *id.*

Both the proposed United States National Employment Priorities Act of 1979²⁵⁶ and the Employment Protection and Community Stabilization Act of 1979²⁵⁷ take the income maintenance approach as part of the package of protection for employees. Employers covered by the proposed statute who close down or relocate under the latter bill would be required to make what is called severance payments²⁵⁸ equal to the difference between the unemployment insurance benefit to which the employee is entitled by state law and eighty-five percent of his weekly income for a period of fifty-two weeks. Workers over age fifty-five at the eligible date would be entitled to an additional fifty-two weeks of benefits. The major difference from the trade adjustment assistance is that the employer, not the government, is paying the benefits.

The government pays trade adjustment assistance because of its decision that as a change in trade policy is beneficial to the country as a whole, it must assume the onus for spreading the losses incurred in an equitable fashion.²⁵⁹ Similarly, where companies make decisions about what is good for the company as a whole, it should bear the responsibility of ensuring that the losses are equitably spread, and not permitted to fall primarily on the employees. Just as it would be possible to prevent the localized losses by continuing a high tariff policy, it would be possible to decrease the losses suffered by employees by putting restrictions on the company's right to close down. However, that may not produce the overall best result for the economy: the cost of requiring assistance to be given to employees is less than the cost of preventing the change.

E. Bankruptcy and Insolvency

A very real concern of employees will be the ability of an employer to pay that which is owed when the employer decides to shut down. The problem is exacerbated when the employer becomes insolvent or bankrupt. Although the employee may be given preference for wages owed,²⁶⁰ there is a likelihood that the assets will not be sufficient to pay the workers' claims.

²⁵⁶ S. 1608, 96th Cong., 2d Sess. (1979).

²⁵⁷ S. 1609, 96th Cong., 2d Sess. (1979).

²⁵⁸ But this is not a severance payment according to the use of that term in this paper. See note 111 and accompanying text *supra*.

²⁵⁹ Not everyone is convinced that the trade adjustment assistance produces such an equitable distribution of losses. See Prosten & MacDonald, *A Union View of the Multinational Problems*, in *LABOUR RELATIONS IN ADVANCED INDUSTRIAL SOCIETIES: ISSUES AND PROBLEMS I* (M. Martin & M. Kassalow eds. 1980).

²⁶⁰ See Bankruptcy Act, R.S.C. 1970, c. B-3, s. 107, which provides that, subject to the rights of secured creditors, the wages of a worker for services rendered during the three months preceding bankruptcy, to the extent of five hundred dollars, rank fourth, after funeral expenses of a deceased bankrupt, costs of administering the bankruptcy and a special levy on all dividends paid out.

Furthermore, restrictive interpretation of the Bankruptcy Act has led the courts to conclude that claims for pay in lieu of notice²⁶¹ and for severance pay under a collective agreement²⁶² are not wages within the meaning of the statute. Hence, workers rank merely as unsecured creditors without any preference for these claims.

Under the United States Bankruptcy Reform Act of 1978,²⁶³ section 507(a)(3) gives third priority to "wages, salaries or commissions, including severance and sick leave pay" earned within ninety days before filing of the bankruptcy petition or date of cessation of the debtor's business. Recovery is limited to \$2,000 per individual. Where a business continues in operation after commencement of proceedings in bankruptcy, first priority is given to administrative expenses which include wages, salaries and commissions for services rendered after the commencement of the case.²⁶⁴ Whether an employee would be entitled to severance pay if terminated after reorganization begins is unclear, but may depend upon whether a flat rate, not depending on years worked, is due. If so, the entire amount should receive priority, whereas if the contract provides for severance pay varying with the years of service, only a *pro rata* share earned while the debtor in possession administered the business should be given priority.²⁶⁵

To the extent that the statutory provisions in Canada creating a secured interest in wages are recognized by the courts,²⁶⁶ that is likely to be a more effective mechanism of protection than giving a priority which would be subject to claims of other secured creditors.

The Canadian provincial jurisdictions create collection mechanisms whereby governmental officials become involved in collecting wages owed.²⁶⁷ Additional protection may be extended in the form of deemed trusts and deemed mortgages to allow employees an opportunity to rank ahead of or on the same level as secured creditors.²⁶⁸ However, court deference to the interests of secured creditors has generally led to restrictive interpretations of these rights.²⁶⁹

The protection of employees on insolvency has been the subject of recent study by the European Commission. The lack of adequate

²⁶¹ *Re Lewis' Dep't Store Ltd.*, 17 C.B.R. (N.S.) 113 (Ont. S.C. Bank. 1972).

²⁶² *Re Hamilton Harvey Ltd.*, [1975] W.W.R. 174, 21 C.B.R. (N.S.) 234 (B.C.S.C. Bank.).

²⁶³ 11 U.S.C. § 1-151326 (1978).

²⁶⁴ 11 U.S.C. § 707(a)(1) and 503(b) (1978).

²⁶⁵ Henrickson, *The Priority of Severance Pay Under the Bankruptcy Reform Act*, 3 INDUS. REL. L.J. 566, at 588 (1979).

²⁶⁶ See *MacMillan v. Frizzell Plumbing & Heating Ltd.*, 23 N.S.R. (2d) 684, 56 D.L.R. (3d) 415 (S.C. 1975).

²⁶⁷ For a thorough consideration of a worker's status as creditor and the various statutory provisions for his protection, see I. CHRISTIE, *supra* note 170, at ch. 8.

²⁶⁸ *Id.*

²⁶⁹ See *Board of Indus. Rel. v. Avco Financial Servs. Realty Ltd.*, [1979] 2 S.C.R. 699, 28 N.R. 140.

protection has resulted in proposals for some form of guarantee institution.²⁷⁰ This could be established either through special or existing social security institutions or by introducing laws requiring a compulsory private insurance scheme for employers on behalf of their employees. Employers alone would be required to contribute, and preferably in such a way that the fund would always have adequate reserves to cover any payments that may have to be made to employees.²⁷¹

The types of payments for which the worker could look to such a fund might include remuneration for work performed, holiday pay, continued payment of wages in the case of sickness and compensation for dismissal and seniority payments. The extent of these guaranteed payments would be limited. Directed only towards entitlements already earned, it would be difficult to justify using the same type of fund to guarantee future retirement income in cases where pension plans have not been totally funded. Such payments would be on an entirely different scale and could be better handled through other mechanisms.²⁷²

Recommendations for a similar type arrangement have been made by a Canadian Senate committee, which stated:

Consideration should be given to the creation of a Government administered fund under the authority of the Bankruptcy Act out of which unpaid wages of employees could be paid forthwith on a bankruptcy. The claim for unpaid wages would cover wages in arrears to a limit of \$2,000 and should not include vacation pay, severance pay and fringe benefits. Contributions to this fund could be received from employers and employees.²⁷³

Particular types of payments may be guaranteed under varying arrangements. In Great Britain, for example, redundancy payments are guaranteed for the employee who, if the employer fails to make the required payment, may look to the Redundancy Fund.²⁷⁴ In a statute recently introduced in Maine, the state made available appropriations for a fund to which employees could look for payment of at least a week's wages if the employer failed to pay wages already owed.²⁷⁵ Under the proposals made in several of the bills introduced in the 96th Session of Congress, if employers required to pay a form of supplementary

²⁷⁰ *Workers' Protection in the Event of Employers' Insolvency*, 47 EUROPEAN INDUS. REL. REV. 2 (1977).

²⁷¹ *Id.* at 3.

²⁷² *Id.*

²⁷³ SECURED CREDITORS: (A) PRIORITY WAGE EARNERS, FINDINGS AND RECOMMENDATIONS OF THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE RELATING TO THE SUBJECT MATTER OF BILL C-60, cited in I. CHRISTIE, *supra* note 170, at 505.

²⁷⁴ See note 151 *supra*. In addition, the Redundancy Fund can be used as a source of funds to pay other debts owed to an employee by an insolvent employer, including eight weeks' arrears in wages, payments in lieu of notice, vacation pay, and awards for unfair dismissal: Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 122.

²⁷⁵ 26 Me. Rev. Stat. Ann., s. 632 (1980 Supp.).

unemployment benefits reneged on their statutory obligation, then the U.S. Government would cover the workers' entitlement.²⁷⁶ As already discussed, pension payments may be guaranteed by guarantee funds and insurance arrangements.²⁷⁷

These arrangements are steps in the right direction for insuring an employee's wages and other payments when bankruptcy or insolvency occurs.

IV. CONCLUSION

No attempt has been made to consider systematically all the possible measures that could be introduced to provide significant protection to workers during plant shutdowns. The foundation of the system is, and will continue to be, the unemployment insurance benefits to which an employee becomes entitled. As well, the training programs,²⁷⁸ placement services²⁷⁹ and labor mobility programs²⁸⁰ already in effect, although not designed specifically to deal with plant closing problems, play an essential role in the adjustment process. The problem faced is in integrating any additional measures with those already in effect.

For example, entitlement to severance pay, if it is meant to be other than a form of supplementing unemployment benefits or of transferring some of the initial costs of unemployment should not in any way be contingent on the worker's reception of unemployment benefits.²⁸¹ To delay payment of unemployment insurance by treating severance benefits as income or to reduce the amount of unemployment insurance benefits does little to compensate the worker for the loss he has suffered.

²⁷⁶ Employee Protection and Community Stabilization Act of 1979, S. 1609, 96th Cong., 2d Sess. § 8(h)(2) (1979); National Employment Priorities Act of 1979, S. 1608, 96th Cong., 2d Sess. § 8(d)(1) (1979).

²⁷⁷ See note 271 and accompanying text *supra*.

²⁷⁸ Adult Occupational Training Act, R.S.C. 1970, c. A-2; Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 39 (as amended by S.C. 1976-77, c. 54, s. 41).

²⁷⁹ Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 140; National Employment Service Regulations, C.R.C., c. 1573.

²⁸⁰ Manpower Mobility Regulations, S.O.R./80-112 (114 CAN. GAZETTE Pt. II, 363); Labour Mobility and Assessment Incentives Regulations, C.R.C., c. 330.

²⁸¹ In Canada, regulations specifically provide that severance pay is not to be treated as earnings for the purpose of reducing benefits: see Unemployment Insurance Regulations, C.R.C., c. 1576, s. 57(3)(f). In the United States many state laws prohibit an employee from receiving compensation during any week he receives remuneration in lieu of notice or dismissal payments: see 1B UNEMPL. INS. REP. para. 1995 (CCH 1981). In Great Britain, where no specific language in the Act or regulations deals with the entitlement to unemployment benefits when no redundancy payments have been made, a 1979 decision by a commissioner has set a precedent for not taking into account redundancy payments in determining eligibility for unemployment benefits: see *Regina v. National Ins. Comm'r*, [1979] Q.B. 361, [1979] 2 All E.R. 278 (C.A.).

The effectiveness of manpower consultative agencies can be improved by requiring employer participation in committees set up to deal with adjustment measures.²⁸² Coordination between provincial and federal jurisdictions in Canada can present problems for setting policies in adjustment programs and redundancy management goals.²⁸³ As well, Canadian concerns about foreign controlled companies have given rise to proposals for special economic sanctions if they become runaway plants.²⁸⁴ Calls for forms of joint consultation, increased collective bargaining rights whenever a significant change takes place during the term of the collective agreement and employee involvement from an early stage in the decision-making process all highlight the real and serious concern of workers for a say in controlling their future.

Other proposals that have not been considered in this paper include the right to time off after the worker has received notice of impending termination to allow an opportunity to look for work.²⁸⁵ Limitations on the rights of employers to terminate until workers have been placed in alternate employment could enormously increase the security of employees, but would also be a great deterrent to change. Mandatory job transfer rights could be another significant employee right. These were given a prominent role in the Armour collective agreements in the early 1960's²⁸⁶ and are part of the package proposed in the National Employment Priorities Act of 1979 and the Employee Protection and Community Stabilization Act of 1979.

²⁸² Employment Protection Act, R.S.O. 1980, c. 137, s. 40(5), states:

An employer who terminates or who proposes to terminate the employment of an employee shall, when required by the Minister for the purpose of facilitating the re-establishment of such employee in employment,

(a) participate in such actions or measures as the Minister may direct,
(b) participate in the establishment of a committee upon such terms as the Minister considers necessary. . . .

²⁸³ See CARROTHERS REPORT, *supra* note 21, at 111, which states

In some instances rivalry between federal and provincial officials appears to have had detrimental effects on those citizens who urgently required public services. In other instances, overly bureaucratic procedures appear to inhibit the efficient application of programs and resources to target situations. Several areas of labour market policy are shared by federal and provincial governments. The facts of federal provincial relations in Canada today do not give cause for optimism concerning the shared administration of policies and programs of so obviously political impact.

²⁸⁴ See, e.g., *Stop the Shutdowns and Layoffs — Adopt an Industrial Development Strategy for Full Employment*, in SUBMISSION OF THE ONTARIO FEDERATION OF LABOUR TO THE GOVERNMENT OF ONTARIO (Jun. 1980).

²⁸⁵ In Great Britain a worker who has been given notice is entitled to "reasonable time off during the employee's working hours" in order to look for new employment or to make arrangements for future retraining; see Employment Protection (Consolidation) Act 1978, U.K. 1978, c. 44, s. 31.

²⁸⁶ See SCHULTZ & WEBER, *supra* note 182. See also AUTOMATION COMMITTEE PROGRESS REPORT, REPORT OF COMMITTEE ESTABLISHED UNDER COLLECTIVE AGREEMENT BETWEEN ARMOUR CO. AND TWO UNIONS (1961).

There is no one measure that is certain to be effective in all situations. Collective bargaining may produce effective results through union concessions or through terms contained in collective agreements which raise the costs of closing down. However, trade unions have generally not been successful in introducing widescale programs because of the difficulties of negotiating complex problems associated with economic recession, competitive pressures and technological obsolescence.²⁸⁷ Furthermore, there is a large segment of the workforce not even protected by the bargaining process, such as it is. Legislative intervention is required, both to ensure that industry bears its share of the readjustment costs and to provide additional resources to ease restrictions on labor mobility and maintain a decent income standard for those willing to work but unable to find jobs.

²⁸⁷ See *Employee Codetermination*, *supra* note 32, at 989.