

CANADIAN LABOUR LAW REFORM AND FREE TRADE

Brian A. Langille*

Increased trade liberalization combined with the internationalization of production and investment puts competitive strains upon Canadian firms and also upon Canadian labour law and other social policies. The 1988 free trade debate and renewed negotiations concerning a possible Canada-U.S.-Mexico Free Trade Agreement directly raised these issues. This paper focuses mainly upon the debate in Canada in 1988 over the Canada-U.S. Free Trade Agreement carried on in light of the significant differences in labour regimes in the two countries. That debate was inadequate in a number of ways, most especially because of the failure, by and large, to recognize the increased importance of labour and human capital policies in an internationalized economy. Since the enactment of the Free Trade Agreement a number of studies have pointed to the significance of such policies and agendas for reform have been articulated and are being acted upon. These agendas contain an important omission — the law of collective bargaining. This article defends the idea that labour law reform is an important component of economic renewal.

Une libéralisation croissante des échanges commerciaux combiné à une internationalisation de la production et des investissements met à rude épreuve la compétitivité des entreprises canadiennes, le droit du travail canadien et d'autres politiques sociales. Le débat de 1988 sur le libre-échange et la reprise des négociations sur un éventuel accord de libre-échange entre le Canada, les États-Unis et le Mexique ont touché directement ces questions. Cet article traite principalement du débat sur l'Accord de libre-échange canado-américain qui s'est déroulé au Canada en 1988 à la lumière des différences importantes entre les régimes de relations de travail des deux pays. Ce débat a été inadéquat à plusieurs titres; en particulier, en raison du défaut de reconnaître généralement l'importance croissante des politiques concernant la main-d'oeuvre dans une économie internationalisée. Depuis l'adoption de l'Accord de libre-échange, plusieurs études ont souligné l'importance de ces politiques et des programmes de réforme ont été élaborés et sont mis en application. Ces programmes oublient un aspect important : le droit portant sur la négociation collective. L'auteur de cet article soutient que la réforme du droit du travail est un élément important de la reprise économique.

* Professor, Faculty of Law, University of Toronto.

I. INTRODUCTION

On Wednesday, June 12, 1991 trade ministers and representatives from Mexico, the United States, and Canada gathered in Toronto to begin negotiations for a North American Free Trade Agreement (NAFTA).¹ In the United States the motivations for and implications of NAFTA have been the subject of much speculation and prediction.² In Canada there was cause not only for speculation about the future but reflection upon the recent past — that is upon the impact of the existing *Canada-U.S. Free Trade Agreement* (referred to in Canada simply as the *FTA*) signed by Prime Minister Mulroney and President Reagan on January 2, 1988 and which came into force January 1, 1989. This bilateral trade arrangement is for goods and services only and it is commonly pointed out that it is *not* a common market involving a common external tariff policy or freedom of labour movement.³ As Canadians watched the warm-up to the NAFTA negotiations and the preliminary sparring of interest groups, particularly business and labour, there was not a mood of anticipation and engagement, but rather ironic detachment and a sense of *déjà vu*. Americans seemed to be encountering for the first time a debate they had already had (and won) with Canada two years earlier. Some of the sense of ironic detachment flowed from the fact that Americans now found themselves on what had been the Canadian end of many of the issues such as job loss and undercutting of labour standards. In Canada in 1987 the following argument was a very common one: "Workers in southern U.S. industries, working under terrible working conditions, low standards of health and safety and sub-standard wages may well become the benchmark for Canadian manufacturing...."⁴ Aspects of the debate which had riveted Canadians' attention, which had dominated the 1988 Canadian federal election, which had reinvigorated Canadian political

¹ O. Bertin, "Free Trade Talks Open Again" *The [Toronto] Globe & Mail* (12 June 1991) B1.

² See, e.g., J. Faux & R. Rothstein, *FAST TRACK, FAST SHUFFLE* (Washington: Economic Policy Institute, April 1991); R.A. Blecker, "Testimony before the U.S. Senate Subcommittee on Labor" (Washington: Committee on Labor and Human Resources and Committee on Environment of Public Works, 23 April 1991); AFL-CIO, *EXPLOITING BOTH SIDES: U.S.-MEXICO FREE TRADE* (Washington: AFL-CIO, February 1991); United States, *Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future U.S.-Mexican Relations* (Investigation No. 332-282) (U.S. International Trade Commission, October 1990); United States, *THE LIKELY IMPACT ON THE UNITED STATES OF A FREE TRADE AGREEMENT WITH MEXICO* (U.S. International Trade Commission, February 1991) [hereinafter *LIKELY IMPACT*]; M. Moffett, "Working Children — Underage Laborers Fill Mexican Factories, Stir U.S. Trade Debate" *The Wall Street Journal* (8 April 1991) A1; M. Moffett, "Youth in Journal Feature Fired from Shoe Factory" *The Wall Street Journal* (30 April 1991) A21.

³ G. Betcherman & M. Gunderson, *Canada-U.S. Free Trade and Labour Relations* (1990) 41 *LABOUR L.J.* 454 [hereinafter Betcherman & Gunderson]. For an argument that the *FTA* is in many ways more integrative than the European Community in 1992 see B. Wilkinson, *Regional Trading Blocs: Fortress Europe vs. Fortress North America* in D. Drache & M.S. Gertler, eds, *IN THE NEW ERA OF GLOBAL COMPETITION: STATE POLICY AND MARKET POWER* (Montréal: McGill-Queen's University Press, 1991) 51 [hereinafter Wilkinson].

⁴ *Free Trade Could Cost Us Canada* (Willowdale: CAW-Canada, 1986) at 8.

debate and debate about the sense of Canadian identity — but which had gone unnoticed in the United States — were now receiving considerable attention in Congress and in the American press.

This paper briefly sets the context of the *FTA* in terms of Canada-U.S. trade and labour policy and then briefly describes the debate within Canada prior to and after the enactment of the *FTA* concerning the impact of that *Agreement* upon Canadian jobs and Canadian labour policy. Three basic modes of argument about the *FTA* which dominated the debate prior to the *Agreement* are described and identified: the world market argument, the nationalist argument, and the adjustment for losers argument. The most interesting post-*FTA* development has been the reinvigoration of a serious national debate about broader labour market issues in the context of economic globalization — which might be called adjustment for winners. And the most interesting aspect of this debate and its agenda for labour reform is its silence regarding the institution of collective bargaining. Finally, one of the aspects of the Canadian debate about free trade, both in respect to the *FTA* and the potential NAFTA, has been the absence of argument along European lines regarding the establishment of a social charter or set of baseline norms for labour and social policy. The focus upon the adjustment for winners argument, rather than baseline norms, is common to both the federal and Ontario governments, that is both the federal Conservative government responsible for the *Free Trade Agreement*, and the leading social democratic government opposed to both the *FTA* and NAFTA.

The overall lesson of the Canadian experience is that in the context of internationalization of production and investment, technological change, and a massive shift from the goods to the service sector, trade liberalization is but one part of the puzzle. Nonetheless the *FTA* has been a lightning rod for public debate about these issues. At present the Canadian debate is still steeped in ambiguity regarding the relationship of market and civil society in a world in which major economic actors have slipped the moorings of provincial or national jurisdiction.⁵

II. CANADIAN TRADE AND LABOUR MARKET POLICY

Over the course of Canada's history since Confederation in 1867, the issue of our relationship with the United States has preoccupied our

⁵ See generally R. Kuttner, *THE END OF LAISSEZ-FAIRE: NATIONAL PURPOSE AND THE GLOBAL ECONOMY AFTER THE COLD WAR* (New York: Knopf, 1990) [hereinafter Kuttner]; M.E. Porter, *THE COMPETITIVE ADVANTAGE OF NATIONS* (New York: Free Press, 1990); R. Reich, *THE WORK OF NATIONS* (New York: Knopf, 1990) [hereinafter Reich]; M.H. Best, *THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING* (Cambridge: Harvard University Press, 1990) [hereinafter Best]; *Budget Paper E — Ontario in the 1990s — Promoting Equitable Structural Change* (Ontario Budget Papers, 1991) at 85-101 [hereinafter *Budget Paper E*]; Premier's Council Report, *People and Skills in the New Global Economy for Ontario* (Toronto: Queen's Printer, 1990) [hereinafter *People and Skills*]; Canada, Report of the Advisory Council on Adjustment, *Adjusting to Win* (Ottawa: Supply and Services, 1989) [hereinafter *Adjusting to Win*]; D. Drache & M.S. Gertler, eds, *IN THE NEW ERA OF GLOBAL COMPETITION: STATE POLICY AND MARKET POWER* (Montréal: McGill-Queen's University Press, 1991) 51 [hereinafter Drache & Gertler].

politics. Almost from the beginning federal elections were bitterly fought over the issues of "reciprocity" and "continentalism". The "Great Free Trade Debate" which dominated the federal election of 1988 and which can truly be said to have riveted the country was simply our most recent variation upon this theme. That an entire nation could be electrified by debate about trade policy is testimony to the fact that Canada's identity is deeply tied to our relationship with the economy, culture and values of the United States.⁶ The difference is widely perceived in Canada as one which revolves around the relationship between society and the marketplace. For example, it has in recent years become commonplace for the American labour movement, labour lawyers and academics to look north to Canada for examples of policy initiatives which place less confidence in the unbridled free play of market forces.⁷ While the great free trade debate of 1988 had many dimensions and involved many voices (over issues of sovereignty, resource ownership, what came to be called "cultural industries", and much else) the debate between labour and capital over the labour market impact and long-term implications of the *Agreement* for labour and social policy were central to the controversy. Believers in classical free trade theory and the notion of comparative advantage predicted net gains to the economy and job creation. Those opposed predicted job loss, plant closings, plant relocation to the U.S. and a race to the bottom with the United States in terms of labour market policy.⁸ How great a threat or promise was the *FTA* for Canadian labour and labour policy?

⁶ There is a large literature on this subject. An interesting and famous contribution is G.P. Grant, *LAMENT FOR A NATION* (Toronto: McLelland & Stewart, 1968). For accounts in the specific context of the *FTA* see M. Watkins, *A Canadian-United States Free Trade Agreement: For and Against* (1986) 1 BRITISH J. OF CAN. STUDIES 185 [hereinafter Watkins], and the essays in M.D. Henderson, ed., *THE FUTURE ON THE TABLE: CANADA AND THE FREE TRADE ISSUE* (North York: Masterpress, 1987).

⁷ The leader of this movement may be a Canadian labour lawyer at the Harvard Law School, Paul Weiler. See P.C. Weiler, *GOVERNING THE WORKPLACE* (Cambridge: Harvard University Press, 1990) [hereinafter *GOVERNING THE WORKPLACE*]; *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA* (1983) 96 HARV. L. REV. 1769; and *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation* (1984) 98 HARV. L. REV. 351.

⁸ Of all of the studies which played a role in the debate, the one in favour of free trade which occupied centre stage was a report of the Economic Council of Canada which predicted net job gains on the order of 250,000 jobs over the course of the *Agreement*: see Economic Council of Canada, *VENTURING FORTH: AN ASSESSMENT OF THE CANADA-U.S. TRADE AGREEMENT* (Ottawa: Supply and Services, 1988) [hereinafter *VENTURING FORTH*]. See also the background discussion paper: Economic Council of Canada, *Open Borders: An Assessment of the Canada-U.S. Free Trade Agreement* (Paper No. 344) (Ottawa: Supply and Services, 1988). For the contrary position of labour, see the submission of the Ontario Federation of Labour to the Committee on Finance and Economic Affairs, (4 February 1988) and Ontario Federation of Labour, *OFL Document No. 1* (Toronto: Ontario Federation of Labour, 1989). For the position of the Canadian Labour Congress, see Canadian Labour Congress, *Free Trade Briefing Documents* (Toronto: Canadian Labour Congress, January 1989, January 1990 & January 1991). For a further vigorous presentation of the case against the *Agreement* see M. Barlow, *PARCEL OF ROGUES: HOW FREE TRADE IS FAILING CANADA* (Toronto: Key Porter, 1990) [hereinafter Barlow].

Canada and the United States have the largest bilateral trading relationship in the world. The two way trade exceeds U.S. \$160 billion annually.⁹ Ontario-U.S. trade *alone* is greater than U.S.-Japan trade.¹⁰ Seventy five percent of Canadian exports go to the United States, while Canada receives 25% of all U.S. exports. U.S. goods represent 69% of all Canadian imports.¹¹ Canada is a small (Canada is the seventh largest OECD economy) and open economy in which 30% of Canada's GDP depends on trade.¹²

Furthermore the United States is the largest investor in Canada. U.S. investment constitutes 75% of all foreign investment in Canada and 30% of all U.S. investment abroad.¹³ Ontario, in particular, has historically benefited from the tariff regime (established as part of Prime Minister Sir John A. Macdonald's national economic policy in 1879) which it was the job of the *FTA* to dismantle. Branch plants of numerous U.S. multinationals were established in Ontario in order to avoid the tariff wall and to supply the domestic Canadian market. These branch plants account for approximately one-third of the manufacturing value added in the province.¹⁴ It has been estimated that a very high percentage (70%) of trade within manufacturing is within corporations.¹⁵ Canada is both an extremely important customer and supplier for the United States. However, it is important to note that prior to the signing of the *FTA*, and under current *GATT* tariff reduction arrangements, a high percentage of all trade between the two countries was tariff free.¹⁶

By comparison, Canada and Mexico have little in common. Only 1.5% of Mexican exports come to Canada and Mexico ranks 17th as a market for Canadian exports.¹⁷ Two way trade with Mexico amounts to

⁹ LIKELY IMPACT, *supra*, note 2 at 91.

¹⁰ Watkins, *supra*, note 6 at 188.

¹¹ *Adjusting to Win*, *supra*, note 5.

¹² M. Gunderson & D. Hamermesh, *The Effect of Free Trade on the North American Labour Market* in C. Reynolds, L. Waverman & G. Bueno, eds, *THE DYNAMICS OF NORTH AMERICAN INVESTMENT* (Palo Alto: Stanford, 1991) 225 [hereinafter Gunderson & Hamermesh].

¹³ Business International Corporation, *INVESTING, LICENSING AND TRADING CONDITIONS ABROAD — NORTH AMERICA, LATIN AMERICA* (November 1990) at 3.

¹⁴ M. Gunderson, *Regional Dimensions of Labour Impact of Free Trade* (1991) 14 CAN. J. OF REGIONAL SCI. [forthcoming] [hereinafter *Regional Dimensions*]. See also J. O'Grady, *Labour Market Policy and Industrial Strategy After the Free Trade Agreement: The Policy Debate in Ontario* (Paper presented to the Industrial Relations Research Association, Buffalo, 30 May 1990) [hereinafter *Labour Market Policy*].

¹⁵ T. Rutley, *ECONOMICS BACKGROUNDER* (Toronto: Canadian Manufacturing Association, May 1991).

¹⁶ G.W. Adams, *The U.S.-Canada Free Trade Agreement and Collective Bargaining* (1988) 14 CAN.-U.S. L.J. 41 estimates 75-80% [hereinafter *The FTA and Collective Bargaining*]. See also A. Rotstein, *Trading Down* (1988) 14 CAN. BUS. L.J. 399 at 400 [hereinafter Rotstein]. The Royal Bank of Canada estimated it at 65-70%: see *Free Trade Agreement — Second Year Review* (Royal Bank of Canada, February 1991).

¹⁷ G. Ritchie, *A North American Free Trade Agreement: Watch Out!* (1991) 55 BUS. Q. 22 [hereinafter Ritchie].

only \$2.3 billion annually.¹⁸ Some useful comparisons between the three economies can be gleaned from Table I.¹⁹

What links Canada and Mexico is the great U.S. market. The prospect that NAFTA offers is a free trade area with a population of 360 million people. Because of Mexico's limited purchasing power the addition of the Mexican market under NAFTA is of limited interest to Canadians.²⁰ Canada's involvement with the trilateral NAFTA negotiations is commonly regarded as simply ensuring that alleged gains made under the *FTA* not be undermined. It has been described simply but accurately as essentially an exercise in "damage containment".²¹

III. CANADIAN LABOUR POLICY IN PERSPECTIVE

In Canada legislative jurisdiction over labour policy is constitutionally split, by virtue of judicial constitutional interpretation, between the federal and provincial governments. The federal government controls the labour policy for a set of specific industries such as airlines, railways, broadcasting, banking, grain handling as well as the federal public sector. It also, by virtue of constitutional amendment, controls unemployment insurance (as well as immigration policy) and as a result, and until recently, has had *de facto* control over macro-labour force adjustment policy.²² Other industries and sectors, covering about 90% of Canadian workers, fall under provincial legislative authority. This is true for both collective bargaining and general labour standards legislation. While the Canadian collective bargaining system was largely borrowed from the American *Wagner Act*²³ model it is now widely understood that experience under Canadian collective bargaining law has been significantly more favourable to workers and unions. This well remarked upon divergence is, as Pradeep Kumar puts it:

....particularly inexplicable in the context of interdependent product and labour markets, similar economic structures and close institutional ties between the two countries. Not only is Canadian economy highly dependent on the United States, but it is dominated by American multinationals who have traditionally emphasized cross-boarder [*sic*] uniformity in their human resource management policies and practices. The international unions, with predominant membership and head offices in the United States, have been an integral part of the Canadian

¹⁸ "What's at issue, why they're meeting" *The [Toronto] Globe & Mail* (12 June 1991) B1.

¹⁹ Taken from Ritchie, *supra*, note 17.

²⁰ *Ibid.*

²¹ S. Ostry, *NAFTA — The International Economic Background* (May 1991) at 14 [hereinafter Ostry]. This is also the American view. See *LIKELY IMPACT*, *supra*, note 2 at 91.

²² *Labour Market Policy*, *supra*, note 14 at 7.

²³ For general review see H.W. Arthurs *et al.*, *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA*, 3rd ed. (Toronto: Butterworths, 1988); see also G.W. Adams *CANADIAN LABOUR LAW* (Aurora: Canada Law Book, 1985); see also P.C. Weiler, *RECONCILABLE DIFFERENCES* (Toronto: Carswell, 1980).

TABLE I
COMPARATIVE INDICATORS OF ECONOMIC DEVELOPMENT IN FIVE COUNTRIES

Indicator	North America			Integration Case Studies			Units of Measurement
	Mexico	Canada	U.S.	Spain	East Germany		
Population	86.4	26.3	248.2	39.4	16.6		millions, 1989
% of Pop. in Urban Areas:	66%	77%	74%	91%	77%		most recent year
% of Pop. in Largest City:	20%	7%	4%	4%	7%		most recent year
Fertility Rate:	3.6	1.7	1.9	1.7	1.8		most recent year
Labor Force:	26.1	13.4	122.0	14.2	8.9		millions, 1987
% of Labor Force in Service Occupations	31%	75%	75%	54%	40%		
GDP:							
GDP per capita:	135.9	471.5	4,900.0	288.3	207.2		U.S.\$, 1988
Inflation Rate:	\$1,640	\$18,070	\$19,800	\$7,390	\$9,300		
External Debt:	20%	5.2%	4.3%	6.8%	9.0%		1989
Exports f.o.b.:	101.57	39.67	328.76	4.33	20.4		U.S.\$, 1988
Imports c.i.f.:	22.9	111.5	322.3	34.2	30.8		U.S.\$, 1987
Trade Balance:	18.6	102.1	440.9	49.1	31.1		U.S.\$, 1987
	4.3	9.4	-118.6	-14.9	-0.3		U.S.\$, 1987
No. Telephones per 1000 persons	50	524	520	264	n.a.		1988
No. of Fax Machines Purchased from Japan '89	20,771	141,977	1,388,390	55,758	n.a.		1989

SOURCES: *Economic Outlook* (OECD, December 1989)

The World Fact Book (U.S. Central Intelligence Agency, 1989)

World Competitiveness Report (World Economic Forum, June 1990)

1985 United Nations Demographic Yearbook (UN, 1989)

The Economist (June 30, 1990)

TABLE II
UNION MEMBERSHIP IN CANADA AND THE UNITED STATES, 1945–1990

Year	Total Membership ('000)		As a % of Non-Agricultural Workers	
	Canada	U.S.	Canada	U.S.
1945	711	12,254	24.2	30.4
1946	832	12,936	27.9	31.1
1947	912	14,067	29.1	32.1
1948	978	14,272	30.3	31.8
1949	1,006	13,936	30.2	31.9
1950	—	14,294	—	31.6
1951	1,029	15,139	28.4	31.7
1952	1,146	15,632	30.2	32.0
1953	1,220	16,310	32.6	32.5
1954	1,268	15,809	33.6	32.3
1955	1,268	16,127	33.7	31.8
1956	1,352	16,446	33.3	31.4
1957	1,386	16,498	32.4	31.2
1958	1,454	15,571	34.2	30.3
1959	1,459	15,438	33.3	29.0
1960	1,459	15,516	32.3	28.6
1961	1,447	15,401	31.6	28.5
1962	1,423	16,894	30.2	30.4
1963	1,449	17,133	29.8	30.2
1964	1,493	17,597	29.4	30.2
1965	1,589	18,269	29.7	30.1
1966	1,736	18,922	30.7	29.6
1967	1,921	19,668	32.3	29.9
1968	2,010	20,017	33.1	29.5
1969	2,075	20,186	32.5	28.7
1970	2,173	20,990	33.6	29.6
1971	2,231	20,711	33.6	29.1
1972	2,388	21,206	34.6	28.8
1973	2,591	21,881	36.1	28.5
1974	2,732	22,165	35.8	28.3
1975	2,884	22,207	36.9	28.9
1976	3,042	22,153	37.3	27.9
1977	3,149	21,632	38.2	26.2
1978	3,278	21,757	39.0	25.1
1979	—	22,025	—	24.5
1980	3,397	20,968	37.6	23.2
1981	3,487	20,647	37.4	22.6
1982	3,617	19,571	39.0	21.9
1983a	3,563	18,634	40.0	20.7
1983b	3,563	17,717	40.0	20.4
1984	3,651	17,340	39.6	19.1
1985	3,666	16,996	39.0	18.3
1986	3,730	16,975	37.7	17.8
1987	3,781	16,913	37.6	17.0
1988	3,841	17,002	36.6	17.0
1989	3,944	16,960	36.2	16.4
1990	4,031	16,740	36.2	16.1

SOURCES: Canada: Labour Canada, *Directory of Labour Organizations in Canada* (annual). In 1950 the reference date of Labour Canada's survey was changed from 31 December to 1 January; therefore, no figure is reported for 1950. In 1979 the survey was not conducted.

U.S.: 1945–1983a: Troy, Leo and Neil Sheflin, *Union Sourcebook: Membership, Finances, Structure, Directory* (West Orange, N.J.: Industrial Relations Data and Information Services, 1985); 1983b–1990: U.S. Bureau of Labor Statistics, *Employment and Earnings*, Monthly.

labour movement, accounting for over one-half to four-fifths of the total membership up until 1975. Similarly, the Canadian public policy framework for labour relations, at least in the private sector, has been modelled on the American legislation, the famous Wagner Act of 1935.²⁴

The collective bargaining divergence is most explicitly revealed in comparing Canadian and American union density figures over time (Table II).²⁵

The figures reveal that since 1963 American union density (as a percentage of the non-agricultural workforce) declined from 30% to around 16%,²⁶ while in Canada union density has stabilized at around 36%. In the manufacturing sector, union density and collective agreement coverage in 1988 was as follows:²⁷

TABLE III
COMPARATIVE UNIONIZATION IN MANUFACTURING SECTOR:
CANADA AND UNITED STATES, 1986

	Unionized	Covered by a Coll. Agr.
All Manufacturing:		
Canada:	41.6%	46.7%
U.S.:	24.0%	25.8%
Durables:		
Canada:	44.6%	50.4%
U.S.:	25.5%	27.3%

SOURCE: *The Current I.R. Scene, 1988* (Queens IR Centre)

It is further estimated that in the 10 largest manufacturing sub-sectors effective collective bargaining coverage for non-office employees is in the range of 72-75%.²⁸ On the other hand private sector union density as a whole has declined in Canada.²⁹ Richard Freeman provides a useful international comparison:³⁰

²⁴ P. Kumar, *Industrial Relations in Canada and the United States: From Uniformity to Divergence* (Queen's University, School of Industrial Relations, Working Paper Series, 1991-92) at 1 [hereinafter *From Uniformity to Divergence*].

²⁵ *Ibid.* at 10.

²⁶ See also GOVERNING THE WORKPLACE, *supra*, note 7.

²⁷ From J. O'Grady, *Human Resource Development and Industrial Restructuring: The Industrial Relations Diversion* (1 March 1991) [unpublished] [hereinafter *Human Resource*].

²⁸ *Ibid.*

²⁹ J. O'Grady, *Beyond the Wagner Act* (February 1991) [unpublished] at 1.

³⁰ R. Freeman, *Canada in the World Labour Market to the Year 2000* in K. Newton, T.T. Schweitzer & J.-P. Voyer, eds, *PERSPECTIVE 2000* (Ottawa: Economic Council of Canada, 1988) [hereinafter Freeman].

TABLE IV
LEVELS AND CHANGES IN UNION MEMBERSHIP AS A PERCENTAGE OF
NON-AGRICULTURAL WAGE AND SALARY EMPLOYEES ACROSS
COUNTRIES, 1970-86

	1970	1979	1985-86	1970-79	1979-86	1970-86
Countries with sharp rises in density						
Denmark	66	86	95	+20	+9	+29
Finland	56	84	85	+28	+1	+29
Sweden	79	89	96	+10	+7	+17
Belgium ¹	66	77	—	+11	—	—
Countries with density rises in the 1970s and stable in the 1980s						
West Germany	37	42	43	+5	+1	6
France ²	22	28	—	+6	—	—
Canada	32	36	36	+4	0	4
Australia	52	58	56	+6	-2	+4
New Zealand	43	46	—	+3	—	—
Ireland	44	49	51	+5	+2	7
Switzerland	31	34	33	+3	-1	2
Norway	59	60	61	+1	+1	2
Countries with density rises in the 1970s and declines in the 1980s						
Italy	39	51	45	+12	-6	6
United Kingdom	51	58	51	+7	-7	0
Countries with declining density						
Austria	64	59	61	-5	+2	-3
Japan	35	32	28	-3	-4	-7
Netherlands	39	43	35	+4	-8	-4
United States	31	25	17	-6	-8	-14

¹ Visser excludes pensioners, and reports: 55 percent in 1970, 69 percent in 1979, and 74 percent in 1983.

² Visser reports densities of 26, 24, and 21 percent, which would put France in declining density.

SOURCE: United States Department of Labor, U.S. Bureau of Labor Statistics; London School of Economics; and OECD Data Set, updated using relevant Country Statistical Abstracts.

The varied explanations for the divergence between Canada and the U.S. are reviewed in Pradeep Kumar's *From Uniformity to Divergence*.³¹ Paul Weiler has been the leading exponent of the theory that

³¹ *Supra*, note 24. See also GOVERNING THE WORKPLACE, *supra*, note 7 at c. 3. See also J. Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"* (1990) 1 WIS. L. REV. 1; *Beyond the Wagner Act*, *supra*, note 29.

legal rules and their administration in the two countries — focusing upon the difficult organizational rules in the U.S., the weakness of remedies for employer unfair labour practices there, and the legally mandated imbalance of power during strikes — explain a lot of the difference. In Weiler's view, weaker American rules combined with a pro-employer administrative posture, have been exploited by aggressive anti-union employers whose tactics obtained a new legitimacy during the late 1970s and 1980s.

The Canadian system of collective bargaining is highly decentralized and is legislatively based upon individual and plant-specific bargaining units. There is, in general, little legal support for firm-wide, industry-wide, or sectoral bargaining. Canadian collective bargaining law is not restrictive, as is American law, in granting unions a legal right to bargain about fundamental entrepreneurial issues such as plant close down. However, there is a fundamental flaw in Canadian labour policy in that while strikes are absolutely prohibited during the term of a collective agreement, the right to arbitrate disputes is limited to, in the view of most arbitrators, the contents of the agreement. That is, many arbitrators take the view that during a collective agreement (and subject to few exceptions) management retains all rights not specifically negotiated away in the agreement. I return to this point later.

The central organization of Canadian unions, the Canadian Labour Congress, has been characterized as "weak" — of its 216 member unions, only 16 have membership exceeding 50,000.³² The Canadian labour movement was once dominated by U.S.-based "international" unions. In 1961, 75% of all union members belonged to "internationals". That has now declined to 32%.³³ Canadian unions have generally been characterized as less "business unionism" oriented. As one Canadian industrial relations scholar put it:

Whatever the underlying reason, it is evident that the mainstream of the present day labour movement has political characteristics that are [more] similar to the European leftist collectivist movements than to the labour movement in the United States....It is interesting to note that as the Canadian labour movement has moved more firmly in the direction of a socially active, partisan political strategy, the political environment [for labour] has improved. The AFL-CIO, on the other hand, despite its support for the expansion of social legislation that has taken place over the past four decades, continues to operate without an articulated social philosophy and without a reliable political arm. Some commentators are arguing that....for the movement to survive and prosper in the future, it must find a new social purpose and must convince American society that it stands for more than maximizing the economic interests of its members.³⁴

³² *The FTA and Collective Bargaining*, *supra*, note 16 at 49.

³³ W. List, "Free Trade, Privatization Pose Challenges for Labour" *The [Toronto] Globe and Mail* (4 January 1990) B1 & B4. See also *From Uniformity to Divergence*, *supra*, note 24.

³⁴ R. Adams, *North American Industrial Relations: Divergent Trends in Canada and the U.S.* (Working Paper no. 307) (McMaster University, Faculty of Business, 19 August 1988) [hereinafter *North American Industrial Relations*].

Canada's compensation costs are close to those of the U.S. (and Japan), below those of Germany and Scandinavia, and about eight times those in Mexico:³⁵

TABLE V
INTERNATIONAL COMPARISONS OF COMPENSATION COSTS, 1975-1988

Country	1975	1980	1985	1986	1987	1988
Norway	116	140	99	99	145	143
Germany	109	147	89	89	140	133
Switzerland	104	133	90	90	143	132
Sweden	123	149	90	90	126	123
Netherlands	112	145	83	83	130	119
Denmark	108	131	76	101	121	116
Belgium	110	156	83	112	126	115
Finland	78	99	75	98	112	112
Austria	74	102	67	94	109	102
United States	109	118	120	120	112	102
Canada	100	100	100	100	100	100
Japan	52	57	60	87	93	97
France	77	107	70	70	103	95
Italy	79	95	67	67	101	95
Australia	91	101	76	77	78	81
United Kingdom	57	89	58	58	75	78
Ireland	51	71	54	54	76	72
Spain	45	72	45	45	65	64
New Zealand	54	64	41	48	57	n.a.
Israel	38	46	37	47	53	n.a.
Greece	29	45	34	34	38	n.a.
Portugal	27	25	14	14	21	20
Singapore	14	18	23	20	19	19
Taiwan	07	12	13	16	18	19
Korea	05	12	12	13	15	18
Hong Kong	13	18	17	17	18	17
Mexico	34	35	19	13	13	n.a.
Brazil	15	16	11	14	12	n.a.

SOURCE: Computed from basic data given in P. Capdevielle, "International Differences in Employer's Compensation Costs," MONTHLY LABOR REVIEW (May 1988) pp. 44-45, and "International Comparisons of Hourly Compensation Costs," MONTHLY LABOR REVIEW (June 1989) p. 12. Compensation costs include pay for time worked, other direct pay, employer expenditures for legally required insurance programs and contractual and private benefit plans, and for some countries, other labour taxes. All figures are exchange rate adjusted and therefore reflect exchange rates as well as wages and fringe benefits.

NOTES: n.a. denotes not available.

³⁵ From 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) at 9 [hereinafter Gunderson & Verma].

In the manufacturing sector Freeman offers the following comparison:³⁶

TABLE VI
HOURLY COMPENSATION FOR
MANUFACTURING PRODUCTION WORKERS,
DEVELOPING COUNTRIES, CANADA, AND
THE UNITED STATES, 1987

	(U.S. dollars)
Canada	11.97
United States	13.44
Brazil	1.49
Mexico	1.59
Hong Kong	2.12
Korea	1.79
Singapore	2.37
Sri Lanka	0.29*

*1986.

SOURCE: United States Department of Labor, U.S. Bureau of Labor Statistics.

Job growth in Canada has been, in recent years, almost exclusively in the service sector. In the 1940s, 60% of jobs were in the goods sector. By 1990, 70% of jobs were in the services sector.³⁷

In terms of non-collective bargaining legislated labour standards, the position can be summarized generally as being much less restrictive for employers in the U.S. as compared to Canada. Laws regarding such basic items as hours, notice requirements, and termination are weaker in the U.S. The U.S. also generally lacks new initiatives such as pay equity (equal pay for work of equal value).

A complete and detailed comparison of American, Canadian and Mexican employment law at a superficial level was recently undertaken by Labour Canada.³⁸ That study merely lists and compares the law on the books and, on many issues, the letter of the law seems reasonably comparable across the three regimes. But as the comparison of U.S. and Canadian union density reveals, real life can vary significantly. Attention has been drawn to the lack of independence of the Mexican labour movement and on some basic issues, such as wages, the real life gulf between the three regimes is huge. Other aspects remain largely unexamined.

³⁶ Freeman, *supra*, note 30 at 13.

³⁷ See The Economic Council of Canada, *GOOD JOBS/BAD JOBS: EMPLOYMENT IN THE SERVICE SECTOR* (Ottawa: Supply and Services, 1990) at 1 [hereinafter *GOOD JOBS/BAD JOBS*]. See also The Economic Council of Canada, *EMPLOYMENT IN THE SERVICE ECONOMY* (Hull: Supply and Services, 1991); R. Belous, *The Impact of the U.S.-Canadian FTA on Labour Relations: Facing New Pressures* (1988) [unpublished] at 6 [hereinafter *Belous*].

³⁸ Canada, *COMPARISON OF LABOUR LEGISLATION OF GENERAL APPLICATION IN CANADA, U.S. AND MEXICO* (Ottawa: Department of Labour, 1 March 1991).

IV. THE GREAT FREE TRADE DEBATE

In light of the extent of Canada's trading relationship with the United States, it is something of an understatement to say that a stable trade relationship with the U.S. is "prima facie crucial to Canadian prosperity".³⁹ Proponents of the FTA, both political and academic, clearly relied upon neo-classical trade theory and pointed to the benefits of expanded markets, increased competition, and the theory of comparative advantage. Access to the huge U.S. market was the prime reason for entering the deal.⁴⁰ But these arguments had a special spin. The argument was not simply one about expanding our opportunity set in terms of the U.S. market, but rather heading off renewed protectionist instincts in the American Congress. An important part of the case for the deal in Canada was that various pieces of American non-tariff protective trade legislation were highly sensitive to and easily manipulable by American interest groups (both labour and capital) and that existing access to that market was in constant peril by virtue of the numerous countervailing, anti-dumping and injury suits brought by American firms and industry organizations.⁴¹ That is, the essence of the deal from a Canadian point of view was not just to increase our access to the U.S. market, but to secure what access we had.⁴² It is a widely held view that Canada was not very successful at all in accomplishing this goal of escaping various U.S. protective trade or the manipulation by interest groups in the U.S.⁴³ The actual *Agreement* is a complex document and the literature

³⁹ *The FTA and Collective Bargaining*, *supra*, note 16 at 41.

⁴⁰ See M. Trebilcock, M. Chandler & R. Howse, *TRADE AND TRANSITIONS* (London: Routledge, 1990) at 11 & c. 2 for a review of the basic theoretical arguments that favour free trade. See also M. Trebilcock, *The Case for Free Trade* (1988) 14 CAN. BUS. L.J. 387.

⁴¹ A.M. Rugman & A. Anderson, *ADMINISTERED PROTECTION IN AMERICA* (New York: Methuen, 1987); A.M. Rugman & A. Anderson, *A Fishy Business: the Abuse of American Trade Law in the Atlantic Groundfish Case of 1985-86* (1987) 13 CAN. PUB. POL. 152. See also *The FTA and Collective Bargaining*, *supra*, note 16 at 42 for an account of U.S. trade actions.

⁴² See Ostry, *supra*, note 21 at 9: "The overwhelming proximate reason for the FTA was fear of mounting U.S. protectionism". See also Rotstein, *supra*, note 16 and VENTURING FORTH, *supra*, note 8 at 4.

⁴³ See T.L. McDorman, *A Guide for Canadians to the New Emergency Protection Trade Law of the United States and Canada* (1990-91) 4 CAN.-U.S. BUS. L. REV. 1 and the sources cited there for a summary of this point and an explanation of the current position regarding "emergency measures". See also R. Grinspun, *North American Free Trade Areas: A Critical Economic Perspective* (May 1991) [unpublished] at 1 [hereinafter Grinspun].

The furor in Canada over U.S. trade representative Carla Hills proceeding with an "extraordinary challenge" to the pork industry ruling in favour of Canada is widely viewed as concrete proof of the manipulable and unprincipled nature of U.S. trade law application. The fact that Canada won the extraordinary challenge is beside the point: see C. MacKenzie & D. Fagan, "Major Trade Victory Hailed in Pork Ruling" *The [Toronto] Globe and Mail* (15 June 1991) A1. See also Barlow, *supra*, note 8 at 9 (preface to the paperback edition).

surrounding each of its provisions is now enormous.⁴⁴ Two crucial points should be made however: first, the *Agreement* removes all existing tariffs over the next 10 years, and second, Canadian exports are still subject to American trade law, but this is, perhaps, somewhat mitigated by a new set of complex dispute resolution mechanisms which, nonetheless, generally still ensure that American trade law is applied.

The goal of open and secure access to the U.S. market generated a cottage industry of economic forecasting about the labour market impact of the *Agreement*.⁴⁵ There was also created a cottage industry of criticism about those studies. Sylvia Ostry recently accurately predicted the repeating of this same cycle in connection with NAFTA.⁴⁶ One study which came to play a vital role during the 1988 federal election was undertaken by the Economic Council of Canada.⁴⁷ Although widely touted by the proponents of the *FTA* because of its prediction of a net gain of 251,000 jobs (439,000 jobs created minus 188,000 jobs lost) the Council itself described this result as "small but positive".⁴⁸ The winners in general were to be in the primary and service sectors, while clearly identifiable losers existed in the manufacturing industrial sector, especially in plastics, rubber, textiles and electrical products.⁴⁹ Other studies were much more pessimistic.⁵⁰ One basic point was clear — the manufacturing heartland of the country in Ontario would benefit the least and be harmed the most from the reduction of tariffs under the *FTA*.⁵¹ Ontario creates more than 50% of the manufacturing output of Canada (with 32.5% of the population), and 16% of Ontario's work-age population is employed in the manufacturing sector. This is second only to Germany. As O'Grady put it, "The adjustment problems faced by Ontario, as a result of the free trade agreement, will be significantly greater than those faced by any other region in North America."⁵² Even on the optimistic and widely cited forecasts of the Economic Council of Canada the across-the-board gains predicted were "surprisingly small", representing a gain of 1.8% over ten years.⁵³ And on the basis of this most optimistic survey the adjustment costs, especially in the manufacturing sector, were seen to be very significant. A study for the government of Ontario concluded:

⁴⁴ For a review of some of the literature see K. Woodside, *The Canada-United States Free Trade Agreement* (1989) 22 CAN. J. POL. SCI. 155.

⁴⁵ See Gunderson & Hamermesh, *supra*, note 12 for a very brief review of the types of studies and their various methodologies.

⁴⁶ Ostry, *supra*, note 21.

⁴⁷ VENTURING FORTH, *supra*, note 8.

⁴⁸ *Ibid.* at 17.

⁴⁹ See Gunderson & Hamermesh, *supra*, note 12 at 236 and *The FTA and Collective Bargaining*, *supra*, note 16 at 45.

⁵⁰ See *The FTA and Collective Bargaining*, *supra*, note 16 at 46 for a brief review. For the debate on the specific impact upon women see Betcherman & Gunderson, *supra*, note 3 at 457.

⁵¹ See *Regional Dimensions*, *supra*, note 14.

⁵² *Labour Market Policy*, *supra*, note 14 at 1.

⁵³ Betcherman & Gunderson, *supra*, note 3 at 457.

The Ontario government should expect extensive withdrawal of certain U.S. owned branch plant investments that no longer need to remain in Canada to bypass tariff barriers.⁵⁴

The debate over the positive or negative impact of the *FTA* upon jobs and capital investment has not resolved itself over the course of the three years since its signing and two years of its implementation. In fact, the debate has become more obscure as both sides claim now to have hard "data" to rely upon. Hardly a day or week goes by without Canadians being able to read of a major layoff, plant shutdown, plant relocation to the U.S., or "rationalization" which is blamed in whole or in part upon the *FTA*.⁵⁵ Critics of the deal, such as the Council of Canadians, claim that up to 315,000 manufacturing jobs, mostly in Ontario, have vanished or moved away since the deal was signed.⁵⁶ Others confidently assess the situation as one in which no job loss, even in the Ontario manufacturing sector, is attributable to the *FTA*.⁵⁷ Meanwhile the federal government's position seems to be one of at least reluctance to attribute any adjustment costs to the *FTA*.⁵⁸ Two things seems clear. First, the manufacturing sector in Ontario is undergoing a truly significant restructuring. Second, given the depth of the Canadian recession, the very high value of the Canadian dollar, high Canadian interest rates (as compared with U.S. rates) and the general pace of technological change in internationalized economies, very little can be concretely said at this stage concerning the impact of the *FTA* on Canadian jobs and investment.⁵⁹

The best post-*FTA* data available on the extent of restructuring in the Canadian economy comes from Ontario. It is compiled by Ontario's Office of Labour Adjustment which administers the advance notice of termination of employment provisions of the *Employment Standards Act* of that province.⁶⁰ Under that *Act* employers are required to report permanent and indefinite layoffs (where 50 or more employees are laid off within a four-week period). The significant data here comes in a comparison of the nature of layoffs during the current recession and that

⁵⁴ J. Baranson, ASSESSMENT OF LIKELY IMPACT OF A U.S.-CANADA FTA UPON THE BEHAVIOR OF U.S. INDUSTRIAL SUBSIDIARIES IN CANADA (ONTARIO) (Toronto: Department of Industry, Trade and Technology, 1985) cited in Watkins, *supra*, note 6.

⁵⁵ The headlines are too numerous to cite.

⁵⁶ J. Ferguson, "Free Trade Has Cost us 315,000 Jobs Critics Say" *The Toronto Star* (1 June 1991) 1. For a negative assessment *see also* B. Campbell, *HARD LESSONS* (Ottawa: The Canadian Centre for Public Policy, 1991); Barlow, *supra*, note 8 (preface to the new edition).

⁵⁷ J. Kettler, "Free trade is not killing jobs" *John Kettler's Future Letter* (19 April 1991) at 9-11.

⁵⁸ H. Solomon, "Hesitant Tories Facing Backlash on Trade Pact" *Financial Post* (2 January 1990) A1.

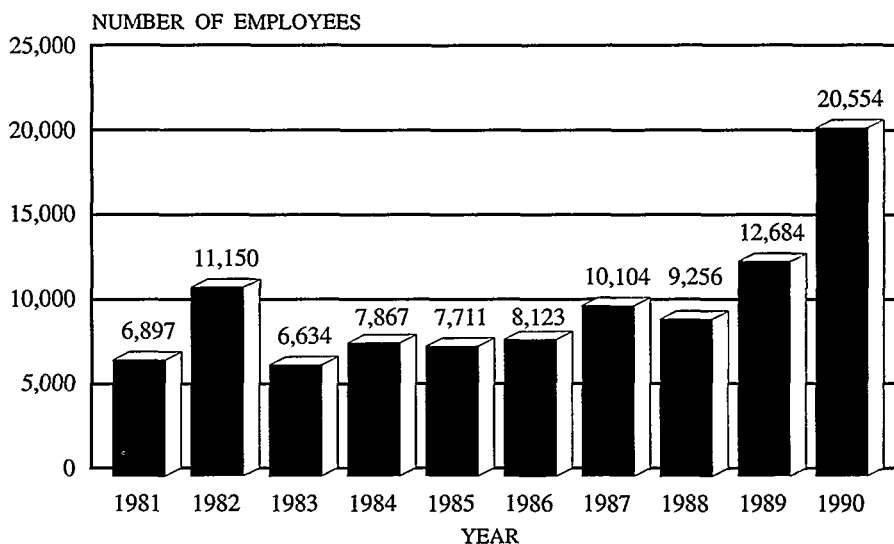
⁵⁹ *See* Betcherman & Gunderson, *supra*, note 3; *Adjusting To Win*, *supra*, note 5.

⁶⁰ R.S.O. 1990, c. E.14, s. 57. *See* Ontario Ministry of Labour, *Report on Permanent and Indefinite Layoffs in Ontario* (Toronto: Office of Labour Adjustment, April 1991).

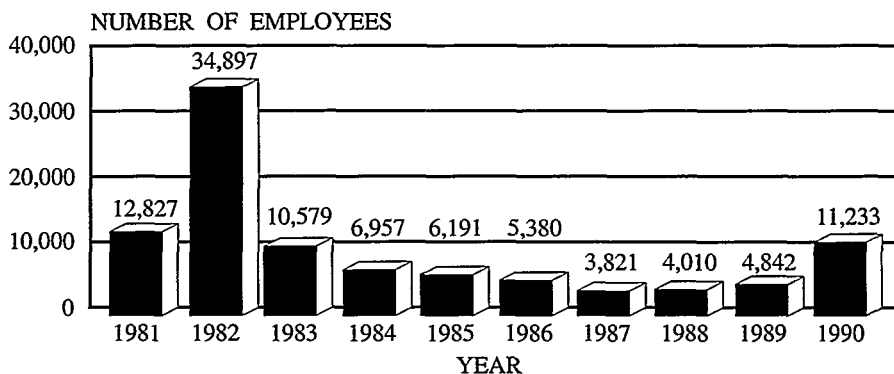
of 1981-82. Though the absolute number of permanent or indefinite layoffs for any of three causes (total closure, partial closure, reduced operation) is lower in the current recession, in 1990 64% of those layoffs were due to plant closures compared to only 24.2% in 1982. In 1982 75.8% of layoffs were caused because of reduced operations at plants which remained in operation and in Ontario. Over time, the shift from reduced operations to closure is as follows:⁶¹

TABLE VII

PARTIAL AND COMPLETE CLOSURES
IN ONTARIO (1981-1990)



LAYOFFS DUE TO REDUCED OPERATION
IN ONTARIO (1981-1990)



⁶¹ Ontario, *Plant Closures, Layoffs and Labour Adjustment Policy* (Toronto: Ministry of Labour, 1 March 1991).

Almost all observers point to this permanent restructuring of the Ontario economy as the most significant post-*FTA* development. Ontario's 1991 budget papers commented, "The economy is undergoing a profound and far reaching structural change".⁶² Although significant impact in the Ontario manufacturing sector was predicted, as we have seen, by pre-*FTA* analysis, it is common ground among many analysts on both sides of the debate that it will be years before the required multi-variate analyses can be undertaken to determine the specific impact of the agreement itself as opposed to that of the high dollar, high interest rates, etc.

V. THE CANADIAN DEBATE: LIMITATIONS, NEW DEVELOPMENTS AND FORGOTTEN POSSIBILITIES

The Canadian debate about the *FTA* has often focused, particularly in the newspaper headlines, upon *direct* impacts such as job loss, plant closures, and plant relocations to the U.S. However, the more profound political discussion surrounding the *FTA* occurred at the level of the *indirect* impact upon Canadian culture, social programs, and, for our purposes, labour policy.⁶³ The great political debate in Canada, and the 1988 federal election, turned on arguments about this sort of impact of the *FTA*. The political issue in the 1988 federal election was the fear of indirect and downward pressure upon Canadian social (including labour) policy caused by increased competition with U.S. firms operating in a more market-oriented environment. In this connection there were three identifiable political positions staked out: the classical free market and free trade efficiency argument, the status quo/nationalist argument, and a free trade/adjustment for losers argument.

The big business community in Canada, represented by the Business Council on National Issues, and the Mulroney government, argued for free trade on neo-classical economic lines.⁶⁴ They argued that econ-

⁶² *Budget Paper E, supra*, note 5 at 85.

⁶³ Attention has been drawn to the ongoing issue of "subsidies" as a *direct* impact of the *FTA*. As noted above, the *FTA* did not secure free access to the American market. U.S. trade law in part focuses upon subsidies as a rationale for retaliatory trade action (in contravention of classic trade theory which would advise the U.S. to take the subsidies and run). However, as Rotstein, *supra*, note 16 at 404 puts it: "The problem does not lie in the lack of objectivity in the application of these laws....the problem lies in the laws themselves." The issues of subsidies is currently under negotiation pursuant to provisions of the *FTA*. There is a real danger here of a *direct* assault upon Canadian labour and social policy as a result of the *FTA*. That is, Canadian labour market measures have been and are likely to be characterized as subsidies by American negotiators: see *Labour Market Policy, supra*, note 14 at 7; see also sources cited, *supra*, nn. 42-44. A logical difficulty here, leaving aside the issue of specificity, is why it is not the case that low-grade labour policies (lower minimum wage and labour standards in the U.S.) do not constitute a subsidy in favour of American producers. For this argument see Grinspun, *supra*, note 43 at 12.

⁶⁴ For a discussion of the role of the Business Council on National Issues in the free trade debate see Barlow, *supra*, note 8.

omies of scale, the theory of comparative advantage, and heightened competition with U.S. firms would create jobs and wealth for Canada. As part of this view, little attention was paid to the adjustment costs of the move to the free trade regime. Although lip service was paid⁶⁵ to adjustment policies, nothing is said about such policies in the *FTA* and indeed there may be real problems with certain adjustment policies under U.S. trade law and in the subsidies negotiations. The very clear subtext here concerned the virtues of market ordering and renewed competition on labour market issues, which Canadian labour law had taken out of competition or for which it had established significant normative baselines.⁶⁶

The status quo/nationalist position was articulated by a broad coalition of interest groups (the Pro-Canada Network), the New Democratic Party, the Liberal Party of Canada and the labour movement. Most Canadians can vividly recall the televised debate between Prime Minister Mulroney and Liberal leader John Turner, in which Turner made the case that the *Agreement* was not just an economic one, but one in which the political, social and cultural fabric of the country was at stake. Maude Barlow's book, *PARCEL OF ROGUES: HOW FREE TRADE IS FAILING CANADA*⁶⁷ aggressively makes the case that the *FTA* is part of a larger federal Conservative agenda to unravel Canadian social policy and to convert us to an American-style market-driven political order. In this vision privatization, deficit reduction, high interest rates, reduction of social program spending and free trade are all part of the overall policy agenda. In making this argument those opposed to the *FTA* focused upon its indirect effects. They noted that inherent in the pro-*FTA* argument, in its celebration of the gains of competition in a much larger marketplace, was the essential idea of putting Canadian labour and social policy into competition with those of America. In this purely competitive exercise, the pressure to lessen the burden of the Canadian regulatory state upon business was said to be straightforward. However, the status quo/nationalist argument, while attentive to the direct and indirect costs of trade liberalization, ignored the cost of the status quo protectionist policy. No effort was made to assess whether the costs per job saved through protectionist measures was actually a wise investment.

The third position staked out during the free trade debate was articulated primarily by academic commentators and is best exemplified in the work of Michael Trebilcock. I have characterized this position as "adjustment for losers". This position is comprised of three elements. First, that the best evidence is that the gains predicted by trade theory will be real. Second, that the costs annually per job saved by protectionist

⁶⁵ Prime Minister Mulroney famously said the government would deliver "the finest adjustment policies in the world": see Barlow, *supra*, note 8 at 53.

⁶⁶ Here I ignore federalism problems *but see infra*, Part VII.

⁶⁷ *Supra*, note 8.

job measures are astonishingly high⁶⁸ and represent in general, a bad investment.⁶⁹ Third, that the gains from trade and savings from foregoing protectionism enable us to compensate the losers in the form of adjustment policies, and, in addition, finance the social programs which are distinctively Canadian.⁷⁰ This position does not, however, answer adequately the general argument about the adequacy of (international) market ordering, nor the problem of indirect and downward pressure on Canadian labour and social policy in the absence of baseline norms. On the basis of these positions, Canadians voted for the *FTA* in 1988.⁷¹

But by far the most interesting development in the Canadian debate in a post-*FTA* era has been the resurrection — in the midst of recession, restructuring, and globalization — of a much more sophisticated debate about adjustment policy and the methods of gaining from free trade. This position may be characterized as “adjusting for winners”. One of the main features of this new debate remains, however, the constant articulation by business interests focused upon the short term, of the *need* for a downward pressure on Canadian labour and social policy in order to remain or become competitive with U.S. firms operating in a comparatively deregulated environment. But by and large Canadian policy has thus far focused upon a longer term set of efficiency initiatives.

The other significant feature of the Canadian debate is that no effort has been made, even as part of the post-*FTA* labour market policy debate, to establish baseline norms for trade along the European Community model. The idea of a social charter, a guarantee that a race to the bottom would be avoided by the establishment of a floor of minimal labour conditions, has not and is not entertained.

⁶⁸ See TRADE AND TRANSITIONS, *supra*, note 40 at 51-76 for estimates of the annual cost to consumers per job saved by protectionist measures. The authors state at 76:

....it makes no sense to “tax” consumers of footwear between \$53,668 and \$69,460 per year for each job saved in the industry when average earnings per worker at the time of the estimates was \$7,145 p.a., or to “tax” consumers of textile and clothing between \$40,600 and \$50,982 per year for each job saved when the average earnings per worker at the time of the estimates was \$10,000 p.a., or to “tax” consumers of automobiles between \$179,000 and \$226,394 per year for each job saved when average earnings in the industry at the time of the estimates were between \$29,000 and \$35,000.

See also A. Masi, *Structural Adjustment and Technological Change in Canadian Steel Industry 1970-1986* in Drache & Gertler, *supra*, note 5 where it is pointed out that over 20 years, \$900,000 was paid in subsidies to save *each* job at Sydney Steel in economically depressed Nova Scotia.

⁶⁹ See TRADE AND TRANSITIONS, *supra*, note 40 for a set of arguments attuned to both efficiency and ethical concerns resulting in a nuanced set of policy recommendations sensitive to communitarian and other values.

⁷⁰ See *The Case for Free Trade*, *supra*, note 40.

⁷¹ Actually, 43% of them voted for free trade. The NDP and Liberals were clearly against the deal and received a majority of the votes cast. This may be Canada's best argument for proportional representation.

I turn now to a discussion of post-*FTA* adjustment policy which has, as John O'Grady puts it, "come in from the cold".⁷²

VI. NEW PROVINCIAL INITIATIVES

During the *FTA* debate, the then Liberal government of Ontario opposed the *Agreement*, reflecting concern for, among other things, the impact upon the Ontario manufacturing sector. The then NDP opposition was aligned with the Ontario Federation of Labour and also strongly opposed the *Agreement*. In September 1990, the NDP won a provincial election and assumed power in the province.

While opposed to free trade, the former Liberal government had not put all of its eggs in the anti-free trade basket and had undertaken a broad-based policy review through an institution called the Premier's Council consisting of highly positioned business, labour, government and academic leaders. In April 1988 the Council released its report entitled *Competing in the New Global Economy*.⁷³ That report focused upon structural weaknesses lurking behind the then still strong Ontario economy. Drawing attention to the role of technological change and the globalization of business, the report advocated shifting resources out of commodity and mature manufacturing sectors into skills-based, higher value-added products and services. Gunderson and Verma⁷⁴ summarize the objectives identified in the 1988 report as follows:

- (1) develop high value-added industries;
- (2) provide industrial assistance to businesses in internationally traded sectors;
- (3) emphasize growth of major indigenous Ontario companies of world scale and those traded sectors;
- (4) create an entrepreneurial, risk taking culture to establish successful ventures in the internationally traded sectors;
- (5) build a strong science and technological infrastructure;
- (6) improve the education, training, and labour adjustment infrastructure to facilitate the necessary adjustment and reduce its adverse consequences;
- (7) follow a consensus approach in establishing general strategies and specific programs.

The 1988 report thus advocated a strategy of picking winners in the sense of identifying firms or sectors. However, another Premier's Council report, *People and Skills in the New Global Economy for Ontario*,⁷⁵ was published in 1990 when Ontario's economy was in recession and major restructuring was evident. This report aims at the problem of "managing" the restructuring process by focusing essentially

⁷² J. O'Grady, *Coming in the from Cold: Canadian Labour Market Policy in the 1990s* (September 1990) [unpublished].

⁷³ Premier's Council, *Competing in the New Global Economy* (Toronto: Queen's Printer, April 1988).

⁷⁴ *Supra*, note 35 at 37.

⁷⁵ *Supra*, note 5.

upon education policy, labour force training, and labour market adjustment policy, including specific labour law reforms. This report is much more Reichian⁷⁶ in its rhetoric than the 1988 report in that it focuses not upon firms, but upon the labour force and accepts the fundamental propositions that (1) in a world of technological change, a shift to the service sector, and globalization of production and investment, government policy is more, not less important, and (2) the key policy objective is to create and sustain a highly trained and flexible workforce which can excel in a world in which routine low value-added production functions will be transported to developing countries with low labour costs. The assumption in the report is that the role of the *FTA* is of academic interest only at this stage, and that reacting to the *FTA* and compensating its specific victims is normatively wrong because it would discriminate between similarly situated victims, and impossible as well. The focus of the report, rather than backward looking and compensatory, is forward looking and aims at broad-based and long-term labour market policies.

Perhaps the most interesting development in Ontario since the election of the NDP has been the lack of a reversion by the new government to an anti-*FTA*, job protection or compensation strategy. The April 1991 NDP budget advocates a policy position which is basically congruent with and extends the analysis of the former Liberal government of 1990's Premier's Council report. *Budget Paper E*⁷⁷ is widely regarded by admirers and detractors⁷⁸ as the new government's economic manifesto. *Budget Paper E* is subtitled *Ontario in the 90s: Promoting Equitable Structural Change*.

Budget Paper E distances itself from what it claims to be federal economic policy, which it sees as a hands off laissez-faire policy of privatization, deregulation, free trade and the erosion of the social safety net.⁷⁹ Its alternative vision is "for government to play a role of facilitator of structural change, not only to reduce the cost of transition and distribute them more fairly, but actively to promote development of high value-added high wage jobs through strategic partnerships".⁸⁰

The paper adopts the basic Reichian rhetoric and extends it by adopting the sort of analysis found in Best's analysis of industrial restructuring⁸¹ and that of the OECD report, *New Technologies in the 1990s*.⁸² The report stresses the end of entrenched methods of mass production where competition on labour costs is key. Change, flexibility

⁷⁶ *Supra*, note 5.

⁷⁷ *Ibid.*

⁷⁸ See, e.g., T. Corcoran, "The Real Taboo Word in Ontario is Profits" *The [Toronto] Globe & Mail* (11 June 1991) B2.

⁷⁹ *Supra*, note 5 at 87.

⁸⁰ *Ibid.*

⁸¹ Best, *supra*, note 5.

⁸² *New Technologies in the 1990s: A Socio-Economic Strategy* (Paris: OECD, 1988). The report also utilizes an analysis for which Paul Osterman is now well known: see P. Osterman, *EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION AND PUBLIC POLICY* (New York: Oxford University Press, 1988).

in restructuring, along with sector-based initiatives, and research and development are emphasized.

The degree of congruence between the Liberal and NDP labour market policy orientations can be gleaned from the concrete legislative reform agenda now being prepared by the NDP government. The two key labour policy sections in *People and Skills* focused upon training and adjustment policies.

The legislative agenda for the new NDP government could be viewed as a programmatic working through of the agenda set out in the 1990s *People and Skills* report.⁸³ Both *People and Skills* and *Budget Paper E* draw attention to a public and private worker training deficit. *Budget Paper E* offers the following comparison regarding public expenditure:⁸⁴

TABLE VIII
PUBLIC EXPENDITURE ON LABOUR MARKET
TRAINING FOR ADULTS AS A PERCENTAGE
OF GDP, 1988

	%
Italy	0.03
Japan	0.03
United States	0.11
United Kingdom	0.14
Canada	0.20
France	0.28*
Germany	0.32

*1987 data.

SOURCE: OECD Employment Outlook, July 1989.

Employers in Canada spend less than 0.3% of GDP on formal workplace training. This is estimated to be one-half the U.S. rate of investment and one-quarter that of Germany.⁸⁵

The Premier's Council in *People and Skills* recommended the creation of a bipartite training and adjustment board with a mandate to foster creation of sectoral and regionally based training funds in order to avoid perceived significant free rider problems.⁸⁶ The Council borrowed heavily from already established sectoral initiatives in the electronic and steel industries.⁸⁷ Legislative proposals for the creation of the Ontario Training and Adjustment Board are currently oscillating

⁸³ There seems, however, to be some lack of controlling vision or coherence, especially regarding collective bargaining reform: *see infra*, note 122 and accompanying text.

⁸⁴ *Supra*, note 5 at 99.

⁸⁵ *People and Skills*, *supra*, note 5 at 91-92. *See also Budget Paper E*, *supra*, note 5 at 99.

⁸⁶ *People and Skills*, *supra*, note 5 at 94-95, 118 & 137.

⁸⁷ An example is the Canadian Steel Trade and Employment Congress initiative. For information *see Adjusting to Win*, *supra*, note 5 at 38-49; *People and Skills*, *supra*, note 5 at 179; *Human Resource*, *supra*, note 27 at 11.

between the provincial Ministry of Industry, Trade and Technology and the provincial cabinet. The sectoral approach with government involvement does, however, raise the problem of U.S. subsidy law and this reinforces again the role of the ongoing subsidy negotiations under the FTA.⁸⁸

The NDP government is also working on a legislative agenda flowing from section 3 of the *People and Skills* report regarding the adjustment process. Like the federal *de Grandpré Report*,⁸⁹ *People and Skills*, and implicitly *Budget Paper E*, reject the idea of a specific reactive response to the FTA. Attention is drawn to the significant degree of "job churning" already existing in the Canadian economy, and the case for separating out the FTA impact is given short shrift.⁹⁰ The Premier's Council recommended specific statutory legal reforms: increasing the length of notice which must be given under the *Employment Standards Act* for "mass" layoffs beyond the current 16 weeks; reducing the threshold number of worker layoffs required to trigger those notice requirements from 50 to 10; making mandatory the creation of bipartite worker adjustment committees to facilitate re-training and re-employment; the creation of a broadly mandated workplace and community adjustment service under the Ontario Training and Adjustment Board; and the creation of a wage protection fund securing wages and other entitlements for employees of closed and bankrupt firms.⁹¹

Almost every aspect of this reform agenda set out by the previous Liberal government has now been adopted by the current NDP government.⁹² Thus far, legislation has been adopted to amend the *Employment Standards Act* to create an employee wage protection program and to extend the personal liability of officers and directors for unpaid wages.⁹³ In January 1992 the Minister of Labour also announced increased financial assistance to labour-management adjustment committees, a new aggressive policy on ministerial authority to demand that such committees be struck (the *Employment Standards Act* currently gives the Minister a discretion in this regard) and a consultation process on notice and severance pay amendments to the *Employment Standards Act*.

⁸⁸ See *supra*, note 65.

⁸⁹ See *infra*, note 112 and accompanying text.

⁹⁰ *People and Skills*, *supra*, note 5 at 154. See also TRADE AND TRANSITIONS, *supra*, note 40 at 1-9 for more data on "job turning" and "firm churning".

⁹¹ Existing employment standards legislation utilized the device of attempting to give employees a priority and security interest (in the form of deemed trusts and charges) over the assets of the employer. This assumed that there were assets — which is the major problem. Thus, the report also goes on to recommend changes to the federal *Bankruptcy Act*, R.S.C. 1985, c. B-3, which gives employees low priority against the assets of a bankrupt.

⁹² See *Labour Adjustment Consultation Paper* (Policy Branch, Ontario Department of Labour, 24 January 1991).

⁹³ *Employment Standards Amendment Act*, S.O. 1991, c. 16. ss 1-5 & 7-18 were proclaimed in force October 18, 1991. S. 6 was proclaimed in force January 20, 1992 and s. 19 on February 10, 1992. The balance has yet to be proclaimed.

The most remarkable aspect of *People and Skills* is its concentration upon the provisions of the *Employment Standards Act*, and its virtual ignoring of the Ontario *Labour Relations Act*⁹⁴ — that is, the total absence of any discussion concerning the institution of collective bargaining. This is so even though the report process itself was vigorously bipartite. It is also particularly striking given the degree of union density in the manufacturing sector where the adjustment process is so significant.⁹⁵ The absence of any institutional reference or set of proposals deserves comment. First, the new NDP government has, via a controversial and inadequate “consultation” process, undertaken a review of the Ontario *Labour Relations Act*. This review did not involve consideration of serious reform of the *Act*, but rather a long list of minor tinkering with the *Act* as it now stands. The “consultation” process was conducted in private with an extremely short deadline, and the results are, predictably, inadequate. As a result, the process of collective bargaining reform has been tainted by the way in which this package of reforms has been handled.⁹⁶ The process consisted of a small group of union and management labour lawyers, assisted by a few public servants, reviewing the *Act*. In the end, the union lawyers and management lawyers issued two completely separate and unhelpful reports. No empirical research, no broad based consultation, and no serious review any of the basic assumptions of the collective bargaining legislation was undertaken. The result is perceived to be a highly politicized set of reforms commonly thought of as a union “wish list” as to how organized labour would like to see the *Act* and its administration reformed.

The inadequacy of the consultation process is a minor point. What is truly striking about this aspect of the NDP government’s collective bargaining legislative agenda is its total disassociation from the overall policy framework enunciated in *People and Skills* and *Budget Paper E*. It is as if reform of the province’s basic collective bargaining legislation did not bear upon the issues discussed there. Nothing could be further from the truth. After considering new federal initiatives I will briefly explain some obvious reasons why this is so.

The basic point is that a package of collective labour law reforms motivated by the equity and efficiency concerns articulated in the Premier’s Council report and *Budget Paper E*, and within the framework of a general policy response to the restructuring of the Ontario economy, could, I believe, be melded with changes to the *Employment Standards Act* and other reforms as a sensible labour market policy. Instead, the collective bargaining part of the picture simply does not exist. Those charged with carriage of the collective bargaining reform package appear unaware of the policy framework of *Budget Paper E*.

⁹⁴ R.S.O. 1990, c. L.2.

⁹⁵ See *supra*, Part III.

⁹⁶ See “Ontario’s Proposals to Skew Labour Relations” *The [Toronto] Globe & Mail* (30 May 1991) A18 [hereinafter *Editorial*].

On the other hand, it is clear that reform of collective bargaining is important to the NDP and is closely monitored by the provincial labour movement. The inadequacy of the collective bargaining reform initiative may reflect the general attitude on the part of labour commented upon by the Federal Commission on Redundancy (*The Carrothers Report*).⁹⁷ In that *Report*, Canadian unions were noted for their lack of initiative in pursuing a voice over fundamental entrepreneurial issues.⁹⁸ The picture painted above by Adams of Canadian unions being less "business unionism"-oriented may be true in many respects, but not in others.⁹⁹

VII. NEW FEDERAL INITIATIVES

By constitutional amendment, the Federal Parliament has legislative and administrative power over unemployment insurance (UI). Combined with its control over immigration policy, the federal government has as a result had *de facto* control over macro labour market policy although, as noted above, recent developments in Ontario may be altering this position.

The federal government's preexisting strategy was overwhelmingly passive, and geared to providing short-term assistance to the unemployed. Under the *Unemployment Insurance Act*¹⁰⁰ assistance is provided to those who qualify with a minimum of 20 weeks of insurable employment and who are without a job and actively seeking work. The other preexisting federal mechanism is a series of programs gathered under the Canadian Jobs Strategy (CJS).¹⁰¹ Labour Canada and Employment and Immigration Canada also operate employment adjustment services which provide funds to labour/management committees established to provide assistance where large layoffs occur, but only where management and labour have agreed to establish such a committee.

The overwhelming bias in this array of programs is towards passive income maintenance for the unemployed. In 1988, Canada spent \$10.5 billion on unemployment insurance compared to \$1.7 billion for the CJS. Furthermore, two-thirds of the CJS budget is expended on those with special employment problems, such as the long-term unemployed, youth, and women. It should be noted, however, that some projects, such as the Canadian Steel Trade and Employment Congress, have been funded by the new initiatives program of CJS.¹⁰² Furthermore, the budget for the industrial adjustment services (IAS) provided by Labour Canada is only \$11.4 million.¹⁰³ As the Premier's Council noted¹⁰⁴ the voluntary nature

⁹⁷ A.W.R. Carrothers, *Report of the Commission of Inquiry into Redundancies and Layoffs* (Ottawa: Department of Labour Canada, March 1979).

⁹⁸ *Ibid.* at 192-93.

⁹⁹ *North American Industrial Relations, supra*, note 34 at 13.

¹⁰⁰ R.S.C. 1985, c. U-1.

¹⁰¹ See Gunderson & Verma, *supra*, note 35 at 26.

¹⁰² See *Adjusting to Win, supra*, note 5 at 38.

¹⁰³ *Ibid.* at 39.

¹⁰⁴ *People and Skills, supra*, note 5 at 185.

of the committees to which the IAS will render assistance has created a situation where, in Ontario, in only 56 of 130 major layoffs were IAS committees established.

This overall bias in favour of alleviation of unemployment and helping the employment-disadvantaged to gain access to the workforce has come at the expense of adjustment and training policies. Canada's total labour market expenditures as a percentage of GDP in 1987 were as follows:¹⁰⁵

TABLE IX
TOTAL LABOUR MARKET
EXPENDITURES AS A
PERCENTAGE OF GDP, 1987

France	3.07
Sweden	2.66
UK	2.57
W. Germany	2.34
Canada	2.24
Australia	1.53
US	0.83
Japan	0.59

SOURCE: OECD Employment Outlook, September 1988: 86.

The overwhelming bias in Canada in favour of income maintenance through measures such as unemployment insurance is revealed in the following comparison:¹⁰⁶

TABLE X
GOVERNMENT EMPLOYMENT PROMOTION AND
INCOME MAINTENANCE EXPENDITURES AS A PERCENTAGE
OF TOTAL LABOUR MARKET EXPENDITURE, 1987

	Employment promotion measures	Income maintenance measures
Sweden	70	30
W. Germany	42	58
US	29	71
UK	35	65
Japan	29	71
Canada	25	75
France	24	76
Australia	21	79

SOURCE: Advisory Council on Adjustment *Adjusting to Win* 1989: 46.

¹⁰⁵ TRADE AND TRANSITIONS, *supra*, note 40 at 131.

¹⁰⁶ *Ibid.* at 132. See also *Adjusting to Win*, *supra*, note 5 at 46 and *People and Skills*, *supra*, note 5 at 197.

Recent federal initiatives indicate a review of this fundamentally passive, unemployment insurance oriented approach and a switch to an adjustment/training model.

In 1989 the federal government announced a new "Labour Force Development Strategy".¹⁰⁷ As part of this strategy, savings (of approximately 10%) from recently enacted eligibility rule changes to the *Unemployment Insurance Act*¹⁰⁸ will be allocated to proactive training measures.¹⁰⁹ The federal government requested the Canadian Labour Market Productivity Centre (CLMPC) to undertake a massive consultative exercise on the Labour Force Development Strategy. The CLMPC is centred in Ottawa and represents one of the rare high level bipartite "corporatist" initiatives in Canada. These initiatives are rare because of the highly fragmented and decentralized nature of the labour movement and employer associations.¹¹⁰ However, in the early 1980s the Business Council on National Issues and the Canadian Labour Congress did establish the CLMPC. The CLMPC is co-chaired by the President of the Canadian Labour Congress and the President of ITT Canada. The fact that the federal government turned to the CLMPC in 1989 to undertake the consultative process in connection with its new labour force development strategy is a significant development in Canadian terms. The CLMPC conciliative process has led to the formation of a new bipartite national institution — The Canadian Labour Force Development Board.¹¹¹ The long term significance of these "corporatist" developments remains to be seen, but they do represent a new departure in Canadian labour

¹⁰⁷ See the two volume policy paper, Canada Employment and Immigration, *SUCCESS IN THE WORKS: A PROFILE OF CANADA'S EMERGING WORKFORCE* (Ottawa: Employment and Immigration Canada, 1989). See also R. Mahon, *Adjusting to Win? The New Tory Training Initiative in HOW OTTAWA SPENDS 1990* (Toronto: Lorimer, 1990) c. 4 [hereinafter Mahon]; See also Gunderson & Verma, *supra*, note 35 at 28; *Report of the Canadian Labour Market and Productivity Centre Task Force on the Labour Force Development Strategy* (Ottawa: Canadian Labour Market and Productivity Centre, 1990) at 1-9.

¹⁰⁸ See A. Yalnezian, *Submission to the Senate Committee on Bill C-21: Amendments to the Unemployment Insurance Act* (Social Planning Council of Metropolitan Toronto, January 1990) for a critical view of the changes to the proposed Act. The *Act to Amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, S.C. 1990, c. 40 received Royal Assent 23 October 1990.

¹⁰⁹ The actual amount here is about \$775 million. See Mahon, *supra*, note 107. See also G. Betcherman, *The Recent Labour Market Policy Debate in Canada* (June 1991) [unpublished] [hereinafter Betcherman]. See also P. Kumar, *Labour Market Adjustment Issues: An Industrial Relations Perspective* (June 1991) [unpublished] [hereinafter *Labour Market Adjustment Issues*].

¹¹⁰ See also *Canadian Labour Force Development Board* (Ottawa: Employment and Immigration Canada, January 1991). See Mahon, *supra*, note 107 at 89.

¹¹¹ See *A Framework for A National Trading Board: The Report of the Phase Two Committee on the Labour Force Development Strategy* (Ottawa: Canadian Labour Market and Productivity Centre, July 1990). The composition of the Board is fundamentally bipartite but also includes representatives from the education community plus four target groups (women, visible minorities, Aboriginal people, and the disabled). See *Labour Market Adjustment Issues*, *supra*, note 109 at 26.

relations and Canadian labour market policy. The degree of consensus about the goals (and not the means, such as financing) of labour market adjustment and the shift of passive to active policies is evident.

One direct outcome of the free trade debate was the striking of the Federal Advisory Council on Adjustment and the subsequent publication of their Report, *Adjusting to Win* (also known as the *de Grandpré Report*).¹¹² The Council was viewed as the policy formation mechanism for what the federal government had promised in terms of adjustment policies in the wake of the FTA. *Adjusting to Win* has been criticized for failing to make a case for special adjustment for FTA victims.¹¹³ The Council rightly, however, took the view that from no policy point of view did it make sense to try to single out FTA victims and prefer them over victims of other causes of adjustment.¹¹⁴ The basic thrust of *Adjusting to Win* is congruent with all of the policy initiatives, both federal and provincial, reviewed thus far. The major emphasis is upon a shift from passive to active labour market policy and from a social safety net concentrating upon unemployment to what the Council called a "trampoline" system focusing upon re-employment and training for higher value-added industries. In general, *Adjusting to Win* sees the government as a facilitator of private action to overcome collective action and free-rider problems. The Council recommended a tax break for firm-based training, increasing the funding for the industrial adjustment service, and a series of specific labour law reforms. The specific labour law reforms are almost exactly parallel to those recommended by the Ontario Premier's Council — increased notice provisions, better severance pay, and a wage protection fund. Of all of these initiatives thus far, the federal government has announced legislation dealing only with the wage protection fund.¹¹⁵ Again, however, it is similarly striking that *Adjusting to Win* makes no mention of the institution of collective bargaining.¹¹⁶ The overall shift, then, at the federal level is away from

¹¹² So named because the council was chaired by Jean de Grandpré, Chairman of the Board of BCE Inc. (ranked the most profitable company in Canada by *The [Toronto] Globe & Mail, Report on Business Magazine* in its annual "Top 1000 Companies" survey: see *The [Toronto] Globe & Mail* (July 1991) at 58.

¹¹³ See Barlow, *supra*, note 8 at 53, where it is asserted that de Grandpré "let the government off the hook....refus[ing] to deal specifically with people thrown out work as a result of free trade".

¹¹⁴ See Betcherman & Gunderson, *supra*, note 3.

¹¹⁵ The proposed legislation is reported to be part of a package of reforms dealing with the federal bankruptcy law and will be funded by a new payroll tax payable by employers and amounting to about 10¢ per employee per week: see D. Fagan, "Workers' Fund Planned for Bankruptcy Cases — Tax on Employers Proposed by Ottawa" *The [Toronto] Globe & Mail* (14 June 1991) A1. The immediate reaction from *The Globe & Mail's* pro-business columnist Terence Corcoran is reflected in his title "Bankruptcy Tax No Way to Protect Wages" *The [Toronto] Globe & Mail* (14 June 1991) B2 [hereinafter Corcoran]. Corcoran argues that the better method of protecting employees would be to give them a super priority rather than add a new tax, minimal as it is. This of course assumes there are assets which can be realized.

¹¹⁶ For a general review of *Adjusting to Win* see Betcherman, *supra*, note 109, and Mahon, *supra*, note 107.

unemployment insurance toward adjustment and re-training measures and an emphasis upon private and corporatist control of training.¹¹⁷

The pro-FTA federal Conservative government and the anti-FTA NDP Ontario government are pursuing post-FTA labour policy agendas which are remarkably similar.¹¹⁸ The Premier's Council report *People and Skills, Adjusting to Win* and *Budget Paper E* share a common perception of the problem and, generally, the same set of policy prescriptions. I have ascribed the perception of the problem and the proposed solution as Reichian in their rhetoric.¹¹⁹ The great FTA debate is also captured by Reich's analysis. In that debate, those adopting the classical free trade stance resemble Reich's "impassive cosmopolitans" — indifferent to the adjustment impact on their fellow citizens in the manufacturing sector (or in Reich's terms "routine production workers"). Those opposed to the FTA share many characteristics of Reich's "zero sum nationalists".¹²⁰ The restructuring of Ontario's manufacturing sector, the rise of the service sector, the "declining middle" and the good job/bad job phenomenon also bear out Reich's description of our plight. The response of Canadian governments has also seemingly been much influenced by the general drift of Reich's analysis. They accept the proposition that in an internationalized economy the key focus of government policy should be upon market labour policies regarding education, training and adjustment.¹²¹ This is an example of what Reich calls "positive economic nationalism".¹²²

¹¹⁷ The major divergences between the Canadian labour movement and the business community on the issue of funding of training are reviewed in *Labour Market Adjustment Issues*, *supra*, note 109.

¹¹⁸ But not, perhaps, well integrated: see J. O'Grady, *Re-Aligning Canadian Labour Market Policy: the Action Up to the First Intermission* (September 1990) at 13 [unpublished].

¹¹⁹ Reich, *supra*, note 5.

¹²⁰ *Ibid.* at c. 25.

¹²¹ See also *The Case for Free Trade*, *supra*, note 40 at 397:

The modern state has a major economic role to play in setting stable and growth-macro economic policies (fiscal, monetary, and exchange rate policies): in establishing "framework" microeconomic policies such as the labour market, competition, and intellectual property policies; for building economic infrastructures, such as transportation, communications, and power generation and distribution networks; for supporting basic and applied research and development; *and above all for promoting the development of human capital*. Our future in the global economy will increasingly rest on having a workforce that is better trained, more productive, and more innovative than that of our international competitors. We have no comparative advantage over many of our competitors and low-skilled, low-wage industries. Upgrading the quality of our education system, reducing the alarming high school drop-out rate, improving our apprenticeship, college and on-the-job training and retraining programmes, and also making our institutions of higher learning and research globally competitive are urgent priorities. (emphasis added)

See also *Labour Market Policy*, *supra*, note 14 at 60, where O'Grady makes the point that in the small open economy this is more the case.

¹²² Reich, *supra*, note 5, c. 25.

But one aspect of the similarity of the renewed Canadian debate and Reich's analysis is troubling. This is the lack of any discussion of the institution of collective bargaining as part of a new labour policy. This in turn raises the question which was so central to the *FTA* and the free trade debate — will Canada's labour policy inevitably be drawn into a race to the bottom with that of the United States? Is this the long term indirect effect of the *FTA*?

The data noted above¹²³ indicate the key differences in collective bargaining law, general labour standards legislation, as well as a union density between the two countries. Are these Canadian policies inevitably going to join the non-union, lower labour standards regime of the United States? Short-term business interests have already reacted to the federally announced wage fund¹²⁴ and Ontario's labour law reforms in rhetorical terms which seem to indicate that the pressure to push to the bottom is already loud and clear.¹²⁵

But the case is much more complex than this easy business rhetoric would have us believe. First, numerous commentators have drawn attention to the fact that important Canadian social policies — most notably the universal medicare system paid out of a general (not payroll) tax base — represents a real positive externality and competitive advantage for Canadians over American firms.¹²⁶ It has also been estimated that total fringe benefits in the manufacturing sector are a larger component of total compensation in the United States — 26% versus 22%.¹²⁷

Some have argued that the real purpose of the *FTA* is to create pressure to deregulate and de-legislate Canadian labour policy down to a "level playing field" — the U.S. field.¹²⁸ It has also been correctly observed that the pressure will be heightened by the constitutional fact of provincial control of labour relations as provinces compete to offer the legislative environment most conducive to business.¹²⁹ Betcherman and Gunderson articulate a commonly held view when they argue:

¹²³ *Ibid.* at 6-16.

¹²⁴ See Corcoran, *supra*, note 115.

¹²⁵ See Editorial, *supra*, note 96 at A18 where it is argued "...there is no evidence that the Ontario government has taken account of Ontario's economic well being. The proposals would raise the cost and risks of doing business in the province, accelerate the loss of jobs and certainly discourage investment by Canadians and foreigners alike."

¹²⁶ See J. Miles, *Post-Industrialism and the Service Economy* in Drache & Gertler, *supra*, note 5 at 359 [hereinafter Miles]; see also *Human Resource*, *supra*, note 27 at 2; Betcherman & Gunderson, *supra*, note 3; Freeman, *supra*, note 30.

¹²⁷ Betcherman & Gunderson, *supra*, note 3 at 459.

¹²⁸ See Barlow, *supra*, note 8. See also Gunderson & Hamermesh, *supra*, note 12 at 227.

¹²⁹ Betcherman & Gunderson, *supra*, note 3 at 456. See also *Regional Dimensions*, *supra*, note 14. This is not a new phenomenon in Canada: see B.A. Langille, *The Michelin Amendment in Context* (1981) 6 DALHOUSIE L.J. 523.

In all likelihood the greatest effect of the FTA on industrial relations will be indirect, through pressures to harmonize labour laws. This will occur as governments (both federal and provincial) will be forced to reassess laws regarding collective bargaining, employment standards, and human rights, given that their cost consequences could make it more difficult for competitive firms to compete against American firms, which tend not to face such strong regulatory constraints. Retrenchment could conceivably involve restrictions on new initiatives and reduced enforcement or updating or even repeal of existing initiatives.¹³⁰

But as Betcherman and Gunderson themselves realize, the economic and political pressures upon Canadian governments are more complex than this analysis supposes. The Reichian character of *Budget Paper E*, the Premier's Council reports, and *Adjusting to Win* are testimony to that. Labour policies which promote a well-trained, informed, and flexible workforce are central to long-term economic success. Short-term business rhetoric, especially given fundamental collective action problems, is not the whole of the story. Much of Canada's employment standards legislation — governing advanced notice requirements, severance pay, wage protection, and labour/management consultation are strongly justified in efficiency as well as equity terms. Trebilcock, Chandler and Howse emphasize the allocative efficiency via market failure analysis as well as the distributional rationales for a strong set of employment standards concerning training and adjustment. Imperfect and asymmetric information, externalities and the accumulation of human capital, and labour market congestion argue for extended notice requirements, wage protection funds and labour/management consultation. Collective action and free-rider problems cannot be solved without governmental or at least sectoral initiatives. Severance pay reflects loss of human capital built up in a job.¹³¹ This analysis points the way to other obvious required improvements in our labour standards legislation — for example greatly enhanced pension portability, flexible retirement policies, etc.¹³²

Much attention has been paid to the impact of increased competition between U.S. and Canadian firms on the collective bargaining system in Canada. Analysts¹³³ had drawn attention to the fact that under the FTA many unionized Canadian firms will be forced to compete with non-unionized American companies. They have also emphasized the work of Kochan, McKersie and Katz¹³⁴ as demonstrating that the U.S. response to increased competition has been the rise of the non-union industrial relations system. As O'Grady puts it:

¹³⁰ Betcherman & Gunderson, *supra*, note 3 at 459.

¹³¹ See TRADE AND TRANSITIONS, *supra*, note 40 at 120 & 124-45.

¹³² For more on the economic argument in favour of strong labour standards see Miles, *supra*, note 126, especially at 359. See also Gunderson & Verma, *supra*, note 35 at 32-36 and GOVERNING THE WORKPLACE, *supra*, note 7.

¹³³ Belous, *supra*, note 37. See also *Human Resource*, *supra*, note 27 at 5.

¹³⁴ T.A. Kochan, H.C. Katz & R.B. McKersie, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (New York: Basic Books, 1986).

Perhaps the most important contribution of their work was to identify the motivation for deunionization and in particular to distinguish it from a simple low wage strategy for achieving competitiveness. Kochan and his colleagues argue persuasively that in the 1970s senior management became convinced that the key to competitive survival of their operations lay in the adoption of new human resource management methods....the most significant finding of Kochan and his colleagues was that *American management generally viewed these new human resource management methods as incompatible with traditional collective bargaining*. Large American employers therefore pursued a deliberate strategy of de-unionization. This de-unionization, as we have noted, was normally accomplished by shifting production to green field sites that had commenced operation on a non-union basis.¹³⁵ [emphasis in original]

Because of the more remote possibility of organizing a green field plant in Ontario, those plants are likely to be created in the United States.

Richard Freeman, on the other hand, has convincingly argued that Canada does not need to follow the path of de-unionization pursued in the U.S. (and also in Japan and the U.K.).¹³⁶ Freeman demonstrates that a wide range of labour market institutions (limited or strong unionism) are compatible with national economic success, and that cheap labour elsewhere will more likely complement than substitute for most Canadian workers. Although Freeman identified three distinct and strong pressures — on wages, on investment, and on employer attitudes — he demonstrates that “no set of labour relations institutions have a monopoly on good, or bad economic policies or efficient behaviour”.¹³⁷ Freeman goes on to add:

Labour and management can produce as or more flexible and economically sensible responses to the changing world economic environment under collective bargaining as under decentralized, managerial/market decisionmaking.¹³⁸

Freeman does predict that unions will be forced to look more towards the bottom lines of the companies with which they negotiate but that employers similarly will be forced to provide more information on these issues during negotiations. Furthermore, fairer labour laws in Canada and the competitive edge of lower fringe benefits will buffer Canada from U.S. de-unionization.¹³⁹ Added to this is the analysis of Professor Kochan who writes:

¹³⁵ *Human Resource*, *supra*, note 27 at 5.

¹³⁶ Freeman, *supra*, note 30.

¹³⁷ *Ibid.* at 191.

¹³⁸ *Ibid.*

¹³⁹ See also W.C. Riddell, *Commentary* in PERSPECTIVE 2000, *supra*, note 30, 198 at 201 where he states “Canada is unlikely to follow the United States along the de-unionization path and the importance of unions in the labour markets of the two countries is likely to continue to differ substantially”.

The means by which change occurs in Canada need not and are not likely to be the same as in the United States....[t]o avoid the adversarial aspects of the U.S. pattern of adaptation, labour, management and government policymakers in Canada, we will need to make significant changes in their traditional beliefs and practices. Labour will become more of a champion of innovation and adjustment at the workplace and play a broader role in the management and governance of the enterprise. Management, in turn, will need to accept the broader role of workers and their representatives in the enterprise in return for the changes in the human-resource policies and practices it needs to compete in contemporary markets. Government policymakers will need to see these industrial relations innovations as critical to the performance of the national economy.¹⁴⁰

The work of Freeman and Kochan points directly to one of the most interesting aspects of the reinvigorated post-FTA labour market debate in Canada. Although that debate has been conducted in a basically bipartite fashion¹⁴¹ no attention has been paid to Canadian collective bargaining law — to the way in which it presents a barrier to efficient and fair methods of dealing with adjustment and restructuring and the ways in which it could be reformed so that the changes predicted by Freeman and Kochan are legally permitted and encouraged. The key legal impediment to effective collective bargaining about adjustment issues is contained in the basic framework of Canadian law. While Canadian collective bargaining law on the duty to bargain in good faith does not make the mistake of American law contained in the mandatory/permissive distinction — and thus legally entitles unions to bargain all restructuring issues — it does achieve this result indirectly. Strikes are banned by statute during the currency of collective agreements, and, again by statute, all disputes are to be resolved by arbitration. Much leading arbitral authority¹⁴² takes a strong management rights view. This view is that if the collective agreement contains no provisions restricting or dealing with management action such as plant relocation or shutdown, then management has the “reserved right” (so called) to act unilaterally. This legal regime structures obvious incentives, which employers have exploited, not to reveal or bargain about restructuring issues until the union is “locked into” an agreement. Then management acts unilaterally in a legally permissible way.¹⁴³ The inefficiency and unfairness of this regime of incentives to create and exploit information asymmetries are central to both the federal and provincial labour market initiatives contained in the *People and Skills* report, *Adjusting to Win* and *Budget Paper E* all of which point to the advantages and efficiencies of more

¹⁴⁰ T. Kochan, *Looking to the Year 2000: Challenges for Industrial Relations and Human Resource Management*, *supra*, note 30 at 217.

¹⁴¹ Labour, however, was not well represented on the de Grandpré Commission.

¹⁴² See generally B.A. Langille, “Equal Partnership” in *Canadian Labour Law* (1983) 21 OSGOODE HALL L.J. 496 at 532-36.

¹⁴³ See, e.g., *UE, Local 504 v. Westinghouse Canada Ltd.*, [1980] 2 CAN. L.R.B.R. 469, [1980] O.L.R.B. REP. 469, *aff’d*, 80 C.L.L.C. 14,062 (Div. Ct.).

notice and consultation. The problem with those reforms is that they are limited to recommending changes in general employment standards legislation and fail to mention Canada's collective bargaining regime. Those reports should have recommended changes in the Canadian duty to bargain and arbitral law and recommended expanded methods of dealing with restructuring and technological change.

The lack of broader-based bargaining structures and the legally fragmented nature of collective bargaining rights in Canada constitute another major flaw and obstacle to optimal results in the labour market. Collective bargaining rights are legally limited, generally, to single locations of a single firm. Bargaining authority is not even firm-wide, let alone sectoral or province-wide, and the division of legislative authority in Canada makes country-wide bargaining authority or structures even more difficult. This fragmented structure is problematic in a host of ways which are relevant to the new labour policy debate. As Freeman has pointed out, two characteristics distinguish countries with continued strong union movements from those undergoing de-unionization:

- (1) They tend to have centralized wage setting that reduces the profit incentive for employers to fight unionization of their enterprise. In some cases this centralization takes the form of a national wage bargaining of the so-called neo-corporatist type. In others, the mechanism is the legal extension of collective agreements to non-union employers.
- (2) They tend to be small open economies where decisionmakers have greater personal contact with persons on the other side of the bargaining table than in large economies, and where there is an inevitable pressure to consider national ramifications of collective negotiations.¹⁴⁴

Current Canadian law is a serious structural impediment for sustainable collective bargaining and restructuring.

This radically decentralized and fragmented legal bargaining structure also effectively precludes organization of much of the increasingly significant service sector¹⁴⁵ and smaller workplaces.¹⁴⁶ Service sector workplaces have proved extremely difficult to organize under the current fragmented regime. The effective thwarting of bank unionization in Canada, where unions are certified on a branch-by-branch basis, and bargain on that basis, is testimony to the effects of this policy.¹⁴⁷

Another phenomenon relevant to the restructuring of work is the increasing importance of part-time work.¹⁴⁸ Current collective bargaining rules in Ontario, for example, relegate part-time workers to ineffectual separate bargaining units and otherwise discriminate against this

¹⁴⁴ Freeman, *supra*, note 30 at 190.

¹⁴⁵ See Reich, *supra*, note 5 at 245 and generally GOOD JOBS/BAD JOBS, *supra*, note 37.

¹⁴⁶ *Beyond the Wagner Act?*, *supra*, note 29 at 21.

¹⁴⁷ See Bank Book Collective, *AN ACCOUNT TO SETTLE: THE STORY OF THE UNITED BANK WORKERS* (Vancouver: Press Gang Publisher, 1979).

¹⁴⁸ See D. Drache, *The Systematic Search for Flexibility: National Competitiveness and New Work Relations* in Drache & Gertler, *supra*, note 5 at 256.

female-dominated category of employment.¹⁴⁹ The fragmented nature of Canadian collective bargaining has, as noted above, resulted in significant collective choice problems resulting in an under-investment in training and adjustment policies.¹⁵⁰ There is no legal support for broader corporatist approaches to these issues.

Collective bargaining law reform is an obviously important element in a new labour market policy — but thus far it has been the missing element in the renewed debate about such policy in Canada at both the provincial and federal levels.

This brief review of collective bargaining law and policy simply points out several of the most relevant and obvious points. A restructuring strategy which does not incorporate such changes and fails to undertake a more thorough review of all relevant policies, especially in light of the heavily organized and much affected manufacturing sector, is missing a central element. Furthermore, the key elements identified by Kochan and Freeman as necessary to continued collective bargaining success and avoiding the non-union American path, face severe restraints under current Canadian law.

If collective bargaining is incorporated into the new labour market policy, then the key question, as Kochan, Freeman, O'Grady, Gunderson, Weiler and others have noted, is: with the parties empowered with more information, better rights of participation, and sectoral or higher levels of legally structured bargaining, will the parties shift the fundamental collective bargain which results? Commentators and participants are unanimous in the view that the fundamental low flexibility/low security bargain which is endemic to North American labour relations must shift to a higher flexibility/high security exchange between capital and labour. All of the labour market reform measures proposed are congruent with the view that this is precisely the new bargain which is to be encouraged. The problem is that current collective bargaining rules pose serious obstacles to attainment of this goal, and they are not being reviewed as part of any of the new Canadian initiatives.

VIII. THE IDEA OF A SOCIAL CHARTER

During the *FTA* debate in Canada, a great deal of attention was paid to the indirect pressure upon Canadian labour policy and the risk of a "race to the bottom". However, the perceived policy choice was articulated simply in terms of adopting or rejecting the *Agreement*. No consideration was given to the alternative, intermediate strategy of accepting the *Agreement* in conjunction with certain safeguards regarding labour and social policy. It is particularly striking that even weak

¹⁴⁹ See R. Davis, *THE OLRB POLICY ON BARGAINING UNITS FOR PART TIME WORKERS* (Kingston: Queen's Industrial Relations Centre, 1991) where the author makes a constitutionally based argument against current Ontario rules based on sex discrimination.

¹⁵⁰ See Mahon, *supra*, note 107 at 81 & 91.

versions of such positions were not articulated. For example, a weak version of the intermediate strategy would be to enshrine adjustment policies in the agreement. An even weaker version would be to protect adjustment policies from subsidy arguments under American trade law. The lack of a debate at this level reflects, no doubt, the enormous power of the U.S. in the negotiations and the power of free trade ideology there, at least when the risk of disinvestment or the race to the bottom is borne by the other party. In connection with the proposed NAFTA, the risks of disinvestment and racing to the bottom are realigned. In this new context, environmental standards, human and political rights, and labour policy are suddenly all matters of interest in the United States. This has not gone unnoticed in Canada.¹⁵¹

A distinction is commonly drawn between the European Community's approach to these issues and that adopted by the *FTA*.¹⁵² From the North American perspective, European integration offers a model which attempts to avoid dilemmas posed by the continental market for social policy. The articulation of base-line norms and the replication at an international level of some elements of civil society stand as experiments of compelling interest. Combined with this is the North American view of Europe as a "beacon of social policy, proof that a dynamic economy can co-exist, however uneasily, with an advanced welfare state".¹⁵³

I have taken the view that the "indirect pressures" or race to the bottom argument is actually quite complex in the context of the *FTA*. The impact of the *FTA* upon Canadian collective bargaining, union density, and many labour standards is not straightforward. Indeed, the reality is that the *FTA* has been (in connection with labour standards policy), and should be (with respect to collective bargaining policy), an impetus to progressive reform.

The advent of NAFTA puts considerable further strain on Canadian public policy. The radical disparity between wage levels in Mexico and in Canada is an obvious pressure point. But even here the import of that strain is ambiguous. Resisting the realignment of the international economy — with the shift of mass production to the developing world — is not easily evaluated from a solely Canadian and North American perspective.

There is no doubt, however, that the possibility of NAFTA, *i.e.* the addition of Mexico to the *FTA*, has again focused attention upon a North American/European comparison. Does North America require a social charter to prevent a race to the bottom?

It is important to recall that Canada and the United States are already federal states and debates about "races to the bottom" versus "races to the optimal" are well known and well developed in North

¹⁵¹ M. Drohan, "Bush Pledge to Workers Embarrasses Ottawa — Aid for Those Pushed Out by Free Trade" *The [Toronto] Globe and Mail* (16 May 1991) B5.

¹⁵² See, e.g., Wilkinson, *supra*, note 3 at 65-68; Kuttner, *supra*, note 5 at 137.

¹⁵³ D. Tarullo, *Can the European 'Social Market' Survive 1992?* (Spring 1991) THE AMERICAN PROSPECT 61 [hereinafter Tartullo].

American legal literature. This is especially true in the corporate law literature dealing with the competition by jurisdictions for corporate registrations. More interestingly for our purposes, Paul Weiler has recently taken an optimistic view of the results of state competition in the production of labour policy, pointing to the Canadian experience where provinces have control over labour relations except for a set of industries controlled federally and representing only 10% of Canadian workers. In the context of a fossilized and failing federal labour law in the United States, Weiler reminds his American readers of the possibility of state labour law reform. And he immediately anticipates the race to the bottom objection. He notes, accurately I assume, that:

The reaction of most liberals and others who support workers' rights is that any such revival of states' rights is unthinkable, given what the more politically reactionary states — such as North Carolina or Utah — might do or not do for employees who are often exploited by small businesses. Since the New Deal era, the assumption of the union movement and its supporters has been that the more liberal congressional delegations from states like Massachusetts and New York must be relied on to secure national legal standards that will guarantee equal rights and protections to those who work in the Carolinas or in the Rocky Mountain states, *and, not incidentally, to protect those employed in the more progressive states from being politically whipsawed by mobile capital pursuing the lowest common denominator of labour legislation*.¹⁵⁴ [emphasis added]

In answer to this objection, Weiler again looks north to the Canadian example where competition among the provinces in the production of labour law policy has not led to a race to the bottom, but rather has had a positive impact on labour law reform. He writes:

One reason why Canada's laws have been so much more innovative and progressive is that in Canada the basic constitutional responsibility for the law at work resides at the provincial rather than the federal level....the fact that each province has this responsibility for the major industries within its borders means that the provinces also have both the opportunity and the incentive to act, in Brandeis's phrase as 'laboratories for social experimentation'. Almost all the significant advances in the Canadian law of the workplace first took hold in individual provinces (as did many of the pioneering efforts in health care, civil rights, and other policy fields) and then spread gradually through a natural process of emulation and competition to other jurisdictions across the country, including the federal government....¹⁵⁵

Should Weiler's American readers be convinced? It strikes me that Weiler may be overly sanguine about the possibility of duplication of the Canadian experience in America. First, Weiler glides over the seamier side of Canadian labour policy competition. No systematic review of a possible Canadian race to the bottom exists. But every Canadian labour

¹⁵⁴ GOVERNING THE WORKPLACE, *supra*, note 7 at 303.

¹⁵⁵ *Ibid.* at 302.

lawyer is familiar with examples of the economically vulnerable provinces being directly, overtly, and successfully pressured by potential investors to rewrite labour policy — downward. The most famous Canadian example of this involved the multinational Michelin Tire Company offering further investment (a third new manufacturing plant which would give Michelin over 10% of Nova Scotia's manufacturing workforce) in return for amendments to the province's collective bargaining legislation which made it a *de facto* impossibility to organize those plants (by requiring all plants to be organized at once) and which further gerrymandered the bargaining unit after a vote had been taken at the two existing plants.¹⁵⁶

Nonetheless, I believe that Weiler is in general right, in that variation in provincial labour laws has been a good thing in Canada. There has not been, in general, a race to the bottom.

It should also be noted, however, when pondering Weiler's invitation for Americans to look north, that in Canada federal labour law has not become fossilized and has not failed Canadian workers in the way that federal labour law has in the United States. Indeed, a good argument can be made that the Canadian federal labour law regime is, in general, as progressive a regime as any in Canada. This should remind us of what the FTA debate in Canada took to be obvious — that the politics and political institutions of Canada and the United States are quite distinct. The fact that federal labour law in Canada should have taken such a different path from American federal law — when neither federal law is in a race with other jurisdictions because its control over certain industries is complete — is a startling fact. This is a fact that Weiler does not mention.

But there is a more important reason for questioning Weiler's assumption that unbridled competition in the production of labour law policy among jurisdictions will bring to America the same results which have been obtained in Canada. As a starting point one might ask, simply, what is wrong with competition among provinces (or states) in shaping their labour policy to attract investment? What is wrong with Nova Scotian voters preferring a government which makes a decision to trade-off labour rights for jobs and investments? Is that not simply a rational choice and one which we should not second-guess?¹⁵⁷ The problem is that provinces and states in competition face a prisoner's dilemma.¹⁵⁸ Weiler's thesis is that American states are just as likely as Canadian provinces to avoid the sub-optimal results of the prisoner's bargain. But the dissimilarity of our federal laws, insulated from competition, suggests this is an optimistic view — and suggests the reason.

¹⁵⁶ See *The Michelin Amendment in Context*, *supra*, note 129.

¹⁵⁷ This objection depends upon the validity of the democratic process in Nova Scotia. The addition of Mexico to North American negotiations is widely thought to be problematic on precisely this democratic premise.

¹⁵⁸ See, e.g., Tarullo, *supra*, note 153.

The solution to prisoner's dilemmas lies in finding methods of cooperation, or perhaps more directly for labour lawyers — solidarity. Cooperation and solidarity require, in turn, institutions and vehicles of communication, bargaining and political brokerage. In these ways Canada is distinct from the United States. For example, the Canadian social democratic NDP is a viable third political voice closely associated with labour. In fact, most of the examples of law reform which Weiler cites as having started in the provinces and spread throughout the rest of the country were, initially, NDP initiatives. This is true of Medicare and also true of most of the labour law innovations he relies upon in Canada, such as first-contract arbitration. In fact, Paul Weiler was appointed Chair of the British Columbia Labour Relations Board by that province's NDP government in the 1970s. A brief thought experiment might be in order here — imagine Paul Weiler being appointed Chair of the NLRB. This should give some indication of the political gap to which I refer. Other mediating, political and brokering institutions can be pointed to in Canada — a large, almost entirely unionized public sector, and a tradition of public sector investment. A thoroughgoing comparison of Canada and the United States is required to make this point, but Weiler's optimism about duplicating the Canadian experience in labour law policy production via competition in the United States, seems, at first blush, dubious.¹⁵⁹

IX. CONCLUSION

Labour policy can be viewed as a set of collective action problems. Within unions, the problem is one of assuring cooperation and controlling free-riders. Within firms the fundamental North American low flexibility/low security bargain is a reflection of the ongoing risk of opportunistic behaviour and defection. As Weiler himself says, this is the "prisoner's dilemma lying at the heart of modern employment."¹⁶⁰

¹⁵⁹ Weiler's optimism seems to be a reflection of a well developed argument in corporate law responding to the prisoner's dilemma. See, e.g., R.J. Daniels, *Should Provinces Compete? The Case for A Competitive Corporate Law Market* (1991) 36 MCGILL L.J. 130 for a review of the American literature and an argument about the prisoner's dilemma/race to the bottom in a Canadian corporate context. Here the pressure is perceived in classic Berle and Means form of uncontrolled managers seeking out jurisdictions which would allow them to take even more advantage of shareholders and other stakeholders by way of weakened fiduciary duties, strong anti-takeover measures, etc. By controlling investment they are able to pressure provinces to compete for their corporate business. It is the classic prisoner's dilemma. Among corporate lawyers, including Daniels, competition is better because exit is fundamentally superior to "voice". This should immediately strike a negative note with labour lawyers. But Daniels' real argument, even if it makes sense within the corporate charter field, is irrelevant to the labour policy area. The thesis is essentially that managers do not have a discretion to take advantage of shareholders because of the market in corporate control, etc. Assuming that this is the case for shareholders, it is not true for labour. Labour is not diversified and exit is not an easy option.

¹⁶⁰ GOVERNING THE WORKPLACE, *supra*, note 7 at 148.

Interestingly, in connection with this prisoner's dilemma, Weiler approvingly notes Libenstein's analysis that "the particular point occupied on the x-efficiency spectrum by a firm, an industry, or a national economy is determined to a considerable extent by the institutional and cultural devices that the firm, industry, or economy has fashioned to respond to this 'prisoner's dilemma'".¹⁶¹ It is this analysis of how different firms or economies find different solutions to prisoner's dilemmas which Weiler overlooks in his comparison of Canada and the United States vis-à-vis the market for labour law policy.

Within industries and sectors the collective action problem manifests itself in the low rate of investment in training, education, and research and development. "Free-riding" and "poaching" are widely perceived to be fundamental problems. The response to this problem is to develop broader, sectoral institutions which can command or mediate in order to solve the prisoner's dilemma and secure the gains from cooperation. Within federal states, such as Canada, the problem is the potential race to the bottom among jurisdictions competing for investment. Finally, international integration simply replicates this dilemma at a higher level.

It is widely known that the solution to the prisoner's dilemma lies in securing cooperation.¹⁶² However, there is no single route to this end. It is striking, however, that the *FTA* debate has ignored this complex problem. The potential of NAFTA has redirected North American minds to Europe. When North Americans look to the European example, what do they see? They see vast differences between the apparatus of international cooperation and order in place in Europe as compared to North America. But while the political realities are worlds apart North Americans have much to learn from Europe's experience.

¹⁶¹ *Ibid.*, note 30 at 148 citing H. Libenstein, *BEYOND ECONOMIC MAN* (Cambridge: Harvard University Press, 1976) and M. Leibenstein, *INSIDE THE FIRM* (Cambridge: Harvard University Press, 1987).

¹⁶² See J. Elster, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (Cambridge: Harvard University Press, 1989), especially c. XIII; R.M. Axelrod, *THE EVOLUTION OF COOPERATION* (New York: Basic Books, 1984).