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# "Equal Partnership" in Canadian Labour Law

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# “EQUAL PARTNERSHIP” IN CANADIAN LABOUR LAW

By BRIAN A. LANGILLE\*

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. . . by permitting labour to organize freely and effectively we can convert the relation of master and servant in to an *equal* and cooperative *partnership*. . .<sup>1</sup>  
 Senator Wagner (1932)

. . . Congress had no expectation that the elected union representative would become an *equal partner* in the running of the business enterprise.<sup>2</sup>  
 Blackmun J. (1981)

The union is an *equal partner*. . .<sup>3</sup>  
 Canada Labour Relations Board (1981)  
 (Dorsey, Vice Chairman)

We cannot subscribe to an interpretation . . . which . . . would make the union . . . an *equal partner* with the . . . employer.<sup>4</sup>  
 Canada Labour Relations Board (1981)  
 (Foisy, Vice Chairman)

## I. THE ISSUE

Does Canadian labour law policy, as reflected in statutory schemes such as the *Canada Labour Code*,<sup>5</sup> permit or ensure that management and labour are "equal partners" in the running of a unionized enterprise? This is a large and neglected issue in Canadian labour law. To focus the issue, the question can be restated as follows: To what extent does a grant of bargaining authority to a trade union under Canadian labour legislation make fundamental inroads into what have been identified as archetypical "managerial prerogatives"? To be even more particular, what is the effect of certification of a union upon management's power to control the scope of the enterprise — to close down all or part of the enterprise, to contract out all or part of the work, or to relocate all or part of the operations? By focusing on this concrete type of issue, we can explore the degree to which our labour law policy ensures or permits collective bargaining by labour and management of issues which, in a pre-collective bargaining environment, seemed clearly to be decisions solely within management's powers. This is an issue of obvious importance. Unfortunately, it is an issue which has yet to be extensively addressed in Canada. It is a neglected issue, perhaps because of its essentially political nature. It touches a sensitive nerve. Readers may draw their own inferences about what this says about the level of debate in Canadian labour law. Yet it is now an issue which has been squarely raised in Canada and which must be faced.

The quotations set out above reveal that there was, recently, a dispute within the Canada Labour Relations Board which called out for discussion of this basic question. The actual dispute, which is discussed below, revolved around the proper interpretation of section 148(b) of the *Canada Labour Code*

<sup>1</sup> Congressional Record 4918, 72nd Congress, 1st session (1932).

<sup>2</sup> *First National Maintenance Corp. v. N.L.R.B.*, 101 S. Ct. 2573, 91 L.C. 12,805 (U.S. S. Ct. 1981).

<sup>3</sup> *Bank of British Columbia*, [1980] 2 Can. L.R.B.R. 441, 80 C.L.L.C. para. 16,032. Dorsey, Vice Chairman wrote for a unanimous Board. See more recently, *Bank of British Columbia, Abbotsford B.C.*, [1980] 3 Can. L.R.B.R. 576.

<sup>4</sup> *Bank of Nova Scotia*, [1981] 2 Can. L.R.B.R. 365, 81 C.L.L.C. para. 16,110. This is the majority decision of Foisey, Vice Chairman and Kean, member. Archambault dissented. This is referred to as the "Foisey" decision.

<sup>5</sup> R.S.C. 1970, c. L-1, as am. by S.C. 1972, c. C-183 [hereinafter *Canada Labour Code*].

which imposes, in common labour law parlance, a "freeze" upon terms and conditions of employment and related matters during collective bargaining.<sup>6</sup> What has become apparent is that the Board found, within this well known and frequently litigated provision, a source of profound disagreement about the fundamental principles underpinning our labour law regime. The level of rhetoric invoked in the debate reflects the force of the deep currents of disagreement. In response to Vice-Chairman Dorsey's assertion that the *Canada Labour Code* statutorily imposes an "equal partnership" upon the parties, Vice-Chairman Foisy was moved to pitch his response in the broadest of terms, stating:

Although in North America we live in a democracy, the free enterprise system prevailing everywhere is based on a veritable autocracy. This free enterprise or "entrepreneurship" is based essentially on the right to property and the concept of investment, risk and profit. Each entrepreneur seeks to maximize profit resulting from his investment. . . .

[the interpretation advanced by Vice-Chairman Dorsey] has the effect of denying all management rights after notice to bargain is given to the employer and of creating an equal partnership between the union and the employer.

We do not think that by enacting section 148(b) and the certification procedure, that the Canadian Parliament wished to make the employer share its property and management rights, which it had held up to that time, equally with a union.<sup>7</sup>

These are powerful words which reveal a deep political theory with which the legislation is obviously being integrated. What are we to do with this issue which touches such deep political convictions? How can we determine the way in which our Canadian legislation ought to be interpreted? What is its attitude to equal partnership (at least on the concrete issues listed above)? The legislation does not give a direct answer. Is it left to unprincipled venting of pre-existing viewpoints and consequent manipulation of the words of the statute in light thereof? In my view, no. Statutory interpretation goes beyond this. It is possible to arrive at an answer to this question along the following lines. Our legislation's attitude to equal partnership can only be determined by constructing a theory of what our entire statutory scheme is attempting to do.<sup>8</sup> This is not an abstract exercise consisting only of arranging pre-existing political views into a coherent argument. The theory, though it will include "political values", must be one which accommodates, and accommodates best, answers to questions that the legislation clearly *does* give us. That is, we seek the theory which best explains or makes sense of the law that we do have by reference to principles which will enable us to capture an answer to our unanswered query about equal partnership. This is what this paper attempts to do. It is suggested that if the law is examined, (that is the answers to questions already solved), we can piece together a view of what the legislation is attempting to do. Such an

<sup>6</sup> Section 148 (b) reads:

Where notice to bargain collectively has been given under this Part, (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180 (1)(a) and 2(d) have been met, unless the bargaining agent consents to the alteration of such term or condition, or such a right or privilege.

<sup>7</sup> *Supra* note 4, at 376-77 (Can. L.R.B.R.), 718-19 (C.L.L.C.).

<sup>8</sup> Professor Dworkin's writings are relied upon indirectly, particularly "Hard Cases," in *Taking Rights Seriously* (London: Duckworth, 1977).

exercise will also involve rejecting some well known interpretations which cannot fit within the basic principles we find established.

Finally, it is not accurate to suggest, as has been done, that the issue of equal partnership has gone totally unexamined in our labour law. Our well known arbitral jurisprudence on "contracting out", for example, reflects the same basic dilemma. It is now trite law to state that contracting out is permitted on an unfettered basis unless the collective agreement contains specific provisions by which it is forbidden or controlled.<sup>9</sup> In the writer's view, our failure to confront the issue of the attitude of our whole legislative scheme to the issue of equal partnership may have placed too great a burden upon our arbitrators — at least upon those arbitrators whose view has now clearly prevailed. The arbitration law of contracting out is discussed below.

The object then is to examine the controversy surrounding the concept of equal partnership in our labour law and to construct a view of our legislation which offers a principled answer to our questions. The arguments to be made are of two types — firstly, arguments from the law as it now stands and, secondly, assertions about what the legislation ought to be understood as doing.

## II. AN AMERICAN STARTING POINT

As revealed in the quotations from Senator Wagner<sup>10</sup> and Mr. Justice Blackmun<sup>11</sup> the debate over "equal partnership" is one that we have in common with the Americans. A recent American case is a useful starting point for consideration of Canadian law. *First National Maintenance*<sup>12</sup> is the United States Supreme Court's most recent contribution to the understanding of our dilemma. The nakedness of the judicial effort here expended to negate equal partnership makes instructive reading for the Canadian reader. First National Maintenance provided a cleaning service to commercial customers in New York City on a labour cost plus set fee basis. First National was losing money on a contract with a nursing home in Brooklyn and on July 25, 1977, First National gave notice that it was terminating that contract. However, on March 31, 1977 First National's employees employed at the nursing home in question had selected the National Union Hospital and Health Care Employees, Retail, Wholesale and Department Store Union AFL-CIO (the Union) as their bargaining agent. Furthermore on July 12, 1977 the Union had written to First National giving notice to bargain. First National did not respond to the Union's notice. Rather, it unilaterally carried out its plans to terminate the nursing home contract and discharged all the employees working there, because the contract was a money loser. The Union filed an unfair labour practice complaint alleging violation of the duty to bargain in good faith.<sup>13</sup> Glossing over the passage of the case through the processes of the National

<sup>9</sup>The *locus classicus* is still Weiler, *Labour Arbitration and Industrial Change* (Task Force on Labour Relations, Study No. 6, 1969). A modern and recent example is *Kennedy Lodge Nursing Home* (1981), 28 L.A.C. (2d) 388 (Brunner).

<sup>10</sup>*Supra* note 1.

<sup>11</sup>*Supra* note 2.

<sup>12</sup>*Id.*

<sup>13</sup>Contrary to s. 8(a)(5) of the *National Labor Relations Act*, 29 U.S.C. §151-69 (1935).

Labour Relations Board<sup>14</sup> and the Federal Court of Appeals,<sup>15</sup> the issue addressed by the Supreme Court was simply stated by Blackmun J., speaking for the majority:

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment" . . . negotiate with the certified representative of its employees over its *decision* to close a part of its business?<sup>16</sup> (Emphasis added).

Canadian labour lawyers will recognize that if this case had arisen under the *Canada Labour Code* it would represent a possible violation of section 148(b),<sup>17</sup> the post notice to bargain "freeze", the exact issue which caused the Canada Labour Relations Board to split in such a dramatic manner.<sup>18</sup> That is, we would be asking whether First National's decision to terminate the work and dismiss all of the employees in the unit constituted an alteration of "rates of pay or other terms or conditions of employment or any right or privilege of employees in the unit." The *National Labor Relations Act* contains no such "freeze" provision, but it has long been clear that a unilateral change by an employer of a term or condition of employment can constitute a refusal to bargain unfair labour practice,<sup>19</sup> if the term or condition so altered constitutes a "mandatory subject of bargaining."

This brings us to the crux of *First National Maintenance*. Canadian labour lawyers will ask "what is a 'mandatory' subject of bargaining and, 'mandatory' as opposed to what?" It is instructive to note the source of Canadian puzzlement here. The judiciary in the United States has, in its interpretation of section 8(d) of the *National Labour Relations Act*, erected a critical distinction between mandatory and permissive subjects of bargaining. As a result, in interpreting the statutory duty to bargain "with respect to wages, hours and other terms and conditions of employment" the courts have, in effect, the power to determine the scope of this duty. The distinction between mandatory and permissive subjects can be simply described:

*Mandatory* provisions lawfully regulate wages, hours, and other conditions of the relationship between employer and employees . . . ; both parties must bargain in good faith about such provisions, but either party may insist on its position to an impasse and use economic force to back its position. *Nonmandatory or permissive* provisions deal with subjects other than wages, hours and working conditions and are lawful if voluntarily incorporated into the labour contracts; either party may propose such a provision, but neither party is obligated to discuss it and neither party may insist to an impasse with such a provision being incorporated in the contract.<sup>20</sup>

It follows that an employer may act unilaterally on an issue which falls within the class of permissive subjects of bargaining. It should also be noted that merely because the subject is mandatory does not mean that the employer cannot bargain in good faith for a contract granting unilateral management control of that issue.<sup>21</sup> The most important decision in this area is *National*

<sup>14</sup> [1979-80] CCH NLRB 15, 849.

<sup>15</sup> 627 F. 2d 596 (Fed. C.A. 1980).

<sup>16</sup> *Supra* note 2, at 2575 (S. Ct.).

<sup>17</sup> *Supra* note 6

<sup>18</sup> *Supra* notes 3 and 4.

<sup>19</sup> *N.L.R.B. v. Katz*, 369 U.S. 736 (1982). See Gorman, *Basic Text on Labour Law* (St. Paul: West Publishing Co., 1976).

<sup>20</sup> Gorman, *supra* note 19, at 498.

<sup>21</sup> *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395 (1952).

*Labour Relations Board v. Wooster Division of Borg-Warner Corp.*,<sup>22</sup> a case containing, in retrospect, a delicious irony. The employer insisted that the contract contain a clause whereby, in future, the employer's last offer would be subject to an employee vote, as well as a recognition clause recognizing a local rather than the international union which has been certified. The Supreme Court censured the employer's conduct by decreeing that the employer had violated the Act by insisting to the point of impasse upon these two clauses, which the Court held to fall outside of the concept of "wages, hours and conditions of employment" and, thus, beyond the scope of the duty to bargain. Surely the employer's conduct deserved censorship,<sup>23</sup> but the method used is a cause for concern. To divide subjects of bargaining into mandatory and permissive is to effectively grant to the agency with the power to make this distinction the power to determine the scope of collective bargaining. In effect, in the United States, the power to determine the scope of collective bargaining is now vested in the courts. The irony in *Borg-Warner* is that while that case was to the initial benefit of unions, it was, in the long run, a decision which was to prove to be for unions one of the most dangerous in American labour law. *Borg-Warner's* distinction between mandatory and permissive subjects of bargaining has been widely criticized on a number of functional and instrumental bases — that it is a distinction too difficult to make, that it turns upon an illusory distinction between proposing and insisting, that it is ineffective against strong parties<sup>24</sup> and that it imposes one set of rules upon all industries.<sup>25</sup> It has also been criticized on the more general philosophical basis that it limits, without good cause, the freedom of the parties to contract as they see fit.<sup>26</sup> But the most powerful criticism of *Borg-Warner* can only be appreciated in light of the use that has been made mandatory/permissive distinction.

The actual decision in *Borg-Warner* is not troubling, but who could imagine that decisions over the contracting out of work, automation, the partial shutdown or relocation of operations, all of which result in the dismissal of employees, would be perceived as problematic when viewed through the lens of the mandatory/permissive distinction? I do not intend to review the American law on these issues.<sup>27</sup> What is clear is that the mandatory/permissive

<sup>22</sup> 356 U.S. 342 (1958).

<sup>23</sup> Because it attacked the bargaining agent's status as "exclusive" representative of the employees. See Gorman, *supra* note 19, at 497.

<sup>24</sup> See, e.g., Wellington, *Labor and the Legal Process* (New Haven: Yale U. Press, 1968) at 68 ff.

<sup>25</sup> Cox, *Labor Decisions of the Supreme Court at the October Term, 1957* (1958), 44 Va. L.R. 1057 at 1083.

<sup>26</sup> *Supra* note 24, at 76.

<sup>27</sup> Canadian readers will note that thus far the discussion has been about the employer's decision in *First National Maintenance* to shutdown part of its operation. American jurisprudence makes a distinction between the duty to bargain about the decision as opposed to the effects of such a decision. This point is not important for the purposes of this paper. For more on the decision/effects distinction and the American law in general see Gacek, *The Employer's Duty to Bargain on Termination Unit Work*, [1981] Lab. L.J. 659 at 699; Morales, *The Obligation of a Multiplant Employer to Bargain on the Decision to Close One of its Plants*, [1979] Lab. L.J. 709; Naylor, *Subcontracting, Plant Closures and Plant Removals: The Duty to Bargain and its Practical Implications Upon the Employment Relationships* (1980-1981), 30 Drake L.R. 203; Note, *Duty to Bargain about Termination of Operations: Brockway Motor Trucks v. N.L.R.B.* (1979), 72 Harv. L.R. 768. A useful summary, now somewhat out of date, is also contained in Manson, *Technological Change in the Collective Bargaining Process* (1973), 12 U.W.O.L. Rev. 173.

distinction has risen to a position of critical importance in determining the scope of equal partnership in American labour law. By simply declaring an issue (such as an employer's decision to terminate all bargaining unit work and to dismiss all the employees) to be a permissive topic of bargaining, the matter is ended. It guarantees the employers a unilateral right to act — it negates equal partnership. Who could have imagined, however, that such a decision would be viewed as permissive and nonmandatory, that is, as not being about “terms and conditions of employment?” In *First National Maintenance* we learn that a majority of the Supreme Court of the United States takes such a view. The majority there did not waste time establishing its starting point:

[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place . . . .<sup>28</sup>

This was followed by the following taxonomy of “management” decisions:

Some management decisions, such as the choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship . . . . Other management decisions such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively “an aspect of the relationship” between employer and employee . . . . The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by termination, but had it as its focus only the economic profitability of the contract with [the nursing home], a concern under these facts wholly apart from the employment relationship.<sup>29</sup>

There, in a brief paragraph, is a complete judicial view of the *National Labour Relations Act's* dedication to the principle of equal partnership. The court went on to say that the decisions falling within its third category are to be viewed as follows:

[I]n view of an employer's need for unincumbered decisionmaking, bargaining over management decisions that have substantial impact on the continued availability of employment should be required only if the benefit, for labour management relations and the collective bargaining process, outweighs the burden placed on the conduct of business.<sup>30</sup>

The Court then went on to hold that regarding a decision such as that undertaken in *First National Maintenance*:

[W]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shutdown part of its business purely for its economic reasons outweighs the incremental benefits that might be gained through the union's participation in making the decision and we hold that the decision is *not* part of s. 8(d)'s “terms of conditions” . . . over which Congress has mandated bargaining.<sup>31</sup>

In light of the developed jurisprudence in the United States, the case may

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<sup>28</sup> *Supra* note 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2584 (S. Ct.).



not have come as much of a surprise to American labour lawyers.<sup>32</sup> To a Canadian reader, it is a dramatic exhibition of misuse of judicial power consisting of the venting of an ideological viewpoint, achieved only at the expense of a gross misreading of statutory language (the meaning of "terms and conditions of employment"). The philosophical starting point for the majority is revealed in their point blank assertion that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise. . . ."<sup>33</sup> A more elaborate explanation of the fundamental starting point of the majority judgments is found in the words of Stewart J., earlier in the *Fibreboard v. National Labour Relations Board* decision:

Congress may eventually decide to give organized labour . . . a far heavier hand in controlling what until now has been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy.<sup>34</sup>

This sounds very much like the words uttered by Vice-Chairman Foisy in his debate with Vice-Chairman Dorsey. When such words are invoked in a labour law case basic issues are not far behind.

### III. THE SCOPE OF THE DUTY TO BARGAIN IN CANADA

The critical point is that, for Canadian labour law, the mandatory/permissive distinction is the path not taken. Administrators of Canadian labour law have not read the duty to bargain in a manner which pre-empts collective bargaining of issues such as closure of all or part of the enterprise resulting in dismissal of all or some of the employees. It is true that the *First National* case does not legally *prohibit* collective bargaining about such decisions — such matters are still permissive subjects of bargaining, not illegal ones. But the case does pre-empt collective bargaining by guaranteeing the right of an employer to act unilaterally if it so desires.

The significance of this point can only be fully appreciated by considering what the impact of a contrary holding in *First National* would have meant. If the closure decision had been declared a mandatory subject of bargaining, the law merely would have imposed a duty upon the employer to bargain in good faith to an impasse and then would have permitted the use of economic sanctions by the parties in an attempt to secure agreement. That is, a finding that such a management decision is a mandatory topic would not be a guarantee to the union of any right to alter the management decision; it merely would have granted the right (and imposed a duty upon the employer) to bargain about the decision. The employer is not compelled to agree and in bargaining can maintain the stance that such matters are to be solely within management's power.<sup>35</sup> In sum, a holding that *First National's* decision was a mandatory topic would merely have put that issue on the table and made it subject to an economic test

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<sup>32</sup> In light of the decision of Mr. Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964). Gorman, *supra* note 19, at 511 describes Mr. Justice Stewart's opinion as "more influential than the opinion of the Court."

<sup>33</sup> *Supra* note 2.

<sup>34</sup> *Supra* note 32, at 225-26.

<sup>35</sup> *Supra* note 6.

of will and strength. The actual finding that the decision was non-mandatory meant that it never got to the table and that it was illegal for the union to insist upon putting it there. In this vital sense, the American law on the duty to bargain pre-empts equal partnership and sanctions employer unilateral control. In Canada we have not perceived the law concerning the duty to bargain limiting the scope of collective bargaining or denying the right of unions to bargain for a say in the contraction of employment and the scope of the enterprise. In fact Canadian law is exactly the reverse.

The leading case establishing the Canadian attitude toward the mandatory/permissive distinction is *Pulp and Paper Industrial Relations Bureau and Canadian Paper Workers Union*,<sup>36</sup> a decision of the British Columbia Labour Relations Board. There the employer refused to bargain about improved pension benefits for retired workers and the union charged the employer with a refusal to bargain. The bottom line in the decision is that the employer was not in breach of the duty to bargain by refusing to discuss the one item, the Board holding that:

The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement. [The duty] does not create a set of separate duties to bargain, duties which are attachable to each of the items placed on the bargaining table by the other side. While making *bona fide* and reasonable efforts to settle a collective agreement . . . the Bureau is legally entitled to refuse to discuss . . . the one issue of pension benefits for retired workers.<sup>37</sup>

For our purposes however, the importance of the case lies in its rejection of the mandatory/permissive distinction as "one of the most heavily criticized doctrines in American Industrial Relations jurisprudence."<sup>38</sup> Two important points were made in the Board's decision:

1. That while an employer can refuse to bargain about a single item, the union may, if committed to its cause (and to the use of American terminology), push the item to impasse. That is, the union can strike over that issue. This is in itself a modification of the American doctrine.
2. That a compelling reason for rejecting the distinction lies in the fact that:

The whole point of a system of *free* collective bargaining is to leave it to the parties to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or by the union. And in the final analysis, the test of whether a particular objective is sufficiently pressing to one party to have moved into the area of mutual agreement, is the price that the party is willing to pay for such a move: either by concessions elsewhere in the contract or by the losses inflicted by a work stoppage. The wrong method is to rely on rigid controls administered by an external tribunal, with the risk this poses that the flow of the collective bargaining regime might be frozen into the currently conventional pattern.<sup>39</sup>

This is simply a completely different view of the collective bargaining world than that revealed in *First National Maintenance*.

Canadian law goes even further. The *one* area where our law *does* interfere with the parties' right to *insist* upon a certain item to the point of im-

<sup>36</sup> [1978] 1 Can. L.R.B.R. 60 (Weiler).

<sup>37</sup> *Id.* at 80.

<sup>38</sup> *Id.* at 78.

<sup>39</sup> *Id.* at 79-80.

passee is the scope of the union's bargaining authority. To restate this in terms of the American mandatory/permissive distinction, the only point at which Canadian law utilizes this distinction is when the issue of the scope of the union's bargaining authority is addressed. Canadian labour law says, in effect, that as between employer and union<sup>40</sup> the scope of the union's bargaining authority is a permissive and not a mandatory item. The employer cannot insist upon restricting the scope of the union's bargaining authority.<sup>41</sup> Nor can a union insist upon bargaining for employees it is not certified to represent.<sup>42</sup> The important proposition is the prior one — that the employer cannot *insist* that the scope of the union's bargaining authority be narrowed. This important conclusion can be, and has been,<sup>43</sup> defended on the basis that such action is an affront to the legislative scheme which clearly vests with the labour relations board the power to authoritatively determine the scope of the unit.<sup>44</sup> More clearly it is a refusal to bargain and amounts to the use of economic pressure to deny employees the rights to collective bargaining — certainly an unfair labour practice.

Canadian law discussed thus far establishes two propositions. Firstly, that the mandatory/permissive distinction does not apply in Canada. Thus, an employer or union may bring to the bargaining table and press to the point of impasse issues such as contracting out, enterprise relocation or enterprise shutdown. Secondly, an employer may not insist to the point of impasse upon restriction of the scope of the union's bargaining authority (and similarly a union may not insist to the point of impasse upon an expansion of its bargaining rights).

But, are not these two conclusions contradictory? They do cause a certain obvious difficulty for each other. How can one bargain about shutdown to impasse and not be effectively bargaining about bargaining unit scope, which cannot be bargained to impasse? The contradiction is illusory, however, and can be dispelled by some clear thinking about certification and certificates. Such an exercise would be useful and would dispel the idea that this area can be thought about in terms of the confusing notion of "bargaining unit work."

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<sup>40</sup> This is an important restriction. The law may say something different about an employee's view of such an occurrence. See Langille, *Developments in Labour Law—The 1980-81 Term* (1982), 3 Sup. Ct. L.R. 223.

<sup>41</sup> *British Columbia Telephone Company*, [1977] 2 Can. L.R.B.R. 404 at 417 (LeBel); *Toronto Star Newspaper Limited*, [1979] O.L.R.B.R. 811 (Burkett); *Carpenter Employer Bargaining Agency*, [1978] 2 Can. L.R.B.R. 501 at 517 (Carter); *Cybermedix*, [1981] O.L.R.B.R. 13 (McDowell). If an employer and the union agree to restrict the unit scope this may be a breach by the union of its duty to represent all employees in the unit. See, *supra* note 40.

<sup>42</sup> A way of looking at this would be that any attempt by a union to bargain to impasse in order to expand its bargaining authority would amount to a recognition strike which is clearly forbidden by the legislation. Of course, if the employer agrees to expand the unit scope, this merely operates as a voluntary recognition. See, *supra* note 40, at 359.

<sup>43</sup> As succinctly stated in *Cybermedix*, *supra* note 41, at 21, "[t]he scope or extent of the union's bargaining rights must be settled through the established mechanisms provided in the *Labour Relations Act*."

<sup>44</sup> *Canada Labour Code*, *supra* note 5, at s. 124(g).

#### IV. CERTIFICATION AND CERTIFICATES<sup>45</sup>

Labour relations boards issue certificates of exclusive bargaining agency status to trade unions following a demonstration of majority support in a unit appropriate for collective bargaining.<sup>46</sup> A union attains certified bargaining agency status by a demonstration that a majority of employees in a unit have expressed a wish<sup>47</sup> that the trade union represent them. The certificate, however, does not describe the unit by listing the names of the employees therein. That is, the unit description is not attached to a group of named individuals, a majority of whom have approved the union. No one has ever suggested that it should. The chaos and instability that would result has been so intuitively clear to all involved in the process that it has, literally, gone without saying. How then are bargaining units and, as a result, the scope of the union's bargaining authority described? In the past, labour relations boards, such as the Canada Labour Relations Board, were prone to issuing certificates which described the units by listing job classifications. It was thus made clear that the certification did not attach to the group of employees in place at the date of certification. This led ineluctably to the conclusion that new employees hired after certification were in the unit. The legislation simply afforded to these late arrivals the right to invoke raiding, decertification, or unit alteration proceedings. While attaching certification to a list of classifications overcame the problem of turnover in employees, it created the problem of turnover of classifications:

The problem with describing bargaining units with a list of included job classification is that over time, with technological change, with expansions or contractions in the scope of the enterprise, and with reorganization of work within the enterprise, classifications come and go. At a minimum the result is uncertainty as to the scope of the unit and, more likely, instability of bargaining rights, undue fragmentation of bargaining structure, and a greater degree of friction between unions and management as they debate whether a new classification is in or out of the unit.<sup>48</sup>

To overcome these difficulties current labour board practice is to describe units as "all employees units." That is, the unit is simply described as "all employees of X Limited"<sup>49</sup> (perhaps at or within a geographic location). Thus, all difficulties of turnover in individuals or classification is avoided. Units may expand (by addition of classifications or of more employees to existing classification), contract (by subtraction of classifications or employees within classification), or evolve (by change in the classification or work done). Unit descriptions are then, in a sense, perfectly neutral — the scope of the bargaining unit is not tied down by the certificate. The effect of certification is described in the *Canada Labour Code* as follows:

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<sup>45</sup> The author draws upon a discussion of the nature of certificates in Langille, *supra* note 40.

<sup>46</sup> No effort is made here to discuss the issue of appropriateness. See Langille, *The Michelin Amendment in Context* (1981), 6 Dal. L.J. 523.

<sup>47</sup> *Canada Labour Code*, *supra* note 5, at s. 124-29. Detailed footnoting is not undertaken here.

<sup>48</sup> Langille, *supra* note 40, at 16.

<sup>49</sup> This is, of course, an over simplification. Units are often "all sales employees" or "all production employees" or "all full time and regular part time" and almost certainly with exclusions. Construction industry unit description is another story not told here.

Where a trade union is certified as the bargaining agent for a bargaining unit,  
 (a) the trade union so certified has exclusive authority to bargain collectively on behalf of all the employees in the bargaining unit.<sup>50</sup>

The central concept of *exclusivity* clearly excludes not only other trade unions from bargaining on behalf of employees in the unit, but also negotiations between the employer and employees in the unit.<sup>51</sup> The legislation thus predicates certification upon the wishes of an identifiable group of employees (those employed at the relevant times for certification) and then makes a grant of bargaining authority covering a unit defined in terms of employees of the employer, unconnected to any identifiable group of individuals or any type of work or job classification. The Act then places a "corresponding obligation"<sup>52</sup> upon the employer to recognize the union as the exclusive bargaining agent for all of the employees in the unit. The legislation does this (mainly)<sup>53</sup> by placing a duty to bargain with the union upon the employer. The *Canada Labour Code* provides that after notice to bargain collectively has been given, the trade union and the employer must:

- (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
- (ii) make every reasonable effort to enter into a collective agreement<sup>54</sup>

What is a collective agreement? The legislation provides:

"collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters.<sup>55</sup>

The Act compels the employer to bargain in good faith with the union over terms and conditions of employment and related matters for all employees in the unit. All of this is extremely familiar. The point in labouring the obvious is precisely that it is so obvious that it is difficult to perceive. If certificates and certifications are regarded in the way just outlined, the apparent contradiction between the two conclusions of law (the rejection of the mandatory/permissive distinction on issues such as subcontracting, relocation or shutdown but the maintaining of the mandatory/permissive distinction on the issue of bargaining units scope) dissolves. It can be regarded in the following way: an employer cannot insist that people who are and will be employees (and therefore still in the unit) be excluded from the union's bargaining mandate, but an employer can bargain (to the point of impasse) that certain people now in the unit no longer be its employees (and thus no longer in the unit).<sup>56</sup>

<sup>50</sup> *Canada Labour Code*, *supra* note 5, at s. 136(1).

<sup>51</sup> *Syndicat Catholique Des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee.* (1959), 18 D.L.R. (2d) 346 (S.C.C.).

<sup>52</sup> This phrase is borrowed from Arthurs, et al., *Labour Law and Industrial Relations in Canada* (Toronto: Butterworths, 1981).

<sup>53</sup> There are also unfair labour practice provisions which are relevant. *Canada Labour Code*, *supra* note 5, at s. 184(g).

<sup>54</sup> *Canada Labour Code*, *supra* note 5, at s. 148(a).

<sup>55</sup> *Canada Labour Code*, *supra* note 5, at s. 107(1).

<sup>56</sup> Or, bargain for unilateral power to make this decision in the future.

## V. AN EVALUATION

The Canadian law and the American law on the scope of the duty to bargain have been compared. It has already been indicated that the mandatory/permissive distinction has been criticized on a number of functional grounds.<sup>57</sup> Another level of analysis will now be undertaken using *First National Maintenance* as a focus.

Before beginning, some of the peculiar facts of *First National Maintenance* should be noted. The employer terminated thirty-five employees because of a dispute with the nursing home about the size of the management fee to be paid by the nursing home on the labour cost plus fee contract. The actual amount in question was \$250 per week. (Obviously not all partial shut-down cases will be reducible to such an obviously surmountable problem.)<sup>58</sup> But it is not the facts of the *First National Maintenance* which deserve special attention, but rather the reasoning invoked by the Court and the basic assumptions from which that reasoning proceeds and which it reflects. First, the starting point for the majority's reasoning is that there is an "undeniable limit"<sup>59</sup> to what falls within the proper scope of collective bargaining. That is, there are issues which are inherently management issues, solely for management to decide. This is reflected in the majority's taxonomy of decisions. Some decisions are purely management decisions. Another group of decisions are appropriately subject to the process of collective decision-making. A third type of case exists where it is difficult to tell whether the issue is in the first or second category. According to the Court, the facts of *First National Maintenance* placed it within this third category. The critical assumption underlying these categories is a view of the world in which some issues are management issues (and in which Congress could not have intended that unions could insist upon bargaining about these issues). One can say no more than this is just assumed.

The majority then proposed its balancing test, as set out above,<sup>60</sup> to settle the issue of whether the actual case before it fell on the management or collective bargaining side of the line. In the end the Court found that the issue fell within the first category, for management only. In both articulating and applying this "balancing" test the majority relied on a set of further assumptions. The first obvious assumption is that it is both possible and desirable for a court, or at least someone other than the parties, to draw the line between the categories and to do so by predicting the result of collective bargaining about issues. This assumption is inherent in the majority's "balancing" test. In the end *the Court* concluded that the cost to the employer outweighed any benefit *the Court* could perceive as possibly flowing from subjecting the issue in question to collective bargaining. As a result the issue was not to be placed within the collective bargaining arena.

The second assumption becomes obvious both in the content of the test itself — collective bargaining may generate "benefits for labour management relations," but it is a "burden . . . on the conduct of the business"<sup>61</sup> — and in

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<sup>57</sup> *Supra* note 8.

<sup>58</sup> *E.g.*, failing all else, the union could have saved the jobs of these thirty-five people by agreeing to a reduction in pay of approximately \$7 per week per employee.

<sup>59</sup> *Supra* note 2, at 2579 (S. Ct.).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

its application. The majority revealed little imagination when reflecting upon the benefits but had no difficulty declaring numerous costs to be apparent. These envisaged costs are really the reflection of assumptions which the Court brought to the issue before it; the assumption that collective bargaining and unions are factors of disutility to be plugged into the cost benefit calculus.<sup>62</sup> The Court referred to collective bargaining as a "burden,"<sup>63</sup> and a "constraint,"<sup>64</sup> which constitutes a "harm"<sup>65</sup> because management needs to "operate freely . . ." <sup>66</sup> Thus the majority could perceive no benefits following from collective bargaining concerning the decision to be taken.

By way of summary, there are three major assumptions (and a language to express them) which the majority brought to its deliberations in *First National Maintenance*: (1) That the universe of decisions undertaken in connection with an enterprise can *a priori* be divided into two categories — "management" decisions and decisions suitable for collective bargaining. (2) That a court or other institution can and should draw the lines between these two categories by predicting the outcome of collective bargaining about the issue. (3) That collective bargaining is to be viewed as a negative factor to be taken into account by calculating how adversely it affects the interests of efficient management of the enterprise. Needless to say, the decision in *First National Maintenance* has attracted considerable attention.<sup>67</sup>

What is the significance for Canadian labour law of the decision in *First National Maintenance* and the set of assumptions revealed therein? It is instructive to see the reasoning and assumptions at work, for despite the fact that the American law has been rejected on this point, the assumptions underlying that decision have had a disquieting tendency to surface repeatedly in other areas of Canadian law. This is a major theme of this paper. It is also critical that we see how the *First National Maintenance* assumptions and language are at odds with basic ideas contained in Canadian labour relations legislation. It is precisely at this level of analysis that the American law of the duty to bargain, of which *First National Maintenance* is merely the most recent articulation, has received the most sustained attack.<sup>68</sup>

As a starting point for considering the fundamental purposes of our collective bargaining regime, it may be useful to consider the preamble to Part V of the *Canada Labour Code*:

Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

<sup>62</sup> A point succinctly driven home in the dissent.

<sup>63</sup> *Supra* note 2, at 2579.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> The following is particularly helpful: Note, *Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closing* (1982), 60 Tex. L.R. 279.

<sup>68</sup> Summers, *Industrial Democracy: America's Unfulfilled Promise* (1979), 28 Clev. L.R. 29; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941* (1978), 62 Minn. L.R. 265; Barron, *A Theory of Protected Employer Rights: A Revisionist's Analysis of the Supreme Court's Interpretation of the National Labour Relations Act* (1981), 59 Tex. L.R. 421; and, *supra* note 67.

And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the basis of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And Whereas the Government of Canada has ratified convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibility in this regard;

And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;

Now Therefore, Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows . . .<sup>69</sup>

It is widely accepted that our collective bargaining legislation serves a number of purposes. At the most basic level, collective bargaining is designed to redress the inequality of bargaining power between employer and employee in negotiating a contract of employment.<sup>70</sup> The perceived result of a more equal bargaining position for employees is a fairer deal for employees — “a just share of the fruits of progress to all.” But this is merely one of several ends served. Professor Weiler has also identified the “civilizing impact”<sup>71</sup> of collective bargaining upon the workplace (“good working conditions”). Weiler maintains, however, that the most important purpose and result of equalizing bargaining power is to increase participation and democracy at the workplace:

Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect the dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them (which, if the employer happens to be benevolent may be just as generous compensation, just as restrained supervision). If one believes, as I do, that self-determination and self-discipline are inherently worthwhile, indeed, that they are the mark of a truly human community, then it is difficult to see how the law can be neutral about whether that type of economic democracy is to emerge in the workplace.<sup>72</sup>

It is also clear that our collective bargaining law is designed to serve the purposes of promoting industrial peace (“constructive settlements of disputes”). But a major purpose of our collective bargaining regime is to create a system of “free” collective bargaining. This is a fundamental point in several ways. The basic notion of redressing the inequality of bargaining power stems from the insight that no free consent or negotiation could be obtained in the context of such inequality. The Canadian system is one of free collective bargaining in the sense that real and actual bargaining is more likely to occur. But it is a system of “free” collective bargaining in another important sense. Free collective bargaining is bargaining not constrained by the political visions of those outside of the process. More particularly, it is not col-

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<sup>69</sup> *Canada Labour Code*, *supra* note 5.

<sup>70</sup> Langille, *Labour Law is a Sub-set of Employment Law* (1981), 31 U. Tor. L.J. 200 at 200-204.

<sup>71</sup> Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980).

<sup>72</sup> *Id.* at 33.



lective bargaining about issues (and only those issues) sanctioned by labour relations boards or the judiciary in Canada. Indeed, the impropriety of judge-made limitations upon the scope of collective bargaining would be blatant. The imposition of an alien political judgment would be clear for all to see.

The last point can be approached from a different direction. It is clear that the law has, and does, treat the employment relationship as a contractual one.<sup>73</sup> It is not a secret that, generally, most employees did not fare well under this contractual regime. The virtues of private ordering were not evident in a situation of one-sided bargaining. Important societal values — concern and respect for workers — were not secured by the device of contract in what was one of society's basic institutional mechanisms: employment.<sup>74</sup> Collective bargaining is fundamentally a *procedural* device to redress the imbalance in bargaining power. But even before collective bargaining legislation there were no *legal* limits on what employees could bargain about — they were merely constrained by their *de facto* lack of bargaining power. In a liberal democratic society the law does not constrain, except in the most fundamental of ways, the scope of contract. Some have seen in the employer's ownership of property the ground for "inherent" employer powers or rights. This too is a legal (but not a social) fallacy. The solvent of contracting washes property too. As long as employers maintained *de facto* bargaining power, the gospel of freedom of contract was not perceived as being troublesome, but rather as being virtuous. The point is that contractualism wipes the slate clean. There are no "management" rights which are not subject to its power. One can test this view by imagining an employee with enormous bargaining power. Suppose, for example, that Wayne Gretzky, in negotiating with his employer, insisted that the hockey franchise for which he plays not be sold or relocated during the term of his next contract. What result? The point of this simple example is that in a world which treats the employment relationship as a contractual one there are no reserved or management rights. Management and employees can contract for whatever they wish. The procedural device of equalizing bargaining power does not alter this fundamental point. To say that it does would be so obviously two-faced about Canadian law of employment as to be unimaginable. It would amount to saying that where employees have no bargaining power there are no restrictions on bargaining, but where employees have bargaining power there are restrictions on bargaining. This is simply unacceptable to those interested in the virtues of consistency and fairness.

A strong purposeful argument can be made that it was the purpose of the *Wagner Act*<sup>75</sup> to extend the scope of collective bargaining and, as a result, co-determination and equal partnership. The argument can be made from the Act's historical context that its purpose was to extend industrial democracy.<sup>76</sup> This argument does not have to be made. It is sufficient to make the point that the Canadian system is a system of free collective bargaining in the sense that has just been outlined. It should now be apparent that the American law has failed where the Canadian law has succeeded in preserving these goals.

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<sup>73</sup> Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980).

<sup>74</sup> *Supra* note 70.

<sup>75</sup> Klare, *supra* note 68.

<sup>76</sup> *Cf.*, *Radical Potential of the Wagner Act: The Duty to Bargain Collectively* (1981), 129 U. Penn. L. Rev. 1392.

## VI. OTHER PARTS OF THE PUZZLE

### A. *The Statutory Timetable*

Thus far, the American approach to the duty to bargain has been examined and it has been noted that, through the invocation of the mandatory/permissive distinction, American law pre-empted collective bargaining of issues such as plant shutdowns for contracting out. Canadian law has rejected this approach. One can say that in Canada issues such as plant shutdown or contracting out are mandatory subjects of bargaining, to use the American terminology. The union can insist that such terms be bargained and can strike to support its position. The duty to bargain has not, in Canada, been a stumbling block to equal partnership. But we can neither evaluate what we have already seen nor intelligently inquire into the remainder of the legislation unless we take into account the fundamental importance of questions of timing in the Canadian legislative scheme of things, which may collectively be referred to as the "statutory timetable."

It has been noted that under Canadian law of the scope of the duty to bargain in good faith, a union can put issues, such as subcontracting, on the table and strike to enforce its demands. But *when* can a union do that? Only during "open seasons" of initial negotiation or periodic renegotiation of a collective agreement and these open seasons are rigidly determined by the legislation. Schemes such as the *Canada Labour Code* provide for a process of certification of trade unions. Following certification, notice to bargain is given. Once notice to bargain is given the statutory duty to bargain in good faith binds the parties.<sup>77</sup> The statutory freeze upon working conditions also becomes operative at this point in the effort to secure rational collective bargaining.<sup>78</sup> The freeze "thaws" either when the parties reach agreement or the preconditions for the use of economic sanctions are met, basically; bargaining, conciliation, failure to agree.<sup>79</sup> The duty to bargain continues past this point in time.<sup>80</sup> If the parties fail to agree, the duty continues in altered form,<sup>81</sup> past the expiry of the freeze and into the period in which economic sanctions are permitted.

In place at all times is a perimeter of unfair labour practice provisions placing constraints upon the parties' actions. Perhaps the most significant aspect of the Canadian statutory timetable is the peculiarly Canadian rule<sup>82</sup> that if the parties secure agreement (a collective agreement is signed) the parties are "locked into" that agreement for its duration, or at least for the statutory minimum of one year. The parties are locked in in the sense that there is generally no legal duty on the other party to respond to a demand for new negotiation on a point not covered or on renegotiation of terms settled.<sup>83</sup>

<sup>77</sup> *Canada Labour Code*, *supra* note 5, at s. 148(a).

<sup>78</sup> *Canada Labour Code*, *supra* note 5, at s. 148(b).

<sup>79</sup> All of these steps are carefully timed by the statute as well.

<sup>80</sup> *Canadian Textile and Chemical Union and Artistic Woodwork Co.*, [1973] O.L.R.B. Rep. 565, [1974] C.L.R.B. Rep. 195.

<sup>81</sup> See, *Fotomat Canada Limited*, [1981] O.L.R.B. Rep. 1397 (Adams).

<sup>82</sup> *Supra* note 71, at 107.

<sup>83</sup> I know of no case in which parties *willing* to renegotiate in mid-contract have been "prevented" by the statute (e.g., the rule of one year contract duration) from so doing. Nor do I have access to data which reveals how much "voluntary" mid term bargaining actually goes on.

But the real sense in which the parties are locked in is by the express statutory ban on all strikes and lockouts during the life of a collective agreement.<sup>84</sup> The ban extends not only to strikes over issues dealt with in the collective agreement, but to strikes on all issues.<sup>85</sup> This Canadian rule is combined with its equally Canadian corollary — compulsory arbitration of all midcontract rights disputes. This corollary of compulsory midcontract arbitration is a *quid* which is widely recognized as smaller than the *quo* of the comprehensive strike ban. The statutes compel arbitration:

[O]f all differences between the parties to or employees bound by a collective agreement, concerning its interpretation, application admission or alleged violation.<sup>86</sup>

The no strike *quo* obviously outweighs the *quid* of arbitration because the strike ban forbids all strikes while arbitration is limited to disputes “concerning the interpretation, application, administration, or alleged violation” of the collective agreement. In short, “if it is not in the agreement it can’t be arbitrated.”<sup>87</sup> We cannot lose sight of this point.

Let us take stock. In Canada issues such as contracting out of work, plant shutdown or relocation, or technological change are proper subjects of bargaining. Thus a union can place such issues on the table, either in the context of an existing dispute over such a change, or in an attempt to secure agreement on terms to deal with any future events. And the union can strike to enforce its demands. But this can occur only during the periodic negotiating sessions permitted by the legislation. If a union does secure agreement with an employer, for example on an issue such as contracting out, what sort of clause might result? The collective agreement might simply forbid contracting out of work performed by the employees in the unit.<sup>88</sup> It might provide that there is to be no contracting out if such action would result in lay-offs.<sup>89</sup> Or it might provide that there is to be no contracting out without prior consultation with,<sup>90</sup> or notice to,<sup>91</sup> the union. The various possibilities will not be reviewed in detail,<sup>92</sup> but in addition to the types of clause already mentioned, there is another class of clause which aims, not at controlling or affecting the subcontract *decision*, but at the *effects* of a subcontracting of work upon, for example, displaced employees.<sup>93</sup>

<sup>84</sup> *Supra* note 71, at 91, 101 and 107.

<sup>85</sup> Compare Feller, *General Theory of the Collective Agreement* (1973), 61 Cal. L. Rev. 663. The courts have even banned “strikes” on issues totally removed from the specific collective bargaining context see, *Robb Engineering* (1977), 86 D.L.R. (3d) 307 (N.S.S.C. A.D.).

<sup>86</sup> *Canada Labour Code*, *supra* note 5, at s. 155.

<sup>87</sup> *Gorsky, Evidence and Procedure in Canadian Labour Arbitration* (Don Mills: DeBoo, 1981) at 2, noting that “few principles in labour law are so well established.”

<sup>88</sup> See, e.g., *Algoma Steel* (1957), 8 L.A.C. 273 (Laskin); *Air Canada* (1975), 10 L.A.C. (2d) 113 (O’Shea).

<sup>89</sup> See, e.g., *Northern and Central Gas* (1972), 1 L.A.C. (2d) 147 (Rayner).

<sup>90</sup> *Burrard Yarrows Corporation* (1981), 30 L.A.C. (2d) 331 (Christie).

<sup>91</sup> *Dominion Stores Ltd.* (1982), 4 L.A.C. (3d) 127 (Prichard).

<sup>92</sup> See Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1978) at 358-61 for a review of some types of clauses, including “no contracting out during lay offs” and “no contracting out if lay off results.”

<sup>93</sup> *Supra* note 71, at 104-105 noting that indemnification, not limits on management’s rights to initiate change is the more normal type of clause.

If any such rights are secured in the collective agreement and these rights are violated during the term of the agreement, arbitration affords a remedy — either a compliance order<sup>94</sup> or damages.<sup>95</sup> To this extent then, our legislative scheme does not prevent, but rather opens the door for the possibility of collective bargaining of the contracting out issue and the enforcement of rights resulting therefrom. On the other hand, the system does not guarantee achievement of any degree of co-determination of issues such as contracting out. As we have seen during negotiations, the employer can bargain to the point of impasse for unilateral control of issues of this sort and not violate the duty to bargain. An employer can insist upon inclusion of a general management rights clause granting absolute and unfettered employer control of this and other matters. Under the Canadian system this approach is not only possible, but widespread.<sup>96</sup> In short, these management decisions are on the table. If trade unions do not seek or cannot win rights within collective bargaining, that is what the legislation approves. Short sightedness or lack of bargaining power may prove costly because of the strict legislative timetable. Once locked into a contract containing *no rights*, the union is legally stuck.<sup>97</sup> But if rights are secured, a meaningful remedy exists in arbitration.

This examination in practical terms of the scope of the duty to bargain, has raised a host of other issues and questions about the extent to which our legislative scheme of things affects equal partnership. In other words, what other provisions encourage, facilitate, force or preclude equal partnership? While inquiring into these issues it will be important not to lose sight of the one point made already — the rejection of the type of reasoning manifested in *First National Maintenance*. An overall view of our legislative response to equal partnership should emerge.

### B. *The Functional Content of the Duty to Bargain*

If Canadian law permits collective bargaining about these issues during the open negotiating season, what is the attitude of Canadian law towards attempts by employers to prevent collective bargaining by unilaterally undertaking changes during the negotiating period?<sup>98</sup> This possibility raises the issue of the *functional content* (as compared to the *scope*, which we have already examined) of the duty to bargain in good faith. It is not necessary to review all of the leading cases outlining in general terms the Canadian attitude toward the purpose and content of the duty. It is sufficient to recall the following statement of the dual purposes of the duty from a leading Ontario decision, *DeVilbiss (Canada) Ltd.*:

[I]t is our belief that the duty . . . has at least two functions. The duty reinforces the obligation of the employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is in-

<sup>94</sup> See, e.g., *Air Canada*, *supra* note 88.

<sup>95</sup> See, e.g., *supra* note 90. Here reliance is appropriately placed on *Re Blouin Drywall Contractors Ltd.* (1973), 4 L.A.C. (2d) 254 (O'Shea), quashed 48 D.L.R. (3d) 191 (Ont. Div. Ct.), restored 57 D.L.R. (3d) 199 (Ont. C.A.).

<sup>96</sup> E.g., *N.S. Negotiated Working Conditions* (Halifax: N.S. Dept. of Labour and Manpower, 1981) 36-37.

<sup>97</sup> The limited exceptions to the legislative timetable's closed season are not dealt with here.

tended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.<sup>99</sup>

It is important not to lose sight of the first "somewhat primitive" purpose of the duty. The duty to bargain is really the heart of the statute. If there is to be *collective* bargaining, the employer cannot be free to bargain individually or directly with employees. The common law right of freedom to bargain or not bargain must of necessity be, and is, removed by the statute. It has already been pointed out<sup>100</sup> that the concept of exclusivity operates to negate direct negotiations with employees. The reports are replete with unfair labour practice decisions holding that direct employer negotiation with, or action regarding employees violates the Act.<sup>101</sup> The terms upon which employees can be dismissed are quintessentially matters of collective bargaining concern. Unilateral and direct action or negotiation of the terms upon which employees can be dismissed simply violates the statute's concern with assuring collective and ending individual, bargaining. This is an important point for much of what follows in this essay. At common law the express or implied terms of the contract of employment determined the conditions for dismissal. In the collective bargaining world we can no longer speak of termination of employment in terms of individual contracts by employment.<sup>102</sup>

A unilateral move by an employer to contract out work, or close all or part of a plant with resulting lay-offs or terminations for all or part of the bargaining unit, would seem to be the most blatant of violations of the duty. Both purposes of the duty would be violated because it would be a prime example of a refusal to engage in collective bargaining (dealing directly and unilaterally with employees) and the total absence of discussion of any sort. Such employer action actually occurred, and the obvious legal result obtained, in the recent *Sunnycrest Nursing Home Ltd.*<sup>103</sup> case. During negotiations, the employer unilaterally made and implemented a decision to subcontract the work of and to dismiss one quarter of the employees in the unit. After reviewing the scope of the duty to bargain in Canada (as contrasted with the United States) and noting the statutory timetable, the Board said:

Even if the employer's decision in this case were wholly free of anti-union animus, in our opinion, a decision made during bargaining, to eliminate so many bargaining unit jobs should have been raised and discussed at the bargaining table. It is implicit in the employer's duty to bargain in good faith.<sup>104</sup>

The Board added:

We do not think the duty to bargain about a major subcontracting decision imposes an unreasonable or unfair burden upon the employer involved. It does not unduly restrain him from formulating or implementing an economic decision to

<sup>98</sup> The "freeze" is discussed later. See text accompanying notes 128-30, *infra*.

<sup>99</sup> *United Electrical Radio and Machine Workers v. DeVilbiss (Canada) Ltd.* (1976), 76 C.L.L.C. para. 16,009 (O.L.R.B., Adams).

<sup>100</sup> *Supra* note 51.

<sup>101</sup> "Paquet" unfair labour practices referring to *Syndicat Catholique v. Paquet*, *supra* note 51.

<sup>102</sup> *McGavin Toastmaster v. Amiscough* (1976), 1 S.C.R. 718; (1975), 54 D.L.R. (3d) 1 (S.C.C.).

<sup>103</sup> [1982] O.L.R.B. Rep. 261 (MacDowell).

<sup>104</sup> *Id.* at 274.

terminate a phase of his business operations, nor does it obligate him to yield to a union's demand that the subcontract should not be let, or should be let on terms inconsistent with management's business judgment. The duty to bargain is not an obligation to agree. It is a requirement to engage in a full and frank discussion with the employees' representative, and make a bona fide effort to explore alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and his employees. If such efforts fail, the employer remains free (absent other unfair labour practice considerations based upon anti-union animus) to go forward with his decision. But experience has shown that candid discussion about mutual problems by labour and management frequently result in their resolution with attendant benefit to both sides. A union confronted by a proposed loss of jobs can often make a useful contribution to the decision-making process. The recent bargaining in the automotive industry provides a good example. Business operations can profitably continue, and jobs may be preserved. And as professor Cox has observed:

"Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion."

(See: Cox, *The Duty to Bargain in Good Faith*, 71 Harv. Law Rev. 1401.) In our view, prior discussion of decisions of this nature is all that the Act contemplates. But it commands no less.<sup>105</sup>

Having found a violation at the duty to bargain (and of unfair practice provisions) the Board ordered the *termination of the subcontract* and the reinstatement of the employees affected, stating:

We are reinforced in our view that reinstatement of the *status quo ante* is the only appropriate remedy in this case, by our separate but related finding that the respondent has breached section 15 of the Act. It would be an exercise in futility to attempt to remedy this kind of violation if the employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of its operations can be conducted where that decision has already been made and implemented. Nor would it make much sense to direct an employer to bargain with a union representing its employees over the termination of jobs which those employees no longer hold. The subsequent provision of a bargaining opportunity cannot cure the violation inherent in the elimination of unit work without notice or consultation. No meaningful negotiation could take place over a fait accompli, where the possible reinstatement of unlawfully terminated employees could be used by the employer as bargaining bait to induce acceptance of its terms. An order framed in this way would aggravate rather than cure the employer's delinquent bargaining conduct. Since the loss of employment stemmed, (in part), from their employer's unlawful action in bypassing their bargaining agent, we believe that a realistic bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to their termination.<sup>106</sup>

This is another important point to add to that already made. Not only does Canadian legislation not legally pre-empt collective bargaining of issues such as subcontracting, but it negates (in an effective manner) employer action undertaken which attempts to avoid it. In this sense, the law not only permits equal partnership but ensures that the employer does not avoid it through unilateral actions. We should not, however, make too much of the *Sunnycrest*

<sup>105</sup> *Id.* at 274-75.

<sup>106</sup> *Id.* at 277.

decision. The reason for this is not hard to see as it lies in the statutory timetable. This can best be put in perspective by examining another recent Ontario decision, *Westinghouse Canada Ltd.*<sup>107</sup> Given the result in *Sunnycrest*<sup>108</sup> it becomes clear that, in light of the statutory timetable, there is a powerful incentive offered to employers *not* to make changes in the scope of the enterprise during the statutory bargaining open season. An employer avoids the restrictions of *Sunnycrest* by not implementing the decision until a collective agreement is in place. Of course, the employer must as well not permit any terms which would limit the "right" to subcontract to be placed in the agreement for the result obtained from the Labour Relations Board in *Sunnycrest* can be obtained from an arbitrator.<sup>109</sup> In light of our current arbitration jurisprudence on contracting out, which is discussed later, this latter result can be achieved by merely saying nothing at all.<sup>110</sup>

Now the one simple point that needs to be made before turning to *Westinghouse* is this: it is much easier to get away with an agreement which says nothing about issues like plant shutdown or contracting out if the probability of such occurrences is perceived as low. Further, one aspect of perception of low probability is ignorance that future occurrences, contemplated or decided upon, are in the works. In short, the statutory timetable offers the employer not only the *Sunnycrest* incentive not to *implement* changes, but the further incentive (referred to as *Westinghouse* incentives) not to reveal possible or actual decisions upon changes. Rather, the incentive to the employer is to remain silent, lock the union into the agreement, and then reveal the plans or act upon them. It is a system geared to nondisclosure. It is this structuring of incentives, flowing from our statutory timetable and (partially) our arbitration jurisprudence, which generated the *Westinghouse* case. The *Westinghouse* decision and a rash of similar cases reveal that these thoughts about incentives are not idle speculations. Employers have attempted to exploit these incentives to nondisclosure. This, in itself, should lead us to question, for example, Canadian arbitration law on contracting out. Yet nondisclosure is in direct conflict with the duty to bargain in good faith. *Westinghouse* addresses this conflict. As a starting point, it may be noted that under the general law of contract bargaining, nondisclosure (of latent defects for example) is generally accepted<sup>111</sup> unless there is a duty to disclose. This state of the general law is said to instance the general proposition that there is no duty of good faith in our law of contract. But, of course, under Canadian labour law the parties *are* under that *precise* duty of good faith. This can be viewed as the second purpose outlined in *DeVilbiss (Canada) Ltd.*, "to foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict."<sup>112</sup> The question left by *Westinghouse* is how well has the Board explicated the content of the duty to bargain over planned changes in the face of the incentives to nondisclosure.

<sup>107</sup> [1980] O.L.R.B. Rep. 577 (Burkett), *aff'd* 80 C.L.L.C. para. 14,062 (Ont. Div. Ct.).

<sup>108</sup> The actual chronology of the cases is irrelevant to the point being made.

<sup>109</sup> See text accompanying notes 88-92, *supra*.

<sup>110</sup> See text accompanying notes 155-65, *infra*.

<sup>111</sup> *Smith v. Hughes* (1871), 6 Q.B. 597.

<sup>112</sup> *Supra* note 99.

In *Westinghouse*, the employer decided to terminate part of its operation at one location and to relocate at a number of other locations. Six hundred employees were "affected."<sup>113</sup> The union attacked the move on several grounds, among them "[t]hat the failure of the company to inform the union of its plan to decentralize and relocate its operations during the course of bargaining constitutes a failure to bargain in good faith."<sup>114</sup> The actual move was not made (as in *Sunnycrest*) during negotiations — the allegation here involved the failure to reveal *plans* for the move.

Faced with this allegation the Board held that the duty to bargain did not require the employer to disclose that it was *contemplating* such a move. Thus, an employer's plan which was, at the time of negotiations, well developed but not approved by the ultimate corporate decision-makers, and which was in fact approved exactly two months after the conclusion of the collective agreement, was not required to be disclosed. But on the way to this conclusion the Board erected a critical distinction between the duty to disclose *decisions actually taken* and the duty to disclose that changes are merely *being contemplated*. Based upon this distinction the Board in *Westinghouse* enunciated three "rules":

1. That decisions actually taken must be revealed by the employer *on its own initiative*, otherwise the employer is in breach of the duty.
2. That decisions contemplated but not finally taken need not be revealed on the employer's initiative. Failure to reveal is not a breach of the duty.
3. That the employer must respond truthfully to questions from the union about any unfinalized plans.

Let us take the first *Westinghouse* rule. This is a positive development, as far as it goes. Our law on our set of issues now states that the scope of the duty covers the issues which interest us; that unilateral employer moves during negotiations are violative of the legislation; and further, that concrete employer decisions must be revealed on the employer's own initiative during negotiation and brought to the centre of collective bargaining attention. Viewed as a set, these points indicate that Canadian law takes a positive and consistent attitude to equal partnership through collective bargaining. The first principle from *Westinghouse* can be justified chiefly in light of the incentive structure outlined above. As far as it goes the decision in *Westinghouse* negates the incentive to nondisclosure.

But there are grave deficiencies in the *Westinghouse* decision, three of which will be addressed. First, the actual decision in *Westinghouse* was that, on the facts, the actual employer decision was not finalized during the open season and therefore, under the rules outlined, was not required to be unilaterally revealed. The decision cannot be read without acquiring the distinct feeling that if the Board was not taken for a ride on the facts of the actual case, surely the Board has purchased a ticket for a future departure. That is, the distinction between plans which are finalized and those which are not, is so slippery, particularly within a large corporation, that the Board may well

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<sup>113</sup> *Supra* note 107, at 577.

<sup>114</sup> *Id.*



mishandle it. The Board in *Westinghouse* conceded that the timing was "convenient"<sup>115</sup> from the company's point of view. But this is a relatively minor point.

The second objection is much more substantial and it concerns the reasoning invoked by the Board to justify limiting disclosure on the employer's own initiative to cases where the decision has been finalized. This reasoning was determinative of the actual decision in *Westinghouse*. The Board's sole justification for its decision that the silence of the employer about relocation plans under corporate discussion did not violate the bargaining duty is contained in a single extraordinary paragraph.

The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual state or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrust the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.<sup>116</sup>

Does this sound familiar? Assumptions are made here in the guise of practical industrial relations thinking. The major one is that the Board can and should predict that any effort to bargain collectively (and thus possibly co-determine outcomes) would not have a desirable but rather an adverse effect because the union would act irrationally. The economic calculus revealed and the assumptions made about the utility of collective bargaining bear a striking resemblance to those invoked in *First National Maintenance*. Disclosure and collective bargaining are factors (usually of disutility) to be worked into a calculus of management's efficiency in making management decisions. The point is that this reasoning is just not on the table in Canada. It sounds in a deep political theory which is not available to Canadian labour boards because in this country, in light of the view of the *scope* of the duty to bargain, there are no issues which are necessarily (legally) management issues. Canadian

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<sup>115</sup> *Id.* at 599. For another case with questionable timing see *Kennedy Lodge Nursing Home*, [1980] O.L.R.B. Rep. 1454. (Davis).

<sup>116</sup> *Id.* at 598-99.

legislation does not, as does the American, divide the world into items beyond the reach of collective bargaining (management issues) and items within its reach.

If the American notion that some issues are exempt from the duty to bargain has been rejected, how can the duty be interpreted in a manner which legally and functionally thwarts collective bargaining of those issues? Non-disclosure of plans (not finalized) to shutdown, relocate, or contract out work is simply inconsistent with a duty to bargain in good faith. In *Westinghouse*, the Board avoided this conclusion by wrongly assuming that some issues were not within the scope of the duty. The Board did respond that the union position is adequately protected by the ruling that the employer must respond truthfully to union inquiries about any plans. But the whole point of a duty of disclosure is to put the onus on a party to reveal the information requested. It has always been a deceit to lie in response to a question, even before the Board's holding in *Westinghouse*. As the Board explained in a later decision, "[i]n *Westinghouse* the employer was silent on a substantial issue about which the employer had exclusive knowledge."<sup>117</sup> Well, exactly. Under a system with a duty to bargain in good faith, this provides a complete rationale for disclosure.

From this perspective, the holding in *Westinghouse* that finalized plans must be disclosed looks very peculiar. If we hold that plant relocation is contemplated by our legislation as a fit subject for collective bargaining, then what rational ground can there be for inducing "bargaining" after one party has "finalized its plans?" This remains a mystery. MacNeil recently and accurately summarized the defects of the *Westinghouse* decision as follows:

The reason for not requiring the employer to give notice that this type of decision is being considered is said to be that notice would be of marginal benefit to the trade union and would only serve to distort the bargaining process. *The Board seems misguided in its approach*. Firstly, it is acting upon the assumption that the union has and should have no say in the decision-making process. Secondly, it fails to see that rather than distorting the bargaining process, such information rationalizes the process. Both parties should bargain from positions where they each can at least understand the goals and limitations of the other. The bargaining process is distorted if this information is known by only one party. Furthermore, even if the union cannot by reason of inexperience effectively provide useful input into the decision-making process, it will have a greater opportunity to protect the interests of its members by including provisions in the agreement to help through the transition process. By forcing the employer clearly to realize its duty toward the employees that will be affected by a decision to alter operations, the union can help internalize the social costs of the decision.<sup>118</sup>

In summary, if the commitment to the rejection of the limited American approach, and the reasoning underpinning it, regarding the issue of the *scope* of the duty to bargain is taken seriously, that reasoning should not be let in the back door to limit the *functional content* of that duty.

The third ground upon which the *Westinghouse* rules may be attacked is simply that of the incentive structure already outlined. *Westinghouse* removes the incentive for not making disclosures about decisions taken. But the result

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<sup>117</sup> *Interior Systems Contractors' Association of Ontario*, [1981] O.L.R.B. Rep. 879 at 886 (Picher).

<sup>118</sup> MacNeil, *Plant Closings and Workers' Rights* (1982), 14 Ott. L. Rev. 1 at 24.

of the other *Westinghouse* rules is merely to replace that incentive with an incentive for not *making* any decisions until the union is locked into an agreement. And, insofar as the third rule on honestly answering union inquiries about plans carries any weight, it merely offers an incentive not to have any memos regarding any plans in circulation until an agreement is in place. The central point lurking in the background here is whether it makes any sense to give content to our law in a manner which offers incentives and rewards to those who seek to *avoid* collective bargaining about issues which are clearly within the scope of the duty to bargain. Is that what our labour law is for?

The effect of *Westinghouse* upon the nature of the duty to bargain can be assessed by examining its progeny. A good example is *Amco Fabrics Ltd.*<sup>119</sup> A collective agreement was signed following negotiations and a protracted strike. A few months after the settlement of the strike the employer began relocating machinery to other plants and laying off employees. The undisclosed decision to relocate was clearly made during the negotiating period and would thus appear to fall within the *Westinghouse* notion of a violation of the duty to bargain. But the employer explained that the relocation was part of a rationalization of its production of various types of products by moving to separate plants. Furthermore, the employer argued that at the time the decision was made it was thought that no reduction in the work force at the existing facility would result.

The employer argued further that the lay-offs which had occurred (of a substantial percentage of the workforce at the existing facility) were *not* due to the relocation, but due to an unanticipated decline in demand for the products still produced there. The Board put the issue as follows: A decision to relocate had been made, but:

The issue is whether the duty to bargain in good faith is violated when a decision of this kind is taken and the employer does not discuss it in bargaining *because he believes that its decision will not adversely affect the job security of the employees (or the bargaining interests of the union).*<sup>120</sup> (Emphasis added).

The Board held that no violation of the duty would result. This, of course, is the *Westinghouse* and *First National Maintenance* thinking taken just a step further. The assumption here is that it is solely for an employer to estimate the likely impact of decisions to relocate upon the union's interests and, because this is so, the usual role that it would be a breach of the duty *not* to reveal the decision does not apply!

The Board was moved to state the issue in the following terms:

Most private enterprise is a risk taking venture. There is always some element of uncertainty in a business decision. Where a corporate planning decision is made and the employer believes that its decision will not affect its employees there is inevitably some possibility of an error in the employer's prediction. Events beyond the employer's control, such as changes in the economy or the introduction into the market of competitors or competing products may affect production and sales and, ultimately, the welfare of the company and its employees. Should it follow that any time during bargaining a company make a decision that risks its capital and know-how, and by extension its production, sales and employment levels, it is re-

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<sup>119</sup> *Amco Fabrics Ltd.*, [1982] O.L.R.B. Rep. 314 (Picher).

<sup>120</sup> *Id.* at 324.

quired to disclose and discuss its business strategy and predictions with the trade union that represents its employees?

An affirmative answer to that question would be tantamount to moving the union into the corporate boardroom. While some might see that as a positive step, it is not one which in our view can be conjured out of the statutory duty to bargain in good faith and make every reasonable effort to conclude a collective agreement mandated by section 15 of the *Labour Relations Act*. Collective bargaining under the Act is premised on the exercise of traditional management rights by employers to the extent that those rights are not abrogated by statute or by the terms of a collective agreement. Absent some contractual restriction, it is generally the prerogative of the employer to finance, organize, plan and direct its enterprise in the way that it sees fit. As some recent plant closures have demonstrated, errors of judgment in these areas can be fatal to an enterprise. As part of the scheme of collective bargaining employees and the trade unions that represent them understand and accept that they are generally vulnerable to the success or failure of decisions taken by management, just as they are to market forces beyond their employer's control.<sup>121</sup>

Again, these words sound familiar. They are the words of Vice Chairman Foisy<sup>122</sup> and Blackman J.,<sup>123</sup> and also the words used in *Westinghouse* to put a stop to the duty of disclosure. Again we see the assumptions and thinking of *First National Maintenance* surfacing in spite of the fact that they are discordant notions. The result is a misstatement of the issue. The issue before the Board was not whether to "move the union into the corporate boardroom." In any important sense the union is already in the boardroom, at least to the extent of its desire and power to bargain its way there.<sup>124</sup> This is something that has already been "conjured" out of our legislative scheme. The issue in *Amoco* was not whether the union could bargain about decisions of this sort — but whether in light of the fact that it could so bargain, there ought to be a duty upon the employer to disclose a concrete decision made concerning these issues. This is a functional question about the practical consequences of the major decision we have already made concerning the scope of the duty to bargain.

Thus, in *Westinghouse* and in *Amoco* we see at this secondary level the thinking that has been rejected in answering the primary question. There is a distinction between what our law *permits* and what it *requires*. In a sense, Canadian law merely permits unions to attempt to achieve equal partnership. But once the law permits, it imposes the *duty* to bargain. But the questions we ask concerning the functional content of the duty ought to be pragmatic, functional questions, not broad political ones. The board question has been answered — we ought not attempt to subvert that answer in working out the "nitty gritty" consequences of our decision. The gap between what the law permits and requires has been bridged in *Westinghouse* where a positive duty to disclose (to open the boardroom door and invite the union in) was upheld. This point seems to have been missed in *Amoco*. The trouble with *Westinghouse* is its failure to carry through this process of pragmatically working out the consequences of the scope of the Canadian duty to bargain. *Westinghouse* and *Amoco* attempt to draw the contours of the *functional content* of the duty

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<sup>121</sup> *Id.* at 324-25.

<sup>122</sup> *Supra* note 2.

<sup>123</sup> *Supra* note 4.

<sup>124</sup> The employer can bargain for unilateral control of the issues, but those issues are on the table and subject to the test of economic strength.

to bargain by tracing the outline of the *scope* of that duty which has been rejected in Canada.<sup>125</sup>

But it is not only *Westinghouse* and *Amoco* that invoke the rejected political theory as a means of undermining Canadian law on equal partnership. Even in *Sunnycrest*,<sup>126</sup> where the Board clearly and correctly censured the employer's unilateral actions during negotiations, there were dark rumblings:

The . . . subcontracting decision meets all of the Westinghouse parameters . . . ; moreover, there is no evidence of any economic factors so compelling that bargaining itself would not alter them, and no indication that even bargaining would be futile.<sup>127</sup>

Again, the same assumptions hold — that the Board can determine the limits of the duty to bargain by predicting the outcome of negotiations. This reasoning is just not acceptable in Canada where there is an unlimited duty to bargain and a free collective bargaining system.

### C. *The Freeze*

Here we return to the starting point for it was a dispute within the Canada Labour Relations Board over the proper interpretation of the freeze which generated the two conflicting Canadian views on equal partnership and statutory purposes set out at the very beginning of this paper.<sup>128</sup> The objective is to address this issue as part of the larger problem of the attitude of our legislative scheme to the issue of equal partnership. The issues of the scope and the functional content (in terms of the duty to disclose) of the statutory duty to bargain in good faith have thus far been addressed. It is widely recognized that there is an intimate connection between the post notice to bargain freeze and the duty to bargain in good faith. In the *Canada Labour Code* the duty and the freeze are jointly contained in section 148:

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

- (a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise, agree, shall
  - (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
  - (ii) make every reasonable effort to enter into a collective agreement; and
- (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.<sup>129</sup>

<sup>125</sup> A preliminary observation. The vision of the O.L.R.B. in these cases seems to be that unions are (should be?) only concerned with the *effects* of management decisions, not the decisions themselves.

<sup>126</sup> *Supra* note 103.

<sup>127</sup> *Id.* at 275.

<sup>128</sup> *Supra* notes 3 and 4.

<sup>129</sup> *Canada Labour Code*, *supra* note 5, at s. 148.

The symbiotic relationship of the freeze and the duty were accurately described by the Canada Board when it was said that in addition to the duty to bargain, the freeze is to be viewed as follows:

[A]s . . . a second method of attempting to create an environment conducive to the settlement of collective bargaining differences and 'cooperative efforts to develop good relations and constructive collective bargaining practices' and 'constructive settlement of disputes' and 'effective industrial relations for the determination of good working conditions and sound labour-management relations' (Preamble), Parliament has enacted s. 148(b) of the Code. . . . The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to implement the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and then acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the *Canada Labour Code*, Part V. . . . Our interpretation of the purposes of s. 148(b), namely protecting the exclusive authority of the bargaining agent from being undermined by unilateral employer action and encouraging cooperative collective bargaining practices and the constructive settlements of disputes, is consistent with the requirements in s. 148(b) that an employer alteration is permissible with the consent of the bargaining agent. The requirement for that consent requires the employer to represent the authority and role of the bargaining agent and necessitates communication between the employer and the bargaining agent, thereby fostering joint resolution of interests of either party.<sup>130</sup>

Several points are immediately relevant to the current inquiry. First, the freeze is an overt and important part of the statute's stance on equal partnership. The freeze expressly removes any rights the employer may have to alter the content of the relationship with the employees. If the context is the negotiation of a first collective agreement, then the employer typically enjoys *de facto* power to renegotiate its relationship with the employees virtually at will. Consideration, in the technical contractual sense, for such "variations" can always be found in the employer not exercising its common law right to dismiss without reason (but with notice). In addition, the common law conferred *powers* on the employer, for example, to dismiss for cause without notice, or without cause with notice.

If the context is the renegotiation of a collective agreement, the point of reference is the expired collective agreement. Typically, it too will grant powers to the employer (to dismiss, but only for just cause). What the freeze clearly does, and it does so most clearly in the context of a first collective agreement, is to remove the power of the employer to alter unilaterally the terms of the employment relationship. The statute expressly grants the right to the union to veto any such changes. In effect, both parties have a veto. This is equal partnership and forces the parties to bargain collectively any such changes. The purpose is not, however, to ensure equal partnership but to ensure that collective bargaining can and does take place. This in itself is an important point, but it is limited by the limited duration of the freeze, already outlined under the discussion of the statutory timetable.

The great difficulty with the interpretation of the freeze, and the source of the dispute with and without the Canada Labour Relations Board, concerns

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<sup>130</sup> *Air Canada* (1977), 23 Decisions/Information 203 at 213-14, 214-15.

the effect of the freeze, not upon the power to alter the terms of the relationship (these are clearly frozen), but upon the *exercise* of power granted by those terms *as frozen*. Put in concrete terms, this point amounts to the following: an employer cannot alter a wage rate, a vacation entitlement or other terms of the employment relationship during the freeze. In a first contract situation this amounts, usually, to an enormous erosion of an employer's *de facto* power. In a renegotiation context it amounts to an extension of the substance of the old collective agreement. But what of the employer's *power* to contract out work — a power an employer had at common law (by lawfully terminating the contracts of the employees), or, let us assume, was granted in the old collective agreement. This was the key point over which the Canada Labour Relations Board split.

The fundamental difference of opinion between Vice Chairman Dorsey and Vice Chairman Foisy concerning the proper interpretation of the freeze provisions of the *Canada Labour Code* and their directly conflicting views on the statute's ideas concerning equal partnership has already been noted.<sup>131</sup> The two cases in which this disagreement surfaced were issued within the space of three months in late 1980. Both cases involved the refusal of banks to implement merit pay increases at organized branches after notice to bargain had been given. The banks argued that such unilateral employer actions were forbidden by the freeze. Vice Chairman Dorsey agreed because in his view the freeze was indeed a total freeze and it was the purpose of the statute to impose an equal partnership upon the parties. *Any* unilateral employer action is forbidden on this view and the parties are thus locked into a true equal partnership. In effect, both parties have a veto over any change of terms or exercise of power thereunder. Vice Chairman Foisy rejected this view stating that the freeze is not absolute and that exercises of power under terms and conditions of employment are to continue in a "business as usual" manner.

This conflict within the Canada Labour Relations Board has now been resolved. The Board held in a decision in which all members took part, and in an eight to two split, that the Foisy view was to prevail.<sup>132</sup> For the purposes of this paper, however, this resolution of the issue within the Canada Labour Relations Board is of secondary importance. What is of primary importance is to note once again the surfacing of viewpoints in the interpretation of the provisions of the legislation. This recurring phenomenon is visible here. The Dorsey-Foisy disagreement is most useful as a demonstration of the fact that fundamental disagreements percolate beneath familiar legislative provisions.

There are, of course, powerful reasons for not permitting the employer to exercise powers during the period of negotiation. It amounts to unilateral and direct dealing with the employees in violation of the central concept of exclusivity<sup>133</sup> and the duty to bargain collectively. The scope of what is to be bargained is not limited by the terms of the old agreement and, thus, the very power which the employer exercises may be a proper subject of negotiations.<sup>134</sup> In short, all of the reasoning contained in the above quotations from *Air*

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<sup>131</sup> *Supra* notes 2 and 3.

<sup>132</sup> Unreported decision No. 367, Jan. 29, 1982.

<sup>133</sup> *Supra* note 51.

<sup>134</sup> This point is well made in *Air Canada*, *supra* note 130.

*Canada*<sup>135</sup> and *DeVilbiss*<sup>136</sup> can be brought to bear upon such unilateral employer actions. Such action can “undermine the authority of the employees’ bargaining agent and also poison the environment within which collective bargaining is being conducted.”<sup>137</sup> Both of the *DeVilbiss* purposes — of forcing the employer to recognize the union and of fostering rational discussion — are thwarted by permitting the employer to exercise such power during the negotiating period. It was these considerations, along with the pragmatic insight that removing the employer’s right to exercise power unilaterally would provide an incentive to the employer to bargain, which led Vice-Chairman Dorsey to adopt his view in the debate over the meaning of the freeze.

The difficulty with his view, on the other hand, is that the language of the statute does not call for a freeze on all exercises of power by the employer, but only upon the power of the employer to alter the terms and conditions of the relationship. Furthermore, the theory of a complete freeze would appear to prove too much. That is, taken to its logical conclusion, the broad view would bring the operation of the enterprise to a halt. This would be a freeze in the true sense and would certainly provide an incentive to both parties to bargain. A partial answer to this point is that the freeze merely gives the union a veto, it does not force a freeze on operations. It could be argued that this is highly desirable because it advances the causes of co-determination and equal partnership by statutorily forcing the parties to come to grips with it, at least during the negotiating period. This reasoning is unacceptable because it is out of tune with the rest of the legislative scheme. It is clear that the statute, in light of its strictly controlled limits upon industrial action, including compulsory conciliation, ought not to be interpreted as granting to the union the immediate right to veto the continued operation of the enterprise. Yet this is precisely what the broad view of the freeze entails. The principles enunciated so far could be viewed as demonstrating that the Canadian legislation permits the parties to secure co-determination through collective bargaining. It does not, however, guarantee equal partnership — there is no “right” to it — only a right to attempt to achieve it. This may be a grave defect in the system of organizing our productive activities in Canada. That the principles at stake should be subject to the market mechanism and the economic test of strength *may* not be justifiable. These issues will not be addressed, however, as the focus of this paper concerns the attitude of our legislative scheme towards equal partnership. The fundamental principle is one of permission and/or encouragement, not requirement. Insofar as Canadian law does require acts conducive to collective bargaining, it does so by virtue of a duty to bargain in good faith which includes a duty to disclose and which, it has been argued, ought to be broader than that mandated by the *Westinghouse* rules. Furthermore, the freeze on the substance of the bargain is imposed by the legislation in order to facilitate bargaining. But a freeze on the exercise of powers would seem to push the issue of facilitating collective bargaining beyond the rules regulating the use of economic weapons.

It is also apparent that the narrow (Foisy) view of the freeze is incorrect as well. Not only should the type of reasoning invoked to justify the narrow view

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<sup>135</sup> *Id.*

<sup>136</sup> *Supra* note 99.

<sup>137</sup> *Supra* note 130.



of the freeze (*First National Maintenance* reasoning) be rejected, but we should reject the substantive conclusion as well. It is just not adequate to draw a distinction between a freeze on terms but not a freeze on exercising power granted by those terms. For example, it is more desirable to say that the dismissal of an employee by an employer, allegedly for cause, in a re-negotiation context, is not a violation of the freeze. The employee has access to the arbitration process<sup>138</sup> and no great violence is done to any important values associated with the duty to bargain or the freeze. But can the same be said when in a first agreement situation an employer, under a duty to bargain collectively with a union for the first time, exercises its common law power to dismiss employees for no reason at all?<sup>139</sup> It is argued, no. Another example could be considered. Suppose an employer has, under the expired agreement, the power to sub-contract. During negotiations the union puts the issue on the table. Can the employer then unilaterally sub-contract? What these examples show is that the narrow (business as usual or as before) approach does not perform the functions we wish to see performed.

In the end, the freeze does very little. It merely performs the obvious task of freezing static items, such as rates of pay. As for exercises of powers conferred by items, it gives no guidance. In some instances the purposes of the legislation require the invocation of the freeze, in others the opposite result is dictated. The freeze should be rejected as a vehicle for achieving the ends which are required. We ought to leave it to its obvious task and forget about asking it to do more. This has already been done. Careful readers will have noted that in the *Sunnycrest* case the flexible concept of the duty to bargain was, in effect, used to perform the task which might have initially been assigned to the freeze. In that case the Ontario Labour Relations Board found a violation of the duty to bargain when the employer sub-contracted during the negotiations. An order effectively undoing the sub-contract was issued. The Board, when pressed with the argument that the employer's actions also amounted to a violation of the statutory freeze, responded succinctly as follows:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless. In the circumstances of this case, however, we do not consider it necessary to review the Board's jurisprudence in this area, or its attempts to accommodate the conflicting interest embodied in the general language of the freeze provisions . . . here we have already found that the respondent's subcontracting arrangements involve a contravention of a number of statutory provisions; and for the reasons set out *infra*, requires a restoration of the 'status quo ante'. It is therefore unnecessary to determine whether the respondent has also contravened the statutory freeze.<sup>140</sup>

Thus, the freeze is an important part of the statute's response to the problem of equal partnership but its importance can be overstated. The express granting of a veto to the union on the alteration of the terms of the employment relationship is significant. But the freeze is of limited duration and it is

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<sup>138</sup> *Canada Labour Code*, *supra* note 5, at s. 160.

<sup>139</sup> This is intended to be an example where no unfair labour motive is present.

<sup>140</sup> *Supra* note 103, at 275-76.

obvious that this enforced co-determination is limited in time and designed to *foster* collective bargaining about equal partnership, not *replace* it. But the freeze is even more limited in its impact upon the exercise of power under power conferring terms of the employment relationship. The alternative, and heatedly defended, interpretations of the effect of the freeze miss the point. The statute's purposes are better effected through the more supple device of the duty to bargain in good faith.

#### D. *Unfair Labour Practices*

Thus far, several aspects of our labour relations scheme have been examined in order to assess the Canadian approach to equal partnership. The scope of the duty to bargain, the functional content of that duty, and the statutory freeze have been examined in light of what has been referred to as the statutory timetable. It can be seen that our legislation responds in the following manner. The fundamental principle is not one of pre-empting, but of permitting co-determination through collective bargaining. Collective bargaining does not guarantee results. Collective agreement provisions granting a trade union rights to co-determine issues on enterprise scope are not guaranteed, but the process of collective bargaining *is* to the extent already outlined. Unilateral employer change in the scope of the enterprise is outlawed. A positive duty to disclose decisions about such moves is imposed upon the employer. It has been argued that this duty to disclose ought to be broader than current rules demand. All of this, however, is subject to the strict limitations of the statutory timetable. But for that very reason an incentive is offered to employers not to engage in such activities during this time. A much more critical period for Canadian labour law is the statutory closed season.

It has already been noted that in this country the union may bargain a result which grants unilateral employer control during the closed season. The disclosure and freeze rules we have examined assure that, in light of the statutory timetable, the union does not concede such a right in the dark, at least concerning concrete possibilities of the exercise of such a power. If collective bargaining results in provisions granting a trade union substantive rights, those rights are enforceable in arbitration. But what else does Canadian law say about life during the closed season?

The unfair labour practice provisions of the legislation ignore the statutory timetable. As such they represent a perimeter of protection of a certain sort.

The question is to what extent the unfair labour practice provisions affect the issues being examined. This is a more difficult issue than might first appear. While it may seem possible at first blush to isolate discriminatory acts of contracting out, or of closing down (that is such acts motivated by a desire to avoid the union), in reality it is not possible to do so. This point is made all too clearly in several recent decisions of the Ontario Labour Relations Board which expose the hidden dilemma, but completely mishandle it. As a result, the Board has completely removed protection offered by the unfair labour practice provisions. What should be viewed as illegal activity has been permitted, with the resulting inroads and injury to the statute's attitude to co-determination.

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<sup>141</sup> *Supra* note 107.

The origins of this development are in *Westinghouse*,<sup>141</sup> a case that has been examined for its contribution to our understanding of the functional content of the duty to bargain. The movement started in *Westinghouse* is continued in a series of subsequent decisions. It will be recalled that *Westinghouse* was essentially a "runaway shop" case. The employer made plans during the open season and finalized and executed them soon after the closed season began. *Westinghouse* was discussed on the basis of the duty to disclose those plans. Its contribution to our understanding of the unfair labour practice provisions in the legislation will now be considered.

The union alleged that the relocation plans were motivated by "anti-union animus."<sup>142</sup> There are very real problems in understanding when a motive is required in unfair labour practice cases, and what that motive is when it is required. A large part of the confusion here stems from the transfer of the "motive" requirement from the context of unfair labour practice dismissal cases (where the statute expressly sets out the requirement of a specified motive) to other unfair labour practice contexts. Leaving this point aside, however, the Board in *Westinghouse* maintained a requirement of an anti-union animus, and adopted the "taint" theory established in unfair labour practice dismissal cases. That is, the Board held that it would be sufficient if the employer's relocation decision was "only partially motivated by anti-union considerations."<sup>143</sup> It was in the explication of this theory of anti-union animus that the Board seriously undermined the perimeter of protection offered by the statute's provisions. It is submitted that the crucial part of the Board's holding amounts to the following: there is a distinction between decisions (to contract out, shut down, relocate) which are based upon anti-union motives, and those which are based upon "business and economic considerations." Thus the Board stated:

If an employer acts because his premises are antiquated or because his market is expanding or shrinking or because of transportation factors or for a range of other economic or business reasons which are unrelated to collective bargaining he is clearly not motivated by an anti-union animus and is not restricted, therefore, by the *Labour Relations Act*.<sup>144</sup>

It should be noted that there is a very narrow notion of anti-union animus at work here. It seems that the Board believes that unfair labour practice protection relates only to the content of the reasons for a decision — not the manner in which the decision is reached. A decision to shut down and relocate for whatever reason, which results in the termination of all or some of the employees in the unit, would appear to offend all of the basic principles of the legislation if undertaken *unilaterally*. Unilaterally does not include unilateral action permitted by the collective agreement. But if the agreement is truly silent (an unlikely occurrence), how could the employer write in and exercise a power of dismissal? This is a point which has already been made<sup>145</sup> and which

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<sup>142</sup> The union also alleged that the action constituted a "lockout." The union conceded the employer's argument that the required legal motive must be the predominant one. The Board rejected this agreed view of the law and restated the familiar "taint" theory as set out in *The Barrie Examiner*, [1975] O.L.R.B. Rep. 745 (Carter). This is an inadequate theory, see Langille, *supra* note 40, at 271-75.

<sup>143</sup> *Supra* note 107, at 605.

<sup>144</sup> *Id.* at 608.

<sup>145</sup> See text accompanying note 103, *supra*.

will be discussed again in relation to Canadian arbitration law. But the Board went even further. On the facts of the case the Board did not have difficulty, for there was testimony and documentary evidence which clearly established that the purpose for some of the relocations undertaken was to rid the employer of the union. The Board did utter, however, some very disturbing words. After acknowledging that “[i]t is axiomatic . . . that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer’s unilateral authority”<sup>146</sup> the Board then waffled on the very difficult issue suggested by its initial dichotomy of economic versus anti-union motives. That difficulty is an obvious one and can be stated in terms of the following question — can one say that a motive is an economic one when the economic impact referred to is the “axiomatic” economic impact of unionization? This question calls in a clear way for a negative answer. It would be an exercise in supreme sophistry if it could be alleged that the motive was not anti-union because the objection taken was not to the union itself, but to its (“axiomatic”) effects. If a positive answer is given to this question, then a great number of contracting out, relocation, and shut down decisions would be protected. Yet the Board, when it asked itself this question, fudged the answer for some straight-forward cases and seemed to give a negative answer for others:

Can an employer faced with economic difficulties caused by collective bargaining-related factors (wages, benefits, seniority, work practices etc.) act to remove himself from his collective bargaining relationship? It may well be that it is more profitable to operate without the union than with one but if an employer can react to this reality simply by moving his business the right to employees to engage in collective bargaining would be seriously undermined. What of the employer who is faced with an economic crisis caused by collective bargaining related factors, seeks relief from the union and is met with an unsympathetic or unsatisfactory response? Assuming that these factors could be established, the answer is by no means clear.<sup>147</sup>

While, on the facts, these remarks carried no weight, it was not long before facts arose upon which they were determinative. This occurred in *Kennedy Lodge Nursing Home*.<sup>148</sup> There the employer terminated all of the housekeeping and janitorial employees and contracted out their work to an outside firm. The union alleged that, among other things, this constituted an unfair labour practice. The union argued that the employer sub-contracted “solely to avoid the economic impact of paying wage rates agreed to in the collective agreement,”<sup>149</sup> and that this constituted an anti-union motive. This argument is crystal clear and correct. It rests on the simple insight that one of the constant objections to unions is some employers’ view of their impact upon labour costs and productivity as well as control of the enterprise. That is, this is simply part and parcel of what is meant when it is said that an employer is anti-union. To view the requirement of an “anti-union animus” as requiring something more is to relegate the unfair labour practice provisions to a role of restraining only the radically irrational employers of this world, that is, those who would say “I don’t care about the effects of unions — I just hate

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<sup>146</sup> *Supra* note 107, at 607.

<sup>147</sup> *Id.* at 608.

<sup>148</sup> *Supra* note 115.

<sup>149</sup> *Id.* at 1460.

unions." This borders on the incomprehensible precisely because rational people base their attitudes towards people or institutions on the basis of their actions and effects. Indeed, if one is ignorant of what effects unions have, it is difficult to understand how one could rationally object to or approve of them, or what it would mean to do so. Yet the Board totally rejected this argument and stated, almost as if it were trying to bully its way past this obvious point, that:

If the complainant's argument was accepted, any action taken by an employer, which has an economic impact upon the bargaining unit would lead to an inference that the employer was motivated by anti-union considerations. For example, employer initiated decisions which resulted in the replacement of bargaining unit employees through processed change, methods change, equipment change done solely to effect savings in labour costs would, on the basis of the complainant's argument, in and of themselves justify an inference of anti-union motive. To accept such a conclusion would appear to be directly contrary to section 68 of the Act which provides in part:

'Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations . . . if the suspension, [or] discontinuance . . . does not constitute a lockout . . .'

The Board, in the past, has made clear that 'cause' in section 68, *supra*, relates only to 'lawful cause'.<sup>150</sup>

This latter comment is a *non sequitur* — the whole question is whether the actions are lawful or not. Then the Board added:

If the cost of doing business is too high in relation to the business revenues generated, the employer, who is motivated solely by correcting that imbalance is not precluded by the Act from taking that action. Absent restrictions in the relevant collective agreement, business operations are not 'frozen' by the collective relationship so long as the action taken is not in any way motivated by the accomplishment of an unlawful objective.

Business decisions must be made on the basis of the overall viability of an operation — one aspect of which might be the cost of labour. In the *Westinghouse* case it was found that the company's decision to relocate its operation was motivated in large part by anti-union considerations. There was evidence in that case that the company had explicitly set non-union operation as a goal to be achieved. However, in the case before the Board there was no evidence that the fact that the employees had engaged in collective bargaining and were represented by a trade union played any part in the employer's decision to contract out some bargaining unit work. We accept Mr. Duncan's testimony on this point. *Westinghouse* makes it clear that an employer may discontinue operations for cause so long as the decision is not motivated by anti-union animus. *A desire to save money and thereby increase profits is not equivalent to anti-union animus simply because the money saved would otherwise have been paid as wages to employees in the bargaining unit.*<sup>151</sup> (Emphasis added.)

All one can do is note that this simply collapses the distinction between discriminatory (anti-union) and economic motives, at least in a good number of cases. What is it that the Board wishes to have as evidence of anti-union animus? The rational employer, intent on avoiding the collective bargaining process for rational reasons is protected through this test. Applying this test, it is difficult to see that *Westinghouse* itself is correctly decided. It seems clear that, absent provisions in the collective agreement empowering the employer to unilaterally make those decisions, employer action violates the act and is a

<sup>150</sup> *Id.* at 1462.

<sup>151</sup> *Id.* at 1462-63.

most blatant unfair labour practice. Contracting out to avoid the axiomatic effects of unionization is contracting out with an anti-union animus. But let us also note that the language just quoted from *Kennedy Nursing Home* reflects (again) a set of assumptions about what is a management decision and what is the appropriate scope of collective bargaining. Because the action taken was a management decision it, by definition, could not be an unfair labour practice. The reasoning in *First National Maintenance* is like a recurring chorus in the Board's decisions.

Any evaluation of this aspect of our law cannot be complete until the arbitral jurisprudence concerning contracting out has been examined. Part of the problem in the unfair labour practice area is the arbitral jurisprudence. The arbitration arena was the first sparring ground for the issues under discussion — the attitude of the Canadian legislative scheme of labour relations to equal partnership. The arbitrator's position was staked out well in advance of the labour board's jurisprudence that has been examined. An examination of the overall view of the entire scheme should create a theory which best explains the whole of the Canadian law in light of its purposes. The arbitral jurisprudence has to be re-evaluated. The tension between the current position on that issue and other aspects of the law is just too great to sustain. That the arbitral jurisprudence has the effect of forcing the Ontario Board to adopt its irrational stance on the scope of unfair labour practice protection can be seen in the explicit reasoning in a subsequent case, *Heritage Nursing Home Ltd.*:

The possibility that an employer might contract out bargaining unit work, for legitimate business reasons has become part of the reality of collective bargaining over the last 30 years. There is little jurisprudential support for the notion that a collective agreement is a "no cut" contract of employment given to a union for the period of its term. . . .

If a union wishes to protect itself from the risk on contracting out, it may attempt to do so at the bargaining table where that issue can be dealt with like any other economic issue. (See, *Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs) and see, generally, Brown and Beatty, *Canadian Labour Arbitration* (Toronto, 1977) at 180-81).

In these circumstances the Board should not lend its remedial authority to fill a contractual gap.<sup>152</sup>

The logic here is this: because the arbitral jurisprudence gives this right to the employer, we cannot interpret an unfair labour practice as an unfair practice. The arbitral law ought to be re-examined.

#### E. *The Arbitration Jurisprudence on Contracting Out*

It has already been indicated<sup>153</sup> that it is trite to state that in Canada a unilateral employer decision to contract out work with resulting terminations is unimpeachable in arbitration unless the collective agreement contains express provisions controlling or forbidding such actions. This point of arbitration law has been established and well known for some years.<sup>154</sup> Most labour lawyers are familiar with the struggle within our law for this point and the

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<sup>152</sup> [1981] O.L.R.B. Rep. 31 (Picher).

<sup>153</sup> See text accompanying note 9, *supra*.

<sup>154</sup> Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book, 1977) at 180-81; Weiler, *supra* note 9.

eventual victory of the point of view permitting contracting out. The turning point is now widely held to be the decision in *Russelsteel Ltd.*,<sup>155</sup> wherein Professor Arthurs compiled his "box score" on the issue and declared the winner. This point is so familiar now that it is sufficient merely to drop a reference to the *Russelsteel* decision in order to end a discussion of this matter. *Russelsteel* seems a fixed star in the arbitral firmament.<sup>156</sup> It is said that this now forms part of the "climate"<sup>157</sup> of collective bargaining in Canada, thus turning Professor Laskin's (as he then was) own words on himself, Laskin being the chief proponent of the losing view. Two recent attempts upon the citadel of *Russelsteel* have failed. The *Kennedy Nursing Home* was one such assault. That part of the assault which was launched in front of the Ontario Labour Relations Board has already been examined at some length. The case was also fought, and lost, before an arbitrator.<sup>158</sup>

A second attempt to shake the foundations of *Russelsteel* was recently undertaken before the British Columbia Labour Relations Board.<sup>159</sup> There it was held that *Russelsteel* is as much a part of the "climate" of that province as it is of Ontario's. In spite of all of this, the law in this area is worth re-examining. The excuse for treading such worn territory is that no one has examined *Russelsteel* as part of a larger problem, that is, as part of the statutory scheme's approach to equal partnership. However, as the law in this area is familiar, the analysis will be brief.

A key to understanding the contracting out controversy lies in noting that beneath the surface discussion about that specific issue there was a much more profound debate, that being, it is submitted, the debate about equal partnership. Professor Weiler has outlined the deeper debate as follows:

Looking back at the cases from the Fifties, one can see two competing versions of the role of the arbitrator. These two conceptions diverged sharply in their handling of a crucial, practical problem: the response of the arbitrator to industrial change, initiated by management decisions to subcontract work, introduce new technology, and shuffle work assignments.

The majority persuasion was articulated by many lower court judges who, ironically enough, doubled as the bulk of the arbitrators in Ontario for the first fifteen years. Their thesis may be summarized as follows. The collective agreement is essentially a written contract. There is nothing that extraordinary about it. It will be interpreted in the standard, literal fashion. The arbitrator should not stray beyond the four corners of the document unless he is absolutely compelled to. But when the surface language used by the parties does not readily supply the answer to a particular grievance, then the arbitrator should have recourse to the background presuppositions supplied from established areas of contract law, in particular the individual contract of employment between the 'master and servant'. One central assumption in that legal tradition was management's freedom to run the business, to exercise the rights of property and capital, to take the initiative in changing the methods of operation if that appeared profitable. Only if the parties positively agreed to clear and specific written restrictions on that 'reserved right' could an arbitrator restrain such a management decision, to subcontract part of the operation for instance.

<sup>155</sup> (1966), 17 L.A.C. 253 at 255.

<sup>156</sup> I borrow from Gilmore, *The Death of a Contract* (Columbus: Ohio State Univ. Press, 1974) referring to the decision in *Hadley v. Baxendale*.

<sup>157</sup> *Supra* note 152.

<sup>158</sup> See text accompanying note 9, *supra*.

<sup>159</sup> *British Columbia Systems Corporation*, [1981] 3 Can. L.R.B.R. 231 (Kelleher).

An alternative, more promising conception of the arbitral rule is being worked out by a few arbitrators, especially by Bora Laskin, then professor of labour law at the University of Toronto (now Chief Justice of the Supreme Court of Canada). Laskin was quick to recognize the inevitable gaps in collective agreements, and to utilize extrinsic aids (such as the history of negotiations or the previous administration of the collective agreement) to decipher the actual expectations of these parties. More important, when there was no persuasive evidence that these parties had mutually agreed to the precise disposition of the problem presented by a grievance, Laskin believes that the labour arbitrator must recognize fundamental differences between the old world of 'master and servant' and the new 'climate of the collective agreement'. The arbitrator must actively develop the common law of the labour contract based on the needs and expectations of Canadian unions and employers in the second half of the twentieth century, not on English judicial precedents drawn from the second half of the nineteenth century.<sup>160</sup>

The lesson of history is, of course, that the "reserved rights" theorists won the day on the issue of contracting out. The reason for going over this familiar terrain is to point out that the assumptions and the overall view which underlie this theory are those of the majority in *First National Maintenance*. From this perspective, the contracting out controversy can be viewed as merely another manifestation of our recurring phenomenon. This is merely another part of the overall structure in which participants in the labour relations system have sought to inject a viewpoint which is fundamentally at odds with our legislation's basic starting point. This point is clearly made in Professor Weiler's account of the reserved rights theory set out above, where he stated:

One central assumption in that legal tradition was management's freedom to run the business, to exercise the rights of property and capital, to take the initiative in changing the methods of operation if that appeared profitable.<sup>161</sup>

Of course in the arbitration context those arbitrators advocating the reserved rights theory did not (and did not have to) promote this point of view in the extreme form exhibited in *First National Maintenance*, that is, that these reserved management rights were (under the legislation) inalienable rights. Rather, the thesis was that the rights inhered in management until expressly alienated in the collective agreement. But the key to the reserved rights theory is the making of the same sort of assumptions as are made in *First National Maintenance*. In particular, it embraces a vision of pre-collective bargaining *de facto* employer control which casts a long shadow into the collective bargaining era. An analogy to libertarian rights theorists, who insist that the inherent "rights" of man in a state of nature cast a long shadow over social organization, is apt.<sup>162</sup>

At the level of implication of the terms in a contract, those who opposed the reserved rights theorists argued that terms reflecting a lack of negotiating power ought not be implied in a contract negotiated in a context of more equal bargaining power. This is the basic flaw with Canadian contracting out jurisprudence. Approval for one possible outcome of the contracting process led reserved rights theorists to weigh the scales in favour of employers — to grant the employers a head start in negotiations by guaranteeing that employ-

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<sup>160</sup> *Supra* note 71, at 95-96. Weiler also canvassed the whole issue of major enterprise changes during the term of collective agreement in Weiler, *supra* note 9. This is a complete comprehensive and critical review of the law.

<sup>161</sup> *Supra* note 9.

<sup>162</sup> *E.g.*, Nozick, *Anarchy State and Utopia* (Basic Books, 1974).



ers were given certain rights for free. The role of the union was to try to make inroads into these employer or management rights. Professor Weiler has written at length on the role of the arbitrator when faced with a change in the enterprise, such as contracting out. He is still of the view that the arbitrator should not imply restrictions upon "management" powers to contract out, arguing that:

If the trade union is to secure these kinds of rights for its members, then it should have to pay them at the bargaining table, not receive them as a gift from the arbitrator.<sup>163</sup>

The great difficulty with this is that it ignores the result that the employer gets *its* rights "as a gift from the arbitrator." The following general points can be made. First, that it is not open to arbitrators in Canada to assume that there are any management rights either inherent or reserved. That, which has been repeatedly pointed out, is simply not the law in Canada. The view in *Russelsteel* is at odds with basic principles in our legislative system. What employers and unions get under our legislation is a comprehensive duty to bargain collectively. If the rights do not flow expressly or impliedly *from the agreement*, it is impossible to see where they would come from. Second, that if arbitrators rejected the approach of *Russelsteel* and brought a neutral approach to the issue of interpreting collective agreements, it may well be that there would still be agreements which do not address the issues under consideration. If powers are granted to management or the union, fine. If, however, the agreement is truly silent, then Professor Weiler is right in saying that an arbitrator cannot create provisions out of whole cloth. But what this amounts to is that the agreement is silent, not that it supports an "inherent" management power to act unilaterally. It can be argued, in a large number of cases, and for reasons set out above, such action would constitute an unfair labour practice.

The *Russelsteel* view is a thorn in the side of a coherent theory of Canadian labour relations legislation's view of equal partnership and a roadblock to the effecting of the purposes of Canadian labour law. Under *Russelsteel* there is an incentive offered to employers not to engage in collective bargaining of vital issues within the scope of the duty to bargain. This surely cannot be right. Furthermore, *Russelsteel* drives us to an irrational law of unfair labour practices. This too cannot be right. Thirdly, *Russelsteel* negates collective bargaining during the term of the collective agreement by placing all of the losses for a (real) failure to bargain on the employees and the union. All of these effects are generated by a view of "management" rights which is at odds with the assumptions of the legislation. Perhaps more fundamentally, and in sum, *Russelsteel* undermines and thwarts collective bargaining and equal partnership in Canadian labour law. A reversal of the thinking in *Russelsteel* would offer incentives to the parties to engage in collective bargaining over these issues during the open season. This would promote the purposes of the legislation. Furthermore, a reversal of *Russelsteel* would mean that under an agreement which was (truly) silent on the issue of contracting out, the employer will have to negotiate with the union during the term of the agreement.<sup>164</sup> The long

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<sup>163</sup> *Supra* note 71, at 105.

<sup>164</sup> The author is not the first to suggest this is what our legislation comprehends — see Freedman, *Report of the Industrial Inquiry Commission on Canadian National Railways "Run-throughs"* (Ottawa: Queen's Printer, 1965) at 86-102.

run effect will be, however, to reject the idea that all the losses are borne by the union and the employees, and to structure a set of incentives so as to make these issues subject to collective bargaining. Much of what has been said about *Westinghouse* would become irrelevant. To put it simply, rejecting *Russelsteel* would enable us to have a coherent theory of our legislation's view of equal partnership.

## VII. CONCLUSION

A few points can be emphasized by way of concluding remarks. First, although a *legal* theory has been presented, it is a coherent theory of what Canadian legislation is doing. Whether this would lead to changes in the real world is not known, but at least we should get the law right so that it is not an obstacle. Second, if this view is sound, the key ingredient in the statutory scheme is a *comprehensive duty to bargain collectively*. Attention has been drawn to this notion, which is part of the law, and it has been urged that it not be systematically ignored in working out the other parts of Canadian labour law. Third, a difficulty is faced in assessing whether it is possible, at this stage of the game, for participants in a labour relations system to reject the many positions that have been criticized and to acknowledge the view outlined, assuming it was accepted. To put it simply, the substantial jurisprudential and institutional constraints placed upon arbitrators and labour relations boards have been ignored. It may simply be too late in the day to have them re-plot our course for us. The legislature may have to be the navigator now. But knowing the difference between where we are and where we should be is progress in itself.