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*Symposium: Rights, Work, and Collective Bargaining*

### Affirmative Action: A Case for Substantive Labour Law

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## **PART II: RIGHTS AND COLLECTIVE BARGAINING**

### **AFFIRMATIVE ACTION: CASE FOR SUBSTANTIVE LABOUR LAW**

**SUSAN SHERWIN\***

#### **I. INTRODUCTION**

Nearly all labour law concerning unions in Canada and the United States deals with questions of procedures and structures rather than with substantive terms. Legislation governing trade union activity is aimed at facilitating the activity of collective bargaining. Relatively little legislation addresses the actual terms and conditions of employment; the latter is left to the outcome of collective bargaining. This orientation is by design, for the legislature assumes that the specific details, terms and conditions of employment, are best left to the negotiating parties. Legislative bodies believe their role is limited to ensuring that negotiations can take place and that it is improper to try to shape such negotiations. At work is the fundamental assumption that government should not attempt to prescribe in any detail the substantive terms that may be found in collective agreements.

By and large, I believe that this basic assumption is well founded and I shall review some of the reasons that support a laissez-faire position with regard to the terms of any negotiated settlement. Chiefly, these reasons reflect a recognition of the fact that the terms and conditions of employment negotiated in a collective bargaining agreement are of primary concern to the parties of the agreement. In most circumstances, therefore, the union and the employer are the best judges of acceptable terms.

Nonetheless, there seem to be matters of substance which ought to be included in collective agreements, but which are unlikely to be negotiated by the bargaining parties because of the nature of the bargaining process. For example, affirmative action hiring programs and other forms of protection against systemic discrimination are seldom achieved by collective bargaining, and yet there are reasons to believe such programs are required as a matter of justice. Specific

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legislation appears to be the only method available for introducing such policies when they are needed most. Extending the scope of legislative intervention into the traditional bargaining domain, however, threatens the integrity of other contractual matters which are otherwise reserved for the collective bargaining process.

It is necessary, then, to carefully consider the reasons supporting the general presumption against substantive interference in the bargaining process by the legislature about matters traditionally reserved for collective bargaining. To this end, we must look closely at the various situations in which this policy clashes with other matters of social concern. The goal of this analysis is to identify a principle by which we might determine when intervention in some of the matters of workplace organization is appropriate and when it is improper.

There is some vagueness inherent in the terminology I appeal to, for there is no precise distinction to be drawn between procedural and substantive labour law. Nonetheless, there is an important difference to be recognized. The term "procedural labour law" refers to law concerned with allowing the process of collective bargaining to occur. I shall use the term "substantive labour law" to mean any law originating outside of the bargaining activity<sup>1</sup> which determines matters of employment that are generally considered to be either management rights or subject to negotiation by the parties. Thus substantive labour law determines or shapes specific workplace arrangements, and in that sense it restricts the parties from negotiating conflicting arrangements in some other fashion. In this paper, I intend to clarify the proper scope of such substantive labour law.

## II. THE BIAS AGAINST SUBSTANTIVE LABOUR LAW

The emphasis on procedural labour law reflects a legislative commitment to collective bargaining. The legislation and regulation affecting collective bargaining is explicitly concerned with designing procedures for facilitating its practice. Labour relations acts express a recognition of the value of collective bargaining; they seek to spell out the relevant constraints that will bring bargaining about by ensuring that both parties bargain in good faith. It would appear, however, that existing labour law does not actually guarantee even this much. There is certainly room for serious criticism about the

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1. For instance, law imposed by government, and government appointed agencies such as the Labour Relations Board, as well as arbitrators.

effectiveness of the actual legislation at accomplishing its purported procedural goal, for it is still relatively easy for one party, usually the employer, to frustrate the process and prevent meaningful negotiation. One of the most serious objections to existing labour law and union activity is that collective bargaining is an option available only to the least vulnerable workers. Those who need the protection of unionization most are unable to force the employer to bargain, and so there is reason to doubt the adequacy of the procedural law. Nonetheless, we can still accurately describe existing labour law in Canada and the U.S. as being chiefly, if imperfectly, concerned with allowing collective bargaining to occur when employees choose to unionize.

In contrast to procedural matters, we find very few specific directions in legislation that can be considered substantive. In Canadian labour law, there is a requirement that a provision be made for hearing and resolving grievances and that there be explicit limits on the right of either party to the use of economic sanctions while the agreement is in force. Generally, Canadian legislation also requires a clause in the agreement that recognizes the union as the exclusive bargaining agent for its members, and some jurisdictions demand a clause prohibiting dismissal except for just cause.<sup>2</sup> Arguably, these requirements can also be seen as procedural, for in content they simply demand that certain mechanisms be available or followed. However, in a broad sense of the term, they are substantive because they involve legislative direction specifying clauses that must appear in collective agreements and prohibiting the parties from agreeing to some conflicting arrangement.

Collective bargaining agreements are also bound by general legislation, such as that incorporated by human rights law and general criminal law. Of course, they must be consistent with provisions governing employment generally; that is, those provisions contained in the various labour standards acts must be complied with in all employment contexts, though this need not be specified in the actual collective agreements. For example, statutory holidays must be honoured, unemployment insurance fees collected, Workmen's Compensation Provisions accounted for, and basic health and safety requirements met. Hence, contract provisions must be compatible with minimum wage laws, and reflect existing legislation on provisions for maternity and sick leave and termination of employment.

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2. H. ARTHURS, D. CARTER & H. GLASBEEK, *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA* 51 (1981).

Beyond these general conditions applying to all employees, the legislation on collective bargaining is almost wholly procedural. It spells out the necessary criteria which must be satisfied for a union to be acknowledged as the exclusive bargaining agent for a specified group of workers. This legislation clarifies the obligation of each party to meet and negotiate with the other once a union is certified. It protects workers against intimidation from either the employer or the union, and it imposes a duty of fair representation on a union on behalf of all members of the bargaining unit. While it defines a collective bargaining agreement as a contract specifying the terms and conditions of employment in a specific workplace, it deliberately refrains from directing the parties as to what terms are permissible or required beyond those cited above.

Interestingly, the most significant intrusion into the substance of collective bargaining agreements which labour legislation makes is the Canadian demand that all agreements contain provisions for grievance and arbitration.<sup>3</sup> It is arbitration that provides the bulk of jurisprudence in labour law, since it is in arbitration that collective agreements are subject to formal interpretation and evaluation by an external agent. This phenomenon raises the possibility that the law might govern collective bargaining agreements more precisely through the judicial process of arbitration.

In grievance arbitration as in labour legislation, however, there is agreement that it is improper to try to specify the substantive content of the terms and conditions of employment.<sup>4</sup> Arbitrators are responsible for interpreting but not changing the words of the collective agreement. Their job is to provide clarification within the terms of the agreement when the parties disagree about the proper meaning of the words: when a situation arises that is not specifically addressed: or when a contradiction is identified in the directions of the agreement and the parties disagree about which principle is to take priority. Arbitrators are specifically limited by the terms of the collective agreement. They cannot neglect the provisions included for the sake of some more sensible rule or even for a more fair outcome. They are bound to respect the terms which the parties chose for themselves when negotiating the agreement. Thus, the will of the parties remains paramount.

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3. This formal demand, common in Canadian law, is not found in American Labour law, but in point of fact, almost all American collective bargaining agreements include some such process.

4. Fuller, *Collective Bargaining and the Arbitrator*, WIS. L. REV. 3-46 (1963)

There is a form of arbitration which allows arbitrators the authority to set the terms of the agreement, namely, interest arbitration. It is sometimes legislated for unions designated as working in the area of "essential services," especially for public service workers, and it is usually contentious as a required mechanism. Sometimes it is chosen by the parties as a procedure for resolving an impasse in negotiations without appealing to economic sanctions. In such cases, it is invoked on specific questions, with the limits of the arbitrator's decision-making authority carefully defined. Thus, even when arbitrators are involved in setting contract terms, they are not granted the authority to impose on the parties some aspect of the terms and conditions of employment which neither party is interested in providing for. Their role is limited to selecting among competing proposals presented by the parties.

Clearly, it is not accidental that labour legislation and the jurisprudence of arbitration decisions and labour relations board hearings are overwhelmingly occupied with procedural questions and refrain from making specific directives on the actual terms and conditions of employment. It is a clear reflection of the underlying principle of labour law which demands a large scope for the autonomy of parties in setting the terms and conditions of employment. There is a wide recognition that it is desirable to ensure that the parties agree on the terms of the collective agreement themselves.

There are several good reasons for this basic principle against legislative involvement with precise workplace arrangements. The most significant one is that there is a great deal of variety in the needs associated with different workplaces. The specific contract provisions must be appropriate to the needs of the parties to that particular agreement. Any attempt to anticipate explicit terms is sure to be inappropriate in some contexts. The expectations and priorities of workers and managers in every employment situation are likely to be unique. Attempts to draft legislation to bind workers and employers in different contexts are certain to create difficulties in some areas. Even within a particular workplace, it is difficult for someone new to the situation to identify the real needs of both parties no matter how objective and well intentioned she may be. The arrangements that exist between a particular union and the employer can be very complex and reflect a delicate balance; it is unlikely that some outside party can fully appreciate the subtleties. Thus, it is thought dangerous even to allow arbitrators to decide substantive questions for a specific workplace. A strict policy of non-interference on the details of structuring the working life of bargaining unit members has evolved for those outside agents who are responsible

for formulating and developing the jurisprudence of labour law.

Moreover, there is a significant psychological value to be gained by having the parties know that they must agree on the terms and conditions of employment. A collective agreement is the basis of labour relations where it operates. If union and employer know they must agree on its terms, they will nearly always, however reluctantly, forge an agreement that each can live with. The priorities of each party will be accommodated. Having explicitly declared their ability to accept the terms of the agreement, they are psychologically more inclined to try to make the agreement work. If some terms are imposed from outside, however, there is a possibility that either one or both of the parties may never truly commit itself to their fulfillment.

A collective agreement must be a contract which both parties are committed to enforcing. If it contains provisions unacceptable to either or both parties which have been imposed by some third party, like the legislature, the labour relations board, or some arbitrator, there may be lacking the important sense of that provision being one that serves the needs of either party to the agreement. No gains will be negotiated as a condition of its acceptance and neither side may have much interest in ensuring that it is honoured; also there will be no mechanism for relief if it creates havoc in its application. Further, any matter removed from the bargaining process reduces the room the parties have for manoeuvring; negotiation involves compromises and trade-offs, and hence it demands a fairly large agenda to permit room for each side to compromise and yet hold on to items it values dearly.

Further, external direction in the substance of collective agreements simply flies in the face of tradition. Labour law is founded on a tradition which recognizes the effectiveness and value of indigenous law developed within distinct work institutions. Any systematic attempt to direct the actual terms of settlement in collective bargaining contexts from some external legal basis would undermine one of the most fundamental principles guiding labour relations in North America. The result may be a significant transformation in the workings of collective bargaining. There are many grounds for being dissatisfied with labour law as it has evolved in North America, but there is little consensus on how it should be changed. Collective bargaining remains a fragile structure at best, and one must be quite cautious in attempting to change the understood principles of its operation. Legislating within the normal subject matter of collective bargaining agreements constitutes a major transformation in collective bargaining practice and hence must be approached with extreme caution.

Thus, we face a powerful inertial force in contemplating explicit legal intervention in bargaining practice. Nonetheless, despite the past practice to the contrary and the arguments just reviewed against substantive labour law, there are situations that seem to call for such action. I shall now explore a case in point.

### III. AFFIRMATIVE ACTION

Since collective bargaining is a process for negotiating terms and conditions of employment between two interested parties—the employer on one hand and the bargaining agent or union representing the employees on the other—the matters which will be negotiated are those which at least one of the parties feels strongly about. Negotiation is usually a long and difficult process. It is unreasonable to expect complex matters to be considered unless at least one of the parties believes it to be important.

Affirmative action policies offer a paradigm case of the sort of issue which is not likely to be addressed if left to the initiative of either the union or the employer. Affirmative action policies are valuable because of their effect in improving social justice. They are designed to increase the number of candidates hired from among groups subject to systemic discrimination in society on the basis of sex, race, ethnic or language group, physical handicap, or some such characteristic. For simplicity sake, I shall concentrate on a single category: affirmative action hiring plans which are designed to increase the numbers of women in job categories where they remain under-represented at this time. Similar arguments are appropriate in dealing with other disadvantaged groups such as racial minorities, and other employment issues, like promotion and equal pay provisions.

In order to intelligently discuss “affirmative action hiring programs” one must first set forth exactly what they entail. Affirmative action programs come in two main varieties, weak and strong. Weak programs demand that a woman be hired if there is no substantially better qualified male candidate. Strong programs direct hiring a woman if there is a qualified female candidate available even if a male with superior qualifications has applied. Quota plans, specifying a minimum number or percentage of women that must be hired, are a special case of strong programs. Strong programs are far more contentious than weak ones and are relatively rare in practice.<sup>5</sup> In job categories that consist of a wide range of degrees of qualification, as in academic

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5. Interestingly, strong programs have been invoked to benefit men, e.g., a quota system was used to increase the number of male telephone operators in the U.S.



appointments or managerial hirings, strong programs involve a clash of principles because they explicitly sacrifice meritocratic principles in favour of social equality (since competency and gender outweigh superior qualifications). In job categories that have quite precise statements of qualification (e.g., Grade 10 education) there is little to distinguish the weak from the strong programs. Where they are distinct, obviously strong programs are especially controversial, for debate reflects disagreement about the ordering of principles. I shall not address that controversy here because the difficulty for labour law arises with both forms of affirmative action programs. The arguments presented here support both types of programs. I shall not attempt to decide which strategy is preferable. In this paper, I am only concerned with establishing the appropriateness of legislating affirmative action programs of any type. I shall not comment then on the details of what sort of programs or what kind of administrative mechanism is to be employed.

The purpose of affirmative action programs is to help counteract the effects of systemic discrimination. Systemic discrimination, in this case sex, involves deepseated and widely practiced social patterns of unjust discrimination based on a characteristic that should be irrelevant in the circumstances<sup>6</sup>. The systemic aspect of the discrimination is very significant. It indicates a wide ranging pattern of injustice against members of a group, not merely a collection of isolated events. As such, it is particularly difficult to eradicate, and it is often difficult even to recognize because when it is systemic, discrimination is perceived as normal. It is widely acknowledged that sexism in our culture is a very broadly based pattern of discrimination against women. It is often unconscious and non-deliberate, but it results in many inequities including disparate representation of women in many job categories. Specifically, women are frequently concentrated in a few particular job "ghettos" which tend to be low-paying and lacking in influence.

The unequal treatment women receive in the employment context is especially problematic in light of the severe inequalities based on gender in society in virtually all other arenas. Women are disadvantaged socially, politically, economically, and sexually. Often, women

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6. Systemic discrimination is defined in the 1978 report of the Canadian Human Rights Commission as a form of discrimination which "results when despite the equal application of an employment practice there is disparate impact on certain groups of workers and this impact cannot be related to job performance or the safe and efficient operation of business." *Id.*

are treated with contempt and disrespect in the popular culture and information media. A women's freedom of movement is severely limited by the threats of physical attack which women face in most public places and, sometimes, even at home. Women are frequently given a disproportionate share of childcare and home care responsibilities but they are not provided with adequate support services. Access to abortion and daycare is severely limited, and yet women are expected to compete for jobs on exactly the same terms as men.

When women do find jobs they suffer serious discrimination in the workplace. Unemployment and underemployment rates are nearly always much higher for women than for men. According to the most recent Canadian statistics, the average earned income of full-time women workers was 58.1 percent of that of their male counterparts.<sup>7</sup> American statistics are similar; even when adjustments are made for education and experience, women receive significantly lower wages than men for the same type of jobs.<sup>8</sup> Socialization processes channel women into low income, low security job categories.

Many economists now accept the analysis of a dual labour market to account for these sex-linked disparities.<sup>9</sup> The primary labour market is the market of large corporations with heavy capital investment that cannot afford significant labour turnover. Jobs in this market tend to be unionized, well-paying, secure, and offer reasonable working conditions. The jobs in this primary market are dominated by white males. The secondary labour market consists of small companies and service or seasonal firms that are labour intensive and maintain flexibility in expenses by hiring and laying off staff as the demand arises. In this market, workers are seldom unionized, employment is insecure, opportunities for advancement are rare, and wages are poor. Workers here are drawn from racial and ethnic minorities, young people, and women. In other words, systemic discrimination has been institutionalized in the labour market and is deeply embedded in it. It will not readily disappear.

Not surprisingly, women tend to be employed in low-status, low-security jobs as a result of this institutionalized systematic discrimination. In fact, the jobs which women frequently occupy are those concerned with the very responsibilities they are assigned in the home.

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7. P. PHILLIPS & E. PHILLIPS, *WOMEN AND WORK: INEQUALITY IN THE LABOUR MARKET* 52 (Canadian Issues Series 1983).

8. *Id.* at 59-60.

9. *Id.* at 77-105.

Most are concentrated in service jobs. Those employed in manufacturing are concentrated in the textiles and garments and food processing industries. Designating certain job categories as women's work has effectively kept wages low and security rare in those areas.

Women are largely excluded from the types of jobs that involve high salaries, power and prestige. Today such exclusion is often not explicit; in fact, we already have human rights legislation prohibiting it. However, it was certainly explicit in the past. Historically, both employers and unions have specifically excluded women from particular job classifications.<sup>10</sup> Now, the exclusion of women from high paying jobs reflects more subtle constraints which have been dubbed "secondary sexism." Professor Warren defines secondary sexism as "comprising all those actions, attitudes and policies which, while not using sex itself as a reason for discrimination, do involve sex-correlated factors or criteria and do result in an unfair impact upon 'certain' women."<sup>11</sup>

Among secondary sexist practices that have contributed to less than a proportional number of women employed in certain job categories are arrangements that prohibit maternity leave, demand gratuitous travel, make unnecessary transfer demands, insist on height requirements, reflect a view that women's salaries are supplemental and not essential to family income, and deny facilities for women in jobs that require living on site. These are deemed secondary because it is not being female per se that creates the problem, just the usual roles and physical needs that tend to go along with it. Other practices are those that insist on uninterrupted work records, make assumptions about child care responsibilities, and refrain from placing women in positions of authority on the assumption that they will encounter disrespect from other workers. These are all in addition to the burden of years of socialization to sex role behavior which all women have experienced, and which serves to discourage them from being assertive, competitive, self-confident, or self-interested and which thereby places them at an initial psychological disadvantage in a competitive job market.

The result, as might have been expected, is that although it has now become the norm for women to work, they are largely excluded

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10. The Trades & Labour Congress of Canada in 1898 called for "abolition . . . of female labour in all branches of industrial life, such as mines, work-shops, factories, etc." Cited in White, *Women & Unions*, THE CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN 15, 11-18 (1980).

11. Warren, *Secondary Sexism and Quota Hiring*, PHILOSOPHY AND WOMEN 238 (1979).

from important and well paying job categories. Such disproportionality in representation in job categories based on sex no longer seems natural or acceptable and is now recognized as evidence of a failure to achieve genuine equality of opportunity. One of the most effective ways of changing discrimination based on gender is to expose people to counterexamples of their stereotypical views. Providing women with access to influential jobs would help undermine stereotypical attitudes by expanding people's experience with women's talents and abilities. It would contribute to reforming the various social institutions that perpetuate systemic discrimination.

Moreover, it is important that we recognize that the training in passivity and submission which females receive in our culture constitutes a severe handicap in the competitive employment market. Equality of opportunity cannot be achieved unless the effects of such psychological oppression are compensated for. Further, since there is evidence that both women and their evaluators tend to underestimate the quality of women's work in comparison with how the work of men is judged, there is reason to believe that women who are judged to be equally or nearly as well qualified as some men may in fact be better qualified. Thus, they may already be entitled to the job under traditional considerations of merit once adjustment is made to compensate for the common sexist bias.

Affirmative action programs are intended to increase genuine equality of opportunity in light of some well-known barriers to women and to reduce sexist attitudes in society. Social justice demands measures to reduce the impact of systemic discrimination against women. In these terms, it is argued that affirmative action programs are necessary as a temporary measure to improve social justice. As for the familiar objection that by making sex a criterion of choice affirmative action is merely a case of reverse discrimination, we must recognize that the disadvantage experienced by male candidates under such a program are quite limited and minimal and not comparable to the general oppression experienced by victims of systemic discrimination. Reverse discrimination is simply not the same sort of social problem as is systemic discrimination. In this case, male candidates lose some of the implicit advantage they are used to experiencing by virtue of their gender. When a job is awarded to a woman under an affirmative action plan, male applicants are not appointed. The discrimination, such as it is, is limited to the particular incident and not to complete role reversals in society. Widespread use of affirmative action programs will not result in men being frequently raped by women and constantly under the threat of attack, or in men being denied abortions, or in their receiving 60 percent of the salary

common to women, or in having virtually all of their elected representatives female. Affirmative action programs simply do not create patterns of injustice in society as does systemic discrimination and so they cannot be dismissed on the same basis. Further, since it is implausible to believe that any candidate has a right to a job, there is nothing unjust about including criteria that will contribute to overall social justice among those used for selecting applicants.

Sexism, like racism, is a problem of systemic and structural discrimination. Justice must be considered at the level of social arrangements, not merely individual competition. Affirmative action programs are justifiable as instruments for reducing systemic discrimination and increasing social equality. Once equality is achieved, such programs are unjustifiable. In the area of gender discrimination, however, we have some time to go before we begin to dismantle such systems. Thus, it is not necessary at this time to consider the details of ending these programs.

The most serious problem for justifying affirmative action programs is to establish their effectiveness. Since they are purely instrumental, their legitimacy is dependent on their success; it is essential that they be designed with care to achieve the ends intended. This has not always happened, and some of the problems associated with legislation adopted in the United States on this issue are commonly cited as grounds for abandoning the project.<sup>12</sup> Without affirmative action programs, however, the force of systemic discrimination against women in the workplace remains. We must be concerned that discrimination is getting worse as large scale unemployment seems to be becoming a permanent feature of the economy. In a tight job market, women tend to be among the first laid off. Affirmative action plans must also attend to the problem of ensuring that women keep the jobs they win even if they do not have the highest seniority.

The problems are serious. First, there remains a substantial salary disparity. Second, the percentage of women in senior positions remains relatively small. In fact the slight improvement seen in the 1970's has already been reversed: for example "an executive search firm reported in 1982 that companies were no longer searching for women for executive positions."<sup>13</sup> The inference is that affirmative action programs are necessary. The voluntary approach is not adequate. However, programs must be designed with sensitivity and

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12. See generally, W. BLOCK & M. WALKER, DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY (1982).

13. P. PHILLIPS & E. PHILLIPS, *supra* note 7, at 164.

care. Existing programs should be studied carefully to understand the reasons for success and failure and particular plans must be made adaptable to the specific demands of a given workplace. Successful programs will help reduce sexism and systemic discrimination and are justified on that basis.

I believe the arguments outlined in support of affirmative action programs are valid. Although I have only sketched the outline here, I believe it can be conclusively demonstrated that justice demands affirmative action programs at this time. My analysis has been concerned with the claim that such programs may be justified by considerations of justice. For the purpose of this paper, however, it does not matter if the particular example ultimately applies. The case for affirmative action policies based on considerations of justice is strong enough that it can be used, at least hypothetically, to illustrate the problem of relying on the collective bargaining processes to settle all matters concerning employment when a workplace is unionized.

#### IV. THE CASE FOR SUBSTANTIVE DIRECTION

Affirmative action provides an example of an issue which is important according to significant value principles. This is especially true with those issues concerned with social justice, where the rules of collective bargaining mitigate against such matters being negotiated into collective agreements.

The activity of collective bargaining is such that matters will be negotiated only if they are either important to at least one of the parties, or are of trivial consequence to one party. Any matter that is strongly resisted by one party must be of serious concern to the other if the latter is to be willing to negotiate it in good faith.

For most unions, affirmative action is not of much interest. It is only appropriate in work situations which have a serious under-representation of women. Unfortunately, such groups are not likely to feel the need to institute affirmative action policies. After all, acknowledging the legitimacy of such policies involves calling into question the system by which all current members received their own jobs. Affirmative action hiring policies are not infrequently linked with affirmative action promotion policies, and the latter threaten union members' own likelihood of advancement. Thus, affirmative action plans are not in the majority's interest and are sometimes actually contrary to their interest. Also, negotiations involve trade-offs; a union seldom gets everything it would like out of bargaining. Thus, for a union to bargain strongly for such plans, it would probably have to compromise on some other matter which would be in the members' interest.

Further, it is vital that affirmative action hiring policies involve some degree of job security. Without some correlative job protection, the familiar "last hired, first fired" policy is likely to make any gains shortlived. This additional constraint, however, violates the traditional union value of respect for seniority in lay-offs. Few unions are willing to accept modification of seniority rules for any reason, and yet they are an important corollary to affirmative action hiring.

Collective bargaining is not a procedure that fosters just behavior from union members. It is designed to concentrate energies on matters which a majority of union members believe to be in their best interest. Thus, it is unreasonable to expect many unions to make affirmative action plans a high priority for bargaining.

The employer is also likely to be less than enthusiastic about such plans. They involve an explicit infringement on the freedom to hire, a practice jealously guarded as being within management rights. Most employers are very anxious to maintain control over the selection of employees and are reluctant to restrict that freedom by any mechanism involving regulation. Further, affirmative action plans are justified as temporary measures to create better representation of women in specific job categories where they are underrepresented. The employer would have to admit that there has been an injustice in the past that should be corrected in order to support such a plan. Employers, like most people, are unwilling to admit to any objectionable behaviour in their past. In the rare cases where the employer does take the lead, the union is likely to be highly suspicious that the purpose is to circumvent union rights.<sup>14</sup> Since adding women to the job pool often results in lowering wages for relevant job categories, unions are quite concerned when employers institute affirmative action programs.

Thus, affirmative action plans are not likely to result from collective bargaining, although that would be the ideal way of introducing them into unionized places of employment. In fact, the evidence supports the *a priori* conclusion that collective bargaining is not a reliable procedure for introduction of affirmative action plans. A report by the Ontario Federation of Labour in May, 1982, determined that

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14. Local 1353, Canadian Union of Public Employees, Borough of North New York, Board of Education, *Union Position in Response to the Affirmative Action Proposals of the Boards 2* (1982), cited in Chegwiddden & Katz, *American and Canadian Perspectives on affirmative Action: A Response to the Fraser Institute*, 2 J. OF BUS. ETHICS 197 (1983). The response was written when the Board of Education seemed to use an affirmative action plan as an excuse to circumvent the collective bargaining process.

"over a seven year period 175 programs have been put in place (1975-82), an average of twenty per year. . . . At the current rate of twenty programs per year, it will take 13,300 years to begin affirmative action programs in all Ontario companies."<sup>15</sup> Left to the forces of collective bargaining, affirmative action programs are too rare and infrequent to accomplish their general goals.<sup>16</sup>

Although we have available a program that can be expected to reduce sexism and to increase justice, it is not likely to be adopted by the ordinary channels of collective bargaining. It is a program that is valuable for reasons of justice, but it is largely inaccessible by collective bargaining procedures, since it is not in the obvious self-interest of either party. In fact, it is probably contrary to the interest of both a majority of employers and the majority of union members.

Any effort to impose affirmative action policies will require legislative intrusion into areas of employment practice usually reserved for negotiation. Yet, protecting those areas as the prerogative of the parties to collective bargaining makes affirmative action unlikely. In these matters, the autonomy of the parties in the bargaining process may run counter to the important social goal of increased equality. Thus, a case can be made for overriding the autonomy of the parties and legislating affirmative action programs where they are appropriate.

I shall not comment on the details of that legislation. Many options are available including the use of quotas or ratios without reference to any of the details of how they should be achieved. Alternatively, it may be determined that the legislation should be largely procedural, by carefully constructing a hiring mechanism. The obvious constraint of any legislation is the requirement that the mechanism used should be sufficiently flexible to be properly adapted to each particular workplace and, of course, that it should be effective. Whatever mechanism is chosen, whether it is itself procedural (specifying how hiring is to take place) or substantive (specifying what results must be achieved), the act of legislating this matter involves interference on substantive matters. These matters include primarily hiring, and additional pay scales, promotion and lay-off criteria, all

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15. *Our Fair Share: Affirmative Action and Women* 18 (a discussion paper prepared for the Ontario Federation of Labour Conference on Affirmative Action and Women, Toronto, May 1982), cited in Chegwiddden & Katz, *supra* note 14, at 199.

16. The failure of the voluntary approach is confirmed by a study of employment practices in Halifax from 1979-81 by K. Edward Renner and Leslie Gillis, reported in *Employment Practices and Opportunities for Women: Why Voluntary Affirmative Action is Inadequate*, forthcoming in STATUS OF WOMEN NEWS.



of which are traditionally protected as the prerogative of the parties to collective bargaining.

Further sexism, however, is not the only social problem that affirmative action programs can ameliorate. Discrimination on the basis of race, language, religion, sexual preference and orientation, and physical handicaps is also of serious concern. Perhaps, far more complex affirmative action programs should be initiated. Further, other social issues arise. For example, unemployment might be reduced if worksharing were instituted.<sup>17</sup> In light of such expectation, perhaps it, too, should be required. Also, retraining programs and socially conscious introduction of technology would be valuable; yet employers find such demands expensive and unions sometimes worry that the costs of such measures will come out of workers' pockets.

Part-time workers present another complex set of concerns. Arguably, better benefits for part-time work would help to reduce unemployment. Employers prefer to keep part-time staff as a "flexible" work force. In contrast, unions often cannot be troubled by them, or may even see part-timers as a threat to the gains of full-time workers. Thus, usually no one bargains for the interest of part-time workers, and frequently they are treated badly.

There are many matters of concern that collective bargaining leaves inadequately addressed; it is tempting to view them all as legislative concerns since it would be desirable to have these matters attended to. There is a clear danger, however, of broadening the scope of labour law ever further; by such action we would be continually weakening the fundamental principle of respecting the autonomy of the bargaining process. The goal of preserving a wide scope for bargaining might easily be lost in a detailed and complex set of regulations which leaves little for the parties to bargain about. It is important, therefore, to refine the principle necessitating legislative interference more precisely. In particular, a simple utilitarian style ideology that allows legislative interference whenever some good consequence could be achieved is far too generous. Let us consider some situations where bad consequences of an autonomous bargaining process have been identified and see why they do not provide justification for legislative interference. In light of such examples, we will be able to refine the principle justifying intervention so that it is not too readily invoked at the expense of abandoning the fundamentals of collective bargaining.

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17. For an explanation and discussion of worksharing, see generally N. METZ, F. REID & G. SWARTZ, *SHARING THE WORK: AN ANALYSIS OF THE ISSUES IN WORKSHARING AND JOBSHARING* (1981).

## V. REFINING THE PRINCIPLE FOR INTERVENTION

The arguments in favour of some form of intervention fall into two general categories. One set has to do with the interests of the parties, especially bargaining unit members. The other set pertains to broad social concerns, often identified as the public good or interest.

The concern for intervention, based on the interests of bargaining unit members, rests on the assumption that sometimes a union does not provide adequate protection for its members' interests. For instance, much of the literature citing the inadequacy of collective bargaining practice focuses on the failure of unions to benefit their members in many cases. This problem arises for many reasons. It occurs when a union is particularly weak. The expectation on which collective bargaining practice is built is the notion that although the employer tends to be in a stronger bargaining position than each independent employee prior to unionization, when employees act collectively through a union, they gain power more closely comparable to that of the employer's. Under the expected circumstances of two parties of approximately equal strength negotiating for their respective interests, collective bargaining is relied on to result in reasonably fair outcomes.

It is sometimes clear, however, that this assumption is unduly optimistic. Even when employees act collectively they may still be significantly weaker than the employer. Procedural rules governing collective bargaining can go some way towards reducing the force of such inequality, but they can hardly eliminate its significance. When one party is significantly stronger than the other, unjust terms may be demanded. Given the potential for abuse of excessive power in collective bargaining contexts, there is a *prima facie* case to be made for some impartial party to spell out equitable contractual terms, or at least to set outside limits on the terms which might be acceptable, so that when one side is actually strong enough to coerce a disadvantageous agreement from the other, the vulnerable party can be protected against exploitation.

In fact, legislative protection against some degree of exploitation has already been built into general labour law statutes which apply to all workers, whether unionized or not. Minimum wage laws, human rights legislation, provisions governing termination of employment, guarantees of maternity leave and sick leave, and so on, are all matters now governed by statute or commonlaw and apply to virtually all employees. They cannot be bargained away in any negotiations. Thus, very weak unions cannot be coerced into sacrificing such fundamental interests of their members. More significantly, those

workers who lack even the strength to unionize are ensured some protection of their interests. Workers are largely protected from sacrificing these fundamental matters of security and dignity out of sheer desperation for work. Fortunately, only the most desperate and vulnerable workers are beyond the scope of this sort of general legislative protection. Unionization demands a certain amount of strength to begin with; therefore, workers who are unionized tend to be strong enough to avoid the worst types of exploitation.

For reasons mentioned earlier, it is complex and risky to try to provide any further protection to unionized workers. Different work situations present different areas of concern. Just as there is no general principle identifying the common needs of all vulnerable unions, there is also no general principle available which could sort the weak and vulnerable unions from the strong and powerful ones for the purpose of further aid. Thus, there is no obvious way of guaranteeing other contractual terms beyond ensuring the effective working of the collective bargaining structure. Some unions will fare worse than others but all are now protected against excessive exploitation.

Also, there are cases where unions are more powerful than their employer. In such circumstances it would hardly facilitate justice to provide unions with automatic guarantees on certain aspects of the contract which would serve to allow them to concentrate their efforts on making even stronger demands regarding other aspects of the contract. Although judicial interference may seem to be desirable in some cases, the difficulties of managing it in the universal fashion which judicial solutions demand make such forays look far too risky to recommend.

For comparable reasons, it is proper to resist substantive interference to protect employers who are dealing with overly powerful unions. While some unions are in enormously powerful bargaining positions, although most are not, it would be vastly unfair to the rest to handicap them further by setting limits on their possible gains in specific areas. It is important to remember that collective bargaining exists in a historical context. The terms of their experience before bargaining is completed. External corrections that direct specific terms on specific items are bound to create distortion in those other matters that remain to be bargained over.

Procedural controls rather than external substantive direction seems the least dangerous and most acceptable means of protecting the parties in the face of a stronger adversary. Therefore, despite the temptation in some cases, the interests of workers faced with a

powerful employer, and vice versa, do not seem to constitute adequate grounds for altering the normal expectations of trade union labour law which explicitly refrains from making substantive proposals on terms and conditions of collective bargaining agreements. These situations are best addressed in the traditional way, by controlling the procedures by which the parties negotiate those terms.

There is another possible basis for legal intervention in the actual terms of a collective bargaining agreement in the interest of justice for bargaining unit members. Collective bargaining assumes that unions always act in the interests of their members. This is presumably the most fundamental premise of all, and yet there are surely occasions when unions, union leaders and negotiators do not foster their members' interests. Under such circumstances, the well-being of bargaining unit members can only be ensured by some sort of external legal injunction.

The most obvious cases for concern are the most widely publicized cases of corrupt and irresponsible union leadership. Unions, especially large ones, are centers of significant power and wealth. As such, control of a union can be very attractive to persons who lack concern for moral and legal principles. Corrupt leaders do not always fulfill their obligations of protecting the employment interests of their members. But there is no justification here for sidestepping union responsibilities and legislating contract terms as a solution to the occasional problem of corruption in unions. Surely the way to deal with this problem is by restricting the behaviour of leaders through sanctions against the abuse of power.

A far more subtle and potentially much broader problem of adequate representation of employee interests is the danger of co-optation of union leaders. Union leaders have a strong institutional motivation to pursue some degree of co-operation with the employer and it is always difficult to judge when co-operation may be excessive and turn out to be costly to members' interests.

Radical critics of collective bargaining see this danger as one of the most serious institutional problems of unions. They believe that the need of unions to develop cooperative arrangements with employers is the structural cause of an inherent conservatism of unions. Since the job of a union is to produce a collective agreement with management, union negotiators must seek a common ground with the employer. They must accept and not challenge the existing economic structures of society and the existing authority of management. By regularly raising wages and benefits they ensure continuing worker support for the overall status quo of workplace structures.

Naturally, union negotiators concentrate their efforts in areas where they are most likely to reach agreement with management, and thus the effect of collective bargaining is said to be an entrenchment of management's authority and workers' subservience.<sup>18</sup>

Union leaders acquire a stake in having relations with management run smoothly. If they cannot reach agreement with the employer, there is no point in the workers' supporting a union. This makes co-optation a realistic option for union negotiators and leaders. But even if co-optation of leadership is a genuine problem for unions as it is perceived to be by radical union members and analysts, it would not be a satisfying solution to look to legislative control. First, legislative responses would surely be far too conservative in substance to satisfy the radical concern with co-optation. Further, the problem of co-optation is inherent in the very structure of collective bargaining. It cannot be accounted for by adjusting some of the provisions of the collective agreements negotiated. Rather, if it is to be resolved, it must be in terms of reconsidering the very foundations of collective bargaining. Major systemic overhaul is the least that would be required, but it is by no means clear that there is any way to eliminate the possibility and danger of co-optation so long as we continue to have the representatives of two parties meeting together repeatedly to negotiate their separate interests.

There is, however, one type of case of worker protection that does seem to merit serious consideration; the case of special interests within unions. This is the generalized case of the affirmative action argument. Unions are expected to be democratic institutions, and as such they suffer from the problems inherent in any democracy, especially the problem commonly identified as "the tyranny of the majority." Within a democratic structure, policy decisions reflect the interests of the majority even when these are unjust. In unions with a minority of women members, for instance, equal pay provisions, maternity leave, day care facilities, and sexual harassment protection are frequently neglected in contract talks. Often when such matters are included on the union's agenda, they appear as minor trade offs against more popular issues. The interests of the minority are sacrificed in pursuit of more broadly based concerns.

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18. Some radical authors object to unions on precisely these grounds, for "collective bargaining tends to accommodate employees to a status of subordination. . . . Trade unionism permits debate around the terms of workers' obedience, while not challenging the facts of their subordination." R. HYMAN & I. BROUGH, *SOCIAL VALUES AND INDUSTRIAL RELATIONS: A STUDY OF FAIRNESS AND EQUALITY* 71 (1975).

A number of political solutions have evolved for handling the problem of minority interests in democracy. Sometimes minorities improve their opposition by shrewdly forming coalitions with other minority interest groups so as to muster a majority when votes are taken on particularly important issues. Other times they get support from members of the majority group who anticipate being in a minority on some later issue and hence are eager to ensure that votes not be taken on purely self-interested grounds. Thus, the power of the majority is often not invoked against the minority, since everyone faces the possibility of being in the minority on some issue and seeks to pursue a suitable strategy for defense in that situation.

We may now return to the problem of systemic discrimination as a pervasive social norm. Depending on their origin, some minority alignments shift frequently and workers recognize themselves as belonging to different groups for different purposes. Interests vary in accordance with age, health, lifestyle, seniority, responsibility, politics, religion and personality, and members who usually vote together may occasionally find themselves differing. In these cases, a laissez-faire governmental attitude seems proper. It is left to the various groups to work out their alliances and priorities and no serious harm is likely to result from the occasional missed vote. Belonging to a minority interest group by virtue of being a victim of systemic discrimination is, however, on a different plane. As noted above, the problems of women in the workplace, like the problems of women in society in general, are quite serious. Women have always been a minority in terms of power, and no one really anticipates that changing in the near future. Men in the workplace do not identify with women's concerns in the sense of worrying about suffering a similar minority status.

There is no random shifting of political strength when minorities are defined by systemic discrimination and not by some single issue. It is because of the deep entrenchment of the problem that concern for this sort of minority requires special consideration. Corrective legislation is not appropriate everytime a special interest group is outvoted. I suggest it is proper only when a particular group is regularly and predictably outvoted and receives unequal benefits and opportunities as a result. Thus, it is not interest groups per se that merit substantive intervention, but only interest groups suffering from systemic discrimination. By limiting the scope of the principle in this matter to concern for only deep seated problems of systemic discrimination, we avoid the danger of admitting a principle that will include so many special cases as to undermine the original principle of non-intervention.

The profound implications of systemic discrimination also mitigate against simple procedural attempts to achieve better treatment of women in the workplace. It has been suggested that changing the bargaining units might help.<sup>19</sup> Separate unions for women and other minority groups would solve the immediate problem of being outvoted by the majority, but it would only push the problem one step back. The employer would then be negotiating with two unions, one composed of men and one of women who were too few or too weak to win their interests within a single bargaining unit. It is hard to imagine that this outcome would not just dilute the strength of both units and crystallize the conflict between them, presumably to the employer's advantage. The union for the minority group would likely be even more vulnerable when isolated than its members were when they were included in the larger union with at least some shared interests. Certainly, historical attempts by women at forming separate unions do not provide much ground for optimism in this approach as a viable solution.<sup>20</sup> There does not seem to be any way available for reducing the problems of systemic discrimination occurring within the union as well as outside it without legislative direction such as affirmative action plans. It is because these plans promote justice, and because no other approach seems to achieve the same results, that we are justified in modifying the principle against substantive labour law under these circumstances.

It is important to note that women do not always fare badly in unions. Many unions have been quite conscientious in trying to eliminate the effects of systemic discrimination and have actively pursued questions of justice associated with gender. Many men within unions do not vote merely in accordance with their own self-interest but are sensitive to the demands of justice and altruism. Therefore, in some unions, despite a male majority in the membership, women's issues are given high priority. In other unions, women have in recent years assumed positions of responsibility and power and use their leadership roles to help shape policy. Thus, it should not be concluded that unions never voluntarily pursue affirmative action, but only that they do it rarely, and often without much enthusiasm and usually against determined employer resistance. Given the importance of the

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19. Adina Schwartz and David Beatty made this suggestion in discussions at the Westminster Institute, November 1982. Separate unions have been of some help in the face of racial discrimination. Their record on gender discrimination is more questionable.

20. This was tried by the Toronto Bell Telephone Operators in 1907, where the independent women's union lost an important strike. See P. PHILLIPS & E. PHILLIPS, *supra* note 7, at 138-41.

issue, and the generally poor history of the voluntary approach, it seems to be time for a more reliable solution.

There is one other type of consideration that is popularly believed to justify legislative interference in the substance of collective bargaining and hence should be reviewed. That is the question of the public interest. Legislation is thought to be justifiable if it is in the public interest; in fact, many people define the legislature's responsibility as that of drafting legislation to further the public interest.

Collective bargaining frequently affects the interests of people who are not party to the process. Collective bargaining occurs between the two principal parties, but they are not the only ones with interests at stake; frequently, others are seriously affected. The costs of implementing contract provisions are passed on to consumers or taxpayers. The terms agreed to as working conditions affect the level and quality of service available to consumers. Also, when negotiations break down and a strike or lock-out occurs, consumers may be very seriously affected by the loss of goods or services available; they sometimes suffer more from work stoppages than either party to the bargaining agreement.

There is a common sentiment in North America that collective bargaining often affects the public interest negatively. In general, this sentiment is not well founded, but there are undoubtedly cases when it is true. When the public interest is seriously threatened, here as elsewhere, it is the government's responsibility to intervene. It is for such reasons that strikes and lock-outs are commonly prohibited or tolerated for only limited periods in "essential services," even though it is an extremely difficult exercise in value judgments and politics to determine what can properly be deemed an essential service. This sort of procedural response seems to be consistent with the general principles underlying labour law.

The question at issue here, though, is whether the government can actually dictate some of the terms for collective agreements when the public interest is thought to be at stake. To answer that question we must first define "the public interest." If one defines it simply as some overall positive utility we again encounter the problem of justice for minorities whose interests are outweighed by competing majoritarian concerns. Also, a principle justifying legislative intervention whenever it serves the public interest defined in this sense would be far too broad. Such a principle would essentially suffocate the important principle we began with, that of respecting the bargaining process and the will of the parties in an employment relationship. If that integrity of bargaining principle could be overcome whenever good consequences might arise, it would not retain much force. In



fact, the whole process of collective bargaining would probably be undermined because either party could then refuse to make concessions, relying on government intervention to impose a settlement whenever a lack of agreement may threaten public interests. Each party might hope to do better by government direction than by negotiation; hence, it might purposely hold out. The government would become a third party to negotiation with a special, decisive power. The entire character of collective bargaining would be transformed.

Intervention when the parties disagree is quite a different matter from intervention when the parties agree to ignore a matter of justice. In the former case the government cannot help but favour the interests of one side over the other, and no impartial solutions are available. The result would be bitterness and a sense of injury by the least favoured party. In the latter case neither side is victorious, and the government maintains a neutral posture vis a vis employer and union. More importantly, the grounds of intervention are properly within its authority, namely reducing injustice; they do not amount to manipulation of labour market forces, as substantive intervention in the event of dispute would.

It is not appropriate for the government to seek to play judicial referee between two well-defined sets of interests in conflict either. In the case of labour relations, where the parties share certain interests in common in addition to competing over others, the historically evolved method of autonomous collective bargaining remains the most effective means of proceeding despite its well-known flaws. However, the government does have an obligation to intervene on behalf of disadvantaged members in matters of serious social justice when those members have no other process to appeal to. When neither party sincerely assumes responsibility for matters of justice within their power, it is appropriate to require them to take account of such matters.

The most problematic issues of intervention on public interest grounds arise when we consider the question of bargaining in the public sector. In this case the government wears two hats and the complexity of its dual roles and responsibilities makes the qualifications against acting in the public interest far more severe. When the public interest appears to coincide with the employer's interest the government is in a most awkward position. It is difficult for anyone, including its own members, to be certain whether concern for self-interest or the public interest takes priority. For example, one can presume that the legislated wage controls for public workers which most Canadian legislatures introduced in the fall of 1982 and the spring of 1983 made good politics. Nevertheless, the various governments

involved had such a vested interest in these policies that it is difficult to evaluate their motives as purely those of addressing the public good.

The government, as an employer, has an enormous degree of power in comparison with private employers. Whatever it cannot win as a concession in bargaining it can proceed to legislate. In fact, governments can and do write special legislation to limit their own employees' options under collective bargaining. They sometimes even change the terms and conditions of employment for their workers unilaterally in the midst of a collective agreement.<sup>21</sup> Such excessive power undermines the whole collective bargaining structure since one party always has it in its power to force compliance when it fails to win concessions.

The fact of collective bargaining in the public sector places the government in a unique situation. Its obligations as guardian of the public interest may conflict with its obligation to play by the accepted rules of labour relations. Nonetheless, I am less willing than others to conclude that collective bargaining is inappropriate in the public service. Employees in the public sector are in need of the same sort of collective bargaining power as are employees in the private sector. Confronted with the frequently unrealistic promises which politicians often make in their campaigns, the case can be made that public service workers need even greater job protection than private sector workers, since political forces may be even more erratic and inconsistent than those of the marketplace; it is unfair to demand that workers have to bear the burden of rash political slogans without having access to collective bargaining.

Nonetheless, the government is in a particularly difficult position as an employer. In most cases it must continue to provide the service in question. Businesses faced with intractable unions usually maintain as a final option the choice to close down completely. Governments do not have this choice. In most cases of public sector bargaining there is no alternative service available and governments maintain a responsibility to provide citizens with the service in question, whether it is education, hospital care, mail service, fire fighting, police protection, air traffic control, or delivery of social services. They must reach agreement with their unions eventually. This gives public service unions a powerful sense of confidence.

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21. The Quebec government in January 1983 and the British Columbia government in July 1983 each took such action against public service workers for two recent striking examples.

However, that confidence is balanced in turn by the union's recognition of the fact that governments have far greater power than does any other employer. At least at the federal and provincial level, governments can ultimately insist on whatever they want; they can "win" if their motivation is strong enough. Governments that control labour legislation have resources available to them that are difficult to resist. Yet it is improper for them to abuse this power for political gain. The government's interest is not identical with the public interest and one should be most careful to avoid blurring the distinction. Given the difficulty of drawing that distinction, we must be most wary of governments that invoke public interest arguments to take action that coincides with their political interest.

This complexity in the situation of dealing with public service unions persuades many analysts that public service unions are an anomaly that can best be addressed by eliminating them. I am not convinced that the difficulties merit such drastic action, and in fact fear that eliminating public service unions would serve to exacerbate the dilemma, since the government's power as employer would become even stronger. In any event, unions in the public sector are a fact of contemporary life, and so long as they do exist we need normative principles to guide the action of governments who deal with them.

The legislative approach to follow with public service unions is to be particularly loyal to the traditional approach and concentrate on procedural issues. Governments must anticipate the problem of delivering services to their citizens when labour disputes arise and develop procedures to provide for public needs. They must ensure that there are fair mechanisms available for resolving conflicts whenever they are likely to occur. They must not, however, rely on their legislative power to favour their own interests in contractual matters. Here, as elsewhere, it is improper for legislation to be used to settle disputes in the interest of one of the parties. The effectiveness of collective bargaining as a process demands that the parties resolve conflicts of interest by negotiation and not preferential legislation. Therefore, we cannot conclude that questions of public interest are always adequate grounds for substantive legislation.

It is only if we restrict the term "the public interest" to the very limited aspect of social justice that we find clear ground for substantive labour law. A "hands off" legislative approach to collective bargaining is most compatible overall with the broadly defined public interest. The only justification for legislative intervention is to deal with the special case of social justice, a particular aspect of the public interest that sometimes requires legislative intervention to bring it about.

## VI. CONCLUSION

The emphasis on procedural legislation governing collective bargaining is deliberate and proper. Collective bargaining is a legitimate approach to setting the terms and conditions of employment for a group of workers, and it is fostered when regulated by procedural rules and minimal substantive direction. It is far from perfect as a mechanism. One of the most serious objections to collective bargaining as a process for setting the terms and conditions of employment is that it is an option available only to the strongest workers. Those workers in greatest need of the benefits of collective bargaining are generally unable to unionize. Nonetheless, it seems that collective bargaining should be protected and not weakened. Since, in most circumstances, any attempt to prescribe certain terms and conditions of employment is likely to make the process of collective bargaining over remaining matters even more difficult and to foster a sense of injustice in the party which is least favoured by the legislation, substantative legislation is usually a mistake.

Thus, a government should strive to maintain a neutral and impartial position with respect to the interest subject to negotiations. It should not allow itself to be used by either party to evade the need for bargaining. This is especially important when it is itself a participant in bargaining, as it is with respect to public service unions. Legislation cannot be used as an alternative to negotiation without undermining the entire collective bargaining system. The government should be especially circumspect in light of the temptation to view its own interest as equivalent to the public interest and conclude that employees' interests are so relatively minor as to be safely disregarded.

Legislation governing the terms of a contract is justified only if it is introduced to govern all employment relationships and sets minimal standards below which no one should be expected to work, such as that which occurs in the labour standards codes. Such broad legislation is consistent with legitimate governmental concern in questions of social welfare so fundamental as to constitute matters of justice.

Beyond these sorts of questions regarding basic labour standards, there seems to be only one justifiable ground for substantive legislative intervention in the details of a contract, which is the case of addressing the employment interests of minority groups subject to the serious inequalities of systemic discrimination. Sometimes, considerations of justice require that special provisions be made for certain groups, such as affirmative action plans for women. Yet when

the arrangements are not in the specific interest of either party to collective bargaining, government ought to assume the responsibility of ensuring that appropriate measures are taken. Under these limited conditions, substantive legislation addresses a neglected matter of justice but it does not favour either party; hence, it does not threaten the general bargaining process. In any circumstance where the public good in question involves a question of justice, substantive legislation is appropriate, and it should not be dismissed because of concern for the principle urging autonomy of the parties when collective bargaining operates. Social justice takes priority even over the valued principles of effective collective bargaining.