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Agenda for Canadian Labour Law Reform: A Little Liberal Law, Much More Democratic Socialist Politics

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Abstract

Statutory collective bargaining has been the linchpin of Canadian industrial relations since World War I. It yielded benefits to large segments of workers, although its reach and impact were always exaggerated. As the economic entente which underpinned the scheme is unravelling, workers fight desperately to hang onto a system which, in retrospect, looks even better than it did before. But the narrow, male-centred, economic premises of collective bargaining make statutory collective bargaining reform a poor vehicle with which to offset employer attacks on the working classes. An agenda which seeks to link the economic and the political, men and women, must be developed. This can be done, in part, by exploiting some of the claims (contrast realities) of the existing industrial relations system. But, more is needed; some suggestions are offered.

Keywords

Labor laws and legislation; Law reform; Canada

AGENDA FOR CANADIAN LABOUR LAW REFORM: A LITTLE LIBERAL LAW, MUCH MORE DEMOCRATIC SOCIALIST POLITICS©

BY H.J. GLASBEEK*

Statutory collective bargaining has been the linchpin of Canadian industrial relations since World War II. It yielded benefits to large segments of workers, although its reach and impact were always exaggerated. As the economic *entente* which underpinned the scheme is unravelling, workers fight desperately to hang onto a system which, in retrospect, looks even better than it did before. But the narrow, male-centred, economic premises of collective bargaining make statutory collective bargaining reform a poor vehicle with which to offset employer attacks on the working classes. An agenda which seeks to link the economic and the political, men and women, must be developed. This can be done, in part, by exploiting some of the claims (contrast realities) of the existing industrial relations system. But, more is needed; some suggestions are offered.

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* Professor of Law, Osgoode Hall Law School, York University. Since the time of presenting this paper in 1991, a small number of the liberal labour law reforms advocated in the paper have been adopted in some modified way in Ontario and British Columbia. They do not affect the general thrust of the thesis presented and, therefore, no effort has been made to discuss them, except to acknowledge the changes where it seems apposite to do so.

I. THE WELL-KNOWN PROBLEMS

Capitalism is restructuring. Prevailing economic dogma suggests that this restructuring is mandated by the unstoppable movement towards unfettered, world-wide free trade. This understanding implies that this movement is to be welcomed, as capitalist relations of production will work finally as they are meant to do. The accompanying argument for the completely free movement of capital, goods, services, and labour is theoretically elegant. To better meet global demands, private actors, wherever situated, should be enabled to maximize their resources and capacities without being bound by national boundaries. The optimum division of productive activities will ensue, generating the greatest amount of welfare possible for the world as a whole.

This unchained free trade model does not provide any kind of guarantee that unrestricted, global production and trading will make any particular country better off. Even if all of the productive potential of truly liberalized and globalized markets is realized, the way in which the spoils are to be distributed is still left up in the air. The model ignores the starting point of the various private actors situated in different parts of the world. Given the uneven distribution of military, political, and economic power, imbalances and inequities may well be, indeed, are likely to be, worsened. This does not seem to bother the fundamentalist economic proponents of unfettered trade, who view it as *the* principal motor of economic growth.

The vociferous intellectual and ideological support for the proposition that a world-wide free trade zone is inevitable makes it easier for localized capitalists to insist that the model be applied within their own nation. Their contention—that any government which erects

barriers impeding productivity and trade puts its nation and citizenry at a serious economic disadvantage—has increasing resonance and respectability. They are able to generate intense pressure on governments to take measures which will give the competitive model full rein. Individual entrepreneurs are able to back this self-interested pleading by threats to leave the jurisdiction. This well-worn strategy has gained credibility due to the globalization of competition; the new technologies which make world-wide production more feasible; and new banking, communications, and transportation facilities, which have improved the potential to integrate globally conducted business and production.[1]

All of this means that, even if they are unable to install a government of their choosing, as they have failed to do in several Canadian provinces recently, the employing classes are able to dictate the free trade model as *the* macroeconomic policy to be pursued by the state. As a result, labouring classes have lost a great deal of ground in the last decade and a half. In North America, more people are now working longer for less.[2] Workers have lost many of the collective bargaining rights they believed they had. They seem unable to convince their political rulers to adopt a different growth model,[3] even though their intellectual allies have tried to put a number of viable alternative models on the table for discussion.[4]

Typically, progressive commentators and labour leaders promote schemes to shift revenues back to local governments and/or promote the

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[1] The literature on the global economic revolution is voluminous. It includes: K. Ohmae, *Triad Power: The Coming Shape of Global Competition* (New York: Free Press, 1985); R.J. Barnet & R.E. Muller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974); S. Strange, *States and Markets* (London: Pinter, 1988); A. Maddison, *The World Economy in the 20th Century*, (Paris: OECD, 1989); D. Drache & M.S. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal: McGill-Queen's University Press, 1991); J. Grunwald & K. Flamm, *The Global Factory: Foreign Assembly in International Trade* (Washington, D.C.: Brookings Institution, 1985); and M.L. Dertouzos, R.K. Lester & R.M. Solow, *Made in America: Regaining the Productive Edge* (Cambridge, Mass.: M.I.T. Press, 1989).

[2] J.B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (New York: Basic Books, 1991); A. Donner, *Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime* (Toronto: Ontario Task Force on Hours of Work and Overtime, 1987).

[3] For an overview, see D. Drache & H.J. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: James Lorimer, 1992).

[4] For a popular rendition and overview of the American literature, see N. Mills, ed., "Labor's Future?" (1992) 39:1 Dissent 31, particularly the essays by D. Brody, R. Reich, and N. Salvatore; for a more integrated and scholarly discussion, see J. Mathews, *Age of Democracy: The Politics of Post-Fordism* (Melbourne: Oxford University Press, 1989); for Canadian exemplars, see D. Drache, ed., *Getting on Track: Social Democratic Strategies for Ontario* (Montreal: McGill-Queen's University Press, 1992).

creation of new federal loan guarantee schemes to enable more money to be spent on infrastructure and affordable housing. This, they argue, will improve the quality of life and create necessary productive employment. In addition, they make demands to make it more costly to engage in speculative trading in stock markets, something which is seen by these critics as a waste of national resources. Inflation and interest rates have made it more productive for capitalists to invest in buying each other's shares, rather than invest in research and development and new production. This was particularly true during the 1980s. In short, it is urged that there should be a return to some sort of social Keynesianism, rather than a continued reliance on the kind of wasteful military Keynesianism of the Thatcher and Reagan regimes,[5] mimicked here as a result of the United States' political and economic influence and the like-minded ideology of some of the elected governments in Canada.

However, the overwhelming power of big business right now is such that these Keynesian-type proposals are portrayed, and often perceived, as the advocacy of a violent economic revolution. Consequently, even in Canadian provinces with New Democratic Party governments, this kind of macroeconomic strategy does not seem to be on the agenda. Yet, despite their obvious lack of success, the opponents of unfettered free trade persist in their arguments for different approaches by governments, and in their demands that governments should engineer on-the-ground changes in the organization of productive activities. It is their pivotal contention that we should no longer rely on decentralized, uncoordinated competition amongst atomistic producers. Would-be Keynesians argue that, in Canada, there are several large oligopolistically-organized firms occupying the commanding heights of any one industry who are in a position to sweat the workforces of their supplier firms who, by contrast, are in fierce competition with one another for contracts from the dominant corporations. This is wasteful and harmful to workers. There is a need, therefore, to have industrial sectors—comprised of oligopolistically-placed employers and satellites of medium and small competing firms—*consciously* integrated as cooperating producing units. This would permit discrete firms, using complementary technologies, to harmonize their activities. Full-blooded use of the new technological capacities would then lead to the production of high quality goods for both domestic and trading purposes. Countries like Canada would be

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[5] F.L. Block, *Postindustrial Possibilities: A Critique of Economic Discourse* (Berkeley: University of California Press, 1990); and R.B. Reich, "Beyond Free Trade" (1983) 61:4 Foreign Affairs 773.

able to build high, value-added niches, which would give them a competitive edge in the world.[6] There would be no need to make the exertion of a downward pressure on working conditions a principal tool in the maintenance of profits.

This vision sees a restructured economy which has the potential to support a shorter work week, flexible work hours, and a productive system, which dovetails closely with workers' needs and a system of self-management. One justifying rationale is that more sovereign and secure workers are, in the end, more productive workers. This scenario, therefore, has strong appeal not only to Keynesians but also to democratic socialists, who see it as having the potential to establish more economic democracy at the ground level, as well as bringing more immediate economic welfare to all workers.[7]

Not surprisingly, this aspect of the reformist proposals also has had limited sway with policy makers. It urges a more direct interventionist, restructuring role for the state at a time when the political clout of the employing classes vastly outweighs that of labour and its allies. Employers, therefore, indicate that they are only willing to accept those features of the progressive models that suit them (*i.e.,* more government subvention for research and development, the training of the workforce at public cost, *etc.*). They are effective on this front. They are equally effective in their rejection of those aspects that would promote trade union strength, worker participation, or those that call for an enriched social net.[8]

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[6] For an overview of the extensive literature on this kind of industrial strategy, see M. Storper & R. Walker, *The Capitalist Imperative: Territory, Technology and Industrial Growth* (Oxford: University Press, 1989); D. Drache, edl, *supra* note 4; and R.W. Cox, *Production, Power and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987).

[7] S. Gindin & D. Robertson, "Alternatives to Competitiveness" in D. Drache, ed., *supra* note 4 at 32.

[8] Canadian capital's efforts on this front seem to be all too successful. Thus, the Ontario New Democratic Party government appears to be very eager to establish cooperatively-based training and skills programmes, backed by government-sponsored research and development, and financing for small, innovative business. This agenda is posited on the notion that, as traditional mass assembly manufacturing and resource industries are faltering and becoming sunset sectors, Ontario should develop special niches based on newly developed skills and natural advantages. While it is hoped that this will lead to high value-added productivity and jobs, it certainly furnishes employers with the kinds of support *they* are seeking. This scenario is like that of more conservative governments (such as that of the Ontario Liberal government, which preceded the NDP one), as enunciated in the Report of the Ontario's Premier Council, or other such government reports. For a review of prestigious reports recommending these kinds of policies, see A. Blais, "The Debate on Canadian Industrial Policy" in A. Blais, ed., *Royal Commission on the Economic Union and Development Prospects for Canada: Industrial Policy*, vol. 44 (Toronto: University of Toronto Press, 1986).

Indeed, while employers are asking governments to help them become more competitive, including aiding them with the establishment of more cooperative capital-labour relations, employers are also invoking the assistance of labour relations boards, courts, and legislatures to launch a full-scale attack on rights which labour had won over time. Alternative strategies, based on a view of the world in which concern for *workers'* welfare would be central, sound far-fetched and unrealistic because they are made as the daily struggles, which labour and its allies wage, concentrate on restoring the institution of collective bargaining and a level of unionization developed during a totally different economic and social era. These labour struggles are provoked because, in response to business' new demands, Canadian governments have set out to constrain workers' bargaining rights[9] at a time of massive decline in employment in the manufacturing and resource industries, where labour's organizational base had been most prominent and successful. There is, therefore, a highly visible campaign by labour to get law reforms, which will make it easier for unions to organize, to be certified, and to bargain in the new employment growth settings, as they were able to do in the much different employment and economic circumstances of the 1960s and 1970s. The most obvious difference between the two eras is that the new growth centres today are ones in which collective bargaining has not taken root in the past. They are peopled by small employers located in the service sectors, as opposed to large, mass assembly and resource industry businesses.

But, even if necessary gains are made on these fronts, it is unlikely that the kind of union rights that will be obtained and the kind of unions that will be formed will slow down capital's pursuit of the pristine competitive model. This is due to the fact that unionization will not become powerful where it matters and, where it does become established, there may not be many benefits to be had. More importantly, the kind of collective bargaining that is being protected and embedded by seeking these kinds of reforms is ill-suited to deal with new employer-employee circumstances. Indeed, in part, it is the nature of

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[9] The way in which, in the last decade or so, the legislatures and labour relations boards, supported by the courts, have attacked collective bargaining and unionism is well documented: see L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited*, rev. ed. (Toronto: Garamond Press, 1988); H.J. Glasbeek, "Labour Relations Policy and Law as Mechanisms of Adjustment" (1987) 25 Osgoode Hall L.J. 179; L. Haiven, S. McBride & J. Shields, eds., *Regulating Labour: The State, Neo-Conservatism and Industrial Relations* (Toronto: Garamond Press, 1990); J. Fudge, "Labour, The New Constitution and Old Style Liberalism" in Queen's University, ed., *Labour Law Under the Charter* (Kingston: Queen's Law Journal and Industrial Relations Centre, 1988) 61.

that institution that has made it so easy for capital to shake off labour's resistance to its drive to restructure the political economy of our nation. What is needed, from labour's perspective, is to attack the extant legal model of capital-labour regulation from within and, thereby, solidify the economic bargaining rights of workers in such a way that they can become a meaningful *political* force. Only if this can be done will it be possible to affect state policies in such a way as to halt the forward march of liberalized trade policies and all the pain and suffering that they entail.

II. A SNAPSHOT OF CANADA'S INDUSTRIAL RELATIONS SYSTEM

Industrial relations in Canada is constituted by three major schemes, which modify the market by different means and degrees. They are seen as regulating different situations and people, and it is customary to treat them as if they were only connected in the most attenuated way. But, it is vital to understand that these schemes are closely interrelated and that their operations impact on each other quite directly.

A. *Collective Bargaining in the Private Sector*

The advent of the *Wagner Act*[10] industrial relations model in North America constituted a large step forward for labour. It forced employers to bargain only with the chosen representative of its workers. This diminished competition amongst workers. It also provided a measure of representative democracy as workers were left as free as possible to choose a union that they could influence. Members were in a position to have their union favour a particular bargaining stance, or to determine which claims of which workers it should pursue when disputes arose during the life of a collective agreement. Despite this progressive approach towards worker needs, a major brake on employee power was built into this regime. The scheme gave bargaining rights on an employer-by-employer basis only; it was not intended to promote the reduction of competition amongst workers on an industry-by-industry, region-by-region, or national basis. But, within its constraints, the state

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[10] *National Labour Relations Act*, 29 U.S.C. §§ 151-169 (1982) [hereinafter *Wagner Act*] was adopted in Canada in the 1940s.

purported to let the parties decide for themselves what kind of collective agreements should govern their working relationship. Collective bargaining North American-style was meant to reflect the atomized market relationships of private actors as much as possible while allowing for *some* unionization.

B. *Collective Bargaining in the Public Sector*

When collective bargaining came to Canada's public sectors, the schemes adopted were posited on the notion that, as in the private sector, workers should be entitled to choose and control their own unions, and that employers should be forced to bargain with the workers' chosen agent. The bargaining was to be done on an institution-by-institution, or a government agency-by-agency basis. That is, it was to function as closely to an employer-by-employer model as could be fashioned in the public sector. The idea was that collective bargaining in the public sector should reflect the market ideal; workers should try to settle their work conditions through a free bargaining scheme which mirrored the one used in the private market sector. The "employer" was to be an independent enterprise with a budget not directly controlled by intervening politicians. It was understood, of course, that curtailments could be put on this new worker bargaining freedom. Because of the kinds of services public sector workers render, electorally-accountable governments have always retained the right to intervene on behalf of the public interest. That is, they can suspend bargaining rights and, thereby, dictate conditions, rather than leave them to be decided by the market-like forces supposedly constructed to regulate public sector capital-labour conflicts in notionally autonomous and discrete settings.

C. *Regulating the Left-overs*

The remaining members of the workforce, the unorganized, who comprise the majority of workers, were the most exposed to exploitation. They were left to be regulated by the law of the individual contract of employment. The effect of this legal doctrine is to promote and to sanction the fiercest forms of competition amongst workers for jobs. The ensuing immiseration of many of these workers forced the state to provide minimum employment standards by direct legislative fiat. Somewhat ironically—as Canada is a liberal capitalist democracy—these workers, and all others, are supported by equality of opportunity, human

rights, and access laws to help them participate in this fragmented set of labour markets where many are destined to be at a bargaining disadvantage.

III. SOME REALITIES OF CANADA'S INDUSTRIAL RELATIONS SYSTEM

Inasmuch as the Canadian employing classes apprehend resistance to their efforts to institute hyperliberalism as a way of life, they expect it to be led by the union movement. After all, it has a legitimate place in Canada's political economy. As long as twenty-five years ago, it was confidently argued that the strength, protection, and participatory rights won through collective bargaining, complemented by equality of opportunity and minimum standards of employment legal protection for the less fortunate, were creating a new industrial citizenship. The potential for political and economic advances for workers, especially their ability to curtail the exercise of new economic power by employers, was seen as having been exponentially increased by the institution of collective bargaining.[11] But, there never was anything in either the logic or the operation of that system, which will now help unions in their efforts to resist the demands for concessions and more flexibility by employers who are bent on changing workplace relations and macroeconomic policies. This is so because the *Wagner Act* model constitutes the smallest step up possible from the previous legal capital-labour regulatory scheme: the individual contract of employment law. If anything, the assumption that the inherent ideology of private contract-making is to be the basis of a well functioning liberal democratic capitalist society was deepened by this model of collective bargaining. This has had implications for the ways in which workers can unionize, *vis-à-vis* whom they can unionize, which workers can unionize, and the way in which trade unions can behave. A sketch of some of the ensuing limitations follows, indicating why the mere reform of existing collective bargaining labour law is not the appropriate response to the employer-driven restructuring of Canada's political economy and the

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[11] H.W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. Bar. Rev. 786.

accompanying efforts to reshape workplace practices to fit in with these new modes of production.[12]

A. *The Wagner Act Model Requires Workers to Opt into Unionization*

There is no starting assumption that workers are to be unionized unless something to the contrary is indicated. This means that workers must take positive action to become organized. There is nothing in the scheme which requires the employer to assist this organization and, given the liberal premises of the scheme, the employer, as an individual, continues to be free to control his assets. This means that he can keep people off his premises and insist that, during contracted-for work hours, there are to be no interruptions. This has made organization a nightmare where workers face intransigent employers. There is something tragicomical about the fact that workers may have to organize furtively, as if they were establishing some kind of underground organization. They meet secretly, in hotels and motels, to convince each other to engage in what is considered to be, according to public cant, the honourable act of unionization. This situation is ripe for exploitation by employers who want to resist unionization. Much of contemporary labour law reform activity in Canada, therefore, is aimed at overcoming such difficulties of unionization, especially in settings which, traditionally, have been non-unionized.[13]

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[12] Elsewhere, I have offered more detailed accounts of how and why Canada's industrial relations system has been much less advantageous than its liberal pluralist proponents had argued: see H.J. Glasbeek, "Law: Real and Ideological Constraints on the Working Class" in D. Gibson & J.K. Baldwin, eds., *Law in a Cynical Society?: Opinion and Law in the 1980's* (Calgary: Carswell 1985) 282; H.J. Glasbeek, "Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance and Real Life" in G. England, ed., *Essays in Labour Relations Law* (Don Mills: CCH Canadian, 1986) 57; and Glasbeek, *supra* note 9.

[13] After this was written, the NDP government in Ontario passed some contentious legislation to respond to labour's demands on this front: *Labour Relations Act*, R.S.O. 1990, c. L-2, as am. by S.O. 1992, c.21 [hereinafter *Labour Relations Act*]. The *Act* makes it more difficult for employers to help workers lodge petitions opposing unionization by the imposition of a time limit; easier for workers to organize in shopping malls by addressing some of the difficulties made apparent by the Eaton's strike in Toronto; and it gives the Labour Relations Board procedural assistance so that it can redress employer anti-union tactics more quickly during an organization campaign. But the reforms leave the fundamentals of the opt-in system untouched. Intransigent employers will not be severely handicapped. Yet, business has been shrill in its opposition. It is all a question of relativity. However primitive Canada's approach to organization may be, it is viewed as being far more generous than that of the United States. Weiler has made a big impact on American labour law discussions by urging Americans, from his prestigious seat at Harvard Law School, to look to the Canadian regimes for leadership if they want to help the downward slide of the institution of collective bargaining in the United States. See P.C. Weiler, "Promises to Keep: Securing Workers'

B. *The Scheme is Liberal in Conception*

The scheme supports the right of an individual worker to choose a union or no union at all. As a parallel right, it supports the employer's right to free speech. Most importantly, the employer may freely use his[14] property as he wills because, in a true liberal polity, one's personality includes one's property rights. Essentially, the employer remains free to decide whether or not to use such property to enter into, or extinguish labour contracts. Of course, once they are entered into, the employer is subject to whatever contractual arrangements have been made. Other than that, the employer's freedom is not to be impaired. The freedom to contract precepts and the facilitating legal techniques they have spawned enable employers to avoid the effects, or the potential effects, of worker collectivization.

Employers can employ independent contractors to do jobs needed for their productive activities. By contracting work out or sub-contracting to have others do it, they can avoid the effect of unionization. Inevitably, they seek to do so.[15] In Canada, this has led to a number of protective pieces of legislation which allow people contracting with employers in this way to form unions or become part of an existing bargaining unit. This only applies if the contracted worker's position is as dependent on the employer for her living as that of the average worker in a bargaining unit. These are dependent contract provisions.[16]

Rights to Self-Organization under the NLRA" (1983) 96 Harv. L. Rev. 1769; P.C. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects For Union Representation" (1984) 98 Harv. L. Rev. 351; and P.C. Weiler, "Milestone or Tombstone: The Wagner Act at Fifty" (1986) 23 Harv. J. Legis. 1. For a view which emphasizes the *status quo,* perhaps even regressive, nature of the Weiler proposals, see E. Tucker, Book Review of *Governing the Workplace: The Future of Labour and Employment Law* by P.C. Weiler (1991) 36 McGill L. J. 1480.

[14] Editor's note: References to employers using the masculine pronoun and to employees using the feminine pronoun are deliberate in order to point to the interrelation of economic and patriarchial domination.

[15] This managerial prerogative has been respected by arbitral jurisprudence since the key decision in *Re United Steelworkers of America and Russelsteel Ltd.* (1966), 17 L.A.C. 253 (H.W. Arthurs). See E.E. Palmer & B.M. Palmer, *Collective Agreement Arbitration in Canada,* 3d ed. (Toronto: Butterworths, 1991). As far as labour relations boards are concerned, they will interfere with this managerial prerogative only when the contracting-out of bargaining unit work is deemed to be motivated by anti-union *animus,* a difficult-to-prove requirement, which leaves employers with a great deal of manipulative power; see G.W. Adams, *Canadian Labour Law: A Comprehensive Text* (Aurora, Ont.: Canada Law Book, 1985) 506ff.

[16] The conceptual and social justifications for these provisions were furbished in a finely crafted article by H.W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 U.T.L.J. 89.

Employers can also fragment their enterprise by a clever use of the corporate vehicle. This enables them to hive off, as apparently discrete, separate activities, their production, transportation, and marketing functions, *etc*. Thus, unionization may be made more difficult and, where unavoidable, less effective. Legislative redress was provided to blunt the effectiveness of these kinds of anti-union activities, resulting in statutory clauses known as related employer provisions.[17]

Similarly, employers may seek to rid themselves of the effects of collective agreements and/or unions by selling off some of the productive work done in a bargaining unit to another entity. Statutory provisions have been won to ward off the more direct of these kind of attacks on union rights as well. These are successor right provisions.[18]

All of these reactive safeguarding mechanisms have proven to be permeable; they provide imperfect protections against clever employer manipulation. For instance, the dependent contractor provisions have been interpreted on a case-by-case basis by labour relations boards. The uncertainty which ensues has meant that employers who might want to resort to fragmentation and splitting as an anti-union stratagem do not feel all that inhibited.[19]

Similarly, the employers who have sold part of their enterprise to another grouping have sometimes escaped their bargaining unit obligations, depending on whether or not a labour relations board has

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[17] For example, *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 35; *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 45; *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 37; and *Labour Relations Act*, s. 1(4).

[18] For an early, useful account of the successor rights problem and attempted resolution, see R.O. McDowell, "The Successor Rights and Related Employer Provisions of the Ontario Labour Relations Act" in *Labour Law: Aspects for the General Practitioner* (Toronto: Canadian Bar Association (Ontario), 1979) (Chair: C.M. McKeown).

[19] Like all decision-making bodies, which have discretionary interpretative powers, the labour relations boards are swayed by the context in which they have to make their decisions. Given the need to expand the scope of collective bargaining, boards could be expected to define people as employees whom common law courts, in different contexts and with a different mindset, might well have categorized as independent contractors. There is evidence that this is what happened initially: compare *Ready Mix Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497 with *Mount Nemo Truckers Association* v. *Nelson Crushed Stone*, [1977] O.L.R.B. Rep. 104. But, the courts, too, have become aware that a new world exists and some observers have argued that the approach taken by boards and courts became quite congruent: see M. Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law" (1982) 32 U.T.L.J. 374. This illustrates the great room for manoeuvring which all these tribunals have. What this means is that general trends in decision making can be identified with the benefit of hindsight, but that results in any one case are quite unpredictable; compare *Ontario Taxi Association* v. *Seven-Eleven Taxi Ltd.*, [1976] O.L.R.B. Rep. 134 [hereinafter *Seven-Eleven*] with *Niagara Falls Co-operative Tax Owners Association* v. *Niagara Veteran Taxi* (1980), 80 C.L.L.C. 16,040 (O.L.R.B.).

found that the core of their business had been sold or not. The meaning of core is rather elastic. Such factors as time gaps and continuity in customer lists have come to play a part. Boards have a good deal of discretion. Labour boards understand that if employers can escape collective bargaining obligations just by selling a part of their business to others, their very *raison d'être* may be undermined. These agencies, after all, are in the business of promoting and maintaining a legitimating level of bargaining rights. Thus, as pressure mounts on employers to destabilize trade unions, labour relations boards have used the flexibility inherent in the discretionary rules to enable them to save the status of certified unions. But, at the same time—intriguingly from a lawyer's point of view—there are indications that employers who have failed in their attempt to get rid of a union by selling part of their enterprise at the labour relations boards' level, have been able to use the courts to have their right to be "flexible" vindicated.[20]

Similarly, with respect to the related employer provisions, decisions of labour relations boards can be characterized as emphasizing the maintenance of existing bargaining rights. Summarizing crudely, the brunt of their decision making on this front suggests that businesses must be engaged and associated in activities under common control or direction before they will be treated as related, that is, as preserving trade union and workers' rights. Criteria such as common ownership or financial control, common management, interrelationship of operations of the various businesses, representation to the public as to whether or not there is a single integrated enterprise, centralized control of labour relations, all matter. Whether or not there is a use of common stationery, bankers and accountants, trade marks and signs, common supervision and invoicing procedures, and whether or not employees are paid out of the same chequing account and whether or not there is much interchange of employees between the allegedly related activities, may

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[20] For a sample of cases which illustrate this trend, as well as the unpredictability and manipulative power of board decisions in this area, see *Gordons Markets Ltd. and R.C.U., Local 206*, [1978] 2 C.L.R.B.R. 460 (O.L.R.B.); *Uncle Ben's Industries and Canadian Union of United Brewery Workers, Local 300*, [1979] 2 C.L.R.B.R. 125 (B.C.L.R.B.); *United Food and Commercial Workers* v. *Price Waterhouse Ltd.* (1983), 83 C.L.L.C. 16,045 (O.L.R.B.); *C.B.R.T.G.W. and K.J.R. Associates*, [1979] 2 C.L.R.B.R. 245; and *British American Bank Note Co. and Steel Plate Printers, Local 6*, [1979] 2 C.L.R.B.R. 122 (O.L.R.B.). For an example of restrictive judicial review, see *Syndicat National des Employés de la Commission Scolaire Régionale de l'Outaouais* v. *Union des Employés de Service, Local 298* (1989), 89 C.L.L.C. 14,045 (S.C.C.). For an illustration of how central this fight is, consider the ongoing saga in the post office: *Canada Post Corp. and C.U.P.W. (Nieman's Pharmacy)* (1989), 4 C.L.R.B.R. (2d) 161; *Canada Post Corp. and C.U.P.W. (Sheldon Manly Drugs Ltd.)* (1987), 1 C.L.R.B.R. (2d) 218; and *Canada Post Corp. and C.U.P.W. (Rideau Pharmacy)* (1989), 1 C.L.R.B.R. (2d) 239.

also enter into the calculations.[21] In recent times, there has been an increasing tendency by labour relations boards to use these interpretative tools to stop some contracting-in and some contracting-out, tactics which they see as too easily available as means by which to avoid bargaining unit obligations. Boards seem to be asking themselves whether or not the work being contracted-in or contracted-out is central or peripheral to the bargaining employers' enterprise. If it is peripheral, contracting-in or contracting out will be permitted; that is, it will not be seen as offending the related employer provision.[22]

In short, there is an understanding and general acknowledgement that employers are capable of running integrated enterprises through technically discrete legal vehicles. The boards, to preserve their own domain and the legitimacy of the industrial relations regime, are apparently feeling the need to pierce those legal veils which have been created, or to knock down some of the contracting arrangements which seek to put up "Chinèse walls" between associated employer enterprises in order to attack bargaining rights. Boards are able to use existing, easily moulded criteria to hold integrated businesses to be one business for the purposes of the institution of collective bargaining. As will be argued, this logic may prove useful to would-be reformers but, thus far, pressured employers do not seem to have been discouraged very much from using these kinds of union-busting tactics.

C. *Employer-by-Employer Bargaining is the Vision*

Although workers have to organize on a localized basis, a common misapprehension arises because local unions belong to national or international organizations, often described as "Big Labour," a truly powerful countervailing force. However, locals cannot act with the power of the integrated union when it comes to bargaining with an individual employer. While administrative and financial aid may be given to a member local by its parent, only that local bargaining agent can use economic force. Sympathy strikes and boycotts are illegal.[23]

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[21] No one criterion, or set of criteria, is identifiable as more important than others, leaving the labour relations boards with a great deal of room to manoeuvre.

[22] For a good, detailed analysis, see G. England, "The Future of Collective Bargaining Law: The Case of Labour Subcontracting" in I. McKenna, ed., *Labour Relations into the 1990s: Papers Presented at The Conference on Labour Relations into the 1990s* (Don Mills: CCH Canadian, 1989) 85.

[23] In part, this is offset by the ally doctrine, which makes picketing at a secondary site legal if the relationship between the two is characterized as being so integrated that, for the purposes of labour law, the two businesses should be treated as one. But, as workers can never be certain that

Employers who are component parts of an integrated enterprise are not handicapped in the same way. The overall controller of the enterprise is not legally inhibited from offsetting the economic impact of a legal strike on any one of its components.[24]

This is not to say that there are no employer-wide, region-wide or industry-wide bargaining schemes. But, overwhelmingly, these have been engineered by employers when they feel this to be advantageous to them. Indeed, when employers have met with union opposition to confront their demand for industry- or region-wide bargaining—as they have when unions have been in a position to exploit their monopoly and an industry's competitiveness (as in construction)—they have sought, and received, the help of labour relations boards and legislatures.[25]

In sum, fragmented bargaining serves as a control on labour cohesiveness and diminishes the impact of labour militancy when it does

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the ally doctrine will aid them, this safeguard is not a very helpful one.

[24] The fact that enterprises operate as a functioning unit, regardless of legal divisions and corporate intricacies, indeed heedless of nation state boundaries, is commonplace to business analysts and economists. Labour law, however, makes no allowances for this, except in-so-far as related or affiliated businesses, successor, and dependent contractor statutory provisions do. These, as seen, have been narrowly interpreted. A topical illustration of the difficulties for unions, which the gap between economic reality and the reality of labour law creates, is provided by the tactics of "restructuring" currently employed by General Motors (GM). The head office of this giant corporation has announced that it will shut down many of its plants and that the unlucky ones will be the ones least useful to General Motors as a whole. Workers in different locales are forced to compete with each other, despite the fact that the automobile industry was one of those spheres where integrated, rather than fragmented, bargaining has been the norm. Yet, GM, the employing enterprise, is able to rely on the local-by-local model to attain its restructuring aims. Here it is apposite to note that even large unions, such as the United Auto Workers (UAW) (and, in Canada, the Canadian Auto Workers (CAW)), have few economic assets compared to the enterprises with which they deal. The Technology Adjustment Research Project of the Ontario Federation of Labour, using data from the *Corporations and Labour Unions Returns Act*, R.S.C. 1985, c. C-43 and from D. Curry & D. Tripp, "Report on Business 1000" (July 1991) *Report on Business Magazine* 58, has calculated that the combined assets of all the head offices of all unions in Canada would create the equivalent of a "Union Inc.," which would rate only 148th on the list of corporations in Canada. Or, again, the 160 corporate members of the Business Council on National Issues control assets almost 1000 times larger than the combined assets of the head offices of the 494 unions in Canada. Of course, union power comes not from financial assets, but from the ability to use economic force. The significance of the unions' inability to act as integrated economic power brokers is thus underscored.

[25] In the 1960s, when they were the Big Three, the U.S. automobile corporations were particularly vulnerable to localized strikes because of their reliance on a complex system of fragmented part suppliers. Sales were good and stability in production was highly prized. The automobile companies proposed sector-wide bargaining to the UAW which, interested in a certain share of a growing pie, accepted the proposal. The legal, fragmented model, however, did not change. See J. Holmes, "The Globalization of Production and the Future of Canada's Mature Industries: The Case of the Automotive Industry" in Drache & Gertler, eds., *supra* note 1 at 153. For examples of labour board and legislative efforts to enhance employee bargaining power, see text below at notes 38-41.

occur. But, from the employing classes' point of view, these are not its only benefits.

D. *Politically Weak Unionism*

The logic of employer-by-employer organization in the private sector means that only narrow economic demands can be made of employers at the bargaining table. This has given a particular cast to the kind of unionism which has emerged. Union leaders frequently engage in electoral politics, seeking to represent rank and file views and interests. But there is always somewhat of a credibility gap as union leaders are not permitted to use the economic power of the fragmented, unionized labour force to support their socio-political demands. Their influence is minimal as they cannot guarantee union members' electoral support for any one political stance and they cannot punish politicians who ignore them.[26] There is a credibility gap because, at the workplace, unions spend all their time educating workers to accept that unionism is about the making of narrow economic demands. In short, the regime splits the economic from the political in a very profound way. This is obviously significant when attempting to use the labour power bestowed by Canada's legalized collective bargaining regime to get the state to develop a different macroeconomic strategy. The proof is in the pudding: Canada's social welfare net has been very poor compared to those in Western European countries where the political links between unions, political parties, and actions have been more strongly forged and where centralized bargaining is better established.[27]

E. *Private and Public Sector Differences*

Another aspect of structural fragmentation makes cohesive worker economic and political action difficult. The private and public sector collective bargaining regimes employ the same language and some

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[26] L. Panitch, "Corporatism in Canada" (1979) 1 Studies Pol. Econ. 42 at 84.

[27] In terms of spending on the social wage as a percentage of gross domestic product, Canada ranked thirteen out of eighteen OECD countries, in 1983: see J.S. O'Connor, "Welfare Expenditures and Policy Orientation in Canada in Comparative Perspectives" (1989) 26:1 Can. Rev. Soc. & Anth. 131. This kind of data caused G. Esping-Andersen to position Canada, Australia, and the United States at the bottom rung of the ladder which made up the spectrum of hyperliberalism (bottom) to social equity (top): see G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: U.K. Polity Press, 1990).

of the same institutional mechanisms, but they are truly different worlds. In particular, the right to strike in the public sectors is much more restricted than it is in the private sphere, and the matters about which public employees can bargain are much more limited. The argument is simply that in these sectors, the use of economic power will inevitably affect political decisions and, therefore, should be contained. Note the paradox: where political demands do not make sense, that is, at the private employer or local level, they are, logically enough, considered to be legally unacceptable bargaining demands. Where they make eminent sense, as demands do when made against governments that are in a position to grant what is being asked, they may simply be prohibited.[28]

F. *Limited Scope and Coverage of Collective Bargaining*

While collective bargaining has yielded substantial economic benefits for many workers, it has not done so evenly. In particular, the greatest gains have been made in the primary resource and mass assembly manufacturing sectors, in large oligopolistically-placed enterprises, where wage costs can be passed on more easily by employers than they can by those in more competitive sectors. Precisely because collective bargaining is based on an employer-by-employer model, it is ill-suited to act as a national wage policy mechanism. It does not function to overcome Canada's pronounced regional differences, which are so characteristic of a resource-based, export-led economy.[29] As a result, in the more competitive sectors, workers, unionized or not, may

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[28] The right to strike in the public sector varies from jurisdiction to jurisdiction. For an overview, see J. Sack & T. Lee, "The Role of the State in Canadian Labour Relations" (1985) 44:1 Relations Industrielles 195.

[29] J. Jenson, " 'Different' but not 'Exceptional': Canada's Permeable Fordism" (1989) 26:1 Can. Rev. Soc. & Anth. 69 at 80, notes that the "profound structuring efforts of a resource-based economy in which natural wealth [is] distributed by geographic lottery" means that, unless countervailing national policies are implanted, "uneven regional development [is] bound to follow." Collective bargaining, although often touted as a Keynesian mechanism, was not characterized as a national incomes policy by its most prestigious assessor, the Woods Task Force. Indeed, it argued forcefully that the failure to redistribute national income or to abolish inequalities in income, whether they arose because of regional differences, or because of inter- or intra-industry differentiations, were not failures at all because the purpose of collective bargaining was not to address these structural problems: see Task Force on Labour Relations, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: Privy Council, 1969).

work for rates which may be as much as 40 per cent less than those paid in the unionized primary sectors.[30]

Of course, income and job security are not the only benefits yielded by collective bargaining. There is also what Geoffrey England has called "the justice component."[31] Collective bargaining and the attendant arbitral jurisprudence has imposed some constraints on the ability of employers to exercise their managerial powers capriciously. Even in those cases where wage gains are unlikely to be dramatic, collective bargaining could have a positive impact. Nonetheless, given that collective bargaining may not yield great economic results in the more competitive sectors, there is less incentive for unions to put scarce resources into organizing employers in those sectors, particularly where the workplaces are small. The costs of organization and then, the administration of ensuing agreements, will vastly outweigh the dues obtained from members. The potential gains for the members of small units may not be felt to be great enough to justify these "losses." This is one reason for the relatively low rate of organization in small employment places. This is important in the new industrial relations setting.

As unions are losing members in the large employment setting, mainly in Canadian manufacturing and resource industries, the work rate participation is increasing exponentially. Many of the new workforce entrants are working in service sectors where small employers predominate in highly competitive situations. In 1990, half of the units created in Ontario employed less than twenty people. In Canada as a whole, 92 per cent of the employment growth between 1978 and 1983 occurred in firms that employed less than twenty persons.[32] That is, the growth in employment is taking place precisely where the institution of collective bargaining is likely to be most difficult to establish, and the least likely to yield desired benefits.

G. *The Family Wage Concept*

A principal thrust of collective bargaining North American-style in the post-war period was that it should provide a linkage between mass

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30 C.F. Aw, *A Dual Labour Market Analysis: A Study of Canadian Manufacturing Industries* (Ottawa: Economic Analysis Branch, Labour Canada, 1980).

31 See *supra* note 22 at 92ff.

32 M. Cohen, "The Feminization of the Labour Market: Prospects for the 1990s" in D. Drache, ed., *supra* note 4 at 105.

production and mass consumption. Unionized workers in the resource and mass production industries were offered contracts of indefinite duration at wage rates that could sustain high consumer demand. Part and parcel of this idea was the notion that the institution was to provide a white male worker with sufficient income and job security to support his family. The family wage concept was central to the institution. While the goal to give a male worker adequate remuneration to support a family was never completely achieved, it did succeed fairly well in the leading sectors. As a result, the model was highly successful in its self-portrayal. It built on and reinforced patriarchal relationships. One of the corollaries was that industrial unions displayed little interest in organizing or protecting women, in either the public work-for-wages, or the supposedly private household work, settings.

Now, as unionized, well paid, and secure jobs have become less available, more and more women have been driven into the workforce. Men's wages are being driven downwards and wages for women are low because they *are* women, non-unionized, and employed in the most competitive sectors. This undervaluation is a consequence of the occupational "ghettoization" of women workers.[33] The expression used to characterize this phenomenon and the downgrading of traditional male jobs is the feminization of labour. It pits men in the work-for-wages force against women and other new entrants, such as the young, the old, men and women of colour, and the differently-abled—often referred to as non-traditional workers. These new pools of cheap labour create downward pressures. Thus, Acker's insight is plausible: what is being experienced is not so much a crisis for capitalism as a distribution crisis.[34] This worker crisis is there to be exploited by employers and, as expected, they are doing so with a vengeance.

For a halcyon period of twenty-five years or so following World War II, collective bargaining, with its notion of the family wage, seemed to work both as a successful economic mechanism and a progressive, liberal democratic one. There was little disruptive disputation between employers, government, and organized labour about, and, therefore, little political pressure to alleviate, the plight of unorganized workers. They were left to the mercies of their own individual bargaining power. The implicit justification was that, notionally, as collective bargaining

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[33] I. Bakker, "The Status of Women in OECD Countries" in R.S. Abella, ed., *Research Studies of the Commission on Equality in Employment* (Ottawa: Minister of Supplies and Services, 1985) 497 at 504.

[34] J. Acker, *Doing Comparable Worth: Gender, Class, and Pay Equity* (Philadelphia: Temple University Press, 1989).

was available to everyone, there was a ready-made institution to help them obtain a decent family living standard. In this context, minimum standards legislation was designed to relieve only the most extreme forms of exploitation of workers who did not have any responsibility for the maintenance of the living standards of others.[35] As a consequence, the protections offered to vulnerable workers are very poor.[36] The increasing number of these workers available to employers, therefore, has a depressing effect on wages and conditions.

From labour's perspective, this is the setting in which economic restructuring is taking place. Organized labour is losing ground quickly as employers pursue the logic of this restructuring uninhibited by the rules of the dominant collective bargaining institution. Indeed, in ideological terms, they may be helped by it. Yet, one of labour's responses is to "beef up" this institution in order to reinforce protections it thought it had. There are struggles for labour law reform, which will facilitate union certification by making it easier to contact workers at work, harder for anti-union, employer-supported workers to organize petitions, and more difficult for employers to intimidate workers by using their right to free speech. These reforms are aimed at overcoming barriers which are costly, both in time and money, and which make organization more difficult. In the same vein, in more "labour friendly" settings, such as Ontario, there have been successful demands to enable unions to organize more easily in common site situations, such as shopping malls, where an undue respect for feudal-type land rights has, in the past, made it very difficult for unions.[37] While they are necessary, these responses to the looming crisis for labour do not address the fundamental problems labour faces. In particular:

1. They do not question the ideological underpinnings of the *Wagner Act* model of collective bargaining which, as seen, provides fertile soil for the macroeconomic policies of the

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35 This case is made out with great insight by J. Fudge, *Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour* (Ottawa: Canadian Centre for Policy Alternatives, 1991).

36 As seen, while Canada, in comparative terms, spends a great deal on health and education, overall it ranks only thirteenth out of eighteen OECD countries in terms of social transfers as a percentage of gross domestic product; see O'Connor, *supra* note 27. In particular, while Canada is on a par or slightly better than the United States with respect to some standards, it fares badly when compared with industrialized countries in Western Europe with respect to such major issues as equal pay, occupational health and safety, unemployment benefits and retraining, paid parental leave, vacation and sick leave, minimum wages, pensions, *etc.*

37 Since the writing of this paper, there has been some success in Ontario, with its more labour-friendly government, on many of these fronts.

hyperliberalism underlying the drive towards globalized, productive free trade zones;
2. They do nothing to question the initial prerogatives of management, which have left North American employers with enormous control over job rights, in particular with respect to farming out bargaining unit work;
3. They do little to enhance the bargaining clout of workers, who might gain the right to unionize but who are faced with relatively small employers buffeted by intense competitive pressures;
4. They do not address the crisis of distribution, especially to the extent that it is propagated and maintained by the downgrading of women's work. While the unionization of women will unquestionably help (and is proceeding at a reasonable pace, given its initial poor starting position), the actual undervaluation attached to ghettoized work is not adequately confronted by this kind of labour law reform;
5. They do not address the question as to how the design and implementation of industrial strategies based on integrated productive activities are to be put on the state macroeconomic planning agenda. They do not do so because the labour law proposals do nothing to link the economic and the political, that is, they do little to increase solidaristic political activities; and
6. They do not put workers in a position to demand, with power and credibility, that a richer social net be established to inhibit employers from exploiting competition amongst workers.

This diagnosis suggests several lines of attack.

IV. A TWO-PRONGED RESPONSE

A. *Institutional Reforms—Using the System's Internal Logic*

When labour makes demands to limit the rights of counter-petitioners or asks for the right to meet with employees at the workplace during working hours or to be allowed to treat shopping malls as public places for the purposes of organizing and/or bargaining, it is making plausible demands because such claims are consonant with the principles which underlie the extant system of collective bargaining. The scheme promotes the extension of collective bargaining rights to as many workers as possible, and workers should be free to exercise it subject to the need to respect the rights of property-owning employers and other

individuals. There is nothing in these kinds of claims for reform that offends the basic structure of the statutory collective bargaining institution. This is why these reformist pushes meet with a measure of success.

There is nothing in the *written* scheme which purports to favour one set of bargaining outcomes over any other. Similarly, there is also nothing in it—except existing practices and the real, but *unarticulated* agenda to constrain unions—which proscribes different definitions of "the employer" or "the appropriate bargaining unit" than the ones presently used. Labour should seek such redefinitions. While collective bargaining lore has embedded the notion of factory-by-factory, office-by-office bargaining, this is not written in either stone or law. Arguments for different kinds of bargaining relations are neither totally novel nor unacceptable to existing labour jurisprudence. Moreover, the economic restructuring, which employers are engineering, seeks to establish new, functionally interdependent schemes of production, distribution, and marketing. Hence, claims that labour relations boards should be responsive to demands for the designation of bargaining units which correspond to these employer efforts ought to have some resonance.[38]

Such bargaining reforms should enable unions to address more directly the fragmentations that disempower them. Efforts to coordinate more solidaristic organization and bargaining may yield better economic outcomes and raise political consciousness about the need to meet capital's restructuring in a coherent fashion. It is the latter possibility which may be the most useful consequence of engaging in an orchestrated set of demands for more consolidated bargaining. It follows that reform particulars sought with respect to restructured bargaining agencies are not as important as the conscious effort to go beyond procedural reforms, which would leave the power of employers virtually unchanged. Some examples of the kinds of useful institutional reforms that may be pursued are sketched out. They demonstrate that some levers to obtain both changes which may yield immediate economic protection and lay the ground for longer term political change can be found within the logic of the scheme.

1. At a minimum, workers should fight to win the right to treat various branches of any one employer in a defined geographical area as

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[38] These defensive actions being urged are not very radical, merely more militant than other reforms. If unions win greater consolidated bargaining rights of the kind advocated, they will do so because this mirrors capitalist organization. This reflects the theoretically reactionary, as opposed to vanguard, nature of trade unionism. For a brief, analytical survey of the limited transformative potential of unions, see R. Hyman, *Marxism and the Sociology of Trade Unionism* (London: Pluto Press, 1973).

one entity. That is, they should seek to be organized on an employer-wide basis where it is beneficial. The scope of the chosen geographic area is, of course, important. Power and strategy will determine the nature of the demand. As a demand, it fits within the model's paradigm, which holds that unions should be able to organize *vis-à-vis* their real employer. In justification, this kind of bargaining organization is quite common where it suits *both* parties. For instance, all the retail stores that belong to one retailer in one geographic area are usually treated as one bargaining unit for the purposes of labour relations statutes.[39] More convincingly, it can be pointed out that consolidated organization and bargaining has met with instrumental approval by labour relations boards and legislatures in Canada, as has its abandonment, when it suited major employers.

Anne Forrest has documented how major meat-packing employers, when they enjoyed an oligopolistic position, were pleased to bargain on a nation-wide basis with the union. But, as competitive pressures and new technologies changed their situation, these employers sought to bargain on a more fragmented basis. The union failed to convince the appropriate labour relations boards that this change in bargaining practice unfairly undermined its long-established bargaining position. The state agency held that the employers could insist on their legal right to engage in more localized bargaining.[40] Another very well known illustration of instrumental manipulation of bargaining units is the *Michelin Bill*.[41] There, the Nova Scotia legislature amended its statute to enable a much-prized employer to remain union-free, even though it appeared as if a majority of the workers at one of the employer's plants had freely chosen to be represented by a union.[42] Similarly, for a long time the banks were able to exploit the argument that the "employer" was all of the branches of a federally chartered bank

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[39] Or with the tacit blessing of labour relations boards, as was the case in the North American automobile industry: see text at notes 24 and 25.

[40] A. Forrest, "The Rise and Fall of National Bargaining in the Canadian Meat-Packing Industry" (1989) 44:2 Relations Industrielles 393; and *Burns Meats Ltd.* v. *U.F.C.W.I.U., Local 139,* [1984] O.L.R.B. Rep. 1049.

[41] S.N.S. 1977, c. 70 and S.N.S. 1978, c. 34, amending *The Trade Union Act*, S.N.S. 1972, c. 19.

[42] For a critique of this nakedly pro-employer conduct, see B. Langille, "The Michelin Amendment in Context" (1981) 6 Dalhousie L.J. 523. For a much less known example of almost identical pro-employer, anti-union activity by a state agency, see the analysis of the British Columbia Labour Relations Board in J. Baigent, "Protecting the Right to Organize" in J.M. Weiler & P.A. Gall, eds., *The Labour Code of British Columbia in the 1980's* (Calgary: Carswell, 1984) 45; and for similar Saskatchewan developments, see R. Sass, "The Tory Assault on Labour in Saskatchewan" (1987) 7 Windsor Y. B. Access Just. 133.

in Canada, making organization virtually impossible. That is, because it suited them, the employers argued for consolidated bargaining and the labour boards supported them. When a labour relations board, under pressure to recognize the obvious need of exploited women workers, finally held that the local-by-local approach it used should generally apply to banks, the banks fought vigorously to keep unions out. Workers were forced to concede that branch-by-branch organization was not likely to be fruitful, given these large employers' continued intransigence. A new compromise was sought from the administrative agencies. The idea now is to cluster bank branches and activities which are more or less functionally integrated in a geographical area and designate them as "the employer." While some boards have been responsive, how this new strategy will work itself out is still unknown.[43]

The point is clear: branch-by-branch bargaining is neither legally mandated, nor have public administrators always adhered to it especially not when employers have asked for modifications. If the appropriate bargaining union designation is malleable at the behest of employers, it is legally and politically sound for labour to ask for manipulations that favour it. The bank worker instance illustrates that this potential is real.

2. Similarly, it is plausible for labour to demand that employees of all franchisees in a given area be treated as the employees of the franchisor. The argument, again, is that the franchisor is the real employer and, therefore, the appropriate respondent for the labour statute's purposes. For example, in the fast food industries, the reason that each outlet is treated as a separate enterprise is merely to suit the owners, who control every aspect of the operations.[44] Thus, unions can argue that the functional integration of the employer's enterprise is to be recognized in order to give collective bargaining meaning.

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43 For the decision which upheld the employer's one bargaining unit position, see *K.T.D.G.W.U., Local 1583* v. *Bank of Nova Scotia* (1959), 59 C.L.L.C. 18,152 (C.L.R.B.); for the social pressures and union politics which led to the change in the labour relations board approach (in *S.O.R.W.U.C.* v. *Canadian Imperial Bank of Commerce* (1977), 77 C.L.L.C. 16,089 (C.L.R.B.)), see J. Ainsworth *et al., An Account to Settle* (Vancouver: Press Gang Publishers, 1979); E.J. Shilton Lennon, "Organizing the Unorganized: Unionization in the Chartered Banks of Canada" (1980) 18 Osgoode Hall L. J. 177; and R. Warskett, "Bank Worker Unionization and the Law" (1988) 25 Studies Pol. Econ. 41. For some of the decisions dealing with the cluster approach, compare *Syndicat des Employés des Banques Nationales de Rimouski* v. *National Bank of Canada* (1985), 86 C.L.L.C. 16,032 (C.L.R.B.) with *U.B.E. (Ont.), Local 2104* v. *National Trust* (1988), 88 C.L.L.C. 16,026 (O.L.R.B.).

44 The detailed extent to which the franchisor controls the operations of each outlet is thoroughly documented in E. Reiter, *Making Fast Food: From the Frying Pan into the Fryer* (Montreal: McGill-Queen's University Press, 1991).

There is a good deal of analogous jurisprudence in other areas of labour law, which can be used to support this argument. In employment standard cases, tribunals have held that franchisees were minor cogs in large integrated machines even though the franchisees were, initially, proud to call themselves independent managers. Despite the fact that their daily tasks are not supervised and they might exercise discretional powers including the hiring of other workers, operators of franchised variety stores and taxi-cabs have been classified as employees entitled to statutory minima.[45] A functional approach to business organization, rather than a narrow legalistic one, then, is supported both by the logic and the practices of labour relations jurisprudence. Employees in franchise-type operations should exploit these possibilities.

This kind of consolidated bargaining would be a large step up. It would make unionization of fast food services and the like more attractive to existing unions and more feasible than it is now. It would give people who are presently considered to be outside the paradigm of "unionizable" workers an incentive to become organized. In short, it would open up possibilities for some of the most oppressed workers in our society. They would be given some standing to help themselves.

3. In some sectors, employers are not fragmented into several functionally related units, yet their competitive positions are such that it really does not make sense for workers to organize *vis-à-vis* one employer. The employer, forced to compete on everything including wages, is simply not in a position to maintain decent living standards for employees. That is, there are sectors in which employers can make a profit only from sweated labour. In these situations, it makes sense, from the workers' point of view, to group the employers together as one. Owners of private nursing homes in a defined area are typical of such employment settings. Again, this bargaining approach has employer-initiated analogues. It is the kind of bargaining structure employers in the construction industries asked for and received when they felt that the monopoly craft labour possessed had given it too much power. The employers got legislatures to agree that a more satisfactory bargaining position would be to certify all the employers within one province as a union able to bargain with all the employees represented by one craft union. They consolidated in order to avoid being played off against each other by the workers. Atomized, free, collective bargaining was seen to be disadvantageous by employers and they eliminated it by arguing that the industry would be more stable and productive if wages were taken

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[45] *Re Becker Milk Co.* (1973), 1 L.A.C. (2d) 337 (D.D. Carter); *Armstrong* v. *Mac's Milk Ltd.* (1975), 7 O.R. (2d) 478 (H. C.); and *Seven-Eleven, supra* note 19.

out of competition.[46] Workers should make similar arguments in those sectors where wage competition is disadvantageous to them.

The thrust of the argument should be clear. The struggles urged on labour will be difficult ones. Employers are pushing in the opposite direction. They are continuously contracting out work to homeworkers, to so-called independent contractors, and sometimes to other parts of the globe where cheap labour and resources are available. All of this is more feasible because new technologies make control over the production of goods and services done elsewhere ever more possible. Piecework and homework are back in vogue. This push has been helped by the fact that the statutory safeguards workers have been able to win against contracting-in or contracting-out are full of holes. Nonetheless, protective provisions for dependent contractors, as well as union protecting related employer, and successor rights do exist. The acknowledgement implicit in their existence must be built upon.

The idea is to focus on the integrated nature of enterprises, rather than on employer-determined criteria such as physical location, common stationery, and bank accounts. Relocation of employers should not permit the avoidance of existing bargaining rights or mean the loss of jobs. Legislation sought should recognize functional integration which, despite the legally subdivided nature of a business, allows people to retain their bargaining and job rights. Inasmuch as there is recognition by a business of the integration of various segments of its industrial activities, labour should seek to organize itself along those lines and to treat all *legally* discrete employers as being one employer for bargaining purposes. The acceptance of the functional interdependence of industrial organization, which is already part and parcel of wealth owners' private industrial and financial planning, has to be made part and parcel of the public administration of the collective bargaining system.

These sketches of arguments are really arguments for a new political agenda for labour. The focus is on how labour can best position itself to deflect the worst effects of employer restructuring. But, the strategies being promoted are not meant to be just defensive; they do have the potential to create pressures for a different set of economic

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[46] The argument that employers should not be forced to compete on wages conflicted with the public policy that promotes competition. It was controversial. As a consequence, before the employers got their way, there were six major studies and commissions of inquiry in various jurisdictions between 1968 and 1976. For a review of the statutory amendments which were engineered, see R.M. Brown, "The Reform of Bargaining Structures in the Canadian Construction Industry" (1979) 3 Ind. Rel. L. J. 539.

policies, policies which do not seek to promote growth principally by reliance on liberalized trade.

As workers struggle to consolidate bargaining in the general ways suggested, they will help to reveal and create an incentive for employers to further the integration of production and research. The increased transparency of the extent of rationalized productivity could help labour convince governments that it is both possible and desirable to initiate industrial strategies aimed at creating a relatively self-sufficient supply of domestic markets and the development of niches based on Canada's special advantages. In short, labour should pursue those policies which social democrats and democratic socialists favour but do not seem to be able to get on the agenda in the existing climate. To bolster this potential, labour must pursue another line of attack at the same time as it is pushing strategies for more consolidated bargaining.

B. *Treating the Labour Market as a Whole*

The analysis presented in this paper holds that more and more workers are being chased out of the labour market core and pushed into the periphery. This has resulted from the drive to get rid of both unions and protective governmental regulations, and is being done under the rubric of liberalized trade and competitiveness. Employers are demanding a "level playing field" so that they can compete with foreign producers, who have the benefit of cheap resources and labour, and no constraining government regulations. It is a drive to the bottom. Employers argue that they should be able to deploy new technologies in order to get more flexible work production. More often than not, they mean flexible workers rather than flexible processes. They would like to be able to employ workers at many skilled positions and on schedules that suit the kind of productivity aimed, not at satisfying mass consumption, but at specialized quality or quantity production. In short, there are to be less workers in the core and they are to be made more flexible in terms of control over their time and the nature of the work they do. In other words, they are to be more like workers in the

periphery.[47] The availability of larger pools of unprotected labour makes these employer goals easily attainable.

Workers in the periphery are to be found overwhelmingly in small employment settings in the service sectors, where undervalued work done by women, part-time, casual, and temporary workers is the norm and where only minimal state guarantees exist. Indeed, these minimal guarantees do not apply to some of the workers found in these sectors.

Organized labour must band together with unorganized labour to overcome these downward-working tendencies. Increased labour protection for all workers must be sought. First, all people who are found in the work-for-wages sector must be covered by the state's minimum standards provisions. In particular, agricultural workers, domestic workers, part-time workers, casual workers, temporary workers, and homeworkers should be covered by statutory provisions dealing with such matters as minimum wage rates, vacation pay, sick pay, regulation and overtime pay, public pension rights, and workers' compensation. There are to be no exceptions. The fight must then be to enrich those programmes, as our minimum standards lag behind those of most of the advanced industrialized nations.

Second, there are some matters which must be taken out of the private bargaining realm of regulation. In particular, the plan must be to develop pay equity programming based on state-wide, occupation transcending policies. Private bargaining, on an employer-by-employer basis, is simply counterproductive as long as patriarchal relationships continue to ghettoize and undervalue the work of women in some sectors.

Third, there must be an emphasis on making the provision of infrastructure and services public rather than private. This has several positive aspects. It will go some way towards debunking the ideological dominance of the notion that welfare is best created by private actors who have been "given their head." Simultaneously, as goods production employment opportunities diminish, jobs must be found. A vigorous campaign to have the state provide high-quality services which citizens

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[47] For a thorough empirical analysis, see D. Robertson & J. Wareham, *Changing Technology and Work: Northern Telecom* (Toronto: CAW Technology Project, 1989). For a sobering governmental assessment of Canadian use of the new technologies, see Economic Council of Canada, *Making Technology Work: Innovation and Jobs in Canada: A Statement by the Economic Council of Canada* (Ottawa: Minister of Supply and Services, 1987) 20, which stated: "On balance ... it appears that many firms ... are operating according to traditional principles of work design and decision-making .... [F]ar too many Canadian firms pay only lip service to the 'people' side of the enterprise."

need, such as day care, rather than leave this to the vagaries of the market, may make it possible to create jobs which require high training and command good wages for people who, otherwise, would be driven into the poor-paying service sectors. This would leave a smaller pool of workers available to work for employers who can only compete by using sweated labour, such as employers in the fast food industries or private nursing homes. In making this argument, Myles indicates that Esping-Andersen has found that the promotion of more high quality publicly rendered services has dramatic impacts. For instance, in Sweden, 26 per cent of the labour force is in health, education, and welfare industries, while only 2 per cent is in food and accommodation services; the comparative numbers in the United States are 17 per cent and 7 per cent.[48] In order to bolster this alternative, a more public service-oriented strategy, it is important that public sector workers and their unions argue for improvement in the quality and reach of services as they fight for wages and their jobs. Drache and I have argued this elsewhere.[49]

Fourth, it is important that organized labour, formerly concentrated in the core sectors, must—not only because it is right, but also because it is beneficial—assist in the unionization of women and support them in their pursuit of pay equity and decent jobs. First, this can be done by helping them unionize in a far more vigorous manner than has been done. Additionally, unions must abandon the male-oriented notion that a family wage can, and should, be earned by a man. They must abandon both their patriarchal approach and the approach dictated to them by the political economy, namely that of behaving like "Rational Economic Men." Women do not want to be merely people with "men-like" jobs; they would like to see a differently-centred world. Unions will not be attractive to women until this kind of politics is accepted by them. It is necessary to have more women unionized (something that is happening), and that they assume more leadership positions in trade unions (something that is occurring much more slowly). This is not enough. There must also be a feminization of unions. A change in both the composition and character of unions is necessary.

Part and parcel of this kind of politics requires unions to abandon the notion that collective bargaining is the best way to obtain

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[48] This argument is made in detail in J. Myles, "Decline or Impasse? The Current State of the Welfare State" (1988) 26 Studies Pol. Econ. 73.

[49] D. Drache & H. Glasbeek, "The New Fordism In Canada: Capital's Offensive, Labour's Opportunity" (1989) 27 Osgoode Hall L. J. 517.

pay equity. Many unions and women's groups are aware that one of the flaws of the various pay equity and equal pay for work of equal value schemes is that they are implemented on the basis of existing bargaining structures. Though difficult, it is essential to put proposals on the agenda which are designed to overcome both the problems of existing bargaining fragmentations and the stereotyping, which governs the evaluation systems promoted and controlled by employers.[50] Conscious struggles along these lines may narrow the harmful gender gaps which debilitate labour and render civil society less acceptable than it might be. This suggests another avenue of attack.

When one family member is a member of a union, altered union rules would make that member's partner a voting member of the union. This would help make the linkage between the work-for-wages sphere and the domestic sphere more apparent. It could also provide an impetus for better coordination between men and women's struggles.

The point here, of course, is not to provide a blueprint for action, but an indication of the kinds of struggles which can, and must, be undertaken.

V. THE POLITICS BEHIND THE ARGUMENTS

The central idea driving the various struggles advocated in this article—whether they be the endorsement of the conventionally-acceptable push for better worker protection when they seek to organize, or the more seemingly Utopian idea of functionally integrated bargaining and increased government sector activity and intervention—is an acknowledgement that today's capitalism is so much purer and more homogenous than it has been in the past that workers may not see how pervasive it has become. It must seem to many people that what is could not be otherwise. It is hard to mobilize against, or to resist, something which seems as natural as the surrounding air. It is precisely for this reason that capitalists have been able to take advantage of the institutionally-created fragmentations among working people.

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[50] D.J. Lewis, in *Just Give Us the Money: A Discussion of Wage Discrimination and Pay Equity* (Vancouver: Women's Research Centre, 1988) 113-128, has recorded a variety of alternative proposals by union groupings which seek to transcend traditional bargaining structures but notes that these proposals still accept employer-controlled job evaluation as a central element. These, then, are necessary first steps; more is needed. For instance, sharp increases in the minimum wage would help women more than localized comparisons with poorly paid men: see Equal Pay Coalition, *Bringing Pay Equity to those Presently Excluded from Ontario's Pay Equity Act*, Submission to the Pay Equity Commission, Toronto, 13 December 1988.

Further, capital is in a great position to exploit racism and patriarchy, forms of oppression which are neither created by or essential to capitalism, but which are expressed within its relations of subordination. Workers cannot afford incoherent responses to the economic restructuring that emphasizes these fragmentations.

The fights being urged upon labour are attempts to promote the notion that, despite appearances to the contrary, the working classes may help meld the many social movements formed to resist the fragmented oppressions which take place in late capitalism. The working classes are still potential, perhaps even the best, agents to lead the fight for social transformation. The kind of labour organization and politics advocated in this article attempt to give people the means to see that their shared interests are more important than their apparent differences. At the same time, they set out to protect their immediate interests.[51]

These proposals ask workers to fight where they are. They are to make claims which emphasize solidarity and are functionally compatible with the dominant ideology. At the same time as workers struggle to better their own situation, they will also be participating in efforts to enlarge and enrich the social net. Welfare and security as a citizen's right will thus be put on the political agenda. This could create the kind of political electoral force which might convince policy makers that labour cooperation can only be obtained if some of its demands are satisfied.[52] It is only in this context that the state is likely to assert its inherent power to impose different kinds of industrial strategies on its domestic capitalists. It is only in this context that managed trade and industrial integration can be thought of as sensible alternatives by policy makers.

What else is there?

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[51] For a further argument supporting this (acknowledgedly contentious) point of view, see J. Fudge & H. Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 Social Legal Studies 45.

[52] They can get more clout, of course, if they control large pools of capital. Politically, this is hard to achieve. Theoretically, the pools known as pension funds are available for this purpose. This, too, should be part of the politics I advocate. For a discussion of the possibilities, see Mathews, *supra* note 4 at c. 3.