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THE INTERNATIONAL LABOUR ORGANIZATION AND THE *WORKER'S COMPENSATION REFORM ACT*: CONFLICT BETWEEN INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS AND DIVIDED JURISDICTION

EDWARD M. HYLAND*

RÉSUMÉ

Le 1^{er} janvier 1998, l'Ontario a mis en vigueur un nouveau régime radical d'indemnisation des travailleurs accidentés et malades. Dans cet article, on examine jusqu'où les conventions de l'Organisation internationale du travail (OIT) mettent l'accent de manière heuristique et établissent des normes concrètes pour évaluer le projet du gouvernement de l'Ontario. Le Canada fait partie de l'OIT depuis 1919, alors que le Traité de Versailles donnait naissance à la nouvelle organisation internationale. Toutefois, sur les 181 conventions adoptées par les Conférences internationales du travail, le Canada n'en a ratifié que 28. De plus, aucune de ces conventions ne porte sur la sécurité du revenu ou sur les dispositions relatives aux avantages des travailleurs accidentés. C'est pourquoi il reste toujours à déterminer si les conventions de l'OIT offrent des normes par lesquelles le gouvernement de l'Ontario pourrait être imputable dans l'évaluation des répercussions de sa loi portant réforme de la Loi sur les accidents du travail. C'est d'autant plus vrai à la lumière du caractère fédéral de la constitution et de l'attribution de la compétence exclusive aux provinces en matière de travail.

Dans cet article, on arrive à la conclusion que deux secteurs ont besoin d'une réforme juridique. Tout d'abord, les récents changements du gouvernement de l'Ontario en matière d'accidents du travail doivent être remodifiés de manière significative afin de répondre aux normes de base établies par la convention sur l'indemnisation des travailleurs accidentés de l'OIT. Deuxièmement, dans cet article, on dit qu'il est temps de rétablir l'équilibre en faveur d'un traité fédéral, du moins pour ce qui est de l'application de la protection des droits de la personne garantis à l'échelle internationale. Les conséquences des décisions du Conseil privé dans les conventions au travail doivent être révisées pour refléter les changements dans la conception de la souveraineté et de la protection des droits de la personne, y compris les droits du travail.

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The poor or those who belong to the so-called working class always live closer to the law, closer to the whims and fancies of political authority.¹

I. INTRODUCTION

On November 26, 1996, the Conservative government of Mike Harris introduced the *Worker's Compensation Reform Act (WCRA)* in the Ontario Legislature.² The *WCRA* radically restructures the way that injured workers and those suffering from occupational diseases are compensated and reintegrated into the workforce. It also includes a repeal of the *Workers' Compensation Act (WCA)*, the legislation that had governed the treatment of injured workers.³

In a September 18, 1996 submission to Cabinet, then Minister of Labour Elizabeth Witmer proposed the overhaul of the workers' compensation system based on the recommendations contained in a report that Cam Jackson, Minister without Portfolio Responsible for Workers' Compensation Reform, prepared in July 1996. Entitled *New Directions for Workers' Compensation Reform*, the Jackson report recommended a more efficient system for managing claims, including a six month limitation period within which workers must file a claim; greater emphasis on worker and employer responsibility for developing a plan to get the injured worker back to work; less emphasis on vocational rehabilitation of injured workers as a means to get them back to work; reducing the compensation level five percentage points, from 90% to 85% of pre-injury net average earnings; reducing the indexation of compensation for all awards except in situations of 100% wage loss; eliminating the dual award system and instituting a single award for permanently disabled workers; focusing more on ensuring workplace safety; streamlining the administration and adjudication of claims and

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1. R. Coles, *The Mind's Fate: A Psychiatrist Looks at His Profession — Thirty Years of Writings*, 2d ed. (Boston: Little, Brown and Company, 1995) at 373.
 2. 1st Session, 36th Leg. 1991 (assented to 10 October 1997, S.O. 1997, c.16), [hereinafter *WCRA*]. The *WCRA*, which came into force on January 1, 1998, affects 25 other pieces of legislation, everything from the County of Oxford Act, R.S.O. 1990, c.C.42, s. 115 to the *Human Rights Code*, R.S.O. 1990, c.H.19. Most significantly it will repeal the *Blind Workers' Compensation Act*, R.S.O. 1990, c.B.8; the *Workers' Compensation Insurance Act*, R.S.O. 1990, c.W.12; the *Workers' Compensation and Occupational Health and Safety Amendment Act, 1994*, S.O. 1994, c. 24; the *Workers' Compensation and Occupational Health and Safety Amendment Act, 1995*, S.O. 1995, c.5, cf. *WCRA*, ss. 2-18. In addition it enacts the *Workplace Safety and Insurance Act* [hereinafter, *WSIA*]. In the summer months of 1997, the Standing Committee on Resources Development held hearings into the Bill. However, the Government passed a time-allocation motion restricting hearing time to four days in Toronto and six days throughout the rest of the province. There were almost 1,300 requests to appear before the Standing Committee, including 573 from Toronto-based groups. Only 118 presentations were allowed, and the government members of the Standing Committee voted down several motions from opposition members that the Committee meet with injured workers themselves, as a group.
 3. R.S.O. 1990, c. W. 11 [hereinafter *WCA*].

appeals from decisions, with the Appeals Tribunal more closely bound by the Workers' Compensation Board's policies.⁴

While the history of workers' compensation in Ontario reaches back to the nineteenth century and its legislation has undergone a series of changes over the years up to the present, the basic structure of the current system has its origins in the 1913 report prepared by the Chief Justice of Ontario, Sir William Ralph Meredith.⁵ Chief Justice Meredith recommended a system based on no fault, administered by a state agency, with payments for the duration of the disability, financed by means of a collective employer liability fund, and the elimination of any rights of action with respect to accidents covered by the fund.⁶ However, as Dee, McCombie and Newhouse point out, the 1914 *Workmen's Compensation Act*,⁷ which resulted from the Meredith Report, was a "truly hybrid piece of legislation...which flowed from common law remedies and pre-dated other pieces of 'social legislation'"⁸

The hybrid character of workers' compensation in Ontario is once again placed in sharp relief with the passage of the *WCRA*, as the line is drawn between those who advocate a radical revamping on principles of a private insurance scheme and those who argue for a system according to principles of entitlement based on the rights of injured workers. Put simply, should workers' compensation legislation provide basic standards of social security for injured workers and their families or should it be conceived as a scheme of collective insurance for employers?

The Conservative party under Mike Harris campaigned on a program of less government, less regulation, less taxation and government spending, stimulation of the economy through a supply-side approach intended to leave more money in the hands of consumers and business, and more reliance on the private sector as the engine of economic growth. The *WCRA* clearly is part of the Ontario government's agenda for change as outlined in the Conservative party's electoral campaign.⁹ Moreover, already

4. See *New Directions for Workers' Compensation Reform: Executive Summary* (1996) <http://www.wcb.on.ca/wcb/wcb.nsf/public/execsumm> (Date accessed: 17 January 1998).

5. For a brief legislative history of workers' compensation in Ontario see G. Dee, N. McCombie & G. Newhouse, *Butterworths Workers' Compensation in Ontario Service*, 2d ed. (Toronto: Butterworths, 1993) Ch. 1; R.C.B. Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, Vol. 2 (Toronto: University of Toronto Press, 1983) 418.

6. Dee, *ibid.*, at 1.5-1.8.

7. S.O. 1914, c. 25.

8. Dee, *supra*, note 5 at 1.10. For a more wide ranging discussion of the principles underlying workers' compensation schemes in Canada, see also T.G. Ison, *Workers' Compensation in Canada*, 2d ed. (Toronto: Butterworths, 1989); H.W. Arthurs *et al.*, "Canada" in R. Blanpain, ed., *International Encyclopaedia for Labour Law and Industrial Relations* (The Hague: Kluwer Law International, 1993) Vol. 3 at 126-28.

9. In its proposal and recommendation to Cabinet, leading up to the introduction of Bill 99, the Ministry of Labour outlined the following expected impact of changes to workers' compensation legislation: "Government will be seen to meet CSR [Common Sense Revolution, the Conservative party's

before the passage and proclamation of Bill 99 into law the government moved to revamp the Workers' Compensation Board and establish policies consistent with the new legislation.¹⁰

The question arises whether there is a legal framework that can act as a countervailing force to the process of restructuring and government retrenchment, and ensure that the rights of injured workers and their families are not sacrificed. Is there some legal basis upon which the rights and interests of injured workers can be protected? And does the new *WSIA* provide that framework?

One method for responding to this question is to examine the standards that have been established in international human rights law. The evolution of international human rights law represents a break from the traditional idea in international law of defining the mutual rights and obligations of states in their international relations.¹¹ Human rights law has progressively come to focus on the protection of individual, and not state, interests. The purpose of this paper is to examine the extent to which International Labour Organization (ILO) conventions provide a heuristic focus and concrete standards for assessing the Ontario government's new legislation for dealing with employment-related accidents. Canada has been a member of the ILO since 1919, when the Treaty of Versailles gave birth to this new international organization.¹² However, of the 181 Conventions adopted by the International Labour Conferences, Canada has ratified only 28.¹³ Moreover, none of these has to do with income security or the provision of benefits to injured workers.

1995 electoral platform] commitments for restoring WCB financial health...reducing average assessment rates by 5%; introducing insurance principles and improving service at the WCB; and enhancing self-reliance and incentives for workers and employers while reducing dependence on WCB bureaucracy. Employers will generally support new directions; some may have expected more aggressive financial measures; and some will be cautious or sceptical about the degree of authority left to the WCB to define and successfully implement some of the major reform areas such as return to work and labour market re-entry. Organized labour and injured workers will very vigorously oppose the rationale for and nature of reforms; and will focus on benefits and indexation changes and entitlement limitations." Ministry of Labour, Cabinet Submission: Proposal and Recommendation on Workers' Compensation Reform (17 September 1996) at 1.

10. The government appointed a new Chair of the Board, Glen Wright, a former insurance executive. In a Memo to staff in early March 1997, Board President Michael O'Keefe outlined the process for assembling a new management team at the Board. This team would be charged with the responsibility of developing and implementing a new business plan for the Board, and would include former senior executives from the private sector, including the insurance industry. Among the new operational areas are "Industry Sector Services", "Small Business Sector Services" and "Customer Service Representative Functions". M. O'Keefe, Implementation Update (7 March 1997).
11. For an extensive discussion of this point, see R. Provost, "Reciprocity in Human Rights and Humanitarian Law" (1994) LXV *The Brit. Y.B. Int'l L.* 383.
12. J. Mainwaring, *The International Labour Organization: A Canadian View* (Ottawa: Ministry of Supply and Services Canada, 1986) at 1-7.
13. Canada has ratified the following Conventions: *Hours of Work (Industry)* (No. 1); *Minimum Age (Sea)* (No. 7); *Unemployment Indemnity (Shipwreck)* (No. 8); *Weekly Rest (Industry)* (No. 14); *Minimum Age (Trimmers and Stokers)* (No. 15); *Medical Examination of Young Persons (Sea)* (No. 16);

Therefore, whether ILO Conventions provide any standards to which the Ontario government can be held accountable in assessing the implications of Bill 99 poses a real question. This is all the more so in view of the federal character of the Constitution and the assignment of exclusive jurisdiction over labour matters to the provinces.¹⁴ Do the Conventions provide some legal basis for challenging the changes contained in the *WSIA*? More generally, do the Conventions provide a foothold for advocating for stronger protection of labour rights in the face of globalization? As we shall see, these Conventions are very limited in their reach, a direct result of the strong place the courts have accorded to provincial federalism.

In what follows, I shall begin with a review of the major changes contained in the *WSIA*. Next I shall examine in more detail what obligations exist under ILO Conventions dealing with employment injury benefits and with income security. An examination of obligations would be incomplete without an analysis of ILO enforcement mechanisms. I shall conclude by exploring the implications of Canadian membership in the ILO for assessing the *WSIA*, and make a number of recommendations for reform.

II. THE *WCRA*: REDRAWING THE LANDSCAPE OF WORKERS' COMPENSATION

The point of departure for assessing the significance of the *WCRA* is found in its Preamble and the name of the legislation it enacts to replace the *Workers' Compensation Act*. The Preamble describes the new legislation as, "An Act to secure the financial stability of the compensation system for injured workers, to promote the prevention of injury and disease in Ontario workplaces and to revise the *Workers' Compensation Act* and make related amendments to other Acts."¹⁵ Two comments are worth noting. First, the focus in the Preamble is on the financial stability of the compensation system.¹⁶ This is borne out in the new Act that the government brought

Seamen's Articles of Agreement (No. 22); *Minimum Wage-Fixing Machinery* (No. 26); *Making of Weight (Packages Transported by Vessels)* (No. 27); *Protection Against Accidents (Dockers)* (No. 32); *Underground Work (Women)* (No. 45), *Ratification Denounced; Minimum Age (Sea)* (No. 58); *Statistics of Wages and Hours of Work* (No. 63); *Food and Catering (Ships' Crews)* (No. 68); *Certification of Ships' Cooks* (No. 69); *Medical Examination (Seafarers)* (No. 73); *Certification of Able Seamen* (No. 74); *Final Articles Revision* (No. 80); *Freedom of Association and Protection of the Right to Organise* (No. 87); *Employment Service* (No. 88); *Equal Remuneration* (No. 100); *Abolition of Forced Labour* (No. 105); *Seafarers Identity Documents* (No. 108); *Discrimination (Employment and Occupation)* (No. 111); *Final Articles* (No. 116); *Employment Policy* (No. 122); *Merchant Shipping (Minimum Standards)* (No. 147); *Labour Statistics* (No. 160); *Asbestos* (No. 162), International Labour Organization, *ILOLEX: Conventions* (19 March 1997) <http://ilolex.ilo.ch:1567/public/english/50normes/inflg/iloeng/ratse.htm> (Date accessed: 15 January 1998).

14. *Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c.3, s. 92(13), (formerly *British North America Act, 1867*). The Privy Council determined that the provinces have exclusive jurisdiction over labour matters in *Toronto Electric Commissioners v. Snider et al.*, [1925] A.C. 396 (P.C.).
15. *WCRA*, *supra*, note 2.
16. This is a point that then Minister of Labour Elizabeth Witmer emphasised in her remarks before the

in to replace the *Workers' Compensation Act*. Second, gaining in ascendancy is a preoccupation with preventive strategies to lessen the incidence of occupational injury and disease. A question to bear in mind is whether the new Act will provide the necessary legislative bite to ensure that Ontario workplaces will become safer.

Beyond the Preamble, however, is the title of the new Act enacted to replace the WCA. The *Workplace Safety and Insurance Act* clearly reorients the legislation's perspective away from the compensation of injured workers, and towards safety in the workplace and the establishment of an insurance system. This reorientation is underscored in the new Act's purpose clause:¹⁷

The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

Consistent with changes to the WCA that the government had already introduced in Bill 15,¹⁸ the overall purpose of the Act is to be accomplished in a "financially responsible and accountable manner." The government was preoccupied with what it has characterized as the Workers' Compensation Board's unfunded liability.¹⁹ Thus,

Standing Committee on Resources Development: "Bill 99 is based on five principles: [First], we will restore the financial viability of the Board by eliminating the unfunded liability by the year 2014." Hon. E. Witmer, Statement by the Honourable Elizabeth Witmer, Minister of Labour, to the Legislative Standing Committee on Resources Development (Re. Commencement of Legislative Hearings, Bill 99) (16 June 1997) at 2-3.

17. WCRA, Schedule A, *Workplace Safety and Insurance Act*, s. 1.

18. S.O. 1995, c.5, s. 1.

19. The Conservatives, in the "Common Sense Revolution," put the matter as follows: "Despite the fact that the number of accidents and the rate of injury in Ontario workplaces have declined, the WCB continues to charge employers higher premiums and the unfunded liability, of almost \$12 billion, continues to grow." In her News Release accompanying the introduction of the Bill into the Legislature, then Minister of Labour Elizabeth Witmer stated, "At \$10.7 billion the unfunded liability threatens the future viability of the system. We are fulfilling our commitment to retire the unfunded liability by the year 2014." Ministry of Labour, News Release "Minister Announces Major Overhaul of Workers' Compensation in Ontario" (26 November 1996). The Minister also highlighted the same point in her remarks before the Standing Committee on Resources Development, *supra*, note 16. Those critical of the changes charge the government with being disingenuous on the question of the unfunded liability. In fact, they point out, the WCB is in healthy financial shape, with a bank balance of \$8 billion. Moreover, unlike private insurers, there is no chance that the Board would be unable to meet its future obligations, and so it is not true to say the liability of future payments is unfunded.

as the Office of the Worker Advisor pointed out in its commentary on Bill 99, "[t]he renaming of the legislation reflects the overall change in language from a compensation scheme to an insurance scheme."²⁰ So, for example, work-related stress will be compensable only to the extent that it results from a traumatic work-place accident.²¹

Of more significance is the re-ordering of the main purposes of the Act, with priority now given to encouraging prevention and safety in the workplace, as well as to developing plans to get individual workers back to work. The contrast with the purpose clause of the *Workers' Compensation Act* is striking:²²

The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To provide fair compensation to workers who sustain personal injury arising out of and in the course of their employment or who suffer from occupational disease and to their survivors and dependants.
2. To provide health care benefits to those workers.
3. To provide for rehabilitation services and programs to facilitate the workers' return to work.
4. To provide for rehabilitation programs for their survivors.
5. To prevent or reduce the occurrence of injuries and occupational diseases at work.
6. To promote health and safety in workplaces.

The focus in the *WCA* was clearly on the worker: to provide him or her with compensation that is fair, with health care benefits, and with rehabilitation services and programs to facilitate his or her return to work. The *WSIA*, on the other hand, gives priority of concern to the conditions in the workplace, as a means of reducing injury and disease and the costs associated with them, and to devising plans to get injured or ill workers back into the labour force. In addition, the new Act will continue to provide compensation (which is no longer to be qualified as "fair") and additional, unspecified benefits. However, this purpose has gone from first on the list to last, suggesting a lessening in priority. Moreover, gone from the purpose clause is a specific commitment

The current account approach of the Board is perfectly adequate to meet the obligations of the future. Ontario Federation of Labour, "Bill 99: Workplace Safety and Insurance Act, To Reduce Claims ... Not Injuries" (1996) at 2-3; P. Biggin *et al.*, "Justice for Injured Workers: The Struggle Continues" (1995) 11 *J.L. & Social Pol'y* 41 at 48-50.

20. Office of the Worker Advisory (Special Services Unit), Summary of Significant Bill 99 Provisions (13 February 1997) at 1.
21. *WSIA*, s. 13(4)(5). As the Minister put it to the Standing Committee, "[t]he second principle of our reforms is to restore the system to its original mandate as a workplace accident insurance plan. In past years compensation has been paid for conditions whose connection to the workplace is often difficult to determine. Therefore, it is now proposed that compensation be provided for stress only when it results from a traumatic workplace incident," *supra*, note 16 at 4.
22. *WCA*, s. 0.1.

to provide health care benefits or vocational rehabilitation services and programs to injured workers.²³

As with most pieces of legislation, though, it is in the details that the full measure of its significance for injured workers can be gauged. In particular, five broad areas stand out and invite closer scrutiny: the scope of coverage; the financial adequacy of the compensation available; the basic principles along which the system will operate, specifically whether it will be a social security system or an insurance system; the range of other benefits to be offered injured workers and survivors of deceased workers; and finally, administrative principles, with a particular focus on rights of appeal.²⁴

Scope of Coverage

A major and longstanding criticism of workers' compensation has been that not all workers were covered. Indeed, according to Biggin *et al.*, "... there are almost 700,000 workers in Ontario who are excluded from coverage under the WCA."²⁵ This represents 12% of the Ontario labour force.²⁶ There is no cause for satisfaction with the new legislation, as the *WSIA* maintains the exceptions to who is a worker within the meaning of the Act, and therefore subject to coverage. The Act specifically excludes homeworkers or others who perform work not on premises under the control of the employer.²⁷ As well, executives, self-employed workers, and casual or temporary workers are all excluded.²⁸ However, self-employed and executives may apply to the Board for coverage under the Act and be deemed to be workers.²⁹ Coverage extends to employees working in forest products, mining and related industries, other primary industries, manufacturing, transportation and storage, retail and wholesale trades, construction, government related services, and a variety of other services. As well,

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23. The Act does provide workers with an entitlement to health care benefits and the Board with an obligation to pay for them (ss. 33-39). Instead of vocational rehabilitation, the new Act provides for a Labour Market Re-entry Plan (LMRP) (s. 42). However, the Board will not have to provide a LMRP to an injured worker, as it was required to prepare a vocational rehabilitation program under the WCA, s. 53.
 24. These areas are suggested by the (1) the purpose clause of the *WSIA*; and (2) the main structure of the new Act: injury and disease prevention (Part II); the insurance plan itself, including the major rights and obligations of workers and employers (Parts III-X); and the administration of the Act (Parts XI-XIII).
 25. *Supra*, note 19 at 55.
 26. The labour force is taken from the annual average for 1995, the year in which Biggin *et al.* appeared, as established by Statistics Canada. In 1995, the active labour force in Ontario was 5,732,000. Statistics Canada, *The Labour Force: December 1995* (Ottawa: Minister of Industry, 1996) at A-8.
 27. *WSIA*, s. 11(1)(b).
 28. *WSIA*, s. 11(1)(a); s. 11(2).
 29. *WCA*, s. 13; *WSIA*, s. 12(1). Consistent with the insurance principles that will apply under the new legislative scheme, the Board will be authorized to require complete (or partial) payment of premiums in respect of persons for whom optional coverage is being sought, *WSIA*, s. 12(4).

employers in a number of transportation industries, municipal corporations, and school boards are individually liable to pay compensation and medical aid.³⁰

Financial Adequacy

Perhaps no other change of Bill 99 provoked sharper criticism from labour and injured workers' organizations than the new compensation scheme. First, the benefit levels are reduced from the current 90 per cent of pre-injury net average earnings to 85 per cent of the difference between the worker's net average earnings before the injury and the net average earnings that he or she earns or is able to earn after the injury.³¹ While this will apply only to workers who are injured after the new Act comes into force, the indexation of the benefits of all injured workers will be subject to a new formula, which is half the annual rate of inflation minus one to a maximum of 4 per cent.³²

What constitutes earnings will be subject to Board policy, as the definition has been removed from the legislation. Under the former Act, any remuneration capable of being assigned a dollar figure was to be counted among earnings and wages. The elimination of the definition of earnings and wages from the legislation gives the Board much greater discretion to determine the basis for establishing the benefit amount it will pay to a claimant. As well, whereas the *WCA* required the Board to calculate the worker's weekly earnings at the time of the accident, s. 53(1) of the new Act states that the Board need only take this information into account. It will therefore be more difficult to determine whether the average earnings that the Board has calculated is appropriate.

The Board will now have the power to review annually whether there are any new conditions to warrant varying or discontinuing a worker's benefits.³³ As it is discretionary power, the Board may exercise it for not longer than 72 months after the injury to the worker. What is not clear is if this discretion includes the power to alter the deemed earnings of a worker established under s. 43(4), which is critical for determining the basis for calculating the amount of the benefit.

Finally, the collapsing of the temporary and permanent disability benefits (ss. 37 and 43 of the *WCA*) into a single compensation scheme tied closely to the new Act's return

30. *Workers' Compensation Act Regulations*, O.Reg. 746/92, s. 6.

31. *WSIA*, s. 43(2). In fact the *WSIA* eliminates the distinction between temporary and permanent disability with respect to providing benefits. As a result, several methods of calculating benefits under the *WCA* will be eliminated (cf. ss. 37 and 43 of the *WCA*).

32. *WSIA*, s. 49(1)(2) and s. 43(6)(b). Ss. 49(2)(a)-(c) and 50(1)(2) allow for full indexation of benefits paid to workers who have suffered 100% wage loss and to survivors in receipt of death benefits. In addition, benefits offset only by CPP disability payments will also be fully indexed (s. 43(6)(a)).

33. *WSIA*, s. 44(1). In its submission to the Standing Committee on Resources Development, the Employers' Council on Workers' Compensation applauded this change, in particular the power of the Board to review wage loss awards if there is any material change in circumstances. Employers' Council on Workers' Compensation, *Bill 99: Review and Analysis of Proposed Changes to the Workers' Compensation Act*: Presented to the Standing Committee on Resources Development (16 June 1997) at 30.

to work and labour market re-entry plan provisions will have the effect of reducing the amount of money paid to claimants. The focus of the *WSIA* is to get injured workers back to work and to discourage overreliance on the compensation system.³⁴ Soon after an injury and the filing of a claim, the Board will endeavour to determine the labour re-entry potential of the injured worker as a means of establishing his or her deemed earnings, again for the purpose of establishing a benefit level. Nowhere in the new Act are principles other than financial ones (lost earnings, deemed or actual post-injury earnings) used to provide the basis for determining the amount of compensation due to an injured worker.³⁵

Range of Benefits

As in the *WCA*, the *WSIA* contains provisions entitling injured workers to health care and requiring the Board to pay for it.³⁶ Health care means professional services provided by a health care practitioner,³⁷ services provided at hospitals and health facilities, drugs, the services of an attendant, modifications to a person's home and vehicle and other measures to facilitate independent living, assistive devices and prostheses, and extraordinary transportation costs to obtain health care.³⁸

Most significant of the changes to the health care entitlements is the penalty for failure to cooperate with the proposed plan for health care that the Board considers necessary. In the *WCA*, the most severe penalty for failure to cooperate was a reduction in benefits; under the *WSIA*, the Board has the discretion to suspend a worker's benefits.³⁹ As under the *WCA*, the new Act continues to give the Board enormous power over an injured worker, to determine what health care is appropriate and necessary. However, under the *WSIA*, an employer will now be entitled to request and receive from a health care professional treating an injured worker information concerning the worker's functional abilities. The consent to release of this information

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34. The concern with "overreliance" reflects a preoccupation on the part of the government that there are fraud and abuse in the system. The Conservatives put the matter as follows in their "Common Sense Revolution": "The PC Party would take immediate action to address the problem of fraud and abuse of the [workers' compensation] system." This concern goes hand-in-hand with the government's overall agenda of reducing the cost of doing business in the province, which reflects employers' interests.
35. In background papers accompanying the release of Bill 99, the Ministry of Labour identified reduction of benefits as a key incentive to encourage the return to work. In addition, benefits would be tied strictly to the economic loss associated with wage loss, and nothing more. Ministry of Labour, "Enhancing Worker and Employer Self-Reliance: Fact Sheet No. 5" (26 November 1996) at 1.
36. *WSIA*, s. 33.
37. The new Act defines a health care practitioner as a health professional regulated by the *Regulated Health Professions Act* and a drugless practitioner regulated by the *Drugless Practitioners Act* or a social worker. A regulated health professional includes chiropractors, massage therapists, medical doctors, nurses, occupational therapists, physiotherapists, psychologists, and respiratory therapists.
38. *WSIA*, s. 32.
39. *WSIA*, s. 34(2).

is a condition an injured worker must agree to in order to be able to file his or her claim.⁴⁰

Absent from the new Act is any mention of medical rehabilitation, or the suggestion of an active program of rehabilitation aimed at restoring an injured worker, as much as possible, to his pre-injured physical state. Also dropped is any reference to a vocational rehabilitation program, which under the *WCA* the Board was required to set up in consultation with an injured worker when the worker was unable to return to her place of employment. Instead, the changes will result in the Board having the discretion to offer to injured workers a Labour Market Re-entry Plan (LMRP).⁴¹ The precise scope and nature of a LMRP are unclear, based on the language of the new Act. Under the *WCA*, the Board was under an obligation to assess a worker's need for vocational rehabilitation services, and to provide such services where the need existed.⁴² Moreover, the *WCA* required that the employer cooperate in any vocational rehabilitation services provided under s. 53.⁴³ As under the sections dealing with the provision of health care, the penalty for a worker's failure to cooperate with the preparation and implementation of a LMRP is increased to include the suspension of benefits.⁴⁴

One of the conditions that will trigger the Board's duty to decide whether to prepare a LMRP is when an employer has been unable to arrange work for a worker that is consistent with her functional abilities and restores her to her pre-injury earnings. Under the new legislation, the onus is on the employer and the worker to develop a plan to get her back to work, accommodating for her new physical condition and ensuring that she is paid at the same level as before the injury. This is an entirely new set of obligations, and is dependent on the quality of information gleaned from the

40. *WSIA*, s. 37(3) and s. 22(5). The Employers' Council on Workers' Compensation viewed this change as foundational to the success of the changes in Bill 99, *supra*, note 33 at 21. There are many problems with the Draft Functional Ability Information Form, including whether it will provide adequate information for the purpose of returning an injured worker to safe and appropriate work without loss of pre-injury income. Moreover, it is arguable that this requirement is open to a s. 7 Charter challenge as a violation of the right to privacy.

41. The language of s. 42(1) only requires the Board to provide a labour market re-entry assessment of a worker given certain conditions. Even if the conditions exist, the Board is under no obligation to provide a worker with a LMRP, but simply is under a duty to decide whether one will be prepared, *WSIA*, s. 42(2).

42. *WCA*, s. 53.

43. *WCA*, s. 103(4.1).

44. *WSIA*, s. 43(7). There is no corresponding legislative or regulatory provision under the *WCA*. However, WCB policy provides that "... VR [Vocational Rehabilitation] caseworkers are not involved in decisions regarding entitlement to compensation benefits, though they furnish information that allows claims adjudicators to make informed decisions." WCB, *Operational Policy Manual*, Document No. 07-01-02. Where a VR caseworker determines that a worker is refusing to cooperate in her vocational rehabilitation plan, the caseworker will close the VR file and inform the worker of possible vocational objectives. These objectives can be used by benefits adjudicators to determine the amount of a worker's benefits. WCB, *Operational Policy Manual*, Document No. 07-04-02.

Functional Abilities Information Form.⁴⁵ The significance of this change is that the Board will take a very secondary role in the process of getting a worker back on the job. The Board will only get involved if it has been notified by either the worker or the employer that there is a dispute.⁴⁶ While the *WSIA* imposes an obligation on employers and workers to notify the Board when there is a dispute and an obligation on the Board, once notified, to attempt to resolve the dispute, it will remain to be seen whether such an arrangement can practically be followed and enforced. The effect of this change will be to leave the worker alone to face his employer in trying to establish the terms and conditions of his return to work; and this often in a context in which the injury or illness has resulted in an adversarial relationship between them.

Security vs. Insurance

Perhaps the single most important change contained in the *WSIA*, one that the government trumpeted when it unveiled Bill 99, is the shift toward running the system along the principles of insurance and away from seeing it as a system of social and income security for injured workers. As one of the Ministry of Labour's background fact sheets put it, "A primary goal of reform is to restore the workers' compensation system to its original mandate as a workplace accident insurance plan. This means a workplace insurance plan that covers *only* the consequences of injuries caused by work and minimizes the losses of both workers and employers."⁴⁷

The title of the Act, the *Workplace Safety and Insurance Act*, contains the most vivid harbinger of the shift in orientation and the guiding principles animating its various provisions. Among the sections that stand out as evidence of this change are greater discretion to the Board in commuting periodical payments for permanent disability into a lump sum;⁴⁸ the elimination of mental stress as a compensable injury, except where it is an "acute reaction to a sudden and unexpected traumatic event arising in the course of his or her employment" (s. 13(4)(5)); restrictions on compensability for chronic pain, as that is defined in the regulations (s. 14(1));⁴⁹ more emphasis on

45. *WSIA*, s.40(1)(2). Cf. *supra*, note 40, for a discussion of the Functional Abilities Information Form.

46. *WSIA*, s. 40(6), although the Board may contact the employer and the worker to monitor progress on return to work, s. 40(5).

47. Ministry of Labour, "Refocusing the System as a Workplace Insurance Plan: Fact Sheet No. 2" (26 November 1996) at 1. [Emphasis added.]

48. Cf. *WCA*, ss. 27(1) and 47. Under s. 47, commutation of compensation is to be done "... in the circumstances [that seem] most for the worker's advantage." The Board is required to apply no such test under the new legislation.

49. In her remarks before the Standing Committee on Resources Development, Labour Minister Witmer stated that the legislation will limit compensation for chronic pain to the normal healing time, a move the Minister characterized as part of the effort to refocus the legislation along insurance principles, *supra*, note 16 at 4. Prior to the enactment of Bill 99, the Board issued Draft Policy Guidelines which, it stated, would form the basis of the regulations. Chronic pain will be defined as, "(i) pain which persists beyond 'usual recovery time'; and (ii) pain for which there is insufficient evidence to indicate that a physical abnormality or loss related to a compensable injury or disease is the cause of the pain." Workers' Compensation Board, "Definition of Chronic Pain Program and Ontario Usual

returning the injured worker to work by imposing greater obligations to cooperate with efforts at returning him to work (s. 40(2)); reducing the benefit levels by five percentage points (s. 43(2)); requiring consent to the release of a worker's functional abilities in order to speed up the return to work (s. 22(5)); suspending benefits for failure to cooperate in efforts to bring about a return to work (s. 43(7)(b)-(d)); increased penalties for a worker's failure to cooperate with health care that the Board determines is necessary and appropriate (s. 43(7)(a)).

In addition to these provisions, the new Act will also permit the Board to pre-fund fully its liabilities. As well, in the case of self-employed and independent contractors who wish to be covered by the insurance plan, the *WSIA* will allow the Board to require from them that they pre-pay their coverage fully (s. 12(4)).

Appeals

A number of changes are contemplated under the *WSIA*. First, the jurisdiction of the Tribunal will be significantly changed, as a number of matters currently under it will be expressly removed.⁵⁰ These include any decisions having to do with injury and disease prevention, rights of action and health examination, payment of benefits, allocation of payments, and enforcement. The most far-reaching change, however, is found in s. 126, which will require the Tribunal to apply the Board's policies in its decisions. Moreover, it will be the Board that will determine whether a relevant policy exists, which the Tribunal will have to apply to the facts of a case, and to certify which policy applies in a given appeal. In short, these changes will strip the Tribunal of much of its independence, rendering it subservient to the Board, whose decisions will be themselves the subject of appeals.

With such proposed changes, what sense can be made of them? And from what vantage point? In 1964, the 48th International Labour Conference of the ILO adopted the *Employment Injury Benefits Convention (No. 121)*, which updated earlier Conventions and confirmed international standards for the compensation of workers injured or ill as a result of their employment.⁵¹ The Conference also adopted a Recommendation

Recovery Time Guidelines: Definitions, Job Strength Categories, Examples (12 June 1997). The usual recovery time is the time it takes for most workers with a particular type of injury to recover from the injury and safely return to their pre-injury employment. If the Board decides that a worker suffering from chronic pain would benefit from a pain management program, then the worker will be eligible for health care and loss of earnings benefits; if not, then the worker will not be so eligible. Moreover, the Board is of the view that workers will not likely benefit from a pain management program more than twelve months after the injury, thus limiting the window for applying such programs.

50. *WSIA*, s. 123(2).

51. Other Conventions that had dealt with this topic included the *Workmen's Compensation (Agriculture) Convention (No. 12, 1921)*, the *Workmen's Compensation (Accidents) Convention (No. 17, 1925)*, the *Workmen's Compensation (Occupational Diseases) Convention (No. 18, 1925)*, the *Workmen's Compensation (Occupational Diseases) Convention (Revised) (No. 42, 1934)*, and the *Social Security (Minimum Standards) Convention (No. 102, 1952)*, in *International Labour Organization, International Labour Conventions and Recommendations* (Geneva: International Labour Of-

with respect to the same matter. We now turn to these two documents, and some other social security Conventions and Recommendations that the ILO has adopted, to provide a framework for assessing the Ontario government's project of reform of workers' compensation.

III. INTERNATIONAL LABOUR STANDARDS AND WORKERS' COMPENSATION

Canada was among the founding nations of the ILO, which emerged from the Paris Peace Conference of 1919.⁵² As John Mainwaring puts it, "[t]he story of the ILO's founding is the story of an attempt to establish a system of international labour legislation."⁵³ However, as Mainwaring also admits, this aspiration of international labour legislation binding on all member countries never materialized. The ILO's standards never achieved such status.⁵⁴

In the course of the Organization's history, its annual Conferences have adopted 181 Conventions and 188 Recommendations.⁵⁵ They break down broadly into categories of basic human rights,⁵⁶ employment policy,⁵⁷ social policy,⁵⁸ labour administration,⁵⁹

fice, 1996).

52. For a history of the Organization from a Canadian perspective, see Mainwaring, *supra*, note 12. Mainwaring was a civil servant in the Department of Labour and, for many years, had responsibility for overseeing Canada's relationship with the ILO.
53. *Ibid.* at 3.
54. *Ibid.* at 3-4.
55. International Labour Organization, *ILOLEX: Conventions* (19 December 1997) <http://ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/convenq.htm> (Date accessed: 15 January 1998); International Labour Organization, *ILOLEX: Recommendations* (19 December 1997) <http://ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/recomq.htm> (Date accessed: 15 January 1998). Cf. N. Valticos and G. von Potobsky, *International Labour Law*, 2d rev. ed. (Boston: Kluwer Law and Taxation Publishers, 1995) for a discussion of the character of Conventions, at 50-51.
56. For the ILO, basic human rights of workers include freedom of association (six Conventions and three Recommendations), freedom from forced labour (two Conventions and one Recommendation), and equality of opportunity (three Conventions and three Recommendations), in *International Labour Conventions and Recommendations*, *supra*, note 51.
57. This broad category includes employment policy (two Conventions and three Recommendations), employment services and agencies (three Conventions and one Recommendation), vocational guidance and training (one Convention and one Recommendation), rehabilitation and employment of disabled persons (one Convention and two Recommendations), and employment security (one Convention and one Recommendation), *ibid.*
58. Social policy includes one Convention on basic social policy standards and a Recommendation on cooperatives, *ibid.*
59. Besides one Convention and one Recommendation devoted to general labour administration matters, this category also includes Conventions and Recommendations dealing with labour inspection (three Conventions and three Recommendations), labour statistics (two Conventions and one Recommendation), and tripartite consultation among labour, employers and government (one Con-

labour relations,⁶⁰ conditions of work,⁶¹ social security,⁶² the employment of women,⁶³ the employment of children and young persons,⁶⁴ older workers, migrant workers, indigenous and tribal peoples,⁶⁵ workers in non-metropolitan areas,⁶⁶ and particular occupational sectors (seafarers, fishers, inland navigators, dockworkers, plantation workers, tenants and sharecroppers, nursing personnel, and hotel and restaurant workers).

Notably absent from among Canada's list of ratifications, for our purposes, are Conventions 121 (Employment Injury Benefits), 102 (Minimum Social Security Standards), 167 (Maintenance of Social Security Rights) and 42 (Occupational Diseases). This is an issue to which we shall return in the next section. It is sufficient to remark here, though, that Canada's failure to ratify these Conventions does not weaken the standards that are set out in them, their moral force on member states that have not ratified them, or their heuristic value in interpreting domestic law.

Significantly, the optic with which the ILO views the *Convention on Employment Injury Benefits (No. 121)* is one of social security standards for injured workers.⁶⁷ In

vention and one Recommendation), *ibid.*

60. This category encompassed seven Recommendations and one Convention, dealing with matters such as collective agreements (one Recommendation), collective bargaining (one Convention and one Recommendation), conciliation and arbitration (one Recommendation), and grievances (one Recommendation), *ibid.*
61. This category includes wages (five Conventions and three Recommendations), general conditions of work involving hours of work (nine Conventions and two Recommendations), night work (two Conventions and one Recommendation), weekly rest (two Conventions and one Recommendation), paid leave (four Conventions and four Recommendations), and part-time work (one Convention and one Recommendation), occupational health and safety (twenty Conventions and twenty-two Recommendations), and social services and leisure for workers (three Recommendations), *ibid.*
62. The category embraces comprehensive general standards of social security (three Conventions and two Recommendations), medical care and sickness benefits (three Conventions and two Recommendations), old age, invalidity and survivors' benefits (eight Conventions and one Recommendation), employment injury benefits (six Conventions and three Recommendations), and unemployment benefits (two Conventions and two Recommendations), *ibid.*
63. There are a number of sub-categories here, including maternity benefits (two Conventions and one Recommendation), night work (three Conventions, one Protocol and one Recommendation), and underground work (one Convention), *ibid.*
64. This field includes minimum age (seven Conventions and two Recommendations), night work (three Conventions and two Recommendations), medical examination (three Conventions and one Recommendation), and underground work (one Recommendation), *ibid.*
65. These are three separate categories: older workers (one Recommendation), migrant workers (three Conventions and three Recommendations), and indigenous and tribal peoples (seven Conventions and two Recommendations), *ibid.*
66. This category includes a mix of Conventions and Recommendations touching themes such as social policy, labour standards, and the right of association, *ibid.*
67. For a discussion of the historical development of the meaning of social security, see A.L. Parrott, "Social Security: Does the Wartime Dream Have to Become a Peacetime Nightmare?" (1992) 131 *Int'l Labour Rev.* 367. The elements of a social security system should include: (i) universal primary

the Organization's taxonomy of Conventions and Recommendations, *Convention 121* (as well as its predecessors and accompanying Recommendations) is grouped with the other social security Conventions and Recommendations. Moreover, in establishing minimum social security standards in 1952, the 35th International Labour Conference included benefits for injured workers. The general obligation clause for employment injury benefits in *Convention 102* provides that, "Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of employment injury benefit in accordance with the following articles of this Part."⁶⁸ While *Convention 102* allows for underdeveloped countries to opt out of certain obligations, importantly such a possibility for employment injury benefits is very circumscribed and limited, and even in countries where this option is exercised certain minimum standards are required.⁶⁹ In other words, even in 1952 the Organization recognized the fundamental right of injured workers to minimum standards of care, including income security against the loss of earnings as a result of being unable to work at all or to the same degree as before the injury.⁷⁰

A review of the various Conventions and Recommendations dealing with employment injury benefits reveals a recurring set of standards, which is most completely present

and preventive medical care; (ii) income maintenance to a minimum standard in the event of involuntary loss of earnings or a significant part of earnings; (iii) supplementary income grants to those with family responsibilities; (iv) systems that are set up by legislation, in virtue of which individual rights are guaranteed by a public or semi-public body that assumes corresponding obligations; (v) and finally, the system should be administered by a public, semi-public or independent body. Part of the history of the debate surrounding the development of the notion of social security was to what extent it was to be based on insurance principles of contributions and limitations of benefits. While that debate remains unresolved, at least in respect of employment injury benefits the question has been resolved in favour of a non-contributory approach to entitlement. Cf. Parrott, *ibid.*, at 378 ff.

68. *Convention 102*, in *International Labour Conventions and Recommendations*, *supra*, note 51 at art. 31.

69. *Ibid.* at arts. 3(1), 33(b), and 34(3).

70. Another indication of the ILO's view of employment injury benefits as a social security right is found in the Preamble to the Organization's Constitution. The Preamble states, in part, "[w]hereas universal and lasting peace can be established only if it is based on social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment...." *Constitution of the International Labour Organization and Standing Orders of the International Labour Conference* (Geneva: International Labour Office, 1989). At stake in the Organization's work, in other words, is addressing "conditions of labour ... involving ... injustice" that are a threat to universal and lasting peace. Or, positively, the aim of the Organization is to establish standards that bring about labour conditions that contribute to social justice for people who are the victims of injustice. Among the conditions of social justice listed is the protection of workers against sickness, disease and injury arising out of employment. Such protection can be both preventive and remedial, but in any case involves establishing and securing a right as the legal expression of the ethical imperative of social justice. It is just such a view that the Organization has taken in adopting provisions in Conventions and Recommendations to protect injured workers.

in *Convention 121* and *Recommendation 121*. Specifically, the following questions articulate the principal concerns that the Conventions and Recommendations attempt to address: who should be covered by national schemes to protect against employment injuries? what contingencies should be covered? what benefits should be provided? how should these schemes be administered? and what obligations are states parties under?

Article 4(1) of *Convention 121* provides for the following scope of coverage:

National legislation concerning employment injury benefits shall protect all employees, including apprentices, in the public and private sectors, including co-operatives, and, in respect of the breadwinner, prescribed categories of beneficiaries.

The Convention's framers clearly envisaged a broad reach for it, to include all workers. Moreover, article 27 requires parties to treat non-nationals in the same way as they treat their nationals in the provision of benefits.

There are, however, three exceptions to the universal coverage implied in articles 4(1) and 27. First, article 3(1) states,

Any Member which ratifies this Convention may, by a declaration accompanying its ratification, exclude from the application of the Convention —

- (a) seafarers, including fishermen,
- (b) public servants,

where these categories are protected by special schemes which provide in the aggregate benefits at least equivalent to those required by the Convention.

Second, article 4(2) allows,

Any Member may make such exceptions as it deems necessary in respect of —

- (a) persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business;
- (b) outworkers;
- (c) members of the employer's family living in his house, in respect of their work for him;
- (d) other categories of employees, which shall not exceed in number 10 per cent of all employees other than those excluded under clauses (a) to (c).

Finally, article 5 states,

Where a declaration provided for in Article 2 is in force, the application of national legislation concerning employment injury benefits may be limited to prescribed categories of employees, which shall total in number not less than 75 per cent of all employees in industrial undertakings, and, in respect of the death of the breadwinner, prescribed categories of beneficiaries.⁷¹

71. The reference to article 2 is to a general opt out clause in the Convention in which underdeveloped countries may, by way of a declaration at the time of ratification, exempt themselves from a number of obligations of the Convention, including the scope of employees to which the Convention applies.

Although the Convention allows for these exceptions, they should be read restrictively, for a number of reasons. First, the overall purpose of the Convention is to provide protection to workers who have been injured or are ill as a result of their employment. While this Convention is not covered, strictly speaking, by the terms of the *Vienna Convention on the Law of Treaties*,⁷² nonetheless the *Vienna Convention* suggests the proper approach to adopt in order to give effect to the purpose of *Convention 121*: a large and liberal reading of the remedial clauses and a restrictive and narrow reading of the exemption clauses.⁷³

Convention 121 also contains a number of qualifications to the exemption clauses, suggesting that these latter should be read narrowly. For example, both articles 2 and 3, which provide for the exclusion of certain prescribed categories of employees from the Convention's application, require that states make a declaration of exemption, which must accompany the ratification. In other words, states contemplating excluding workers from the Convention's protection must do so by a positive act and publicly. Moreover, such states must, when they submit their annual reports to the Governing Body of the ILO detailing their compliance with the Conventions they have ratified, include their reasons for continuing to avail themselves of the exemptions allowed under article 2(1) of the Convention.⁷⁴

In addition, article 3 allows for the exclusion of seafarers and public servants from the application of the Convention provided that these workers are covered by other schemes whose benefits are at least equivalent to those contained in the Convention. In a similar manner, the exclusions allowed under article 5 must be such that not less than "75 per cent of employees in industrial undertakings, and, in respect of the death of the breadwinner, prescribed categories of beneficiaries" are covered by domestic legislation.

Third, article 4 contains an instructive juxtaposition of language. On the one hand, the clause providing for the scope of coverage is mandatory — "National legislation concerning employment injury benefits *shall* protect..."; on the other hand, the exceptions under clause 2 are permissive — "Any Member *may* make such exceptions...." [Emphasis added.] The presumption, and fundamental obligation, of the

72. Article 4 of the *Vienna Convention* provides that it applies only to treaties concluded after its entry into force. (1969) 8 I.L.M. 679.

73. See *Vienna Convention*, articles 18 (obligation not to defeat the object and purpose of a treaty prior to its entry into force), 27 (internal law and the observance of treaty obligations), 31 and 32 (principles of interpretation), *ibid.*

74. The annual reports are required under article 22 of the ILO's Constitution: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request," *Constitution of the International Labour Organization*, *supra*, note 70. Article 2(2)(a) of *Convention 121* requires that states availing themselves of the possibility of exemptions include a statement of why the reasons for the exemptions continue.

Convention is in favour of the inclusion within its ambit of all employees. Exceptions and exclusions are permitted, not required, and under limited conditions.

More recently, the ILO has turned its attention to the phenomenon of migration and its impact on workers' social security rights. In 1982, the 68th Conference adopted the *Convention Concerning the Establishment of an International System for the Maintenance of Rights in Social Security (Convention 157)*.⁷⁵ In recognition of the globalization of the economy and the increasing movement of peoples, the Conference adopted a Convention that lays out principles governing member states' bilateral and multilateral agreements with respect to social security rights of individuals who are required to move from state to state.⁷⁶ What is significant about this Convention is the extension of the protective scope of employment injury benefits to other categories of workers: migrants, refugees and stateless persons.

Finally, in *Recommendation 121* the 48th Session of the International Labour Conference urged each member state to extend the application of its employment injury legislation to workers not otherwise covered.⁷⁷ In particular, article 2 makes reference to any employees who have been excepted in virtue of article 4(2) of *Convention 121*. As well, *Recommendation 121* states that,⁷⁸

Each Member should, subject to prescribed conditions, secure the provision of employment injury or analogous benefits, if necessary by stages and / or through voluntary insurance, to —

75. *International Labour Conventions and Recommendations*, *supra*, note 51.

76. Article 2(1) provides: "Subject to the provisions of paragraph 1 and of paragraph 3, subparagraph (a) of Article 4, this Convention applies to those of the following branches of social security for which a Member has legislation in force: (a) medical care; (b) sickness benefit; (c) maternity benefit; (d) invalidity benefit; (e) old age benefit; (f) survivors' benefit; (g) *employment injury benefit, namely benefit in respect of occupational injuries and diseases*; (h) unemployment benefit; and (i) family benefit." [Emphasis added.]

77. *Supra*, note 51. The constitutional authority for adopting Recommendations is found in article 19(1)(b) of the ILO's constitution, *Constitution of the International Labour Organization*, *supra*, note 69. Generally, observers and members of the ILO see Recommendations serving several functions. First, a Recommendation will often be adopted when the International Conference is of the opinion that a question is not mature enough to be settled by a Convention. In such cases, a Recommendation frequently becomes a prelude to the adoption of a Convention by a later Conference. Second, Recommendations will often accompany the adoption of a Convention, serving as more detailed guidelines for the implementation of the standards contained in the Convention. Third, Recommendations have been used for areas of labour law that are very technical and vary considerably from country to country. Under these circumstances, the Conference prefers a more flexible instrument, which can be adjusted more frequently. The use of Recommendations is not without its critics. In particular, workers' organizations object to their use alone as a poor substitute for Conventions. For a more detailed discussion of this see, Valticos and von Potobsky, *supra*, note 55 at 61-63.

78. *Supra*, note 51 at Cl. 3(1). Paragraph 2 of this clause demonstrates the Conference's priorities, stating that the financing of voluntary schemes should not be done at the expense of or from the contribution intended to finance compulsory schemes.

- (a) members of co-operatives who are engaged in the production of goods or the provision of services;
- (b) prescribed categories of self-employed persons, in particular persons owning and actively engaged in the operation of small-scale businesses or farms;
- (c) certain categories of persons working without pay, which should include —
 - (i) persons in training, undergoing an occupational or trade test or otherwise preparing for their future employment, including pupils and students;
 - (ii) members of volunteer bodies charged with combating natural disasters, with saving lives and property or with maintaining law and order;
 - (iii) other categories of persons not otherwise covered who are active in the public interest or engaged in civic or benevolent pursuits, such as persons volunteering their services for public office, social service or hospitals;
 - (iv) prisoners and other detained persons doing work which has been required or approved by competent authorities.

With this article, one gains in appreciation the breadth of coverage that the ILO envisages, even though this vision is contained in a non-binding instrument. In short, the purpose of *Convention 121* is to ensure complete coverage of nationals and non-nationals who work and who are injured or fall ill as a result of their work, whether in the form of paid employment, volunteer work, or training and education in preparation to join the labour force.

But if everyone who works, broadly defined, is to be covered, against what misfortune are they to be covered? Articles 6 through 8 of *Convention 121* provide for the contingencies that any national legislation dealing with employment injuries should cover. Significantly, none of these articles contains any exception clauses. The situations covered include a morbid condition, the incapacity for work and a resulting loss of earnings due to an injury or disease, a total or partial loss of earning capacity that is likely to be permanent, and the loss of support suffered by prescribed beneficiaries due to the death of the principal income-earner.⁷⁹ In other words, the Convention applies to work-related injuries or diseases that affect a person's capacity to work in the same way and with the same potential for earning as before the injury or onset of the disease, whether the effect is temporary or permanent, partial or complete.

In addition, the Convention requires of states parties that their national legislation include a definition of what constitutes an industrial accident, and that such definition include the conditions under which commuting to and from work is considered an industrial accident.⁸⁰ Finally, article 8 of the Convention requires that the parties include in their legislation either a list of occupational diseases comprising at least

79. *Convention 121, supra*, note 51 at art. 6.

80. *Ibid.*, at art. 7(1).

those diseases contained in Schedule I of the Convention or a definition of occupational disease broad enough to encompass the Schedule I diseases.⁸¹

As for the benefits to which injured workers are entitled, *Convention 121* requires that parties provide a range of medical benefits and cash benefits as compensation for loss of earning capacity, whether temporarily or permanently, partially or fully, and for death of the breadwinner. Moreover, article 9(2) specifies that “[e]ligibility for benefits may not be subject to the length of employment, to the duration of insurance or to the payment of contributions: Provided that a period of exposure may be prescribed for occupational diseases.” As well, clause 3 of article 9 stipulates that “[t]he benefits shall be granted throughout the contingency: Provided that in respect of capacity for work the cash benefit need not be paid for the first three days....”

Article 9 represents a central obligation article and distinguishes *Convention 121* as preeminently concerned with social security and not insurance. In the first place, there is an entitlement to benefits irrespective of the length of employment or whether contributions have been paid or not. Second, the benefits are to cover the entire period of the injury or illness resulting in incapacity. Although there is allowance for a three day waiting period, it is permissive and applies only to the payment of cash benefits.

Among the medical care benefits that must be provided are,⁸²

- (a) general practitioner and specialist in-patient and out-patient care, including domiciliary visiting;
- (b) dental care;
- (c) nursing care at home or in hospital or other medical institutions;

81. The diseases listed in Schedule I are: pneumoconioses caused by sclerogenic mineral dust and silico-tuberculosis; bronchopulmonary diseases caused by hardmetal dust; bronchopulmonary diseases caused by cotton dust or flax, hemp or sisal dust; occupational asthma caused by sensitising agents or irritants; extrinsic allergic alveolitis and its sequelae caused by the inhalation of organic dusts, as prescribed by national legislation; diseases caused by beryllium or its toxic compounds; diseases caused by cadmium or its toxic compounds; diseases caused by phosphorous or its toxic compounds; diseases caused by chromium or its toxic compounds; diseases caused by manganese or its toxic compounds; diseases caused by arsenic or its toxic compounds; diseases caused by mercury or its toxic compounds; diseases caused by lead or its toxic compounds. The Governing Body of the ILO is proposing a revision of this list, to be considered at the 87th Session of the International Labour Conference in 1999. The proposed new list would cover the following additional new items: diseases caused by inorganic and organic chemical substances or their compounds not included in the current list; diseases caused by physical agents such as heat radiation, ultra-violet radiation, and extreme temperatures; occupational respiratory diseases not included in the current list; occupational musculo-skeletal disorders and diseases caused by repetitive motion, forceful exertion and postures; occupational cancer caused by carcinogenic substances not in the current list; other diseases and disorders, including skin diseases caused by physical, chemical, or biological agents not included under other items, and any other diseases for which a direct link between the exposure of workers to such an agent and the diseases suffered is established. International Labour Office, “Proposals for New Standards” GB.268/2 268th Session (March 1997) <http://www.ilo.org/public/english/20gb/docs/gb268/gb-2.htm> (Date accessed: 15 January 1998) at para. 40.

82. *Convention 121*, in *International Labour Conventions and Recommendations*, *supra*, note 51 at art. 10(1).

- (d) maintenance in hospitals, convalescent homes, sanatoria or other medical institutions;
- (e) dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances kept in repair and renewed as necessary, and eyeglasses;
- (f) the care furnished by members of such other professions as may at any time be legally recognized as allied to the medical profession, under the supervision of a medical or dental practitioner; and
- (g) the following treatment at the place of work, wherever possible:
 - (i) emergency treatment of persons sustaining a serious accident;
 - (ii) follow-up treatment of those whose injury is slight and does not entail discontinuance of work.

The Convention goes on to specify that the application of medical care to an injured worker must be done with the aim of restoring him to pre-injury health, or at least sufficiently to enable him to return to work and to attend to personal needs.⁸³ While article 9 can be made the subject of a declaration of exception in virtue of article 2, a party so declaring must nevertheless provide at least general practitioner care, including home visits, specialist care, both in and out of hospital, essential pharmaceutical supplies, hospitalization as needed, and emergency treatment at work.⁸⁴

Convention 121 also contains a number of additional clauses imposing obligations on states parties in respect of cash payments. What stands out from these other clauses is the comprehensiveness of coverage that the Convention aims to achieve and requires. Payment is to be periodical, thus ensuring a flow of compensation for the duration of the incapacity (arts. 13 and 14). Commutation of the periodical payment into a lump sum payment is to be done only exceptionally, with the agreement of the injured worker, and in circumstances when it is determined that the use of the lump sum is clearly advantageous to the worker (art. 15). The restriction of commutation in this way reflects the concern that disabled workers might outlive the actuarial prediction upon which the lump sum was calculated, thus leaving them without a source of income.

Article 17 provides that reassessments of periodical payments will be done at prescribed intervals and according to prescribed criteria. Although these may result in a reduction or cancellation of payment, they also may require an increase in the payment due an injured worker. However, the force of the article is to provide some legislative framework for such reassessments, and not leave them (and injured workers) to the whim of bureaucrats, politicians or public opinion eager to cut people off at the first opportunity. The Convention also prescribes a minimum level of benefit: in the case of injured workers, 60% of pre-injury earnings and any family allowances payable to the spouse, and in the case of survivors' benefits, 50% of the breadwinner's earnings and of the family allowances payable to the surviving spouse (arts. 19 and

83. *Ibid.*, at art. 10(2).

84. *Ibid.*, at art. 12.

20). While the Convention allows a state party to prescribe a maximum benefit rate, this clause is restricted to the calculation of benefits payable to skilled workers and in the final analysis is permissive (art. 19(3)). The Convention is silent on the question of indexation; in the accompanying Recommendation, clause 15 urges that cash benefits payable in respect of permanent disability and of death should be fully indexed. As well, the Convention itself requires additional payments to permanently disabled workers who need the help and attendance of another person (art. 16).

Curiously enough, *Convention 121* does not require states parties to establish a system of vocational rehabilitation of any sort. Nevertheless, the ILO has not remained silent on the question of rehabilitation, devoting a Convention to vocational training and rehabilitation of disabled persons, as well as two Recommendations.⁸⁵ The overall purpose of *Convention 159* is to "...enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society."⁸⁶ States parties to the Convention undertake to formulate and implement policies of vocational rehabilitation and employment of disabled persons.⁸⁷

ILO Conventions create substantive obligations only for states that have ratified them. So, for example, Canada's obligations under international law may be engaged only in respect of those Conventions that it has ratified.⁸⁸ However, as a member of the ILO Canada does have certain obligations, which are set out in the Organization's Constitution.

First, article 19(5) requires member states to submit within 18 months of their adoption all Conventions and Recommendations to the national "authorities within whose competence the matter lies, for the enactment of legislation or other action." An innovation at the time, this obligation is a compromise between the view that an adopted Convention should automatically impose binding obligations on states parties and the view that states remain sovereign in the determination of what obligations they undertake.⁸⁹

In the case of federal states, the ILO's Constitution requires that for Conventions and Recommendations touching upon matters that belong within the jurisdiction of a constituent legislative authority, for example a state, a province or a canton, the federal government must refer them to the appropriate constituent authorities.⁹⁰ Again, this is to happen within 18 months of adoption of the Convention or the Recommendation.

85. *Convention No. 159*, in *International Labour Conventions and Recommendations*, *supra*, note 51; *Recommendation No. 99* and *Recommendation No. 168*, *ibid.*

86. *Convention 159*, *ibid.*, at art. 1(2).

87. *Ibid.*, at art. 2.

88. See *supra*, note 13 for a list of the Conventions that Canada has ratified.

89. See Valticos and von Potobsky, *supra*, note 55 at 267.

90. *Constitution of the International Organization*, *supra*, note 70 at article 19(7).

In addition, the federal government is required to report to the ILO on the steps it has taken to refer the Conventions and Recommendations to the appropriate authorities, as well as on the actions of these latter.

Article 19(d) of the Constitution makes it clear that states that ratify a Convention are bound only to do what is necessary to give effect to the provisions of the Convention. While this might include legislation, legislative measures are not mandatory.⁹¹

In addition to this principal obligation, the ILO Constitution also lays out two main supervisory mechanisms to ensure compliance with the Conventions and the Recommendations. One is complaint driven and provides for a two-part procedure. One part allows any member state to lodge a complaint against another state for failure to observe the terms of a Convention that both states have ratified. The second part permits workers' and employers' organizations to make complaints to the Governing Body of the ILO.⁹²

The more common method of supervision is through the reporting requirements set out in article 22 of the Constitution. The principal supervisory body is the Committee of Experts on the Application of Conventions and Recommendations, consisting of independent experts appointed by the Governing Body of the ILO who sit on the Committee in their personal capacity. It is this Committee's responsibility to survey the extent of compliance with the Conventions and Recommendations, based on governments' reports, the observations of workers' and employers' organizations, and the replies of governments to the comments that the Committee itself makes. The annual report of the Committee is submitted to the International Labour Conference, which is the principal organ of the ILO.⁹³ Finally, article 19(5)-(7) of the Constitution requires, upon request by the Governing Body, that members submit reports on Conventions they have not ratified and on Recommendations.

The ILO has developed over the years, then, a series of specific standards whose purpose is to ensure that states provide a basic level of care and security to injured workers and their dependents, and to the survivors of workers killed on the job. Despite these standards, and despite the gains in dealing with occupational health and safety, each year there are some 200,000 work-related deaths in the world and approximately 120 million workers suffer work-related injuries and diseases.⁹⁴ Although these numbers tell only part of the story, they serve to concentrate attention in assessing the

91. See the opinion given by the International Labour Office to the governments of the United States and of Ireland, *International Labour Code*, art. 342 n. 464, pp. 277-78 and art. 1082 n. 352, pp. 863-64, as cited in Valticos and von Potobsky, *supra*, note 55 at 275.

92. State complaints are covered under articles 26-34 of the Constitution; private party complaints, known as representations, are governed by articles 24-25 of the Constitution. For a discussion of these contentious procedures, see Valticos and von Potobsky, *ibid.*, at 290-94.

93. For a discussion of the reporting requirements and mechanisms, see Valticos and von Potobsky, *ibid.*, at 284-89.

94. International Labour Office, "Proposals for New Standards", *supra*, note 81.

WSIA's capacity to respond to the needs of injured and ill Ontario workers and their survivors.

IV. THE ILO AND BILL 99: THE CONFLICT BETWEEN INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS AND DIVIDED JURISDICTION

Introduction

There is, of course, a patent and immediate problem. Canada has not ratified *Convention 121*, nor for that matter any of the ILO Conventions dealing with social security and vocational rehabilitation. Thus Canada is under no obligation at international law to adhere to the standards set out in any of these Conventions.⁹⁵

Moreover, even if Canada had ratified these Conventions, in and of itself this would not have given them legal effect in Canada in the absence of implementing legislation, which would be subject to the constitutional division of powers between Parliament and the provincial legislatures.⁹⁶ Here we run up against the conflict between treaty federalism and provincial federalism: while the power to ratify treaties, and thereby create international obligations, is an exclusive prerogative of the federal government, the treaty implementing power is subject to the sovereignty of parliament and the provinces in respect of their areas of exclusive jurisdiction.⁹⁷

95. It is doubtful that the rights outlined in *Convention 121* have achieved the status of customary international law, which, according to the *Statute of the International Court of Justice*, would require evidence that countries have given effect to these rights as a matter of law (Art. 38(1)(b)), Can. T.S. 1945 No. 7. While the Supreme Court of Canada has not pronounced clearly on the subject, Canadian courts have suggested that customary international law automatically becomes part of domestic law, without the requirement of a legislative act of incorporation. Thus the only real issue, for the purposes of discussion here, is whether Canada has ratified the Convention (which it has not) and the conditions surrounding implementation were the Convention ever to be ratified. For a fuller treatment of the relationship between international customary law and domestic law, see A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 5ff. The Alberta Union of Public Employees, in a challenge of a provision of the *Public Service Employee Relations Act* prohibiting public service sector strikes, argued that the right to strike was part of international customary law, was therefore automatically part of the law of Alberta, and that the province did not have the constitutional right to legislate contrary to international law. The Alberta Court of Queen's Bench rejected the union's position, holding that the right of public sector workers to strike was not part of international customary law, *Re Alberta Union of Provincial Employees et al. and the Crown in Right of Alberta* (1981), 120 D.L.R. (3d) 590 at 621. The judgment was upheld on appeal in the Alberta Court of Appeal, 130 D.L.R. (3d) 191, and leave to appeal to the Supreme Court of Canada was denied, December 7, 1981, [1981] 2 S.C.R. v.

96. See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) Vol. I at 11-5.

97. *A.G. Canada v. A.G. Ontario et al. (Reference Re. Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act)* (1937), 1 D.L.R. 673 (P.C.) [hereinafter *Labour Conventions*]. There is a related question, which is moot for our purposes insofar as the ILO Conventions concerning employment injuries have not even been ratified by Canada, namely, whether provinces have the constitutional authority to legislate contrary to international law. For a

Now, except in federal undertakings,⁹⁸ the regulation of labour is within the exclusive jurisdiction of the provinces by virtue of s. 92(13) of the *Constitution Act, 1867*.⁹⁹ Within the scheme of federalism that has developed in Canada the power for implementing legislation to give effect to *Convention 121* and any other Conventions affecting the rights of injured and ill workers rests squarely with the provinces. The reason for non-ratification is traceable directly to the particular configuration of the division of powers within the federation, and thus places the urgency of adhering to international standards in the protection of the rights of workers in conflict with the protection of provincial sovereignty over civil and property rights. In a background memo to the twelfth annual meeting of the Deputy Ministers of Labour on ILO matters, the Department of Labour explained the process of ratification as follows: "...where an ILO Convention applies to labour standards coming under both provincial and federal jurisdiction, the federal government will not, as a rule, proceed with ratification unless there is full compliance throughout Canada, in all jurisdictions, and unless the provinces have given their assent to a decision to ratify."¹⁰⁰

In the absence of ratification, and in the face of such deference to sovereign provincial federalism, is it futile even to look to ILO Conventions for principles with which to assess the *WSIA*? This conflict highlights precisely the analogous tension between international human rights law and the international law principle of the sovereign equality of nations.¹⁰¹ The evolution of international human rights law has resulted in

discussion of this see, D.C. Vanek, "Is International Law Part of the Law of Canada?" (1960) 8 U.T.L.J. 251 at 273 and 292; G.V. LaForest, "The Treaty-Making Power: A Canadian Dilemma" (1967) 45 Can. Bar Rev. 478; G.V. LaForest, "May the Provinces Legislate in Violation of International Law?" (1961) Can. Bar Rev. 78 at 79; G.V. LaForest, "The Labour Conventions Case Revisited" (1974) Can. Y.B. Int'l L. 137 at 140.

98. For example, see *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R. 749. *Constitution Act, 1867*, *supra*, note 14, s. 92(10).

99. See *supra*, note 14.

100. Labour Canada (International and Provincial Relations), "Agenda Item 5B: Report on the Legal Implications of Ratification of ILO Conventions" 12th Annual Meeting of Deputy Ministers of Labour on ILO Questions (21-22 April 1981) at 4 [unpublished]. The normal method for ratification of ILO Conventions is for the international affairs branch of Human Resources Development Canada to examine the Conventions and the degree of compliance within Canada. When the examination reveals that the requirements of a Convention are met in all jurisdictions, the practice is for the Prime Minister to write to the Premiers of the provinces inviting them to confirm that their legislation conforms to the requirements of the Convention and asking them to support Canada's ratification of the Convention. When all provinces have indicated their support, Canada ratifies the Convention. See Labour Canada (International and Provincial Relations), "Review of Federal Compliance with Selected ILO Conventions: Report of a Labour Canada Working Party, March 1979" 10th Annual Meeting of Deputy Ministers of Labour on ILO Questions (25-26 April 1979) at 3 [unpublished]. See also, Department of External Affairs (Legal Bureau), "Letter, June 17, 1985: Means of Expressing Consent to be Bound by Treaty" (1986) 24 Can. Y.B. Int'l L. 386 at 397.

101. This principle is expressed in a variety of documents, for example, the Charter of the United Nations, Can. T.S. 1945 No. 7, art. 2. However, it is also important to note the following limitation, expressed in the *Draft Declaration on the Rights and Duties of States*, which subjected the sovereignty of each state to the supremacy of international law, (1949) 1 Y.B. Int'l L. Comm. at art. 14.

a fundamental challenge to the inviolability of sovereignty, spelling out for state responsibility and individual protection the implications of the principle that all human beings are under the direct protection of international law.¹⁰² Thus, even in the absence of ratification and the consequent legal obligations that are created, the ILO Conventions provide principles to sharpen the focus on the rights of injured workers and the responsibility of governments for the protection of those rights.

The WSIA in the Light of the ILO Conventions and Recommendations

Several features of the new workers' compensation legislation require a critical reading. First and foremost, the Act does not address the lack of coverage for all working people. While *Convention 121* does contemplate excepting certain categories of workers,¹⁰³ the overall thrust of the Convention is for universal coverage. Indeed, *Recommendation 121*, as we saw, encourages member states to provide employment injury benefits to a wide range of workers and students. The *WSIA*, on the other hand, continues to withhold coverage for homeworkers, casual or temporary workers, the self-employed and executives. While the new Act will continue to allow the self-employed and executives to apply for coverage, it will do so subject to conditions laid down by the Board, including the possible requirement that premiums be fully pre-paid.¹⁰⁴ The more vulnerable workers — homeworkers, casual and temporary workers — will still be excluded from protection.

Although it is true that the level of cash benefit under the *WSIA* exceeds that prescribed in *Convention 121*, the determination of a worker's deemed earnings and earnings at the time of injury will be more firmly entrenched within the discretion of the Workplace Safety and Insurance Board than in the past.¹⁰⁵ What constitutes earnings will be subject to Board policy, as the definition will be removed from the legislation. *Convention 121*, on the other hand, takes a broader notion of pre-injury income and includes any family allowances payable to the spouse at the time of the injury as the basis for calculating the level of cash benefit. Moreover, article 16 of the Convention requires additional payments to permanently disabled workers who need the attendance of another person. The *WSIA*, on the other hand, looks only to lost earnings and deemed or actual post-injury earnings as the basis for calculating benefit levels.

102. This was first articulated by F.V. Garcia-Amador, in a report to the International Law Commission: "The object of the internationalization (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings as such are under the direct protection of international law." "State Responsibility: International Responsibility" (1956) 2 *Y.B. Int'l L. Comm.* 173 at 203. See also Provost, *supra*, note 11.

103. See *supra*, "International Labour Standards and Workers' Compensation."

104. Compare s. 12 of the *WSIA* to s. 13 of the *WCA*.

105. The Workplace Safety and Insurance Board (WSIB) is the new name of what formerly was the Workers' Compensation Board (WCB).

Convention 121 is silent on the question of indexation of benefits. However, *Recommendation 121* advocates that countries provide full indexation of benefits for those permanently disabled and in receipt of survivor's benefits. The *WSIA* does provide for full indexation of survivor's benefits; but only those injured workers who suffer 100% income loss or whose benefits are offset only by CPP disability payments will also enjoy full indexation. The benefits of other injured workers, including those permanently disabled, will be subject to indexation that is half the annual rate of inflation minus one to a maximum of 4 per cent.

One of the principal features of the new legislation is the degree to which discretionary power will be vested in the Board. One clear example of this, which contrasts with the requirements of *Convention 121*, is the power to reassess the level of a worker's benefits, for a period of up to 72 months. The language of the new Act's section granting this power to the Board is broad: "Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments."¹⁰⁶ Article 17 of the Convention, on the other hand, provides that the conditions under which such periodical reassessment happens must be set forth in legislation. The language of the article makes it clear that a change in the degree of loss suffered by a worker will trigger a reassessment of the benefits payable. However, the article also requires that the criteria for such reassessment be governed by a legislative framework, and not simply be left to administrative whim. The *WSIA* fails to provide the requisite legislative direction.

The Act also fails to define a compensable accident in such a way as to include the conditions under which a commuting accident is also subject to compensation. A requirement of article 7(1) of *Convention 121, Recommendation 121* goes even further and urges member states to treat as compensable,¹⁰⁷

- (a) accidents, regardless of their cause, sustained during working hours at or near the place of work or at any place the worker would not have been except for his employment;
- (b) accidents sustained within reasonable periods before and after working hours in connection with transporting, cleaning, preparing, securing, conserving, storing and packing work tools or clothes;
- (c) accidents sustained while on the direct way between the place of work and —
 - (i) the employee's principal or secondary residence; or
 - (ii) the place where the employee usually takes his meals; or
 - (iii) the place where he usually receives his remuneration.

The new legislation retains the basic framework and definition with respect to occupational diseases as is found in the *WCA*.¹⁰⁸ It will remain to be seen what diseases

106. *WSIA*, ss. 49(2)(a)-(c), 50(1)(2) and 43(6)(a).

107. Clause 5.

are included in the prescribed list of those that are compensable. Under the *WCA*, this list was not as extensive as the list contained in *Convention 121* (Schedule I) nor in the proposed changes to Schedule I of the *Convention*.

The range of medical care provided for under the *WSIA* corresponds in many respects to the care called for in *Convention 121*. The *Convention's* article 10, however, contains broader language and greater detail than is found in sections 32-38 of the *WSIA*. Specifically, the *Convention* calls for benefits that include glasses, dental care and supplies, and the upkeep and repair of prosthetic devices. The new Act, on the other hand, makes no mention of dental care or eyeglasses, and restricts the repair of prosthetic or assistive devices to circumstances in which they are damaged as a result of an accident at work.¹⁰⁹

Furthermore, the *WSIA* has dropped any reference to medical rehabilitation, a principle that is affirmed in the *Convention*: "The benefits provided in accordance with paragraph 1 of this article shall be afforded, using all suitable means, with a view to maintaining, restoring or, where this is not possible, improving the health of the injured persons and his ability to work and to attend to his personal needs."¹¹⁰ The *WSIA*, in contrast, puts emphasis on the worker's duty to cooperate with the prescribed medical care, at the risk of losing benefits. The suspension of benefits for failure to cooperate in medical care allowed under *Convention 121* is subject to a good cause provision, which is absent in the *WSIA*.¹¹¹ The *Convention* does not envisage, in other words, that the failure to cooperate is, of itself, sufficient to trigger the suspension of benefits. Finally, under the *WSIA* it is up to the Board to determine what is necessary and appropriate health care.¹¹²

The gap between the requirements of *Convention 121* and the provisions of the *WSIA* is no more vividly illustrated than in the difference between operating a workers' compensation system as an income security scheme or as a collective liability insurance scheme. The *Convention on Employment Injury Benefits* aims at establishing the former, consistent with the overall principles of the ILO. The standards set forth in the *Convention* are expansive, a view reinforced by *Recommendation 121*, and the exceptions are to be read narrowly. The *WSIA* is, on its face and according to the government's own statement of purpose in introducing the legislation, crafted along the lines of an insurance system, designed to minimize the risk to the insured (the employers) and get claimants (workers) off benefits and back to work as quickly as possible. For example, under *Convention 121* the commutation of periodic cash payments into a lump sum is to be done only very exceptionally and under restrictively narrow circumstances. The *WSIA*, on the other hand, allows for more relaxed condi-

108. Compare s. 15 of the *WSIA* to s. 1(1) of the *WCA* and article 8 of *Convention 121*.

109. *WSIA*, s. 39(1).

110. Article 10(2).

111. Article 22(1)(f).

112. *WSIA*, s. 33(2).

tions under which such commutation is permitted.¹¹³ Furthermore, whereas both the Convention and its corresponding Recommendation seek to increase the scope of coverage, in terms of who is covered and the contingencies covered, the *WSIA* moves in the opposite direction. Only executives of companies and self-employed who pre-pay fully their premiums will be eligible for coverage; mental stress has for the most part been eliminated as a compensable condition and there are restrictions on the compensability of chronic pain; the traditional exceptions of who is covered will be maintained under the *WSIA*; the avowed aim of the new law is to run a financially viable safety and insurance system whose chief purpose is not compensation but accident prevention and the return to work of injured workers. While compensation is included in the purpose clause, it is last in the list and is diminished in stature as a guiding principle for the new Act. The *Convention on Employment Injury Benefits* is, on the other hand, clearly intended to provide a set of standards for providing income security to injured and ill workers and their families, as well as the survivors of workers killed on the job.

Labour Rights and Challenging Provincial Federalism¹¹⁴

Whatever standards the Convention establishes are legally irrelevant as far as Canada is concerned, principally because of the conflict between treaty federalism and provincial federalism. Canada has not ratified the *Convention on Employment Injury Benefits* and thus not incurred any international obligations. Moreover, since the matter which is the subject of the Convention falls within the exclusive jurisdiction of the provinces, it is unlikely that the federal government will move soon to ratify the Convention in the absence of an assurance that all the provinces are in compliance with its obligations.¹¹⁵

113. *WSIA*, s. 62(2). There are only two conditions under which the Board may commute a periodic payment: if the amount of payment is 10 per cent or less of wage loss and if the Board is no longer allowed to review the payments. A worker may elect to receive periodic payments, however. In contrast, under the Convention, commutation may happen in exceptional circumstances and only with the agreement of the injured worker. The Convention does not, however, provide for a maximum threshold of benefit level beyond which commutation may not occur. See article 15 of *Convention 121* and clause 10(1) of *Recommendation 121*. The latter recommends a ceiling of 25 per cent of wage loss as the maximum benefit subject to commutation.

114. It is doubtful that the *Charter* could be used to force compliance with international standards for the treatment of injured and ill workers. First of all, the *Charter* provides no clear expression of the standards and rights that are expressed in *Convention 121*. While s. 7 of the *Charter*, security of the person, and perhaps s. 15 (prohibiting discrimination on the ground of handicap), might provide a basis, the courts have been very reluctant to give either of these rights a broad reading that would include social and economic rights, much less as requiring a positive obligation on governments to legislate in order to fulfil international obligations. Thus, it seems, the issue of holding governments accountable for respecting and providing for international human rights obligations is best dealt with as a federalism matter. For a discussion of the use of the *Charter* in support of enforcing international human rights obligations, see Bayefsky, *supra*, note 95 at 33ff. However, such an approach was rejected by the Newfoundland Supreme Court in *Newfoundland Association of Public Employees et al. v. The Queen in Right of Newfoundland*, 85 C.L.L.C. #14,020 at 12,091.

115. Cf. *supra*, note 100.

So, what avenue is available to move beyond this impasse? A set of international standards exists which, by all accounts, provides a basis for establishing a scheme of income security and rehabilitation for injured workers and their families. However, these standards lack bite and seem doomed to irrelevance due to the struggle for sovereign supremacy between two levels of government. Perhaps the time has come to reconsider the wisdom of according so much deference to the logic of this struggle. The context in which it is playing itself out is one of globalization, which poses profound challenges for the sovereignty of governments. The challenge is profoundly ethical: establishing the political conditions to enable a community to choose its social, economic and cultural values. Rising to the challenge includes developing a legal regime that will help give effect to this political enterprise. More concretely, various writers have described the challenge in different ways.¹¹⁶ A common thread, however, is that the increasing integration of economies is reducing the manoeuvring room of states to chart and realize their own goals in areas of social security, cultural expression, environmental protection, and labour standards.

The emergence of globalization as a powerful international social force is compelling international law to define new approaches to the question of sovereignty, on the one hand, and the interests of the individual, on the other. Steve Charnovitz describes the matter in the following terms: "To the extent that market failures are local or national, then local or national governments will be able to handle them. But when market failures are international in scope, there is an institutional problem, since no international government exists. The closest thing we have are treaties which commit nations to take commensurate (or at least coordinated) action."¹¹⁷ For the protection of labour rights, in the face of globalization and international market failures, the task is to challenge the inviolability of sovereignty in the same way that the idea of internationally protected human rights has done so over the past fifty years.

116. Stephen Toope has put the matter as follows, "... international human rights law is weakly articulated in terms of implementation mechanisms. For that reason, political implementation is required and this inevitably sets up significant tensions between states," "Cultural Diversity and Human Rights" (1997) 42 *McGill L.J.* 169 at 176; Lance Compa describes the question and debate in terms of challenging the sovereignty of nations through international fair labour standards: "Advocates of international fair labor standards have challenged the traditional right of countries to address their labor laws and labor relations as solely internal matters...Opponents of international fair labor standards contend that each nation has the sovereign right to order its labor relations in accordance with domestic economic policies and development strategies," "International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies" (1993) 9 *Am. U. J. Int'l L. & Pol'y* 117 at 117; Joel Trachtman puts the matter differently: "Given the increasing intercourse across state borders, and the increasing imperative to organize production from a global perspective, no state can any longer afford to be self-sufficient. Therefore, no state has the ability alone to express the full range of its citizens' needs without the cooperation of foreign peoples or states. The state is called upon to transmit and negotiate the aspirations of its citizens in order to obtain this cooperation," "L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 *Harv. Int'l L.J.* 459 at 462.

117. S. Charnovitz, "The World Trade Organization and Social Issues" (1994) 25 *J. World T.* 17 at 19.

As borders dissolve in the wake of economic globalization, how can nation states be strengthened so that they can provide effective protection of the rights of workers? The question of sovereignty and the protection of labour rights is, on the one hand, a matter of holding states accountable for the treatment of their own workers and, on the other hand, creating standards and mechanisms for enforcement which make it possible for states to resist the race to the bottom as the *quid pro quo* for economic development. With this new economic context, then, is there a way of conceptualizing anew the constitutional framework to act as a countervailing force to this international economic process, to ensure that the rights of workers — in particular injured workers — are not sacrificed? Is there some constitutional basis upon which the internationally sanctioned rights of injured workers can be given legal effect across the country?

In a comment on *The Queen v. Klassen*, then Professor Bora Laskin made the following assessment of the Privy Council's interpretation of s. 91(2) of the *Constitution Act, 1867*:¹¹⁸

What, it may properly be asked, were the defects of Privy Council interpretation of section 91(2)? The major one was its consistent refusal to look at an economic or social problem as a whole, and its correlative *a priori* assumption that every problem of trade regulation necessarily had its national and its local aspects which constitutionally had to be separated regardless of resulting violence to a legislative scheme...Arguments of functional connection or integration, if made were rejected...This, however, was the very approach which was used in the *Klassen* case and which undergirds its importance.

The analogical importance and relevance of Laskin's insight, in connection to the treatment of the federal power to regulate interprovincial and international trade, is clear: the need to adopt a more functional and integrated, and correspondingly less compartmentalized, approach to the treaty making and implementing powers within the federation.

The world has changed immeasurably since the *Labour Conventions* case, as has the conception of the relationship between individual human rights and the sovereignty of nations. While *Labour Conventions* remains, to this day, the statement of law with respect to the division of treaty powers, in *obiter* various justices of the Supreme Court have not ruled out the possibility of reconsidering the decision.¹¹⁹ Former Chief

118. Note on *The Queen v. Klassen* (1959) 37 Can. Bar. Rev. 630. *Klassen* represented a challenge of s. 16 of the *Canadian Wheat Board Act* as *ultra vires* because it trespassed upon the s. 92(13) power of the provinces. The Manitoba Court of Appeal upheld the section as a necessary and incidental interference of intraprovincial grain businesses in the interests of controlling the export of grain. The purpose of the Act, the court held, was in relation to the regulation of interprovincial and international trade in grain, and any interference in local or provincial business is a necessary but ancillary result of this purpose. Leave to appeal to the Supreme Court was denied.

119. *Francis v. The Queen*, [1956] S.C.R. 618, Kerwin C.J.; *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134: "In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the im-

Justice Rand, in an article in the *Canadian Bar Review*, rejected the divided treaty power established by the Privy Council in *Labour Conventions*:¹²⁰

I cannot agree that it is possible to eliminate the treaty character from legislation accomplishing its terms....Assuming treaty-making to be an entirety as legislative matter, the transmission or originated faculty finds its only place of reception in the residual power of the Dominion; to attribute any role to the province would require a statutory enlargement of provincial capacity.

The debate following *Labour Conventions* continues, as the two sides argue for and against the expansion of the federal government's treaty implementing power in regard to matters that fall within the exclusive jurisdiction of the provinces. While the precise terms of this debate are beyond the scope of this paper, in what remains I wish to focus on the following question: within the federal framework is there some way of ensuring that Canada's international obligations in respect of the protection of human rights are effectively and nationally implemented?¹²¹

An indication of how to develop an answer to this question is found in Mr. Justice La Forest's reasons for judgment in *Hunt v. T&N plc*, in which, writing for the Court, he stated,¹²²

In my view, the old common law rules relating to recognition and enforcement [of judgments] were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe. ... This issue is ultimately related to

plementing legislation and not be left to inference," *MacDonald* at 171, Laskin J.

120. "Some Aspects of Canadian Constitutionalism" (1960) 38 *Can. Bar Rev.* 135 at 143. However, for a contrary view see A.L.C. de Mestral, "L'évolution des rapports entre le droit canadien et le droit international un demi-siècle après l'affaire des conventions internationales de travail" (1987) XXV *Can. Y.B. Int'l L.* 301.
121. With the ratification of human rights conventions and of international and regional trade agreements, there have been more calls for a reconsideration of the *Labour Conventions* case by the Supreme Court, or at least questioning the wisdom of that decision. See for example, J. Claydon, "The Application of International Human Rights Law by Canadian Courts" (1981) 30 *Buff. L. Rev.* 727 at 735; T.H. Strom & P. Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25 *Ott. L. Rev.* 39 at 58; R.E. Sullivan, "Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff" (1986) 24 *U. West. Ont. L. Rev.* 63. For a strong contrary view, see A.L.C. de Mestral, "Treaty Power, and More on Rules and *Obiter Dicta*" (1983) 61 *Can. Bar Rev.* 856; de Mestral, *supra*, note 120.
122. [1993] 4 S.C.R. 289 at 321-322; 326. A conflict of laws case involving a claim for compensation by a B.C. worker for asbestosis, it concerned the principles for recognizing and enforcing judgments across provincial jurisdictions. *Hunt* confirmed that in the matter of interprovincial recognition and enforcement of judgments, all courts in Canada are constitutionally required to give full faith and credit to judgments rendered in other provinces, provided that the court that issued the judgment had properly assumed jurisdiction. For a discussion of the case see C. Walsh, "Conflicts of Laws — Enforcement of Extra Provincial Judgments or *In Personam* Jurisdiction of Canadian Courts" (1994) 73 *Can. Bar Rev.* 394.

the rights of the citizen, trade and commerce and other federal legislative power, including that encompassed in the peace, order and good government clause.

Indeed, the world has changed, and along with these changes has come the need to think anew ideas of national sovereignty. Perhaps the most radical change in international law is that the individual has become the subject of cognizable rights. Moreover, Canada has been integral in fashioning this change by shaping and promoting international human rights instruments as a means of giving concrete expression to this new status of the individual in international law.

This change harkens back to the insistence of Professor Laskin, in his comment on *Klassen*, that what is needed is a more functional and integrated approach to the division of powers, one that is not stuck on the formalism and separation of distinct powers but enables each level of government to respond effectively and integrally to the subject matter within its jurisdiction. Or, as La Forest J. puts it, the issue is about the "rights of citizens" and the power of government to ensure the respect for and protection of those rights. Put simply, in a world in which global market failures are increasingly at the root of national and local social, economic, environmental, and political dislocation, what justification is there for continuing to view remedial steps to such dislocation as a purely local matter?

Indeed, the history of the past half-century shows that the protection of human rights is an international challenge, one that requires the full participation of each member of the international community and all their citizens. Werner Sengenberger characterizes the role of standards in the context of an international trading system in the following terms:¹²³

Labour standards can play a role in reaching such mutual understanding of competitive relations. Where collective pay contract or a common safety standard exists, and is enforced, [it] makes it clear that these areas are taken out of competition, at least in a downward direction. ... A strategy of fair trade, repeatedly proposed by trade union organizations, would be to link trade and certain labour standards. Commodities produced not in conformity with essential labour standards, such as the right of association, collective bargaining, equality of opportunity and treatment, the prohibition of forced labour and child labour, etc. should be ousted from international trade.

123. W. Sengenberger, "Labour Standards: An Institutional Framework for Restructuring and Development" in W. Sengenberger & D. Campbell, eds., *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (Geneva: International Institute for Labour Studies, 1994) 3 at 24 and 32. Later, in another essay, Sengenberger returns to the theme of *international* labour standards: "[T]o be effective, social organization is required on a scale commensurate with economic organization. The outreach of labour standards has to be co-extensive with the market. Given the advancing internationalization of the economy, the question is raised as to how much the existing system of setting and enforcing labour standards can contribute to channelling international competition in constructive ways" in "Restructuring at the Global Level: The Role of International Labour Standards", *ibid.*, 394 at 415.

Given these changes and this imperative of effective and international protection of human rights, including the rights of workers, it is time for the federal government to assume more responsibility and power for Canada's compliance with international human rights standards. The means for achieving this might vary, including a constitutional amendment that would make treaties ratified by Canada self-executing,¹²⁴ or a constitutional amendment that would grant to the federal government a treaty implementing power, or simply the application of the Peace, Order, and Good Government (POGG) national concern doctrine to uphold federal legislation implementing international human rights agreements.¹²⁵ In one sense the choice is irrelevant, provided that as a nation we are able to give effect to these standards and support their development internationally by giving them such effect. The alternative is what we have seen with the ILO's social security conventions, and in particular the conventions dealing with workers' compensation, namely, Canada's refusal to ratify them because the provinces have failed to comply with their standards. And so, workers across Canada are subject to a patchwork quilt of labour standards, which fall short in various respects of the minimum standards set down by the international community; and the international standards are weakened because ignored and not ratified by a country such as Canada.

V. CONCLUSION

This paper has revealed two areas in need of legal reform. First, the Ontario government's recent changes to workers' compensation must be significantly reworked if they are to meet the basic standards set out in the ILO's *Convention 121*. Specifically, the government should ensure that:

- all workers in Ontario are covered by a compulsory compensation scheme;
- the legislation contains a purpose clause in which the stated principal aims include compensation for work-related injury and death on the social security principles of entitlement for workers and their families, the protection of worker safety on the job, the provision of health care intended to rehabilitate injured workers, the provision of vocational rehabilitation services whose purpose is to facilitate the reintegration of injured workers and survivors of deceased workers back into the labour force, and an administrative system that is respectful of injured workers and seeks to protect their right to security;
- the legislation's principles of security take into account the needs of workers and their dependents, in determining the level of compensation;

124. This is unlikely. See Hogg, *supra*, note 96 at 11-6.

125. The Supreme Court has already used the national concern doctrine to uphold as *intra vires* federal legislation enacted to implement Canada's obligations under the *Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter* (1975), see *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

- the income replacement benefits, both for injured workers and survivors, be fully indexed to and protected against the ravages of inflation;
- any commutation of benefits be done on sound actuarial calculations and medical assessments, and that allowance be made to enable a worker whose condition has deteriorated to apply for a supplement to reflect his or her changed condition;
- income benefits are maintained at current levels, at a minimum, and ways are sought to increase these benefits to reflect the worker's full pre-injury income as well as anticipated growth in earning power had the injury not occurred or the illness not developed.

Second, the time has come to shift the balance in favour of treaty federalism, at least insofar as it applies to the protection of internationally guaranteed human rights. The legacy of *Labour Conventions* must be reviewed to reflect changes in the conception of sovereignty and the protection of human rights, including labour rights. While a number of avenues are available to achieve this shift in the balance of the treaty implementing power, two stand out as obvious. One would be for constitutional amendment, granting the federal government power to enact legislation to implement Canada's human rights obligations. Second would be for the Supreme Court to decide to embark on a full reconsideration of the Privy Council's decision in *Labour Conventions*.

Workers are being injured, falling ill, and are dying on the job. *Convention 121* is not a full answer to this tragedy by any stretch of the imagination. However, it and other Conventions of the ILO provide a way to think about injured and deceased workers and their families: they are subjects of rights, including and most importantly the right to an income, to medical care, and to every chance to get back into the workforce as soon as possible and with dignity. The *Workers' Compensation Reform Act* fails to see workers and their families in this way. And the federation has failed also, to the extent that its two main levels of government squabble over power while injured men and women, and their children, suffer the indignity of slipping into poverty and persistent pain because of injury and death due to unsafe working conditions.