TOWARDS A NEW VITALITY: REFLECTIONS ON 20 YEARS OF COLLECTIVE BARGAINING REGULATION

*Professor George W. Adams**

There is much current controversy over the appropriate direction of labour law reform particularly in the light of concerns over Canadian employer competitiveness in an increasingly global trading environment. Using the influential Federal Task Force Report on Labour Relations as a starting point, Professor Adams reviews the performance of Ontario's labour laws over the past 20 years against these concerns, other recent criticisms, and proposed alternatives. He concludes the Task Force Report remains substantially correct in its assertion that collective bargaining provides greater opportunity for individual fulfilment and achievement in dealing with distributional issues in a market oriented society than any proposed alternative.

He argues that there is no necessary correlation between rigorous labour laws and workplace inefficiency as evidenced by the superior competitive performance of several European and Scandinavian countries despite the existence in those countries of more restrictive workplace laws and the presence of much greater trade union density. Accordingly, Professor Adams concludes that the policy objective of improving, extending and preserving collective bargaining still prevails. At the same time he points out the reality

Il y a actuellement de nombreuses controverses au sujet de la direction appropriée que devrait suivre la réforme du droit du travail, particulièrement à la lumière de préoccupations concernant la compétitivité des entreprises canadiennes dans un contexte de mondialisation croissante des marchés. En utilisant comme point de départ l'important rapport fédéral de l'Équipe spécialisée en relations de travail, le professeur Adams examine les résultats atteints par la législation du travail de l'Ontario pendant les vingt dernières années en tenant compte des préoccupations mentionnées, d'autres critiques faites récemment et des solutions proposées. Il en vient à la conclusion que l'assertion de l'Équipe spécialisée selon laquelle la négociation collective est le mécanisme qui permet mieux que tout autre l'épanouissement individuel lorsqu'on aborde des problèmes d'affectation de ressources dans une société axée sur le marché est en grande partie toujours vraie.

Il maintient qu'il n'y a pas nécessairement corrélation entre une législation du travail exigeante et l'inefficacité dans les entreprises tel que le démontre la compétitivité supérieure de plusieurs pays européens et scandinaves, alors que dans ces pays il existe

* Faculty of Law, Common Law, University of Ottawa. I wish to thank my colleague William Kaplan for his helpful comments and suggestions. A version of this paper was delivered as the Larry Sefton Memorial Lecture at Woodsworth College, University of Toronto, February 11, 1991. Larry Sefton passed away almost 20 years ago. Those who knew him describe him as having been a great trade union leader: enlightened, inspiring and imaginative. Through his life he made a most important contribution to labour market policy in this country. It, therefore, was an honour to give this public lecture which bears his name.

that increasing competitiveness is a condition precedent to rising social standards and, thus, the need for our workplaces to adapt to the changes they face by continuous improvement and innovation.

Professor Adams ends his essay by sketching both a range of reforms that could make collective bargaining yet more accessible to workers and a series of more fundamental policy changes that might facilitate labour/management cooperation and adaptation to change.

une législation du travail plus restrictive et un taux plus élevé de syndicalisation. Par conséquent, le professeur Adams conclut que l'objectif visant à améliorer, étendre et préserver le régime de négociation collective est toujours en vigueur. Par la même occasion, il attire l'attention sur le fait qu'une compétitivité croissante est une condition préalable à l'amélioration du niveau de vie, et que par conséquent, il est nécessaire que nos entreprises s'adaptent aux changements auxquels elles font face au moyen d'améliorations et d'innovations constantes.

Le professeur Adams termine son essai en esquissant une série de réformes qui pourraient rendre la négociation collective encore plus accessible aux travailleurs et travailleuses, et une série de changements d'orientations fondamentaux qui pourraient faciliter la collaboration entre le monde du travail et le patronat ainsi que leur adaptation au changement.

I. INTRODUCTION

This is an appropriate time to reflect on the direction of labour market policy in so far as it pertains to collective bargaining. We have witnessed a significant decline in trade unionism in the United States of America.[1] In our own country, where the extent of collective bargaining has remained more or less constant but with some recent signs of decline, we are concerned about the role of collective bargaining in a "Free Trade" environment and the growing globalization of competition Canadians face in almost all market places.[2] Moreover, the enactment of a variety of significant workplace laws over the last 10 years appear to bypass collective bargaining as the central labour market regulatory instrument by creating important individual rights. In this respect, I am referring to health and safety laws, human rights legislation, certain employment standards enactments and pay and employment equity legislation.[3] Many feel this trend is a Canadian testament to the decline of collective bargaining.

Significantly, there is also a growing literature, most of it emanating from the United States of America, which chronicles the "transformation of North American workplaces" over the past decade, a transformation accelerated by the recession experienced in the early

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[1] See generally, P.C. Weiler, GOVERNING THE WORKPLACE (Cambridge: Harvard University Press, 1990) [hereinafter GOVERNING THE WORKPLACE]; P.C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty* (1986) 23 HARV. J. ON LEGISLATION 1; P.C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA* (1983) 96 HARV. L. REV. 1769 [hereinafter *Promises to Keep*]; P.C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation* (1984) 98 HARV. L. REV. 351; P.C. Weiler, "The Representation Gap in the North American Workplace" (Larry Sefton Memorial Lecture, Woodsworth College, University of Toronto, 11 February 1989) [unpublished] [hereinafter The Representation Gap].

[2] D. Carter, *The Comparative Effects of U.S. and Canadian Labor Laws and Labor Environment in the North American Competitive Context: The Canadian View* (1987) 12 CAN.-U.S. L.J. 241; G.W. Adams, *The U.S. – Canada Free Trade Agreement and Collective Bargaining* (1988) 14 CAN.-U.S. L.J. 41; M. Gunderson & A. Verma, "Canadian Labour Policies and Global Competition" (Paper presented at the International Business and Trade Law Conference on Canadian Federalism and Global Competition, University of Toronto, 15 September 1990) [hereinafter Canadian Labour Policies]; N.H. Meltz, *Unionism in the Private Service Sector: A Canada U.S. Comparison* [hereinafter *Unionism in the Private Service Sector*] in J. Jenson, ed., CANADIAN AND AMERICAN LABOUR RESPOND: ECONOMIC RESTRUCTURING AND UNION STRATEGIES (Philadelphia: Temple University Press 1991).

[3] In Ontario *see, e.g., Employment Standards Act*, R.S.O., c. 137, s. 40; *Ontario Human Rights Code*, 1981, S.O. 1981, c. 53; *Pay Equity Act, 1987*, S.O. 1987, c. 34. *See generally* P.C. Weiler, *The Wages of Sex: The Use and Limits of Comparable Worth* (1986), 99 HARV. L. REV. 1728 and R. Abella, *Employment Equity* (1987), 16 MAN. L.J. 185.

1980's.[4] This transformation is seen to be driven by fundamental demographic change, technical advances and global market forces. These elements have, in turn, encouraged new approaches to human resource management which, it has been argued, avoid the adversarial nature of collective bargaining as well as other policy flaws associated with encouraging collective workplace action.[5] It is pointed out that management of our workplaces is much more employee-oriented with modern managers exploiting the relationship between worklife quality and productivity. This has led, it is said, to mutual commitment between employees and employers and, thus, a team approach to human resource management. The result, we are told, is not only at odds with collective bargaining but employees so managed have no appetite for a more adversarial approach. In any event, it is added, Canada has already given significant support to the collective bargaining process and that to do more in light of events in the United States (and now Mexico) can only put us at a competitive disadvantage in North American and world markets.

In reply, supporters of collective bargaining have argued that the decline in union density is more a function of the absence of labour law reform and that the new human resource techniques may actually exploit workers and in no way alleviate the need for trade union representation. Scholarly work has also demonstrated that inefficiency and collective bargaining do not walk hand in hand, as do the superior economic performances of several countries having much greater trade union membership density in their labour forces than Canada.[6] But even many supporters of collective bargaining are unsatisfied with both its reach

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[4] T.A. Kochan, H.C. Katz & R.B. McKersie, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (New York: Basic Books, 1986) [hereinafter AMERICAN INDUSTRIAL RELATIONS]; J. Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations* (1991) 44 INDUS. & LAB. REL. REV. 241; Conference Board of Canada, STRATEGIC CONNECTIONS: TECHNOLOGY, INNOVATION AND LABOUR RELATIONS (Report 69-91) by R. Wright (Ottawa: Conference Board of Canada, March 1991) [hereinafter Wright]; R.J. Adams, *Employment Relations in an Era of Lean Production*, (Working Paper No. 361) (McMaster University, Research and Working Paper Series, April 1991).

[5] *See* GOVERNING THE WORKPLACE, *supra*, note 1 at c. 1 and at 191 where the argument is concisely set out but ultimately rejected. *See also* M. Beer *et al.*, MANAGING HUMAN ASSETS (New York: The Free Press, 1984); C. Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects* (1984) 51 U. CHI. L. REV. 1012; J.G. Getman, *Ruminations on Union Organizing in the Private Sector* (1986) 53 U. CHI. L. REV. 45; R.A. Epstein, *A Common Law For Labor Relations: A Critique of New Deal Labor Legislation* (1983) 92 YALE L.J. 1357; R.A. Epstein, *In Defense of the Contract at Will* (1984) 51 U. CHI. L. REV. 947.

[6] *See generally* the work of P. Weiler cited in note 1 and R.B. Freeman & J.L. Medoff, WHAT DO UNIONS DO? (New York: Basic Books, 1984). *See also* D. Wells, SOFT SELL: "QUALITY OF WORKING LIFE" PROGRAMS AND THE PRODUCTIVITY RACE (Ottawa: Canadian Centre for Policy Alternatives, 1986) [hereinafter Wells]; D. Drache & H. Glasbeek, *The New Fordism in Canada: Capital's Offensive, Labour's Opportunity* (1989), 27 OSGOODE HALL L.J. 517 [hereinafter *The New Fordism in Canada*]; M.E. Porter, THE COMPETITIVE ADVANTAGE OF NATIONS (New York: The Free Press, 1990).

and performance prompting them to propose fundamental change. In this respect, several prominent scholars appear to have concluded that collective bargaining has reached its zenith and, in the current environment, needs to be "complemented" or replaced by a brand new enterprise-based institution described as universal and compulsory workplace councils or committees.[7] These bodies, composed of employee and employer representatives in equal numbers, would perform many of the functions for which collective bargaining is now responsible and might ultimately be transformed into multi-union representational vehicles as exist in France and other European jurisdictions which have shunned exclusivity of bargaining rights.

One of the reasons these quite disparate policy perspectives have arisen is that there has been no comprehensive governmental review of labour relations policy in Canada for the last 15 to 20 years. This absence of public review involving the labour market partners and others interested in workplace developments has become very disorienting in the face of the significant forces of change that have impacted our economy. I am referring to demographic changes centering on gender, ethnicity, age and education; OPEC-induced oil pricing crises; relentless technological change; recession and inflation cycles; globalization of trade; major currency fluctuations; and the growth of secondary and tertiary labour markets, to list several of the changes and forces which have affected all North American workplaces over the last 20 years.[8] I suspect this neglect has also fostered the pessimism concerning collective bargaining. Unarguably, then, it is an appropriate time to re-examine our collective bargaining laws.

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[7] D.M. Beatty, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (Kingston: McGill-Queen's University Press, 1987) at 133 [hereinafter PUTTING THE CHARTER TO WORK]; D.M. Beatty, *Ideology, Politics and Unionism* in K.P. Swan & K.E. Swinton, eds, STUDIES IN LABOUR LAW (Toronto: Butterworths, 1983) 299; D.M. Beatty, *Labour is Not a Commodity* in B. Reiter & J. Swan, eds, STUDIES IN CONTRACT LAW (Toronto: Butterworths 1980) 313; R.J. Adams & C.H. Rummel, *Worker's Participation in Management in West Germany: Impact on the Worker, the Enterprise and the Trade Union* (1977), 8 INDUS. REL. J. 4; R.J. Adams, *Should Works Councils Be Used as Industrial Relations Policy?* (1985) 108:7 MONTHLY LAB. REV. 25; R.J. Adams, *Two Policy Approaches to Labour-Management Decision-Making at the Level of the Enterprise* in W.C. Craig Riddell, ed., LABOUR-MANAGEMENT COOPERATION IN CANADA (Toronto: University of Toronto Press, 1986) 87; *Governing the Workplace, supra*, note 1 at chs 5-6; K.E. Klare, *The Labour-Management Cooperation Debate: A Workplace Democracy Perspective* (1988) 23 HARV. C.R.-C.L. L. REV. 39. *See also* H.J. Glasbeek, *Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life* [hereinafter Glasbeek] in G. England, ed., ESSAYS IN LABOUR RELATIONS LAW (Don Mills: CCH Canadian Limited, 1986) 57.

[8] R.B. Reich, THE NEXT AMERICAN FRONTIER (New York: Times Books, 1983); AMERICAN INDUSTRIAL RELATIONS, *supra*, note 4; GOVERNING THE WORK PLACE, *supra*, note 1 at 4-6. *See also* M.L. Contes, D. Arrowsmith & M. Courchene, THE CURRENT INDUSTRIAL RELATIONS SCENE IN CANADA 1989 (Kingston: Industrial Relations Centre at Queen's University, 1989); The Economic Council of Canada, GOOD JOBS, BAD JOBS (Ottawa: Ministry of Supply and Services, 1990) [hereinafter GOOD JOBS, BAD JOBS].

II. Looking Back on 20 Years

Looking back or reflecting is often a useful way of assessing a current situation although not determinative of future direction. Labour laws do not "fall from the sky" as Seymour Lipset has pointed out.[9] Legal institutions reflect underlying political, social and economic forces in society which act as an invisible or not so invisible hand in charting government policy. A critique of existing institutions is healthy and essential to progress. But understanding the wider social, political and economic context, both historical and contemporary, is often the difference between fashioning meaningful reform proposals and ineffectual political rhetoric. It is also helpful to look back and assess our accomplishments if we wish to build on experience or at least not repeat our mistakes.

In looking back on collective bargaining I will be very selective. The 20-year period roughly commences with the Federal Task Force on Labour Relations known as the "Woods Task Force Report".[10] This report embraced the views of several preeminent Canadian labour policy scholars. The Task Force consisted of Chairman H.D. (Bus) Woods, the then Dean of the McGill Faculty of Arts and Science; Fred Carrothers, the then Dean of the University of Western Ontario's Faculty of Law; John Crispo, the then Director of the Centre for Industrial Relations at the University of Toronto, and Abbé Gérard Dion of the Department of Industrial Relations at Université Laval in Quebec City. At about this same time, the late Chief Justice Bora Laskin was sitting on the Ontario Court of Appeal, but momentarily would move to the Supreme Court of Canada, and Jacob Finkleman had just left the Ontario Labour Relations Board to become Chairman of the new federal Public Service Staff Relations Board.[11] These two outstanding individuals had left a lasting

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[9] S.M. Lipset, "Labor and Socialism in Canada and the United States" (Larry Sefton Memorial Lecture, University of Toronto, 8 March 1990) [unpublished] [hereinafter Lipset]; *see also* D.C. Bok, *Reflections on the Distinctive Character of American Labor Laws* (1971) 84 HARV. L. REV. 1394 [hereinafter *American Labor Laws*], and J. Bakan, *Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)* (1991) 71 CAN. BAR REV. 307 [hereinafter *Constitutional Interpretation and Social Change*]. Professor Joel Bakan has recently made this same point in writing, *supra*, at page 327:

> Ideologies become dominant because they are symbiotic with the prevailing order of social relations, and the interests of those who are dominant within it; they are unlikely to lose their status merely because an alternative set of ideas is constructed and presented.

[10] CANADIAN INDUSTRIAL RELATIONS, Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) [hereinafter Task Force]. I am sensitive, however, to the tendency in law to look backward rather than forward in deciding courses of present action. It is for this reason I believe the time is right for another public inquiry into labour relations drawing on all disciplines.

[11] W.L. Hunter, *Bora Laskin and Labour Law: The Formative Years* (1984) 6 SUP. CT L. REV. 431 at 436; for a general review of Laskin's contribution to labour law, *see* D. Beatty & D. Langille, *Bora Laskin and Labour Law: From Vision to Legacy* (1985) 35 U.T.L.J. 672; for Jacob Finkelman's contribution *see* W. Kaplan, S. Goldenberg & W.S. Martin, *A Profile of Jacob Finkelman* (1991) 1 LABOUR ARB. Y.B. xi.

impact on labour law scholarship and policy against which the Task Force carried out its mandate. The names of authors who undertook studies for the Task Force constituted the then "Who's Who" of Canadian labour and employment policy and their studies reflected a wide-ranging consensus over the content and direction of Canadian labour market regulatory policy.

The consensus found expression in the Task Force's recommendations which focused on the central role collective bargaining should play in labour market regulation. In this respect, the Task Force observed:

> Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society. For this reason the emphasis in the remainder of this Report is placed on how the existing system can be *improved, extended* and *preserved* by a combination of parliamentry [*sic*] support, federal – provincial cooperation and voluntary action by the parties of interest.[12]

Collective bargaining was therefore seen as the preferred instrument of labour market regulation for distributive issues. This procedure was deemed superior to a process of government-imposed and administered employment standards because it could better adapt itself to individual workplaces and to the conflicting interests of employees and employers in those workplaces. In this sense, collective bargaining best identified and accommodated both market forces and employee needs. Importantly, collective bargaining also provided employees with countervailing bargaining power and, thus, a greater "voice" in fashioning the terms and conditions of their employment. This led many scholars to analogize collective bargaining to democratic or participatory political institutions. From this perspective, collective bargaining was said to be a mechanism of "industrial democracy" providing to employees rights of "industrial citizenship".[13] But as morally uplifting as this analogy is, it tends to obscure from view the more pragmatic attraction of collective bargaining in a mixed-enterprise liberal democratic society – that it purports to accommodate such a society's concerns for both the welfare of individuals and the preservation of competitive markets, private property and freedom of contract.

Seen from this latter perspective, collective bargaining represented an opportunity for responding to the abuses of free markets while essentially relying on the same underlying market or contractual forces. Bargaining power had been simply lifted up a notch by formal support for what trade unions were already doing, not unlike what had happened on the employer side with the general legislative support of the modern corporation.

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[12] Task Force, *supra*, note 10 at para. 431 (emphasis added).

[13] H.W. Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century* (1967) 45 CAN. BAR REV. 786.

Pragmatism, not the rhetoric of "partnership",[14] "participation" or "citizenship", appears to have united the Task Force authors in writing:

> The motivating force within this general framework is economic self-interest. Within the limits of various laws designed to protect the public interest, decisions are permitted to be made on the basis of individual or institutional gains. These decisions set in motion economic forces that effect the distribution of available resources among competing ends through the interaction of capital, labour and other markets.
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> It is not hard to discover why western societies have, with varying degrees of doubts, reservations and constraints, accepted the institutions and incentives of the modified capitalistic or mixed enterprise framework. Despite its faults and shortcomings, the system has so far provided a greater opportunity for individual and social fulfilment and achievement than any viable alternative. No effective substitute for the relatively free market has yet been found to ensure optimum allocation of resources. Nevertheless, it has its deficiencies and detractors.
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> Government has consequently come to play an integral part in the prevailing economic system. It is government's expanding role that has made it a "modified" capitalistic or "mixed" enterprise system. Yet despite this growing state involvement, the economy remains largely governed by competitive and institutional forces created by individuals and organizations pursuing their own economic and social goals.[15]

A. *The Task Force Recommendations*

The Task Force, as previously noted, recommended that collective bargaining be "improved, extended and preserved". To this end, it made broad recommendations for change to our federal labour laws. The report, as well, became the intellectual and policy standard for labour law reform in the 1970's for all Canadian jurisdictions. Not only was the *Canada Labour Code* enacted in line with many of the recommendations of the Task Force, but almost every collective bargaining statute in Canada was subsequently amended to pursue the course charted by the Woods Task Force Report.[16]

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[14] B.A. Langille, *Equal Partnership in Canadian Labour Law* (1983) 21 OSGOODE HALL L.J. 496 [hereinafter *Equal Partnership*]; B.A. Langille & P. Macklem, *Beyond Belief: Labour Law's Duty to Bargain* (1988) 13 QUEEN'S L.J. 62 [hereinafter *Labour Law's Duty to Bargain*]. By using the term "rhetoric" I am simply mirroring the terminology employed to critique the so-called pragmatic pluralist view of collective bargaining – a view that, in part, grounds its emphasis on incrementalism, proceduralism and institutional competence upon the essential ambivalence of mixed enterprise or market economies. I do not intend to demean the scholarship, which is outstanding. *Compare Constitutional Interpretation and Social Change*, *supra*, note 9 and R.A. Posner, THE PROBLEMS OF JURISPRUDENCE (Cambridge: Harvard University Press, 1990) at 414-19.

[15] Task Force, *supra*, note 10 at paras. 31-32 & 37.

[16] G.W. Adams, CANADIAN LABOUR LAW (Toronto: Canada Law Book, 1985) at c. 2 [hereinafter CANADIAN LABOUR LAW].

The key problem seen facing collective bargaining on entering the 1970's was that the legal and institutional commitment to the collective bargaining process lagged behind the needs of this now valued and proven system of workplace regulation. No comprehensive updating of labour laws had occurred across Canada during the prior 20-year period, with the result that these laws were not delivering sufficient support to the collective bargaining process in terms of the challenges then faced. Often out of tune with the premises underlying a system which had detoured around it, the judiciary had also compounded this problem by undue judicial intervention.[17] Accordingly, the Task Force made comprehensive recommendations to bring the statutory language into line with a maturing and valued socio-economic process.

Collective bargaining laws require that employees take the initiative to bring collective bargaining into their workplaces. From this perspective, the Task Force pointed out a number of impediments to such employee action. Membership evidence requirements were too high; the potential for hostile employer reaction was too great and existing unfair labour practices remedies too meagre; and the administrative practices of labour boards too slow and too judicial. The Task Force also believed the Canada Labour Relations Board should have a broad jurisdiction over all aspects of industrial relations conflict in contrast to the then limited jurisdictional reach of such tribunals. The Task Force therefore made several recommendations designed to redress this situation. Finally, recommendations were made to extend the ambit of collective bargaining by repealing various exclusions such as the denial of collective bargaining to supervisors and dependent contractors.

Ontario brought in reforms by the mid-1970's drawing their essence from the Task Force Report, as did many other provinces. An analysis of the Ontario reforms, by way of example, allows for the identification of major but unstated premises underlying the Task Force Report and current Canadian labour law. Such a review may also contribute to a better appreciation of contemporary criticism of the collective bargaining system and its future reform.

B. *Ontario's Legislative Initiatives*

Every labour relations statute can be broken down into at least two broad categories.[18] First are the "constitutive" provisions which provide access to collective bargaining and protect those who seek such access. Here I am referring to the scope, organizing and unfair labour practice

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[17] G.W. Adams, *Grievance Arbitration and Judicial Review in North America* (1971) 9 OSGOODE HALL L.J. 443; B. Langille, *Developments in Labour Law: The 1981-82 Term* (1983) 5 SUP. CT L. REV. 225; K.P. Swan, *The Supreme Court of Canada, Judicial Review and Labour Arbitration* in STUDIES IN LABOUR LAW, *supra*, note 7 at 1. More recently, *see* P. Macklem, *Developments in Employment Law: The 1988-89 Term* (1990) 1 SUP. CT L. REV. (2d) 405 at 418.

[18] K. Van Wezel Stone, *Labor and Corporate Structure: Changing Conceptions and Emerging Possibilities* (1988) 55 U. CHI. L. REV. 73 at 82-84.

provisions. A second category of provisions can be referred to as "power-broking arrangements" which, in effect, allocate bargaining power between labour and management. For example, the extent of "countervailing" power provided by such statutes is a direct function of the strike definition; the ambit and timing of economic sanctions; the content of the bargaining duty; and the willingness of the state to control the exercise of management discretion, to name only a handful of power-broking considerations. These two groupings are not watertight of course, but I believe they are sufficiently distinct to support the following analysis.

Against this twofold categorization, it is revealing to observe that the Task Force Report and the subsequent Ontario amendments in no significant way altered the allocation of power underlying Canadian labour law as it then existed. Rather, all of the recommendations for change made by the Task Force and the actual changes implemented by Ontario policy makers were confined to the constitutive area of labour law. For example, Ontario streamlined its administrative process within the confines of mandatory hearings outside of the construction industry. Interim certificates were provided for in order to expedite the certification process and to avoid exploitative delay. Membership evidence requirements were reduced, thereby facilitating card-based certifications. The legal onus for unfair labour practice complaints was reversed as was the evidential onus in successor and common employer applications. The Ontario *Labour Relations Act* was amended to provide for more effective remedies in respect of unfair labour practices and unlawful work stoppages. The use of professional strikebreakers was prohibited and the statute was made available to dependant contractors. In general, the Ontario Labour Relations Board (hereinafter OLRB) was accorded a larger enforcement or protective role. Essentially, these were all changes to the constitutive provisions of the statute.

There were really no alterations to the provisions fixing power between the labour market parties, nor had the Task Force advocated such change. Strike replacements were still envisaged. The *status quo* restricting secondary picketing, hot cargo clauses or boycotts remained. The traditional arbitral approaches to contract administration were not changed and in particular the residual management rights doctrine was unaltered.[19] Not even the limited alteration in the *Canada Labour Code* pertaining to technological change was adopted.[20] Moreover, the amended constitutive provisions still left significant impediments to employee access to collective bargaining. For example, the setting of a terminal date after the application date for determining employee wishes remained, thereby continuing the practice of permitting "change of

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[19] *Equal Partnership*, *supra*, note 14; Canada, Task Force on Labour Relations, LABOUR ARBITRATION AND INDUSTRIAL CHANGE (Study No. 6) by P.C. Weiler (Ottawa: Queen's Printer, 1970); K.E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda For Legal Reform* (1988) 38 CATH. U.L. REV. 1 at 51 [hereinafter Klare].

[20] R.S.C. 1985, c. L-2, ss 51-55.

heart" employee petitions – a practice which encourages employers to express their views to employees in opposition to an organizing campaign with inevitable coercive effect. Supervisors, domestics and farm workers remained outside the scope of collective bargaining. Property interests of employers were not required to reasonably accommodate lawful picketing or the efforts of trade union organizers seeking access to employees.[21] The certification process in Ontario remained essentially a judicial one with mandatory hearings.

It is also significant that the OLRB continued as a tripartite institution with no guaranteed tenure for its members, unlike its federal counterpart where vice-chairs are guaranteed 10-year terms. Similarly, grievance arbitrators continued to be selected and paid for by the parties. These structures are significant because they hint at the limited degree of adjudicative "creativity" the collective bargaining system expects from its administrators. For example, one must seriously question whether this type of institutional setting is designed to support decision-making that would make fundamental changes to bargaining power. What are adjudicators being told when they are provided such limited judicial independence?[22]

In light of this twofold categorization of labour law provisions, one can see the potential for aggressive adjudication under the constitutive provisions where the policy direction was clear, but with the likelihood of little change where no new guidance was given with respect to property rights or managerial discretion. On the other hand, we should not be surprised if decision-making tracked the *status quo* under the power-broking provisions where the conflicting impulses underlying the statute as described above are at their greatest and where the statute went unamended, particularly given that the statute accords little, if any, security of tenure to the decision-makers.

On the whole, the Task Force Report and the related amendments across the country continued to envisage collective bargaining as primarily "process" oriented, not "outcome" oriented. To be outcome-sensitive would require the state to impinge upon the exercise of bargaining power or freedom of contract. Paradoxically, however, collective bargaining was chosen because it was expected that such a process, through countervailing power, would improve substantive outcomes for employees. But no explicit provision in our collective bargaining statutes is devoted to responding to situations where this does

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[21] *Labour Relations Act*, R.S.O. 1980, c. 228, s. 11. *See generally* P. Macklem, *Property, Status and Workplace Organizing* (1990) 40 U.T.L.J. 74 [hereinafter *Workplace Organizing*] and Klare, *supra*, note 19 at 45.

[22] *See generally* The Canadian Bar Association Task Force Report, THE INDEPENDENCE OF FEDERAL ADMINISTRATIVE TRIBUNALS AND AGENCIES IN CANADA (Ottawa: Canadian Bar Association, 1990) (Chair: Professor Edward Ratushny, Q.C.), also known as "The Ratushny Report". Some, however, might argue that administrative agencies are implementing government policy and should be directly accountable to political control. But by using the adjudicative model, are not these agencies being held out as "independent" decision-makers?

not happen. Ignored then are situations where bargaining power is totally lopsided. Left unstated is the fact that the statute's design permits the exercise of such unequal bargaining power. There is obvious tension here which is reminiscent of the long-standing policy dilemma that has faced our legislators and courts in the administration of the law of contract. How much state regulation of market forces is appropriate and what role should judicial bodies play? Indeed, this remains "the" policy issue in a mixed-enterprise liberal democratic state.

The Ontario Labour Relations Board's performance over the ensuing 15 years tracks this structure and ambivalence of the amendments quite closely, as does, I suspect, the experience in other Canadian jurisdictions.

C. *The OLRB's Performance*

The OLRB performed as predicted in the area of the protective or constitutive provisions of its statute. Of necessity, I will again be very selective.

A wide temporal and substantive definition was given to trade union activity as illustrated by the *St. Catharines General*[23] case where a nurse, during the currency of a collective agreement, erroneously linked a patient's death to allegedly inadequate staffing and, in response, was reported to a health disciplines board by her employer. Yet, where an expansive definition of trade union activity was argued in support of protecting a trade union's political activity during a federal election, the Board lost its "protective" train of thought and ended up limiting the definition of trade union activity to the direct collective bargaining purposes of the statute.[24]

The OLRB developed a broad range of remedies designed to take the profit out of egregious unfair labour practices.[25] The procedures of the Board were considerably expedited in tune with the concern for delay expressed by the Legislature in enacting the "interim" certificate.[26] The reversal of onuses, both evidential and legal, lessened the effectiveness

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[23] *St. Catharines General Hospital* v. *O.N.A.*, [1982] 2 CAN. L.R.B.R. 262, [1982] O.L.R.B. REP. 441. I should make clear to the reader that I was the chair of the Ontario Labour Relations Board [hereinafter OLRB] from 1979 to 1984. I was also a vice-chair in 1974 and was one of the policy advisors on the 1975 amendments.

[24] *Adams Mine, Cliffs of Canada Ltd* v. *U.S.W.A.*, [1983] 1 CAN. L.R.B.R. (N.S.) 384, [1982] O.L.R.B. REP. 1767. The "purposes" were expressed as immediate collective bargaining activity, although the Board left open the case of "political" union activity in response to a government attack on unions.

[25] *See e.g.*, *U.S.W.A.* v. *Radio Shack*, [1980] 1 CAN. L.R.B.R. 99, 27 L.A.C. (2d) 246 [hereinafter *Radio Shack*]; *U.E., Local 504* v. *Westinghouse Canada Ltd*, [1980] 2 CAN. L.R.B.R. 469, [1980] O.L.R.B. REP. 469 [hereinafter *Westinghouse*]; *U.S.W.A.* v. *Fotomat Canada Ltd*, [1981] 1 CAN. L.R.B.R. 381, [1980] O.L.R.B. REP. 1397 [hereinafter *Fotomat*].

[26] *Labour Relations Act*, R.S.O. 1980, c. 228 *as am.* s. 6(2).

of employers simply putting grievors to the strict proof and this, along with the new remedies, facilitated increased pre-hearing settlements.[27]

The high water mark of the period is best reflected by the *Radio Shack*[28] decision. The employer was a multinational U.S.-based employer, non-union throughout the world, and apparently dedicated to maintaining that status. The employees of Radio Shack in Barrie, Ontario were represented by the United Steelworkers of America. Radio Shack committed a variety of classic unfair labour practices throughout the trade union's organizing drive, including the use of industrial spies. As a consequence, the OLRB certified the Steelworkers as an unfair labour practice remedy. First contract negotiations with the company saw very little change in attitude until shortly before the trade union struck, when an alleged "change of heart" led the employer to engage a new labour lawyer.

Thereafter, the parties again came before the Labour Board in response to a trade union complaint alleging, *inter alia*, a violation of the bargaining duty. The Steelworkers had gone on strike prior to the filing of this charge, and the employer therefore claimed the union was seeking to have the Board extricate it from a situation of its own making. It proved significant, however, that the sole remaining issue between the parties was the appropriate union security provision. The employer was offering the statutory minimum, which at that time was voluntary revocable checkoff of trade union dues, and the trade union was seeking the Rand formula – compulsory payment of union dues by all bargaining unit members. The Board found that the employer's position on this issue was designed, at least in part, to weaken the trade union by taking advantage of the turnover in its workforce and the natural inclination of new hires not to pay union dues. This finding provided a link back to Radio Shack's earlier unfair labour practices. The result was a finding of relentless lawlessness and, in response, the Board imposed a range of remedies not previously developed in Canadian labour law.

Radio Shack was directed to cease and desist from its unlawful bargaining stance on union security, with the effect that the parties were then in agreement because the only other position available to the company was the Rand formula requested by the trade union. The employer was ordered to pay damages to the Steelworkers to compensate for that union's "loss of opportunity" to negotiate a first contract earlier then it actually did, together with interest on such damages. Without the need for subsequent intervention by the Board, the parties ultimately agreed these damages to be in excess of a quarter of a million dollars. Radio Shack was further directed to post in the workplace information concerning the proceedings, the Board's findings, and the employer's commitment to honour the provisions of the *Labour Relations Act* in the future. The company was also required to provide trade union personnel

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[27] *Ibid.*, s. 1(5), s. 63(13), and s. 89(5). *See also, e.g., OLRB Annual Reports* for years 1981 to 1984 and the description of field service activities.

[28] *Supra*, note 25.

with access to its premises at any time Radio Shack addressed employees on issues relating to collective bargaining and to provide the Steelworkers with a right of reply. The employer was directed to provide the trade union with an updated list of employees and to pay to the Steelworkers union all its wasted bargaining costs flowing from the unlawful conduct. Finally, Radio Shack was ordered to provide workplace locations for all trade union notices to employees and to provide trade union officials with workplace access to the company's employees for the purposes of representation.

The message was clear. The Labour Board would no longer tolerate either blatant or subtle anti-unionism and was determined to devise remedies that would effectively deter such conduct. Remedies would be designed to take the profit out of breaching the statute by visiting on employers many of the very consequences they sought to avoid. Subsequent cases such as *Westinghouse*[29], *Fotomat*[30], *Valdi*[31] and *Penmarkay Foods Ltd*[32] all gave effect to the protective provisions of the statute.

However, even in the area of protective provisions, the Board lost its single-minded zeal when asked to impose directly an entire collective agreement as a remedy, or when the only conduct of the employer being attacked was reliance on a strict adherence to its property rights. In the former instance, and the *Radio Shack* case itself is an example of such ambivalence, the Board was influenced by "free collective bargaining" doctrine and a reluctance to arbitrate bargaining power when it refused to impose a collective agreement as a remedy.[33] As for the relationship between collective bargaining activity and employer property rights, notwithstanding the evolution of a "reasonable accommodation" doctrine in nearby human rights policy, the Ontario Board, without guidance from the Task Force, continued to follow a rigid distinction between the rights

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[29] *Westinghouse, supra*, note 25.

[30] *Ibid.*

[31] *U.F.C.W., Local 175* v. *Valdi Inc.*, [1980] 3 CAN. L.R.B.R. 299, [1980] O.L.R.B. REP. 1254.

[32] *R.W.D.S.U., Local 414* v. *Penmarkay Foods Ltd* (1984), 8 CAN. L.R.B.R. (N.S.) 203, [1984] O.L.R.B. REP. 1214.

[33] *Supra*, note 25 at 139-42. *See generally Labour Law's Duty to Bargain, supra*, note 14. The Board was also concerned with judicial review. The demonstration of restraint on the part of the Board by disclaiming the power to impose a collective agreement directly may have encouraged judicial deference in respect of what the Board actually did. Moreover, it was open to the trade union to attack the Board's refusal to impose an agreement directly as a declining of jurisdiction although, as a practical matter, the Board had imposed an agreement indirectly by its decision on union security. The Board was also aware of the fact that organized labour had opposed first contract arbitration being added to the 1975 amendments. With respect to the validity of the Board's concern for judicial review in response to imposing a collective agreement *see C.U.P.E.* v. *N.S. Labour Relations Bd*, [1983] 2 S.C.R. 311, (*sub nom. Re C.U.P.E.* v. *Labour Relations Bd*) 1 D.L.R. (4th) 1.

of employees and the rights of "third party" trade union organizers.[34] This can be seen in such decisions as *Adams Mines*[35] and *International Wallcoverings*,[36] in *T. Eaton Co.*,[37] and in the Supreme Court of Canada's decision in *Harrison* v. *Carswell*.[38] Neither the Task Force nor government policy makers had addressed the proper balance between collective bargaining and property rights, and this was reflected by the reluctance of labour boards to be creative even in the name of the protective or constitutive provisions.[39] Very simply, the absence of more explicit statutory guidance, the judicial climate, and the institutional setting of the OLRB (its tripartism and the lack of tenure of its decision-makers) contributed to these outcomes.

Looking at the OLRB's performance under the power-broking or power-allocation provisions, as predicted, we see that it essentially maintained the power-broking *status quo*. A good example is the *Westroc*[40] case, where the Board dismissed a complaint by a trade union seeking to prevent an employer from locking out its employees and hiring temporary replacement workers. The trade union submitted that the only reason these employees were removed from their jobs was because they were engaged in the collective bargaining process. In dismissing the complaint, the Board emphasized that the employer was merely using an economic weapon open to it under the *Act*. It noted that the trade union's submission, if accepted, would have the effect of permitting trade unions to control the timing of economic conflict, in that employers would only be allowed to hire replacement workers where unions first called strikes. Similarly, where parties were engaged in multi-employer or industry bargaining, trade unions could selectively strike some employers, while those left operating would not wish to lockout their employees in support of the industry because to do so would put them at a competitive disadvantage relative to the struck employers, who could hire replacement workers while the employers engaged in a lockout could not.

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[34] A distinction, arguably, reinforced by s. 11 of the Ontario *Labour Relations Act*. *See Int. Wallcoverings, Div. of Int. Paints (Canada) Ltd* v. *C.P.U., Local 305* (1983), 4 CAN. L.R.B.R. (N.S.) 289, [1983] O.L.R.B. REP. 1316 [hereinafter *International Wallcoverings*]. *But see Workplace Organizing*, *supra*, note 21.

[35] *Supra*, note 24.

[36] *International Wallcoverings*, *supra*, note 34.

[37] *R.W.D.S.U.* v. *T. Eaton Co.* (1985), 10 CAN. L.R.B.R. (N.S.) 289, [1985] O.L.R.B. REP. 1683, *aff'd* (1987), 62 O.R. (2d) 337, 45 D.L.R. (4th) 401 (Div. Ct) *aff'd* (1989), 71 O.R. (2d) 206, [1989] O.L.R.B. REP. 1292 (C.A.). There is the beginning of a greater accommodation of collective bargaining interests in this case but the result is some considerable distance from the requirements of "reasonable accommodation" in the human rights field. *See* the Court of Appeal's decision.

[38] (1975), [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68.

[39] *Workplace Organizing*, *supra*, note 21.

[40] *Westroc Industries Ltd* v. *C.L.G.W.*, [1981] 2 CAN. L.R.B.R. 315, [1981] O.L.R.B. REP. 381.

Another example is the *Mini-Skool Ltd*[41] case. There the Board refused to characterize as an unfair labour practice an employer's refusal to recall striking employees in order of seniority following the signing of a collective agreement, permitting the strikers to displace more junior employees who had returned to work before the strike's termination. The Board held that the employer's actions did not constitute a discriminatory scheme of super-seniority aimed at penalizing striking employees. Indeed, the junior employees actually returned to work under a statutory provision[42] enacted in the wake of Mr. Justice Locke's *obiter* in the *Zambri*[43] case which had put in jeopardy the right of striking employees to return to work failing a comprehensive collective bargaining settlement. Also, the *Act* provided for no one method of orderly recall from a strike. In the Board's view, recall procedures were matters for collective bargaining and, again, the Board saw the union's position as affecting the balance of power underlying the statute. The employer had continued to operate during a strike and certain striking employees had chosen to return to work, as was their statutory right, to the bargaining disadvantage of their trade union.

The OLRB's long-standing approaches to contracting out under the sale of business provision; to layoffs and other change under the freeze provisions; and to the extent of disclosure pursuant to the bargaining duty can all be seen in the same light – a reluctance to reallocate bargaining power without more explicit statutory direction. Cases like *Consolidated Bathurst*[44], *Spar Aerospace*[45] and *Metropolitan Parking*[46] all cut to the core of our collective bargaining system by presenting major requests that the OLRB substantially redraw bargaining power boundary lines. From this perspective, all of these cases are somewhat

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[41] *O.P.S.E.U.* v. *Mini-Skool Ltd* (1983), 5 CAN. L.R.B. R. (N.S.) 211, [1983] O.L.R.B. REP. 1514.

[42] *Labour Relations Act*, R.S.O. 1980, c. 228, s. 73.

[43] *C.P.R. Co.* v. *Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654.

[44] *I.W.A.* v. *Consolidated Bathurst Packaging Ltd* (1983), 4 CAN. L.R.B.R. (N.S.) 178, [1983] O.L.R.B. REP. 1411 [hereinafter *Consolidated Bathurst*].

[45] *Spar Professional & Allied Technical Employees' Association* v. *Spar Aerospace Products Limited*, [1979] 1 CAN. L.R.B.R. 61, [1978] O.L.R.B. REP. 859. The debate in this type of case has been over the content of the freeze provisions. Generally, our boards have pursued a "business as usual" approach allowing and sometimes requiring ongoing change after certification and during bargaining. More recently, *see Simpsons Ltd* v. *B.F.C.S.D.* (1985), 9 CAN. L.R.B.R. (N.S.) 343, [1985] O.L.R.B. REP. 594. The Canada Labour Relations Board attempted to implement a "static freeze" precluding all change to employment practices without the trade union's consent but the position was ultimately reversed for essentially the same reasons underlying *U.S.W.A.* v. *Russel Steel Ltd* as discussed *infra*, note 47. *See S.O.R.W.U.C.* v. *Royal Bank of Canada, Kamloops & Gibsons Branch*, [1978] 2 CAN. L.R.B.R. 159, 79 C.L.L.C. 16,132 and *R.C.I.U.* v. *Bank of Nova Scotia*, [1982] 2 CAN. L.R.B.R. 21, 82 C.L.L.C. 16,158.

[46] *C.U.P.E.* v. *Metropolitan Parking Inc.*, [1980] 1 CAN. L.R.B.R. 197, [1979] O.L.R.B. REP. 1193 [hereinafter *Metropolitan Parking*].

reminiscent of and build upon the well-known *Russel Steel Ltd*[47] arbitration decision of Professor Harry Arthurs, determining the appropriateness of subcontracting when a collective agreement is silent. In the freeze provision cases, it had been argued that no significant workplace change such as a layoff due to subcontracting could be implemented without the trade union's consent. A requirement of trade union consent could effectively veto change or permit the exaction of a very high price. The arbitrator's decision, therefore, directly affects bargaining power in the context of industrial change. In *Consolidated Bathurst*, the Board was asked to prevent any significant mid-contract change which had not been revealed to the trade union during bargaining and yet was being "seriously considered" by the employer at that time. In *Metropolitan Parking*, the Board was asked to hold that the replacement of sub-contractors constituted a sale of business thereby binding the new sub-contractor to the losing contractor's collective agreement. This contention also implicitly asserted that a subcontract constituted a sale of business, effectively precluding long-standing subcontracting practices – practices and their limitations, if any, which had been the exclusive preserve of collective bargaining as illustrated by the *Russel Steel Ltd* line of cases. In *Russel Steel Ltd* the arbitrator was asked and refused to hold that there could be no subcontracting unless it was explicitly provided for in the collective agreement. Had all these cases been decided the other way, Ontario would have taken on a distinctly Swedish hue in its workplaces.

Sweden, however, is a political economy where all of these arguments are in fact explicitly provided for by law and thought logical by both labour and management.[48] The approach clearly gives labour a greater voice and enhances employee participation in decision-making, what is often referred to as "industrial democracy". It also directly increases trade union bargaining power, in that industrial change requires the union's consent. Workplace power obviously has some considerable correlation to political power. It is therefore not surprising to learn that Sweden's trade union membership as a percentage of its total working population is more than double ours, and that Sweden refers to itself as a "social democracy". In short, if political power is a precursor to bold workplace initiatives, is it likely we are going to create a Swedish

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[47] *U.S.W.A.* v. *Russel Steel Ltd* (1966), 17 L.A.C. 253 [hereinafter *Russel Steel Ltd*]. Practically, the right to engage in change in the face of a silent collective agreement determines who has the negotiating onus to achieve explicit language. The policy of the existing jurisprudence is that during bargaining it is not possible for employers to specify every change that may be required and that to try to do so would encourage conflict over mere "potential" change. It is, therefore, left to trade unions to specify, on the basis of their actual experience, the changes they are interested in dealing with. Clearly, the jurisprudence is change-oriented in that it is equally difficult for the union to predict every significant change that might impact its members.

[48] C. Summers, *Comparisons in Labour Law: Sweden and the United States* (1985) 7 INDUS. REL. L.J. 1; A.C. Neal, *A New Era for Collective Labor Law in Sweden* (1978) 26 AM. J. OF COMP. LAW 609; O. Hammarstrom, *Negotiation for Co-determination – the Swedish Model* (1976) 76 LAB. GAZ. 535.

political economy by only labour board decision-making? What external sign posts were there in Ontario or Canada to encourage the Labour Board to move in the direction requested in these cases? Have we provided our labour boards with the requisite security of tenure to merit such significant changes by way of adjudication, given that the policy implications posed by these cases are of equal or greater significance to any responsibility currently allocated to our courts?

Our industrial relations policies and practices preceding each of these cases had more emphasized market forces and ownership interests, creating an onus on those seeking to prevent workplace change.[49] *Russel Steel Ltd* highlighted this history and held that parties negotiating contracts against this background would appreciate that industrial change was permissible unless explicitly precluded by the contract.[50] More than a decade later, at the height of the recession in the early 1980's, labour boards were asked to hold that subcontracting constituted a sale of a business, a decision that would have precluded or substantially impeded the practice which had accelerated during the recession.[51] As I noted with respect to the *Metropolitan Parking* case, if this was the law, the *Russel Steel Ltd* decision would have been unnecessary and all the subsequent reliance on that line of jurisprudence by the parties in collective bargaining wrong. Admittedly, giving effect to this request in the 1980's was a possible result but it would have constituted (outside of Quebec)[52] a profound shift in bargaining power where unions had failed to negotiate adequate constraints on contracting out. Indeed, the OLRB could have rationalized such a change by stating that collective bargaining is aimed solely at achieving greater employee participation in decision-making or that the statute was designed solely to achieve an

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[49] F.J.L. Young, THE CONTRACTING OUT OF WORK (Kingston: Queen's University, Industrial Relations Centre, 1964); LABOUR ARBITRATION AND INDUSTRIAL CHANGE, *supra*, note 19. *See also Windsor Public Utilities Commission* v. *I.B.E.W., Local 911* (1974), 7 L.A.C. (2d) 380. In the case of contracting out of work for "cost" reasons, many have thought this possibility to be a check on excessive wage demands just as is the possibility of capital substitution. Of course, only the ultimate closing of a business for financial reasons is a check to excessive wage demands where a trade union has the power to extract language precluding subcontracting or capital substitution. Others, however, have argued it to be an unfair labour practice or at least unfair to subcontract bargaining unit work and, thereby, avoid the wage provisions negotiated by the trade union. The human resource trend, of recent, is towards greater consultation on such matters, but employers remain wary of giving trade unions a veto. *See particularly* Wright, *supra*, note 4.

[50] *Russel Steel Ltd*, *supra*, note 47.

[51] *Charming Hostess Inc.* v. *B.F.C.S.D., Local 304*, [1982] CAN. L.R.B.R. 409, [1982] O.L.R.B. REP. 536; *I.B.T., Local 880* v. *Freight Emergency Ltd* (1984), 84 C.L.L.C. 16,031; and *see, more generally, Canada Post Corp.* v. *C.U.P.W. (Nieman's Pharmacy)* (1990), 4 CAN. L.R.B.R. (2d) 161.

[52] *See* the Quebec subcontracting decisions referred to in Mr. Justice Beetz's opinion in *U.E.S., Local 298* v. *Bibeault* (1989), [1988] 2 S.C.R. 1048, (*sub nom. Syndicat National des Employés de la Commission Scolaire Régionale de l'Outaouais* v. *U.E.S., Local 298*) 89 C.L.L.C. 14,045.

"equal partnership".[53] "Reconstructing" a purpose for the statute in this manner might justify holding trade union consent a condition precedent to workplace change.[54] However, by pointing to the Task Force Report, one can more tenably argue there was no political or workplace consensus over an "equal partnership" purpose of collective bargaining nor is one reflected today in either the long standing practices of the parties or a new legislative direction.[55] Moreover, employees continue to "participate" in decision-making through collective bargaining notwithstanding the cases which have been decided but clearly not with the same strategic or practical effect apparently desired by the critics of these decisions.

Why was the Labour Board being asked to make these decisions? Was it because those seeking the change were frustrated by their inability to move the government of the day in the direction desired, an explicit motivation of many seeking creative workplace change through use of the *Charter*?[56] However, even armed with our *Charter*, we have seen the courts increasingly reluctant to impose, irreversibly, complex and unpredictable socio-economic change.[57] The institutional limitations of adjudication and the concern over the appropriate relationship between courts and legislatures in a democracy fuels this reluctance. The labour law variation on this same theme sees that the larger the shift in the balance of power by a possible labour board or arbitration decision, the less likely the change will be made without greater legislative guidance.[58]

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[53] *Equal Partnership*, *supra*, note 14; Klare, *supra*, note 19; K.E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941* (1977-78), 62 MINN. L. REV. 265; and K.E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin* (1985), 44 MD. L. REV. 731.

[54] *See generally* R.M. Unger, *The Critical Legal Studies Movement* (1983) 96 HARV. L. REV. 563. *See also* the criticism of this approach in THE PROBLEMS OF JURISPRUDENCE, *supra*, note 14 and the author's alternative at note 16, *supra*, c. 15.

[55] Task Force, *supra*, note 15; C.L. Tomlins, *The New Deal, Collective Bargaining and the Triumph of Industrial Pluralism* (1985) 39 INDUS. & LAB. REL. REV. 19; J.A. Gross, *Conflicting Statutory Purposes: Another Look at 50 Years of NLRB Law Making* (1985) 39 INDUS. & LAB. REL. REV. 7. However, these practices, at least in progressive work environments, are changing. *See* Wright, *supra*, note 4.

[56] *See* the analysis in PUTTING THE CHARTER TO WORK, *supra*, note 7 at 86, 87 & 170. *But see generally* P.C. Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law* (1990) 40 U.T.L.J. 117; Glasbeek, *supra*, note 7; *Constitutional Interpretation and Social Change*, *supra*, note 9.

[57] A very good example of this is the mandatory retirement cluster of cases. *See Harrison* v. *University of British Columbia*, [1991] 1 W.W.R. 681, 91 C.L.L.C. 17,001 (S.C.C.); *Douglas/Kwantlen Faculty Assn* v. *Douglas College*, [1991] 1 W.W.R. 643, 91 C.L.L.C. 17,002 (S.C.C.); *Stoffman* v. *Vancouver General Hospital*, [1991] 1 W.W.R. 577, 91 C.L.L.C. 17,003 (S.C.C.); *McKinney* v. *University of Guelph* (1991), 76 D.L.R. (4th) 545, 91 C.L.L.C 17,004 (S.C.C.).

[58] A preamble that emphasized employee participation in corporate decision-making, for example, would obviously lessen the ambivalence over the purposes of modern collective bargaining laws. To date, labour boards have not seen it as their role to moderate significantly either trade union or employer bargaining power by "creatively" reconstructing legislative purpose to sidestep this continuing ambivalence.

Nevertheless, we have seen important incremental and pragmatic change in the Ontario Board's policy. Before cases like *Westinghouse* and *Consolidated Bathurst*, no Canadian labour board had developed any kind of unsolicited disclosure duty. Indeed, *Consolidated Bathurst* was the first successful Canadian application of such a duty and it employed a "highly probable" test, not the *de facto* decision requirement criticized by some academic commentators. These decisions were clearly supportive of collective bargaining and obviously subject to review with greater experience. The real difficulty in these bargaining cases may stem not so much from the Board's approach but from the overbreadth of the statutory no-strike clause and the absence of an on-going duty to bargain over changes not contemplated by a collective agreement. If we seriously wish to provide unions with a more strategic say in the management of change, by building more generally on the *National Labour Relations Act* in the United States[59] and on the Canadian federal approach to technological change,[60] the Ontario Legislature could consider the creation of an on-going bargaining duty and, possibly, a less extensive mandatory no-strike clause to complement the extended bargaining duty.

D. *The Conflict Between Protection and Power Broking: The Duty to Bargain in Good Faith*

Section 15 of the Ontario Labour Relations Act provides that the parties shall meet within 15 days from the giving of notice to bargain, and requires them to "bargain in good faith and make every reasonable effort to make a collective agreement". The 1975 amendments to the *Act*, for the first time, gave the Labour Board the primary responsibility to administer this bargaining duty. Available to guide it in this new mandate was the substantial experience of the National Labour Relations Board in the United States, although the bargaining duty expressed in the Wagner Act makes no mention of "reasonable efforts". On the other hand, from the Woods Task Force Report it can be seen that collective bargaining was primarily thought of as a procedural device providing the "opportunity" for better bargaining outcomes for employees by increasing their bargaining power from what it would otherwise be if acting as individuals. Indeed, the Task Force did not believe an aggressive bargaining duty would either contribute to cooperative labour

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[59] *See, e.g.*, C.J. Morris, THE DEVELOPING LABOUR LAW (Washington: Bureau of National Affairs, 1983) at 672*ff*.

[60] *Canada Labour Code*, R.S.C. 1985, c. L-2, ss 51-55.

relations or be consistent with "free collective bargaining".[61] At all times, parties were expected to be pursuing their "self-interest" and references to "self-interest" are usually a code for "freedom of contract" or, the labour relations equivalent, "free collective bargaining".

In the name of "free collective bargaining", the OLRB has consistently refused to arbitrate which economic weapons are available to the labour market parties[62] and a similar restraint has underlayed the Ontario Board's refusal to examine the "reasonableness" of bargaining proposals in administering the bargaining duty.[63] The Board has worried that an assessment of the reasonableness of a proposal or bargaining position will adversely affect bargaining power and directly or indirectly result in the Board dictating the substantive terms of collective agreements. Such "interest arbitration" has been seen by the Board to be inconsistent with the premises underlying the statute and inconsistent with its own institutional competence. In short, the parties are best able to determine the content of their collective agreement and, in the Board's view, this has been a fundamental premise underlying the legislation.

Against this backdrop, the Board has therefore limited the reference to "reasonable effort" in section 15 to issues of procedure only. For example, the withdrawal of a proposal in the "eleventh hour" of negotiations without reasonable justification could be a violation of the bargaining duty even though done in good faith because it is singularly out of tune with customary bargaining "procedures" aimed at achieving collective agreements.[64] By emphasizing process, the Board has sought to prevent the bargaining duty from becoming a provision pursuant to which the Board would "substantively" arbitrate bargaining power and directly moderate the effect of the power-broking provisions of the statute. Unfortunately, this single-mindedness is all too reminiscent of the court administration of the law of contract whereby judges have consistently expressed a reluctance to dictate contract terms except in

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[61] Task Force, *supra*, note 10 at para. 547. In this respect, the Task Force wrote:

> The duty to bargain is not a duty to agree; nor does the right to bargain grant a right to a particular bargain....As to tactics, the highest duty that should reasonably be placed on either party to a bargaining situation, in which each has a claim to preserve its freedom respecting its bargaining position, is to state its position on matters put in issue.

See also E. Palmer, *The Myth of "Good Faith" in Collective Bargaining* (1966) 4 ALTA L. REV. 409.

[62] *C.U.P.E.* v. *Hydro-Electric Power Commission of Ontario*, [1970] O.L.R.B. REP. 962. *See also* discussion in CANADIAN LABOUR LAW, *supra*, note 16 at 516.

[63] CANADIAN LABOUR LAW, *ibid.* at 511; H. Wellington, *Freedom of Contract and the Collective Bargaining Agreement* (1964) 112 U. PA. L. REV. 467; *Can. Trustco Mortgage Co.* v. *B.F.C.S.D., Local 304* (1984), 8 CAN. L.R.B. R. (N.S.) 275, [1984] O.L.R.B. REP. 1356 [hereinafter *Trustco Mortgage*]; *The Daily Times* v. *Toronto Typographical Union Local 91*, [1978] 2 CAN. L.R.B.R. 446 (Ont.) [hereinafter *The Daily Times*]; *R.W.D.S.U.* v. *T. Eaton Co. Ltd* (1985), 85 C.L.L.C. 16,027, [1985] O.L.R.B. REP. 491 [hereinafter *T. Eaton Co. Ltd*].

[64] *O.N.A.* v. *Pine Ridge District Health Unit*, [1977] O.L.R.B. REP. 65; CANADIAN LABOUR LAW, *supra*, note 16 at 581-83.

areas characterized as exceptional.[65] However, one quickly appreciates that this expressed judicial deference to contractualism is often more rhetoric than reality. "Procedural" doctrine is regularly manipulated to obtain "substantive" outcomes considered fair and just in the circumstances. This has prompted scholars to argue for a more explicit and well-developed doctrine of intervention and there is a promising indication the courts are moving in that direction.[66]

In labour law, first contract bargaining nicely illustrates this problem. Stressing that the bargaining duty is not to be used to arbitrate the reasonableness of proposals, labour boards have effectively tied their own hands in examining substantive bargaining proposals even to determine the presence or absence of good faith. For example, by accepting that parties can pursue their own self-interest at the bargaining table "willy nilly", the Ontario Board has held that in pursuing self-interest a party may make unreasonable proposals without censure.[67] The result has left the Board with the unenviable task of distinguishing permissible "hard bargaining" from impermissible "surface bargaining" or just "going through the motions" with no real intention of arriving at a collective agreement.[68] This is not to deny that, where the Ontario Board has been highly suspicious of the asserted good faith of a party having regard to the surrounding circumstances, it has found ways of using the now proceduralized bargaining duty to achieve more balanced outcomes.[69] But where pre-existing unlawful conduct has been missing, such as in the *T. Eaton Co. Ltd*[70] or *Canada Trustco Mortgage*[71] cases, the Board's reluctance to admit to the relevance of substantive outcomes in first contract bargaining and to assess explicitly the reasonableness of bargaining proposals turned out to be fatal for the nascent trade unions in those two cases. Accordingly, the Legislature was required to enact first agreement arbitration legislation to direct the Board to consider "the uncompromising nature of any bargaining position adopted....without

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[65] *See* S.M. Waddams, THE LAW OF CONTRACTS, 2nd ed. (Toronto: Canada Law Book, 1984) at c. 14; F. Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract* (1943) 43 COL. L. REV. 629; P. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT (Oxford: Clarendon Press, 1979); and M.J. Trebilcock, *An Economic Approach to the Doctrine of Unconscionability* in STUDIES IN CONTRACT LAW, *supra*, note 7.

[66] *See Hunter Engineering Co.* v. *Syncrude Canada Ltd*, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321; R.W. Clark, INEQUALITY OF BARGAINING POWER: JUDICIAL INTERVENTION IN IMPROVIDENT AND UNCONSCIONABLE BARGAINS (Toronto: Carswell, 1987).

[67] *Trustco Mortgage*, *supra*, note 63. *See* the critique in *Labour Law's Duty to Bargain*, *supra*, note 14 at 68-80.

[68] The Labour Law Casebook Group, eds, LABOUR LAW: CASES, MATERIALS AND COMMENTARY, 5th ed. (Kingston: Industrial Relations Centre, Queen's University, 1991) at 467. *See particularly The Daily Times*, *supra*, note 63.

[69] *See* the close attention to evidentiary detail in *Radio Shack* and *Fotomat*, *supra*, note 25.

[70] *Supra*, note 63.

[71] *Ibid.*

reasonable justification"[72] – something one would have thought the Board already had the power to do.[73]

In the end, the Board's concern for the bargaining power implications of its decision-making under the bargaining duty blinded it to the need for and opportunity of using unreasonable bargaining proposals as a surrogate for bad faith in immature bargaining relationships. This would have been a particularly attractive approach to first agreement bargaining, where inequality in bargaining power is most likely to be exploited for an improper purpose. It may also have been a useful approach for the first several collective agreements until a bargaining relationship matures. In a very real sense, these situations are the labour relations analogy to the lopsided consumer transactions that have prompted our courts to overcome their reluctance to assess substantive contract terms. Freedom of contract is clearly an important value but pursued to the extreme the freedom of one party can become the subjugation of another. From this perspective, section 40a of the Ontario *Labour Relations Act* symbolizes the failure of the OLRB to respond creatively to first agreement bargaining and, indeed, to other related types of lopsided bargaining power. But the power-broking perspective at least allows us to understand how the Ontario Board arrived at the position it did.

III. Collective Bargaining and the Broader Context

As previously noted, during the past 20 years massive structural changes have occurred in the North American economy. Global competition, the growth of service industries, and the downsizing effects of recessionary pressures are only the most recent manifestations of such change.[74] The trade union movement and collective bargaining in the United States, without any legislative change since 1959, have dramatically declined. Trade union membership has tumbled from in excess of 30% of the private sector labour force to less than 15%.[75] Many fewer non-union workers each year have achieved collective bargaining than have lost this benefit by the attrition of unionized plants and firms. Predictions are that collective bargaining in the United States will fall to 5% coverage of the non-agriculture private sector labour force by the

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[72] *Labour Relations Act*, R.S.O. 1980, c. 228, s. 40 *as am.* S.O. 1986, c. 17, s. 1. *See also Unionism in the Private Service Sector*, *supra*, note 2.

[73] *See gencrally Labour Law's Duty to Bargain*, *supra*, note 14.

[74] *See* text accompanying note 4; *Unionism in the Private Service Sector*, *supra*, note 2; Canadian Labour Policies, *supra*, note 2.

[75] The Representation Gap, *supra*, note 1 at 3; Governing the Workplace, *supra*, note 1 at 10; *see also* Lipset, *supra*, note 9.

year 2020.[76] On the other hand, union membership in Canada (a figure much smaller than those employees actually covered by collective agreements) was 33.6% of the labour force in 1968 and rose to 37.5% by 1984.[77] In this sense, collective bargaining and labour boards responded relatively well to such profound change. In fact, Ontario's and Canada's experience undermine the assertion that trade union decline in the United States is a product of forces other than the absence of legislative reform. This, however, is not to say that all is well in Canada.

There have been indications of a growing decline in collective bargaining coverage in Canada since the mid-1980's.[78] This decline is partnered by a very significant restructuring of Canadian workplaces emphasizing sub-contracting, privatization, downsizing, and the increased use of part-time workers.[79] The most significant job growth has been in the service sector where workplaces tend to be small and employees are employed on a part-time basis.[80] These features create substantial hurdles for trade union organization. The result has been a significant increase in the size of non-union secondary and tertiary labour markets and a shrinkage of the primary or industrial labour markets where, historically, trade unionism has been at its strongest.

It is against this all too brief a background that I now turn to consider the legislative activity in the areas of health and safety, human rights, workers' compensation and pay and employment equity. Many have pointed to these legislative initiatives providing rights to all employees, whether union or non-union, as a further indication of the decline in relevance of collective bargaining. Historically, and as the Task Force expressed, there had been a reluctance to set employment standards at too high a level in order not to undercut the attractiveness of collective bargaining. Collective bargaining was the preferred manner of regulation for the reasons previously noted. However, many of the provisions in our current employment standards legislation are so far removed from undermining the attractiveness of collective bargaining as to constitute a positive incentive to employers to remain or become non-union.[81] Moreover, collective bargaining is limited in labour market reach and therefore cannot deliver the universal protection we wish to

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[76] The Representation Gap, *supra*, note 1 at 7.

[77] *Unionism in the Private Service Sector*, *supra*, note 2, Table 2.

[78] *Ibid.*, where Table 1, using data from other sources, shows a decline from 39.6% of non-agricultural paid workers in 1983 to 36.6% in 1988. *See also* A. Verma & N.M. Meltz, "The Underlying Sources of Union Strength: Certification Activity in Ontario 1982-88" (Paper delivered to the Canadian Industrial Relations Association, Victoria, B.C., 3-5 June 1990) [unpublished].

[79] GOOD JOBS, BAD JOBS, *supra*, note 8.

[80] *Unionism in the Private Service Sector*, *supra*, note 2. The service sector also exhibits high employee turnover rates.

[81] J. Fudge, *Labour Law's Little Sister: The Feminization of Labour and the Employment Standards Act*, (February 1991) [unpublished] [hereinafter *The Feminization of Labour*].

achieve in key areas such as health and safety, human rights and pay equity. Indeed, it is somewhat paradoxical that the more successful employers are in constraining the extent of collective bargaining, the more they expose themselves to the potential of even less appealing direct and vigorous regulation by government.

After carefully examining these recent trends creating individual as opposed to collective rights, it can be argued that health and safety, human rights and pay equity legislation are, in fact, supportive of collective bargaining and more substantial employment standards legislation may be too. By making collective bargaining the central labour market institution in the 1940's and 1950's, we ended up asking this process to do too much by the 1960's and 1970's. Collective bargaining began as primarily a distributive mechanism. As our workplace goals and interests turned to more complex economic and non-economic issues, collective bargaining performed less and less well or simply became overloaded. For example, health and safety issues have had to sit on the bargaining table alongside the hard currency of wage and benefits increases. In the eleventh hour of collective bargaining, it has been all too common for these health and safety issues to be pushed off the bargaining table in return for more tangible economic improvements. Even without an economic incentive, health and safety matters may sometimes be too hypothetical or intangible to strike over. Accidents happen to "other people" and, therefore, may not be something for which the vast majority of employees are willing to sacrifice the "here and now" of wages by way of strike action.

Human rights and pay equity issues also have had difficulty in attracting adequate attention during collective bargaining negotiations. While the trade union movement would assert that these issues have always been important, they have regularly taken a back seat to economics in the face of pressure associated with strike activity. Even when these issues get sustained attention, they prove awkward to deal with because bargaining works best where trade-offs can easily be compared as in the case of economic issues. Pay equity, like other group interest concerns, may also become an issue dividing a trade union particularly when an employer adopts the understandable position that there is only so much money available for settlement and it is for the union to decide how this fixed amount is to be distributed. Finally, collective bargaining has been most prevalent in primary labour markets which historically have been male-dominated. Trade unions most active in these labour markets are therefore male-dominated as are their management counterparts.

Removing these issues from collective bargaining does two very important things. First, it unburdens collective bargaining, allowing it to deal with those matters it deals with best. Secondly, it creates the potential for more creative responses to these key issues. For example, in the health and safety area, policy makers have been able to experiment with bipartite decision-making processes and third-party dispute resolu-

tion mechanisms.[82] Health and safety has been taken out of the adversarial and distributional context of collective bargaining and placed within a framework tailored to achieve more cooperative and, therefore, lasting responses to these life and death issues. Bipartite, consultative and other enhanced employee decision-making structures now utilized in health and safety also have the potential for positively affecting the entire relationship between management and labour. In this area, organized labour has the opportunity to demonstrate that with "jointness" comes greater responsibility and interest in the results of such decision-making. Different but equally innovative initiatives have occurred in the areas of human rights, pay equity and workers' compensation. These initiatives have also brought forward an entirely different cast of representatives not weaned on the distributional model of labour relations.

Workers' compensation legislation took a particularly interesting approach outside collective bargaining very early on in our labour relations history.[83] One of the important aspects of workers' compensation legislation is that it forces employers to internalize the human costs of production – the costs of accidents and injuries arising out of workplace activity. Consumers then pay the true cost of the goods and services they purchase and the response of consumers to these costs creates a real incentive in employers to control health hazards and accident frequencies. A variation of this approach might be considered in the context of the costs of restructuring which at present are being shouldered too much by employees with the resulting ferocious opposition to free trade by organized labour.[84]

Save for layoff notice and severance pay requirements, which are, in any event, limited by comparison with European standards, employers

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[82] *An Act to Amend the Occupational Health and Safety Act and the Workers' Compensation Act*, S.O. 1990, c. 7; K.E. Swinton, *Enforcement of Occupational Health and Safety Legislation: The Role of the Internal Responsibility System* in STUDIES IN LABOUR LAW, *supra*, note 7; J. Elie, *Full Circle* 6 OH & S CANADA 63; L. Jack, *Governing Principles*, 7 OH & S CANADA 32; R.J. Adams, *Universal Joint Regulation: A Moral Imperative*, (Paper presented at the 43rd annual meeting of the Industrial Relations Research Association, Washington, D.C., 29 December 1990) [unpublished]. *But see* H. Glasbeek & S. Rowland, *Are Killing and Injuring at Work Crimes?* (1979), 17 OSGOODE HALL L.J. 506. Endorsing this lightening of collective bargaining's load on an issue-by-issue basis is quite different, I would argue, from recommending work councils in every workplace to perform *all* that collective bargaining now performs. In my view, such a comprehensive mandate practically precludes the use of effective dispute resolution devices like interest arbitration given our political economy and, thus, such councils will be either ineffective and/or dominated by employers. Yet their presence may undermine collective bargaining by giving the illusion of representation. Indeed, if there is the political will to establish "effective" work councils as many have proposed, why should not this will be used to revitalize collective bargaining? I fear a policy preference for work councils arises from a concern that revitalized collective bargaining is simply not appropriate.

[83] R. Risk, *'The Nuisance of Litigation': The Origins of Workers' Compensation in Ontario* (1983) 2 HIST. CAN. LAW 418.

[84] *The New Fordism in Canada*, *supra*, note 6.

in Canada are able to terminate employees at will without regard to the social cost to these employees, their families and their communities. Without a greater commitment by employers to their employees, collective bargaining will inevitably remain highly adversarial and employee loyalty will remain elusive. While it may not be practical or fair to impose all restructuring costs on particular employers, industry and government must be required to shoulder a much greater proportion of the costs now being experienced by employees who are subject to redundancy. Requiring employers to internalize more of the societal costs that their restructuring creates or to justify why they cannot and what they have done to lessen such costs, would likely induce greater efficiency in the management of human resources and set the stage for greater reciprocal employee loyalty. It could also lighten the burden presently placed on collective bargaining which significantly contributes to its adversarial image. Recent federal initiatives with respect to employee redundancy generally and retraining specifically are important indications of movement in this direction.[85] Government has a key role to play in the development of an active labour market strategy in order to support labour, management and employees who must adjust to change. Several European and Scandinavian countries together with Japan are far ahead of us in this regard. Somehow, retraining opportunities in response to workplace change have to become as institutionalized and available as are workers' compensation and primary education, and only government involvement can cause this to happen.

Employment standards legislation could also make a substantial contribution to collective bargaining, contrary to popular wisdom. Minimal employment standards legislation has created a positive attraction for employers to remain or become "union free".[86] Unfortunately, in North America many employers fight trade unions with a tenacity seldom brought to bear on other management initiatives. Viewing employment standards legislation as minimal terms and conditions of employment has undermined government incentive to update such policy instruments to benefit the large number of employees who are now dependent upon such regulation. Moreover, the failure to build in disincentives to part-time work, long hours, and the arbitrary treatment of employees who are sick, require time-off, become pregnant, or are dismissed actually encourages restructuring of unionized settings in order to achieve the benefits of the secondary and tertiary labour markets regulated only by employment standards.

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[85] *See* the *Program for Older Worker Adjustment* (POWA), and its predecessor, the *Labour Adjustment Benefits* (LAB) program. For a discussion of the LAB legislation, *see* R.J. Adams, "The Unorganized: A Rising Force?" (Paper presented to the 31st Annual McGill Industrial Relations Conference, Montreal, 6 April 1983) [unpublished]. The federal government has also recently established a national training board, *see infra*, note 105.

[86] *The Feminization of Labour*, *supra*, note 81 at 19; *Unionism the Private Service Sector*, *supra*, note 2 at 11.

A classic example in Ontario is the failure of the *Employment Standards Act* to in any significant way regulate the justness of the dismissal of an employee.[87] No matter how long an employee has been in the service of an employer and no matter the impact of dismissal on that employee, there is no requirement in Ontario employment standards legislation which limits the grounds for which an employee can lose his or her livelihood. There is, in turn, no way for the unfairly dismissed employee to get his or her job back. Indeed, in Ontario it seems we give more protection to the holding of a driver's licence than we do to an individual's job. This in turn has created a fundamentally unbalanced relationship between employees and employers which is easily exploited during a trade union organizing campaign. Without general employment security being provided by the *Employment Standards Act*, employees will always be reluctant to participate in any activity, like joining a trade union, to which their employer viscerally objects.

Today, therefore, we must look at labour and employment law reform in a more comprehensive manner. No longer should collective bargaining be considered so central that all other workplace laws must be measurably sub-standard in comparison to it. There are tasks which collective bargaining does not perform well. There are also rights and responsibilities which we consider to be universal. Finally, we must not only make collective bargaining more accessible to workers, but we must have regard to the positive incentives for employers to remain non-union contained within the current minimalist design of employment standards legislation, a design which effectively discriminates against women and visible minorities who tend to dominate our secondary and tertiary labour markets.[88]

In my view, however, the Task Force Report remains substantially correct in its assertion that our system of collective bargaining provides a greater opportunity for individual fulfilment and achievement in dealing with inherently distributional issues in a free and market oriented society than any viable alternative. It is preferable to detailed regulation by government with its inevitable efficiency and enforcement problems. The last 20 years have neither revealed a suitable replacement nor established collective bargaining's inappropriateness. Inefficiency and

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[87] *See* the full discussion and literature referred to in GOVERNING THE WORKPLACE, *supra*, note 1 at c. 2., although I do not subscribe to the proposed policy outcome suggested therein. *See also* K.E. Swinton, *Contract Law and the Employment Relationship: The Proper Forum For Reform* in STUDIES IN CONTRACT LAW, *supra*, note 7 and, *more generally*, R.J. Adams, *Employment Standards in Ontario: An Industrial Relations Systems Analysis* (1987), 42 IND. REL. 46.

[88] *See generally The Feminization of Labour*, *supra*, note 81. Worthy of a separate study is Quebec's subtle use of parity committees and collective agreement extensions as employment standards (where generally representative) for specific industries unlikely to be unionized by conventional means: *See* P. Verge, *Law and Industrial Relations in Quebec: Object and Context* in G. Hébert, H. Jain, eds, THE STATE OF THE ART IN INDUSTRIAL RELATIONS (Kingston: Industrial Relations Centre, Queen's University, 1988) 73 at 79-80.

the presence of trade unions are not synonymous as demonstrated by experience in North America and abroad.[89] Contemporary human resource practices may be more employee-centered, but they in no way effectively protect employees at times of greatest need. Moreover, a strong trade union voice in society enriches our public policy making in respect of work places and beyond. Accordingly, the policy objective of improving, extending and preserving collective bargaining yet prevails.

IV. REVITALIZING COLLECTIVE BARGAINING

As I noted at the outset of this essay, collective bargaining legislation in Ontario and generally elsewhere in Canada has not been comprehensively reviewed and amended since the amendments which followed the Federal Task Force Report. If we remain committed to collective bargaining, as I think we must, there is still much that can be done to strengthen the process. While it may be debatable that the passage of time has altered significantly our ambivalence over the appropriate balance of bargaining power, there remains substantial room to reform the protective provisions of the Ontario *Labour Relations Act* where consensus over the right of access to collective bargaining has always been much clearer. Providing greater access to collective bargaining builds incrementally on our experience, responds to the widespread labour market changes which challenge our existing laws, and is in no way inconsistent with the evolution of trading blocks and increasing global competition. Many high performing European economies are more efficient than ours while at the same time having a greater trade union presence and more rigorous labour laws.[90] Indeed, North American scholars have demonstrated that collective bargaining can actually be a stimulus to efficiency.[91] On the other hand, labour strife can clearly impede productivity and job creation. And there is no escaping the need for our workplaces to be able to adapt to change by continuous improvement and innovation. Thus, as well as fostering access to collective bargaining, we must also look for ways of encouraging greater co-operation and adaptation in our workplaces. First, access and a few examples.

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[89] WHAT DO UNIONS DO?, *supra*, note 6 at 250; *The New Fordism in Canada*, *supra*, note 6 at 52*ff*; THE COMPETITIVE ADVANTAGE OF NATIONS, *supra*, note 6.

[90] THE COMPETITIVE ADVANTAGE OF NATIONS, ibid. at 84; C.S. Allen, Germany: Competing Communitarianism in G.C. Lodge & E.F. Vogel, eds, IDEOLOGY AND NATIONAL COMPETITIVENESS: AN ANALYSIS OF NINE COUNTRIES (Boston: Harvard Business School Press, 1987) 79. As Porter points out, the desired policy objective of any modern society is rising living and social standards. The capacity of a society to achieve this end depends upon the productivity of its industries. Productivity, in turn, depends upon continuous improvement and innovation, not some favourable fixed factor of production like wages or low social standards.

[91] WHAT DO UNIONS DO?, *supra*, note 6 at 19-22, *but see* 190 for a discussion of profitability.

A. *Facilitating Greater Access*

All exclusions in the *Labour Relations Act* can be re-examined. One of the most important exclusions meriting significant re-thinking is the managerial functions exemption which currently excludes thousands of front-line supervisors, professional and technical staff who have the same need for collective representation as any other employee. Here Ontario could consider the now long-standing federal lead of permitting supervisory and professional bargaining units by ridding itself of the "effective recommendation" test. This is not inconsistent with trends in industrial relations. Increasingly, more and more responsibility is being returned to bargaining units, with real management in a supportive or coaching role. Collective bargaining needs to accommodate more employee and trade union participation in corporate decision-making and become less concerned with identifying who is on which team.[92] The Ontario Board has been sensitive to this perspective in the context of universities but seldom elsewhere.[93]

More generally, the certification process needs to be made much more transparent for employees. There are still far too many hurdles for employees who must risk their employer's displeasure in order to initiate change within their workplaces and there remain too many opportunities for coercive employer intervention. These hurdles and risks, coupled with the inertial forces which accompany any need for positive action, substantially impede access to collective bargaining. Accordingly, a program for reform in Ontario might, for example, consider: (a) the elimination of employee petitions as in the federal sector and elsewhere; (b) confining an employer's role in certification procedures to making representations on bargaining unit configuration, as in Manitoba and Quebec; (c) the availability of interim and expedited relief in response to unfair labour practices together with the provision of "just cause" protection from dismissal to every employee in Ontario; (d) a more explicit duty on the part of employers to reasonably accommodate access to collective bargaining in administering property and managerial rights[94]; and (e) the elimination of mandatory oral court-like hearings to deal with certification applications, as exists federally and in Ontario's construction industry. These reforms recognize that the workplace is the single most effective location for contact between employees and trade unions, that the decision to join a trade union is for the employee alone

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[92] G.W. Adams, WORKER PARTICIPATION IN CORPORATE DECISION-MAKING: CANADA'S FUTURE? (Kingston: Queen's University Papers in Industrial Relations, May 1990) [hereinafter WORKER PARTICIPATION]; and *see generally* the discussion in GOVERNING THE WORKPLACE, *supra*, note 1 at 288*ff*.

[93] *Compare Carleton University Academic Staff Assn* v. *Carleton University*, [1975] O.L.R.B. REP. 500 and *Laurentian University Faculty Assn* v. *Laurentian University of Sudbury*, [1979] O.L.R.B. REP. 672 with *U.S.W.A.* v. *McIntyre Porcupine Mines Ltd*, [1975] O.L.R.B. REP. 261.

[94] *See generally Workplace Organizing*, *supra*, note 21.

to make,[95] and that the establishment of a bargaining agent must become a relatively easy administrative procedure and not the adversarial, trial-like battle it now often is. These changes would also make signing a union membership card a much less daunting exercise.

Collective bargaining itself can be made more attractive to employees and more efficient in resolving conflict. Bargaining unit determinations could be made more flexible in combining part-time with full-time workers and clerical with production workers, and all bargaining unit orders should be subject to an overriding labour board power to consolidate or revise bargaining units as trade unions obtain more numerous footholds in an employer organization. This too is comparable to the federal scheme. These powers encourage labour boards to emphasize access to collective bargaining in bargaining unit determinations, while ensuring that employers are not left with fragmented workforces.[96]

Consideration might also be given to improving and increasing the number of guaranteed provisions in a collective agreement by adding a statutory grievance procedure emphasizing the settlement of grievances, a more expeditious arbitration clause based on single arbitrators, a "just cause" clause and, possibly, a clause obligating an employer to exercise its managerial discretion in a reasonable manner.[97] When such basic provisions are the subject of dispute in first agreement bargaining, it usually signals ideological not economic conflict.

The bargaining duty could also be defined to continue to operate after achieving a collective agreement for those significant issues with which the collective agreement does not deal. As noted previously, our workplaces have been rocked by change and the Legislature would signal more employee consultation and involvement by such a reform. One might couple with this change that the mandatory strike and lockout prohibitions only be coextensive with the content of the collective agreement. This is essentially the approach in the United States.[98] If a

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[95] *Promises to Keep, supra*, note 1 at 1775-1816; P.C. Weiler, RECONCILABLE DIFFERENCES (Toronto: Carswell, 1980) at 37*ff*.

[96] *See, e.g., Woodward Stores (Vancouver) Ltd* v. *G.A.U., Local 210*, [1975] 1 CAN. L.R.B.R. 114 (B.C.) and the power the Ontario Board tried to exercise in *Re Union of Bank Employees (Ontario), Local 2104* v. *National Trust* (1986), 86 C.L.L.C. 16,026, [1986] O.L.R.B. REP. 250, *reconsidered* (1988), 88 C.L.L.C. 16,026. Where more than one union is involved, the Board would need the power either to impose a council of unions upon application or to consolidate in one bargaining representative by holding representation elections.

[97] The vast majority of agreements contain these clauses and a skeletal statutory agreement would provide to employees a comforting foundation for negotiations. I stress a standard of "reasonableness" not "fairness" with respect to managerial discretion in order to allow some deference by arbitrators to day-to-day decision-makers, unlike the Manitoba legislation *An Act to Amend the Labour Relations Act and Various Other Acts of the Legislature*, S.M. 1984, c. 21, s. 69.2. *But see* D.M. Beatty, *The Role of the Arbitrator: A Liberal Version* (1984) 34 U.T.L.J. 136. However, *compare Cohnstaedt* v. *University of Regina*, [1989] 1 S.C.R. 1011, 57 D.L.R. (4th) 641 and *Greenberg* v. *Meffert* (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548 (C.A.).

[98] THE DEVELOPING LABOUR LAW, *supra*, note 59.

collective agreement is silent on a matter, the employer and trade union would be obligated to bargain in good faith on this issue during the currency of the collective agreement and, failing an agreement, each would have access to economic sanctions. This change could be partnered with a preamble to the statute which is explicit in its commitment to employee consultation and effective participation in workplace decision-making. This reform would encourage both parties to anticipate change and to negotiate broad consultation commitments where foresight was not practical. The bargaining duty could also be changed to apply section 40a to all bargaining as previously discussed, but with the addition of criteria that would cause the Board to have regard to the maturity of the bargaining relationship.

Another change that would make collective bargaining a less threatening process for employees is to provide that key fringe benefits and seniority accrue during a strike, subject, in the case of benefits, to employee payment.[99] Similarly, all discipline during the currency of a strike might continue to be subject to a statutory "just cause" clause administered by arbitrators or the Labour Board.[100] Trade unions themselves might be made more attractive to the public by amending the duty of fair representation to require a trade union to act "reasonably" in the exercise of its mandate or, alternatively, all trade unions might be required to have, as do the Canadian Automobile Workers, a public review board in their constitutions as a court of last resort on critical membership interest issues such as expulsion, penalties and removal from office. The internal affairs of trade unions are remarkably unregulated given the movement's support by legislation and this absence of regulation may be, to many, a deterrent to join.[101]

Most of these changes, and they are simply illustrative of what can still be done within the current ethos, would not by definition have a major impact on the basic power arrangements between labour and management implicit in the current design of the *Labour Relations Act*.[102] Admittedly, by making employees more secure, one is detracting from management's power to resist trade unionism but the existing insecurity facing employees is out of tune with any conception of the

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[99] *See, e.g., Canada Labour Code*, R.S.C. 1985, c. L-2, s. 94(3)(d).

[100] This problem is illustrated in *International Wallcoverings*, *supra*, note 34.

[101] CANADIAN LABOUR LAW, *supra*, note 16, c. 14; GOVERNING THE WORKPLACE, *supra*, note 1 at 227 and 306.

[102] With a changing political climate and growing aggregation of corporate power, the power-broking provisions might also be subject to reconsideration. My review of OLRB decision-making makes clear that changes to the division of bargaining power between certified bargaining agents and employers requires clear legislative direction. And from this perspective it can be cogently argued, that for collective bargaining to have a real chance of taking root in the portion of the private sector which is growing, there is a need to revise some of the basic collective bargaining ground rules. However, I do not intend to comment on these issues any more than I have previously in this paper. Obviously, some of my suggestions touch on power. While the power-broking arrangements in the statute are easily identified, the appropriate changes are not. Here policy and politics are doubly intertwined.

current purposes of the *Act*. Simply put, collective bargaining is a valued process and access to it and its administration ought not to be subject to unreasonable hurdles. Access, in particular, must be made as transparent as possible and, in this sense, the Legislature would simply be reasserting the continued importance of collective bargaining. The process, I believe, needs such reaffirmation.

This is not to deny that capital is becoming increasingly mobile. Clearly, it is not essential for many corporations to locate in Ontario or Canada for that matter. On the other hand, there is general support for the maintenance and improvement of our standards of living and social justice. Canadians do not want to be the victims of "social dumping", *i.e.* the lowering of our labour and environmental standards to the lowest common denominator of competitor nations, nor should we be. Fortunately, there is no inevitable link between inferior or frozen social standards and a country's competitiveness. In fact, more the reverse is true. Scarce, expensive, difficult to fire labour can actually drive innovation.[103] However, high social, legal and living standards do depend upon the productivity with which a nation's resources are employed. Productivity, in turn, depends upon a state of mind committed to continued improvement and innovation.[104] Thus, we have the need to facilitate cooperativeness and to enhance our ability to adapt to change.

B. *Facilitating Greater Cooperation and Adaptation to Change*

While strengthening collective bargaining is essential, there can be little doubt that cooperative and adaptable labour/management relationships attract investment and enhance competitiveness. If trade unions are made more secure, one should expect their greater willingness to work with employers in responding to competitive problems and new opportunities. Increased productivity is as important to trade unions interested in improving wages as it is to employers focused on profits. Thus, what I have already said about labour reform is not unrelated to the issues of productivity and competitiveness.

Furthermore, one by-product of global competition is that it is forcing unionized relationships to adopt cooperative strategies in order to survive.[105] Progressive trade unions are transforming themselves on the issues of industrial change with much greater emphasis on facilitation. This trend is going to increase no matter what else is done. Improving the protective provisions of collective bargaining law, however, will encourage employers to pursue cooperation with trade unions by making unilateral avoidance strategies less attractive. Nevertheless, as I noted previously, collective bargaining and trade unions will remain highly antagonistic to change without more active labour market assist-

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[103] THE COMPETITIVE ADVANTAGE OF NATIONS, *supra*, note 6.

[104] *Ibid.* at 6.

[105] Wright, *supra*, note 4. *But see* Canada's strike performance in *International Comparisons of Industrial Stoppages for 1987* (1989) 97 EMPLOYMENT GAZETTE 309, ranking Canada last among OECD countries for the period 1978-87.

ance to employees by employers and government. Those countries with both more cooperative labour management relationships and competitive economies generally exhibit much greater public and employer commitment to the redundant worker. Early quality education preparing workers for a life of continued learning and easier access to effective mid-life education, training and retraining are much more likely to produce cooperative labour/management relationships than any other single employment law reform. Unfortunately, it is a most expensive and complex initiative to undertake, and made further complicated by our fragmented constitutional responsibilities in the areas of education and unemployment. But there is some significant recent evidence of greater government awareness of the need for active retraining strategies.[106]

It is also important to recognize that ours is a system of enterprise-based collective bargaining, unlike many European and Scandinavian labour law regimes where collective bargaining is a much more centralized process. When more centralized industrial relations systems are closely examined, one sees labour and management bargaining over the basic terms and conditions of employment for an entire industry or economy but with management often having a much freer hand in the day to day administration of the workplace.[107] The attractive aspect of more centralized bargaining and consultation is that it provides the labour market parties with (1) a broader range of opportunities to cooperate both centrally and locally; (2) greater insight that flows from the involvement of many; and (3) a greater opportunity for leadership in the management of change. Union, employer and government partnerships are more practical at centralized levels. Industry-wide solutions are less threatening to individual employers because all domestic competitors will be subject to the same requirements. Centralized regimes therefore often exhibit greater trade union density because trade unions are also less threatening to any individual employer. This is particularly so if a centralized approach is accompanied by somewhat more flexible enterprise-based bargaining.

While Europe and Sweden may be over centralized,[108] North America suffers from an almost total absence of centralized bargaining and

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[106] The federal cabinet has recently approved the creation of a national training board to be directed by labour and business and potentially funded to the tune of $2 billion. *See* V. Galt, "Jobless Get Boost – Ottawa Plans Retraining Initiative" *The [Toronto] Globe and Mail* (11 January 1991) B1 and B2. But the constitutional impediments remain and this initiative pales in comparison to the commitment of other more productive nations to active labour market strategies involving government and employers.

[107] *American Labor Laws, supra*, note 9.

[108] Sweden, *Debate on Labour Costs* (1991) EUROPEAN INDUSTRIAL RELATIONS REVIEW (Feb. 1991) 27 where it is reported Swedish employers are attempting to revert to industry bargaining and ultimately to enterprise-based bargaining. Swedish employers are asserting that too centralized a system of collective bargaining can become balkanized and resistant to change. I am not suggesting we replicate the Swedish system. Rather, I am suggesting the need for a pragmatic increase in the breadth of labour/management relationships and at all levels of the economy.

consultative structures. This shortcoming hinders our management of labour markets and our ability to develop broadly shared industrial strategies. The constitutional distribution of power over workplace regulation contributes to this problem. Accordingly, in Canada we might explore ways in which to both encourage and require more centralized discussions between the labour market parties. This can be done generally, by region and by industry or on an issue-by-issue basis. The structures could be limited to regular consultation, or specific operational mandates might be conferred. For example, Ontario could encourage the creation of a province-wide employers' association equivalent to the Ontario Federation of Labour and request that the two federations meet regularly with government on issues of shared concern. A secretariat, in part funded by government, could support these meetings. The hope would be that regular meetings, joint reports and joint initiatives could positively affect attitudes and government policy. Treating the labour market parties as social partners is the first step to having them act as social partners. Quebec has been active on this front for several years now and appears well ahead of the rest of Canada in developing a better understanding between its unions and employers.[109] There are also several joint industry committees in other jurisdictions[110] which have played pivotal roles in increasing labour/management cooperation on important issues. Similarly, special legislation might be enacted to require industry-wide cooperation between employers and trade unions on key issues like restructuring, retraining and competitiveness with the same purpose.

More centralized opportunities for labour/management cooperation with the assistance of government have the prospect of reducing the pressure on enterprise-based collective bargaining, permitting it to do what it does best. Over time, and reinforced by growing competitive pressures, these centralized structures might take on or supplement certain of the tasks now performed exclusively by our enterprise-based bargaining structures. At the very least, more centralized consultative structures would allow organized labour and management to cooperate with government in fashioning much needed Canadian industrial strategy. Government, of course, will have to treat both organized labour and management more as true partners for such meaningful strategies to evolve.

At the level of the firm, more statutory support should be given to continuous problem solving as opposed to the current emphasis on contractualism and litigation. For example, grievance mediation might be made a compulsory prelude to all arbitrations and regular relationship meetings during the currency of collective agreements actively encouraged. Our on-going workplace relationships should feature a process of

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[109] I understand Quebec has had at least three economic summits. They, in turn, have spawned several industry-wide committee structures and the very recent reported cooperation on wage moderation.

[110] For example, in the steel, retail, electrical and marine industries.

dispute resolution that does not emphasize winners and losers. Mediation and its hybrids have this dispute resolution potential.[111] I can even envisage broad industry inquiries into productivity and workplace quality issues not unlike the present industrial inquiry commissioner mechanism in Ontario and federally but focusing on an entire industry, not just one relationship. Such inquiries, of course, would require considerably more technical support than we currently provide to our interventions, which are now limited to crisis situations.

Clearly, however, there is less labour law can do to secure performance than it can with regard to securing access to collective bargaining. Law cannot dictate cooperation or positive attitudes to change and fairness. Continual improvement and innovation with due regard to the legitimate interests of employees and employers are the keys to creating a dynamic society committed to improving the quality of life of its citizens. Ultimately, this is a state of mind to which legal structures can only be supportive.

V. CONCLUSION

There has been much recent despair over the direction of collective bargaining and its ability to adapt to what lies ahead. This concern has prompted some commentators to propose a radical reconstruction of our labour market institutions both legislatively and judicially. Others, more quietly, propose no action be taken because this mid-century process is no longer useful for the years ahead. Both views underestimate the most effective mechanism our political economy has been able to create to represent working people. Collective bargaining continues to capture best our still conflicting societal interests. My all too brief review of the performance of Ontario's labour laws over the past 20 years reveals, I suggest, a continuing strong foundation, but also points out the need and opportunity to further strengthen the collective bargaining process.

Of course, not everyone wants to join a trade union. There are features of our demography, history and treatment of working people

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[111] There has been too much emphasis on "rights" in modern labour relations instead of shared on-going "interests". From being a pioneer in dispute resolution, labour relations has become a backwater. Early inspiring works were C.M. Stevens, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATIONS (New York: McGraw-Hill, 1963) and R. Walton & R. McKersie, A BEHAVIOURAL THEORY OF LABOR NEGOTIATIONS (New York: McGraw-Hill, 1965). But today the cutting edge of dispute resolution is elsewhere, while labour relations has settled into a rigid dichotomy between highly adversarial grievance arbitration and strike-prone collective negotiations. For the recent emphasis on shared interests and more principled dispute resolution *see* R. Fisher & W. Ury, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN (New York: Penguin Books, 1983); S.B. Goldberg, E.D. Green & F.E.A. Sander, DISPUTE RESOLUTION (Boston: Little, Brown & Co., 1985); W.L. Ury, J.M. Brett & S.B. Goldberg, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (San Francisco: Jossey-Bass Inc., 1988); and K. Kressel, D.G. Pruitt & Associates, MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION (San Francisco: Jossey-Bass Inc., 1989).

which have resulted in an absence of a tangible working class solidarity in comparison with experience abroad.[112] We may also be subject to more consumerism and individualism than elsewhere which has affected our commitment to group action and collective sacrifice. All this contributes to our culture, our management styles, our educational policies and, in turn, our trade union density. Human resource management techniques have also changed for the better from the time of Frederick Taylor and Henry Ford.[113] But we are not giving collective bargaining sufficient support today, while at the same time we continue asking it to do too much. Fortunately, we can solve both of these problems and there is some evidence that we are in the process of doing so. It is wrong to think collective bargaining must play its role alone or not at all. What the future requires is a more sophisticated appreciation of the complimentary relationships between collective bargaining, other workplace mechanisms dispensing necessary regulation, and our key economic institutions. There is a much richer relationship needed between collective bargaining, these other workplace mechanisms, and the overall management of our economy than we have previously acknowledged. There is also the crucial relationship between increased productivity and rising standards of living which the trade union movement must come to embrace.

This is no time to give up on collective bargaining because of its decline in the United States. If we do not emulate the antipathy between the labour market parties in that country abetted by government inaction, we need not emulate the decline in collective bargaining so evident there. We can revitalize collective bargaining in Canada by direct legislative amendment and, at the same time, foster a much more cooperative labour/management climate by building meaningful complimentary relationships around it. Few Canadians, I suspect, wish to live in a world without a trade union voice. Few Canadian trade unionists wish to live in a country with fewer and fewer jobs. This common ground is there to be exploited and provides great hope.

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[112] Lipset, *supra*, note 9.

[113] H. Kolodny & H. van Beinum, THE QUALITY OF WORKING LIFE AND THE 1980'S (New York: Praeger, 1983); AMERICAN INDUSTRIAL RELATIONS, *supra*, note 4; K. Newton, *Quality of Working Life in Canada: A Survey* in LABOUR-MANAGEMENT CO-OPERATION IN CANADA, *supra*, note 7 at 73. *But see* the critique of these methods by Wells, *supra*, note 6; *The New Fordism in Canada*, *supra*, note 6; and WORKER PARTICIPATION, *supra*, note 92.