LABOUR LAW AND UNION GROWTH:

THE CASE OF ONTARIO

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SUMMARY

What role the law should play in encouraging the growth of trade unions is a matter of considerable controversy in Canada, the United States, and the United Kingdom. Limits to growth in other sectors of the economy coupled with heightened employer hostility to unionism have made the extension of collective bargaining to the tertiary sector the most pressing task for unions in the 1980s. In a limited way, the Canadian procedure for certifying and recognizing unions is being considered as a model for labour law reform. And there is much to recommend the Canadian system. It is far more efficient than its American counterpart. There are fewer delays, fewer unlawful interventions by employers, and a substantially higher likelihood that newly organized unions will be granted certification. Even so, unions have failed to break into the trade, finance, and services industries that are so critical to their future.

Taken as a whole, Canadian labour law tends to block rather than promote the growth of unions in the unorganized sectors of the economy. The certification procedure is only one aspect of a legal regime that has as its primary purpose the preservation of industrial peace, not the encouragement of union growth. By shaping bargaining structure and regulating bargaining tactics, Canadian labour law tilts the balance of power in favour of employers. Small, fragmented unions are frequently pitted against large corporations and as there is nothing to stop anti-union employers from using their overwhelming strength to frustrate the collective bargaining process, efforts to organize the tertiary sector have failed.

CONTENTS

LIST OF TABLES

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DEDICATION

To my mother and father

I. INTRODUCTION

Chapter 1

UNION RECOGNITION AND UNION GROWTH

Labour law and policy have traditionally been accorded a decisive role in the growth of trade unions in Canada. The widely held view is that the absence of a 'positive' legal framework explains the small size of the trade union movement prior to the mid-1940s. And, conversely, the spectacular growth of union membership among industrial workers during and immediately after World War II is attributed to the policy of compulsory collective bargaining introduced in 1944. Also ascribed to the law is the rapid growth of union membership among public sector employees starting in the mid-1960s. Between 1939 and 1985 union membership in Canada increased more than ten-fold, from 359,000 to 3,666,000 while union density, which stood at 17.3 per cent of the paid, non-agricultural labour force before the war, reached a peak of 40.0 per cent in 1983 (Kumar, 1986:108-9).

This study explores the relationship between the law and union growth today when labour's challenge is to organize workers in the tertiary sector. Of principal interest are the finance, trade, and services industries where the growth of employment has been particularly strong while union density has remained extremely low: 2.5, 8.9 and 24.2 per cent, respectively. Over half of these jobs are held by women and more than one-fifth by part-time employees, two categories of workers that unions have generally found difficult to organize (Labour Canada, Women in the Work Force, 1983). Fewer than 30 per cent of full-time working women and only 15 per cent of part-time employees are union members (Kumar, 1986:143). There are, in addition, many newly arrived

immigrants and young people employed in the service sector. For the former, jobs of any sort are difficult to find while the latter are often more interested in pursuing their eduction that improving their terms and conditions of employment.

For unions, the problems are many but the potential for growth is enormous. Unorganized workers in the finance, trade, and service industries alone account for one-half of the paid labour force in Canada[a] while the potential for union growth elsewhere in the economy is comparatively small. Over the last thirty years, unions have done no more than hold their own in the resource, manufacturing, and transportation industries. Nor is there much possibility of further growth in the public sector.[b] By some estimates, union density is already in excess of 90 per cent of those legally eligible to join unions. Sizeable gains in union membership, therefore, are likely only if employees in the tertiary sector organize in large numbers.

The Role of the Law

Whether the law should contribute to the growth of unions is a highly controversial issue. Recent efforts to extend collective bargaining to the retail and finance industries have brought workers into sharp conflict with employers. In almost every case, unions have suffered decisive defeats despite widespread support for collective

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[a]Not all of these workers are eligible for union membership, however, as labour laws generally exclude the self-employed, professionals, and persons who exercise managerial functions or are employed in a confidential capacity with respect to labour relations.

[b]Included in the public sector are governments; schools, colleges, and universities; hospitals and nursing homes; fire and police departments.

bargaining among the employees themselves. Even so, there have been few signs of the eager anti-unionism of employers south of the border. Nor has there been much enthusiasm for dismantling the framework of legal rights and protections for workers that has been evident in the United Kingdom. For manual workers in large primary and secondary sector firms, the legitimacy of unions is reasonably well established in Canada; it is the extension of collective bargaining to unorganized white-collar and service workers, and any changes in the law that would be necessary to encourage the growth of unions, that are the source of controversy.

The debate about the role of unions in the United States, by contrast, has been much broader and the fight much uglier. Whatever consensus existed over the desirability of collective bargaining immediately after World War II has clearly broken down in the last ten years. 'Union-free' is the buzz word of the 1980s. Even companies with longstanding bargaining relationships are seeking to get out from under what they see as the crushing cost of union wages and restrictive practices. Highly paid consultants advise managers about how to abrogate their collective agreements through bankruptcy proceedings, where to locate new plants to avoid organizing drives, and how to utilize the latest 'union substitution' techniques (Kochan, 1980:183).

Though much of the new labour relations strategy is patently unlawful, frustrated unionists often cite the law as one of their problems, not one of the solutions. Long delays in the processing of applications for certification and the high level of illegal interference by employers have been repeatedly linked to the inability of unions to win bargaining rights. Between 1955 and 1980 there was a six-fold

increase in unlawful dismissal complaints in the United States; a frightening one in twenty union supporters can now expect to be discharged during an organizing drive (Weiler, 1983:1781). The volume of refusal to bargain complaints has grown even faster, by 700 per cent since 1955 (Weiler, 1985:3). One result is that fewer than one-half of the unions seeking recognition are granted certification and a quarter of those failed to negotiate collective agreements (Cooke, 1985c). Reviewing the literature, Freeman and Medoff (1984:239) concluded that employer 'opposition, broadly defined, is a major cause of the slow strangulation of private sector unionism'.

The failure of the recognition procedure to adequately protect the right to associate has been centred out as a critical weakness in American labour law and a focal point for reform. None the less, proposals to amend the legislation were soundly defeated in 1978, in spite of Democratic majorities in both houses. Labour's objective was a modest package of amendments to streamline the certification procedure, penalize employers for breaking the law by imposing double back pay awards for unfair dismissal, and provide equal time for unions to address employees at work on company time. One of the first issues dropped was a proposal to permit the certification of unions without representation votes when 55 per cent of the potential members have signed membership cards (ibid.:202-3). Widely used in Canada, so-called automatic certification is thought to be the crucial difference between the representation procedures in the two countries (Weiler, 1983:1818-9; Meltz, 1985:322). Because the Canadian method relies on membership evidence gathered early in the organizing drive there are fewer

opportunities for employers to interfere and intimidate workers. The American procedure, by contrast, has institutionalized the representation campaign which, the evidence suggests, is likely to be fraught with anti-union tactics and innuendo. Accordingly, the value of outright certification has taken on almost mystical proportions in the debate over labour law reform. In Freeman's (1985:61) opinion, 'the principle difference between unionization in the United States and Canada is that U.S. laws allow management to conduct lengthy well-funded election campaigns against unions' whereas in Canada most provinces certify unions without any representation campaign at all. 'Result: growing unionization in Canada.'

The debate over labour law reform in the United Kingdom also has at its core a fundamental disagreement over the role of unions and the importance of collective bargaining. The consensus that characterized the 1940s and 1950s has all but disappeared (Lewis and Simpson, 1981:231). The present government is pursuing a step-by-step approach to labour law reform explicitly designed to curb the power of unions--reforms it insists are vital for securing industrial peace, controlling inflation, raising profits, and increasing the number of jobs (ibid.: 223). Meanwhile, union membership has fallen sharply, largely as a result of unemployment and industrial restructuring but also because of growing employer resistance to collective bargaining (Townley, 1987:177-8). Some large firms have refused to recognize unions or even withdrawn recognition from established unions (Wedderburn, 1985:52).

Clearly, labour law reform of the sort sought by trade unionists must await the election of a more hospitable government; in the meantime,

however, what direction the reform should eventually take is being widely debated. One approach would be for Labour to nullify the Conservatives's recent initiatives. In 1974, the newly elected Labour government simply withdrew the unpopular Industrial Relations Act and strengthened the traditional immunities for persons acting 'in contemplation or furtherance of a trade dispute'. At the same time, the rights of individuals were expanded and a series of legal rights for trade unions introduced, a recognition procedure among them (Lewis and Simpson, 1981:15). But a simple reversion to the past may no longer be possible. Times have changed, McCarthy (1985:8-9) has warned. The past is no longer retrievable. Some initiatives, like the election of union officers and the use of strike ballots, have already affected the behaviour of labour and management. There are, as well, the EEC directives to be considered. Tied to the larger issue is the question of a statutory procedure for union recognition. 'There is undoubtedly a need for positive rights in this area', McCarthy (ibid.:29) argued. High levels of unemployment, the rise of the 'hard-line' manager, plus the growth of employment in the traditionally hard-to-organize service industries mean that 'the problem of the recalcitrant employer, who fights the workers' attempts to organize and "match" his natural power in the labour market, has in no way diminished in recent years'. Established unions are affected as well. Because many of the rights accorded trade unions by the previous Labour government are contingent upon a union being recognized, they are lost when recognition is withdrawn (Clark and Wedderburn, 1983:210).

But how the recognition procedure might work raises several pressing problems. The procedures established under both the Conservatives's Industrial Relations Act and Labour's Employment Protection Act have been severely criticized. Citing the research of others, Townley (1987:179) reported that the law proved less advantageous than originally thought for a number of reasons, 'most notably employer recalcitrance and judicial control; the absence of effective reinstatement remedies for union activity and narrow judicial interpretations'. Finding the same problems with the recognition procedure in the United States, Townley concluded that certain 'unintended' consequences are unavoidable and 'cannot be remedied by careful drafting but remain inherent to the introduction of law in this area' (ibid.:194).

Townley's conclusion is reinforced by Canadian experience. Though promoted in a limited way as a model for reform in both the United States (Weiler, 1983) and the United Kingdom (Beaumont and Townley, 1987), the union recognition process in Canada is fraught with the same obstacles of delays, employer opposition, and ineffective remedies. The deleterious effects are less dire perhaps but the fundamental problems are there none the less.

The apparent inevitability of these shortcomings does not mean, however, that voluntarism is the better policy. In one sense, voluntarism is not a policy at all but simply a willingness to permit the vagaries of the labour market and the caprices of employers to determine the fate of unions. Nodding acceptance of the right to associate and the right to strike are not much use. 'To be effective these rights need adequate legal support, more than ever in an economy where soaring

unemployment debilitates workers' bargaining strength in the labour market' (Wedderburn, 1985:38). Thus, even though statutory procedures are prone to develop deep flaws, Lewis and Simpson (1981:147) argued that 'the risk may well be worth taking on a question of such fundamental importance as the establishment of collective bargaining'. In any event, voluntarism is no longer a viable option. Government intervention is a fact of modern economic life. Regulation of labour-management relations is simply one facet of government regulation designed to achieve certain economic and social ends. The issue, therefore, is not whether there ought to be labour laws but what sort of labour laws there ought to be.

For unions to grow, the right to bargain collectively must be a central objective of public policy. The legal form that the intervention takes, whether immunities from prosecution or statutory rights, is far less important than the objective itself. What matters most is that workers have an over-riding right to organize, a right that is clear to those who sit on courts and tribunals. An important lesson we have learned, von Prondzynski (1985:189) argued, is that 'labour law is inevitably frustrated in its purpose unless it is applied by and adjudicated in institutions which understand that they must implement a social policy rather than apply abstract legal constructs'.

To date, support for collective bargaining has not been the sole objective of legislative intervention. In the United States, the institutionalization of conflict was the over-riding purpose of the Wagner and Taft-Hartley Acts; in the United Kingdom, the reform of collective bargaining was the central purpose behind the legal intervention of the 1970s (Townley, 1987:191). In Canada, too, the

promotion of collective bargaining has been a secondary consideration. The government's primary concern has been industrial peace, a bias clearly reflected in the severe constraints imposed on the timing and scope of lawful strike activity. Yet, so long as the desire for union representation was confined to industrial workers, the growth of collective bargaining was possible within the legal framework established by Privy Council Order 1003 in 1944. The now familiar features of certification, duty to bargain in good faith, prohibition of unfair labour practices, and constraints on the right to strike established a legal system which saw the union movement grow from a small group representing mostly skilled workers to a mass organization. For workers in the tertiary sector, however, the legal framework of the 1940s is proving inadequate. Tough, sophisticated employers make organizing increasingly difficult. They use the law to ensure that certification is a long, drawn-out affair and even when unions are certified there is no guarantee that employers will bargain seriously. A much more aggressive policy of encouraging union growth will be necessary for the majority of women and part-time workers to gain the advantages of collective bargaining.

Methodology and Data Base

The focus of the thesis is the union recognition process in Ontario, both because recognition is a decisive juncture in the growth of unions and because recognition is the aspect of the collective bargaining process most directly affected by the law. In this study, a union is considered to be recognized if it has been certified as a bargaining

agent by the Ontario Labour Relations Board and has negotiated a collective agreement with an employer. Admittedly, the signing of a first agreement is no more than an indicator that collective bargaining will survive, nevertheless, it is a critical indicator: if not a sufficient condition, then a necessary one, and superior to certification alone.

The study has benefited from the voluminous American research which has looked for the determinants of success in certification in the process itself.[c] The thrust of this work has been to correlate variables such as procedural delays and unfair labour practices with the outcome of representation votes, and the results illustrate nothing so much as that employer resistance to collective bargaining has grown rapidly in the United States and has been extremely effective in blocking workers' efforts to organize. But even though these studies have added to our understanding of the law, as attempts to discover the source of the steep decline union membership in the United States their focus has been too narrow. The researchers' vision has been fixed most firmly on the procedural elements of the law and, as a rule, the analysis has gone no further than the representation vote. More recent work has begun to correct these shortcomings. Voos's (1984) research, for example, has led her to conclude that part of the decline in union membership in the United States is attributable to the reduction in expenditures for organizing. Goldfield (1982) and Freeman (1985) have considered the shift of employment away from the historically well organized industries

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[c]For a fairly complete list, see the studies reviewed by Fiorito and Greer, 1982; Heneman and Sandver, 1983; and Delaney, Lewin, and Sockell, 1985.

such as manufacturing to the less well organized service industries and from the relatively well organized northern states to the predominantly non-union south-west. One study by Cooke (1985a, 1985c) has carried the analysis past the granting of certification to consider why some unions were able to negotiate collective agreements while others were not. And Weiler (1985) has considered how legal constraints on the organizing of secondary boycotts have affected the ability of unions to negotiate collective agreements.

Following the lead of the American studies, data on certification applications in Ontario during the 1970s were collected and analyzed to determine whether the recognition process itself had an effect on the outcome of certification. Data on first agreements were also gathered and analyzed to determine whether various elements of the certification process were linked to the likelihood that unions granted bargaining rights would negotiate collective agreements. In so doing, statistically significant correlations were found between the length of the certification process, anti-union petitions, and unfair labour practice complaints, on the one hand, and the likelihood that a union would be granted certification and negotiate a collective agreement, on the other. There was, in addition, a considerable amount of bargaining failure apparently unrelated to employer interference. For this reason, the analysis was broadened to consider how the law shapes the bargaining process and, most particularly, the bargaining power of management and labour.

To better understand the legal processes at work, the law and its application in the province of Ontario were analyzed. Most important is

the Labour Relations Act[1] which regulates the certification and bargaining processes. The Ontario Labour Relations Board[d] is the agency which interprets and applies the Act and as its important decisions have been reported and made available in the series, OLRB Monthly Reports, since 1960, the Board's jurisprudence is readily assessable. To complete the legal analysis, decisions of courts and grievance arbitration panels were utilized when appropriate. Court decisions have been published in the series, Ontario Reports, Dominion Law Reports, and Supreme Court Review; a cross-section of the more important awards of grievance arbitration boards has been compiled and published in the Labour Arbitrations Cases series.

The data base for the study includes all non-construction applications for certification disposed of by the Ontario Labour Relations Board under the Labour Relations Act during the twelve fiscal years from 1970-71 to 1981-82,[e] a total of 8,750 applications and 9,154 bargaining units. Of the latter, 8,637 were newly organized and without union representation at the time of application.[f] Bargaining rights were granted for 5,981 (69.3 per cent) of the 8,637 newly organized groups and collective agreements negotiated for 5,033 (84.6 per cent) of the 5,947 units for which the outcome of the first round of negotiations was known by the end of 1983.

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[d]Labour relations matters are a provincial responsibility in Canada. The issue of legislative jurisdiction is discussed in Chapter 2.

[e]From 1 April, 1970 to 31 March, 1982.

[f]The remaining 517 bargaining units were involved in applications to displace one bargaining agent with another.

For each application information on industry, geographic location, name and application of the applicant union(s), date of application and date of disposition, number of bargaining units applied for, and number of units for which the union was certified, was gathered. For each bargaining unit information on type (office, manual, professional and full- or part-time), number of employees, number of valid union membership cards, presence of a petition opposing certification, total number of ballots cast for and against certification in a representation vote, and date of disposition was collected where relevant. For those bargaining units for which unions were certified, the outcome of bargaining, including the date of ratification, the scope of the collective agreement, the stage at which the agreement was reached and whether or not a work stoppage was involved, and the current status of collective bargaining was recorded. When no agreement was negotiated, the only information consistently available related to work stoppages. Data on the level of male and female employment proved unreliable.

Additional data on unfair labour practices were collected for a subset of 1,820 bargaining units, comprised of the 914 bargaining units for which certified unions were unable to negotiate collective agreements plus 906 units chosen randomly from the remainder. To obtain a representative sample, the two parts were weighted so that when combined the subset would exhibit the same proportion of bargaining success, 84.6 per cent, as the file as a whole. As a result, the proportion of units for which unions were certified was somewhat lower, 68.5 per cent compared to 69.3 per cent. The information available respecting unfair labour practice complaints included the complainant (whether a worker,

union or employer), the union involved, the sections of the Labour Relations Act alleged to have been contravened, the date of application, and the date and method of disposition. Only complaints laid against employers (over 95 per cent of the total) were analyzed. Matching the Labour Relations Board's files of certification applications with unfair labour practice complaints and linking this information with the Ministry of Labour's data on collective agreements to create a single, continuous computer record for each bargaining unit proved to be the major challenge of the data collection process.

Organizing in Ontario during the 1970s

Organizing under the Labour Relations Act was most active and most successful in the tertiary sector during the 1970s, but least active and least successful in those tertiary sector industries where union membership was particularly low: trade, finance, and private services. Although three out of five of the applications for certification filed with the Ontario Labour Relations Board were for tertiary sector workers, over two-thirds of them were in the community, business and personal services industry where organizing was predominantly a public sector affair: hospitals and nursing homes, primarily. Applications for bargaining units in trade, finance[8], and private services, by contrast, accounted for less than one-quarter of the total.

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[8]Not all of the employees in the finance, insurance and real estate group fall within the jurisdiction of the OLRB, however. Employees of the chartered banks are in the federal jurisdiction and are covered by the Canada Labour Code.

Outside of the tertiary sector, organizing was almost exclusively confined to the secondary sector where manufacturing was the predominant group[h]. Thirty-two per cent of all the applications processed by the OLRB were for workers employed in manufacturing; another 7 per cent were for employees in transportation or public utilities. Fewer than 2 per cent of all applications for certification during the 1970s were for bargaining units in the primary sector.

The importance of the tertiary sector units was even more pronounced in the distribution of unions certified[i] and certified unions with collective agreements although rates of success varied considerably from industry to industry. Overall, the proportion of unions granted bargaining rights was 72.1 per cent in the tertiary sector compared with 59.1 and 65.6 per cent in the primary and secondary sectors, respectively. And while collective agreements were signed by 87.2 per cent of unions representing service workers, the likelihood of negotiating collective agreements was considerably lower among unions in the goods-producing industries: 80.7 per cent of newly certified unions negotiated collective agreements in the primary sector and 70.4 per cent in the secondary sector. Within the tertiary sector, rates of success in both certification and collective bargaining were higher than average in the services industry and public administration but lower than average in trade and finance.

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[h]The construction industry was excluded from the study.

[i]Strictly speaking, it is the union which is certified to represent the workers in a designated bargaining and this is the construction used here. Terminology has become confused, however, so that many authors speak of the certified bargaining unit.

Table 1.1: Industrial Distribution of Certification Applications[#1]
Fiscal Years 1970-71 to 1981-82

	Number of applications	Percentage of applications
Primary Sector[#2]	149	1.7%
Forestry	14	0.2
Mining	135	1.6
Secondary Sector[#3]	3,387	39.2%
Manufacturing	2,771	32.1
Transportation and utilities	616	7.1
Tertiary Sector	5,082	58.8%
Trade (retail and wholesale)	1,444	13.2
Finance, insurance and real estate	291	3.4
Community, business, and personal services	3,343	38.7
Public administration	304	3.5
Total	8,637	99.7%[#3]

[#1] In fact, the numbers presented in all the tables are for bargaining units, not applications. On occasion, one application involves more than one bargaining unit; however, the difference is of no particular importance.

[#2] Categorized as 'other' were 19 bargaining units, representing 0.2% of all applications. Due to rounding, the total does not add to 100.0%

[#3] The construction industry was excluded from the study.

[#4] Agriculture workers are specifically excluded from the Labour Relations Act.

Of the over 100 unions organizing in Ontario, only 7 filed more than 300 applications in the period under study, 8 if the independent employee associations are counted as one. The most active unions, not surprisingly, included those whose jurisdictions take in the community, business and personal services industry and health and welfare in particular: the Canadian Union of Public Employees (CUPE), the Service Employees International Union (SEIU), and the Ontario Nurses Association (ONA). These unions were also the most successful in bringing their newly organized workers under collective agreements. Overall, only 58.6 per cent of newly organized unions won recognition (that is, were certified and negotiated a collective agreement), whereas newly organized unions affiliated with CUPE were recognized for 71.5 per cent of the 1,101 bargaining units for which applications were made and of the 682 applications filed by the SEIU, 70.4 per cent were recognized. Even more successful was the ONA which won certification and collective agreements for 91.1 per cent of the 402 groups for which bargaining rights were sought.

Outside of the tertiary sector, the unions most active in organizing were those which claim to be general unions: the International Brotherhood of Teamsters, the United Steel Workers of America (USWA), and the Labourers International Union. Of the three, only the USWA was able to win recognition for more than half of its newly organized unions: 299 agreements (55.9 per cent) were signed out of the 535 applications for certification filed with the Board. The Teamsters Union was much less successful, covering only 383 (47.2 per cent) of its 812 bargaining units with agreements; the Labourers fared worse still, bringing 143 (42.1 per cent) out of the 340 it sought to represent under agreement. Also in the group of most active organizers was the Canadian

Food & Allied Workers (CFAW).[J] The CFAW had slightly better than average success, negotiating collective agreements for 61.6 per cent of the unions it organized. Employee associations, on the other hand, won recognition for only 141 (39.5 per cent) of the 357 bargaining units they sought to represent.

The pattern of applications by bargaining unit type during the 1970s reflected the fact that collective bargaining in the private sector, whether in the goods or service producing industries, remained a predominantly blue-collar phenomenon. Over two-thirds of the applications disposed of by the OLRB involved bargaining units of manual employees. Only one in four unions was seeking bargaining rights for white-collar workers, that is, office and clerical, technical, professional, or mixed groups. Sales units accounted for just over 6 per cent of the total. Other groups -- security guards, dependent contractors, and 'tag end' units--accounted for fewer than 2 per cent of the applications.

None of the occupational groups was appreciably more or less likely to achieve certification or negotiate a collective agreement. Unions representing white-collar units were somewhat more successful than average in winning certification while unions representing manual and sales employees were somewhat less so, but the conclusion is based on incomplete data. Because information on bargaining unit type was missing for those applications dismissed or withdrawn before the bargaining unit was determined by the Labour Relations Board, certification rates cannot be accurately calculated. More reliable were the data on first agreements and from these it was evident that certified unions representing white-collar employees were most successful in negotiating

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[J] Now part of the United Food and Commercial Workers International Union.

agreements while those representing blue-collar and sales workers were less so.

Table 1.2: Industrial Distribution of Bargaining Units Certified and with Collective Agreements

Fiscal Years 1970-71 to 1981-82

	Number of Units Certified	Percentage of Certified Units	Number of Units with Agreements	Percentage of units with Agreements
ry Sector	88	1.5%	71	1.4%
orestry	11	0.2	9	0.2
ining	77	1.3	62	1.2
dary Sector	2,223	37.2%	1,764	35.1%
anufacturing	1,819	30.4	1,444	28.7
ransportation nd Utilities	404	6.8	320	6.4
ary Sector	3,665	61.3%#1	3,196	63.5%
rade	803	13.4	624	12.4
inance, etc.	170	2.8	125	2.5
ervices	2,446	40.9	2,226	44.2
ublic dministration	246	4.1	221	4.4
otal	5,981	100.0%	5,033	100.0%

ntage may not add to 61.3 due to rounding.

able 1.3: **Number of Certification Applications by Union and Rates of Success in Certification and Collective Bargaining**

Fiscal years 1970-71 to 1981-82

	Number of Applications	Percentage of bargaining units certified	Percentage of certified units with agreements
Canadian Union of Public Employees	1,101	76.5%	93.5%
International Brotherhood of Teamsters	812	63.9	73.8
Service Employees International Union	682	74.6	94.3
United Steel Workers of America	535	72.7	76.9
Ont. Nurses Association	402	92.5	98.4
Canadian Food & Allied Workers	391	76.0	81.2
Independent Employee Associations	357	44.5	88.7
Labourers International Union	340	57.7	73.0
All Unions	8,637	69.3	84.6

Table 1.4: Distribution of Certification Applications by Bargaining Unit Type

Fiscal Year 1970-71 to 1981-82

	Number of applications	Percentage of applications
Blue-collar/manual	4,502	67.7%
White-collar	1,641	24.7%
Office and Clerical	422	6.3
Technical	147	2.2
Professional	522	7.9
Mixed white-collar	550	8.3
Sales	414	6.2%
Other	93	1.4%
Security guards	47	0.7
Dependent contractors	30	0.5
Tag end	16	0.2
Total	6,650#1	100.0%

#1 Information was not available for 1987 bargaining units, primarily because the applications were withdrawn or dismissed before the unit was described by the Board.

Table 1.5: Distribution of Bargaining Units Certified and with Collective Agreements by Bargaining Unit Type

Fiscal Years 1970-71 to 1981-82

	Number of units certified	Percentage of certified units	Number of units with agreements	Percentage of units with agreements
Blue-Collar/manual	4,022	67.3%	3,287	65.3%
White-collar	1,518	25.4%	1,389	27.6%#4
Office and clerical	381	6.4	345	6.9
Technical	136	2.3	124	2.5
Professional	502	8.4	487	9.7
Mixed white-collar	499	8.3	433	8.6
Sales	355	5.9%	285	5.7%
Other	83	1.4%	70	1.4%
Security guards	40	9.7	35	0.7
Dependent contractors	30	0.5	24	0.5
Tag end	13	0.2	11	0.2
Total	5,978#1	100.1%#2	5,031#3	100.0%

#1 Information was missing for 3 bargaining units.

#2 Percentage may not add to 100.0 due to rounding.

#3 Information was not available for 2 bargaining units.

#4 Percentage may not total 27.6 due to rounding.

Full-time groups were the majority seeking certification. Unions of full-time workers represented 85.6 per cent of the applications filed with the OLRB, 85.5 per cent of the unions granted certification, and 84.5 per cent of certified unions that negotiated collective agreements. Unions composed wholly or partially of part-time employees made up the balance. From the data (which were incomplete), the likelihood of certification appeared to be evenly balanced between unions representing full-time and part-time employees. On the other hand, unions of part-time, or mixed full- and part-time, workers were somewhat more successful in negotiating collective agreements than were unions of full-time employees alone.

Finally, the distribution of applications by size of bargaining unit described the marked degree to which organizing was concentrated among small groups. Over three-quarters of the units for which data were available were smaller than 50 employees; almost one-third was smaller than 10. At the other extreme, units of 500 or more workers numbered only 42 over the period of the study. Fortunately for unions, small groups were more likely to be granted certifications than larger groups, although these data were also incomplete. While the proportion of unions seeking bargaining rights for units smaller than 50 was 78.9 per cent, 82.1 per cent of the unions granted certification were in this category. In bargaining, however, the experience was reversed. The very smallest unions, those representing fewer than 10 employees, were least likely to sign collective agreements, whereas unions certified as bargaining agents for units of 100 or more workers had above average success in bargaining. Overall, however, success in certification appeared to weigh

PAGE NUMBERING AS IN THE ORIGINAL THESIS

Table 1.8: Distribution of Certification Applications by Bargaining Unit Siz

Fiscal years 1970-71 to 1981-82

	Number of Applications	Percentage of of Applications
Fewer than 10 employees	2,443	31.2%
10 - 49	3,734	47.7%
50 - 99	981	12.5%
100 - 499	630	8.0%
500 or more	42	0.6%
Total	7,830#1	100.0%

#1 Data for 807 bargaining units were missing.

Table 1.9: Distribution of Bargaining Units Certified and with Collective Agreements by Bargaining Unit Size

Fiscal Years 1971-72 to 1981-82

	Number of units certified	Percentage of certified units	Number of units with agreements	Percentage of units with agreements
Fewer than 10 employees	2,020	33.8%	1,594	31.7%
10 - 49	2,889	48.3%	2,450	48.7%
50 - 99	674	11.3%	615	12.2%
100 - 499	375	6.3%	352	7.0%
500 or more	23	0.4%	22	0.4%
Total	5,981	100.1%#1	5,033	100.0%

#1 Percentages may not add to 100.0 due to rounding.

more heavily. For unions representing 50 or more employees, the greater likelihood of negotiating collective agreements was not sufficient to offset the lower likelihood of winning certification.

Unions can be encouraged that organizing in Ontario during the 1970s reflected the shift in economic activity away from the production of goods towards the provision of services. Non-union workers were most likely to be found in the tertiary sector and this was where organizing activity was concentrated. Equally encouraging was the predominance of smaller groups among those seeking recognition, for, to the extent that small bargaining units were found in small establishments, this was where union density was lowest. On closer inspection, however, the experience of the 1970s was not so reassuring. Two-thirds of the tertiary sector applications were concentrated in the community, business, and personal services industry and two-thirds of those were for workers in public employment, mainly health-care. Organizing success in the private, tertiary sector industries was much less propitious. Fewer than one in four applications were for workers employed in retail or wholesale trade, in finance, insurance, or real estate, or in private sector services--industries where union density was especially low. Equally worrying from the labour movement's point of view was the small proportion of unions seeking certification for units of white-collar workers. Only 24.7 per cent of the applications filed during the 1970s were for clerical, technical, or professional employees and only 6.2 per cent were for sales personnel. Also of concern was the relatively small number of certification applications for part-time workers: less than 15.0 per cent of the total. Disturbing, as well, was the low overall rate of success.

For every ten unions seeking certification, only six achieved recognition: three were denied bargaining rights and the fourth, though certified, failed to negotiate a collective agreement.

Organization of the Thesis

The thesis is organized into four parts: Introduction (Chapters 1 and 2), Certification and Collective Bargaining (Chapters 3 and 4), Bargaining Structure and Bargaining Power (Chapters 5, 6, and 7), and Conclusion (Chapter 8). Chapter 1 discusses the use of the law to encourage the growth of unions, describes the methodology and data base of the study, and examines the progress of organizing in Ontario during the 1970s. Chapter 2 examines the historical relationship between labour law and union growth in Canada, firstly, by describing the Labour Relations Act and its evolution. The second and third sections of the chapter attempt to analyze the effect of the law on the growth of unions in the private and public sectors, respectively.

The objective of Part II is to determine whether the certification procedure itself affects the likelihood that a union will win bargaining rights and negotiate a collective agreement. The two chapters, 'Certification' (Chapter 3) and 'Unfair Labour Practices' (Chapter 4), discuss, in turn, the rules and procedures regarding certification in Ontario and the law of unfair labour practices as interpreted and applied by the Ontario Labour Relations Board, including the Board's efforts to remedy contraventions of the Act. The data on the outcome of certification and collective bargaining are used to analyze the extent to which certain features of the process--namely, the time required to

process applications, anti-union petitions, and unfair labour practice complaints--are associated with the likelihood that certification would be granted and, for certified unions, the likelihood that a collective agreement would be negotiated. It is argued that the certification procedure is unnecessarily complex and offers employers too many opportunities, legitimate and illegitimate, to interfere with and disrupt organizing drives.

Part III focuses on the bargaining process and attempts to broaden the analysis by examining the link between the law and bargaining power. Chapter 5, entitled 'Bargaining Units and Bargaining Structure', reviews the OLRB's notion of an appropriate bargaining unit and its relationship in law to bargaining structure. The conclusion argues that the small, fragmented units for which unions are certified are not an especially stable foundation for collective bargaining, particularly in the tertiary sector. Chapter 6, 'Bargaining Tactics', discusses how the law shapes the bargaining power of the parties by regulating strikes and picketing. The narrowly circumscribed power of workers and unions is contrasted with the broad resources available to employers. The last chapter in Part III, 'The Duty to Bargain in Good Faith', examines the OLRB's standard of good faith. The fact that hard bargaining is accepted as lawful is considered in light of the legal constraints imposed on the bargaining power of unions.

Part IV concludes the thesis by discussing the extent to which labour law has been, and continues to be, a critical factor in encouraging or impeding the growth of unions, especially now that unorganized workers are concentrated in the trade, finance, and services

industries. Proposals for change are advanced based on the conclusions that the law affords employers too many opportunities to intervene and undermine employees' support for collective bargaining during the certification process and that there is a structural imbalance in bargaining power between labour and management institutionalized by the law.

Conclusion

Limits to growth in other sectors of the economy have made the extension of collective bargaining to the tertiary sector the most pressing task for Canadian unions. And while organizing during the 1970s was not particularly effective in the industries or occupations where union density was lowest, there were, nevertheless, many hopeful signs. The bulk of the certification applications filed with the Ontario Labour Relations Board were for workers in the community, business and personal services industry where many women, clerical, and part-time workers were employed. And most of the applications were for small bargaining units. Thus, even though unions have found these groups hard to recruit in the past, the experience of the 1970s suggests that they are neither innately anti-union nor totally willing to put up with the low wages and poor working conditions characteristic of jobs in the tertiary sector.

What role the law should play in encouraging the extension of union representation to these groups is a matter of considerable controversy, however. Although Canadian employers appear willing to accept unionism within its current confines, they are resisting the extension of

collective bargaining to the tertiary sector and are adamantly opposed to initiatives which alter the balance of power in favour of labour.

In the United States, the debate over the role of the law is both broader and more acrimonious than in Canada because labour's predicament is far more acute. Union membership has been falling absolutely and proportionately for many years, primarily as a result of the growing hostility of American employers to collective bargaining. And while the law is blamed for giving anti-union employers many opportunities to delay and defeat organizing drives unfairly and for failing to deter anti-union conduct, there are few hopes of reform.

Hostility to collective bargaining is increasingly evident in the United Kingdom as well. A sharp decline in the number of industrial workers has cut deeply into union membership at a time when the legal framework that has supported union activity since the turn of the century is being radically altered. The erosion of the traditional structure of trade-union immunities underlines the importance of the law in advancing the cause of unions and has aroused interest in a legal regime which offers workers positive rights.

In a limited way, the Canadian recognition procedure is being considered as a model for labour law reform in both the United States and the United Kingdom. From the American perspective, there is little that is strange about Canadian labour law. It is cut from the same fabric of certification, duty to bargain in good faith, and prohibition of unfair labour practices, yet seems to work much more effectively. The critical difference is thought to be the general (though not universal) reliance of labour boards on membership cards rather than representation votes to

certify unions. This procedural device is said to deflect anti-union conduct so explains the higher level of union membership in Canada. From the British perspective, the Canadian legal system is entirely foreign, but for those who advocate a shift away from the traditional immunities towards a system of statutory rights, Canada offers a comforting contrast to the United States. If Canadian unions can flourish within a scheme of positive rights then the dim prospects facing American unions cannot be entirely ascribed to an inevitable 'legislative snare' (Hart, 1978); indeed, it simply highlights the importance of choosing the right procedure.

Any transferring of procedures from place to place should be done cautiously and with full knowledge of shortcomings as well as strengths. Certainly, the Canadian scheme has much to recommend it. Certification in Canada is vastly more effective than in the United States. Rates of success are much higher while the time required to process applications is considerably lower. The level of employer interference, though far from insignificant, is also substantially lower in Canada. Whether all of these differences are attributable to the law alone is, of course, highly unlikely; furthermore, the recognition procedure must be seen for what it is: one part of a legal regime that is highly restrictive for unions and workers. Canadian labour law was not inspired by philosophical pluralism or any desire to encourage the growth of unions but primarily as a measure to control industrial conflict, a purpose that is evident from the structure and effect of the law as a whole.

By shaping bargaining structure and regulating bargaining tactics, Canadian labour law tilts the balance of power in favour of management.

Certification is easily circumvented because small, fragmented unions are commonly pitted against large, powerful corporations. On the one hand, the law favours single-establishment bargaining units and precludes virtually all forms of sympathetic activity, yet, on the other, does nothing to prevent employers from using their superior bargaining power to frustrate the bargaining process. Taken as a whole, therefore, the law tends to block rather than promote the growth of unions in the unorganized sectors of the economy, despite a relatively efficient certification procedure.

Legal References

1. R.S.O. 1980, c.224, as amended.

Chapter 2

LABOUR LAW AND UNION GROWTH

Labour law and policy have been accorded a decisive role in the growth of unions in Canada. The small size of the trade union movement prior to the 1940s has been largely attributed to the government's reluctance to require employers to recognize and bargain with unions while the rapid growth of union membership among industrial workers during and immediately after World War II has been linked to the policy of compulsory collective bargaining adopted in 1944. In the public sector as well, the law has played a central role. The quick pace of union growth among public sector workers during the 1960s and 1970s coincided with a series of statutes which recognized for the first time the right of government employees to bargain collectively.

But whether changes in the law caused unions to grow is a conclusion that demands further examination. Certainly, encouraging the growth of unions has not been the government's specific intention. Since the turn of the century, the over-riding purpose of labour relations policy has been the maintenance of industrial peace and any expansion of workers' rights has been granted with this objective in mind. Thus, the policy of compulsory collective bargaining introduced in 1944 was not the choice of a government motivated by philosophical pluralism but a concession wrenched from a government besieged on both the industrial and political fronts. Only when an increasingly restive workforce threatened to disrupt the production of war material did the government act, and then in a most begrudging manner.

The over-arching concern for minimizing industrial conflict has been evident in post-war legislation as well. Although the provinces have had the authority to pursue their own labour relations policies, they have chosen to adopt the framework of certification, duty to bargain in good faith, prohibition of unfair labour practices, and constraints on the right to strike introduced by the federal government. Public sector legislation has also followed this pattern, with a critical difference: in most jurisdictions, most public sector workers are classified as essential and may not strike at any time.

Chapter 2 describes the evolution of labour relations policy in Canada with particular regard to Ontario. The first section outlines the framework of labour law in Ontario today, focusing on the Labour Relations Act.[1] The second and third sections examine the growth of unions in the private and public sectors respectively with emphasis on the role of the law. The final section considers the econometric evidence which links the law to union growth in Canada and elsewhere and re-evaluates the experience of the 1940s.

Labour Law in Ontario

Certification is the only certain route to union representation in Ontario: voluntary recognition is possible, but seldom granted outside of the construction industry. Thus, for the vast majority of workers in private-sector employment, the recognition process begins when an application for certification is filed on their behalf with the Ontario Labour Relations Board. Representation rights are granted on the basis of majority membership in defined bargaining units. In Ontario, the

Labour Relations Act provides that certification may be granted outright, that is, without a representation vote, if a union has, as members, more than 55 per cent of the employees in a unit that is appropriate for collective bargaining. If a union falls short of the level required for outright certification, the Board will order a representation vote if membership is 45 per cent or more, in which case certification will be granted if more than 50 per cent of the ballots cast favour union representation. If the union's membership support is less than 45 per cent, its application is dismissed without a vote. Alternatively, a union may apply for a pre-hearing vote, in which case a representation vote is held within ten days and certification granted if a majority of the ballots cast favour the union.[2] The Act also provides for the termination of bargaining rights[a,3]

A certified union is the exclusive bargaining agent for all of the employees in the bargaining unit and its rights are protected. No rival application for certification, and no application for termination of bargaining rights, is timely for one year from the date of certification, and then only after the expiration of the conciliation process. In the event of a strike or lock-out, no application for certification or termination is timely until six months have elapsed or until seven months following the expiration of the conciliation process, whichever occurs first. And once an agreement is signed, a union's representation rights are protected until the commencement of the two-month 'open-period' prior to the expiration of its collective agreement.[4]

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[a]The termination process is called decertification.

Certification is no more than the necessary first step, however: no more than a 'legal licence to bargain' (Weiler, 1980:48). A union's, bargaining rights are fragile until cemented in a collective agreement. In Canada, the agreement is both the purpose and the extent of collective bargaining. Typically, it is a lengthy document describing in detail the terms and conditions of employment to which all concerned--the union, the employer, and the workers--are bound by law.[5] The agreement constitutes the outer boundary of workers' rights. Management, by contrast, retains its broad, common law rights except as expressly limited by the collective agreement (Palmer, 1983:589-591).

Unfair labour practices, most importantly dismissal of and discrimination against union members and supporters, are prohibited by the Labour Relations Act. Intimidation or coercion of employees seeking to exercise their rights under the Act and interference with the formation, selection, or administration of a union are unlawful. It is also an unfair labour practice for an employer to alter wages, or any other term or condition of employment, or any right, privilege or duty of employees, without the consent of the union, once the Board has notified the employer of an application for certification.[6],[b],[7] The Act gives the OLRB broad authority to inquire into and remedy unfair labour practices. In the event of a complaint, a labour relations officer is assigned to mediate and attempt to resolve the dispute by agreement of the parties. If the informal process fails, the matter is heard by a panel of the

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[b]The Act also proscribes unfair labour practices committed by trade unions: intimidation or coercion of employees exercising their right not to join a trade union and failure to comply with the duty of fair representation.[7]

Board. To remedy unfair practices, the OLRB has the power to determine what, if anything, an employer, union, or person(s) shall do, or refrain from doing, including the reinstatement, with or without compensation, of an employee dismissed in violation of the Act. Orders of the Board are enforceable as decisions of the Supreme Court of Ontario when filed with the court's registrar.[8] In extraordinary circumstances, the Ontario Board is specifically empowered to certify a union without a representation vote, notwithstanding the fact that membership is below the level required for outright certification. If the Board finds that an employer has violated the law and intimidated workers to the extent that a representation vote would not be a true expression of their wishes, it may certify the union provided that it has membership support sufficient for collective bargaining.[9],[c10]

By contrast with the certification process, there is a marked absence of procedural requirements in the Labour Relations Act respecting collective bargaining. Once the union has notified the employer of its desire to negotiate, the parties are obliged to meed within fifteen days, bargain in good faith, and make every reasonable effort to make a collective agreement.[11] What the law does regulate in considerable detail is the use of sanctions. Where the Act provides procedures, they must be followed. It is unlawful, therefore, for a union to strike for recognition: the certification process is provided for that purpose. Similarly, it is unlawful to strike during the term of a collective

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[c]Equivalently, if the Board finds that a union has harassed or intimidated workers into signing membership cards, or submitted fraudulent membership evidence, or discriminated against any person on the grounds of race, creed, colour, nationality, ancestry, age, sex, or place of origin, bargaining rights will be terminated or withheld.[10]

agreement: the Act requires the parties to submit their disputes over the interpretation, administration, application, or alleged violation of an agreement to final and finding arbitration.[d] And, once the agreement has expired it is unlawful to strike before the exhaustion of the conciliation process, including a one or two-week 'cooling-off' period. And finally, it is unlawful to threaten an unlawful strike or to do anything, the probable and reasonable consequence of which would be to cause another person to engage in an unlawful strike. Excepted are acts done in conjunction with a lawful strike.[12]

Conciliation is a two-stage procedure in Ontario: officer and board. A work stoppage is unlawful until both have reported and seven days have elapsed from the release of the board's report or fourteen days have elapsed from the date on which the parties are notified that the Minister of Labour does not consider it advisable to appoint a board.[e] The Act also provides for a myriad of other forms of third-party intervention, any of which may be assigned at the discretion of the Minister, usually with the agreement of the parties: a mediator, a special officer, an industrial inquiry commission, or a disputes advisory committee. In all cases, the appointees are empowered to offer recommendations which the parties are free to accept or reject. The parties may also agree to refer a dispute to arbitration,[f] in which case the decision of the arbitrator is final and binding. Also final and binding are the terms

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[d]The fact that the prohibition is broader than the range of potential disputes is a source of constant frustration (not to mention illegal strikes) for workers and unions.

[e]The 'no-board' option is the most common nowadays.

[f]This option is very seldom used.

and conditions of employment imposed to settle a first-agreement dispute. A recent amendment to the Ontario Act permits the OLRB to order arbitration if it finds that bargaining has been unsuccessful because of the refusal of the employer to recognize the union, either party has adopted an uncompromising position without reasonable cause or failed to make expeditious efforts to conclude an agreement, or any other reason the Board considers relevant.[13]

The Labour Relations Act says little about the conduct of strikes and nothing at all about picketing. Neither a strike vote nor a ratification vote is required in Ontario, but the Minister may direct, and an employer may request, a vote on the employer's last offer respecting the matters remaining in dispute.[g] And, whenever a vote is held, it must be a secret ballot; furthermore, all employees in the bargaining unit are eligible to participate, whether or not they are members of the union, and must be given ample opportunity to do so.[14]

Traditionally, the courts, not the OLRB, have regulated picketing. And even though peaceful picketing for the purpose of communicating information is permitted under the Criminal Code, judges have been quick to see conspiracies to injure and other tortious behaviour. More recently, the Ontario Board has sought to embrace picketing within its jurisdiction by asserting its authority to order the parties to cease and desist from conduct that is likely to result in an unlawful strike (Adams, 1985:653-4).

When a collective agreement is made, the law requires that it contains certain provisions: the union must be recognized as the

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[g]The employer is limited to one request per bargaining round.

exclusive bargaining agent of the employees in the bargaining unit; strikes and lock-outs during the lifetime of the agreement must be prohibited; there must be a procedure for the final and binding settlement by arbitration of disputes over the interpretation, application, administration, or alleged violation of the agreement; and, at the union's request, the agreement must provide for the deduction of union dues, or an amount equivalent to union dues, from the pay cheques of all of the employees in the bargaining unit, whether or not they are members of the union, and the remittance of the money to the union.[h,15] In addition, every collective agreement must be for a fixed term and at least one year in length. Union shop clauses are expressly permitted (although not when the union has been voluntarily recognized and has not demonstrated that its membership exceeded 55 per cent of the employees in the bargaining unit at the time of recognition); however, the Act precludes the use of compulsory membership clauses for requiring the dismissal of an employee who has been expelled, suspended from, or denied membership in a union for the reason that the person was or is a member of another union, has engaged in activity against the union or on behalf of another union, has engaged in reasonable dissent within the union, has been discriminated against, or has refused to pay unreasonable dues or assessments.[16]

The Ontario Labour Relations Board has the exclusive jurisdiction to exercise the powers conferred on it by the Labour Relations Act and to determine all questions of fact or law that arise in any matter before

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[h]Exemption is granted to bona fide religious objectors. A person granted exemption by the Board is required to send an amount equivalent to dues to an agreed-upon charity.[15]

it.[17] The Board is tri-partite in composition and ordinarily sits in panels of three: the OLRB chairperson or a vice-chairperson with one representative from each of the two panels of members nominated by employer and union organizations. At present, there are 51 Board members including a chairperson, an alternate chairperson, and fourteen vice-chairpersons, all but two of whom are legally trained (Ontario Labour Relations Board, Annual Report, 1985-86: 9-16).

The Board's powers are broad. It is empowered to make its own rules and procedures[18] and, in addition to adjudicating the cases which come before it, the OLRB is specifically empowered to attempt to settle disputes informally through mediation.[19] Its remedial jurisdiction is equally broad with a general authority to determine what, if anything, an employer, union or employees must do, or refrain from doing, and a specific power to issue cease and desist orders and directions, including directions to employers to reinstate employees with or without compensation.[20] Decisions of the Board are final and binding and enforceable as decisions of the Supreme Court of Ontario.[21]

Despite the OLRB's exclusive jurisdiction and a privative clause which purports to shield its awards from judicial review[1], the courts have intervened and quashed its orders and directions. Defect of jurisdiction and error on the face of the record have been particularly fertile grounds for judicial intervention (Adams, 1985:159). Until the

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[1]Section 108 of the Labour Relations Act states that no decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered into, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question, review, prohibit or restrain the Board or any of its proceedings.

mid-1970s, however, the Supreme Court of Canada was far from systematic in its approach: if the court agreed with the Board's decision, it was considered not reviewable; if the court disagreed, the decision was reviewable and would be quashed (Weiler, 1971:33). So unencumbered by authoritative pronouncements were the lower courts that they intervened almost at will. 'The results grew to be so conflicting that authoritative commentators came to conclude that individual court decisions were of little practical importance and could be ignored' (Adams, 1985:157).

Starting with CUPE, Local 963 v. New Brunswick Liquor Corp.[22] in 1973, the Supreme Court began to develop guidelines for review which took note of the specialized jurisdiction and accumulated experience of labour boards, recognizing, that is, their right to be wrong within the confines of their authority. Greater acceptance of the policy of compulsory collective bargaining by the courts and of the need for speed and finality in decision-making to make the policy effective have led to greater judicial deference. In the meantime, for its own protection, the Ontario Board, for one, has found it prudent to adopt elaborate rules and procedures, in part, to satisfy the judiciary's concept of natural justice (Finkelman, 1965).

Although the overall framework of labour laws is similar throughout Canada the Labour Relations Act in Ontario differs somewhat from its counterparts in other jurisdictions. Depending on the place, a union needs as few as 25 or as many as 50 per cent of the employees in the bargaining unit as members before an application for certification will be entertained. Other jurisdictions also require different levels of

membership support before certification is granted. Most of the acts permit a labour relations board to certify a union without a representation vote; however, the Nova Scotia and British Columbia statutes do not (Craig, 1986:129). Constraints on the right to strike are found in all jurisdictions. Most common is compulsory conciliation with a cooling-off period, but other prerequisites are the giving of notice or the taking of a strike vote, and all of the statutes provide a multiplicity of dispute-resolution techniques from conciliation to mediation, commissions, and arbitration (Adams, 1985:94-5). Several of the acts provide for first-agreement arbitration. Finally, all jurisdictions require every collective agreement to provide for the settlement of disputes over the interpretation, administration, or alleged violation of its terms without a work stoppage, generally by binding arbitration (ibid.:96).

So many were the variations among the statutes that by the 1970s Woods (1973:347) thought it 'not misleading to refer to the British Columbia, the Ontario, or the Quebec system' of labour relations. Such diversity has been championed by some, abhorred by others. Although recognizing the complications, Weiler (1980:11) favoured the lack of uniformity which allowed the provinces to be 'laboratories for legal experimentation with our industrial relations ailments'. Woods (1973:362-3) and Jamieson (1973:134), contrariwise, thought that jurisdictional fragmentation blocked the evolution of structures that would lead to greater stability. Yet, viewed from a distance, the legislative diversity is more apparent than real. The essentials of the present-day system have been in place since the promulgation of PC 1003

in 1944. None of the jurisdictions strays far from the twin policies of certification and compulsory collective bargaining, on the one hand, and compulsory conciliation and delay of strikes, on the other.

The Law and Union Growth: The Private Sector

The Labour Relations Act in Ontario and its counterparts in other jurisdictions have as their common root Privy Council Order 1003. Proclaimed on 17 February, 1944, the Wartime Labour Relations Regulations protected the right to organize[j] by prohibiting employer interference with trade unions and requiring an employer to negotiate in good faith with a union or other bargaining representatives[k] acting for a majority of the employees. A national Wartime Labour Relations Board with provincial arms[1],[23] was created to determine questions of representation and other matters related to collective bargaining. The regulations also provided for the appointment of conciliation officers and boards to investigate and attempt to settle disputes. Strikes and lock-outs were prohibited during the lifetime of a collective agreement and until 14 days after a conciliation board had submitted its report to the Minister of Labour (Canada, Department of Labour, 1945:13).

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[j]PC 1003 did not affect provincial and federal government employers, however; only in Saskatchewan was the right to organize extended to employees of the Crown. Unionism among government employees was not possible under the law until a series of special statutes was enacted beginning in the mid-1960s.

[k]The war-time regulations certified individuals, not a union, as the workers' bargaining agent--a novelty without merit, in Laskin's (1948:785) opinion.

[1]The Ontario Relations Board was first established by the Labour Relations Board Act[23] (Finkelman, 1965:3).

After World War II labour relations reverted to provincial jurisdiction where responsibility had rested since 1925. The right of the federal government to act on labour matters had been challenged two years earlier by the Toronto Electric Commission. The Commission's claim was initially rejected by the Canadian courts but accepted ultimately by the Judiciary Committee of the Privy Council in Great Britain which, until 1949, was Canada's highest court of appeal. In the Snider[m,24] case, the British court ruled that the legislation in question[n] was ultra vires because the federal government lacked the authority to legislate in matters of civil rights and private property. The British judges held that under the British North America Act responsibility for labour relations fell to the provincial governments with the exception of those industries operating within federal jurisdiction: railways, communications, shipping, defence, Crown corporations, chartered banks, and other industries operating in more than one province or of national importance.[o]

One result of the Snider decision was to create ten separate jurisdictions respecting labour relations: the nine provinces[p] plus that of the federal government. At first, the provinces chose to follow the lead of the federal government by enacting similar legislation. 'Within

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[m]Toronto Electric Commissioners v. Snider.[24]

[n]The Commission was challenging the appointment of a conciliation board under the Industrial Disputes Investigation Act of 1907.

[o]The federal jurisdiction now encompasses a little more than 5 per cent of the non-agricultural labour force (Jamieson, 1973:124).

[p]The nine provinces became ten in 1949 with the induction of Newfoundland into Canada.

seven years the whole country, with the exception of Prince Edward Island, had made the adjustments necessary to retain a uniform policy on dispute settlement across the nation', Woods (1973:24) reported. By the mid-1930s, however, the federal government's inaction on the most pressing matter of the day, union recognition, had led to provincial experimentation. The most comprehensive of these attempts to resolve the stand-off over recognition was Ontario's Collective Bargaining Act[25] of 1943 which foreshadowed PC 1003 in many respects. Other provinces had affirmed labour's right to organize in legislation earlier but had failed to provide a workable method of enforcement. But with the proclamation of Privy Council Order 1003 the federal government reasserted its leadership. Most of the provinces withdrew their alternative legislation and after the war enacted labour codes based on the PC 1003 model. In 1947, the Ontario Labour Relations Board became independent of its federal counterpart[q],[26] and in 1950 completely separate provincial legislation, the Labour Relations Act,[27] was enacted.

PC 1003 and the policy of compulsory collective bargaining emerged in a period of intense social unrest in Canada. In sharp contrast with the deprivations of the depression years, the rough equality of the war-time austerity seemed to many 'a demonstration of the real possibility of social justice in the post war world' (Creighton, 1976:77). In the meantime, however, reality was falling short of workers' rising expectations. Wages were frozen at their 1929 level (MacDowell,

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[q]By The Labour Relations Act[26] of 1948, an interim legal regime was established to bridge the gap between the termination of the federal government's jurisdiction over labour-management relations and the enactment of provincial legislation.

1982:65)[r] and employers remained adamantly opposed to collective bargaining. In 1943, one out of three union members was involved in a strike, a level of discontent unsurpassed except in 1919 and then only marginally (MacDowell, 1978:176). Politically, the unrest was manifested as a dramatic rise in the popularity of the leftist Co-operative Commonwealth Federation (CCF). The party took 34 seats in the Ontario election of that year, just four fewer than the government's 38. In September, the Canadian Congress of Labour[s] declared the CCF, 'the political arm of labour', and the Gallop Poll reported that the party had won the support of 29 per cent of the electorate nationally compared with 28 per cent for each of the Liberal and Progressive Conservative parties (Creighton, 1976:102).

Union membership was growing rapidly. When Canada entered the war in 1939, membership was below its 1919-20 level and concentrated among craft and skilled workers. The thousands of unskilled workers in the manufacturing and resource industries were 'largely untouched by any form of legitimate employee organization' (Laskin, 1944: 780). But after a year of slow growth organizing proved highly successful: membership increased by 100,000 between 1940 and 1941, then by 116,000, 87,000, and 59,000 in each of the following years, so that by 1944 the number of

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[r]Wage guidelines (established by Privy Council Order 7440) were replaced in 1941 by a wage stabilization order (Privy Council Order 8253) administered by the National War Labour Board.

[s]The CCL was the labour federation of the newly formed industrial unions--the United Auto Workers, the United Steel Workers, the United Electrical Workers, etc.--affiliated with the Congress of Industrial Organizations (CIO) in the United States. In 1939, they were expelled from the Trade and Labour Congress at the behest of the American Federation of Labour (AFL).

union members stood at 724,000 or 24.3 per cent of the paid, non-agricultural labour force.

Table 2:1: Union Membership and Density in Canada, 1939 to 1949[#1]

	Union membership (thousands)	Union membership as a % of the civilian labour force	Union membership as a % of the paid, non-agricultural labour force
1939	359	7.7	17.3
1940	362	7.9	16.3
1941	462	10.3	18.0
1942	578	12.7	20.6
1943	665	14.6	22.7
1944	724	15.9	24.3
1945	711	15.7	24.2
1946	832	17.1	27.9
1947	912	18.4	29.1
1948	978	19.4	30.3
1949	1,006	19.3	29.5

[#1]Canada. Department of Labour. 1972. Labour Organizations in Canada. Ottawa: Queen's Printer.

These gains were made within a voluntaristic legal framework: workers were free to organize trade unions and employers were equally free to discriminate against them for doing so. True, an amendment to the Criminal Code in 1939 made it an offence for an employer to refuse to

employ or to dismiss any person on the sole ground of union membership, or to discourage union membership through intimidation or by threatening or causing loss of position or employment,[28] but as the offence was a criminal one requiring prosecution by the Crown few employers were brought before magistrates. And those that were, faced risible fines. Society Brand Clothes, for example, was charged with six counts of unlawful dismissal in 1942 and fined of $50 on each count.[29] The workers, meanwhile, were left without jobs. Government policy, formulated in its 1940 'Declaration of Principles'[30] was that employees should be free to organize independent trade unions and free to negotiate with management over terms and conditions of employment with a view to making collective agreements. But the 'principles' were recommendations only. The federal government was prepared to encourage, but not to compel, employers to recognize and bargain with trade unions (Woods, 1973:71-2).

The only policy formulated in law at the start of the war was the Industrial Disputes Investigations Act.[31] Enacted in the wake of a potentially disastrous strike of coal miners in Alberta during the winter of 1906, the IDIA initially had the character of emergency legislation. The policy combined two principles: compulsory conciliation of disputes by tri-partite boards and the suspension of strikes and lock-outs until after the conciliation process was completed and a further waiting period had elapsed. Conciliation was made compulsory chiefly because experience with the Conciliation Act[32] of 1900 had demonstrated the limitations of

voluntarism. The earlier legislation empowered the minister[t] to inquire into a dispute, arrange a conference between the parties, and appoint a conciliator or board of conciliation at the request of either labour or management.[u] In Woods' (ibid.:50-1) opinion, the Conciliation Act failed because it required mutuality. A conciliator might be appointed on labour's request but the employer was free to refuse to participate. From the employers' point of view, the joint machinery accorded unions greater recognition than most businessmen were prepared to concede.

An element of compulsion was added to the conciliation process with the Railway Labour Disputes Act[33] of 1903. As introduced, the bill would have imposed compulsory arbitration and a binding award; however, stiff opposition from organized labour resulted in a much reduced form of intervention. Babcock (1974:93-4) explained the critical role of the American Federation of Labour on this issue. Many Canadian unionists, particularly those in relatively weak unions, favoured compulsory arbitration along Australian lines. The AFL, however, feared that its adoption in Canada would lead to legislatively imposed compulsory arbitration in the United States so persuaded the Trades and Labour Congress to alter its policy of tentative support for compulsion. In any

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[t]One section of the Conciliation Act created the Department of Labour as an appendage of the Post Office. In 1909, labour became a completely separate department; its first minister was William Lyon Mackenzie King (Craven, 1980:360).

[u]On the request of both parties, an arbitrator could also be appointed.

event, the scope of the statute and thus the use of compulsory conciliation was limited to the railways.[v],[34]

In 1907, the Industrial Disputes Investigation Act extended compulsory conciliation to disputes in the mining and public utilities industries but after the constitutionality of the Act was successfully challenged, it was redrafted to respect the ruling in the Snider case. After 1927, the scope of the IDIA[35] was restricted to industries within federal jurisdiction, coverage that was simultaneously narrower, because industries such as mining were no longer covered, and broader, because all industries in the federal jurisdiction and not just 'essential' industries were embraced. In the process, the Act lost its emergency character and became a procedure of general application (Woods, 1973:24).

Workers covered by the IDIA and its provincial counterparts[w],[36] had a limited right to strike. So long as their strike was timely, that is, after conciliation and the cooling-off period, unions were not liable for damages. For most workers, however, there was no such immunity. Outside of 'essential' industries, strikes were frequently enjoined on grounds of conspiracy. In Le Roi Mining Company v. Rossland Miners Union No.38[37], for example, the court copied the decision of English court in the Taff Vale[38] case even though, Carrothers (1965:421) noted, the statute law on which the Taff Vale decision was founded did not apply in Canada. But Canadian judges were far from consistent in their views and no line of

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[v]In 1906, the Conciliation Act and Railway Labour Disputes Act were joined to create the Conciliation and Labour Act[34]. No new principles were introduced at this time.

[w]The IDIA principles were applied to mines, railways, and public utilities within Ontario's jurisdiction in 1932 with the passage of the Industrial Disputes Investigation Act.[36]

reasoning prevailed. Some regarded strikes as unlawful per se while other were persuaded that workers had a right to strike. Consequently, decisions of the Supreme Court of Canada were 'remarkably lacking in direction' (ibid.:423) and remained so well into the post-war years. Whether workers could strike without incurring liability was anybody's guess.

The policy of conciliation and strike delay was the federal government's only labour relations policy until well into World War II. In 1939, the IDIA was extended to all war-related industries[39] under the auspices of the War Measures Act.[40] But with most of mining and manufacturing brought under federal jurisdiction, the demand for conciliation quickly out-stripped its supply. The government's response was to introduce another intermediary body, an industrial dispute inquiry commission,[41] the function of which was to make a preliminary investigation of an industrial dispute, attempt to secure a settlement, and report back to the Minister of Labour with a recommendation respecting the advisability of appointing an IDIA-board (Webber, 1985:66). Even so, the volume of strikes continued to grow. From 120 in 1939, the number of new strikes rose each year to 401 in 1944. The central issue in dispute was union recognition.

In typically Canadian fashion, the federal government responded to the symptom rather than the cause of the unrest. Instead of enforcing its 'Declaration of Principles', or even exhorting employers to accept the recommendations of its inquiry commissions and conciliation boards, the government sought to impose labour peace by erecting further legal barriers in the way of strikes. Yet another obstacle was added in 1941.

With Privy Council Order 7307, a supervised vote became a condition precedent to a lawful strike. Because the Minister of Labour determined the voting constituency and a union was required to win the support of a majority

Table 2:2: Strike Activity in Canada, 1939 to 1949[#1]

	Number of strikes beginning during the year	Workers involved	% of estimated working time
1939	120	41,038	0.04
1940	166	60,619	0.04
1941	229	87,091	0.06
1942	352	113,916	0.05
1943	401	218,404	0.12
1944	195	75,290	0.06
1945	196	96,068	0.19
1946	223	138,914	0.54
1947	231	103,370	0.27
1948	147	42,820	0.10
1949	130	46,867	0.11

[#1]Canada Information Canada. 1975. Strikes and Lockouts in Canada. Ottawa: Information Canada.

of those entitled to vote, the measure was detested by labour. In Canadian Forum, PC 7307 was criticized for imposing further delays

'without doing anything whatsoever to deal with the causes of strikes'[x].

In its attempt to avoid industrial strife and accelerate war production, the government failed to provide a coherent labour relations policy. The Industrial Disputes Investigation Act was demonstratably unsuited to deal with recognition disputes, a conclusion supported by Selekman's (1936) knowledgeable assessment of the Act from its inception to the mid-1930s. The emphasis was entirely accommodative--many times Selekman noted that the thrust of the conciliation effort was to take the parties as far along the path of collective bargaining as they could be persuaded to go--which meant that issues of 'principle' were especially troublesome. The parties were best served, Selekman concluded, when the issue in dispute was wages or some other term or condition of employment. Conciliation of recognition disputes was much less effective. When an employer could not be persuaded to recognize the union, the conciliation board generally recommended a compromise more on management's terms than the workers', in spite of frequent affirmations of the employees' right to a voice in determining wages and working conditions and to be represented by persons of their own choosing. None the less, the IDIA lent a limited legislative support to weak unions and this was sufficient to secure labour's approval in the pre-World War II years. Conversely, employers tolerated government intervention precisely because it was limited to essential industries in which the public had a legitimate interest in the promotion of labour-management harmony. But any

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[x]Quoted by Webber (1985:68). The strike-vote requirement was repealed after the introduction of PC 1003.

extension of the IDIA principles to other industries threatened to turn their compliance into hostility, Selekman (ibid.:23-6, 42-3) concluded.

Labour's war-time experiences confirmed the inadequacy of compulsory conciliation for resolving recognition disputes. The failure of uranium miners in Kirkland Lake, Ontario, to win their strike for union recognition in 1941-2 highlighted the inherent unfairness of the system. Compulsory conciliation did not make a collective agreement inevitable, 'nor did it establish an indefinitely continuing relationship between union and management' (Woods, 1973:73). The saga of delay and frustration culminating in apathy and defeat exposed the policy's deficiencies. Long delays led to few concessions from management while damaging the union's ability to sustain a strike. The intermediaries further aggravated workers by repeatedly attempting to secure a compromise on what they regarded as a non-negotiable issue. The ultimate betrayal was the government's failure to back up favourable recommendations of the commission appointed to inquire into the cause of the dispute and the conciliation board (Webber, 1985:70). The effect of the IDIA with its strict constraints on the right to strike was to nullify the advantage that the acute manpower shortages have given labour without providing any assurance that an employer would comply with recommendations that proposed union recognition.

The policy's failure at Kirkland Lake 'began the march toward PC 1003', said Logan (1948:547). The demand for legislation modelled after the Wagner Act south of the border united the leaders of an otherwise divided union movement in a common political purpose (MacDowell, 1978:187). The results of the 1943 election, with a particularly strong

showing for the CCF among industrial workers, affirmed Prime Minister King's worst fears: it might even be 'the beginning of the end of the Liberal Party federally', he confided in his diary[y]. Surrounded on the political as well as the industrial front the government was forced to act. 'It is sad but true', said Pentland (1979:19), 'that Canadian employers as a group--and Canadian governments--have never taken a forward step in industrial relations by intelligent choice, but have always had to be battered into it'. PC 1003 was not the product of government or employer enlightenment but was 'forced out of a most unwilling government and set of employers by the terrifying rise in time lost by industrial disputes in 1943'.

In fact, PC 1003 exhibited little confidence in the process of collective bargaining. The form of the measure, an order-in-council, betrayed a government little interested in remodelling labour-management relations and only in securing labour's co-operation for the duration of the war. Equally, the tight constraints on the use of economic sanctions demonstrated little understanding of the role of strikes (or threats of strike) as an inducement to settle and totally ignored the fact that such constraints, no matter how even-handedly applied, reinforced the status quo by undercutting the bargaining power of labour. Warrian's (1986) conclusion was that the model of labour-management relations which underpinned PC 1003 was unitarist, not pluralist.

The evidence for the war years suggests that while the policy of compulsory conciliation coupled with severe constraints on the right to strike may have stifled the growth of collective bargaining, it did not

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[y]Quoted by MacDowell (1978:193).

prevent the growth of union membership. Certainly, the years prior to the proclamation of PC 1003 were years of remarkable increases in membership. The number of unionists doubled within four years and union density increased by almost 50 per cent. But membership actually fell, from 724,000 to 711,000, between 1944 and 1945, the first year of the new policy. During the years immediately following the war, the pace of union growth remained strong: new recruits numbered 80,000 in 1946-7 and 65,000 in 1947-8. Thereafter, however, the rate of increase was much slower. As a proportion of the paid, non-agricultural labour force, union membership peaked at one-third in 1954 then tapered off, hitting its post-war low of 19.4 per cent ten years later. Between 1954 and 1964, the number of new trade unionists increased by only 225,000 (17.7 per cent) while the labour force[z] grew by 1,320,000 (35.2 per cent) persons.

During the 1950s, unions concentrated on the development of collective bargaining; organizing was a secondary consideration. The contours of the modern collective agreement were established and, in the process, momentous improvements in living standards achieved. Wages were increased substantially and retirement pensions introduced. Vacations with pay and medical insurance were also made available to working people for the first time. Although recruiting continued, the pace of growth slowed considerably. Unions had reached their 'temporary limits to growth', Jamieson (1957:27-8) concluded:

> Virtually all the workers that are organizable, in terms of present union techniques, finances, ideologies, and policies, have been enrolled. The two-thirds of paid workers who remain outside of union ranks represent primarily the employees of small or isolated enterprises, uneconomical to organize, and,

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[z]The paid, non-agricultural labour force that is.

far more important in the aggregate, the large and rapidly growing numbers of white-collar workers.

Jamieson's prediction proved prescient. In the private sector, unions made only modest gains over the next thirty years. In manufacturing, for example, union density stood at 37.4 per cent in 1954 and 44.4 per cent in 1981. In construction, the proportion of workers organized increased from 50.5 to 54.0 per cent over the same period and in forestry from 43.5 to 56.2 per cent. In some industries, union membership fell relative to total employment. In transportation, communications and utilities, a large industrial grouping, the proportion of workers organized dropped from 65.4 to 53.2 per cent. Similarly, in mines, quarries and oil wells membership fell from 50.0 to 35.5 per cent. Overall, union density in the primary sector[aa] appears to have fallen from 47 per cent in 1954 to 40 per cent in 1981; concomitantly, there was a small increase in the level of membership in the secondary sector, from 47 to 48 per cent.

The tertiary sector, meanwhile, remained largely unorganized. Despite dramatic increases in employment--the trade, finance, and service industries accounted for 54 per cent of paid employment by 1981--union membership languished outside of the public sector. In wholesale and retail trade, for example, union membership is lower than one in ten while in finance, insurance, and real estate, the proportion of workers enrolled in trade unions is below one in thirty. Only in the services industry does membership exceed one in four, and then largely because union membership is extensive in the public sector employments of

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[aa]Agriculture excluded.

teaching and health care. Union membership in the private, tertiary sector industries remains very low.

The Law and Union Growth: The Public Sector

For government employees, Privy Council Order 1003 offered no opportunity to unionize. Expressly excluded were 'His Majesty and any person or corporation acting for or on behalf or as an agent of His

Table 2:3: Union Density in the Primary and Secondary Sectors, 1954 and 1981

	1954[#1]	1981[#2]
Primary Sector	46.6%	39.7%
Forestry	43.5	56.2
Mines, quarries and oil wells	50.0	35.5
Fishing	-0-[#3]	37.5
Secondary Sector	47.1%	48.1%
Manufacturing	37.4	44.4
Transportation, communication, and utilities	65.4[#4]	53.2
Construction	50.5	54.0

[#1] [Eaton, J.K. and K. Ashagrie]. 1970. Union Growth in Canada, 1921-1967. Ottawa: Department of Labour.

[#2] Canada .Statistics Canada. 1983. Corporations and Labour Unions Returns Act, Report for 1981. Ottawa: Ministry of Supply and Services.

[#3] Not available

[#4] Estimated from data provided.

Majesty', although the employees of certain Crown agencies--the Canadian Broadcasting Corporation, the National Harbour Board, the Bank of Canada, and the Canadian National Railway System, for example (Finkelman and Goldenberg, 1983:25)--were permitted union representation. The rights and protections of the new law were also withheld from provincial government employees with the exception of Saskatchewan where the CCF government extended to its employees both the right to bargain collectively and the right to strike in 1944 (Arthurs, 1971:45). After the war, civil servants continued to be excluded from the general labour code. The Industrial Relations and Disputes Investigation Act[bb],[42],[43], for example, governed labour-management relations in firms falling within federal jurisdiction, Crown corporations, and some government agencies,[cc] but not of the federal government itself. The post-war labour codes of the provinces, apart from Saskatchewan's, also excluded government employees. In Ontario, civil servants were beyond the scope of the Labour Relations Act as were the employees of agencies such as the Workers' Compensation Board, the Niagara Parks Commission, the Ontario Housing Corporation, and the community colleges. On the

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[bb]The IRDIA was the post-war equivalent of the Labour Relations Act in Ontario, and the predecessor of the Canada Labour Code.[42]

[cc]Finkelman and Goldenberg (1983:53) provided a partial list of the agencies covered by the Canada Labour Code: Atomic Energy of Canada Ltd., Air Canada, Bank of Canada, Canadian Arsenals Ltd., Canadian Broadcasting Corporation, Canadian National Railways, Canadian Overseas Telecommunications Corporation, Canadian Wheat Board, Canada Mortgage and Housing Corporation, Eldorado Nuclear Ltd., Export Development Corporation, Farm Credit Corporation, Harbour Commissioners, National Arts Centre, National Harbour Board, Northern Transportation Co. Ltd., Petro-Canada, Pilotage Authorities, Polysar Ltd., Royal Canadian Mint, St. Lawrence Seaway Authority, and most recently Canada Post Corporation.

other hand, labour relations in proprietary industries such as Ontario Hydro and the Toronto Transit Commission are governed by the general labour code (Adams, 1985:149).

Even so, civil servants were not entirely without representation. A system of joint consultation dated from 1944 in the federal civil service when, under the combined pressures of inflation and labour shortages, the federal government was forced to formalize its earlier consultative initiatives. Privy Council Order 3676 established the National Joint Council of the Public Service of Canada on the model of the Whitley Councils in Great Britain. The change was sought after by the staff associations and initially they were very positive about joint consultation; however, Frankel (1960:371) wondered 'whether there could have been any meaningful joint deliberation after the government had presented its own version in detail'. In practice, the system delivered something less than envisioned:

> The scope of issues which were open to consultation proved narrower than the Staff Side initially believed. In particular, wages were deemed to be outside the jurisdiction of the council, forcing associations to submit periodic salary briefs directly to the government. No mechanisms were provided in the event the Staff Side and the Official Side could not reach agreement on a particular issue. Essentially, if the Official Side said 'no', there the matter rested, and the status quo prevailed. Staff associations also complained of excessive secrecy surrounding the council's deliberations. In certain cases, the Official Side would refuse to engage in meaningful discussion of an issue unless Staff Side representatives agreed not to divulge the contents and progress of the discussions. Such promises prevented staff associations' representatives from consulting even with their own constituents. Further, in the absence of the principle of exclusive representation, more than a dozen staff associations were represented on the council. The many associations often claimed similar jurisdictions and competed with one another. Thus, Staff Side representatives sometimes operated at cross-purposes, weakening their ability to achieve objectives. Finally, in the last analysis, council decisions were only

> advisory. The government retained the right to reject recommendations if it was so inclined. While council recommendations were usually implemented, their implementation sometimes followed lengthy delays, preliminary rejections, and content changes in the recommendations. This absence of guarantees and the uncertainty it fostered added to the dissatisfaction of Staff Side representatives (Ponak, 1982:348-9).

Over and over again, the government emphasized that the role of the National Joint Council was advisory only. Moreover, because the council reported to the Treasury Board, the cabinet, and the Public Service Commission, delays were inevitable while these three bodies consulted among themselves. Over two years were required to resolve the staff associations' request for the automatic deduction of dues from their members' pay-cheques because the council's recommendation was initially turned down by the Treasury Board (Frankel, 1960:373). On the council itself there was no mechanism for resolving deadlocks. Neither side could out-vote the other as recommendations had to be unanimous. Nor was there any provision for mediation or arbitration of issues in dispute.

From the staff associations' point of view, the greatest weakness of the consultative mechanism was its vagueness with respect to wages and salaries. The government read out of the legislation any obligation to consult over wages, even though the council's mandate was to make recommendations respecting the 'general principles governing conditions of employment in the public service of Canada including among other conditions recruitment, training, hours of work, promotion, discipline, tenure, regular and overtime remuneration, health, welfare and seniority'.[dd] Recommendations on salary matters were restricted to

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[dd]Quoted by Frankel (1960:375-6).

general objectives with no mention of dollars and cents. The peripheral role of the council was made evident in 1952 when the staff side was 'consulted' after the government had already decided on a salary increase. 'It is difficult to regard this as consultation in the sense envisaged in the idea of a joint council', Frankel (ibid.: 377) concluded. A further, important shortcoming of the consultative mechanism was the failure to establish joint councils at the departmental level to deal with day-to-day problems and individual grievances. On the official side, management resisted any attempt to cut down its traditional prerogatives while the staff side was chronically weak due to fragmentation and competition among the various associations. It was not uncommon for three or four staff associations to claim the right to represent the employees of one department (ibid.:382-3).

By 1960, the questioning of the joint consultation mechanism 'had turned into a chorus of support for abandoning the NJC scheme and replacing it with collective bargaining' (Ponak, 1982:348). For the employee organizations, the continuing flaw in consultation was that, consult for as long as they might, it was the government that finally set the rates of pay and conditions of service. Government officials were not enamored with the process, either. It was a situation, they said, where the employee organizations consulted before and complained after (Armstrong, 1968:488).

The experience with joint consultation was not much happier in the provinces. In Ontario, joint consultation had a stronger employee base than federally. Even though they could not be said to have had full collective bargaining rights, government employees in Ontario were

nevertheless protected from management's unilateral decision-making after 1962 (Goldenberg, 1973:18). The joint council mechanism was empowered to make recommendations respecting working conditions, remuneration, leaves and hours of work. More importantly, every agreement was put in writing and implemented. And if no agreement were reached the minister could appoint a mediator and/or refer the matter to the Civil Service Arbitration Board for final and binding settlement. All the same, the system chafed. The staff side wanted to be free to appoint its own representatives. It also felt the arbitration mechanism was less than impartial and that the issues subject to consultation should be broadened.

It was not until the mid-1960s that the legal constraints respecting collective bargaining in the civil service began to be lifted. As late as 1964, the Premier of Quebec could forestall the demand for collective bargaining by provincial employees by asserting, 'The Queen does not negotiate'.[ee] The next year, however, Quebec became the first of the provinces (apart from Saskatchewan) to permit its employees to organize. The federal government followed soon after, extending the right to bargain to its employees in 1967 with the Public Service Staff Relations Act.[44] Ontario's policy was revised in 1972. Employees, other than the employees of the community colleges, were given the right to organize under the Crown Employees Collective Bargaining Act[45] and the Colleges Collective Bargaining Act[46] was enacted the same year. By 1975, the transformation was complete: government employees in all the provinces had a protected right to organize and bargain collectively.

[ee]Quoted by Ponak (1982:347).

Once disenchantment with the consultative mechanism set in, change came swiftly:

> Staff associations began switching from a position of opposition to collective bargaining to one of advocacy. At the same time, they began to model themselves along traditional union lines, excluding management personnel from membership, hiring full-time staff experts, eliminating no-strike clauses from their constitutions, merging with competing or complementary organizations, and in many cases affiliating with the Canada Labour Congress (Ponak, 1982:349).

Organizing was immediately successful: 'unprecedented in its brevity'. The first applications for certification in the federal jurisdiction were filed a month after the proclamation of the new law (Armstrong, 1968:492) and virtually all of the federal civil service was organized within three years (Rose, 1984:97). Union density in the federal civil service is now in excess of 95 per cent of those eligible for collective bargaining and the 'same is probably true of most of the provinces and territories' (Finkelman and Goldenberg, 1983:3).

For government employees, the link between the law and union growth seems self-evident. According to Craig (1986:256), 'favourable government legislation was the major catalyst in the phenomenal growth of unionization in the federal and provincial public sectors'. For other public sector employees, however, the connection is less obvious. Although collective bargaining in the public sector was the exception prior to 1965, many groups had had the right to organize for decades. Collective bargaining for fire fighters,[ff,47] for example, dates from the 1920s in Ontario (Adams, 1981a:147). Elementary and secondary school

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[ff]Labour-management relations in fire departments are governed by the Fire Departments Act.[46]

teachers[gg,48] had been bargaining without legislative support from the 1920s as well. Since 1947, municipalities in Ontario have been required to bargain in good faith with the representatives of police officers[hh,49] although, in practice, bargaining was infrequent until the mid-1960s when the employee associations became strong enough to demand change (ibid.:141-2). Likewise, the employees of social welfare agencies, hospitals, universities, and libraries had been entitled to organize for over forty years but generally chose not to until the late 1960s. And finally, employees of municipal governments have long been covered by the general labour code in most provinces, although in Ontario local politicians had the option of exempting their municipalities from the Labour Relations Act until 1966 (Sack and Mitchell, 1983:52).

Once the exception, collective bargaining is now the rule in the public sector. Today, 'it is very difficult to find public employees not covered by a collective agreement' (Ponak, 1982:345). What is more, their organizing successes revitalized a stagnating union movement. Between 1964 and 1976, union membership in Canada doubled and continued to grow as the appetite for collective bargaining spread among public employees. Of the 1.6 million new members recruited between 1964 and 1977, over 900,000 were the result of organizing in the civil service, schools and universities, hospitals and nursing homes. And of the two million new members recruited between 1961 and 1981, half were employed

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[gg]Since 1973, collective bargaining in Ontario's elementary and secondary schools has been regulated by the School Boards and Teachers Collective Negotiations Act.[47]

[hh]The statutory foundation for collective bargaining between police officers and their employers is provided by the Police Act.[48]

in the public sector (Kumar, 1986:114, 115). Today, the level of union membership in the public sector far exceeds that of the private.

The effect on the labour movement has been dramatic. By one estimate, almost one-half of all members are now employed in the public sector (Ponak, 1982:345); by another, two out of five union members are public employees (Kumar, 1986:115), even though public sector employment accounts for less than one-quarter of total employment (Bird, 1978:25). The gains have been most impressive among the historically hard-to-organize: white-collar and female employees. Of the more than one-and-a-half million members recruited between 1965 and 1984, almost a million were women and most of them were employed in the tertiary sector. By contrast, membership in the traditional union strongholds grew by slightly more than 300,000, eroding the leadership of the male-dominated, international unions.[ii] In 1974, the Canadian Union of Public Employees surpassed the United Steel Workers of America to become the largest union in the country. And in 1986, CUPE's past-president was elected president of the Canadian Labour Congress.

But, like PC 1003, collective bargaining legislation in the public sector evidences little confidence in the bargaining process. Although a broader range of occupations including lower-level managers are generally permitted union representation, in most jurisdictions public sector workers have fewer rights than their private sector counterparts. In

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[ii]Calculated from data found in the following sources: Corporations and Labour Unions Returns Act, Report for 1965. Ottawa: Ministry of Industry and Tourism. Canada, Ministry of Industry and Tourism. 1968 Corporations and Labour Union Returns Act, Report for 1966. Ottawa: Ministry of Industry and Tourism. Canada. Statistics Canada. 1987. Corporations and Labour Unions Returns Act, Report for 1984. Ottawa: Ministry of Supply and Services.

half, the law designates the organization that the government is prepared to recognize as bargaining agent (Craig, 1986:272) and everywhere the range of negotiable issues is severely constrained. Under the federal code, for example, matters of demotion, promotion, appraisal, transfer, and superannuation are reserved exclusively for management. Similar restrictions are common in the provinces as well. Strikes of government employees are always unlawful in six provinces and it is the rare jurisdiction that permits police officers or fire fighters to engage in a lawful work stoppage. Strikes of hospital workers are commonly prohibited, and of teachers occasionally. The result is a peculiar amalgam that simultaneously encourages workers to expect the benefits of collective bargaining while frustrating their attempts to achieve them.

Econometric Studies of Union Growth

The importance of public policy and favourable legislation as sources of support for the growth of unions is widely acknowledged. The literature on the Wagner Act in the United States is voluminous and virtually unanimous in concluding that the New Deal legislation was vital to the emergence of collective bargaining in the mass-production industries.[JJ] And despite Britain's history of voluntarism, Bain (1970:181) concluded that the growth of white-collar unions in private industry came about, 'directly or indirectly, as a result of government policies and the favourable climate they created for trade unionism'. Similarly, legislative aid for trade unionism and collective bargaining

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[JJ] See, for example, Bernstein (1971), Brody (1981) and Gross (1974, 1981).

was provided by the legally imposed system of compulsory arbitration in Australia at the turn of the century and by the Rights of Association and Negotiation Act of 1936 in Sweden.

Interestingly, the seeming importance of legislative support has not always been revealed by econometric analyses of the growth of union membership. To date, the most comprehensive attempt to specify a mathematical model has been that of Bain and Elsheikh (1976a). Their basic model, initially developed to account for the growth of union membership in the United Kingdom, was applied with varying degrees of success to the United States, Australia, and Sweden. The Bain-Elsheikh model relies on the conventional explanatory variables: rate of change of retail prices, rate of change of money wages, level and/or rate of change of unemployment, and level of union density. Using these variables, they reported explaining 73 per cent of the variance in the rate of growth of union membership[kk] in the United Kingdom for the years 1893-1965, 1893-1966, 1893-1968, and 1893-1970. In light of Bain's (1970) earlier research, Bain and Elsheikh (1976a:86) employed a dummy variable to denote either the favourable legislation or the favourable social climate prevalent during the years 1915-20, 1940-45, and 1952-70 in earlier versions. The results were unsatisfactory, however, so discarded: 'the estimated coefficients of all the variables either had the wrong sign, lacked significance, or were faulty in both respects' (ibid.:86).

The basic Bain-Elsheikh model was also used to analyze the rate of growth of union membership in Sweden with considerable success.

[kk]Bain and Elsheikh (1976a:58) specified the dependent variable as the ratio of the actual number of union members to the potential number.

Restricting the independent variables to prices, wages, unemployment, and union density, they explained 86 per cent of the variance in the rate of union membership growth for the period 1914 through 1970. No measure of legislative support was included because, in their opinion, the purpose of the 1936 Act was mainly to stimulate the growth of unions among white-collar workers, which it did, 'but there is no evidence from the graphs or from the statistical analysis that the legislation has had an appreciable impact upon aggregate union growth' (ibid.:100).

The conventional variables proved unsatisfactory for the United States and Australia, however. In both cases, the explanatory power of Bain and Elsheikh's model was enhanced by the addition of a dummy variable for the years during which the two governments actively intervened to encourage the extension of collective bargaining. For the United States, they were able to build on the earlier work of Ashenfelter and Pencavel (1969). The latter pair had included, as an independent variable, the proportion of Democrats elected to the US Congress as a proxy for pro-labour sentiment which they felt would both determine the response to union organizing drives and indicate the extent of positive labour legislation. This approach was criticized by Bain and Elsheikh (1976a: 41-2) on a number of grounds including the accuracy of Ashenfelter and Pencavel's assumptions about the workings of the American political system; they also questioned the usefulness of a variable with a limited range of possible values. Bain and Elsheikh proposed, instead, to incorporate a dummy variable with a value of one for the years 1937-47 and zero for all other years as a proxy for the benefits accruing from

the Wagner Act[11] before labour's rights and privileges were cut back by the Taft-Hartley Act in 1947. The Bain-Elsheikh, Ashenfelter-Pencavel hybrid model proved highly satisfactory, explaining 73 per cent of the variance in the rate of union growth between 1904 and 1960. The dummy variable distinguishing the years 1937-47 was positive and statistically significant.

Bain and Elsheikh were similarly able to benefit from Sharpe's (1971) work on Australia. Taking his lead from Ashenfelter and Pencavel (1969), Sharpe initially employed, as an independent variable, the proportion of the electorate voting for the Australian Labour Party but found no significant correlation with the rate of growth of union membership. He then tested his model using a dummy variable to reflect the impact of the compulsory arbitration system on union growth and discovered that the most successful formulation was to assign the variable a value of one for the years 1907 to 1913 and zero otherwise. Bain and Elsheikh (1976a:95) incorporated Sharpe's discovery as a modification to their basic model and found the results pleasing. The coefficient of the dummy variable was positive and highly significant. And, overall, the model accounted for 74 per cent of the variance in the rate of union membership growth for the years 1907-1969.

A strong statistical link between the rate of union growth and changes in law and policy in Canada has yet to be demonstrated despite a long history of government intervention and a strong presumption that the legal framework introduced in 1944 was critical to the emergence of a

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[11]The constitutionality of the Wagner Act was in doubt before 1937 when the United States Supreme Court, packed with Roosevelt's appointees, affirmed its legality.

mass trade union movement. Three of the five published studies did not even include a variable to capture the effect of changes in the law, yet performed satisfactorily. The other two attempted to measure the impact of the law but the results proved insignificant.

Swindinsky's (1974) model was the first attempt to analyze the rate of growth of union membership in Canada with statistical techniques. The dependent variable, the rate of change of union membership, was hypothesized to vary with the rate of change of employment in unionized industries, the rate of change in the number of strikes, the level of unemployment, the rate of change in prices lagged one year, and the rate of change of union membership in the United States. Although he reported explaining 72 per cent of the variance in the rate of growth of union membership between 1911 and 1970, his model was severely, and tellingly, criticized on 'theoretical, statistical, and methodological grounds' by Bain and Elsheikh (1976b:483). The employment variable measured three, not one, effect, they argued, and the volume of strikes was related to the growth of union membership only by way of their common cause: rising prices. Swindinsky's data source was also criticized as unreliable, his variables were thought to have been badly specified, and his model troubled by multi-collinearity. Correcting these problems, Bain and Elsheikh were able to explain 61 per cent of the variance in the rate of union growth using only three variables: the rate of changes of prices, the level of unemployment, and the rate of growth of union membership in the United States. Eastman (1983) was similarly able to account for 73 per cent of the variance in the rate of union growth for the years 1947-1970 using economic variables only.

Only two published studies have incorporated a dummy variable to mark the influence of legislative change on the rate of union growth. One, by Abbot (1982), was based on the Ashenfelter and Pencavel (1969) approach but did not seem to benefit from the critique of Bain and Elsheikh (1976a, 1976b), who had already rejected several of the variables used by Abbott as flawed. To capture the effect of Privy Council Order 1003, Abbott created a dummy variable set equal to one starting in 1944 and zero before. He also included an interactive variable to account for the effect of PC 1003 on union density. For the period 1925-1966, Abbott's model performed well, explaining 85 per cent of the variance in the rate of union growth. There were problems, however. The model did not perform satisfactorily when applied to the data for 1967 through 1972. Moreover, in Abbott's opinion the coefficient of the dummy variable for PC 1003 was improbably large. His conclusion was that the model provided only indirect evidence of the positive impact of the change in policy on the growth of union membership.

The other study, by Chaison and Rose (1981), sought to account for the growth of national unions.[mm] Finding that the Bain and Elsheikh (1976b) model performed poorly when applied to national unions, Chaison and Rose attempted to construct an alternative. They were no more successful, however. Their model was not statistically significant, suffered from multi-collinearity, and explained only 20 per cent of the variance in the rate of the change of membership in national unions

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[mm]National unions are those unions with Canadian members only, as opposed to international unions which, in the Canadian context, are American unions with branches in Canada.

between 1920 and 1972. Nor was the dummy variable for the effect of PC 1003[nn] significant. But this was hardly surprising for, as the authors themselves noted, PC 1003 was not particularly relevant to the growth of national unions. Because their jurisdictions fall almost entirely within the public sector, to test for the effect of changes in the law the dummy variable should have been specified as one for the years after 1965 and zero before.

The quantitative evidence, such as it is, does not appear to confirm what historians have documented, that is, that Privy Council Order 1003 in the case of the private sector, and special collective bargaining legislation in the case of the public sector, have been vital to the growth of unions and collective bargaining in Canada. This apparent paradox may be addressed in two ways. First, it is possible that further work may lead to a more exact mathematical model of union growth. Experience suggests that Bain and Elsheikh's (1976a) 'basic' model is the place to begin, modified as it was for the United States and Australia. Extraneous variables, notably the rate of growth of union membership in the United States, should be forgotten. Despite its frequent use as an explanatory variable in Canada there is no convincing reason to anticipate a direct link; indeed, union membership in the US has plummeted in recent years, both absolutely and relatively, even as membership in Canada continued to climb. One element of a reconstructed model should be a dummy variable capturing, firstly, the effects of PC

[nn]Set equal to one for the years 1944 and after, zero before.

1003 but limited to the years 1943[oo] to 1949 and, secondly, the effects of the public sector legislation enacted between 1965 and 1975. Modifications of this sort may turn up a statistically significant relationship between legislative change and union growth after all, especially if the analysis were to incorporate data for the years after 1970.

Alternatively, a more sophisticated model may be necessary. If, as the historical record indicates, the rapid growth in union membership between 1940 and 1944 coupled with the terrifying rise (to use Pentland's description) in strike activity forced the federal government to introduce PC 1003 which then supported further union growth, the interaction of the law with other factors cannot be captured by a simple dummy variable; in fact, the bluntness of econometric models is a shortcoming of statistical analysis noted by many others.[pp] Moreover, a statistically significant relationship, if found, does not demonstrate causation. The simple conclusion, that liberalized labour laws caused unions to grow would be unwarranted. A more accurate assessment would be that liberalized labour laws did not so much cause union growth as permit it.

There is no doubt that industrial workers exhibited a strong propensity to organize during the early years of the war. Nor is there any doubt that compulsory conciliation coupled with constraints on the right to strike was an inadequate policy. 'Positive' labour law

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[oo]The year 1943 should be included to account for the effects of Ontario's Collective Bargaining Act.

[pp]See, for example, Galenson and Smith (1978:33).

affirming a right to associate and a right to strike were likely essential. But even though PC 1003 may have been a necessary condition for the emergence of a mass trade union movement, it was not a sufficient condition. Brody (1981:107) might well have been describing Canada when he concluded that the Wagner Act in the United States was 'indecisive for one whole stage of unionization':

> More than the enrollment of workers and the attainment of certification as bargaining agent was needed in unionization. The process was completed only when employers and unions entered bona fide collective bargaining. But this could not be enforced by law. Meaningful collective bargaining was achievable ultimately only through the interplay of nonlegislative forces.

PC 1003 did not force employers to recognize unions, nor did it make collective bargaining inevitable. In many firms, unions were recognized only after collective bargaining had been won on the picket line. At Ford, for example, the United Auto Workers was established with stewards and committee men--there was even a collective agreement 'but the company continued to make decisions as it had in the past, without regard to the men or the union' (Moulton, 1975:132). There were few constraints on management's right to make decisions unilaterally and Ford did not hesitate to abrogate even this weak agreement in 1944 (Millar, 1980:249). During the fateful 1945 negotiations, the company laid off 13 per cent of its workforce just as the report of the conciliation board was issued, then questioned whether the union still retained its majority. Ford then refused to bargain with 'outside' UAW officers and rejected further third-party intervention. The stewards were publicly denigrated as a bunch of Communists.

It took a three-month strike to convince Ford that it must accept joint decision-making; a five-and-a-half month strike was necessary at Stelco. And this was typical. Time lost due to strikes in 1946 was higher than in any previous year, with the exception of 1919.[qq]

> The fall of 1945 marking the return of peace was hailed by both parties--not altogether secretly--as a testing time: was collective bargaining to dominate the field of labour relations or was it not? The showdown at Ford in Windsor in November-December and that at Stelco some months later were crucial (Logan, 1956:75).

The role of the law in this process should not be over-rated. Union recognition, then as now, was not something labour boards could grant. The law could do nothing more than sanction workers' efforts to bargain collectively. Legal recognition meant little unless employers were prepared to relinquish their prerogative to determine terms and conditions of employment unilaterally. The new legal framework was undoubtedly of secondary importance. Of much greater moment was the steady rise in the bargaining power of labour. By 1941, the rapid expansion of the war industries created a seller's market for labour that was to give workers their opportunity. As the war wound down, labour's bargaining power was sapped by the transition to peacetime industries but this hiatus was quickly followed by the 'great post-war expansion with increasing prices, increasing work population, and rising business confidence deriving from continuing prosperity' (ibid.:77). In these circumstances, the demand for collective bargaining could not be refused.

[qq]While time lost due to strikes as a percentage of total working time was higher in 1946 than in 1943, a smaller proportion of union members--one in six--was involved in strike activity.

Liberalized labour laws played a similar role in the growth of unions in the public sector. Government employees demonstrated their propensity for collective action during the years of joint consultation. For whatever reasons--rising prices, bureaucratic management, unfair treatment, and so on--civil servants at all levels felt the need to act collectively respecting their terms and conditions of employment. And when the joint consultation process failed to meet their expectations, they turned to collective bargaining. The law was an important, though secondary, consideration: when it chafed, it was changed. The change was critical, however, more so than in the private sector. In the private sector, the pre-1944 legal framework permitted, but did not support, collective bargaining. In the public sector, the pre-1965 legal framework made collective bargaining impossible. Governments would not and, they claimed, could not recognize unions demanding full representation rights. By liberalizing the law, unionism was almost assured. Civil servants quickly transformed their associations into unions and applied for certification. And, unlike some private sector employers, governments could be relied upon to bargain in good faith. Having agreed to change the law, they were unlikely to resist collective bargaining.

The growth of unions among public sector employees, other than government employees, has been less directly affected by the law. In many jurisdictions, elementary and secondary school teachers have had well entrenched, though not legally recognized, bargaining rights for half a century. Some groups, hospital workers most importantly, have had the right to organize and bargain under the PC 1003 framework since the

1940s while others, notably police officers and fire fighters, have been covered by legislation peculiar to their occupations for several decades. The upsurge in union membership in the late 1960s and 1970s had little to do with the law, consequently. Factors such as inflation, budgetary constraints, and the like provide a more convincing explanation for the recent growth of unions among these public sector groups. The one possible exception might be hospital workers. For them, the law may have played an important part in the decision to unionize. To the extent that strikes conflict with a commitment to their patients, hospital workers, and nurses in particular, have been relieved of the potential dilemma by the widespread practice of outlawing work stoppages in hospitals and nursing homes. Moreover, because the law prescribes final and binding arbitration of all disputes, hospital workers are assured that if their unions are certified, collective agreements will result. The guarantee has carried its price, however, for as Deverell (1982:124) astutely observed, hospital workers may be unionized but they are in large measure unorganized. Hospital bargaining is less and less a voluntary process; more and more, terms and conditions of employment are dictated by the process of interest arbitration.

The link between the law and union growth in Canada sits comfortably within Bain's (1970) model of union growth among white-collar workers in the United Kingdom. Bain's investigations led him to conclude that the density of white-collar unionism depended upon the extent to which employees were concentrated in large numbers and the extent to which employers were prepared to recognize trade unions. An employer's

willingness to recognize unions was, in turn, a function of the level of union membership and the extent to which government action promoted the recognition of unions. His model was presented as follows:

$$D = f(C,R)$$

$$R = g(D,G)$$

Where D = the density of white-collar unionism;

C = the degree of employment concentration;

R = the degree to which employers are prepared to recognize unions representing white-collar employees; and

G = the extent of government action which promotes union recognition.

Bain's basic insight, that union growth depends on the recognition of unions and that the recognition of unions depends on their relative size, helps put the contribution of the law into perspective. In Canada, it seems quite likely that neither PC 1003 nor the Public Service Staff Relations Act and its provincial counterparts would have been enacted had workers not already organized on a large scale. The most rapid growth in union membership during the 1940s occurred before collective bargaining was made compulsory. But once the law was changed, that is, once the legitimacy of trade unions was, in a sense, recognized by the government, growth continued apace. Similarly, civil servants were already well organized in employee associations and demanding collective bargaining before the laws respecting collective bargaining in government employment were liberalized. In either case, governments had no real choice: either the law would be changed to reflect social reality or they would face the consequences. In the 1940s, the prospect was civil disobedience and widespread disruption of war production; in the 1960s, the consequences

were hardly so dire although the postal strike in 1965 in defiance of the law may have been seen as a portent of things to come.

Conclusion

Taken at face value the econometric studies suggest that the law has been an incidental influence on the growth of union membership in Canada. Despite a strong presumption that PC 1003 was central to the extension of collective bargaining to manual workers in the mass-production industries, only two studies investigated the relationship between the change in policy and the rate of growth of union membership, and the results of neither provided convincing evidence of causation. Yet, to dismiss the influence of the law on the growth and development of the labour movement would certainly be rash in the face of historical evidence linking changes in public policy in a significant way to union growth, first in the private sector and some time later, in the public sector. It is much more likely that the econometric models employed have been flawed or that the seminal role of public policy has been masked by problems of multi-collinearity.

The link between the law and union growth in Canada, as elsewhere, is not a straightforward one of more favourable laws therefore more union members. The record suggests that in both the private and public sectors, workers were already widely organized before the law was changed. The new policies, moreover, were more directly related to the growth of collective bargaining than union membership. By encouraging the practice of collective bargaining, both PC 1003 and its public sector equivalents created a climate favourable to further membership growth.

In the public sector, collective bargaining was a certainty once the law was changed. There was no question that governments in their capacity as employers would flout their duty to bargain in good faith. Once civil servants were organized into trade unions, collective bargaining quickly became the established method of determining terms and conditions of employment. In the private, by contrast, the outcome was not so predictable. Although PC 1003 made collective bargaining legally compulsory most employers were no more prepared to bargain with unions after the law was changed than they had been before. Their objections to unions and collective bargaining were not automatically resolved by the simple expedient of certifying unions. It was only through strikes that workers firmly established their right to union representation. A few key confrontations in the 1940s convinced employers that for industry to function, labour-management co-operation was necessary and the price of that co-operation was recognition of unions and bona fide collective bargaining.

The law's seminal contribution was its role in shaping the bargaining power of the parties. Prior to 1939, most workers had neither immunity from tort liability nor a statutory right to strike. With the extension of the Industrial Disputes Investigation Act to most resource and manufacturing firms at the beginning of the war, industrial workers were given a limited right to strike. Under the IDIA, strikes were lawful and unions indemnified so long as the dispute had been referred to conciliation, the report of the board had been issued, and the subsequent cooling-off period had expired. But the process was time-consuming. Conciliation had never been expeditious and during the war the delays

grew longer and longer. And since the government's primary concern was the preservation of industrial peace, it heaped more obstacles in the way of lawful strikes: first another commission of inquiry and then compulsory strike votes. By the time the strike arrived, workers were frequently disillusioned and demoralized. PC 1003 did not remove all of these obstacles but it did give the outcome greater certainty. Certification enhanced the legitimacy and stability of trade unions and while there was no over-riding right to strike, timely strikes were made lawful. And even though the new policy was not a particularly liberal package of rights for workers, it proved to be workable framework for the extension of collective bargaining.

Conceivably, the rights themselves were less important than the setting in which they were won. The critical labour shortage of the early 1940s gave industrial workers new power; power to demand better terms and conditions of employment and power to demand union representation without fear of reprisal. It was their insistence in the face of employer resistance that finally forced the government to introduce the policy of compulsory collective bargaining, a right which workers were on the verge of winning for themselves. The post-war confrontation had been in the making for a decade and a half. With or without PC 1003, it was bound to happen.

In 1944, Laskin (1944:783) predicted that 'the battle for collective bargaining, for the opportunity of employees to share in the determination of the conditions under which they will work, is on the way to being won in Ontario'. And while PC 1003 did, indeed, prove to be a workable framework for the extension of collective bargaining to manual

employees in large, primary and secondary sector firms, for workers employed in smaller firms or in the tertiary sector, the PC 1003 framework has not been adequate. The laws that permitted the growth of unions in the private sector forty years ago do not appear to meet the needs of unorganized workers today. To overcome the opposition of employers, government action in support of collective bargaining must take other forms.

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43. S.C. 1980-81, c.47.

44. S.C. 1967, c.72.

45. R.S.O. 1980, c.108.

46. R.S.O. 1980, c.74.

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II: CERTIFICATION AND COLLECTIVE BARGAINING

In Chapters 3 and 4, the recognition process is analyzed to determine whether the certification procedure affects the likelihood that bargaining rights are granted. Two aspects of the process are under study. One is the procedure itself, that is, the extent to which the rules and regulations prescribed by the Labour Relations Act and the Labour Relations Board facilitate or obstruct organizing campaigns. If certification is a complex process or open to abuse, and this is reflected in the outcome, the procedure is less effective than it might be and falls short of the statutory objective of encouraging the practice and procedure of collective bargaining. A related consideration is the conduct of employers as captured and formalized by the certification process. If some employers oppose collective bargaining and their opposition takes the form of procedural delays, support for anti-union petitions, or the commission of unfair labour practices, the impact of their behaviour on the outcome of certification can be measured statistically.

Studies of certification in the United States have revealed, among other things, a strong negative relationship between the likelihood of winning bargaining rights and both the time required to process applications and the use of unfair labour practices. Whether a similar relationship would hold in Ontario is a matter of conjecture. Despite many outward similarities with the American system, the certification procedure in Ontario is substantially different. For a variety of reasons, employers are afforded fewer opportunities to delay proceedings and interfere with the outcome. The result is that proportionately more

unions are certified in Ontario, in a shorter time, and with fewer unfair labour practice complaints.

A second objective is to examine the relationship between the certification process and the outcome of bargaining. In law, the outcome of certification is unproblematical: once certified, a union is recognized. But the reality of labour-management relations is more complex. While certification adds to the legitimacy of a union's claim to represent a group of employees, it is the employer's acceptance of the union that is decisive.

To date, only one American study has considered the possibility that the nature of the certification process might affect the likelihood of negotiating a collective agreement. There are, in addition, two small Canadian studies--one in Ontario and one in the federal jurisdiction--which analyze the relationship between certification and first agreements. And while a first agreement, admittedly, is no guarantee that a bargaining relationship has been firmly established it is, nevertheless, a critical benchmark and one that many newly certified unions in Ontario fail to achieve.

Whether the law works to encourage collective bargaining depends, in large measure, upon the willingness of employers to accept the legitimacy of unions. To the extent that employers are prepared to recognize the legitimacy of certified unions and refrain from obstructive practices, the law is grounded in a realistic premise. However, if employers are not willing to abide by the law and actively resist collective bargaining, the certification process is far from a dispassionate exercise. Though banished from the scene, bargaining power plays a major

role. By dismissing union supporters, circulating anti-union petitions, or obstructing the proceedings, anti-union employers inform workers that they choose union representation at their economic peril. It is in this sense that the certification process is linked to bargaining success. Delays, anti-union petitions, and unfair labour practices, to a greater or lesser extent, are indicative of employer opposition. And employer opposition is a primary determinant of the success of collective bargaining.

Chapter 3

Certification

Certification is tantamount to union recognition in Canada's system of compulsory collective bargaining. Whereas, in the past, workers were commonly forced to win recognition on the picket line, under the PC 1003 framework a labour relations board is empowered to determine whether a group of workers, by majority decision, wishes to be represented by a trade union. And their decision is conclusive. Once a union is certified it is the workers' exclusive bargaining agent in law, so entitled to compel an employer to enter negotiations. An employer, in turn, is legally obliged to recognize the union, bargain in good faith, and make every reasonable effort to make a collective agreement.

What was once a simple and informal procedure is now a complicated morass of deadlines and details. The multiplication of forms and rules, the increasing formality of the proceedings, and the striving for legal precision are distorting the purpose of the certification process. Unions are required to adhere to a complex set of rules about when and how members can be recruited. Every step of the process is scrutinized by the OLRB and any irregularities that come to light are investigated further. Full-scale hearings are frequent, evidence is presented, witnesses are examined, then cross-examined. Any weakness in a union's case is probed by the employer's lawyer. As a result, the procedure is hedged about with a myriad of extraneous details, driving the cost of organizing and risk of failure relentlessly upwards.

The complexity of the process invites employers to interfere where they do not belong. Whether workers want union representation is surely a matter for them alone to decide, yet employers are entitled to intervene at every step of the way. They are asked to express their opinion on the appropriateness of the bargaining unit proposed by the union, may question the eligibility of certain employees for membership in the union, and may draw the Board's attention to any procedural lapses it may have overlooked. Some employers go further and, contrary to the law, sponsor or tacitly support anti-union petitions. The result of these interventions is, of course, further delay in the processing of a union's application for certification while the Board investigates the employer's allegations of wrong-doing or, in the case of a petition, the union's allegations that the document has been vetted by management.

Delays are an integral feature of the certification process in Ontario. Not only are they a frequent source of frustration for workers hoping to get on with the business of bargaining, delays directly affect the outcome of certification and collective bargaining: the longer the process, the lower the likelihood that certification will be granted and, if granted, the lower the likelihood that a collective agreement will be negotiated. Anti-union petitions have a similar, deleterious effect. Even if a petition is free of managerial influence unions are much less likely to win bargaining rights. And when employers are involved in sponsoring or supporting a petition, unions are much less likely to negotiate collective agreements.

Chapter 3 analyzes the relationship between delays and anti-union petitions, on the one hand, and the outcome of certification and

collective bargaining on the other, firstly, by describing the procedure developed by the OLRB and, secondly, by discussing its potential for abuse. The petition procedure is then described and discussed in light of the Board's jurisprudence. Finally, the effect of delays and petitions on the granting of certification and the negotiation of first agreements is analyzed statistically using data collected from the OLRB and the Ministry of Labour for the years 1970-1981.

The Procedure

For most unorganized workers,[a1234] the collective bargaining process begins with an application for certification filed on their behalf with the Ontario Labour Relations Board. To be granted bargaining rights, a union must demonstrate that it enjoys the support of a majority of the employees in a unit appropriate for collective bargaining. The critical numbers are 55 and 45 per cent.[b] When a union can demonstrate that it has, as members, more than 55 percent of the employees in a bargaining unit, certification is commonly granted outright, that is, without a

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[a]The following categories of persons falling within provincial jurisdiction are excluded from the coverage of the Labour Relations Act: professionals (architects, dentists, land surveyors, lawyers, and doctors)[1]; managerial employees and persons employed in a confidential capacity in matters relating to labour relations[2]; domestics employed in a private home; persons employed in agriculture, hunting or trapping; and persons, other than employees of municipalities or persons employed in silvaculture, employed in horticulture by employers whose primary business is agriculture or horticulture[3]. Also excluded from the scope of the Act, but entitled to bargain collectively under other statutes are police officers, fire fighters, teachers and employees of the provincial government[4].

[b]For the period, 1 September, 1971 to 1 January, 1976, the percentages were 65 and 35, respectively, as recommended by the Task Force on Labour Relations (Woods, 1968:143).

representation vote. Alternatively, if membership falls short of this mark but is 45 percent or more, a vote is ordered, in which case a majority of the ballots cast must favour the union for certification to be granted.[c] Finally, if membership in the union is below 45 percent, the application is dismissed without a vote.[5]

Accompanying the Act are the OLRB's rules of procedure. The Board is 'master of its own house' (MacDowell, 1977:266), empowered to make whatever regulations seem necessary or advisable to carry out the purpose of the legislation.[6] Included in the regulations are fifteen pages of rules, thirty-six forms, and sixteen practice notes pertaining to certification in general industry. A complementary set of rules and forms has been devised for the construction industry.

On receipt of a union's application for certification (form 1), the OLRB establishes a terminal date (form 2)--typically, eight to ten days hence--for acceptance of evidence of membership in, or objection to, the union. A hearing date (form 2)--generally within three weeks--is also determined at this time. The employer is then notified of the application (form 4) and instructed to post the official 'Notice to Employees of Application for Certification and Hearing before the Ontario Labour Relations Board' (form 6) conspicuously around the workplace and to confirm the posting by return mail (form 74). The employer is also required to file its reply (form 10) in quadruplicate on or before the terminal date.

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[c]Prior to 1 September, 1971, a union was required to secure the votes of a majority of the employees in the bargaining unit, not just the majority of those casting ballots.

In addition to reporting the firm's name, address, and the nature of the business, an employer is directed to provide information respecting the total number of employees in the establishment(s) concerned, and the number of employees in the bargaining unit(s) described by the union. If an employer wishes to contest the appropriateness of the unit the union seeks to represent, the number of employees in the alternate unit must also be reported. Finally, form 10 asks for the name and address of any union that might be affected by the certification application.

With its reply, an employer is required to file a list, in alphabetical order, of the employees in the bargaining unit described in the union's application. On schedule A are all employees in the unit proposed by the union as of the date of application. Listed on schedules B,C, and D are all employees regularly employed for not more than twenty-four hours per week (or, if the application is for part-time employees, all employees employed for more than twenty-four hours per week), all employees in the bargaining unit not at work on the date of application by reason of lay-off, and all other employees in the bargaining unit not at work on the date of application, respectively. The names of those the employer intends to challenge as ineligible for membership in the union or not in the bargaining unit are indicated by an asterisk or listed at the bottom of the page. Specimen signatures (not in the form of cancelled cheques), against which the union's membership evidence can be verified, must be provided.

The Board then notifies any union (other than the applicant) that might be affected by the certification proceedings (form 11) and directs the organization to state the nature of its interest if it wishes to

intervene (form 12). Alternatively, an interested union may apply for certification on its own behalf (form 13).

Hearings are held in all cases. The right to be heard is integral to the OLRB's conception of natural justice:

> At the very outset of the Board's history in 1944, the Board members determined that every employer, every trade union, every employee and, for that matter, every other person who had an interest in a proceeding before the Board should be entitled as of right to present his case orally to the members of the Board at a formal hearing...*Every* application, no matter whether it was contested or uncontested, was not only listed for hearing, but an oral hearing on every aspect of the case was held before the Board itself before any decision was reached (Finkelman, 1965:3-4).

In uncontroversial cases, such as the legal status of unions created by merger, hearings are no longer held but when bargaining rights are at issue hearings are routinely scheduled.[d]

The parties are required to be fully prepared on their scheduled hearing day. Proceedings will not be adjourned to allow either the company or the union to assemble evidence or call witnesses not in attendance (Cornish and Ritchie, 1980:99). Nor are adjournments granted

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[d]An important exception is the construction industry. The transitory nature of employer-employee relations in construction caused the Goldberg Commission (1962) to recommend the streamlining of the certification procedure. Hearings are no longer scheduled automatically in certification cases; instead, the party requesting a hearing is required to explain why it is necessary. The result was an immediate, drastic reduction in the time required to process applications. Within a year of implementation one-quarter of all cases involving construction units were disposed of within eight days, one-half within twelve days, and three-quarters within nineteen days (Finkelman, 1965:19). The most recent data are not so encouraging, however. While 3.0 per cent of the certificates granted in the construction industry in fiscal year 1985-86 were finalized within 14 days and 51.5 per cent within 21 days, compared with 2.4 and 37.6 per cent respectively for non-construction, applications, the remainder of the cases took somewhat longer to dispose of. Seventy days elapsed before three-quarters of the applications in construction were settled compared with fewer than 56 days for non-construction (Ontario Labour Relations Board, Annual Report, 1985-86:77).

for the convenience of counsel (MacDowell, 1977:231); indeed, one employer's complaint that a refusal to grant an adjournment amounted to a denial of natural justice was lost on appeal.[7] When delay is unavoidable, additional days will be set aside by the registrar of the Board if the parties cannot agree to further dates within a reasonable period of time, usually six weeks (Wakely, Wahl, and Freeman, undated: AIX-3).

Compared with its counterparts in other jurisdictions, the Ontario Board is far more legalistic. Its first rules and procedures were modelled from those of the Ontario Labour Court[e] (Bromke, 1961:74) and remain court-like, despite the power of the Board to devise its own rules and procedures.[8] Hearings are formal: witnesses may be subpoenaed, excluded from the proceedings, and sworn in to testify; they are subject to examination-in-chief, cross-examination, and re-examination; and, for the most part, the rules of evidence are followed. Technical questions constantly arise. Arguments about the burden of proof, the weight of precedent, proper identification of documents, estoppel, and so on are common (Cornish and Ritchie, 1980:101; MacDowell, 1977:230-1). And although lay-persons can, and do, appear before the OLRB, for anything other than straightforward cases legal counsel is essential.

Objections and Disputes

Between application and disposition lie a host of potential disputes. The Board's initial task is to determine the scope of the

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[e]The Labour Court was established as a division of the Supreme Court of Ontario in 1943 to administer the Collective Bargaining Act. The Act was repeated and the court dissolved after PC 1003 was proclaimed.

bargaining unit. What constitutes an appropriate bargaining unit is now well established for most occupations in most industries. The Act does not, however, entitle union officials to the names and addresses of potential members; nor are they entitled to copies of the schedules filed by the employer in its reply. Accordingly, although organizers know generally the size of the group they are seeking to recruit, they may discover the unit is larger or composed differently than they supposed. After the terminal date (that is, after the date by which the union must have filed its membership evidence) and in the presence of an officer of the OLRB, an official of the union may check his or her membership lists against those of the employer, but may not record the names (Cornish and Ritchie, 1980:98). However, the inquiry must be bona fide. Union officials have been reprimanded by the Board when it believed that an application for certification was not genuine, only filed to gain information for a future organizing drive.[9]

But even when the parties can agree on the description of the unit, challenges to the lists (that is, schedules A-D of the employer's reply) are potentially numerous. Either the union or the employer may be uncertain about the legal status of some employees or attempt to gerrymander the size of the bargaining unit by inflating it with persons not covered by the Act (e.g., independent contractors[f])[10] or deemed by the Act not to be employees (e.g., managerial and confidential employees), employees not in the unit applied for (e.g., part-time employees or

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[f] Independent contractors are excluded from the scope of the Act by virtue of the definition of a trade union as an organization of employees. Since 1975, however, workers classed as 'dependent contractors' have been defined as employees and so permitted to bargain collectively.[10]

students), or employees not at work on the date of application and therefore not eligible for inclusion in the 'count'. Equally, either party may seek to restrict the scope of the unit by claiming certain persons are not employees under the Labour Relations Act or are otherwise ineligible for inclusion in the bargaining unit.

A check of an employer's records can resolve the status of some of the contested persons. Employees at work on the date of application are included for the 'count', that is, for determining the level of the union's membership support in the bargaining unit, unless they quit or were dismissed before the terminal date and were not reinstated by the OLRB. Workers absent on the date of the application are counted in the unit if they satisfy the Board's '30/30 rule': if they worked at jobs included in the bargaining unit during the thirty-day period prior to, and returned to work or were expected to return to work within thirty days of, the date of application (Sack and Mitchell, 1985:122). Similarly, to distinguish between full- and part-time workers the Board applies its 'seven-week rule'. If, over a representative period, normally four or more of the seven weeks preceding the date of application, the employees worked twenty-four or more hours per week they are considered full-time (ibid.:158).

More difficult to resolve are allegations that certain employees should be excluded from the bargaining unit because they are independent contractors, perform managerial functions, or are employed in a confidential capacity in matters related to labour relations. Even though 'every person is free to join a trade union of his own choice and to participate in its lawful activities',[11] roughly thirty per cent of

the labour force falls outside the protection afforded by collective bargaining legislation. Since the 1960s, the Board has routinely assigned[g] a labour relations officer to inquire into a dispute over the eligibility of any person for inclusion in the bargaining unit. An officer has no adjudicative power, however, so seeks to resolve the matter by informal agreement of the parties. If settlement is not possible, a formal examination into the nature of the employment relationship, the duties and responsibilities of the person(s) in dispute, and other relevant matters is conducted.

Examinations are held at the employer's place of business during working hours. Documentary evidence is filed with the labour relations officer and the persons in dispute are questioned about their duties and responsibilities. Once the witnesses have been examined by the Board's representative, counsel for the union and the company are afforded an opportunity to ask further questions and present additional evidence. The discussion, generally recorded verbatim on tape, forms the basis of the officer's report to the OLRB. The parties are also served with copies of the report and notified that any comments they wish to make must be submitted within six days. If a party wishes to make further representations, not with respect to the accuracy of the report but concerning the conclusions to be drawn from it, a hearing will be scheduled.[12]

An examination may resolve a dispute relatively quickly or it may take weeks, even months. The first date is fixed by the Board, generally

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[g] In the past, at a hearing but now as soon as the dispute becomes apparent.

within three weeks of the date of application, but additional dates are set by agreement of the parties as needed, within four weeks of each other if possible. In the past, when the status of an entire classification of employees was challenged, a labour relations officer was required to interview all of those in dispute unless the parties agreed that the functions of one person were representative of the duties and responsibilities of the employees in the classification as a whole. For those wishing to proceed expeditiously, there was an incentive to reach agreement but there was also an invitation to delay. The revised policy now provides that one or more representative persons may be interviewed; however, neither party is required to accept a grouping of employees merely because an examination would otherwise be lengthy (Cornish and Ritchie, 1980:123).

Once the composition of the bargaining unit has been settled, the Board ascertains the level of membership in the union as of the terminal date, that is, the 'count'. Although a union with more than 55 per cent of the employees in the bargaining unit as members is normally certified without a representation vote, the OLRB has the discretion to order a vote[13] and will do so to resolve any doubts about the validity of a union's claim to represent the requisite majority.

To be granted certification, a union must present evidence of membership in, not just support for, the union. Since 1950, the Act has defined a member as a person who has applied for membership and paid at least one dollar on his or her own behalf.[14] The OLRB prescribes the form in which, and the time as of which, membership evidence is acceptable. Evidence must be in writing and submitted by the terminal

date. The Board is empowered to determine what form the membership evidence should take[15] and does not accept oral evidence. Its preferences are well established:

> Each document submitted as evidence that a person is a member of the applicant union must bear the signature of the employee. In addition, the application for membership must be supported by evidence of the payment by the employee of the requisite dues or fees, and this evidence is usually submitted in the form of individual receipts for the payments made. The Board has encouraged unions to have the receipts countersigned by the employee who paid the dues or fees so as to confirm the fact of payment (Finkelman, 1965:33).

At the end of each membership drive, the supervising organizer is required to submit a 'Declaration Concerning Membership Documents' (form 9) substantiating the authenticity of the evidence filed. The Ontario Board is extremely strict about the veracity of these claims. Because it cannot interview each new member it insists 'on the highest standards of integrity on the part of those who submit such evidence'.[16] When a declarant has no personal knowledge of the circumstances in which cards were signed, he or she must inquire through a direct and complete chain of persons from himself through to those subscribing as collectors on the receipt portion of the membership cards and confirm with all that they have themselves collected at least one dollar from the employees who joined the union and that those employees paid the dollar personally on their own behalf (Sack and Mitchell, 1980:181). If the chain is incomplete, the evidence is defeated. Although errors may be declared on form 9, it is preferable to avoid listing mistakes which may be fatal to the application or result in delays and the questioning of employees. Organizers are advised instead to re-sign the member properly,

remembering to collect a second dollar payment (Cornish and Ritchie, 1980:43).

Even one defective card, if submitted knowingly by a responsible union official, may cause the Board to conclude that it cannot rely on any of the membership evidence submitted by the union.[17] An official's failure to report that a worker was loaned the necessary dollar has caused the OLRB to dismiss more than one application.[18] On the other hand, when proper inquiries were made but a rank-and-file collector deceived the principal organizer, only the evidence submitted by the former has been disregarded.[19]

Over time, a body of 'strict but hard-to-evaluate rules' has evolved (ibid.:44). A seemingly endless stream of cases attest to the Board's chariness. The OLRB will investigate to determine whether a worker who was loaned a dollar paid it on his own behalf,[20] whether it was proper for an organizer to tell workers that membership would cost five dollars now but fifty later,[21] or whether goods given as payment-in-kind were the equivalent of the required dollar.[22] Any hint that workers might have been confused or deceived can be equally troublesome. If, for example, the application is in the name of the international union while the worker appeared to have joined a branch, the evidence is generally acceptable; however, if membership is in the international, the application of a local union is ordinarily dismissed.[23] If the local union number was mistakenly omitted from the membership card[24] or the local merged with another branch of the same union during the organizing drive[25] the evidence has been judged equivocal. Even the validity of

membership cards signed on a Sunday has been litigated before the Ontario Board.[26]

Doubts about the value of the union's membership evidence may cause the Board to exercise its discretion to order a vote, notwithstanding the union's claim to represent more than 55 per cent of the employees in the bargaining unit. In one instance, a vote was ordered when a collector failed to report that he had received one membership card and the accompanying payment indirectly. When this was revealed, all fourteen of the cards counter-signed by this collector were disregarded.[27] A vote was also ordered in Primo Importing and Distributing[28] because the union failed to collect a second dollar when members reaffirmed their support for the union on cards signed over a year earlier. In the absence of the reaffirmation, the cards would have been considered 'stale' and of no value (ibid.:52). In another case, the entire organizing drive was aborted because the sign-up campaign had been led in large part by an employee who was, in the union's opinion, a group leader, but whom the Board later found to be a managerial employee.[29] And evidence proffered by the union was rejected in Intermodal Marine[30] when it was learned that an organizer suggested that non-members would not be allowed to work at unionized jobs.

Anti-Union Petitions

The validity of a union's claim to membership in excess of 55 per cent may also be undermined by a petition or statement of desire opposing certification. If a sufficient number of union members subsequently sign

a document repudiating their membership in the union, the OLRB may exercise its discretion to order a representation vote.

Such petitions are a regular feature of the certification process Objections were filed in 19.5 per cent of the applications dealt with by the OLRB between fiscal years 1970-71 and 1981-82; yet, they are nowhere mentioned in the Act. At first, the Board's practice was to determine the level of membership support as of the date of application and no weight was accorded to subsequent repudiations. But this practice was struck down by the Supreme Court of Canada in 1953. Holding that the Labour Relations Board was obliged to hear all relevant evidence and that evidence of withdrawal from membership was relevant to the issue of certification, the Board's award was quashed.[31] To cure the defect identified by the courts, the OLRB chose to fix a terminal date for each case. Now, the size of a bargaining unit is determined as of the date of application, while the union's membership support is ascertained as of the terminal date, that is, eight to ten days later. The result is a formalized procedure for repudiating membership in a union.

Only a petition which satisfies the Board's criteria is considered well-grounded. To be valid, a petition must be in writing, filed by the terminal date, include the name of the employer, and the address of the petition's sponsor. These requirements are communicated to employees by the 'Notice to Employees of Application for Certification and of Hearing before the Ontario Labour Relations Board' (form 6) posted by the employer in the workplace. Objectors are warned that statements of desire not conforming to these requirements will not be accepted.

Other defects in form may also result in rejection. The document must, for example, state clearly on its face that the employees oppose the union. Statements which do not cast doubt on the employees' desire to be represented by a union will be disregarded. Thus, when workers petitioned the Board for the sole purpose of obtaining a representation vote their request was denied.[32] Similarly, a petition headed by the equivocal statement, 'The undersigned people are petitioning the Hotels, Clubs, Restaurant, Taverns Employees Union Local 261', was rejected.[33] But even a petition which is timely and proper in form may not be germane to the disposition of an application. To be relevant, a petition must cast doubt on a union's claim to certification without a vote, that is, the number of union members signing a petition must be sufficient to reduce a union's unqualified membership support to 55 per cent or less. Consequently, if no union members endorse the statement of desire or if the number of member signatories (called 'overlaps') is too few to reduce a union's uncontested support below that required for outright certification, a petition will not affect the disposition of the application.

To complicate matters further, a union may file a counter-petition which, on its face, nullifies the intent of the statement of desire. By signing the counter-petition, those who repudiated their membership in a union reaffirm their support. If a sufficient number of 'overlaps' subsequently sign the counter-petition, the Board may decide to grant certification without a representation vote notwithstanding an anti-union petition, so long as the signatures were obtained without threats, intimidation, undue influence, or misrepresentation. Once a counter-

petition is accepted, an anti-union petition becomes irrelevant, whether or not it was signed voluntarily (Sack and Mitchell, 1985:199-200).

While revocations of membership raised doubts about the employees' true wishes, they are not considered decisive. In the face of a petition, the import of a union's membership evidence is equivocal but not void:

> It would be somewhat anomalous if evidence of membership, which must withstand the requirements laid down in the Act together with its related rules and forms, could be 'revoked' by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union...If this was not the approach taken, a trade union would never know when to cease organizing [34].

Thus, by itself, a petition is not grounds for dismissing an application; at most, it will cause the Board to exercise its discretion to order a representation vote. First, however, the Board must be satisfied that the signatures were obtained voluntarily. When a petition is timely, proper, and potentially relevant, the OLRB investigates the circumstances surrounding the origination, preparation, and circulation of the document to ensure that it truly reflects the wishes of the employees involved.

The onus is on the objectors. They must dissipate the 'aura of suspicion' which attaches to the members' 'sudden change of heart'.[35] It is not enough for the origin of a petition to be left uncertain, the petitioners must show that 'they got the idea, drew up the petition without company help, and obtained all signatures themselves in a fair way, without intimidation or misrepresentation' (Cornish and Ritchie, 1980:88-9). Objectors are forewarned that witnesses must be available to attest to the origination of a petition and how and under what circumstances each signature was obtained: form 6. Failure to testify

or gaps in the evidence will cause the OLRB to disregard the statement. Each signature on the petition (referred to by number to prevent disclosure of a person's name) must be identified by someone who saw or was present when the petition was signed. Signatures not so identified will be discounted and, if only a small proportion is identified, the weight attached to a petition as a whole will be reduced (Sack and Mitchell, 1985: 206-7).

Having regard for an employee's 'natural desire to want to appear to identify himself with the interests and wishes of his employer', a petition is inherently suspicious if it has been abetted by management.[36] Any involvement by an employer, for example, referring the objectors to a lawyer, paying their legal fees, or allowing a petition to be typed or copied in the office, invalidates the document (Cornish and Ritchie, 1980:90-1). A petition will be rejected if it is circulated by persons exercising even limited managerial authority.[37] If a document is signed by a foreman or other person in authority, the signatures which follow will be discounted (Sack and Mitchell, 1985:211-2).[38] In one case, a petition was rejected because the objectors were escorted to the home of the petition's originator by a foremen. His presence in the house, though not in the room, where the document was discussed and signed caused the Board to conclude that the employees had been unintentionally influenced.[39]

Any intimidating statement or action may cause the Board to regard a petition as involuntary. A petition drive organized in the wake of a 'captive audience' speech held during working hours and on time paid for by the company has traditionally been viewed with suspicion. In the case

of New Ontario Dynamics,[40] the decision to unionize was linked with the possibility of bankruptcy and the inevitability of strikes in a speech by a member of the company's board of directors. But no matter what is said, these meetings by themselves may 'convey the anti-union sentiments of the management regardless of their content' and thus 'tend to taint the following efforts of employees who decide to oppose the application'.

Voluntariness is the sole issue. The test applied does not depend on an employer's anti-union intent. Thus, a petition may be set aside even if management's influence has been unintentional and quite by accident: it is not the actions of an employer but 'the reasonable perception of the employees that the Board must assess'.[41] Because workers may logically fear that a refusal to sign might become known to management, circulating a document in the workplace during working hours, though not fatal in itself, is suggestive of the employer's support. Accordingly, management's failure to discipline the promoter of a petition when he was absent from his work-station was decisive in one instance. Its failure to respond could not have gone unnoticed, the Board reasoned. Other workers might logically have assumed that management supported the petition and that the names of those refusing to sign would become known. Thus, despite the absence of 'collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company', the petition was rejected.[42] Similarly, in Valley Bottling,[43] the petition was rejected because the employer's conduct was judged capable of unduly influencing employees even though its written statements were factual and devoid of comment, there were no threats, promises or references to the union during

interviews with the employees, and meetings were not unusual at that time of year.

The Effect on Certification and Collective Bargaining

Certification is a complex and time-consuming process in Ontario: a 'legal nightmare', unions complain.[h] Though designed to be informal and speedy, 'we find ourselves today with a bureaucratic, court-like tribunal that seems far removed from ordinary people wishing to have their unions certified' (Cornish and Ritchie, 1980:15). Unnecessary delays and undue attention to legal technicalities are the perennial complaints of labour's representatives. Unions are 'bogged down in a mass of detail, technical difficulties and legal quibbling', (Ontario Federation of Labour, 1962:2). The law obstructs unions and allows anti-union employers who 'know where to find counsel who will exploit every provision and procedure available to delay and defeat certification' (Ontario Federation of Labour, 1978:20). Unionists have been particularly outspoken in their opposition to anti-union petitions. Their frequent abuse by employers has caused unions to assume that all petitions are management-inspired. 'If any aspect of the administration of the Act impedes unionization, it is this one', the Ontario Federation of Labour (1980a:3) complained. 'The record of abuse, irregularities and management inspiration of petitions is so clear that these statements opposing certification should be dropped' (Ontario Federation of Labour, 1980b:1).

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[h]Cited by Cornish and Ritchie (1980:16).

Employers, by contrast, insist the process is not thorough enough. Addressing the Woods Task Force on Industrial Relations, the Canadian Chamber of Commerce (1967:3) argued that workers 'often "join the union" (i.e. sign the membership card and pay a nominal sum) not so much from a desire to join the union, but rather to avoid controversy and dispute in the work place'. Not infrequently, the employer is aware, 'or believes he is aware, of employee opposition to the union which, because of the certification procedures, did not have an opportunity to express itself. As a result, many unions are certified without the true wishes of the employees being determined a secret ballot'. From the employers' perspective, petitions are an essential component of the process, an opportunity for sober second thought, and should be made easier to organize.

The belief that workers might be pressured rather than persuaded to join a union is shared, to some extent, by the Ontario Labour Relations Board. Absent the check of a representation vote, the Board defends its many procedural precautions as necessary to protect the integrity of the procedure. But too much complexity--too many checks and balances--afford employers many opportunities to intervene. The result is that certification is made harder to get. Three out of ten applications for certification were unsuccessful during the 1970s, and not always because of inadequate membership support. Of the 2,656 applications dismissed or withdrawn, at least 31.3 per cent[i] were applications in which the union

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[i] In fact, the proportion may have been higher because data on membership were available for 832 applications and missing for the 970 applications that were dismissed or withdrawn before the bargaining unit was determined.

had enrolled more than 50 per cent of the employees in the bargaining unit as of the terminal date.

A minimum of two to three weeks was required to dispose of uncomplicated applications, and generally the process took much longer: an average of 58 calendar days over the course of the study; 72 days when a petition was involved. More than four weeks elapsed before a majority and more than eight weeks elapsed before three-quarters of all applications were settled. After fourteen weeks, one out of eight applications remained unresolved. And the longer the process, the lower the likelihood of certification. Applications disposed of within five weeks were significantly more likely to result in certification than those finalized thereafter: 75.4 per cent of unions were granted bargaining rights when their applications were processed within 35 days compared to 61.2 per cent when their applications took longer.

Table 3.1: Average Time Elapsed in Certification

Fiscal Years 1970-71 to 1981-82

Applications with petitions	72 days
Applications granted certification	52 days
All applications	58 days

Applications involving petitions were also significantly less likely to result in certification although the difference was relatively small. Bargaining rights were granted to 69.9 per cent of unions whose applications for certification were unopposed whereas unions were successful in securing certification 66.5 per cent of the time when anti-

union petitions were filed. And even this difference disappeared when those petitions which the Board found to have been voluntary were substracted. Of this group, fewer than one in five (18.3 per cent) were granted certification following a representation vote whereas the rate of success in all other petition cases was slightly higher than average at 71.9 per cent.

Table 3.2: Time Elapsed in Certification by Outcome of Certification

Fiscal years 1970-71 to 1981-82

	1-35 days	36 or more days	Total
Union certified	3,700	2,281	5,981
Union not certified	1,207	1,449	2,656
Total	4,907	3,730	8,637
Proportion certified	75.4%	61.2%	69.3%

$X^2 = 202.1^{**}$
(1 degree of freedom)

**Significant at the .01 level

The impact of delays was evident in the outcome of bargaining as well. Delays not only reduced the likelihood that certification would be granted but also the likelihood that collective agreements would be negotiated. Unions certified within five weeks of application were

significantly more likely to negotiate collective agreements than were those certified later. The effect was comparatively small, however: of the former group, 85.3 per cent concluded first agreements compared to 83.5 per cent of the latter.[j]

Table 3.3: Incidence of Petitions by Outcome of Certification

Fiscal years 1970-71 to 1981-82

	Petition	No Petition	Total
Union Certified	1,119	4,862	5,981
Union not Certified	564	2,092	2,656
Total	1,683	6,954	8,637
Proportion Certified	66.5%	69.9%	69.3%

$X^2 = 7.5^{**}$
(1 degree of freedom)

**Significant at the .01 level

Bargaining success was more obviously affected by anti-union petitions. When statements of desire were filed, unions were found to

[j]Solomon (1984), using a sample of 150 certification applications disposed of by the OLRB during fiscal year 1980-81, found the length of the certification process was a significant factor in predicting the outcome of bargaining. Span (total time elapsed between the opening of the hearing and the disposition of application) was significantly and negatively related to the likelihood of a first agreement. Similarly, the number of days of hearing was an impediment to the negotiation of an agreement although the number of hours of hearings appeared to increase the likelihood of concluding a first agreement.

have concluded agreements for only 79.1 per cent of their bargaining units, a rate of bargaining success almost seven percentage points lower than for unions whose applications for certification were unopposed. But the effect was not evenly distributed. The likelihood of bargaining failure was highly concentrated among those unions against which petitions were filed and dismissed by the OLRB as tainted. When statements of desire were found to have been involuntary (and the unions were certified without a representation vote), the likelihood of

Table 3.4: Time Elapsed In Certification by Bargaining Outcome

Fiscal years 1970-71 to 1981-82

	1 - 35 days	36 or more days	Total
Collective agreement negotiated	3,138	1,895	5,033
No collective agreement negotiated	539	375	914
Total	3,677	2,270	5,947#1
Proportion with collective agreements	85.3%	83.5%	84.6%

$X^2 = 3.7^*$
(1 degree of freedom)

*Significant at the .1 level

#1The total in this table differs from the total number of unions certified by the number of cases in which the outcome of bargaining could not be determined.

negotiating collective agreements was only 66.6 per cent, that is, sharply lower than the 85.2 per cent of unions negotiating agreements when petitions were either untimely, irrelevant, or accepted as genuine by the Board. For the latter group, the rate of bargaining success was not significantly different than for unions whose applications for certification were unopposed.[k]

Table 3.5: Incidence of Petitions by Bargaining Outcome

Fiscal years 1970-71 to 1981-82

	Petition	No Petition	Total
Collective agreement negotiated	880	4,153	5,033
No collective agreement negotiated	233	681	914
Total	1,113	4,834	5,947
Proportion with collective agreements	79.1%	85.9%	84.6%

$X^2 = 32.6^{**}$
(1 degree of freedom)

**Significant at the .01 level

[k]Solomon (1984) using a sample of 150 certified unions in Ontario, reported no correlation between anti-union petitions and the incidence of first agreements which, he said, defied expectation. But as the total number of applications with petitions analyzed was small (fewer than 50) and because information about the number of union signatories and the relevance of the petition were not collected, the importance of this finding is questionable.

These findings echo the experiences of American unions with respect to delays. A number of studies have demonstrated a significant, negative correlation between the length of the certification process and the likelihood of winning bargaining rights (Drotning, 1967; Miller and Leaming, 1962; Prosten, 1978; Roomkin and Juris, 1979; Roomkin and Block, 1981; and Cooke, 1983). And Cooke (1985a, 1985c) found that delays during certification were also strongly associated with the failure to negotiate collective agreements although contrary evidence was reported by Solomon (1985) for a sample of 195 cases granted certification by the Canada Labour Relations Board in 1979-1980. In this sample, the likelihood that collective agreements would be negotiated was significantly higher for unions whose applications for certification took longer to process.[1]

Policy-makers are not unaware of the prejudice caused by procedural delays. Both the pre-hearing vote procedure, introduced in 1960, and interim certification, introduced in 1975, were intended, in part, to shorten the time required to process applications. The advantage of the former is that representation votes are conducted relatively quickly, usually within ten days of application, and the ballot box sealed (with elaborate provision for identifying the ballots of those whose eligibility to vote is being challenged). Only after all the disputes over the composition of the bargaining unit, the admissibility of the union's membership evidence, and so on are resolved, and only if the

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[1]There is nothing comparable to Ontario's petition procedure in the United States or under the Canada Labour Code.

Board is satisfied that a union had, as members, not less than 35 per cent of the employees in the voting constituency as of the date of application, are the ballots counted.[44] On average, however, pre-hearing vote applications took longer to resolve than so-called regular applications. Six weeks elapsed before a majority of the pre-hearing vote applications was disposed of compared to four weeks for regular applications.

Table 3.6: Type of Petition by Bargaining Outcome

Fiscal Years 1970-71 to 1981-82

	Petition relevant but not accepted #1	All other petitions	Total
Collective Agreement negotiated	243	637	880
No collective Agreement negotiated	122	111	233
Total	365	748	1,113
Proportion with collective agreements	66.6%	85.2%	79.1%

$X^2 = 51.2^{**}$
(1 degree of freedom)

**Significant at the .01 level.

#1 These unions were certified without a representation vote.

Interim certification has been a more successful innovation. Observing that collective bargaining was frequently delayed because unions with an indisputable right to be certified were caught up in

disputes over the legal status of a relatively small number of persons, the Act was amended to permit the OLRB to grant certification on an interim basis when the outcome of a dispute would not affect a union's claim to represent more than 55 per cent of the employees in a bargaining unit.[45] But even though the volume of cases has been sizeable--404 over six years--the impact of the change has been marginal as bargaining rarely began in earnest until the case was finally closed.

The Labour Relations Board has also sought to expedite the processing of certification applications by organizational changes. To improve efficiency, a manager has been appointed to co-ordinate the Board's case-load, the progress of applications though the system is now monitored, and the Board's method of scheduling continuation hearings has been revised (Adams, 1980a:4). Most innovative of the internal changes is the waiver of hearing programme encouraging the parties to dispense with a full-scale hearing. But as this is possible only when there are no impediments to outright certification, the parties must agree on the description of the bargaining unit and the union's claim to represent more than 55 per cent of the employees in the unit: there can be no anti-union petition on file and no outstanding unfair labour practice allegations (Wakely, Wahl, and Freeman, undated:AVIII-14).

The cumulative effect of these changes is not evident from the OLRB's statistics. The proportion of applications disposed of within 14 days remains small: 8.9 per cent in fiscal year 1985-86. By the end of the fourth week, a majority (49.5 per cent) of the applications had been settled; however, ten weeks elapsed before three-quarters (75.1 per cent)

of the cases were closed (Ontario Labour Relations Board, Annual Report 1985-86:72).

Shortening the certification process is impossible without altering it fundamentally. So long as employers have full standing before the Board, it is easy for them to buy time:

> It is always possible to manufacture some kind of contest about legal certification: about whether the office staff should be included in a plant unit, or about the status of certain foremen and leadhands. Counsel for the employer demands a hearing, which will have to be scheduled weeks later, and which may be able to be adjourned or continued for months (Weiler, 1980:39).

In Ontario, 'most challenges are raised by employers who have the resources and incentive' to pursue such matters (Adams, 1985:360). Disputes are easily exaggerated. Questions about the legal status of employees, the size and composition of bargaining units, and the weight to be accorded membership evidence offer employers many legitimate opportunities to intervene and delay the disposition of applications.

Considerable time and effort are spent in ferreting out technical lapses. A single breach of its complex rules, a single indiscretion by a lay organizer, will cause the OLRB to investigate. And if it is the least bit uncertain, a representation vote is ordered. But does it really matter whether a member gave the dollar to the organizer directly or by way of another worker? Why is it so important that the money be collected when the card is signed rather than later? Is the worker any less committed to collective bargaining because she borrowed the dollar or gave the organizer his lunch instead of cash? The important issue, Bain (1978:36) emphasized is 'not whether a majority of the employees in a bargaining unit are "legally" members of the union but whether they

wish the union to represent them'. In the meantime, employees become impatient, wonder why the union has done nothing to improve their working conditions, leave their jobs, or lose interest. Delays also allow anti-union employers time to take counter-measures designed to undermine the employees' support for collective bargaining.

Equally troublesome for unions is the petition procedure. Anti-union petitions serve no useful purpose. For employees who oppose certification, the procedure offers nothing at all. Signing a petition is no more weighty a statement than refusing to sign a union's membership card. At the same time, the procedure entices employers to intervene where they do not belong. Sponsoring and defending a petition may also turn a group of disaffected individuals into an organized and vocal, anti-union minority: a division only hardened by the Board's investigations. Hearings may be spread over weeks or months; tension at work remains high; many bitter things are said. To discredit the petitioners, a union's lawyer must cross-examine aggressively and feels compelled to deride their independence and motivation leaving them hostile and resentful. Certification cannot heal the rift; indeed, in these circumstances, certification is 'probably still the most deeply resented decision that a Board makes. Where the union loses it will blame the Board for failing to take account of employer anti-unionism. Where it wins the employer will assume that the true wishes of a majority of the employees have not been properly ascertained' (Christie, 1977:47).

Whether so detailed an examination of a union's application is necessary is questionable. Arguably, the Ontario Board makes too much of certification. It is nothing more than a necessary prerequisite for

bargaining: in Weiler's (1980:48-9) words, a 'legal licence to bargain'. The real test of the employee's wishes comes 'when the trade union looks for a mandate to support its efforts at the bargaining table'.

Conclusion

To facilitate the growth of unions, the certification procedure should be simple and straightforward; instead, it is long and involved, and less effective than it might be. Delays in the processing of applications were not only frequent during the 1970s, they were associated with lower rates of success in certification. Unions whose applications took longer than five weeks to process were less likely to be granted bargaining rights and, if certified, much less likely to negotiate collective agreements.

Far from reinforcing the right to associate, the OLRB's complex rules and exacting standard of conduct impede the organizing of unions. Procedural niceties have been the downfall of many organizing campaigns. The OLRB is excessively careful, checking and cross-checking the details to insure that its many rules have been followed. Any question about the validity of a union's membership evidence -- any uncertainty about the manner in which the membership cards were signed, any hint that the workers might have been confused about the organization they were joining, or any doubt that each new member paid a dollar directly to an organizer -- will cause the Board to investigate. And if the Board remains uncertain, it will order a representation vote.

Equally frustrating for unions are the objections raised by employers. Because they are a party to every application, employers are

entitled to raise points of law and procedure, challenge the scope and composition of a bargaining unit proposed by a union, question the eligibility of supervisory or other employees for union membership, or alert the Board to irregularities in the conduct of organizing drives. Each of these allegations will cause the OLRB to investigate and if the matter cannot be resolved informally either party is entitled to a full-scale hearing. So willing is the Board to entertain these objections, anti-union employers can delay the outcome of certification proceedings almost at will.

A second obstacle to the growth of unions in Ontario is the ubiquitous anti-union petition. Associated with petitions are time-consuming inquiries into the organization, preparation, and circulation of the documents with the result that unscrupulous employers may encourage their use, even in the knowledge that those tainted by managerial involvement will result in rejection by the Board. In fact, most of the petitions filed with the OLRB during the 1970s were either not relevant to the outcome of the applications concerned or were tainted by management's sponsorship or tacit approval. In only a small number of cases was a petition both signed by enough union members to cast doubt on a union's claim to outright certification and found to be a voluntary statement of the employees' true wishes. But of this group, fewer than one in five unions was granted bargaining rights following a Board-ordered representation vote.

More troubling was the strong correlation between anti-union petitions and bargaining failure. Unions were generally less likely to negotiate collective agreements when their applications for certification were opposed by petitions; however, a closer look revealed that the

problem was confined to unions opposed by petitions rejected as involuntary by the OLRB. For the sizeable group of unions faced with petitions that were relevant (that is, signed by enough union members to reduce a union's uncontested membership support to below the level required for outright certification) but were found to be unreliable because of managerial involvement, the likelihood of negotiating collective agreements was dramatically lower.

Petitions are clearly troublesome for unions. Even though the OLRB seeks to impose a high standard of conduct on employers by rejecting not only petitions directly sponsored by management but also petitions which appear to be tacitly supported, it can do little more than set the document aside and certify the union. If, in the process, workers have come to believe that management is strongly opposed to collective bargaining and knows who supports the union, the process of investigating a petition and questioning its promoters may split the workforce into pro- and anti-union factions. Such division saps a union's bargaining power and reduces its chances of negotiating a collective agreement significantly. Given the potential for abuse, therefore, the anti-union petition should be eliminated: it does little to protect the rights of those who oppose collective bargaining while undermining the rights of workers who prefer union representation.

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Chapter 4

UNFAIR LABOUR PRACTICES

The right to associate enshrined in the Labour Relations Act is made effective by the prohibition against aggressive, anti-union conduct. Interference with the formation, selection, or administration of a trade union, intimidation or coercion to discourage workers from exercising their statutory rights, discrimination against or dismissal of workers for union activity, and the unilateral alteration of wages or working conditions during organizing and bargaining are unlawful. Though wide-ranging in scope, the protection afforded by the prohibition against unfair practices is undercut by the Board's view that anti-union animus is a necessary ingredient of unlawful conduct. Unless the OLRB is persuaded that an employer is motivated by unlawful intent, management retains the right to run the firm as it sees fit. Thus, a dismissal during an organizing campaign is not unlawful per se or even if it is unjust, but only if the Board can detect an anti-union purpose. Other sorts of employer conduct are similarly protected so long as the initiatives are undertaken for reasons of efficiency or profitability. An employer may, for example, sub-contract work, lay workers off, reorganize the work process, or introduce new technology despite the adverse effects that such conduct may have on an organizing drive, provided of course that the motivation for such changes is the pursuit legitimate self-interest.

The right to associate is undercut as well by the nature of the Board's remedies. Orders to reinstate and compensate workers dismissed in violation of the Act may right the wrong suffered by an individual but

do little to assert the rights of the collective. Such orders, moreover, fail to deprive an unfair employer of the benefits of its unlawful conduct so have little deterrent value. This being the case, outright certification may be the most effective means of protecting workers' rights. By certifying unions on the basis of membership cards rather than representation votes, the law prevents an unscrupulous employer from undermining a union's application for certification. No amount of unlawful conduct can take away membership cards already signed.

This chapter examines the effect of unfair labour practices on certification and collective bargaining by looking first at the Board's jurisprudence. How the Board interprets the statutory prohibition against unilateral changes in terms and conditions of employment is followed by a discussion of the scope of the protection against intimidation and dismissal for union activity and then by a review of the cases dealing with unlawful interference. The next section describes the Board's remedial authority and how it exercises its power to remedy violations of the Act. Finally, the effects of unfair labour practice complaints on the outcome of certification and the likelihood of negotiating a collective agreement are analyzed statistically using data gathered from the OLRB and the Ministry of Labour.

Statutory Freeze

The most straightforward of the unfair labour practice protections is the so-called statutory freeze. Since 1970 it has been unlawful for an employer to alter wages, or any other term or condition of employment, or any right, privilege or duty of employees without the consent of their

union once it has filed an application for certification with the Labour Relations Board and the employer has been notified of the application. The freeze lasts until certification has been granted and bargaining has been initiated or until the certification application has been dismissed or withdrawn. Also caught by the freeze are changes decided upon but not communicated to employees before the employer learned officially of the certification drive.[1] Terms and conditions of employment are again frozen once a union has served an employer with notice of its desire to negotiate and the freeze lasts until the conciliation process has been exhausted and the right to strike accrues or the union's representation rights have been terminated, whichever occurs first.[2]

The purpose of the freeze is to establish 'a period of stability, prohibiting unilateral change during the sensitive periods when the union is seeking certification or while the parties are negotiating a collective agreement' (Adams, 1985:551). And although changes are permitted with the consent of a union, employers apparently feel that by seeking agreement they would be drawn into bargaining (Christie and Gorsky, 1968:49). In fact, unions are advised to greet an attempt to blame a wage freeze on an organizing drive with a well publicized invitation to management to implement the increase (Cornish and Ritchie, 1980:108-110).

Unlike other categories of unfair practices, anti-union animus is not a necessary ingredient for violations of the freeze. There is strict liability regardless of motive. To be above the law an employer must, not, for example, reduce wages[3] or alter benefits, introduce a fee for parking,[4] or revoke the privilege of permitting employees to refuse

Saturday work.[5] In one case, an employer was found to have breached the freeze when it reduced the hours of work after consulting with, but without the consent of, the union.[6] Nor is it necessary to rely on a contractual right, a formal written policy, or even an express promise:

> The term 'privilege' is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a 'right'... It is sufficient if there is an established, and well entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued.[7]

Elsewhere, the Board explained that 'some promises do give rise to expectations that harden into privileges, and such privileges are not beyond the reach of the statutory freeze'.[8] In the Canron[9] case, management was found to have committed an unfair labour practice when it unilaterally ceased paying workers in cash. The company's defence, that the change was merely procedural, was rejected. And in Etobicoke General Hospital,[10] the employer was required to continue its historical error in the calculation of payments for statutory holidays: the established method of payment constituted a privilege frozen by the Act.

Not only are the existing terms and conditions frozen but the prior pattern of the employment relationship in its entirety. The 'business as before' approach requires an employer to continue managing the operation as it has in the past, that is, in accordance with the patten established prior to the onset of the freeze including any firmly established promises to improve wages or conditions. Thus, an employer has been required to implement the customary wage[11] and merit[12] increases during the freeze period, maintain the long-standing parity between the wages of full- and part-time employees,[13] and continue to adjust working

conditions in concert with the established reference group.[14] By the same reasoning, it was not a breach of the Act for an employer to grant a retroactive wage increase just before a representation vote because the adjustment had been promised to employees prior to the onset of the freeze.[15]

Management is not in a complete legal straitjacket, however. The 'business as before' approach does not imply an absolute freeze because 'such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy'.[16] In AES Data,[17] therefore, the Board affirmed the employer's right to make ordinary business and production decisions in the interest of efficiency even though the effect was to modify an employee's job functions. So long as an employer does not depart from the previous pattern of conduct, it is free to exercise its traditional prerogatives and may, for example, transfer employees from one shift to another to meet staffing requirements[18] or dismiss an employee during the freeze period, provided that the discharge is implemented in a manner consistent with the prior operation of the business (Adams, 1985:557). Even large-scale changes can be justified if an employer is motivated by economics and not anti-union animus. Thus, there was no breach of the statute in Superior Glove Works[19] when one production line was closed down and workers were laid off in the face of an organizing drive, in spite of the owner's open hostility to unionism. Because the cut-back was for business reasons and the lay-offs were based on seniority, no anti-union intent was evident.

Changes of this sort are justified, the OLRB believes, because lay-offs for business reasons are part of workers' 'reasonable expectations'. Employees should anticipate that employers will respond to changing economic conditions through hiring, firing, and attrition: 'It is in this sense that it is "reasonable" for employees to expect an employer to respond to a significant downturn in business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze'.[20] The magnitude of the cut-backs must be proportionate to the severity of the loss of business, but otherwise a firm is free to adjust the size of its workforce as it considers advisable. In another case, the 'business as before' rule was interpreted to permit the introduction of new technology during the period of the statutory freeze with no obligation on the employer to discuss the consequences with the union.[21]

On occasion, the Board has distinguished lay-offs resulting from a downturn in business from lay-offs resulting from contracting out: the former were said to form part of employees' reasonable expectations while the latter did not. None the less, in Town of Petrolia,[22] management's right to sub-contract its garbage collection and landfill operations was affirmed even though the parties were in the midst of negotiations for a first agreement and the union was seeking to protect workers from lay-offs. In this particular case, the cost-cutting programme had been initiated well in advance of the onset of the freeze and the lay-offs should have been anticipated by the employees, the Board decided; moreover, the possibility of intermittent lay-offs was clearly stated in the employees' handbook. In any event, the right of an employer to sub-

contract work for bona fide business reasons was considered to be a traditional prerogative of management which remains intact and which cannot be modified by an employment manual or by past practice.

Clearly, an application for certification does not herald the start of a collective bargaining regime in Ontario. Although the freeze is said to provide a fixed point of departure for bargaining, it does nothing of the sort. As interpreted by the OLRB, the law affords employers one last opportunity to rid themselves of unwanted employees, introduce new technology, contract work out, or make any other changes they choose without bargaining, or even consulting, with the union. The legitimacy of such decisions is grounded in the legitimacy of the pursuit of economic self-interest: so long as there is no anti-union motive, an employer remains free to continue making decisions which affect terms and conditions of employment. Nor is the constraint of past practice a pressing one. As interpreted by the Board, the Labour Relations Act allows an arbitrary employer to continue to act arbitrarily.

While the statutory freeze has been characterized as an interim legal regime during which neither the law of master and servant nor the law of collective bargaining applies, the freeze is not regarded as the prelude to collective bargaining. By adopting the 'business as before' approach, the Board has chosen the individual contract of employment as its point of reference. The workers are not treated as equal partners in the decision-making process; indeed, the notion of joint decision-making has been almost forgotten. Neither the fact that workers have formed a union nor the fact that the parties may be about to negotiate a collective agreement appears to entitle them to be consulted.

Full acceptance of collective bargaining, by contrast, would imply that the freeze should be absolute. Important changes should be held in abeyance during the certification process. Once workers have organized, an employer has lost the right to act unilaterally; moreover, the terms and conditions of employment established under individual bargaining are no longer the appropriate reference point. In a collective bargaining regime there are no rules governing the employment relationship until the parties have negotiated them. There should be no right to discipline or dismiss in accordance with past practice, no right to introduce new technology or sub-contract work, no right to make any changes at all without consulting with the union, at least not until those rights have been agreed to by both parties. But so total a freeze is not acceptable to the OLRB. An absolute freeze would not give management the flexibility it desires: so total a freeze would fail 'to accommodate necessary and inevitable changes' and would allow a union to extract an 'artificially high price for change' (ibid.:559). Instead, employers are accorded is traditional prerogatives even though the effect may be to undermine the right to associate.

Intimidation, Coercion, and Dismissal for Union Activity

It is also an unfair labour practice for an employer, at any time, to seek by intimidation or coercion to compel any person to become or to refrain from becoming, or to continue to be or to cease to be a member of a trade union, or to refrain from exercising any other right conferred by the Labour Relations Act.[23] The protection afforded is quite specific: only a person (and not a trade union) is a potential victim and it is

necessary to establish that there was a threat, or intimidating or coercive action coincident with an express or implied demand to join, or to refrain from joining, a union or to forgo exercising a right. But there is no need to establish that the person was, in fact, intimidated or coerced (Sack and Mitchell, 1985:440). The converse also holds: it is not sufficient to demonstrate that the complainant might reasonably have been intimidated or coerced, or even that he or she was.

For the conduct to be unlawful, an illegal motive is necessary.[24] Accordingly, the Board has found unlawful the sudden and strict enforcement of plant rules or safety procedures, transfers of employees which were in effect demotions, hypercritical supervision and the harassment of union activists, and overburdening an employee with work while withholding the necessary assistance because the employer's underlying purpose was unlawful (Adams, 1985:496-7). In some instances, the injurious results of the employer's conduct have been so predictable that the Board was willing to assume that management intended the consequences of its actions. Most serious were threats of personal injury. In Norsemen Plastics Ltd., [25] the necessary unlawful motive was found in the company's campaign of anonymous telephone calls threatening physical harm against those who refused to sign an anti-union petition. Management also counselled workers to vote against the union and distributed company and T-shirts on the date of the representation vote. Similarly unlawful was the surveillance of those involved in union activities by spies or agents provocateurs hired by a company to infiltrate a union.[26] And by dramatically increasing security in

conjunction with an organizing campaign, Skyline Hotels[27] was also found to have intended to intimidate its employees, though it claimed to be protecting them from harassment by union organizers.

Almost as telling have been threats which undermined workers' job security. Trulite Industries[28] was found to have committed a serious breach of the Act when it told employees in a 'captive audience' speech that a union would 'kill the company'. In another case, the employer's 'request' to attend a meeting during working hours amounted to an order. Coupled with a reference to the survival and profitability of the firm the employer's conduct was no less than 'a veiled threat to the job security of the employees'[29]. Finally, Food City[30] was found to have violated the Act when management questioned workers about their union membership and imposed a punitive change in work schedules.

For the same reasons, lay-offs and cut-backs to avoid collective bargaining have been regarded as breaches of the law. Decisions to shut-down or cut-back were tainted if motivated, even in part, by anti-union animus. In one case, employees were reinstated despite the fact that the decision to sub-contract their work had been made weeks before the complainants applied for certification. In the Board's assessment, management's decision had been 'crystallized' by the organizing drive and so was unlawful.[31] It was similarly unacceptable for Culverhouse Foods[32] to contract work out to a less than arm's length sub-contractor that subsequently refused to employ workers who had challenged their terminations by lodging grievances. And when the Academy of Medicine[33] closed down its telephone answering service rather than bargain with its newly certified union, the OLRB found it 'difficult

to conceive of conduct more destructive of rights than a permanent closure of a business, based not upon legitimate business considerations but upon an employer's simple refusal to operate with a trade union'.

At the same time, however, a shut-down or cut-back resulting from bona fide business considerations does not violate the law. Specifically protected by the Labour Relations Act is an employer's right to suspend or discontinue all or part of its operations for cause.[34] Consequently, a lay-off is not unlawful simply because it coincides with an organizing drive or otherwise interferes with the right to associate. In Accutext,[35] for example, the union's complaint was dismissed because the Board accepted that a downturn in business was the real reason why two employees had been terminated shortly after two others had been dismissed from a six-person bargaining unit, all within three months of certification. Nor was an unlawful purpose discerned when a nursing home contracted out its housekeeping and janitorial work, laying off all sixteen of the workers employed in this capacity. The employer's motivation was purely economic, the Board concluded: 'the fact that the union and the employees were adversely affected does not itself taint the legitimacy of that decision'. At no point did the employer consider the advantages of non-union over union labour: 'It was not until a substantial saving was offered that the respondent took the idea of contracting out seriously'.[36,a],[37] But economic necessity cannot make legitimate, conduct motivated by anti-union animus. Even though lay-offs

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[a]However, a later decision by the nursing home--to sub-contract its nursing functions while retaining control over the work -- was not legitimate. In the Board's opinion, the imperfect contracting out of a 'core function' of a business raised the presumption of an unlawful objective.

at Tillotson-Sekisui Plastics[38] were justified by the company's financial predicament, the OLRB ruled that management had violated the Act because it had manipulated the timing of the cut-back in order to undercut the union's application for certification.

In addition to the general prohibition against intimidation and coercion, the Act specifically forbids an employer to refuse or threaten to refuse to employ or to continue to employ, or to discriminate against a person in employment because the person is a member of a trade union or is exercising any other right under the Act.[39] Dismissal or discipline is unlawful if an employer is motivated, in part or in whole, by anti-union sentiment. An employer runs afoul of the law, consequently, unless the dismissal is 'for some reason totally unrelated to the presence of union activity at or around the time of discharge'.[40] Affirming this approach, the Ontario High Court ruled that a comparable provision in the Canada Labour Code had been breached when membership in the union was merely 'present in the mind of the employer' when the decision to dismiss was made.[41] Whether union activity was the main or merely an incidental consideration was unimportant: an improper motive need be only one, not the sole, or even the principal reason.

Questions of fairness, reasonableness, or 'just cause' do not arise, however. Where no anti-union motive is established, a dismissal is not unlawful simply because it is unjust. The Labour Relations Act does not protect employees 'from the unfair or unreasonable actions of their employers if those actions are not tainted by anti-union motive'[42]; the Board 'determines the quite different issue of whether a cause of the discharge was the employees's union activity'.[43] Thus, the dismissal of

an employee on the grounds that she was not perfect was upheld once the OLRB was satisfied that the employer genuinely expected near perfection.[44] Nor was the dismissal of an employee for eating peanuts on the job interfered with once this infraction was accepted as the real reason for his discharge.[45] Similarly, when a union's chief organizer was fired for making caustic remarks and behaving in a threatening way, the worker was not reinstated even though he was dismissed on the day of the certification hearing.[46] On the other hand, the Board found the dismissal of an employee who was incompetent and, in another case, an alcoholic, unlawful because both employers had been motivated, in part, by anti-union animus (Sack and Mitchell, 1985:411).

Before a complaint is upheld, the Labour Relations Board requires evidence of the employer's anti-union motivation. But proving intent can be difficult:

> Typically, an employee will assert that there has been an anti-union motive for his termination, while the employer will deny that the termination has in any way been connected with the employee's union activity. It has been the Board's experience that self-serving assertions of this sort have little probative value and that the true reasons for the discharge can best be gleaned from objective circumstances.[47]

Accordingly, the OLRB inquires into the events surrounding a dismissal including the existence of a pattern of anti-union conduct, the employer's knowledge of the organizing drive and the complainant's involvement in the campaign, the manner in which the employee was dismissed, and the credibility of the witnesses.[48] Suspicious are the sudden dismissal of a long-service worker or the discharge of an employee without a legitimate reason.

Other anti-union conduct around the time of a dismissal is circumstantial evidence that supports the inference that the discharge was part of a pattern. In Comstock Funeral Home[49], the Board relied on two unlawful dismissals during the organizing drive to conclude that the lay-off of a third, four months later, was a breach of the Act. None the less, the decision to lay off a fourth employee was found to have been rooted in legitimate self-interest so not disturbed. Conversely, if the dismissal was an isolated event or separated in time from other anti-union conduct the Board has been unlikely to find an employer's conduct suspicious. Thus, when one of the leaders of an organizing drive at DeVilbiss[50] was dismissed for producing too much scrap, low productivity, and absenteeism, the OLRB could find no evidence of management's anti-union animus. Although the complainant felt he had been observed signing up members in the company's parking lot, his concerns were dismissed as exaggerated. And although a second union supporter was reprimanded for absenteeism and warned after he was observed distributing leaflets some time later, the Board could detect no pattern of anti-union conduct. In G. Tamblyn Limited,[51] on the other hand, the Board was not deterred by the fact that ten weeks had elapsed between the time when the employer became aware of the complainant's union activity and his dismissal because his services had been required to cover for others away on vacation in the interim.

Nor has evidence of an employer's anti-union animus always been conclusive. The managers of Makita Power Tools[52] were anti-union without a doubt: they organized a petition opposing certification, predicted the distributorship would be closed if the union were granted bargaining

rights, and questioned workers about their membership in the union. Even so, the Board accepted that the complainant had been dismissed as a result of his poor performance. While he was one of three union members in a bargaining unit of only five persons, the OLRB concluded that the dismissal was not for union activity because the complainant had had no particular involvement with the organizing drive.

Ordinarily, the employer's knowledge of a worker's involvement in the union has been strongly suggestive of an underlying, improper motive. In Delhi Metal Products,[53] for example, a worker was allegedly dismissed for having alcohol on his breath and he had, in fact, drunk two bottles of beer at a lunch-time organizing meeting before returning to work. However, the union was able to show that management was well aware of the worker's union activities; indeed, moments before his dismissal he had torn up an anti-union petition presented to him to sign by another employee, the son of a foreman. As a result, the OLRB rejected the employer's claim that it was unaware of the worker's role in the organizing drive and found the dismissal to have been motivated by anti-union animus.

Lack of knowledge of a worker's union activity has been a correspondingly strong defence. The Ontario Board has been unlikely to find anti-union animus when a union has been unable to demonstrate that the employer knew of the complainant's involvement. Accordingly, the dismissal of a worker for inventory shortages was upheld in Becker Milk[54] for, although he had written to co-workers urging them to unionize, he was not publicly linked to the letter. The Board also doubted that the complainant's activity was union-related as he could produce no

witnesses, bank books, membership cards, or minutes of meetings to prove the organization existed. In Imperial Flavours Inc.,[55] likewise, it was alleged that five employees had been terminated in contravention of the Act although the company disavowed all knowledge of the union's presence, a defence the Board accepted despite the fact that management had posted a news article describing an organizing drive at Eaton's. Management's legitimate concern over extended work-breaks was determined to be the real reason for the dismissals. And no unfair labour practice was found in another case in which the employer denied knowledge of a worker's union activity, even though the dismissal had been precipitous and 'on the face of it, appear[ed] less than fair'.[56]

The reasons for, and the manner of, a dismissal may also indicate unlawful intent. An employee laid off for no apparent reason after eight months of satisfactory work shortly after she had been observed talking to a union organizer was reinstated.[57] In another case, in which an employee was dismissed for violating minor company rules, the Board found the necessary unlawful intent in the unusual severity of the punishment[58]. In cases of this sort, it has been the employer's past practice that has been the Board's touchstone. When, for example, the employment of a nurse's aid was terminated, ostensibly for rough treatment of patients, it was established that the incident would normally have warranted no more than a verbal warning. Because the complainant had four years of service, was a good employee, had no disciplinary record and was well known as the initiator of the organizing drive, the Board was convinced that the true reason for her discharge was her determination to unionize the nursing home.[59] Similar was the case

of a worker who admitted the profanity for which he was allegedly dismissed. But since he had over three years of service, a good work record, and had never been insubordinate before, it was concluded that his conduct would normally have warranted only a suspension: the real cause of his dismissal was his activities as president of the works committee and proponent of unionization.[60]

Finally, the Board considers the credibility of witnesses. Unions are warned that their witnesses should impress the OLRB with their frankness and sincerity: 'many discharges have been lost because witnesses exaggerated something and were caught by the company lawyers', Cornish and Ritchie (1980:193) cautioned. The union lost the DeVilbiss case,[61] in part, because the complainant was not forthright about his rather poor work performance. And the employer in Barrie Examiner[62] lost, in part, because a supervisor was less than frank about how vigorously he had opposed the union.

Traditionally, the complainant was required to establish the validity of the allegation; but, in 1975, the Labour Relations Act was amended and the burden of proof shifted to the employer in cases of unlawful dismissal, discrimination, intimidation, and coercion.[63] Prior to 1975, a worker had to show that he or she had engaged in union activity and that his or her employer knew, or believed, the complainant was involved in such activity (Sack and Levinson, 1973:217). In reply, an employer was required to give a credible explanation for its conduct. Now, however, an employer must show that it did not act unlawfully. The onus is on it to satisfy the OLRB that the reasons given for the discharge were the only reasons and that those reasons were not tainted by an

anti-union purpose.[64] Though criticized as an unjust assumption of an employer's guilt, the reversal of the burden of proof has been defended as consonant with the common law and not inconsistent with the presumption of innocence enshrined in the Charter of Rights and Freedoms (Adams, 1985:489). As a practical matter, the 1975 amendment did little more than codify the Board's existing practice (England, 1976b:601). In Belisle Automobiles Limited[65] decided in 1970, for instance, the employer was required to justify the sudden dismissal without explanation of seven employees whose service ranged from eight weeks to ten years.

Although it recognizes that a dismissal for any reason during an organizing drive is potentially damaging to a union, the Ontario Labour Relations Board will leave unremedied conduct which undermines the right to associate when it cannot detect an underlying anti-union purpose. When urged to recognize the chilling effect that dismissal for any reason can have on an organizing campaign, the Board replied:

> That is no doubt true. Other innocent factors, such as layoffs for good business reasons or a financial downturn might also have a negative impact on the fortunes of a union. As real as those concerns may be to a union, they are not matters which the provisions of the Act are designed to protect unions or employees against. They should, therefore, not be the basis of a complaint to this Board.[66]

The issue of motive is paramount. In principle, the Board adheres to an objective standard and so quoted with approval the United States Supreme Court's view that an improper motive is revealed by conduct that is inherently discriminatory or destructive of the right to associate:

> The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, the unfair labor practice charge is made out... His conduct does speak for itself -- it is

> discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. (Adams, 1985:492).

In practice, however, the Ontario Board is reluctant to infer an unlawful motive from an employer's conduct particularly when there is some evidence of an acceptable business justification. Efficiency and productivity are over-riding considerations: 'every employee remains subject to the legitimate actions of his employer in adjusting his work force to meet the genuine needs of his enterprise'.[67] A good deal of damaging conduct goes unremedied as a result. Lay-offs and terminations are acceptable so long as an employer is pursuing a legitimate business objective. Although a former chairperson of the Ontario Labour Relations Board has argued that Canadian collective bargaining legislation prohibits 'employer conduct that interferes with the organization of employees' (Carter, 1982:1), this is not, in fact, how the law has been interpreted and applied.

Unlawful Interference

The least tractable of the statutory protections of the right to associate is the prohibition against an employer participating in or interfering with, the formation, selection or administration of a trade union or the representation of employees by a trade union.[68] Despite efforts to restrict its meaning, unlawful interference remains a broad category of offences including closing or threatening to close an establishment to avoid collective bargaining, dismissing an employee for union activity, sponsoring an anti-union petition, conferring benefits

and soliciting grievances to undermine support for the union, disciplining employees to prevent them from discussing union business on their coffee breaks, or spreading rumors that management knows the names of those who joined the union (Sack and Mitchell, 1985:433-4). Employers have been warned against assisting workers in the formation of an employees' committee to rival a union seeking certification[69] or helping to establish such a committee and discussing terms and conditions of employment with it.[70] An employer may also be in violation of the Act if its foremen or supervisors assist in sponsoring or circulating anti-union petitions; even if upper management is unaware of their activities.[71] And because a union is the aggrieved party under this section of the Act, complaints of unfair practices directed at individuals are commonly coupled with a general complaint alleging unlawful interference with the union.

The Board's rule is simple: do not interfere.

> An employer can align himself neither with the employees who favour a union nor with those who are opposed. Doing so distorts the balance of choice and frustrates the free exercise of employees' rights under the Act. Support to either camp, whether open or covert, amounts to interference contrary to the Act...Apart from the right to express his views, a right whose exercise requires some care, the Act imposes a simple rule for the employer: Do not interfere.[72]

But even though the wording of the Act suggests a total ban on 'any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists',[73] this is not how the Act has been applied. So broad an interpretation would render other sections meaningless, the Board believes. If an employer's motive were not considered, any dismissal of an organizer, or possibly of any employee, during an

organizing campaign might lead to a finding of unlawful interference. Similarly, any other conduct that has the effect of undermining the right to associate could lead to a finding of unlawful interference. Such an interpretation implies that any violation of section 66, 70, or 79[b] would necessarily be a violation of section 64, although the reverse would not necessarily hold. This far the Ontario Board is not prepared to go.

Contradictions abound, however. In some cases, the employer's motivation has been a pivotal issue while in others the Board has fastened on the effect, rather than the intent, of the conduct. In the 'no-solicitation' cases, for example, the Board has attempted to balance the workers' right to organize against the employer's right to have work continue uninterrupted. Although the Act specifically warns employees that they have no right to engage in union activity during working hours,[74] an employer is not permitted to rely on its property rights to ban organizing altogether. A blanket no-solicitation rule is not acceptable unless an employer can show that it has a legitimate business reason for prohibiting solicitation at all times. Otherwise, the OLRB distinguishes between working and non-working time and employees are free to engage in organizing activities while not on the job, for example, on their lunch and coffee breaks, even if paid for by the company. Other forms of campaigning, such as wearing buttons, are also permitted (Adams, 1985:521-2).

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[b]Sections 66, 70, and 79 prohibit dismissal and discrimination for union activity, intimidation and coercion of union supporters, and unilateral changes in terms and conditions of employment during organizing and bargaining, respectively.

In the no-solicitation cases, the employer's motivation has generally not been evaluated or, if it has, the Board has often been willing to assume that the purpose of the rule was a legitimate interest in maintaining order and efficiency (ibid.:523). In Consolidated Fastfrate Ltd.,[75] for example, the Board said that the Act does not preclude the introduction of rules designed to enhance efficiency or prevent the interruption of work and in this instance it could discern no other, unlawful, purpose behind the company's policy against unauthorized posting or circulating of literature or stickers on its property even though 'its rule was rather broadly drafted and, ex facie could apply to non-working areas'. Canadian boards also give to management the right to prohibit solicitation by non-employees on company property: an employer 'may raise its property rights against strangers to the employment relationship even though access could not interfere with any bona fide management interest' (ibid.:523)[c,76] and to prohibit solicitation, such as political campaigning and canvassing, not directly related to collective bargaining.[77]

The full adoption of an objective standard, one that puts the results of the employer's conduct ahead of its purpose, is stymied by the Board's condonation of conduct that has at least a partial business or collective bargaining purpose. In A.A.S. Telecommunications,[78] conduct that interferes with a trade union was distinguished from conduct that merely affects a union incidentally. Only the former is unlawful: the 'normal wear and tear of collective bargaining' should not be

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[c]The exception to this rule occurs when employees reside on property owned or controlled by the employer in which case union organizers must be allowed access pursuant to a direction of the Board.[76]

characterized as illegal interference, the OLRB concluded. And although it will occasionally infer motivation from an employer's conduct, when there is some evidence of a business purpose the Board is unlikely to do so. Thus, the OLRB accepted as totally genuine one hospital's explanation for laying a complaint of professional misconduct against a union activist who had publicly linked the death of a patient to under-staffing, an issue then in dispute between management and the nurses' union. Whether there might have been an unlawful, ancillary motive the Board failed to consider.[79] Other times, a more objective test has been applied when the Board concluded that its inaction would have left unremedied, conduct motivated by good faith but which interfered with the right to associate and had no persuasive or worthy business purpose. A case in point was the dismissal of workers whom the employer mistakenly believed were involved in an assault on two strike-breakers. In this instance, the Board decided that it must intervene otherwise its lack of action would have given the impression that peacefully picketing the place where strike-breakers convened before attending the plant was not a protected activity. To give effect to this right, the complainants were reinstated with back pay.[80]

What constitutes unlawful interference is greatly complicated by the right of free speech. The Ontario Board has never required employers to remain neutral in organizing campaigns, a view endorsed by the Task Force on Industrial Relations (Woods, 1968:159). Apart from making threats or promises, the Task Force thought employers should be entitled to defend their records through statements of fact or by rebutting a union's allegations or promises.

Though it recognizes the sensitive nature of the employer-employee relationship, the OLRB does not accept the proposition that employers' statements, by definition, exert an undue influence on workers. Even before 1960 -- when the qualification, 'nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence', was added to what is now section 64 -- the OLRB distinguished between statements designed to compel and those designed to persuade, and only the former were unlawful (Laskin, 1961:118-9). In fact, the so-called free speech protection does not seem to have influenced where the OLRB drew the line. Then, as now, workers were presumed to 'recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union'.[81] Employers have always had the right to review their past accomplishments, draw attention to current wages and working conditions, advise employees of their freedom of choice, and even express their opposition to collective bargaining (Sack and Mitchell, 1985:251).[d]

Statements about the company's profitability and competitive position, for example, were not considered to be threats but legitimate expressions of the employer's concerns in Greb Industries.[82] And in

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[d] McPhillips (1982:148) argued that 1975, not 1960, evidenced a change of emphasis in interpretation. In the earlier cases, employers were permitted greater latitude in their dealings with employees, he thought. More recently, the Board has sometimes been willing to ban propaganda 'although an employer is still entitled to express his views and is not confined to mere platitudes'. The differences he noted are difficult to find, however.

another case, an employer's encouragement to vote against the union in a representation election 'delivered in writing in the absence of any surrounding facts or circumstances which would cause employees to place undue emphasis on such statement' was not characterized as undue influence.[83] Likewise, an address by a plant manager urging employees to give careful consideration to the certification proceedings and indicating his disappointment with their decision to unionize was found to be neither intimidating nor coercive, or sufficient to taint the anti-union petition circulated in the wake of the speech.[84] Nor will the Board censor communications in the absence of threats or other elements of intimidation. Employees must be credited with common sense: exaggeration, inaccuracies, partial truths, name-calling and falsehoods, while not condoned, are excused as legitimate propaganda so long as they are not so misleading as to prevent the exercise of free choice.[85] Thus, it was not interference for an employer to allege that a union was interested only in the workers' dues and its own advantage when the employer did not suggest that jobs or wages were in jeopardy.[86] However, another employer was found to have exercised undue influence when its message was clearly discernible: 'the employees were invited to reject the union and thusly obtain an immediate salary increase or otherwise they must be prepared to assume the risks inherent in the arduous negotiations which would subsequent (sic) ensue'.[87]

The scope of the protection against interference afforded by the Act is sharply narrowed once workers are organized. The high standard of behaviour required of employers during the representation process is considered unnecessary and too intrusive once a union is certified. So

long as an employer respects a union's status as the exclusive bargaining agent, management is generally free to communicate with workers during negotiations. Accordingly, statements that would be construed as intimidating during an organizing drive are acceptable as part of a party's negotiating strategy. While it was improper for G.T. Couriers[88] to tell workers that its operations in Hamilton might be closed because the firm's most important customer would not do business with an organized company, the same prediction made in the context of bargaining would not be unlawful. Similarly, the statement that the plant might be closed if the employees failed to accept the employer's offer did not constitute an unlawful threat or undermine the reliability of the ratification vote in another case.[89] And in A.N. Shaw Restorations[90] it was not the threatening content of the employer's messages to its workers but management's attempt to by-pass the union as bargaining agent that the Board found unlawful. Nor did management's insistence on a no-reprisals clause in the collective agreement amount to unlawful interference. The company's objective, to protect strike-breakers from union discipline, had a legitimate collective bargaining purpose in encouraging the parties to put the dispute behind them.[91]

The purpose of the free speech protection, the Board says, is to 'enable others to make an informed judgment as to what concerns them'[92]. But such statements often have a 'sinister significance' (Arthurs, Carter, and Glasbeek, 1980:151). In law, the decision to bargain collectively is the employees' alone. An employer has no legitimate part to play: 'the employer's concern is not that the employees make a free and informed choice in their interest[,] rather the employer wants to

influence the employees to make a choice in his interest' (Weiler, 1980:47). Indeed, what the Ontario Board permits under the free speech protection is called interference by others. In Weiler's (1975:3) opinion, the law tells an employer to adopt a totally neutral stance:

> The audience of employees is a captive one and particularly vulnerable to the overtones underlying such comments. Reasoned debate is precluded by an appreciation of the employer's wishes and anticipation of the consequences that may follow from exposing a viewpoint at odds with that position. That is not free speech nor any form of debate which can assist an employee in making an informed decision.[93]

There is a definite conundrum in the Ontario Board's permissive construction of the free speech protection. Its interpretation of this section of the Act is at odds with its view that mild and unthreatening statements made during an organizing drive may be improperly suasive and so render involuntary the repudiations of union membership which sometimes follow. Anti-union petitions which emanate from captive audience speeches, for example, are frequently rejected as tainted; yet, the statements themselves appear to be protected by the free speech guarantee. The OLRB cannot have it both ways: either the workers were influenced or they were not.

Remedies for Unfair Labour Practices

Over the years, the power of the OLRB to investigate and remedy breaches of the Act has been greatly expanded. The statutes of the 1940s and 1950s were rudimentary: 'certification of a trade union -- that was it' (Adams, 1981b:44). Authority over complaints was vested in the Minister of Labour; the Board lacked even the power to enforce its own awards. In 1960, on the recommendation of the Select Committee on Labour

Relations, the OLRB's jurisdiction was expanded to include investigating and remedying complaints that a person had been dealt with unfairly. At the same time, its awards were made enforceable as decisions of the Supreme Court of Ontario (Bromke, 1961). In 1975, the Board's jurisdiction was again expanded, and now encompasses all allegations that the Act has been violated. Previously, unions were not entitled to file unfair labour practice complaints because they were not legally 'persons'. Although they were lumbered with most of the disadvantages of legal personality--unions were bound by their 'contracts' and liable for breaches and while they could not be sued in tort they could be prosecuted, fined and ordered to pay damages for violations of the Labour Relations Act--unions had few of the advantages, an imbalance partially redressed when the Board was given the authority to investigate and remedy all complaints arising under the Act.[94]

When a complaint is filed, a labour relations officer is routinely assigned to inquire into and attempt to settle the dispute by agreement of the parties.[95] If it cannot be settled informally, the parties are entitled to a formal hearing.[e] On finding a breach of the Act, the OLRB has a broad authority to remedy the wrong and determine what, if anything, the employer, trade union, or person(s) shall do, or refrain from doing. Remedies are pronounced by way of declarations and directions: the former are simply statements of facts and findings, the latter are injunction-like orders to rectify the conduct complained of. Declarations are routinely issued in unfair labour practice cases but if

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[e] In fiscal year 1958-86, fewer than one in five complaints were ultimately referred to the OLRB (Ontario Labour Relations Board, Annual Report 1985-86:69).

a stronger measure is warranted, the Board will issue a direction, most commonly an order to cease and desist augmented where appropriate by an order to reinstate in employment, pay compensation, and so on.[96] Orders are effective when issued and not delayed if challenged in court.[97]

The Board's mandate is remedial, not punitive: its awards must not have punishment, harassment, or public embarrassment as their primary purpose. As a practical matter, therefore, a breach of the statutory freeze is the unfair labour practice most amenable to remedy. Normally, a complaint of deteriorating terms or conditions, or a refusal to adjust terms or conditions in accordance with past practice, can be rectified by a direction to compensate workers for their losses. The Board has, according to circumstances, awarded a retroactive wage increase, [98] directed an employer to reinstate the old work schedule,[99] and compensated employees for wages lost due to an unlawful reduction in the hours of work.[100] In another case, to avoid depriving employees of the improved working conditions unlawfully conferred (and to minimize interference with the operation of the business), the Board did not require the employer to revert to the status quo ante but ordered instead that a notice informing the employees of the violation be posted in the workplace and permitted the union to address the assembled workforce.[101]

Unlawful dismissal is a far more difficult wrong to right. Unique to labour boards is the power to order reinstatement[f] and this is the OLRB's standard remedy. An employer may also be required to compensate a worker for lost income, ordinarily, an amount equal to wages lost

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[f]The Board's power does not include the substitution of a lesser penalty, however (Adams, 1985:492).

adjusted for interim changes and the amount of overtime the employee might have worked, vacation pay he or she would have been entitled to, and any special bonuses or supplementary payments. Prior to 1980, interest was not required and, as yet, there is no 'pain and suffering' component, although in one extraordinary case K-Mart was ordered to pay two workers $500 each to compensate for the mental distress caused by their employer's unusually aggressive harassment and surveillance.[102]

An employee collects only the equivalent of his or her net pay, that is, total wages minus stoppages for income taxes, Canada Pension Plan contributions, and unemployment insurance premiums. Compensation is also reduced by the amount earned from alternate employment. Accordingly, an employer pays only the difference between what the employee received while out of work and what is owing. If the new job pays more, an employer is only required to compensate a worker for the time between jobs (Cornish and Ritchie, 1980:113-4). To qualify for compensation a worker must attempt to mitigate his or her losses or suffer a reduction in compensation commensurate with the failure to do so. The duty to mitigate also requires a complainant to accept an offer of reinstatement if the terms are generally similar to those prevailing before the discharge, but not if the job offered is substantially inferior to the one the employee is entitled to or if there are other extenuating circumstances.[103] An employee is expected to apply for unemployment insurance benefits, register with Canada Manpower, and be willing to accept any work in the field, whether full- or part-time. The complainant must also make reasonable efforts to secure a job on his or her own (ibid.:114).

Failure to follow its rules has caused the Board to reduce or deny compensation in unlawful dismissal cases. The amount paid to one worker was cut by a third when he unreasonably delayed filing his complaint with the OLRB and later quit another job.[104] And if the OLRB believes a worker's behaviour contributed to the dismissal, he or she may be reinstated without compensation or with the amount of compensation considerably reduced. In one case, compensation in full was denied because the complainant had a record of absenteeism.[105] And in another, full compensation was withheld when the Board decided that anti-union animus had caused an employer to dismiss an employee for conduct which would have normally warranted a suspension. The worker was reinstated but compensation was reduced by the amount that would have been earned during the suspension.[106] Normally, the Board does not calculate the amount owing but leaves it for the parties to determine. If they cannot agree, the OLRB will resolve the dispute, but only if it was specifically asked to retain jurisdiction; otherwise, the case is closed (ibid.:114).

While reinstatement with compensation is an appropriate, albeit far from generous, remedy for the wrong suffered by an individual, it is at best a weak palliative for the employer's interference with what is an inherently collective right. The impact of a dismissal during an organizing campaign extends far beyond the consequences for the dismissed worker. With this act, the employer deliberately, and often successfully, sets out to intimidate the entire work force. Dismissal is a warning to all and cheap at the price.

It was this deficiency the Board sought to correct with its 'make whole' order, first issued in Academy of Medicine.[107] The Academy was a

determinedly anti-union employer: the union's organizing drive was punctuated with threats of job losses and dismissals and it was clear from the outset that bargaining would be fruitless. Not long after the start of a strike, the business was shut down. The Board found the employer to have been egregious in its disregard for its employees' rights but because it was impractical to order the business to be re-opened, the OLRB granted a 'make whole' order. The employees and the union were awarded compensatory damages amounting to the equivalent of three months of wages for the workers and, for the union, its organizing, bargaining, and other expenses.

The 'make whole' order remains an extraordinary measure. More commonly, the Board augments its standard remedy -- reinstatement with or without compensation -- with a posting and/or access order. An unfair employer may be required to post a notice informing workers that it has been found guilty of violating the Labour Relations Act accompanied by a commitment to comply with the law in future. The notice is directed at the collective: it is specifically 'designed to have restorative impact on the employees and the union as a whole',[108] to ameliorate 'the lingering psychic effects of unfair labour practices and the consequent injury to a union's organizational or bargaining strength'.[109] Normally, the notice must be posted for sixty days in one or more conspicuous locations in the workplace. And when flagrant violations have been committed, an employer may also be directed to mail, publish, or read the notice to the assembled workforce. In 1980, it was decided that posting orders ought not to be restricted to exceptional breaches of the Act because even isolated violations have 'an undoubted and significant

psychological impact on labour relations and the attainment of the statute's objectives'.[110] Accordingly, a posting order is now routinely incorporated into the Board's directions.

An access order is another recent innovation intended to help a union re-establish communication with its members. Unfair labour practices may leave the union in disarray. Long lapses of time and employee turn-over make it difficult for a union to keep in touch with its members. The employer, by contrast, has day-to-day contact with its workers. Thus, to redress the one-sidedness of the information received by workers, the Board may direct an employer to permit union officials to address employees during working time, to post union notices on bulletin boards, and give a union access to the names and addresses of employees.

Finally, when an employer has contravened the Act so extensively that the true wishes of the employees are not likely to be ascertained, the Labour Relations Board may certify a union without a representation vote, even when membership in the bargaining unit falls short of the requisite majority.[111] By imposing certification, the Board seeks 'to visit the employer who has breached the law with the very outcome he sought to avoid' (Adams, 1981a:155) and to ensure that an employer does not profit from its own wrong-doing.[112]. Three conditions must be satisfied: the employer must have contravened the Labour Relations Act, the contravention must be of a nature that the true wishes of the employees are not likely to be ascertained in a representation vote, and the union must have membership support adequate for the purpose of collective bargaining. Prior to 1975, the Act was somewhat less restrictive in that it allowed the Board to impose certification when a

representation vote would not be expressive of the employees' wishes, even in the absence of a technical violation (Adell, 1966:29); on the other hand, prior to 1975, the union could not be certified unless it could demonstrate that a majority of the employees in the bargaining unit were members. Presently, remedial certification is restricted to situations where the breach is serious and where the Board's prognosis as to the viability of collective bargaining is favourable--in practice, to those situations in which the union has signed up more than 40 per cent of the employees.[g],[113]

Outright certification remains an extraordinary remedy, reserved for those instances in which the employer's unlawful conduct has caused workers 'to equate their decision to unionize with a threat to their economic security'.[114] The Board did not agree, for example, that sponsoring an anti-union petition was sufficient to trigger the remedy.[115] And a representation vote was ordered in Robin Hood Multifoods[116] even though it was clear to the OLRB that the captive audience speech was intended 'to frustrate the applicant's campaign and that conclusion would not easily evade the most naive of employees'. Similarly, an employer's suggestion that workers form an 'in-house' union was not grounds for outright certification although it was coupled with a foreman's comment that a sister plant had been closed down, in part, as

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[g] In Manor Cleaners,[113] the Board spelled out the factors it considers in determining the adequacy of a union's membership support: the stage of the organizing campaign at which the unlawful conduct occurred, the circumstances surrounding the signing of membership cards prior to the employer's interference, the existence of a full-time group to support the bargaining objectives of a part-time group seeking certification, the severity of the employer's misconduct, and the level of the union's membership support in the bargaining unit.

the result of unionization. Because the statement was ultimately denied by upper management, the Board believed a representation vote would allow the workers to express their true wishes.[117] And despite finding numerous breaches of the Labour Relations Act and agreeing that many union supporters were 'fearful that the company would close or they would be blacklisted if they continued to support the union', the Board did not consider remedial certification appropriate in Primo Exporting and Distributing:[118] there were no discharges, demotions, transfers or layoffs; there were no 'captive audience' or small group meetings; there were no speeches or anti-union leaflets; there was no surveillance or any systematic attempt to identify, isolate or discriminate against union supporters; there was no evidence of widespread threats or other coercive activity; in short, there was no co-ordinated or concerted campaign of illegal conduct.

Where outright certification has been awarded, the employer must have exhibited a wilful and flagrant disregard for workers' rights. In one case, management told the assembled employees that unionization would cause the company to close the site down.[119] In another, the employer referred frequently to job security in its communications with employees and linked the closure of another plant with its unionization.[120] Certification was also ordered when management 'skillfully juxtaposed' comments about 'strikes, wages and benefits, customers, and job security' and in spite of some employees' denials of undue influence;[121] inquired about union membership, offered workers a wage increase if they would quit the union and abandon its certification, and fired union activists;[122] and bombarded workers with letters 'calculated to play upon

employee fears for their job security', displayed posters urging workers to keep the union out, and instructed them how to 'Vote No' in the representation election.[123]

The Labour Relations Act also provides for the prosecution of offenders[h,124], but only with the consent of the Board;[125] however, permission is seldom sought and even more seldom given. Over the last five years, the Board has received only 72 applications. And of the ten disposed of in fiscal year 1985-86, 7 were withdrawn, 1 was settled, and 2 were indefinitely postponed (Ontario Labour Relations Board, Annual Report, 1985-86:68, 66).

Neither the Board nor the parties put their faith in criminal penalties: 'Since the 1930's it has been recognized that a criminal "penalty" is not an effective "remedy" in labour relations' (MacDowell, 1977:216). Both labour and management prefer the Board to the courts. In addition to the accommodative component of the Board's mandate, proceedings before the OLRB are expedited, less costly, and more likely to take industrial relations considerations into account. And over the years, judges have come to appreciate the validity of the Labour Board's remedies. Though interventionist in the past, the courts are now less likely to set aside the Board's rulings on appeal and more likely to accept its remedies (Carter, 1976).

Prosecution is permitted only if it is consistent with good industrial relations; certainly not if the matter is trivial or

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[h]Though a union is not a legal person, the Act specifically permits a union to institute a prosecution or to be prosecuted in its own name.

vexatious, or the offending party is in substantial compliance with the Act:

> It is clear to us that, given the expanded remedial power of the Board, applicants seeking consent to prosecute must bear a heavy onus to establish that a criminal prosecution is consistent with the promotion of good industrial relations in the Province....Since full remedial relief from the Board is now available to unions and employers, as well as individual employees, an applicant seeking consent to prosecute should establish why the matter cannot be dealt with effectively by recourse to the Board's remedies alone.[126]

Consent has been granted when an employer threatened and intimidated employees in an effort to destroy their union, threatened to dismiss workers who went on strike, or threatened not to employ them if they joined the union. Prosecution was also allowed when an employer unilaterally increased wages, cancelled a cost of living bonus, and withdrew pension plan coverage after the union had given notice to bargain and no collective agreement was in effect (Sack and Mitchell, 1985:525,528).

Enforcement of its orders has rarely been a problem for the Ontario Board: 'even the most obstreperous party' is unlikely to disobey when it will be appearing before the Board again (MacDowell, 1977:221). But if its orders are not complied with, a party may seek the Board's help after fourteen days. Finding non-compliance, a copy of the award will be filed with the Supreme Court of Ontario whereupon it is enforceable as an order of that court.[127]

Because its enforcement problems are few, the Board believes its remedies are effective. In reality, it is difficult to conceive of remedies that would be truly effective: remedies that would compensate the injured, deprive the offending party of the benefits of its unlawful

conduct, and prevent further breaches of the law (Backhouse, 1980:501). None of these goals has been fully accomplished by labour boards in Canada. Fear of over-compensation has caused the Ontario Board to reject anything more generous than a strict accounting of the money actually lost which, oddly enough, leaves the Board lagging behind the courts on this issue. Damages as high as $25,000 have been awarded in common law actions for wrongful dismissal as compensation for mental distress resulting from firing in a callous and humiliating manner, unfounded accusations of incompetence, and failing to give an employee the opportunity to tell his or her side of the story (The Globe and Mail, 6 October, 1986). By artificially limiting its awards, the Board fails to force an employer to compensate workers fully. As a result, the Board's awards have little deterrence value. From an employer's point of view, the value of unfair practices is in the doing. Firing union activists, threatening to run-down the plant or 'move out west' instill fear which cannot be erased. The resulting loss of confidence in the union and the law are not easily rectified while the benefits for employers are potentially large. Unions increase wages an average of 10-15 per cent and the impact on the cost of fringe benefits is generally greater (Gunderson, 1982).

Compensation, reinstatement, posting and access orders, even certifying the union without a representation vote, are valuable instruments but cannot repair the damage already done as is often claimed. McPhillips (1982:153) thought remedial certification was 'one of the most severe and effective disincentives to the commission of unfair labour practices'. By imposing certification the Board creates a

disincentive to the use of anti-union tactics because it deprives the employer of the benefits of its unlawful conduct. But remedial certification is only imposed when support for the union has already been crushed. In K-Mart (Peterborough),[128] for example, the OLRB confidently predicted that certification would restore 'the legitimacy of the trade union in the eyes of the employees' even though the company was found to have harassed two union supporters with 'a ruthless campaign of surveillance that endured for some three weeks' and subjected one woman to 'the most humiliating treatment of an employee that this Board has yet encountered'. Even so, the Board thought certification augmented by posting and access orders and $1,000 in compensation would 'establish the conditions for collective bargaining in an atmosphere devoid of fear and suspicion'. 'Assuming that all unfair labour practices will end', there was 'little reason to doubt that the union's base of support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agents'. Under the circumstances, this conclusion was unduly optimistic, to say the least.

The Effect on Certification and Collective Bargaining

Though much has been made of the Board's innovative remedies and determination to show employers that 'brazen violations of the statute will meet a Labour Board that means business' (Adams, 1980a:5), a significant minority of employers continue to practice union-avoidance tactics. During the 1970s, unfair labour practices complaints were laid

by 11.6 per cent of the unions seeking certification.[i] But although unfair practice complaints lengthened the process substantially,[j] they appeared to have no significant affect on the outcome. Of those unions filing complaints, 66.5 per cent were granted bargaining rights compared with 68.7 per cent in cases in which no unfair labour practice was alleged, a difference that is not statistically significant.

Experience in the United States has been quite different: not only is the incidence of unfair practices startlingly high by comparison with Ontario, the likelihood of winning certification is markedly lower when unfair practices have been employed. Between 1960 and 1980, the number of unfair labour practice complaints rose four-fold in the United States, the number of charges involving dismissal for union activity rose three-fold, and the number of workers awarded back pay or ordered reinstated rose five-fold, even though the number of representation elections barely changed. The ratio of workers fired to workers voting in favour of union representation is now 1:20. More important was Freeman's (1985) conclusion that one-quarter to one-half of the decline in union success in representation elections was due to the growing tide of unfair labour practices. And Cooke (1985b, 1985c) estimated that the

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[i]This proportion was calculated from the sub-sample data. Due to the mediating process it is impossible to determine how many complaints would have been confirmed, in whole or in part, had they been heard by the Board.

[j]The time required to process applications was at least twice as long when unfair labour practice complaints were laid against employers. Whereas four weeks were required to dispose of 50.1 per cent of the applications uncomplicated by complaints, eight weeks were required to dispose of a comparable proportion (50.6 per cent) of applications with complaints. Similarly, 76.3 per cent of applications without complaints were resolved within 8 weeks while 18 weeks were required to resolve 78.5 per cent of applications with complaints.

Table 4.1: Incidence of Unfair Labour Practice Complaints by Outcome of Certification

Fiscal Years 1970-71 to 1981-81

	Complaint	No complaint	Total
Union Certified	141	1,106	1,247
Union not certified	71	502	573
Total	212	1,608	1,820
Proportion certified	66.5%	68.8%	68.5%

$X^2 = 0.5$
(1 degree of freedom)

use of unfair labour practices reduced the likelihood of a union victory by 17 percentage points. Procedural delays, the use of management consultants, and active programmes of communication with employees during organizing campaigns have similarly undercut unions' prospects of securing bargaining rights (ibid.; Roomkin and Block, 1981; Roomkin and Juris, 1978; Lawler, 1981; Murrman and Porter, 1981, Prosten, 1978; Seeber and Cooke, 1983; Lawler and West, 1985).

A critical difference between Canada and the United States is the possibility of outright certification. In Ontario, 85.8 per cent of the unions certified were granted bargaining rights without a representation vote during the 1970s. The popularity of the procedure derives from the Board's reliance on membership cards signed near the start of an organizing campaign. Ordinarily, an organizing drive is all but over before a union files its application with the Labour Relations Board so that 'by the time the union surfaces with its majority, the die is cast: the statutory condition is satisfied and the union is legally entitled to certification irrespective of what the employer may be tempted to do' (Weiler, 1980:41-2). Unfair labour practices committed subsequently can delay the proceedings but cannot reverse a union's majority or undermine its claim to certification without a vote.

It is this feature which makes the outright certification so controversial. Employers in Canada are quite candid about their preference for representation votes as a check on unions' organizing tactics. Weiler, too, was attracted by the democratic aura of votes. In the abstract, he thought the case very compelling. 'The literature is replete with references to the flaws to which union membership cards are

prone', he argued, yet cautioned that there is no easy equation between representation votes and the employees' true wishes. In his experience as the chairperson of the Labour Relations Board in British Columbia, 'the employer normally found it impossible to resist the temptation to engage in improper tactics to turn his employees against the union' during a hotly contested organizing campaign. Moreover, any attempts to 'sanitize' the process, to provide the 'ideal laboratory conditions' in which employees could freely express their wishes, were futile. Subsequent interventions, ordering new votes and so on, did little more than increase business for labour lawyers (ibid.: 30-41).

It is certainly true that unions in Ontario fare poorly when representation votes are ordered. Unions won only 50.0 per cent of the votes directed by the Board during the twelve years under study. It must be remembered, however, that it was mainly those unions whose membership support was too low to qualify for outright certification that were put to the test. But even well-supported certification applications may be jeopardized by representation votes. Piliotis (1975:14-7) reported that over a three-year period during the early 1970s only two-thirds of the unions with majority membership support as of the date of application were granted bargaining rights following a representation vote. When the initial level of membership in the union was compared with the results of the representation vote, the number of applications in which support for the union had decreased was double that where support had increased and the overall decrease outweighed the increase. Accordingly, when the Act

Table 4.2: Method of Disposition of Certification Applications by Outcome of Certification

Fiscal years 1970-71 to 1981-82

	Granted without vote	Granted after vote	Dismissed after vote	Dismissed without vote	Withdrawn	Other	Total
Union certified	5,175[#1]	806					5,981
Unions not certified			805	943	853	55	2,656
Total	5,975	806	805	943	853	55	8,637

[#1] Includes remedial certification.

was amended in 1970 and level of support for outright certification was raised from more than 55 to more than 65 per cent (and the percentage required to obtain a vote was lowered from 45 to 35 per cent)[k] as recommended by the Task Force on Labour Relations, the results were disastrous for unions. Not only did the anticipated growth in the volume of applications not materialize, the percentage of applications decided by votes increased and the overall likelihood of certification fell. For all of the years but one, the rate of success in certification was lower than the average for the 1970s as a whole.[1]

It is not representation votes per se that frighten union organizers but the opportunity afforded employers to intervene in the campaign. Thus, Weiler (1980:48) was intrigued by the possibility of 'instant votes'.[m] Implemented in Nova Scotia (where the volume of applications was small but because the Board sat part-time, three-month delays were common), votes were conducted within a week of application and the ballot box sealed until after the hearing. Only if the union did not have the required membership support for outright certification were the ballots

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[k]The 65/35 levels were in force from 1 September, 1971 to 1 January, 1976 at which time the 55/45 formula was restored.

[1]The concomitant relaxation of the requirement that unions win the votes of a majority of the employees in the bargaining unit to a majority of the ballots cast as the law presently stands had little apparent effect on the proportion of votes won by unions (Piliotis, 1975). Many years earlier, the chairperson of the OLRB told the Select Committee on Labour Relations of the Ontario Legislature that 'in 272 votes taken over a period of some two years... the number of cases in which the result would have been different if [the Board] had taken the majority of votes cast rather than the majority of eligibles was 3.' Quoted in Bromke (1961:85).

[m]Weiler (1983) now advocates this alternative in the United States where outright certification is politically unacceptable.

counted. A union that could not win certification in these circumstances did not represent the workers, the chairperson of the Nova Scotia Board argued (Christie, 1977). But while the 'instant vote' procedure drastically reduced the time in which Nova Scotian employers could campaign against union representation it was not eliminated. In Ontario, where anti-union petitions filed with the Board commonly bear the name of one or more union members, the period during which the signatures are obtained is the short, eight- to ten-day hiatus between the application and terminal dates. Nor do 'instant votes' shorten the certification process as a whole: post-vote delays are simply substituted for the more common pre-hearing delays while membership cards are checked and hearings held.

To many, outright certification is the most effective mechanism for discouraging unfair labour practices. So glossy is this solution to the problem of employer interference that certification without a vote is said to be a seminal difference between the Canadian and American systems of granting bargaining rights. In Canada, the proportion of successful applications ranged between two-thirds and three-quarters during the 1970s whereas American unions were winning fewer then half of their petitions for certification (Kochan, 1980). Explaining the difference, Meltz (1985:324) thought outright certification 'the single most important factor'. Others agreed. Freeman (1985:61) called outright certification the 'principal difference' between the Canadian and American systems:

> U.S. laws allow management to conduct lengthy well-funded election campaigns against unions. Canadian labor law does

> not permit such activity...Result: growing unionization in Canada.

Outright certification is particularly important in Canada where legal recognition is a necessary pre-condition for collective bargaining. If representation votes were compulsory, anti-union employers could shield themselves from the intent of the law. Still, it is easy to exaggerate the importance of a procedure. Weiler (1983) was careful to explain that it is not the law (which has changed very little in twenty-five years) but the mounting hostility of American employers that is the primary obstacle to the growth of unions in the United States. None the less, he advocated outright certification as a means of 'finessing' the anti-union employer, a method of deflecting anti-union tactics rather than trying to stop them head-on. By substituting membership cards for representation votes labour-management conflict and the damage that results from the improper exercise of power during representation campaigns can be minimized. By eliminating the invitation to interfere, the law would prevent the future bargaining relationship from 'being poisoned with charges and counter charges made during the heat of any such campaign' (Weiler, 1980:42).

The lower incidence of unfair labour practices in Canada is undoubtedly linked to their apparent futility. Because unions are frequently certified without a representation vote, the effect of anti-union tactics is not immediately evident; indeed, applications involving unfair labour practice complaints were almost as likely to result in certification as applications without during the 1970s, and the difference was not statistically significant. But the damage was real,

none the less. Although camouflaged at the certification stage, the effectiveness of unfair labour practices was evident once unions tried to negotiate collective agreements. Unfair labour practice complaints were strongly and negatively associated with bargaining success. Only 67.6 per cent of the certified unions which filed unfair labour practice complaints with the OLRB were able to negotiate first agreements, almost 20 percentage points lower than the 86.8 per cent of unions with collective agreements which filed no complaints.[n] Even the Board's most powerful remedy, outright certification, has been far from effective. Very few bargaining relationships have followed remedial certification in Ontario; in fact, the rate of bargaining failure has been astonishingly high. Of the 44 unions granted certification in this manner, only 26 (59.1 per cent) negotiated first agreements.

Conclusion

The right to associate is far from absolute in Ontario. The standard of conduct demanded by the OLRB leaves employers considerable room to manoeuvre. In general, an employer is permitted to run its firms as it see fit so long as it does not act out of anti-union animus. But anti-union animus can be difficult to prove, particularly

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[n]Solomon (1985) reported a similar, strong correlation between unfair labour practice complaints and the likelihood of negotiating collective agreements from his study of the federal jurisdiction. Unfair labour practices have also been correlated with bargaining failure in the United States. Cooke (1985a,c) estimated that the likelihood of negotiating a collective agreement was one-third lower when management's hostility to collective bargaining took the form of verifiable unfair labour practices.

Table 4.3: Incidence of Unfair Labour Practice Complaints by Outcome of Bargaining

Fiscal years 1970-71 to 1981-82

	Complaint	No complaint	Total
Collective agreement negotiated	96	956	1,052
No collective agreement negotiated	46	146	192
Total	142	1,102	1,244
Proportion with collective agreements	67.6%	86.8%	84.6%

$X^2 = 35.3^{**}$
(1 degree of freedom)

**Significant at the .01 level.

when there is an over-riding business justification. Thus, lay-offs and cut-backs are usually permitted during an organizing drive despite the statutory freeze, if the changes can be linked to efficiency. Even dismissals may be sanctioned by the Board if an employer is able to establish that it was motivated by its legitimate business interests and not anti-union animus. Nor is an employer required to remain neutral in the face of an organizing drive. An employer is permitted to state its desire to remain non-union so long as the statement is not coupled with threats or promises.

In the circumstances, the workers' most effective defence is undoubtedly outright certification. Because unions are commonly granted certification on the basis of membership cards signed near the start of an organizing campaign, subsequent attempts by an employer to interfere with an organizing drive cannot subvert a union's representation claim. Once the cards are filed, a union is entitled to certification if it has more than 55 per cent of the employees in the bargaining unit as members. For this reason, there was no significant correlation between the incidence of unfair labour practice complaints and the outcome of certification. By granting bargaining rights on the basis of cards rather than votes the law ensures that the representation process is well insulated from the deleterious effects of anti-union conduct.

The effect of anti-union conduct on bargaining, by contrast, was dramatically evident. Unions which complained of unfair practices were significantly and substantially less likely to negotiate first agreements during the years under study. Despite the Board's efforts to mediate

these disputes and resolve them by encouraging an employer to voluntarily reinstate and/or compensate employees whose right had been violated or, failing informal settlement, by ordering an employer to remedy any breach of Labour Relations Act, anti-union tactics had a lingering effect on labour-management relations. By adopting aggressive tactics, an employer makes it known that workers choose union representation at their economic peril. And no amount of reassurance from the OLRB can obscure that fact. Remedies such as reinstatement, compensation, the posting of notices, even outright certification and 'make whole' orders, can do little to affirm the right to associate in the face of an employer's determined hostility to collective bargaining. Put bluntly, unfair labour practices pay large dividends; the cost of being caught is far out-weighed by the potential savings derived from avoiding unionization.

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PART III: BARGAINING STRUCTURE AND BARGAINING POWER

The evidence presented in Part II suggests that the certification procedure is longer and more complex than necessary and provides anti-union employers with many opportunities, both legitimate and illegitimate, to delay and subvert the recognition process. Disputes over the composition of bargaining units or the eligibility of employees for membership in a union are readily manufactured by employers hoping to forestall an organizing drive. And some employers go much further, sponsoring or tacitly promoting anti-union petitions or employing unfair labour practices to undermine their workers' enthusiasm for collective bargaining.

Such interventions were highly effective in warding off unionization during the 1970s. Unions whose applications for certification took longer than five weeks to process were significantly less likely to win bargaining rights as were unions whose applications were opposed by anti-union petitions and although the more aggressive forms of anti-union conduct were less likely to affect the outcome of certification they were particularly effective in disrupting collective bargaining. The likelihood of negotiating collective agreements was substantially lower in cases in which employers were found to have sponsored or supported petitions opposing the applications for certification or in which unions lodged unfair labour practice complaints.

Overtly anti-union behaviour does not, however, explain the full extent of bargaining failure in Ontario. Fewer than one in eight certified unions filed an unfair labour practice complaint with the OLRB during the 1970s, only one in sixteen encountered a petition that was rejected by the Board as employer-sponsored, and the applications of

fewer than 40 per cent took longer than five weeks to process. Bargaining failure was, in fact, concentrated among unions which could not be said to be victims of aggressive, anti-union tactics: in 76.0 per cent of the cases there was no unfair labour practice complaint, in 74.5 per cent there was no anti-union petition of any sort, and in 59.0 per cent the union's application for certification was disposed of in fewer than five weeks.

With these data in mind, Part III pursues a different sort of explanation for the failure of many unions to cement their bargaining rights in collective agreements. Believing that the outcome of bargaining is primarily determined by the relative power of the parties, the remainder of the thesis describes how the law institutionalizes an imbalance of bargaining power. Accordingly, Chapter 5 argues that there is a structural imbalance between organized workers and employers rooted in the practice of certifying unions on a single-establishment basis and, within establishments, of dividing workers into even smaller groups of office, manual, full- and part-time employees. Nor are workers entitled to structure themselves into broader-based negotiating units. Such a demand is unlawful if pursued to impasse.

So fragmented a bargaining structure leaves unions weak and vulnerable because the law constrains the time and manner in which workers may exercise their economic power. These constraints are discussed in Chapter 6, first, under the heading of strikes. Workers have a right to strike only after the expiration of their collective agreements or if there is no agreement in force only after conciliation. Strikes at other times leave workers open to discipline, including

dismissal, and their unions liable for damages. In fact, the jobs of strikers may be in jeopardy even if the stoppage is lawful. As the second section explains, strikers retain their status as employees yet, perversely, may be permanently replaced. There is but a narrow right of reinstatement in Ontario, and only on terms dictated by employers. Finally, the legal constraints on picketing are such that effective picketing is unlawful, that is, picketing which trespasses on private property, interferes with the movement of goods or people, or attempts to widen the ambit of a dispute is almost always a breach of the law and likely to be enjoined. As a result, workers are legally isolated in the small bargaining units created by the OLRB and within the confines of these units are unable to exert their bargaining power to its fullest extent even though there are few legal constraints on the conduct of employers.

Having institutionalized an imbalance in the bargaining power of labour and management, the law does nothing to ameliorate the adverse effects. Chapter 7 describes how the duty to bargain in good faith is interpreted and draws particular attention to the fact that the labour boards find hard bargaining lawful, even when the result is no bargaining. Thus, in the Eaton's case, the company was found to have met the good faith test simply because it was willing to sign a collective agreement. That the agreement was on terms dictated by the employer, terms so onerous that there was no role for the union, did not alter the OLRB's conclusion.

Chapter 5

BARGAINING STRUCTURE

Bargaining units are 'obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole'[1]. The size and composition of the units described by the OLRB may dictate success in certification and are critically important in determining the outcome of collective bargaining. While small units are generally easier to organize, quite the reverse is true in bargaining where large groups of workers are more likely to negotiate collective agreements. This conundrum has presented labour boards with a seemingly irresolvable problem: the broad-based bargaining units that would provide the most stable basis for collective bargaining are often too large to permit unions to win certification.

This dilemma is exacerbated by the Ontario Board's interpretation of the Labour Relations Act and in particular its unwillingness to recognize the link between bargaining structure and bargaining power. The OLRB sticks religiously to its conception of an appropriate bargaining unit as a work group with day-to-day interests in common despite the highly fragmented structure which results. At the same time, the Board refuses to permit workers to form broader-based negotiating units even within the same firm. The result, therefore, is a structural weakness rooted in the law.

Central to the argument is the Board's definition of an appropriate bargaining unit, and this is the first issue examined. Equally important, however, is the relationship between the bargaining unit for

which a union is the certified bargaining agent and the bargaining unit as negotiating unit. In the Board's opinion, the bargaining unit it describes is also the negotiating unit. Whether or not these units provide a firm basis for collective bargaining is examined in the third section.

Appropriate Bargaining Units

Newly certified bargaining units are small in Ontario, averaging 35 employees during the 1970s. Only one in fourteen was larger than 100; one in three was smaller than 10. Units of this size are the product of the Labour Board's preference for establishment-by-establishment certification: the 'single-employer, single-location, single-plant unit' is the cornerstone of OLRB policy (Bromke, 1961:80). Within an establishment, office workers are separated from production and part-time workers from full-time.

Legally, a bargaining unit is simply a unit of employees appropriate for collective bargaining: an employer unit, a plant unit, or a subdivision of either.[2] And apart from certain groupings deemed to be appropriate--security guards, dependent contractors, professional engineers, and craft workers in certain circumstances[3]--the authority to determine the scope of the bargaining unit is vested in the Labour Relations Board:

> The only fetters on the Board's discretion to make a determination are the requirements contained in section 6(1) that the 'unit shall consist of more than one employee'... and that the unit of employees is appropriate for collective bargaining--there are no other requirements.[4]

None the less, the Ontario Board has 'standard units' which it typically determines. Most common is the blue-collar/production unit described as all employees, save and except foremen, persons above the rank of foremen, office and sales staff. The corresponding white-collar unit encompasses all office employees, all office and clerical employees, or all office, clerical and technical employees depending on the work setting. With the qualification, employed for not more than twenty-four hours per week, part-time units generally mirror the composition of the full-time units they complement.[5] Occupations not caught by the Board's standard descriptions are recognized as 'tag-end' units (Sack and Mitchell, 1985:149-153).

Although the bargaining unit need only be appropriate, not 'more' or 'most' appropriate,[6] the OLRB feels bound by its past practice. Its standard units have become 'a kind of norm', ensuring 'some uniformity in collective bargaining'.[7] And the onus of proof is borne by the party seeking to depart from the established pattern.[8] Unless the Board's earlier decisions are shown to be 'manifestly in error, or that the facts are sufficiently dissimilar to those earlier decisions' the Ontario Board is loathe to depart from its previous rulings.[9] Even modifications are unusual: disputes over the inclusion of particular persons or job classifications are generally resolved by appending a 'clarity note' to the standard description in the certification order (Labour Law Case Book Group, 1974:140).

Each establishment is considered a natural bargaining constituency. Multi-employer certification, possible under the 1948 Act, has been precluded since 1950 (Sack and Levinson, 1973:60). And single-employer,

multi-establishment units, though legally possible, are rare. Single-establishment certificates have been the rule from the Board's inception in 1943.[a] Initially, it may have simply followed the progress of organizing prevalent among industrial workers, but what was then no more than a common practice has become a hard and fast rule.

Multi-establishment units are created only when the Board is convinced that the workers at the two (or more) locations have a day-to-day working relationship. Accordingly, the union's request for a multi-plant unit at Magna International was rejected even though the workers at all three (close) establishments had similar skills, performed similar work, were paid similar rates, and laboured under similar conditions. The workers' community of interest was held to be 'more local'; the absence of transfers between sites meant that employees would 'not see work at the other plants as part of any promotional opportunity and may feel threatened by anything more than plant-wide collective agreement administration'.[10] Similarly, the employees of Adams Furniture Stores, were also separated into three bargaining units when one had been requested: there was 'simply no evidence to establish a community of interest among the employees in a regional bargaining unit of the size proposed by the applicant'.[11]

Retailing was the one notable exception to the single-establishment rule. Because terms and conditions of employment were often standardized across a chain of stores, the Board felt that the interests of employees at all locations were essentially the same; hence, it would not be

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[a]For the practice of the Ontario Labour Court and the Wartime Labour Relations Board see the awards cited by Willes (1979) and Chrysler (1949), respectively.

'conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar interests'.[12] Until the mid-1970s, the standard unit in the retail and personal service industries was all locations within a municipality (Sack and Mitchell, 1985:144-5). More recently, however, the realities of organizing in the tertiary sector have shaken the Board's confidence in this approach. The multi-establishment unit was itself an obstacle to organizing, so abandoned. Recognizing the 'right to self-organization' as a primary theme of the Act,[13] the Labour Relations Board now says it will 'lean towards the bargaining structure which best facilitates organization' in industries where collective bargaining has not gained a foothold.[14] Over the objections of employers, single-establishment certificates are now common.

The separation of office and production workers is an equally well entrenched practice: the Board has 'always recognized the divergent interests of plant and other employees' (Reed, 1969:3). To the Ontario Board, 'it is readily apparent why plant units, or office and sales units are appropriate as a subdivision of any employee unit'.[15] Combined units are not always precluded, however. Initially, office and production workers were permitted to join forces if they expressed a preference for an organization structured along those lines.[16] But rigidity soon followed. Indeed, separate bargaining units were not sufficient for some Board members: 'there should be a different union or at least a separate local' for office employees, one panel declared.[17] So restrictive a policy could not be justified, however, and the Board soon reverted to

its previous practice. Office workers were once again placed in separate units (but not separate unions), save in the most exceptional circumstances.[18,b] And this remains the firm policy, although clerical and sales staff are sometimes combined (Sack and Mitchell, 1985:150).

Within the white-collar group, professional employees[c19] are accorded separate bargaining units where numbers warrant. In hospitals, for example, registered nurses are invariably grouped into their own units. Elsewhere, the Board's policy is less settled. Librarians and social workers have sometimes been included in office units and other times in bargaining units of their own. Much depends on the history of the relationship, that is, on whether management has traditionally regarded the professionals as a distinct grouping (ibid.:151-2). Professional engineers, excluded from the Act until 1970, now have a statutory right to be recognized as a group appropriate for collective bargaining.[20]

The Board's policy also excludes part-time workers from a unit of full-time employees, with certain exceptions. When the part-timers are primarily students, as in grocery stores, the practice is to create one bargaining unit. Nor will they be excluded if there is no history of part-time work at the establishment;[21] in fact, part-timers hired after

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[b]Reed (1969:57), a former chairperson of the OLRB, explained that exceptions were rare. In a few cases, office workers have been included in a plant unit when exclusion would have deprived the lone white-collar employee of his or her right to union representation.

[c]Excluded from the Act are architects, dentists, land surveyors, lawyers, doctors and persons who exercise managerial functions or are employed in a confidential capacity with respect to labour relations.[19] By s.2 of the Act, elementary and secondary school teachers and employees of the provincial government are also excluded.

a union is certified are swept into the established full-time unit by the 'all employee'[d] description (Sack and Levinson, 1973:70-1).

Separate units reflect the Board's view that part-time employees and students do not generally share a community of interest with full-time workers. The former are 'primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits'.[22] Accordingly, part-time workers are segregated at the request of either party (ibid.: 1973:70).

Nor is the OLRB prepared to accept groupings smaller than its standard units. The evils of 'unnecessary' fragmentation are legion: 'a patchwork quilt of bargaining units is a recipe for industrial unrest';[23] 'each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt' and the likelihood of a strike increases with the number of bargaining rounds and competition among bargaining agents;[24] a viable and meaningful bargaining relationship may be impossible if the employer is 'faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes';[25] piecemeal certification might 'unreasonably restrict the employer in the manner in which it has always carried on its business';[26]

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[d]The Board describes its units as 'all employee' meaning, of course, all employees of the same category: full- or part-time, office or manual.

certification of a segment of the total enterprise could 'seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise'.[27] Fearing undue fragmentation, the Ontario Board has rejected the practice of approving, as appropriate, 'random agglomerations of departments within an enterprise merely because they favour unionization' (Labour Law Case Book Group, 1974:140). Only if the group has a distinguishable community of interest or can demonstrate a history of bargaining separately and apart from other employees will the Board sanction units smaller than all the employees of one type at one location (Sack and Levinson, 1973:66). Accordingly, when a group of school secretaries and clerical assistants was found to have bargained separately through their own association for many years, the Board created a separate unit despite the employer's preference for the standard all-employee grouping.[28]

Generally, however, separate interests are difficult to establish. In one case, a group of physiotherapists were denied union representation because the Board felt their work-related concerns could have been accommodated in a wider, all-employee bargaining unit.[29] Similarly, the application of a union representing non-professional library workers was dismissed because the grouping requested would have impeded mobility and interfered with management's attempts 'to integrate and administer a common policy for the office, clerical and technical employees of the university as a whole'.[30] And in another case, a group of cost estimators and analysts was not appropriate, primarily because four other bargaining units were already in place. Foreseeing even further fragmentation in the event that the security guards and professional

engineers sought union representation, the Board felt that an all-encompassing, tag-end unit would be the appropriate structure.[31] Even a unit of craft workers has been rejected as an inappropriate grouping in an otherwise unorganized open-pit mine.[32],[e33]

Perversely, concern over fragmentation has caused the Board to rule single-establishment units inappropriate on occasion. In Usarco,[34] the union had organized along the traditional, single-establishment lines but was blocked by the employer's claim that its two scrap yards formed an integrated operation. Noting that the employees at one yard were sometimes required to work at the other, the Board agreed. Similarly, because the employees at Bright Veal Meat worked alongside employees of a related company from time to time, the OLRB ruled the two companies constituted one bargaining unit even though it was the employer's choice 'to present separate faces of its operation to the public'.[35]

The OLRB refuses to shape its bargaining unit determinations around workers' preferences; in fact, the workers themselves are seldom consulted. Although the Act permits the Board to conduct a vote to ascertain their wishes,[36] this provision is used only when 'the evidence in support of two or more proposed bargaining units is so evenly balanced that the wishes of the employees themselves must be considered a factor of great weight' (ibid.:61). Likewise, the extent of organizing is rarely considered; indeed, its relevance is the 'most controversial consideration by labour boards in determining the appropriate bargaining

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[e]The Act no longer requires the Board to carve craft workers out of established bargaining units as it did in 1948. However, the OLRB is still required to create a separate unit when a group is distinguishable because of its technical or craft skills, or commonly bargains separately and apart from other employees through the appropriate craft union.[33]

unit' (Adams, 1985:320). In Goodyear Service Stores,[37] for example, the fact that the union had majority membership in all but one of the stores it sought to combine into a single bargaining unit was of interest but not determinative. And even when the pattern of organizing has been taken into account, it did not inform the Board's assessment of the workers' community of interest. Having noted the employees' wishes, the Board in Ponderosa Steak House[38] then considered other pertinent factors: the workers' community of interest and the possibility of undue fragmentation.

Nor does the Board feel bound by an agreement of the parties. Their requests are considered, but 'a unit agreed to by all concerned will not be accepted by the Board where to do so would violate fundamental policy considerations'.[39] In fact, their motives may be suspect: a union may argue for a narrowly defined unit because small groups are generally easier to organize but if the union has sufficient support to warrant certification for a broader grouping, the larger, more powerful unit will be preferred.[40] An employer, on the other hand, may seek a unit so broad that certification is effectively precluded. In opposition to the wishes of both labour and management, two bargaining units were created at Ex-Cell-O when one had been requested because the eleven employees of the engineering department were found to be a distinct and cohesive group with skills and responsibilities that set them apart from other office employees.[41]

Though flexible in theory, the Labour Relations Board is less so in practice. In the pursuit of consistency, the wider industrial relations setting has been almost forgotten. Of the criteria of appropriateness

considered by labour boards--the purpose of the legislation; the community of interest of the employees; the history and pattern of collective bargaining in the industry, firm, or unit; the desires of the employees, unions, and management; an agreement of the parties; and prior decisions on policies or principles (Herman, 1966:41-2)--most are disregarded by the OLRB.

Even though it has acknowledged that 'different communities of interest will exist at one and the same time among different groupings of employees',[42] the OLRB sticks rigidly to its standard units. But community of interest is neither so neatly nor so permanently defined as the Ontario Board supposes. Sources of conflict within a workforce are numerous and not limited to those institutionalized by its standard units. Men and women, senior and junior, immigrant and native born, skilled and unskilled may also have different needs and bargaining priorities but none of these is considered a distinct bargaining constituency. Moreover, work groups are willing to form alliances to augment their bargaining power when it is to their advantage to do so. From the workers' point of view, the elimination of wage differentials between groups is more than just equitable, it is a practical means of combatting employer whipsawing. In any event, it is the union, not the OLRB, that is charged with the responsibility of sorting out competing demands and priorities. Tough decision-making is the essence of collective bargaining: in Weiler's words, collective bargaining is 'intrinsically valuable as an experience in self-government'. Workers 'take their destiny into their own hands, deciding what kind of working conditions they want'. 'Choices must be made, priorities determined,

[and] compromises struck between the contrasting interests of different groups inside the bargaining unit'. 'Self-determination' and 'self discipline' are the core of the bargaining process (Weiler, 1980:32-3).

Negotiating Units

Narrowly described bargaining units do not preclude broader-based negotiating units. The Board's function is 'not to establish a final structure for collective bargaining but, instead, to act as a catalyst for collective bargaining by requiring the employers to negotiate with the union' (Herman, 1966:42). The parties are 'not obliged to incorporate into their collective agreement the bargaining unit contained in the certificate granted by the Board, but may amend, alter, extend or abridge the bargaining rights contained in the certificate, provided that in so doing they do not breach the duty to bargain in good faith or the duty of fair representation' (Sack and Mitchell, 1985:147). Accordingly, the unit for which a union is certified is no more than the 'critical starting point' for collective bargaining;[43] 'the basic building block from which more complex structures may be erected by the bargaining parties' (Herman, 1966:5). Once a collective agreement is negotiated, 'the certificate has served its purpose and is, for all practical purposes, spent'.[44] For this reason, the OLRB has refused to certify a union which already had bargaining rights by virtue of its collective agreement: a certificate would have added nothing to what the union already possessed (Sack and Mitchell, 1985:280).

By certifying a union on a single-establishment basis, the task of building broader negotiating structures is reserved for the parties

(Herman, 1966:42). And the evidence suggests that workers do perceive their common interests more broadly. Of non-construction collective agreements covering 500 or more employees, 47 per cent covered more than one establishment in 1983, including 8 per cent covering more than one employer (Craig, 1986:170).[f] Though organized on a plant-by-plant basis, company-wide bargaining has long been the norm in the automobile, meatpacking, rubber, and agricultural machinery industries while multi-employer bargaining has characterized the clothing, pulp and paper, printing, longshoring, and transportation industries.

Yet, by comparison with other countries, bargaining in Canada is highly decentralized: 'too fragmented to operate efficiently' according to some (Davies, 1986:211). Moreover, because data are available for the largest groupings only, the extent to which bargaining appears to be centralized is undoubtedly overstated (Anderson, 1982:178). On the other hand, what is lacking in formal structure is made up for, in part, by strong pattern bargaining. In many industries--basic steel, steel fabrication, electrical products, education, and health care, for example--the bargaining process may appear fragmented but the result is not. Although negotiating units are commonly single-establishment in scope, a few 'key bargains' form the basis for settlements throughout the industry.

The disparity between bargaining structure and bargaining practice is attributable, in some measure, to the law. Woods (1973:362) thought it 'not unreasonable to assume that [negotiating] units are smaller than

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[f]The comparable data for 1984, including both construction and non-construction agreements, were 54 and 18 per cent (Craig, 1986:170).

they would have been, that they tend to be confined more to the single plant, and that probably more experiments with regional, company-wide, and even industry-wide bargaining involving multi-employer units would have occurred, in the absence of the bias in the law'. The bias results, in part, from the practice of certifying unions on a single-establishment basis and, in part, from the fragmentation of responsibility for labour relations law and policy among eleven jurisdictions. As a result, negotiating units which span more than one province are 'extra-legal', to use Craig's (1983:153) terminology, and beyond the capability of any one labour board to create (or defend). The freedom of the parties is likewise restricted by provincial control over conciliation, still compulsory in most jurisdictions, and while this constraint can be circumvented by permitting one conciliation board to draw in establishments in other jurisdictions (Herman, 1966:26), in general, 'it is practically impossible for a union to strike several plants of one company at the same time because of the necessity for independent conciliation in each dispute situation. Each conflict is related to a particular bargaining unit and the legal bargaining unit is also the legal conciliation unit' (Woods and Ostry, 1962:502).

The gap between law and bargaining reality has recently been widened and hardened by the Ontario Labour Relations Board in its Burns Meats[45] decision. For almost forty years, national bargaining 'took wages out of competition' in the meatpacking industry. The practice was for the three largest firms to meet the union in Toronto, at the same hotel but at separate tables, for negotiations. On 'policy' issues--wages, benefits, overtime, and so on--the union's negotiating committees presented common

demands formulated at a joint bargaining conference. Any tentative settlement had to be recommended by the committees jointly and ratified by the members of the meatpacking group as a whole. If agreement proved difficult, one company was chosen as the 'strike target' and once a settlement was reached this agreement set the pattern for the industry. The result was three, identical company-wide agreements.

In 1984, Burns Meats insisted on altering this arrangement. It refused to negotiate in Toronto and demanded plant-by-plant bargaining. When the union resisted, the company laid a complaint of bargaining in bad faith.

The OLRB agreed. A company-wide negotiating unit has no legislative underpinning, the Board observed: the bargaining functioned 'without any statutory foundation, or perhaps more aptly, in spite of there being no statutory foundation for it'. Thus, even if the international union had been clearly recognized in the collective agreement as the bargaining agent for all of Burns's employees, the union's representation rights were circumscribed by the boundaries of the Board's jurisdiction. By refusing to bargain except in the context of a national agreement, therefore, the union wrongly sought to bargain beyond the limits of its exclusive bargaining rights: conduct inconsistent with the scheme of the Labour Relations Act. The demand itself was not unlawful, national bargaining could be 'raised and discussed', but could not be legally pressed to impasse.[46.g] The effect of this decision is to take

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[g]Burns complained to the Alberta and Manitoba Boards as well. Both ruled that the union had not met the good faith requirement, but on the narrower grounds that adopting an unyielding position on any subject was unacceptable.

bargaining structure off the table. The scope of the negotiating unit is no longer a mandatory subject of bargaining, to use the American terminology which, until recently, has had no place in Canadian law.

With respect, the law of Burns Meats is suspect. The two purposes of the bargaining unit have been improperly melded. While the OLRB is clearly empowered to determine the bargaining unit for which a union is certified as the exclusive bargaining agent, its authority to shape negotiating structure is doubtful. The unit designated by the Board establishes the group for which the employer is minimally obliged to recognize a union. Consequently, an employer may not insist on altering the boundaries of the unit for which a union has been certified: indeed, if the extent of the union's bargaining rights remained a negotiable issue, certification would be a pointless procedure. And the proposition is reversible: in the absence of voluntary recognition, a union must obtain bargaining rights through certification. Thus, it was unlawful for the Carpenters union to strike in support of its demand to bring non-union workers at unorganized sites under its collective agreement. The extension of bargaining rights was not an issue that could be taken to impasse, the employers complained, and the Board agreed:

> Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, must be removed from the bargaining table once a strike or lock-out is imminent, or in progress. If such demands are not removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith.[47]

Burns Meats is the doubtful corollary to this principle. By the Board's reasoning, it is inconsistent with the scheme of the Act for a

union to seek to amalgamate one or more bargaining units into a single negotiating unit unless the employer 'voluntarily' agrees. In a subsequent case, the Board affirmed this interpretation by confirming that Eaton's was entirely within its rights to insist upon separate, albeit similar, collective agreements for each of thirteen bargaining units in six establishments.[48] The parties have the right to construct broader-based negotiating units but only by mutual consent. And having made a broader-based negotiating unit, they are stuck with it. With respect to an application to displace (or terminate) a union's bargaining rights, for example, it is the negotiating unit described by the collective agreement, not the bargaining unit originally designated by the OLRB,[h] that is relevant (Sack and Mitchell, 1985:195-6). But what the Board has failed to consider is how such units can evolve if employers have the right to refuse to bargain on a broader basis and it is in their interest to do so.

The link between bargaining structure and bargaining power is frequently overlooked by the industrial relations community in Canada. Woods (1973:363-4), for example, spoke of the 'natural evolution' of bargaining structures and the 'most logical unit', that is, the unit that would stabilize labour-management relations over the widest area and eliminate, for both parties, the 'insecurities, uncertainties, and extra expense of small-scale bargaining'. Herman (1966:44-5) thought broader-based bargaining would be the inevitable response to workers' demands for greater job security in the face of technological change. A similar assumption caused the Canada Labour Relations Board to dismiss a union's

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[h]So long as the unit is entirely within provincial boundaries.

request for a revised unit embracing a number of bank branches.[i] The application was unnecessary, the CLRB reasoned, because both parties had an interest in avoiding chaos and in negotiating common terms and conditions of employment: 'It is common labour relations experience that bargaining parties, in their mutual interests, do develop a bargaining structure that minimizes the incidents of bargaining and meets their respective responsibilities'. Nor was the Board moved by the fact that it was the union's failure to achieve this objective that motivated its application for consolidation.[49]

According to Burns Meats, therefore, employers now have the right to veto bargaining structures more advantageous to unions than the narrowly based, fragmented units for which they are certified. But establishment-by-establishment bargaining in multi-establishment firms is a particularly weak structure for unions: it 'both results from and adds to union weakness' (Greenberg, 1966:350). A union confined to one location is especially vulnerable to whipsawing; the impact of a strike is easily blunted by an employer's ability to shift production to other locations. For tactical reasons, therefore, unions prefer multi-establishment negotiating structures.

Bargaining Units and Bargaining Power

The Board denies that its bargaining unit determinations are for the convenience of employers: 'the structure and policies that promote a maximization of the employer's business interests are not those that will

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[i] Revision of bargaining units already designated by the Canada Board is specifically permitted by the Canada Labour Code.

necessarily describe a viable bargaining unit, or the only viable bargaining unit--particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness'.[50] All the same, groupings which might impede efficiency or enhance the effectiveness of strike action have been rejected in favour of units which promote uniformity and stability and minimize the possibility of whipsawing or disruption in the event that one part of an integrated operation goes on strike. When, for its convenience, an employer has chosen to treat its various establishments as distinct administrative or operational entities, the OLRB has accepted that arrangement as proof of the unique community of interest of the employees at each location. Conversely, when an employer has chosen to operate two establishments as an integrated unit, the Board has accepted the broader grouping as the one appropriate for collective bargaining. Incredibly, the OLRB has lost sight of the fact that discontent with the existing terms and conditions of employment is what propels workers to organize.

When challenged, the Ontario Labour Relations Board has defended its standard units as the most viable groupings. On the one hand, larger units are more difficult for unions to organize and they may be more difficult for unions to represent. If too much attention is paid to sectional interests, it may be 'more difficult for a union to formulate a coherent package of proposals or make necessary concessions'.[51] At the other extreme, narrower structures may result in undue fragmentation, jurisdictional disputes, and unions too weak to negotiate effectively.

The tension between the appropriate bargaining unit <u>qua</u> organizing

unit and the appropriate bargaining unit qua negotiating unit is not easily resolved:

> A common experience of labour boards is to find that these two uses of the 'unit' will point in opposite directions when the Board must determine the precise boundaries of the appropriate unit. The optimal structure for long-range negotiations is often quite different from any grouping within which the applicant union could obtain majority support in the short-run (Weiler, 1976:133).

Canadian law conceives of the bargaining unit as a static structure, Herman (1966:9) complained, with little appreciation of the dynamics of bargaining. In most jurisdictions,[j] the legally designated bargaining unit is fixed at the time of certification and cannot be altered.[k52]

Certainly, unions have found it easier to win bargaining rights for smaller units. Rates of success during the 1970s were highest among unions seeking certification for groups of fewer than 10 employees and significantly lower in groups of 100 or more.[1] The proportion of successful applications ranged from 75.0 per cent for bargaining units smaller than ten to 53.7 per cent for groups of 100 or more.

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[j]The federal and British Columbia jurisdictions excepted.

[k]At least that is the Labour Board's interpretation of its mandate. For the views of the OLRB, see City of Toronto Non-Profit Housing Corporation.[52]

[1]This conclusion is drawn from faulty data, however. Because information on bargaining unit size was missing for the 10 per cent of applications dismissed or withdrawn before the unit was described, the conclusion that certification was granted most frequently to smaller units is correct only if the applications for which there were no data were distributed fairly evenly by size and not clumped at the low end. From the Board's records, this was difficult to determine.

Table 5.1: Certification Outcome by Bargaining Unit Size

Fiscal years 1970-71 to 1981-82

	Fewer than 10 employees	10 to 49	50 to 99	100 or more	Total
Certified	2,020	2,889	674	398	5,981
Not certified	673	1,232	408	343	2,656#1
Total	2,693	4,121	1,082	741	8,637
Proportion certified	75.0%	70.1%	62.3%	53.7%	69.3%

$X^2 = 152.0^{**}$
(3 degrees of freedom)

**Significant at the .01 level.

#1The 807 cases for which data on bargaining unit size were unavailable (i.e., applications dismissed or withdrawn before the bargaining unit was determined) have been apportioned in accordance with the overall distribution.

A similar relationship between bargaining unit size and the outcome of certification applications has long been apparent in the United States. Reviewing the literature, Heneman and Sandver (1983:544) reported:

> Unit size has been the most thoroughly investigated predictor of election outcomes, appearing in fourteen of the twenty-one studies. In each instance, a negative relationship was found between unit size and the union victory rate . . . For example, Rose found that the union victory rate consistently declined

from 66 per cent in units of nine or fewer employees to 52 per cent in units of 100 or more employees.

The greater homogeneity of small units is advanced as the primary reason for their greater success in certification. Units of fewer than ten employees conform to Weber's notion of the informal work group 'whose members are unified by a set of common aspirations and common interpretation of their environment' (Weber, 1967:xviii). Perceiving the need for union representation, small groups are more likely to act cohesively, particularly when work relations are friendly and the groups cohesive. In smaller bargaining units, the influence of the majority's objectives and expectations on an individual's behaviour is more pronounced. Group solidarity can exert 'subtle pressures to conform on those employees who may have been ambivalent or apathetic toward the union' (Lowe, 1981:883). In his study of union growth in the Canadian chartered banks, Lowe reported that union activity emerged more frequently in branches in which the work group was well established, closely knit, and harmonious. Several older and part-time workers said they supported the union, not for their own advantage, but 'for the gals that are working here full-time'.[m] In other branches, the organizing drive collapsed when management was able to manipulate inter-personal frictions and rivalries to divide the employees into pro- and anti-union factions.

Small bargaining units have an advantage under the Labour Relations Act as well. Because bargaining rights are generally granted without a representation vote if a union has enrolled more than 55 per cent of its

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[m]Quoted by Lowe (1981:884).

potential members, certification is more easily won for small bargaining units. In addition, anti-union petitions and unfair labour practice complaints were much less common in applications involving bargaining units of fewer than ten employees during the 1970s.

Table 5.2: Incidence of Petitions by Bargaining Unit Size

Fiscal years 1970-71 to 1981-82

	Fewer than 10 employees	10 to 49	50 to 99	100 or more	Total
Petition	293	945	275	192	1,705
No petition	2,400	3,176	807	549	6,932#1
Total	2,693	4,121	1,082	741	8,637
Proportion with petitions	10.9%	22.9%	25.4%	25.9%	19.7%

$X^2 = 220.0^{**}$
(3 degrees of freedom)

**Significant at the .01 level.

#1 Data adjusted as described on Table 5.1.

Table 5.3: Incidence of Unfair Labour Practices by Bargaining Unit Size

Fiscal years 1970-71 to 1981-82

	Fewer than 10 employees	10 to 49	50 to 99	100 or more	Total
Unfair Labour Practice	32	122	30	29	213
No Unfair Labour Practice	540	710	209	146	1,605
Total	572	832	239	175	1,818#1
Proportion with unfair labour practice complaints	5.6%	14.7%	12.6%	16.6%	11.7%

$X^2 = 31.9^{**}$
(3 degrees of freedom)

**Significant at the .01 level.

#1Data based on a sample of 1,820 applications; however, data for 2 cases were not available.

Paradoxically, the predominance of small establishments in the unorganized sector is regarded as a major impediment to the growth of unions (Finn, 1977). Workers in small establishments are thought to have a lower propensity to unionize, in part, because labour-management relations are more personal and less formalized than in larger workplaces. As a result, workers are more likely to identify with their employer. In addition, the higher costs of organizing, bargaining, and administration make smaller units less attractive to trade unions (Bain,

1970:73). By contrast, the greater propensity to unionize among workers in large establishments has been linked principally to their 'bureaucratic' work environment. Impersonal and standardized relationships, Lockwood (1958:137-143) argued, foster a sense of common identity and so create 'a set of conditions extremely favourable to the growth of collective action'. As work relations become more concentrated and bureaucratized, individuals 'find that they have less and less ability to influence the making and the administration of the rules by which they are governed on the job'. To rectify the situation, 'they join trade unions and engage in collective bargaining' (Bain, 1970:188).

In fact, union density is generally higher among employees in large, rather than small, establishments:

> In the united States, studies by the Bureau of Labor Statistics, Cleland, Meyers, and Steele and McIntyre have found a strong positive relationship between the size of establishments and the extent to which they are unionized. Studies in Norway, Sweden, Austria, and Japan indicate that the level of unionism is higher in larger than in smaller offices (ibid.:74).

Comparable data for Canada are sparse and not especially reliable. Using unpublished data from a 1977 Labour Canada survey, White (1980:49) reported that manufacturing establishments employing 700 or more workers were almost twice as likely to be organized as those employing between 20 and 100; however, the actual percentages were wildly inaccurate. Due to the over- and under-representation of large and small establishments respectively, union density was estimated at 60.3 per cent in manufacturing, more than ten percentage points higher than the more reliable estimate of Bain and Price (1980:118).

Small bargaining units and small establishments are not necessarily synonymous, however (Bain, 1981:15). Given the OLRB's practice of dividing the workforce into units of office and manual, and full- and part-time employees, small bargaining units are sometimes found in relatively large establishments. It is not uncommon, for example, to find five units in a nursing home (two full- and two part-time units for both the nurses' aids and cleaning staffs plus a unit of clerical workers), and even more in a hospital where laboratory technicians are sometimes grouped separately. Furthermore, the dictomony between large and small suggests some confusion of small establishments with small businesses. It is the entrepreneur-run firm that is characterized by 'simple control', to adopt Edwards's (1979) topology. Typically, the entrepreneur has an informal and unstructured approach to management. Work rules and discipline are arbitrary and erratic, decisions are prone to favouritism. But not all small establishments are small businesses; they may, in fact, be branches of large national or multi-national corporations. Thus, while impersonal and standardized terms and conditions of employment may well be characteristic of large establishments, there is no guarantee that small establishments are not bureaucratically managed (Bain, 1981:15).

Bureaucratic management was precisely what spurred union growth in the Canadian chartered banks. Despite an average size of only 25 employees, organizing drives were successful in a number of branches because employees had no voice in wage, benefit, or promotion policies, some of which discriminated against women. At the same time, local management was all-powerful in day-to-day matters and abused its

decision-making authority by acting capriciously and arbitrarily. Thus, it was not bureaucracy per se that the workers objected to, but the combination of inequitable rules and unfair application. In Lowe's (1981:881-2) opinion, the employees turned to unionization 'as a means of achieving a greater degree of bureaucracy'. The rules and regulations contained in a collective agreement were thought necessary to counterbalance the arbitrariness and uncertainty which defined employee relations in the banks.

The combination of bureaucracy at the top and 'particularistic administration' below was cited as a source of frustration by employees in many certification cases involving small bargaining units,[n] 5354555657 suggesting that the tensions which cause workers in large establishments to organize may also be present in small workplaces. The desire to curb the power of foremen and supervisors, to eliminate discrimination and favouritism have loomed large in the accounts of many organizing drives.[o] No matter how systematic the rules and regulations imposed from above, their implementation is always 'prone to arbitrariness [and] to abuse of authority, whether for reasons of personal gain, discrimination, retaliation, or just plain thoughtlessness' (Weiler, 1980:30-1).

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[n]See, for example, Goodyear Tire Stores[53], McDonald's Restaurants[54], T. Eaton Company Limited[55], Tip Top Tailors[56], and Canada Trustco Mortgage Company[57].

[o] As a case in point, the United Steel Workers Union's most determined supporters during the 1946 strike against Stelco were the non-Anglo Saxon immigrants who complained of discrimination and poor treatment (Roberts, 1981). Dofasco, by contrast, was never organized, probably because of its more enlightened personnel policies. The power of the foremen to hire and fire was curbed by upper management during the 1930s and European immigrants, who at Stelco were automatically placed in the hottest and most dangerous mills and never promoted, were employed throughout the works at Dofasco, occasionally as foremen (Storey, 1983).

But propensity to unionize is not the sole consideration. Union density is not simply a measure of the desire for union representation. Collective bargaining exists where workers have been able to assert their demand for union recognition, even in the face of employer opposition. And in this respect, large groups of workers are likely to succeed where small groups would fail.

This, in fact, was the experience in Ontario during the 1970s. On the one hand, unions were more likely to be certified for units of fewer than ten employees; on the other hand, these groups fared less well in bargaining.[p] Overall, collective agreements were negotiated by 84.6 per cent of certified unions, but by only 79.5 per cent of the unions representing units smaller than ten workers. Moreover, the likelihood of negotiating a collective agreement rose steadily with size. Agreements were settled by 85.3 per cent of the unions with bargaining units of 10 to 49 employees, by 91.5 per cent with units 50 to 99 employees, and by 94.0 per cent with units of 100 or more employees.

Experience in the United States has differed somewhat. The lone published study investigating first agreements found that bargaining units size[q] was a statistically significant[r] predictor of the likelihood of negotiating a first agreement based on a sample drawn from one state; however, the same variable was neither positive nor statistically

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[p]These data are more reliable because only certified unions were counted and for these bargaining unit size was known.

[q]The variable used was the natural log of bargaining unit size multiplied by the percentage of workers voting for the union in the certification election.

[r]At the .05 level.

significant when employed in an analysis of a larger, nation-wide sample (Cooke, 1985a,1985c).

Smaller units are easier to organize but larger units are more powerful: this is the dilemma in which the Labour Relations Board finds itself--a dilemma aggravated by the Board's unnecessarily rigid adherence to its standard units. Only in the tertiary sector has the Board shown flexibility. Recognizing that its standard, municipality-wide units were impeding organizing, the OLRB reconsidered its practice and agreed that a single-establishment unit would be appropriate in the retail and finance industries when local managers exercise control over day-to-day employment relations, there is little or no interchange of employees

Table 5.4: Bargaining Outcome by Bargaining Unit Size

Fiscal years 1970-71 to 1981-82

	Fewer than 10 employees	10 to 49	50 to 99	100 or more	Total
Collective agreement negotiated	1,594	2,450	615	374	5,033
No collective agreement negotiated	412	421	57	24	914
Total	2,006	2,871	672	398	5,947
Proportion with collective agreements	79.5%	85.3%	91.5%	93.4%	84.6%

$X^2 = 93.7^{**}$
(3 degrees of freedom)

**Significant at the .01 level

between locations, and the union has organized on a one-location basis. More recently still, the OLRB has accepted, as appropriate, one bargaining unit composed of seven, unrelated branches of National Trust[58] in Toronto. Summing up the policy as 'bigger is better' except when bigger poses an obstacle to bargaining, the proposed multi-establishment unit was considered appropriate because the seven branches were in a recognized geographic area, the workers had common terms and conditions of employment, and there was a history of movement between branches. All the same, workers are being cautioned against presuming that any grouping would be accepted as appropriate simply because it accorded with their wishes (Adams, 1985:326-7). Had there been evidence of greater independence in the formulation of labour-relations policy at the regional level, the Board said that it might have described the unit along the company's regional lines as the employer requested.[59]

The OLRB remains blind to the structural imbalance of power its decisions engender by fragmenting workers into small single-establishment groupings of office and manual, full- and part-time workers. And while the effect of the National Trust decision may have been to put more bargaining power on the union's side of the table the result was inadvertent. The Board's criteria were the conventional ones: community of interest and the employer's administrative structure. The issue of bargaining power per se was deliberately set aside: 'Whether the oft-used term "viable" bargaining unit in the case law of the various Labour Boards was meant to specifically include the "bargaining strength" question need not be decided here'. Even so, the greater flexibility demonstrated by this decision might have given cause to hope for change

were not the potential benefits already nullified by the OLRB's growing inflexibility on the issue of negotiating structure.

Conclusion

The Ontario Labour Relations Board has hard and fast rules about what constitutes an appropriate bargaining unit. The single-establishment unit is the cornerstone of its policy, but equally well entrenched is the Board's practice of separating office from manual employees and part-time from full-time employees. The result is that newly certified unions are small, averaging fewer than forty persons. Units of this size are defended as more readily organized than broader, more disparate groupings. At the same time, however, smaller groups are much less likely to negotiate collective agreements.

Greater stability in collective bargaining will be difficult to achieve because the OLRB firmly believes that its bargaining units, determined for the purpose of granting certification, simultaneously define the constitutency for which both parties are legally obliged to negotiate a collective agreement. Only by mutual agreement can the bargaining unit be broadened or narrowed. And for either labour or management to insist on a different grouping is a breach of the duty to bargain in good faith if the dispute is pursued to impasse, an interpretation of the Act formalized in the recent Burns Meats decision.

Burns Meats suggests that the Labour Relations Board is blind to industrial relations reality. The small, fragmented groups for which unions are certified as bargaining agents are not a firm foundation for collective bargaining. Single-establishment unions have a weak economic

base, especially in multi-establishment firms where establishment-by-establishment bargaining leaves workers vulnerable to whipsawing and other divide-and-rule tactics. The Board should know that where collective bargaining has flourished, negotiations are commonly industry-wide in scope, if not formally then by way of strong pattern bargaining. By allowing employers to veto the creation of more extensive negotiating units, units that would add appreciably to the economic power of workers, it has entrenched a structural imbalance of power between labour and management -- an imbalance that is all the more acute because of the severe legal constraints imposed on the use of sanctions by workers.

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Chapter 6

BARGAINING TACTICS

Not only bargaining structure but bargaining tactics are shaped by the dictates of the Labour Relations Act. First and foremost are the strict constraints on the timeliness of strikes and lock-outs. The law gives workers a right to strike only when there is no collective agreement in force and then only after the conciliation process has been exhausted. At other times, all forms of collective conduct that have the effect of interfering with production are unlawful. And while it is an unfair labour practice for an employer to dismiss workers for participating in a lawful strike, they may be replaced. The only statutory protection for strikers permits them to apply within the first six months for reinstatement on a individual basis on terms agreed to with the employer. There are no protections whatsoever for workers whose strike is unlawful. Discipline, up to and including dismissal, is an acceptable response to an illegal work stoppage. And if union officials have called or encouraged or simply failed to bring a halt to an unlawful strike, a claim for damages may be pressed against the union.

The right to picket is also severely constrained. At bottom, effective picketing is unlawful. Workers who trespass on private property, carry defamatory picket signs, or block the movement of goods or people, almost certainly break the law, in which case their activities will be enjoined. Similarly unlawful is picketing at a secondary location which threatens to broaden the scope of a dispute. Unless a third-party employer has allied itself with the struck company, the

picketing of a site separate from the site of the primary dispute is unlawful.

The overall effect of these constraints is to severely restrict the bargaining power of workers. Employers, by contrast, face no similar legal impediments. They are free to operate during a strike, are entitled to replace strikers with other employees or newly hired replacements, and have the right to move goods and people without restriction.

Strikes

Although the Labour Relations Act does not confirm the right to strike explicitly, it can be implied from the assurance that every person is free to join a trade union of his own choice and to participate in its lawful activities.[1] Accordingly, it is an unfair labour practice for an employer to discriminate against or dismiss a worker for participating in a lawful strike or to engage the services of a professional strike-breaker.[2] The law also provides that strikers retain their status as employees[3] and, in certain circumstances, requires their reinstatement following a strike.[4] Read together, and in conjunction with judicial pronouncements that 'no statutory permission is necessary to participate in the lawful activities of any organization', these sections implicitly recognize the right to strike (Adams, 1985:621).[a]

Not all strikes are lawful, however. Unlawful are strikes which are untimely: in Ontario this includes a strike for recognition; a strike

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[a]Except for workers -- police officers, fire fighters, provincial government employees, and hospital and nursing home employees -- for whom strikes are always unlawful in Ontario.

during the lifetime of a collective agreement; and when no collective agreement exists, a strike before the completion of the conciliation process, including a 'cooling-off' period of seven or fourteen days. It is also unlawful to threaten to call or authorize an untimely strike or to counsel, procure, support or encourage an untimely strike. [5b]

The ban on mid-agreement strikes is imposed not only by the Labour Relations Act but also by the collective agreement. By law, every agreement must provide that there will be no strike or lock-out for its duration, and any agreement without such a provision is deemed to contain the following clause: 'There shall be no strikes or lock-outs so long as this agreement continues to operate'.[6] As a counterweight to the bar on mid-term stoppages, every collective agreement must also provide for the final and binding settlement by arbitration of differences arising from the interpretation, application, administration, or alleged violation of a collective agreement without stoppage of work. In the absence of such a provision, an agreement is deemed to contain the model clause specified in the Act.[7]

In the event of an untimely strike, an employer may lay a complaint with the Labour Relations Board, or, if the strike is during the term of an agreement, an employer may file a grievance against the union, or both.[c8] Where a collective agreement exists, arbitration is the most obvious forum. An arbitrator has the authority to issue declaratory

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[b]The same time constraints apply to lock-outs.

[c]In some provinces, the courts have maintained, to varying degrees, their traditional jurisdiction with respect to strikes. In Ontario, however, their role has been narrowed considerably by the immunities for collective action written into the Rights of Labor Act.[8]

judgments and affirmative directions, and to award compensatory damages. However, the delays inherent in the process mean that arbitrators' remedies, apart from damages, have little practical value. Partly in response to this problem, the jurisdiction and remedial authority of labour boards was expanded (Adams, 1985:626). In 1975, the OLRB was empowered to issue unlawful strike declarations and directions, affirmative and negative, to the parties. The Labour Relations Board also has the authority to consent to the prosecution of a union and may have the power to order the payment of damages under its general authority to remedy breaches of the Act (ibid.:627); usually, however, claims for damages are referred to arbitration (Sack and Mitchell, 1985:504). Decisions of arbitrators and the Labour Board are final and binding on all concerned and enforceable as judgments of the Supreme Court of Ontario when filed with the registrar.[9]

Before either board, (that is, the Labour Relations Board or board of arbitration), the central questions are whether the action constituted a strike and, if so, the extent of the union's liability. In Ontario, a strike is defined to include a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down, or other concerted activity on the part of employees designed to restrict or limit output.[10] So broad a definition invites a wide prohibition and the OLRB does not disappoint. Only two conditions are essential for the Board to find that a strike has occurred: some concerted employee activity and disruption of the employer's operations. There is no implied requirement that the purpose of the activity be taken into account (ibid.:502):

> The Labour Relations Act treats any collective work stoppage as being, in essence, an economic weapon and restricts its use to certain collective bargaining situations -- the final stages of the negotiation and renewal of a collective agreement. To avoid disruption in production and to promote industrial relations harmony, all work stoppages occurring outside this limited period, whatever their underlying motive, are prohibited.[11]

Accordingly, it was unlawful for union officials to urge members to absent themselves from work in support of the National Day of Protest sponsored by the Canadian Labour Congress to protest against the imposition of wage and price controls. Despite its political purpose, the threatened stoppage constituted a threat to strike. The union's argument, that a strike of necessity involves some attempt to win concessions from an employer, was rejected by the Board because to do otherwise would have left it powerless to remedy breaches of the contractual peace obligation so long as the union could establish that the stoppage had no collective bargaining purpose.[d],[12] As a practical matter, therefore, most forms of collective activity are unlawful if untimely:

> Numerous cases in Ontario have held that a concerted refusal to work overtime constitutes a strike. Similarly, a refusal to do certain work, in purported reliance on the collective agreement, was held to be a strike, as was a boycott of material emanating from a 'strike' operation. Likewise, a refusal to work because of the company's reintroduction of piecework, and a refusal to work (presented as a mass resignation) until a union steward was reinstated were both held to be strikes. A concerted refusal to cross a picket line may also be a strike (Adams, 1985:618).

An overtime ban is a strike, even when the hours in question are voluntary under the terms of the collective agreement (England,

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[d]In other jurisdictions, e.g., Manitoba, where the labour code incorporates a collective bargaining purpose in the definition of a strike, workers' support for the National Day of Protest was not unlawful.

1980:556). In Canada Packers Limited[13], the OLRB issued an unlawful strike declaration because the union was urging its members to refuse extra hours. Embroiled in a strike at a newly purchased subsidiary, Canada Packers was diverting work to its Toronto abattoir. Neither the fact that the hours in question were voluntary (because they were in excess of the statutory maximum) nor the employer's failure to comply with the terms of the permit issued by the Ministry of Labour altered the Board's assessment.[e]

Similarly, transit drivers who refused to cross a picket line were found to have participated in an unlawful strike. Because the union had endorsed the line and recommended that its members not cross, the Board concluded that the individual refusals were really concerted. Past practice was of no significance: even though management had previously accommodated drivers who felt an obligation to respect picket lines, it was not required to continue to do so.[14] Indeed, not even a permissive clause in the collective agreement would have protected the union. Clauses which permit workers to refuse to cross picket lines (or handle struck goods) cannot sanitize collective activity. An agreement of the parties cannot make lawful conduct that would otherwise be unlawful; thus, any clause that purports to create an exception to the no-strike provision in the Labour Relations Act is invalid and without effect.[15] However, properly drafted, such a provision can shield workers from discipline for refusing to cross a picket line (or handle struck goods), even when instructed by their employer to do so. Unions may be similarly

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[e]In another case, in which the employer failed to obtain the necessary permit from the Ministry of Labor, the stoppage was not considered a strike.[15]

protected against an employer's claim for damages (Brown and Beatty, 1984:457, 661).

Arbitration boards have adopted a similarly broad construction of the strike bar. Unless the collective agreement provides its own description of prohibited conduct[f], arbitrators generally take the statutory definition as their starting point (Palmer, 1983:725) and are usually prepared to accept the OLRB's unlawful strike declaration as the foundation for any subsequent claim for damages (Brown and Beatty, 1984:20-1). Even those (few) arbitrators who have stressed that, to be a strike, concerted activity must have some collective bargaining purpose have defined the self-interest of the group involved sufficiently broadly so as to align their decisions with those of the OLRB. Accordingly, most arbitrators ruled the National Day of Protest constituted a strike. And, in line with other rulings of the Labour Relations Board, arbitrators have found a wide array of activities to be strikes when done in concert: refusing to work overtime, refusing to handle certain goods, refusing to accept work, refusing to cross a picket line, leaving work early without authorization, even taking a vacation at a certain time (Palmer, 1983:726-7).

The necessary element of collectivity is also readily found. Unless the employees can give credible and convincing evidence of individual decision-making, concerted activity will normally be inferred (Sack and Mitchell, 1985:510). No less a body than the Supreme Court of Canada was willing to find the required element of concerted activity in the union's

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[f]Which, to be consistent with the Labour Relations Act, could only be more encompassing.

very existence. The thrust of the decision in the Longshoremen's case[16] was that 'personal beliefs having their "common root in labour organization" would constitute a "common understanding"' (England, 1980:533). So sweeping an indictment has not found favour with the OLRB, until recently, anyway:

> The proposition that the principles or philosophy of a particular group of individuals can, if implemented on an individual basis, make actionable an otherwise lawful activity, without any evidence of an agreement, either tacit or express between the individuals in question, is not a sound theory upon which to base a statutory violation, especially one which entails the risk of criminal prosecution.[17]

Now, however, the Board is prepared to accept that, in the construction industry at least, refusals to cross a picket line are concerted if they flow from a common understanding 'based upon sentiments of sympathy or solidarity'.[18]

The second criterion, that the concerted activity be 'designed to restrict or limit output', has been construed as imposing on objective test. The OLRB, arbitrators, and the courts have adopted the view that if the action has the effect of impeding production, it was 'designed' for that purpose (ibid.:534): 'If conduct produces the proscribed results, and might reasonably be expected to do so, it is "designed" to do so.'[19] Accordingly, the defence that its motive was the pursuit of union solidarity and not an attempt to extract bargaining concessions failed to protect the Longshoremen's union.

Where a strike is on-going or the rights of the parties are unclear, a dispute will likely come before the OLRB rather than an arbitrator. A hearing will be convened as soon as is practicable and a remedy granted

within a few days of the commencement of a strike (MacDowell, 1977:223).[8] The Board's principal remedy is an unlawful strike declaration granted when it finds that a union has called or authorized an untimely strike, took active steps to promote a work stoppage, or failed to take steps to stop a strike. A declaration is not granted in every case, however. The Board's purpose is not to punish, but to inform the parties of their rights and bring the strike to an end (Sack and Mitchell, 1985:510). Consequently, its policy is to refuse to issue a declaration if the employees are back at work by the hearing date. Declarations have also been refused when the unions sought to persuade their members to return to work or when an employer provoked the walk-out, for example, by adopting an interpretation of the collective agreement that the wording could not reasonably bear (ibid.:505,513). Declarations are granted when there has been a pattern of illegal strikes, there is a reasonable likelihood that the strike will recur, or if the failure to issue a declaration might prejudice an employer's claim for damages in a further proceeding (Adams, 1985:658-9).

A declaration may be supplemented with a direction, that is, an injunction-like order by which the Board directs the conduct of the parties. The OLRB has ordered union officials to refrain from threatening, counselling, and encouraging strikes, and required them to inform employees that a strike was unlawful and not officially supported. Employees have been directed to cease and desist from an illegal strike

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[8]The Board's usual practice is to abridge the time limits for filing pleadings in an unlawful strike case and put the matter on for hearing quickly, usually within two or three days[2]2 -- quite unlike the Board's less hurried response to a union's complaint of an unfair labour practice.

and to return to work. Using its power to issue directions, the Board has prohibited picketing and ordered employers to post copies of its directions around the workplace (Sack and Mitchell, 1985:515).

Calling, authorizing, or encouraging an unlawful strike leaves a union open to prosecution for violating the Labour Relations Act. Although a union has no legal personality, it may be prosecuted in its own name and is vicariously liable for the acts of its officers and agents. Conversely, if a union has been found guilty of an offence under the Act, every officer, official, or agent who assented to the commission of the offence is deemed to be guilty. The organization may be ordered to pay a fine of not more than $10,000 per day, each day constituting a separate offence; union officials and employees may also be fined not more than $1,000 per day.[20] Proceedings may not be instituted without the Board's consent, however.[21] In granting consent to prosecute the OLRB considers 'whether, by granting its consent, it will advance the purpose and intent of the Act and thereby promote a sound relationship between the parties'.[22] The Board seeks to determine whether prosecution would serve the parties' interests, whether the issues can be resolved by the courts, and what other avenues might be pursued to settle the dispute. 'Usually, leave to prosecute has been refused where no useful purpose would be served thereby, as where the strike was short, there was no violence, the employees had returned to work and those responsible had been disciplined, or the union had taken steps to settle the strike and had disciplined the business agent responsible for calling it' (ibid.:527).

Vicarious liability may also entangle a union in a claim for damages.[h23] Although a union does not automatically assume absolute liability for the illegal strikes of its members, in the end, the members are the union and so their decision to strike or continue to strike, if adopted at a properly constituted meeting, gives rise to liability, even if the officers opposed the strike and in spite of the unconstitutionality of the resolution (Palmer, 1983:741). Furthermore, 'at least one arbitrator has expressed the view that the union's liability can be premised on this basis even in the absence of a formal resolution and vote by the membership' (Brown and Beatty, 1984:665). Damages will also flow if the officers, including stewards and committee persons, encouraged, instigated or actively participated in the work stoppage (Palmer, 1983:743). And although stewards would not be expected to order strikers back to work, their presence on a picket line or in a demonstration, unless explained away, suggests the union was encouraging the continuation of the strike.[24]

In the event of a spontaneous strike, a union is liable for the inaction of its officers. The onus is on the union to show that it took all reasonable steps to terminate the walk-out. To exculpate the organization, union leaders must make more than a nominal effort to bring the strike under control. There must be prompt attempts to get the employees back to work:

> It may well be necessary for the Union, if uncoordinated efforts by its stewards and officers to terminate the stoppage are unsuccessful, to make concerted efforts and to obtain the

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[h]Where no collective agreement exists, the Labor Relations Act provides for the arbitration of a claim for damages once the Board has declared a stoppage unlawful.[23]

> permission of management to call a meeting on the premises for that purpose. It may be necessary to threaten, and even to take disciplinary measures against particular members of the Union. At all events, it would seem that the initial obligation of the Union should be to make known to management that the union has not authorized or encouraged the stoppage and thereafter to give continued evidence of this position by manifest steps to bring the stoppage to an end. It may, of course, be finally necessary for the Union to report to management that it cannot control its members or other employees, thus leaving it to management to take such action as it sees fit.[25]

In one case, the union was liable because the local president did not instruct the membership to return to work, but rather allowed them to vote on the issue; however, unions have not been held accountable when the vote favoured a return to work or the strike was attributed to a faction within the union (Brown and Beatty, 1984:665).

Damage awards[i] are compensatory in nature: the arbitrator seeks to put 'the innocent party, so far as can reasonably be done, in the position in which he or it would be if the particular rights had not been violated'.[26] Thus, unless the collective agreement specifically provides for punitive damages, an employer is entitled to compensation for 'those proven losses that were occasioned by, and attributable to, the unlawful strike for which the union was found to have been responsible', including overhead expenses, depreciation, and lost profit (Palmer, 1983:749). Apart from any expenses directly connected to the strike, arbitrators have been unwilling to award damages where total production and revenue were no different over the relevant fiscal period than they would have been if work had continued uninterrupted. And some arbitrators have

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[i] Damages may be assessed against the union but not against employees.

exercised their discretion not to award damages where to do so would have been unfair to the union (Brown and Beatty, 1984:660-70).

The overall effect of these constraints on strikes and lock-outs is far from even-handed; nor are they consistent with the presumptions which underlie industrial relations policy. The ban on mid-agreement strikes is far too broad, England (1980:526) argued:

> The crucial point in all instances is that the system visualizes the strike as the ultimate determinant of interest disputes between the parties, and statutory definitions of 'strike' should be construed in that light. Mid-term work stoppages that are not concerned with obtaining employment concessions -- such as honoring picket lines and hot cargo declarations, refusing to obey management orders promulgated in breach of provisions of the agreement, slowdowns to preserve employment opportunities, concerted fishing trips and protest stoppages against government legislation -- belong to the domain of collective agreement arbitration, not to the 'strike' ban as the term is properly understood in the system.

Weiler (1980:59) also thought that 'the effort to spread the net of Ontario strike law beyond its normal collective bargaining reach ... quite unsound as a matter of policy'.

But construing the word 'strike' more purposefully would change little. No doubt the law would better reflect the underlying policy, but the policy itself is unsound. According to Weiler (ibid.:91), the purpose of the no-strike policy is to give employers the 'benefit of a strike ban as and when they enter into a collective agreement, and give employees the benefit of binding arbitration of their grievances during the term of that collective agreement'. But this description is deceptive in its simplicity. As Weiler (ibid.:67) himself has pointed out, the right to strike is not the workers' equivalent of the employers' right to lock-out; the right to strike counter-balances the employers' right to alter terms and conditions of employment. 'If the law is to be

fair', he concluded, 'it must accompany any ban on strikes with an adequate alternative by which the union and its members may challenge that basic management prerogative of capital'.

Ontario law does not provide such an alternative. A ban on mid-agreement strikes supposes both that disputes over the interpretation of the collective agreement are clearly distinguishable from interest disputes and that only the former arise during the course of a collective agreement. But this does not accord with reality; the categories collide and overlap with the result that interest disputes are commonly treated as though they are rights disputes simply because they arise during the lifetime of a collective agreement.

The grievance arbitration procedure is fundamentally unsuited for settling disputes over issues not specifically addressed by the parties in writing. An arbitrator derives his or her authority from the collective agreement as written and if there is no violation of the agreement there is no grievance. And when an agreement is silent arbitrators have decided that management retains the right to act unilaterally: there is no obligation to bargain, no obligation to consult, no obligation to even inform a union of changes. The industrial relations community is not a democracy, arbitrators emphasize:

> It is a relationship created and governed by contract. The respective rights and obligations of the parties are expected to be set forth in a collective agreement. In that contractual relationship, management retains all the rights that are not bargained away to the union in the course of collective bargaining (Public Employers of British Columbia, 1980).

By the residual rights view of management's rights, therefore, employers retain the right to sub-contract work, introduce new

technology, require workers to work overtime, and so on, as long as there is no constraint imposed by the collective agreement. And few agreements impose such constraints.[j] At the same time, any attempt by employees to block management's course of action is undercut by the illegality of mid-agreement strikes.

The no-strike policy has other implications as well. By designating when strikes over interest disputes are lawful, the timing of most strikes is highly predictable. Thus, not only are workers denied the right to act when action seems most appropriate, the effectiveness of lawful strikes can be undermined by their anticipation. And because work-to-rule campaigns and overtime bans are unlawful if untimely, the law makes it difficult for workers to interfere with an employer's attempt to stockpile in anticipation of a stoppage. Finally, the no-strike policy makes it impossible for workers to ally themselves with others. Even when they may be affected by the outcome of a dispute, workers may not assist the strikes of others by refusing to handle struck goods, refusing to cross picket lines, or even refusing to work overtime. Strong groups, therefore, cannot aid weaker groups in their struggle to negotiate acceptable terms and conditions of employment.

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[j] Approximately 70 per cent of collective agreements covering 500 or more employees (excluding the construction industry) expressly permitted (16.9 per cent) or had no provision (53.0 per cent) respecting contracting-out in 1985. No collective agreements prohibited the introduction of new technology; furthermore, only 38 per cent required employers to give advanced notice, 31 per cent obligated employers to retrain those displaced, and 22 per cent provided for some sort of wage and/or job guarantees. With respect to overtime work, management had a free hand to require extra hours in all but 38 per cent of collective agreements covering 500 or more employees (Canada, Labour Canada, Provisions in Major Collective Agreements in Canada Covering 500 or More Employees, 1985).

Job Security

Legally, employees on strike are simply absent from work and since the Labour Relations Act draws no distinction between lawful and unlawful stoppages, all strikers retain their status as employees.[27] Merely engaging in a strike, even an unlawful strike, by itself, does not terminate the relationship, 'rather, some affirmative act on the part of the employer is required to actually sever the employment relationship' (Brown and Beatty, 1985:655). And while it is an unfair labour practice to dismiss workers for exercising their right to engage in a lawful strike,[28] participation in an unlawful strike is generally considered just cause for discipline. Anyone who causes or perpetuates an unlawful strike does so at the risk of his or her job (Palmer, 1983:734). In the words of one arbitrator, 'If participation in an unlawful strike and picketing is not cause for discharge there can hardly be any dereliction of duty to an employer in respect of service that would be'.[29]

The employer's right to discipline and dismiss is constrained by the requirement that workers be treated equally. It is improper for an employer to discipline strikers randomly: 'equality of treatment is a necessary component of just cause':[30]

> The concept of 'just cause', which governs all matters of discipline, has as its basis the evaluation of individual conduct and circumstances; the idea of collective responsibility or view that one could 'make an example' being foreign to this concept.[31]

It is not permissible for employers to 'shoot every 10th man as an incentive to the remaining nine'.[32] Thus, unless management is able to identify those who led a walk-out, there is no basis for disciplining

some workers but not others. And, by parity of reasoning, arbitrators have ruled that it is improper for an employer to discipline the entire workforce when there is no evidence to substantiate the claim that all the workers participated in the stoppage (Brown and Beatty, 1984:663).

Arbitrators also require that the discipline bear a reasonable relationship to the strikers' conduct (ibid.:662-3) and so have approved of the practice of dismissing those who instigated or actively participated in a stoppage in conjunction with lesser penalties for those who merely followed along. But if the designation of the leaders was indiscriminant or arbitrary, the dismissals will be over-turned.[33] Arbitrators also consider mitigating circumstances. And 'the more severe the discipline imposed, the greater the emphasis that has been placed on questions such as similarity of seniority, work record, previous discipline imposed on the griever, comparable incidents of discipline and so on'.[34]

Arbitrators are divided in their assessments of the responsibility of union officials in the face of an unlawful strike. Earlier awards accepted that union officers and stewards owed a higher degree of loyalty to their employer than did ordinary employees. As a result, officials were saddled with a greater responsibility to refrain from participating in, or give leadership to, an unlawful walk-out and were expected to counsel others as to the proper procedure for processing grievances. Failure to meet the higher standard justified the imposition of 'more severe disciplinary sanctions on union officials when they actively, and indeed passively, participate in an unlawful walk-out, or other forms of misconduct' (ibid.:649). The soundness of this approach has been

questioned in more recent cases, however. While it is agreed that a union may be liable for the actions of its officials, stewards and other officers are now thought to have no responsibility to their employer apart from their responsibility as employees. In Douglas Aircraft,[35] the Supreme Court of Canada affirmed this view:

> The total fabric and structure of labour relations is predicated on the integrity in law and in fact of the representatives of both sides of the bargaining process. That integrity is not promoted, and in fact would be defeated, if the law were to place in the representative of the employees a duty enforceable by the company, or indeed a duty, the failure to exercise which would expose the employee representative to punitive action of any kind by the company against the employee in his status as employee.

None the less, the fact that a steward's presence among the strikers might encourage others to participate in an illegal strike, simply by virtue of his or her recognized role as a leader, suggests to some arbitrators that more severe punishment might be justified after all (ibid.:652).

Employees may also be disciplined for action taken as individuals. Arbitrators assume the employer's interest in uninterrupted production ranks ahead of a worker's desire to follow his or her conscience. Apart from its power to discipline employees for participating in an unlawful strike, an employer retains the right to discipline workers for breaches of their obligations to attend work; to obey reasonable orders; to work with diligence, care, and honesty; and, while not at work, to act in a manner consistent with continued employment (Palmer, 1983). Thus, even minor initiatives, such as refusing to work overtime to prevent stockpiling or in support of striking co-workers, may be acts of heroism.

The wording of the collective agreement is critical. Unless overtime is expressly voluntary, management retains the right to require employees to work overtime and refusing to work constitutes insubordination unless the employee offers an acceptable excuse. For most workers, overtime (not in excess of the statutory limit of 48 hours per week) is compulsory. And, while taking a pregnant wife to the doctor was considered a reasonable excuse by one arbitrator, refusing to work because the employee did not want to, had arranged a family outing, was scheduled to participate in a bowling tournament, or because others were on lay-off were not considered reasonable excuses by other arbitration panels (Brown and Beatty, 1984:456).[k]

Workers may also be disciplined for refusing to handle struck goods. Acting as an individual, an employee commits no unlawful act, yet leaves himself open to discipline for insubordination. The arbitral rule is 'work now, grieve later', so that even if the worker can point to a 'hot-cargo' clause in the collective agreement, he or she is required to perform the task as assigned and grieve the propriety of the order subsequently. Failure to follow the procedure constitutes insubordination (ibid.:457). So sweeping a rule is justified on the grounds that a 'plant is not a debating society':

> Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be

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[k]The precise issue of refusing to work overtime in order to avoid stockpiling or to support another strike has not been reported but would likely embroil a worker in a controversy over whether or not the activity was undertaken in accordance with a common understanding.

> vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.[36]

It is likewise an industrial offence to refuse to cross a picket line in defiance of management's direction to do so. While some arbitrators have stuck to the 'work now, grieve later' principle, others have ruled that workers may be shielded from discipline if the collective agreement permits such refusals (ibid.:457). But most agreements contain no such clause and in the absence of such a clause workers may refuse to cross a picket line only if they fear for the safety of their person or their property. Whether the fear was reasonable is a matter of evidence, however. In one case, the arbitrator felt that congestion at the plant gates, pushing and shoving on the picket line, and the rocking of one car from side to side were not sufficient to justify the workers' absence. Finding themselves unable to gain entry at the normal time, the grievors were expected to have kept trying throughout the day.[37] Moreover, if an arbitrator suspects that the refusal to cross the picket line was motivated by support for the striking employees, discipline will be considered appropriate, even if the collective agreement permitted workers to refuse to cross when there was a possible safety risk.[38]

In no circumstances is respect for a picket line established in conjunction with an unlawful strike justified. So grave was the offence committed by a hospital employee who, on her own, refused to cross a picket line of co-workers (organized by a different union) participating in an illegal strike, the arbitrator refused to consider re-instatement until he was convinced that she understood the seriousness of her error

and promised not to repeat the offence, and then the order was without back pay.[39]

Despite the protections of the Labour Relations Act employees may also find their jobs in jeopardy when they participate in a lawful strike. While it is an unfair labour practice to dismiss or discipline workers for exercising their right to strike, it is perfectly acceptable for employers to replace them. The law guarantees strikers their status as employees, but not necessarily their jobs: 'a legal distinction without a factual difference' said Weiler, (1980:76). In Ontario, employers are obliged to reinstate only those who apply, unconditionally and in writing, within the first six months of a strike on terms agreed upon by the employer and employee, although an exception is made when the work is no longer being performed or work has been suspended or discontinued in all or part of an employer's operations.[40] Apart from this limited protection, reinstatement following a strike is a negotiable issue.

That the protection provided by the Act falls short of guaranteeing the jobs of strikers who return to work without invoking section 73 is considered 'an integral feature of the balance of power in collective bargaining'.[41] For powerful groups, the absence of statutory protection for the jobs of strikers presents few problems. But when a union is weak or the strike has been lost, employers may insist that replacements hired during the strike be retained, in which case the strikers are recalled on an 'as-needed' basis. In these circumstances, the use of replacements is frequently accompanied by picket-line violence leading to the dismissal of strikers for picket-line activities. On occasion, serious offences

are involved but not all relate to violence. Pickets are constantly in danger of committing acts of trespass, defamation, and obstruction which employers may use as grounds for dismissal. Nor do employers accept the argument that the civil and criminal law provide adequate penalties, or that dismissal is a reprehensible form of double jeopardy.

Employees dismissed for picket-line activities may or may not have access to the grievance-arbitration procedure. Once a collective agreement and/or statutory freeze have expired, the bargaining relationship evaporates: all that remains is the 'bare skeleton of the employment contract fixing the wage/work bargain, which the employer is free to renegotiate by individual "bargaining" with his employees' (England, 1976a:441). The employer is no longer bound by the negotiated terms; workers are no longer entitled to the regular rate of pay or the established scale of benefits. The collective agreement has ceased to exist and with it goes the 'just cause' provision and the right to challenge management through the grievance procedure. Nor is an employer's refusal to arbitrate strike-related dismissals a violation of the Labour Relations Act in the opinion of the Ontario Board (Sack and Mitchell, 1985:425).

For the strong, the legal lapse poses few difficulties. At the end of the strike, the union will negotiate a 'no-victimization' clause calling for an orderly return to work. A less powerful group may have to settle for the employer's commitment to process any dismissals through to arbitration, in which case the memorandum of settlement must be worded very carefully. A retroactivity clause is essential to bridge the legal hiatus between the old and new agreements; otherwise, the strikers'

grievances will not be arbitrable (England, 1976a:444). Furthermore, unless the terms of settlement specifically prohibit further discipline, workers may be discharged for strike-related offences after the memorandum of agreement has been signed, in which case their grievances would not be arbitrable unless a retroactivity provision has already been agreed to. At arbitration, picket-line incidents or infractions away from the site of the dispute can be relied upon to justify dismissal. Penalties can be for something as amorphous as conduct that harms the firm's reputation or would make it difficult for co-workers to get along after the stoppage (Vector Union Report, August, 1985).

For the weak, the situation may be perilous. Even if a collective agreement is signed, many strikers may remain dismissed; many others may never be recalled. Moreover, because strike replacements are legally employees in the bargaining unit, they have the right to participate in any ratification vote or to initiate an application to terminate a union's bargaining rights and to vote in a representation election.[42]

The law does not mirror reality when it treats the expiration of a collective agreement as the termination of the bargaining relationship. The relationship does not cease to exist in law or in fact. The union remains the legally recognized bargaining agent with which the employer is legally obliged to bargain. And ordinarily, both parties expect to reach a settlement of their dispute. Clearly, the bargaining relationship remains intact, in which case a worker should have recourse to those elements of a collective agreement required by law in Ontario, most importantly, the final and binding settlement by arbitration of rights disputes, particularly because a dismissed worker is relying on

the universally required standard of 'just cause' and not a right that flows from the specific wording of a collective agreement.[1] During a strike, a union retains its status as the workers' exclusive bargaining agent; thus, the fact that employers are allowed to negotiate with workers individually is a contradiction, whether they are strike replacement (who are, after all, employed at jobs in the bargaining unit), or strikers exercising their right to return to work within six months.

England (1976a) argued that arbitrators and labour boards have got the law wrong: the statutory protection of strikers as employees parallels the doctrine of suspension at common law and so entitles them to reinstatement. None the less, tapping our way back through the legal maze in which industrial relations are now imprisoned poses enormous problems for those who sit on these boards. The simplest way to cut the Gordion knot would be to legislate a ban on the use of strike replacements. Strikers would then be assured of their jobs unless they were dismissed for strike-related activities; at the same time, the absence of strike replacements would mean less violence on the picket line and fewer dismissals.

Some noted scholars vigorously oppose this solution, however. While he thoroughly supported the protection of strikers' jobs from usurpation by strike replacements, Weiler (1980:78) felt this had been accomplished in Ontario with the guarantee of individual reinstatement during the first six months of a strike. To go further would radically alter the

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[1]Even when a collective agreement does not restrict an employer's right to discipline or dismiss for 'cause' or 'just cause', arbitrators read this restriction into the agreement (Craig, 1986:241).

balance of power. A legislative ban on the use of strike replacements would stray 'much too far from the competitive economic struggle which, in the final analysis, does underlie our system of free collective bargaining'. England (1983:283), by contrast, found the existing legislative scheme a paradox. Not only do workers have a legal right to strike -- indeed, sometimes, they may have no practical choice in the matter -- but strikes and lock-outs are integral to the collective bargaining process. It is 'illogical and unfair' he argued to penalize anyone for participating in a lawful strike. No worker should bear the burden for action that is essential to the functioning of the society in which he finds himself and from which the public derives the benefits. At most, employers have an interest in hiring temporary replacements. Thus, by permitting the permanent displacement of strikers, the existing legal framework tips the balance of power in management's favour. Elsewhere, England (1976b:606) has argued that a ban on strike replacements would be more even-handed and have the desirable effect of reducing picket-line violence, 'an objective very much in line with the public interest'.

A ban on strike replacements would also correct the anomaly which leaves lawful strikers exposed to permanent replacement while protecting the jobs of workers who defy their union and cross a lawful picket line of striking co-workers. Anti-union conduct may lead to expulsion from membership, but ostracism is as far as a union can go. It is unlawful for a union to require an employer to dismiss a worker pursuant to a union shop clause for the reason that a worker was suspended, expelled or denied membership because he or she was engaged in activity against a

union or engaged in reasonable dissent within the a union,[m] unless the conduct was instigated or procured by the employer.[43]

Picketing

In most jurisdictions[n], picketing is regulated by the courts, not the Labour Relations Board. Although picketing constitutes watching and besetting under the Criminal Code, workers have seldom been prosecuted since 1934 when the Code was amended to permit peaceful picketing for the purpose only of obtaining or communicating information.[o] While criminal prosecutions declined rapidly, actions in tort increased concomitantly:

> As the criminal sanctions were eased, the civil sanctions were imposed: criminal conspiracy was abolished, for example, and civil conspiracy took its place. The judiciary developed a number of tort doctrines to curtail labour activities considered 'offensive' in the eyes of the judges. Inducing breach of contract and conspiracy joined the traditional torts of defamation, assault, nuisance and intimidation (Tacon, 1980:132).

On the principle that a combination to do an unlawful act, or to do a lawful act by unlawful means, constitutes a civil conspiracy, judges reasoned that picketing that goes beyond communicating information can found an action in tort. Traditionally, the tort was grounded in means wrongful in themselves, either criminal (e.g., assault) or tortious

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[m]Other protected forms of dissent are membership in another trade union, activity on behalf of another trade union, and refusal to pay unreasonable initiation fees, dues or assessments.

[n]British Columbia is the exception.

[o]In 1876, peaceful picketing was made lawful but the protection was eliminated in 1892 when the qualification, that attending merely to obtain or communicate information did not constitute watching besetting, was omitted from the codification of the criminal law (Woods and Ostry, 1962:36-7).

(e.g., inducing breach of contract); nowadays, however, the courts also recognize breach of a statute, breach of a collective agreement, or secondary action as grounds for liability (Tacon, 1980:17,23). Thus, even though some judges have required that the picketing be assessed independently of the striking, the weight of authority is that picketing in conjunction with an unlawful strike is itself unlawful. Recognition picketing is similarly prohibited: the judiciary has inferred from the provision of certification machinery that picketing for recognition is contrary to the spirit of the Labour Relations Act. Also unlawful is peaceful picketing before or during conciliation, even in the absence of a strike, because the union has failed to follow the procedures laid down by the Act and so failed to meet its obligation to bargain in good faith (ibid.:34, 54-5).

The courts are also quick to find unlawful conspiracies to injure. 'Token' or 'signal' picketing is frequently enjoined because the pickets are providing information to those who already possess it, a fact which suggests the presence of an ulterior objective to judges: 'Where information picketing does not touch the public but reaches only those who already have the information the purpose of the picketing is not merely to convey information but to accomplish some injurious purpose' (Carrothers, 1956:69). And, by parallel reasoning, picketing at a location other than the site of a dispute is suspect: not necessarily unlawful, but the further the picketing is removed from a labour dispute the more likely that it will be enjoined as secondary. Troublesome distinctions between cases were eliminated when the Ontario Court of Appeal discovered in 1963 that secondary picketing was unlawful per se.

The union in that case was unable to negotiate a collective agreement with Deacon Bros., a clothing manufacturer. But instead of calling a strike, it chose to embark on an 'educational campaign' to persuade retailers to boycott Deacon Bros.'s products. Hersees, a retailer of menswear in another city, refused to participate in the boycott and was picketed by workers whose placards asked consumers to look for the union label. On Hersees's application, the picketing was enjoined:

> Appellant has a right lawfully to engage in its business of retailing merchandise to the public. In the City of Woodstock where that business is being carried on, the picketing for the reasons already stated, has caused or is likely to cause damage to the appellant. Therefore, the right, if there be such right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade.[44]

The arbitrariness of the '<u>per se</u>' doctrine has been repeatedly ridiculed by academic lawyers. In a sharply critical comment, Arthurs (1963)[P] derided the court's application of the traditional tort doctrines and exploded at the bald assertion that the workers' right to picket must always give way to a third-party employer's right to trade. So stark a pronouncement was completely at odds with provincial labour policy. Not long before, the Ontario Legislature had specifically rejected the blanket prohibition of secondary picketing recommended by the Select Committee on Labour Relations, choosing instead to outlaw acts, other than acts done in connection with a lawful strike, the reasonable or probable consequence of which would be an unlawful strike.

[P]The judges got it wrong, he claimed. By the 'algebra' of torts -- if C has a contract with A, etc. -- the defendant, Goldstein, was liable to Deacon Bros. if to anyone.

The courts have not been completely insensitive to workers' rights, however. An otherwise unlawful conspiracy may be protected if there is just cause or excuse for the injury caused. A central problem, therefore, is the court's assessment of the object of the combination. Even so, Canadian courts have rarely appreciated the legitimacy of a union's objectives. In his reading of the cases, Carrothers (1956:100) could discover 'no clear meaning of object and no clear test for its determination'. Nor have the courts appreciated the possibility of mixed motives, or that harm is rarely the union's sole objective. In practice, consequently, the plea of economic self-interest has not been a successful line of defence, notwithstanding its acceptance by British judges.

In Ontario, the Rights of the Labour Act[45] has protected unions from conspiracy charges. But the judiciary has been difficult to deter: the tort of inducing breach of contract has replaced conspiracy actions in the regulation of picketing (Mandel, 1961:126). Inducing breach of contract is unlawful whatever the nature of the contract and whatever the union's motive or object, unless liability is removed by statute or the defendant can establish justification. And while British courts have emphasized the need to demonstrate that the pickets (or their union) had knowledge of the contract, intended and advocated the breach of contract and damages resulted from the breach, and that the breach was the necessary consequence of the picketing (ibid.:125), Canadian courts have been less rigorous in their analysis:

> There are instances of liability despite lack of proof of a contract or knowledge thereof, contractual breach, and inducement of breach. The action may succeed even though it was the plaintiff who breached the contract. The distinction

> between direct persuasion and indirect inducement, which requires an illegal act apart from the inducement itself, has been blurred or gone unnoticed. In picketing cases, the element of causation has been inferred; the courts have judicially noticed the 'rule of the picket line'. That is, a picket line is regarded as an 'invisible barrier', invariably respected by other trade unionists, around the premises of the struck employer. In the judges' view, the picketers, then, are said to have 'caused whatever consequences follow, including breaches of employment contracts of workers respecting the line (Tacon, 1980:28-9).

Liability is almost a certainty because the defence of economic self-interest is rarely accepted. Although he could find numerous dicta stating that there can be justification for inducing breach of contract, Mandel (1961:121) could find only two labour cases in which justification was successfully advanced.

Picketing is also wrongful if it involves any of the nominate torts: assault, battery, trespass, defamation, intimidation or nuisance. Apart from any criminal liability, pickets must not threaten or commit bodily harm. They may not enter private property without permission, including shopping plazas,[q] and must beware of placards that bear opinions rather than facts. Describing the offending goods as 'hot cargo' constituted defamation in one case: such a designation was a matter of opinion and carried a sinister meaning, the judge said (Carrothers, 1956:28). Mass picketing is frequently tortious and likely to be enjoined because it is inherently intimidatory (Tacon, 1980:30) for although the courts have no

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[q]As the law now stands, pickets can be charged under the Petty Trespass Act and evicted from shopping malls. No less a body than the Supreme Court of Canada has affirmed the right of mall owners to evict pickets despite the defence that the property rights in question were, in the words of an American court, 'worn thin by public usage' (Ulmer, 1975:880). Where peacefully picketing might be lawfully conducted is open to question: if removed to the perimeter of the mall the picketing would likely be construed as illegal secondary pressure against all the businesses, no matter how explicit the signs (Arthurs, 1965:363)

firm rule respecting numbers, they are inclined to regard picketing as a form of intimidation when the number of pickets exceeds what the judge believes is necessary for the union to convey its message, usually three or four at an entrance. To avoid an 'atmosphere of intimidation', picketing in one instance was limited on days on which large numbers of workers received their strike pay at a trailer parked adjacent to the struck premises (Armstrong, 1970:474). And finally, picketing may be enjoined if it constitutes a legal nuisance.

Prior to 1951, judges were inclined to accept that picketing was always a nuisance: some cases said watching and besetting was a form of nuisance while others said nuisance was present in watching and besetting; in any event, all agreed it was unlawful (Carrothers, 1962:6). Unions were issued a momentary reprieve when the Supreme Court of Canada determined that peaceful picketing, unencumbered by other wrongful acts, was not an unreasonable interference with the enjoyment of private property. That picketing inevitability mixes persuasion with communication was finally acknowledged, and the court could find no objection so long as the persuasion was carried out by means of rational argument.[46] But as has been noted, the Aristocratic Restaurants doctrine led a 'short, unhappy life' (Palmer, 1960:166). Although never overturned, the decision has been steadfastly avoided. 'The old notions were gradually revived: picketing was unlawful if it sought to compel or persuade even peacefully' (Tacon, 1980:18). Glaring at customers, stopping customers' cars in a parking lot, jeering and defamatory placards, and picketing before recourse to conciliation have been declared nuisances (ibid.:21), confirming Carrothers's (1964:6)

observation that picketing that is an irritation or nuisance in the colloquial sense is frequently found to be a nuisance in the legal sense.

The law of picketing is 'a marvel of confusion that would not be tolerated in any other area'(ibid:3,5). Unions are at the mercy of a common law 'of unknown content' which they are admonished to obey. Only if picketing can pass unscathed the batteries of form, object and result is it lawful; 'if not it is unlawful, and enjoinable to the extent of the unlawfulness' (Carrothers, 1956:27).

In any event, the real purpose of actions in tort is the injunction; indeed, the evidence is that few cases proceed to trial (Krever, 1966:22-3). Whether the injunction is perpetual, interlocutory (until trial), or interim, and whether it is all-encompassing or merely limits numbers, restriction of picketing invariably undercuts the union's bargaining power: 'By the time the matter comes to trial (if, indeed, the employer pursues the action), the granting of the injunction may well have served to defeat the strike' (Adams, 1985:655). Before 1970, judges often granted ex parte injunctions without notice to the union, and not infrequently in the middle of the night. However, the worst abuses of the system were eliminated by changes to the Judicature Act[47,r,48] prohibiting the granting of injunctions in labour disputes without notice (with certain exceptions for interim injunctions) and not until the court has been satisfied that reasonable efforts were made to obtain police assistance and the police were unable to assert control.

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[r]Section 20 of the Judicature Act was replaced by s.115 of the Courts of Justice Act[48] in 1984.

The purpose of an injunction is not to preserve the peace but to protect property rights pending a trial on the merits of the dispute. Consequently, an injunction should be granted only when the complainant can demonstrate that the defendant's activity is likely to result in irreparable and substantial injury that cannot be remedied in damages. In practice, however, the requirements of a strong prima facie case and evidence of irreparable harm not compensable by damages are rarely applied (Krever, 1966:7-29). In balancing the employer's risk of loss if the picketing were to continue against the union's risk of loss if the picketing were restrained, the weight of the employer's immediate financial losses is invariably heavier than a union's less tangible loss of bargaining power. Similarly, the doctrine of 'clean hands' is not usually considered so that an employer's provocative behaviour seldom stands in the way of issuing an injunction (Southin, 1970:81-2). The defence, that only unlawful acts are enjoined (McKelvey, 1968:116), fails to consider the problems of proof and the pressures of time: 'the court simply does not have the docket time to adequately consider each application for a labour injunction' (Tacon, 1980:8).

In Ontario, the role of the common law and the courts have been narrowed by the recent attempts of the Ontario Labour Relations Board to regulate picketing by way of its authority to regulate strikes. The Labour Relations Act provides that no person shall do any act if he or she knows, or ought to know, that as a probable and reasonable consequence of the act, another person will engage in an unlawful strike or lock-out, with the exception of an act done in conjunction with a lawful strike or lock-out.[49] Read in conjunction with the section which

prohibits calling or authorizing, or threatening to call or authorize, an illegal strike the OLRB believes the Act establishes 'a comprehensive framework for the regulation of picketing', and creates in the Board a parallel forum to which the Ontario courts may defer (Adams, 1985:653-4).

In fact, actions in tort add little to what is now available from the OLRB. The doctrines of civil conspiracy and inducing the breach of contract are now unnecessary because the OLRB will issue a cease and desist order to restrain picketing in conjunction with an unlawful strike (Sack and Mitchell, 1985:509) and can order an end to picketing for recognition or before the conclusion of the conciliation process on the grounds that such activity is likely to cause an unlawful strike. The OLRB has also prohibited picketing in conjunction with a lawful strike. In the construction industry, common site picketing has been declared unlawful when the work of the striking tradesmen was not being performed and separate entrances had been provided for the employees of the contractors not involved in the dispute.[50]

The tort of conspiracy to injure is likewise unnecessary to protect third-party employers. Initially, the Ontario Labour Relations Board drew no distinction between primary and secondary sites. Confident of its power to restrain unlawful work stoppages, it refused to interfere with picketing in connection with a legal strike at any location. In Canteen of Canada[51], strikers from Toronto were allowed to picket locations of their employer in Windsor and Cambridge. But such sweeping protection is no longer given. In a subsequent case, a union was directed to stop picketing because the party performing the struck work was not an ally, but a competitor, of the principle employer.[52] How

far the protection will be narrowed is unclear. Speculating, the Board has said that the transfer of struck work would undoubtedly justify expansive picketing. At the other extreme, the picketing of the premises of a geographically removed, secondary employer would not be protected. Asking without deciding whether its approach in Canteen of Canada was too generous, the OLRB said that the legitimacy of picketing a functionally separate location might have to rest on the rationale that the employees are entitled to picket an employer's entire economic domain.[53]

Canteen of Canada makes a great deal more industrial relations sense than the 'per se' doctrine. By outlawing secondary action the law indemnifies third parties by confining the scope of a dispute to those immediately involved. Logically, therefore, the distinction between primary and secondary picketing should not be locational, Beatty (1974) argued. Of interest is the relationship between the parties. If there is no functional relationship, picketing, even at the site of the dispute, should be enjoined. But when the secondary employer is functionally integrated with or economically dependent upon the primary employer picketing should be permitted. Only picketing that involves third parties differently or to a greater extent than would a simple strike should be outlawed.

With frequent missteps the courts were wending their way the direction of 'functional analysis', Beatty (ibid.:411-414) concluded. In one case, picketing was described as primary because the third party had involved itself in a labour dispute by agreeing to perform struck work. Similarly, a firm that rented its premises to a struck employer for the purpose of continuing its operations was considered a legitimate target

for picketing. And in the Aristocratic Restaurants case, the Supreme Court of Canada agreed that the union representing the employees at one location was entitled to picket other restaurants in the same chain (so long as the picketing was informational and free of other tortious or criminal conduct): 'The fact that two of the restaurants were not within the unit of employees for which the Union was authorized to act does not affect the question; the owner's economic strength is derived from his total business; and it is against that the influence of information is being exerted.[54],[s]

The tort of inducing breach of contract is equally redundant nowadays; indeed, it is difficult to see how it has any relevance at all in the face of comprehensive labour relations legislation. A union can hardly be said to have induced lawful strikers to break their contracts of employment.[t] Picketing might be said to induce workers not involved in the strike to break their contracts of employment but whether the breach should fall on the heads of the pickets is arguable. In any event, the Board will exercise its power to order workers to stop picketing where their activities are causing, or are likely to cause, an

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[s]Judges were sometimes too permissive, Beatty (1974:413) thought. The use of common ownership and control to categorize picketing away from the site of the dispute as primary allowed unions to expand a dispute beyond 'what is acknowledged by all to be legitimate consequences of an effective strike'. The doctrine of common ownership and control was irrelevant to, and often in conflict with, functional analysis. Thus, he objected to the finding that the picketing of a second plant, physically removed from the site of a labour dispute, was lawful. The site, a wet-process salt mine owned by the employer of the strike-bound, dry-process mine, was functionally independent and, therefore, uninvolved in the dispute.

[t]According to the s.1(2) of Labor Relations Act, strikers are employees.

unlawful strike and order strikers back to work once their stoppage is declared unlawful. And while it might technically be possible for pickets to induce unorganized workers to break their contracts of employment, this is rarely (if ever) the union's objective. Ordinarily, the persons concerned are managerial personnel and, on occasion, strike replacements whose refusals to cross a picket line can safely be attributed to their inability to do so.

In most circumstances, the Board's remedial authority is adequate to protect contracts to purchase or supply goods or services as well. A third-party employer has a ready remedy against its own employees if they engage in an unlawful strike by refusing to handle struck goods or, if striking workers attempt to procure a breach of contract indirectly by picketing (or by threatening to picket) the premises of a third party, the OLRB will direct the workers and the union to cease and desist unless the third party is allied with the primary employer. In addition, employers can lodge a grievance against a union that supports an unlawful strike and may discipline workers who refuse to work as directed.

Those who advocate extending the Labour Relations Act to include picketing do so on the assumption that the Labour Relations Board understands and is sympathetic to the policy of encouraging collective bargaining. The courts, by contrast, are known to be hostile. Judges, Carrothers (1964:5) said, have a 'defective perception of the nature of the industrial conflict and [a] bias against both collective action and the institutions of collective action'. But while the OLRB has a more enlightened view of industrial relations, unions will find little comfort in its picketing decisions. Whether regulated by the Board or the

courts, effective picketing is unlawful. Thus, whether it is an injunction issued by an anti-union judge or a cease and desist order issued by a more sympathetic Labour Board is of little consequence. The result is the same: unions are denied an important sanction at a critical time.

The law[u] respecting secondary boycotts, Weiler (1985:352) concluded, is unfair and one-sided because it 'hampers the waging of an effective strike, especially by a new, weak bargaining unit struggling to achieve a first contract'. The economic contest is particularly unequal when workers are bound by the narrow confines of the single-establishment bargaining unit while their employer has access to the financial and productive resource of the firm as a whole. For collective bargaining to work effectively, there must be a distribution of power which, 'while not necessarily equally balanced between the two sides, at least is not so unequal as to induce either side to feel it is being coerced' (Fox, 1985:144). Yet, not infrequently, the law pits small groups of 35 employees against large, multi-establishment (if not multi-national) firms. The workers, furthermore, are legally isolated, unable to call upon the resources of other, more powerful, groups. Corporations, by contrast, have 'deep pockets'. Goods and people may be moved from place to place while the losses sustained at any one location may be spread across the business as a whole.

The critical importance of this difference was illustrated by Craypo (1976) who described how Trailways, a major firm in the American inter-

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[u]Weiler was analyzing the American law which restricts unions somewhat less than Canadian law.

city bus industry, was able to use the full extent of its considerable financial power to resist workers' demands. Historically, Trailways paid lower wages and provided poorer benefits than its principal competitor, Greyhound. Understanding the source of its advantage, Trailways successfully resisted a joint petition from its unions requesting the National Labour Relations Board to conduct a representation vote which, if successful, would have resulted in the consolidation of the firm's many divisions into a single, national negotiating unit. By judicious use of whipsawing, Trailways undercut the union's bargaining power by diverting work from high to low-wage subsidiaries. In addition, the company was able to absorb substantial strike-related losses by subsidizing the cost of resistance in one subsidiary out of the earnings of another. A three-year strike against one division had no effect on operating profits because, the president explained, 'We just make 'em up from the other subsidiaries'.[v] Trailways also used its corporate structure to isolate local decision-makers. More than once, negotiators concluded agreements only to discover the subsidiary was about to be cut-back or shut-down.

The Board's approach in Canteen of Canada makes industrial relations sense because it permits unions to picket the firm as a whole. But whether its acceptance would make any practical difference is arguable. Picketing is lawful only if it has no impact. Effective picketing, that is, picketing that interferes with the movement of goods and people, would still be unlawful and quickly enjoined. Consequently, unless the right to picket were accompanied by a right in employees to

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[v]Quoted by Craypo (1976:286).

refuse to cross a lawful picket line or handle struck goods without fear of reprisal, the change would be ephemeral.

Conclusion

The law is far from even-handed in its regulation of bargaining tactics. Legal constraints on the right to strike and picket sharply curtail the effectiveness of workers' actions while employers are virtually unfettered. The ban on untimely stoppages means that workers cannot lawfully bring economic pressure of any kind to bear on their employers during the lifetime of a collective agreement: slow-downs, work-to-rule campaigns, and overtime bans are all unlawful if they restrict or limit output. Picketing is also unlawful if a strike would be untimely. Employers, by contrast, are free to run their firms as they see fit. Technically, of course, they are obliged to observe the terms of an agreement or face a grievance but even when an agreement has been breached employees are required to 'work now and grieve later'. When exercising their residual rights employers can act with impunity. Despite what may be massive changes, workers are shackled by the ban on mid-agreement strikes even when they have no recourse through the grievance-arbitration process. Workers whose anger goes untempered may find themselves in a precarious position as discipline and dismissal are considered appropriate penalties for those who lead or participate in unlawful strikes.

Constraints on the timeliness of strikes undercut the effectiveness of lawful stoppages as well. Their predictability allows employers to warn their customers, build up stockpiles, or even relocate equipment and

machinery. During the course of a strike, employers have every right to maintain full-scale production and are entitled to restrain pickets who trespass on private property or interfere with the movement of goods or people. Employers are equally free to post other employees to strikers' jobs or hire strike-replacements. Strikers are not even assured of returning to work after a dispute is settled. Their right to reinstatement under the Labour Relations Act is a slim guarantee, generally useful only when a union has been utterly defeated.

The effect of the law is to leave workers divided and isolated. They may not solicit the support of others sympathetic to their cause. Any attempt to broaden the parameters of a strike, even within the same firm, is almost certainly unlawful. Secondary picketing is banned unless a third-party has allied itself with the struck employer. In any event, lawful sympathetic action is virtually impossible. Workers who attempt to support the strikes of others will find themselves accused of participating in an unlawful strike if they refuse to cross a picket line or handle struck goods in combination or in concert with others. Acting as individuals, they are liable to be disciplined for insubordination.

The law, quite obviously, institutionalizes a power imbalance. Small, fragmented groups of workers frequently negotiate with large, powerful employers for a first agreement. And many of the tactical advantages that workers might have are undercut by the severe constraints on the right to strike and picket. If the bargaining becomes a contest of strength, in these circumstances, it is a contest that many unions cannot hope to win.

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Chapter 7

THE DUTY TO BARGAIN IN GOOD FAITH

Critical opinion is sharply divided over the wisdom of using the law to force labour and management to bargain in good faith. Those who champion voluntarism and 'free' collective bargaining consider the duty to bargain in good faith, at best, a fiction. Because economic power is the driving force in collective bargaining, intervention by a labour board is useless, if not positively harmful. No less a body than the Task Force on Industrial Relations considered the duty to bargain in good faith to be a mere platitude:

> We see no reason why the subject matter of bargaining should not include anything that is not contrary to law. As to tactics, the highest duty that should reasonably be placed on either party to a bargaining situation, in which each has a claim to preserve its freedom respecting its bargaining position, is to state its position on matters put in issue. But we cannot envisage such a duty being amenable to legal enforcement, except perhaps to the extent of an obligation to meet and exchange positions (Woods, 1968:163).

The contrary opinion holds that the duty to bargain in good faith is the very linchpin of the Labour Relations Act to which all else is ancillary. Certification is no more than a preliminary step; it merely gets the union to the bargaining table. The real purpose of the Act is collective bargaining and for this reason the duty to bargain in good faith is vital. Nor should the Board be reticent about intervening to advance the fundamental purpose of the statute. Undue reverence for abstract principles like freedom of contract distorts rather than reinforces the policy of encouraging the growth collective bargaining.

In practice, the Ontario Board falls somewhere between these extremes. On the one hand, it is quite prepared to supervise the conduct of the parties to ensure that they meet with regularity and pursue their

obligation to make every reasonable effort to make a collective agreement with diligence. On the other hand, the Board draws the line at regulating the content of bargaining. The parties are not, it emphasizes, obliged to make a agreement, only try. There is nothing in the Act which gives the Board the right to judge determine the demands of the parties or to force them to make concessions. Hard bargaining is perfectly lawful even when the result is no bargaining.

Whether the OLRB should be more aggressive in its application of the law is the subject of this chapter. Its reluctance to intervene only sharpens the disparity in bargaining power rooted in the law. In any event, the Board's standard remedy for a breach of the duty to bargain is a predictably weak order directing the parties to bargain in good faith. Even the new measure of first-agreement abitration is unlikely to work where the failure to conclude an agreement results from an employer's unwillingness to accept collective bargaining.

Good Faith

The Labour Relations Act requires the parties to bargain in good faith and make every reasonable effort to make a collective agreement,[1] but it does not require them to agree. So long as they bargain in good faith, 'the collective agreement which they ultimately reach, or whether they conclude any collective agreement at all, must ultimately depend upon the ability and economic power which they can bring to bear in bargaining'.[2] Fruitless negotiations are no more than 'an indicator that the parties have not met the obligation'[3]; failure to agree 'may be a simple function of unreasonable demands' (Adams, 1981a:154).

As interpreted by the OLRB, the duty to bargain in good faith is first and foremost procedural. The Board demands 'good bargaining practice', that is, the parties must attempt to resolve their difference through a rational, informed process in order to minimize the potential for 'unnecessary' industrial conflict: 'Rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them'.[4] Central is the obligation to engage in full and frank discussion. Decisions which may 'precipitate strike or lock-out obviously require, as a matter of public policy, open and full discussions'.[5] Bargaining, particularly bargaining for a first agreement, must be pursued with reasonable diligence and may obligate the parties to attend conciliation or mediation meetings. However, the exhaustion of the conciliation process does not extinguish the duty, although 'the nature and extent of the bargaining in which a party is required to engage may change as the collective process progresses and will depend on such factors as whether one of the parties has requested the other to resume negotiations, whether the party making the request has indicated that it is prepared to make significant concessions, and whether a strike or lock-out is in progress' (Sack and Mitchell, 1985:463). The premature use of sanctions, or threat of sanctions, is both unlawful in itself and a breach of the duty to bargain in good faith.

Conduct which inhibits or undermines the decision-making capability of the other party is a breach of the duty. An employer's failure to explain the rationale for its final position on wages,[6] or to detail how

the spending guidelines of the Ministry of Health impinged on management's wage decisions[7], constituted bad faith. In the Board's opinion, full discussion might have convinced the employer that it was not in the financial straitjacket it assumed. But even if the constraints were absolute, the obligation to discuss remains because collective bargaining is an exercise in decision-making and to make informed choices the union must have the necessary information.[8] Full and frank discussion was similarly precluded when an employer asserted its own interpretation of the anti-inflation guidelines and refused to discuss any other.[9] And by extension, it was unlawful for a council of trade unions to insist on resolving a jurisdictional dispute before proceeding to other issues: 'the duty to discuss fully does not permit a party to discuss the issues of its choice to the exclusion of all others'.[10]

Following from the obligation to engage in full and frank discussion is the obligation to provide information. It was 'patently silly', the Board said, for the union to be 'in the dark' because the employer refused to provide wage and job classification data.[11] Information of this sort is now a basic requirement for employers, particularly when the union is a newly certified bargaining agent.[12] The full extent of this aspect of the duty to bargain has yet to be adumbrated, although in one case the OLRB ruled that 'disclosure and explanation of an employer's financial position will, in some circumstances, be as necessary to informed bargaining as the disclosure of employee wage data'.[13]

It also follows that if the employer is obliged to engage in full and frank discussion and to provide the union with necessary information,

the information must not be false. 'It is self-evident to the Ontario Board that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which bargaining decisions are made' and so alien to the collective bargaining process and contrary to the Act.[14] Accordingly, reneging on a tentative agreement constituted bad faith[15] as did the last minute tabling of sixteen new demands,[16] but not the withdrawal of one previously agreed-upon item.[17] For the same reason, an employer must take the initiative to inform a union of 'those decisions already made which may have a major impact on the bargaining unit' and must respond honestly when questioned, but is not obliged to reveal on its own initiative, 'plans which have not become at least de facto decisions'. Accordingly, it was not unlawful for Westinghouse[18] to withhold information about tentative plans to relocate its factory to another city.

The substantive element[a] of the duty to bargain is less readily described. Good faith in this sense is the 'absence of the intention to destroy the union's bargaining rights' (Adell, 1980:19). Thus, conduct which undermines the union's status as exclusive bargaining agent is a breach. It was unacceptable for an employer to refuse to bargain though it honestly believed the union had lost its claim to represent a majority of the employees in the bargaining unit.[19] Impugning the union's credibility by disparaging its bargaining proposals and inviting workers to approach management directly were also violations of the Act,[20] as was an attempt to interfere with the right of a union to structure its own

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[a]The categories of procedural and substantive are not meant to suggest completely separate compartments, merely the Board's emphasis

bargaining committee and choose its own spokespersons.[21] And an obvious violation was the infiltration of a union during a strike. Such conduct trespasses on the exclusive domain of the union.[22],[b23]

It is the process, not the content, of bargaining that the Board primarily seeks to judge; nevertheless, it has occasionally felt compelled to restrain the parties from pressing 'illegal' demands. Unlawful are demands which conflict with other legislation such as the Ontario Human Rights Code (which prohibits discrimination on the basis of age, race, sex, religion, nationality, or place of origin) or the Employment Standards Act (which prescribes, among other things, minimum wages and maximum hours). Also improper are demands the Board believes are inconsistent with the scheme of the Labour Relations Act. Thus, it was unlawful for a union to strike in support of its demand to bring carpenters at unorganized sites under its collective agreement because the route to collective bargaining in Ontario is certification.[24] Similarly, a strike over a jurisdictional dispute was unlawful because the Act prescribes the procedure for adjudicating disagreements over work assignments.[25] And, in the Burns Meats[26] case, the OLRB decided that a refusal to bargain except in the context of a national agreement was a breach of the good faith obligation. The demand itself was not unlawful, national bargaining may be raised and discussed, but not pressed to impasse.

Also suspect are bargaining demands which suggest an employer's unwillingness to recognize a union. An offer of lower wages for

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[b]The case was quickly followed by an amendment to the Act prohibiting the use of professional strike-breakers.[23]

unionized workers was unacceptable because of the implicit promise of preferential treatment for its non-union employees. It was 'plainly unlawful' for an employer 'to punish a group of employees because they have chosen union representation or to reward another group because they have not'.[27] Radio Shack violated the duty to bargain in good faith when it advanced 'patently unreasonable' demands lacking 'any semblance of business justification'. Its offer to the union provided for no increase in wages above the statutory minimum and no fringe benefits. More importantly, the company insisted on an open shop -- a demand the union felt would expose its supporters to harassment -- and a disciplinary code that prescribed harsh penalties without arbitral review.[c28] In the Board's opinion, there was 'little doubt that the employer's positions on wages, transfer, union security and rules of conduct cut to the very heart of a collective agreement' and were advanced for the purpose of provoking an untenable strike. Radio Shack was engaging in surface bargaining, 'going through the motions', with no intention of signing a collective agreement.[29]

But Radio Shack had been egregious in its disregard for workers' rights. Two ex-police officers had been hired to infiltrate the union and photograph its supporters. Five employees were dismissed; two were reinstated by the OLRB. When one had the temerity to return to work, he was removed from his regular job and assigned to work in an otherwise empty storage shed. This provoked a further complaint and a second reinstatement order. Throughout the organizing campaign, the company

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[c]When a collective agreement contains a specific penalty for the infraction that is the subject-matter of a grievance, the arbitrator may not substitute another penalty.[28]

called meetings during working hours to explain how disruptive a union would be, threatened to 'move out west' if the plant were organized, and distributed T-shirts which read on the front, 'I'm a company fink', and on the back, 'and proud of it'.

But what about the employer that has 'a fixed resolve to avoid an agreement yet is prepared to go through all the bargaining motions, including the full, free and rational discussions of positions'? (Armstrong, 1976:35) What about Eaton's?

Eaton's was exceedingly careful not to commit overt unfair labour practices and adhered scrupulously to the procedural requirements of the duty to bargain: the union was frequently acknowledged as the bargaining agent, requests for information were satisfied, there was no attempt to interfere with the composition of the union's negotiating committees, and so on. At the same time, the talks were fruitless: long, drawn-out and repetitive.[30] In the end, Eaton's offered nothing at all: no increase in wages, no increase in benefits, no job security, and contract language 'so outmoded as to be more relevant in the 1940s' (Financial Times of Canada, 3 December, 1984). The principle of seniority was rejected: suitability for promotion was based, among other things, on the employee's compatibility with the image and customer profile being attracted by the merchandise (The Globe and Mail, 4 December, 1984). Absent from the proposed agreement were wage scales and a job classification scheme. Benefits could be altered by the employer at any time and certain disciplinary disputes were not subject to arbitration.

In principle, demands of this sort are lawful. Hard bargaining, even if accompanied by harsh words or insults, is not a breach of the

Labour Relations Act. Thus, despite Eaton's admission that higher wages and benefits 'would simply encourage employees in our other stores to organize', the Board concluded that the company's bargaining stance, though hard, was lawful.[d] To ensure an agreement contains favourable terms, even 'terms which will retain for management most of the flexibility it currently enjoys and which will not result in any increase in operating costs', was a legitimate bargaining objective.[31]

The law does not require either party to put reaching an agreement ahead of maintaining its bargaining position. Thus, proposals which are unacceptable, even predictably unacceptable, are not necessarily a breach of the good faith obligation: '"best" offers are sometimes made in the knowledge that they may not be sufficient to avoid an economic confrontation'.[32] The 'trade-offs and compromises which parties are prepared to make are matters to be determined within their own judgment'.[33] So long as an employer is prepared to sign a collective agreement, though only on its own terms, it is within the law.[34]

The OLRB is reluctant to deduce bad faith from bargaining proposals alone. Divorced from anti-union behaviour, therefore, bad faith is an elusive concept. Surface bargaining, though unlawful, is readily disguised as hard bargaining so difficult to detect. An inflexible position on issues central to the negotiations is but one of the factors the Board considers relevant.[35] Bendel (1980:30) concluded that, absent other unlawful conduct, a finding of failing to bargain in good faith is unlikely. Yet, hard bargaining may be all that is needed to defeat a

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[d]Eaton's demand to write into the collective agreement a clause prohibiting all union activity on company property was found to be a violation of the Act.

union. An employer that scrupulously avoids aggressive behaviour may nevertheless be relying on its overwhelming bargaining strength to evade collective bargaining: a tough stance 'may well have a secondary (or not so secondary) purpose of disillusioning the employees about what a union can do for them' (Adell, 1980:19).

What can be said of an employer that seeks to retain its managerial prerogative intact, demands a free hand in discipline, rejects the principle of seniority, and offers a wage increase 'so small as to be tailor-made for union and employee rejection'?[36] Certainly not that it accepts the principle of collective bargaining. An employer like Eaton's is not prepared to engage in joint decision-making and takes every opportunity to by-pass the union when dealing with employees. Its willingness to sign an agreement indicates little when the proposed terms are no more than a catalogue of the existing terms and conditions of employment. To have any meaning, collective bargaining must produce something more than a booklet of rules dictated by the company.

Particularly in the context of negotiations for a first agreement, hard bargaining is suspect. Unwillingness to compromise on issues which go to the heart of the union's role in the workplace is, itself, indicative of anti-union animus. The difference between the employer that seeks to avoid signing a collective agreement and one that agrees to sign only on its own terms -- terms that it dictates -- is semantic: 'No employer ever sought to reserve complete unilateral control unless he expected the negotiations to fail' (Cox, 1958:1425). For collective bargaining to work, Fox (1985:145) observed, management must acknowledge that the union has 'proper and legitimate function within the

organization and that these include mobilizing employees to challenge its prerogative in respect of certain categories of decision'. In Canada, issues such as the use of seniority in promotion and lay-off decisions, full third-party review of disciplinary actions, and the concept of equal pay for similar work are central to the function of trade unions. An employer that adopts uncompromising positions on these issues goes beyond hard bargaining.

In a decision that opens to question the established, limited, interpretation of the duty to bargain, the Canada Labour Relations Board accepted the lawfulness of hard bargaining, yet argued that an employer that interferes with the right of employees to participate in 'meaningful' collective bargaining fails to bargain in good faith. The Canadian Imperial Bank of Commerce was such an employer: it rejected the concept of seniority; refused to submit disputes over promotion, lay-off, or recall to third-party arbitration; and declined to negotiate over wage and merit increases. The bank was determined to keep the union impotent, the Board concluded, by denying workers their 'fundamental right to participate in meaningful collective bargaining':

> Without meaningful collective bargaining the attraction for the system disappears and the possibility for revocation of the union's bargaining rights are heightened. Much more important to the bank, an ineffective union practically guarantees that collective bargaining will not spread to other areas of its establishment. In short, what we saw was the bank's uncompromising yet skillfully camouflaged rejection of the principles of the freedom of association upon which the [Canada Labour] Code is founded.[37]

The OLRB's conception of good faith is either too restrictive or too permissive. If voluntarism and freedom of contract are of paramount importance, the Board has no business telling the parties how to bargain.

As Cox (ibid.:1436) noted, 'The technique most conducive to reaching some agreement often excludes tactics most conducive to getting agreement on one's own terms'. The Board's promotion of collective bargaining as a rational process of persuasion is not self-evidently essential; nor are there criteria readily available or easily established with which to judge the parties' conduct. Why the Board should object to one party insisting on resolving some issues before others[38] or why it should feel the need to direct an employer to justify its wage offer[39] if freedom of contract is of paramount importance is difficult to comprehend. Similarly, the Board's refusal to see that directing an employer to provide wage and financial data[40] or announce plans for major changes[41] alters the balance of power is perverse. In fact, it is not primarily the principle of freedom of contract that informs the Board's concept of good faith, but public policy. While it might be an intrusion on the parties' freedom to insist on 'good bargaining practice', it is certainly not inconsistent with Canada's activist labour relations policy. That the Board believes its intervention reduces the incidence of industrial conflict is sufficient grounds for intrusion.

What is inconsistent with public policy is the OLRB's insistence that hard bargaining is lawful even when it means no bargaining. England (1983:230) argued that, in a pluralist system, the bottom line 'must be that collective bargaining is not replaced by unilateral regulation'. However, this is precisely the strategy of an employer like Eaton's. By refusing to compromise on any of the issues central to collective bargaining, the employer retains its right to act unilaterally even though it meets the Board's benchmark criterion of willingness to sign a

collective agreement. References to freedom of contract by employers like Eaton's invite its use as justification for refusing to bargain collectively, an objective clearly contrary to the policy which underpins the Labour Relations Act.

Remedies for Bargaining in Bad Faith

Prior to 1975, the courts, not the Labour Relations Board, enforced the duty to bargain in good faith. Responding to the criticism that quasi-criminal penalties were inappropriate, even counter-productive, for resolving labour-management disputes, the Ontario Legislature broadened the OLRB's remedial authority to embrace any breach of the Labour Relations Act, including a breach of the duty to bargain in good faith (Bendel, 1980:3). Initially rather timid, the Board's intervention has grown bolder over time; none the less, its standard remedy remains an order directing the parties to bargain in good faith, frequently with the assistance of a mediator.

When the parties are truly uncertain about the propriety of their conduct, a bargaining order may be all that is required to start negotiations afresh. In other circumstances, an order is far less useful. Indeed, it is a particularly inadequate response when one party's intention is to frustrate the founding of a bargaining relationship. A direction to bargain in good faith operates only prospectively and does nothing to redress past wrongs. And although an employer effects sizeable savings by delaying or resisting serious bargaining, a bargaining order does nothing to compensate the employees or their union for their losses; nor does it restore their confidence in the effectiveness of the bargaining process. In any event, there is no

guarantee that the direction will be obeyed: 'the premise that simply ordering employers to bargain in good faith will succeed bears a dubious logic' (Backhouse, 1980:499-500). But other remedies have been too punitive or incompatible with the principle of voluntarism.

'Make whole' orders were initially rejected as too speculative. Because the OLRB would have to guess at what the terms of settlement might have been, such an order was an unwarranted violation of freedom of contract. Twice, the OLRB considered whether it had the power to impose a collective agreement and twice avoided the issue by arguing that the remedy was not appropriate in the circumstances. In one case, the Board felt the parties were 'quite capable of arriving at their own agreement provided the employer immediately commences to bargain in good faith and makes all reasonable efforts in the direction of making a collective agreement'.[42],[e] In the other, both parties were found guilty of bad faith.[43],[f],[g],[44],[45] Accused of putting its most effective remedy beyond its reach, the Board finally addressed the question squarely in Radio Shack.[46] The answer was a resounding no. Though sorely tempted, the

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[e] No agreement was ever reached.

[f] In this case, an agreement was negotiated; however, the bargaining relationship was a long-established one.

[g] In another case [44] an employer was directed to sign an agreement on terms it had already agreed to. The employer was refusing to finalize the agreement because it felt that to do so would prejudice other legal proceedings in which it was challenging the union's right to certification. Noting that the agreement would be invalid if the certification were struck down by the courts, the OLRB directed the employer to sign. And in a fourth case, [45] the Board directed a union to sign an agreement on the terms approved by a vote of its members. The Act provides that an employer may request a vote on its last offer and though the section makes no mention of the result of the vote, the OLRB ruled that its binding effect could be deduced from the Legislature's intent.

OLRB concluded that its jurisdiction did not encompass the imposition of a collective agreement. Radio Shack's dismissive attitude had enraged the Board. Its orders had been flouted: 'treated as a licence fee for continued violations'. But the Board could do no more, it said: the Act had been pushed to its limits.

At the same time, the need for a remedy stronger than a simple direction to bargain in good faith was apparent.[h] To ensure that wrong-doers do not benefit from their unlawful conduct, the OLRB was prepared to issue a general damages award. Radio Shack was directed to pay employees all monetary losses that could reasonably be established as arising from the loss of an opportunity to negotiate a collective agreement, plus interest. The union was awarded all of its negotiating costs to the date of the decision and all of its extraordinary organizing costs resulting from the employer's unlawful conduct (but not its legal costs). Such an order did not amount to the dictation of terms and conditions of employment, the Board concluded:

> While we admit that monetary relief based on the collective agreement that would have been negotiated had there been good faith bargaining requires the assumption that an agreement would have resulted, awarding no monetary relief is tantamount to assuming no agreement would have arisen out of good faith bargaining. Clearly, reality is usually somewhere in between in the sense that either proposition may be valid in any particular case. What trade unions like the Complainant and the employees it represents lose in cases of this kind is 'the loss of opportunity' to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time.[47]

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[h]Though technically possible, the Board almost never consents to prosecution. So rare is the remedy, it is not even discussed in the seminal work on law and practice before the OLRB. See Sack and Mitchell (1985:473).

The Board was confident that sufficient data were available for the parties to make an informed estimate of the amount of wages and benefits forgone as a result of the employer's failure to bargain in good faith.

In addition, Radio Shack was ordered to bargain in good faith with the assistance of a mediator, to make a full proposal of the terms and conditions it would consider acceptable as a collective agreement, and to drop its demand for a voluntary dues check-off; ordered to cease and desist from all activities found to be in violation of the Act, specifically, engaging in surveillance of employees, intimidating and coercing employees into quitting the union, causing employees to act as informers, communicating directly with employees, and any other acts of interference with the workers' statutory rights; ordered to post for sixty days, and to mail out, publish, and read aloud to the assembled workforce, a notice explaining the violations of the Labour Relations Act and a commitment by the company's officers to respect its employees' rights in future; and ordered to provide the union with an updated list of employees' names and addresses, allow the union access to company bulletin boards, and notify the union of any meetings with employees, and to give union representatives full opportunity to respond, all for a period of one year.[48] The award was, The Globe and Mail editorialized, 'a landmark, detailing the most comprehensive set of remedies for bad faith ever given by a labour board in Canada' [i]. The cost to Radio Shack was $180,000 in payments to employees and another $150,000 in payments to the union (Meltz, 1985:324).

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[i] Quoted by Backhouse (1980:519).

All of these initiatives were confirmed on review. Though slightly scandalized by the direction to have the company's officers read the notice aloud, the Ontario Court of Appeal nevertheless accepted the OLRB's assessment that the measure was 'essential to restore the union to the position that it occupied before it was weakened by the unfair acts of the company'. The objection that the order to refrain from its position on union security was tantamount to imposing a contractual term was likewise dismissed. The court ruled that Radio Shack's rigidity on this issue was integral to its strategy to avoid collective bargaining; hence, the order was reasonable and within the Board's jurisdiction to award. The remedies, as a whole, were compensatory and not punitive and flowed from the scope, intent and provisions of the Act: novelty alone was not grounds for finding the Board's directions unreasonable.[49]

Refining its damage awards to fit other circumstances, the Board later distinguished between net and gross claims. Only the former, that is, damages amounting to the difference between what the employees would have received had they worked and what they would have agreed upon had the employer bargained in good faith were awarded, when the employees struck illegally in the face of bad faith bargaining or the employer violated the Act after the commencement of a strike (Sack and Mitchell, 1985:471-2). In Fotomat,[50] for example, the Board considered the union's decision to strike premature so decided the employees were entitled to net damages while the strike was in progress and gross damages for the subsequent period during which the employer's failure to bargain in good faith was wholly responsible for their losses.

Truly effective remedies would compensate the injured, deprive the offending party of the benefits of its unlawful conduct, and discourage further breaches of the law (Backhouse, 1980:501). And while the efficacy of the OLRB's remedies is difficult to measure, it seems likely that none of these goals has been accomplished. There was no shift in the rate of bargaining success after the Board's remedial authority was broadened in 1975. Collective agreements were negotiated by 84.9 per cent of the unions certified during the years 1970-1975[j] compared with 84.4 per cent for the years 1976-1982,[k] although the rate of bargaining success was slightly higher after the Radio Shack award.

Bad faith bargaining makes economic sense. The deterrent value of bargaining orders, notices, even the occasional damage award is minimal. Though the amounts sound impressive, damages (when ordered) fall well short of the cost of the higher wages and benefits unions typically negotiate. Freeman and Medoff (1984:46,62) reported a 'pure' union effect[l] of 20-30 per cent for wages and as high as 50 per cent for fringe benefits during the 1970s in the United States. Though less comprehensive, the data suggest that the wage effect is of the same magnitude in Canada (Gunderson, 1982). Statistics Canada estimated the unadjusted union/non-union wage differential[m] at 30 per cent in 1984 (The

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[j] For 1970, the months of March through December are included.

[k] Only the first quarter of 1982 is included.

[l] The pure union effect refers to the size of the union/non-union compensation differential taking into account confounding factors such as education, industry, sex, and so on.

[m] Unadjusted meaning that the effects of education, industry, location, and so on have not been screened out.

Windsor Star, 23 October, 1985). Thus, the savings are large for anti-union employers and on-going.

Monetary compensation inevitably falls short of the mark. Workers can never be fully recompensed for the loss of union representation. Monetary compensation is no substitute for what Weiler (1980:30) has called the 'civilizing' effect of unions on the working life and environment of employees. All the frustrations of powerlessness, low wages, and whimsical management that frequently drive workers to unionize remain unchanged. In any event, monetary compensation is rare. Only flagrantly unlawful behaviour warrants 'make whole' awards in Ontario.

Whether the law demands so laisser faire a response is a point of contention. As Palmer (1966:410) observed, there is a tendency for labour boards in Canada to 'ape the U.S.' despite marked differences in labour law and policy. It is notable that much of the reasoning that underpins the Ontario Board's refusal to impose a collective agreement in Radio Shack[51] was drawn from a decision of the United States Supreme Court[n52] in which the court expressly relied on s.8(d) of the Taft-Hartley Act which makes it clear that the duty to bargain does not 'compel either party to agree to a proposal or require the making of a concession'.[o] The comparable Canadian statutes merely exhort the parties to bargain in good faith and make every reasonable effort to make a collective agreement. Consequently, Bendel (1980:14-5) has argued that the OLRB's reverence for freedom of contract is a foreign import. The

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[n] H.K. Porter Company Inc. v. N.L.R.B[52]

[o] Quoted by Bendel (1980:13).

Table 7.1: **Percentage of Unions Negotiating Collective Agreements by Year of Certification**

	Collective Agreement Negotiated	N. Collective Agreement Negotiated	Percentage with Collective Agreeme
1970	288	70	80.5%
1971	278	47	85.5%
1972	339	69	83.1%
1973	488	67	87.9%
1974	514	80	86.5%
1975	438	85	83.8%
1970 - 1975	2,345	418	84.9%
1976	316	87	78.4%
1977	344	64	84.3%
1978	363	74	83.1%
1979	505	89	85.0%
1980	546	78	87.5%
1981	524	89	85.5%
1982#1	90	15	85.7%
1976 - 1982	2,688	496	84.4%

#1 The months of January, February, and March only.

Ontario Board has 'chosen to espouse the American reverence for freedom of contract', refusing to infer bad faith bargaining solely from the substantive bargaining proposals of one of the parties or to impose a collective agreement on the parties as a remedy for the violation of the duty to bargain in good faith. A more interventionist approach, he concluded, would not be at all inconsistent with labour relations policy in Canada.[p53]

In fact, voluntarism was not always the predominant policy concern of the Ontario Labour Relations Board. Thirty years ago, the duty to bargain in good faith was described as the 'very keystone' of the Act to which all other provisions were ancillary.[54] In New Method Laundry,[55] the Board argued, 'If the bargaining between the parties is characterized by good faith and reason, they will succeed in negotiating and executing a collective agreement'. It was 'inconceivable that the Legislature intended that, once the conciliation procedure has been exhausted, differences between employers and trade unions are to be resolved by brute force alone, and we should strive to avoid a construction of the Act which leads to such an untoward result unless that construction is forced upon us by clear and unequivocal language'.

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[p]The American statute differs from Canadian legislation in other important ways as well. In the US, for example, the duty to bargain is on-going whereas, in Canada, there is no obligation to bargain once a collective agreement has been signed. Also different is the notion of 'mandatory' and 'voluntary' subjects in bargaining. Mandatory are matters related to wages, hours, and other terms and conditions of employment (rather narrowly construed to exclude issues like contracting-out) which may be pursued to impasse. Voluntary matters, by contrast, may be raised and discussed but may not be the subject of a strike or lock-out. Until quite recently, the distinction had no resonance in Canadian law; now, the Ontario Board appears to be moving in that direction with its Burns Meats award.[53]

By its reasoning in New Method Laundry, the Board sought to align the policy of encouraging collective bargaining with that of maintaining industrial peace. Giving weight to both, the conclusion that economic power alone should dictate the outcome of bargaining was untenable. Finkelman, the Board's chairperson at the time, had previously been the registrar of the Ontario Labour Court[q] and was acutely aware of the imbalance of bargaining power that underlay the enactment of the legislation. To subsequently argue that nothing had changed, that the superior bargaining power of employers could continue to frustrate workers' demands for union representation, would have nullified the primary purpose of the statute.

The courts, however, held to a different tradition. Judges knew when the duty existed -- after conciliation, during a strike or lock-out, and so on -- but were unwilling to give it much content. Beyond the obligation to meet, the duty was described in generalities (or tautologies): 'Bargaining in good faith must involve making every reasonable effort to make a collective agreement'.[r] Applying concepts derived from contract law, the judiciary interpreted the duty to bargain as a necessarily limited obligation. It was unfortunate that the parties could not reach an agreement but 'there is no requirement of the law which says they must'. They are obliged to 'try honestly' so that 'even if they are stupid about it, so long as there is good faith in their beliefs and honest effort, and the procedures laid down by the Act have

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[q]The Ontario Labour Court had the functions of the Ontario Labour Relations Board under the Collective Bargaining Act of 1943.

[r]Decision of the Ontario Court of Appeal quoted by Palmer (1966:410).

been complied with, it cannot be said they have acted in bad faith and failed to make every reasonable effort to make a collective agreement'.

Inheriting this tradition, the OLRB did not, as the [then] chairperson later claimed, begin the task of defining the duty to bargain 'with a clean slate' in 1975 (Carter, 1978:2). Its initially expansive interpretation had been over-ridden by the court's narrower construction. Yet, neither voluntarism nor freedom of contract has been a compelling principle of labour-relations policy in Canada. Both have frequently given way to the perceived need for greater industrial relations stability.

Canada is the only western nation with an absolute ban on work stoppages during the lifetime of a collective agreement (Weiler, 1980:107) and a highly constrained right to strike at other times. Many workers have no protected right to organize and others, while organized, have no right to strike. Back-to-work legislation, though still rare, is an increasingly resorted to means of settling public sector and transportation disputes (Panitch and Swartz, 1985). Freedom of contract is further diminished by the statutory requirements respecting the contents of collective agreements: there must be a clause recognizing the union as the exclusive bargaining agent; there must be no strikes or lock-outs for the duration of the agreement; the collective agreement must be for a fixed term and valid for a minimum of one year; it must provide for compulsory dues check-off at the request of the union; and there must be provision for the final and binding resolution of disputes over the interpretation, application, administration or alleged violation of the collective agreement.[56] 'Freedom of contract competes with

industrial peace as a goal of labour policy and an uneasy tension between them is inevitable' (Bendel, 1980:14).

Labour relations policy in Canada is utterly pragmatic: voluntarism is a fine principle so long as it does not interfere with the more pressing goal of maintaining industrial peace. It is hardly surprising, therefore, that Canada has pioneered the remedy of first-agreement arbitration to bridge the legal impasse resulting from, on the one hand, the Labour Relations Board's acceptance of hard bargaining (even when the result is no bargaining) and, on the other, the Board's refusal to impose a collective agreement as a remedy for bargaining in bad faith. In British Columbia[s], where first-agreement arbitration was first introduced, trade unionists decried the measure as the 'thin edge of the wedge' and vowed never to make use of the remedy. They even persuaded the Manitoba Federation of Labour to oppose a similar provision in 1973. However, by the time the federal government was prepared to enact first-agreement arbitration, the Canadian Labour Congress was willing to admit the measure had proved useful, although it continued to voice a preference for less rather than more government intervention (Backhouse, 1980:543). By contrast, the enactment of an equivalent amendment in Ontario in 1986 was at the urging of the labour movement. Stung by many defeats, trade unionists were willing to bend their voluntaristic principles for greater equity.

Employers, however, remain adamantly opposed.[t] They fear that

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[s]First-agreement arbitration is provided for in the British Columbia, Manitoba, Quebec, Ontario, and federal labour codes covering approximately 80 per cent of the Canadian labour force (Sexton, 1987:1).

[t]But not in Quebec, apparently (Sexton, 1987).

bargaining power will be pushed aside and an agreement imposed when management adopts a tough stance motivated by legitimate business concerns. A union without the bargaining 'clout' can 'ask the province to arbitrate and a binding contract will be imposed' (The Globe and Mail, 2 January, 1986). The real cure for bargaining failure, employers insist, is not compulsory arbitration but compulsory representation votes:

> The perceived problem is the refusal of an employer to recognize the bargaining authority of the trade union. The underlying problem, however, rests with the certification process itself, whereby certification is automatic if more than 55 per cent of the total number of persons in the bargaining unit have joined the union. The automatic and often minimal nature of the certification process can result in the certification of a union that does not enjoy the true support of the people in that bargaining unit. Employers similarly are often left with the impression that the true wishes of the employees have not been represented by the process and that the union does not have the support of the employees. Both these factors contribute greatly to difficulties in negotiating a collective agreement (Canadian Manufacturers' Association, 1986:3).

Indeed, employers' hostility to outright certification is evident from the significantly lower likelihood that collective agreements will be negotiated when unions are certified without a vote. Despite the generally higher level of membership support in outright certification cases, collective agreements were concluded only 83.9 per cent of the time compared to 89.0 per cent when bargaining rights were granted pursuant to a vote.

As conceived in British Columbia, first-agreement arbitration was to be an extraordinary, not a universal remedy. 'We did not contemplate binding arbitration as the standard response to a breakdown in first-contract negotiations', said Weiler (1980:51-3), then the chairperson of

the BC Labour Relations Board. It was fashioned for the 'truly exceptional cases': 'a sharp surgical instrument for lancing those running sores in the body of industrial relations', the kind of dispute that 'deteriorates into an emotional and messy confrontation, in which the parties not only are inflicting disproportionate harm on each other, totally out of line with the negotiating issues which divide them, but their willingness to escalate the dispute is drawing others into the melee -- sympathizers, the police and public authorities, or third-party employers'. The immediate objective was to put an end to the dispute and, more generally, to provide a year[u] of 'trial marriage' during which the Board assumed experience would dispel the employer's paranoia about collective bargaining.

But the problem of first-agreement bargaining failure goes well beyond the messy strike. There are few causes célèbres of the sort described by Weiler. In Ontario, most unions die quietly: no strike, no picket line, no violence. Of those unions unable to negotiate first agreements during the 1970s, only one union in ten[v] was involved in a work stoppage.

It is this broader problem which the recent amendment to the Ontario Act appears to address. The Labour Relations Act now provides that when the parties are unable to effect a first collective agreement (and the conciliation process has been exhausted), either union or management may

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[u]The BC statute provides for a one-year agreement only. The Manitoba, Ontario, and federal Acts stipulate two-year agreements; the Quebec Code allows for three years. Weiler now believes that one year is too short a time to allow the bargaining relationship to mature.

[v]The precise figure was 10.5 per cent.

apply to the OLRB to direct a settlement of the outstanding issues by arbitration. In considering the request, the Board determines whether bargaining has been unsuccessful because of the employer's refusal to recognize the bargaining authority of the union, the respondent's uncompromising bargaining position taken without reasonable justification, the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement, or any other reason the Board considers relevant. If arbitration is directed, no employee may strike and no employer may lock-out an employee or if a strike is in progress

Table 7.2. Method of Disposition of Certification Applications, by Outcome of Bargaining

Fiscal years 1970-71 to 1981-82

	Certification granted without vote (#1)	Certification granted after vote	Total
Collective agreement negotiated	4,318	715	5,033
No collective#1 agreement negotiated	826	88	914
Total	5,144	803	5,947
Proportion with collective agreements	83.9%	89.0%	84

$X^2 = 13.9^{**}$
(1 degree of freedom)

**Significant at the .01 level.

#1 Includes 44 cases in which the union was certified without a vote as a r
for unfair labour practices.1

the employer is directed to reinstate the strikers, notwithstanding the presence of replacements. The arbitrated agreement is of two years duration.[57]

Had the grounds for intervention been limited to those associated with the duty to bargain in good faith -- refusal to recognize the union and failure to make reasonable efforts to make a collective agreement -- the legislation could be said to have had in mind a Radio Shack, not an Eaton's. The Minister of Labour, however, said the amendment was intended to provide broad relief. Eaton's was precisely the sort of bargaining impasse the government sought to remedy: 'There are times when intransigence in negotiations is symptomatic of a more basic resistance to collective bargaining', he said. While not proposing 'a risk-free alternative to the present system', the expectation was that 'certification should lead to a collective agreement' (Ontario, Legislative Assembly, Debates, 1985:1809-1817).

The Ontario Act appears to go considerably further than Weiler contemplated but whether the Board will impose an agreement to remedy hard bargaining of the sort practiced by Eaton's remains to be seen. Within six months of the enactment of the amendment, the OLRB received 30 applications for a direction to arbitrate : 4 of which were granted and 7 refused. There were, in addition, 2 cases pending and 17 instances in which an agreement was negotiated and/or the application was withdrawn.[w] In its first published decision[58], the Board granted the union's request for an arbitrated agreement because the employer refused to accept collective bargaining. In this case, however, hard bargaining

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[w]Data provided by the Ontario Labour Relations Board on request.

was coupled with unlawful dismissals and a tainted anti-union petition. To date, no straightfoward Eaton's-like case has been decided.

But how successful is arbitration? Does the trial marriage work?[x] Does an arbitrated agreement lay a sound foundation for a mature bargaining relationship? Of the experience in British Columbia, Weiler (1980:54) concluded:

> By and large, these collective bargaining relationships did not mature. The unions were decertified after the expiry of the contract which we had imposed. These bargaining units tended to be small, employee turnover was high, the union was not able to retain or to rebuild its support, and the employer remained hostile throughout the entire experience.

Of the 12 agreements imposed[y] by the previous NDP government, the majority failed to negotiate a second agreement. The unions were either decertified or the companies went out of business (Financial Post, 11 January, 1986). A change of government coupled with the fact that applications come to the Board by way of the Minister of Labour has resulted in no referrals since 1979. Elsewhere, the experience with first-agreement arbitration has been equally mixed. Between 1978 and 1987, the Canada Board intervened in only 19 disputes and imposed a first agreement in 10[z]. In Manitoba, arbitration was imposed 12 times between 1982 and 1986; in another 11 cases, the dispute was settled and an agreement negotiated with the Board's assistance. Seven of the imposed

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[x]Or, in the idiom preferred by the Canada Board, Does the transplant take?

[y]There were 30 applications in total.

[z]Data supplied by the Canada Labour Relations Board. The Canada Board does not follow the history of the agreements it imposes.

agreements have expired and only 4 were subsequently renegotiated (Korpesho, 1986:4).

In terms of the volume of cases at least, Quebec's experience has been quite different. The amendment came into force in 1978 and by the end of 1984 there had been 376 requests for arbitration addressed to the Minister of Labour, 205 of which were granted. But only 88 agreements were imposed by arbitration because, in 63 cases, the parties negotiated an agreement before the arbitration board finished its work. In 12 other cases, the Board decided not to intervene, in 13 cases the request was withdrawn, and in 8 the union's certification was cancelled.[aa] Following up the 88 agreements imposed by arbitration, Sexton (1987:11-2) found that of the 72 for which information was available, the union's bargaining rights were terminated or the plant shut down in 26. A newspaper report of another study stated that of 26 agreements imposed between 1978-81, only 11 were renewed. (Financial Post, 11 January, 1986).

Despite an equivocal record of success, commentators have argued that first-agreement arbitration is a most valuable deterrent to anti-union employers (Weiler, 1980:54-5; Muthuchidambaram, 1979:20; Sexton, 1987:15) and that the intervention of a Board has often spurred the parties to settle. As a remedy for bargaining in bad faith, first-agreement arbitration is far superior to the Board's conventional measures which typically fail to compensate, cure, or deter. The improved terms and conditions of employment deprive an employer of some

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[aa] Of the remaining 21 cases, in 8 the plant was closed, in one the arbitration board decided it had no jurisdiction to proceed, and in 12 arbitration was underway when the data were compiled.

of the benefits of its anti-union behaviour, even though arbitrators have generally been quite conservative in their monetary awards. Their non-monetary awards have been more generous (Sexton, 1987:13), however, and the availability of grievance arbitration protects union supporters from victimization.

As a counter-weight for hard bargaining, however, first-agreement arbitration falls short of the mark, principally because it cannot correct the imbalance of power which often underpins a union's inability to negotiate an acceptable collective agreement. From her study of organizing in the banking sector, Lennon (1980:236) decided that first-agreement arbitration as presently administered could do a little to aid the growth of unions but is 'not the answer to inequities of bargaining power embedded in the structure of an entire economic sector'. The problem is deep-seated and long-term and 'cannot be solved by a procedure grounded on the assumption that the system is basically viable and calls for state intervention only rarely in exceptional situations'. A union too weak to negotiate acceptable terms and conditions of employment in the first instance can be defeated by hard bargaining in the second round. So long as there are weak unions, Cox (1958:1413) warned, 'there will be employers who are tempted to engage in the forms of collective bargaining without substance'.

Conclusion

Critical opinion remains sharply divided about the usefulness of a legally imposed duty to bargain. Most severe in his criticism was Palmer (1966:417-8) who thought the concept a contradiction in terms:

> In fact, 'good faith' is not a part of the bargaining process and, indeed, seems impossible of attainment under the conditions of the existing economic system. Unions and companies are bodies actuated by self-interest and their conduct reflects this fact. Thus, to impose the concept of good faith into their mutual activities is to introduce a fiction. Unfortunately, it is a harmful fiction because it distracts the parties from the central purpose of working out an agreement and stimulates the negotiators to build up a case for an unfair labour practice or to go through the charade of adhering to the objective tests of good faith then prevailing.

Others have been less troubled by fundamentals. Identifying the problem as primarily one of enforcement, these commentators thought the difficulty largely resolved when the remedies of labour boards were substituted for the penalties of the courts.

As interpreted by the OLRB, the duty to bargain in good faith does little to correct the imbalance of power institutionalized by the law. The Labour Relations Act requires only that the parties make every reasonable effort to make a collective agreement; it does not oblige them to agree, or even to make a concession. As a practical matter, therefore, the duty to bargain in good faith is primarily a procedural standard. The parties must meet regularly, exchange proposals and counter-proposals, provide essential data, discuss their disagreements fully and frankly, and so on. Otherwise, however, the parties are largely free to determine their own demands and bargaining strategies. Certain demands are unlawful per se, but for the most part the restriction is a relatively narrow one that precludes demands which, if granted, would punish workers for joining a union or violate other statutes.

Although the Board has, on occasion, rejected demands which it considered patently unreasonable, it has no desire to judge the substance

of bargaining and apart from other obviously anti-union conduct, has no criteria by which it would make these determinations. The less intervention, the better, the OLRB believes. In a system of free collective bargaining the parties must stand or fall on the strength of their own bargaining power. The duty to bargain in good faith was never intended to redress an imbalance of power and should not be used as an equilibrating mechanism.

In the Board's decisions, bargaining power is often discussed as though it were a naturally occurring, fixed commodity unaffected by public policy. In fact, however, the law does much to shape the relative power of the parties. The practice of certifying unions on a single-establishment basis and even smaller groupings of office, manual, full and part-time employees, fragments the bargaining power of workers. Coupled with the legal constraints on the right to strike and picket, the result is that small, legally isolated unions are frequently bargaining with large, powerful corporations. And even though the contest is clearly unequal, when bargaining fails the Board responds with pieties about the virtues of free collective bargaining.

The Eaton's dispute illustrates the problem workers sometimes encounter when they confront an employer unwilling to negotiate an agreement on anything other than its own terms. With less than 3 per cent of the workforce organized, the union was unable to exert the pressure required to force Eaton's paternalistic owners to accept collective bargaining. Those who survived the six-month strike won a victory of sorts, but the agreement was on terms dictated by the company. Not long afterwards, the union's bargaining rights were terminated for

all but four of its bargaining units (Windsor Star, 6 June, 1987). Even first-agreement arbitration, much touted as the necessary antidote to anti-union employers, would have been of questionable help had it been available.[bb] In Manitoba, arbitration was imposed to end a first-agreement dispute at the Eaton's store in Brandon. The company soon retaliated, cutting back its operations because, it said, the higher wages made the store unprofitable. Not surprisingly, the workers responded by circulating a decertification petition and the union was forced to agree to a reduction in wages to save its bargaining rights. Even so, the Manitoba Labour Relations Board has ordered a representation vote.

Whether the law can impose an effective obligation to bargain in good faith may ultimately depend less on the willingness of the Labour Relations Board to intervene or on the remedies it imposes and more on the way in which the law shapes the bargaining power of the parties. At present, the law in Ontario helps create and entrench an imbalance of power. The structural weakness of unions rooted in the law coupled with their unequal access to resources leaves many ill-equipped to pressure reluctant employers to bargain seriously. Unless these fundamental imbalances are redressed, neither bargaining orders nor damage awards, nor even compulsory first-agreement arbitration, is likely to induce anti-union employers to accept collective bargaining.

[bb] The amendment to the Labour Relations Act was made a year later.

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IV. CONCLUSION

Chapter 8

DO THE OLD LAWS STILL WORK?

The growth of unions in Canada is inextricably linked to the extension of collective bargaining. And for unions to grow in the 1980s, collective bargaining must take root in the trade, finance and services industries. Traditionally a hostile environment for unions, the tertiary sector may now be organizable. Women and part-time employees are seeking union representation in unprecedented numbers. But the desire for collective bargaining is not enough. Unless workers can overcome the ingrained anti-unionism of tertiary sector employers their organizing efforts will flounder and fail.

In the past, PC 1003 was a firm legal foundation for the growth of collective bargaining. Following its introduction in 1944, union membership doubled in the space of ten years. But since the mid-1950s unionism in the private sector has been stagnating. The dominant firms in the resource, manufacturing, and transportation industries have been brought under collective agreement, but beyond these boundaries union membership is sparse. Nor is change likely. Far from encouraging the growth of unions, the effect of the law today is to exaggerate the obstacles in the path of unions. This is particularly true of the tertiary sector where workers are scattered in small groups and the ordinary economic sanctions are less effective. To overcome these barriers, the right to bargain collectively will have to be reinforced and the ability of employers to refuse recognition undercut.

By shifting the balance of power in labour's favour, changes to the law may encourage the growth of unions in the tertiary sector. But there

are limits to the effectiveness of the law. No amount of legal intervention can eradicate the fact that collective bargaining is, ultimately, a voluntary relationship and functions well only when workers have the power to curb management's ability to make decisions unilaterally. The effectiveness of the law, therefore, depends largely on the balance of power between labour and management, a balance which is influenced by the law but is even more fundamentally shaped by the labour market.

Collective Bargaining and the Law

Prior to 1939, workers were free to organize, but the law recognized no right to do so. In any event, most forms of collective activity remained unlawful. Even after the Criminal Code was amended to prohibit dismissal for union activity, the right to organize was more nominal than real. The ineffectiveness of the criminal enforcement mechanism and the absence of suitable industrial relations remedies left anti-union employers unprosecuted or with risible fines while workers dismissed in violation of the law were neither compensated nor reinstated. The right to strike was equally vague. Apart from the minority of workers covered by the Industrial Disputes Investigation Act and its provincial equivalents, workers could rarely strike with impunity as there was no immunity from the common law torts of civil conspiracy, breach of contract, nuisance, and so on.

The advent of World War II extended to most industrial workers the limited right to strike embodied in the IDIA. The unlawfulness of untimely stoppages under the Act established, by implication, the legality of strikes preceded by tri-partite conciliation. There can be

no doubt that the rights of industrial workers were thus greatly enhanced. In less than two years, union membership increased by more than 25 per cent. Yet, by itself, this change was far from decisive. Of much greater importance was the shift in the balance of power between labour and management resulting from the growing labour shortage. Canada's early entry to the war meant that by 1941 factory workers were in short supply. So dire was the situation that the federal government found it necessary to impose strict constraints on the mobility of labour, including constraints on management's right to hire and fire. In these circumstances, strikes were an effective threat.

Still, workers were thwarted in their attempts to organize. Employers either refused flatly to recognize trade unions or, like Ford, dissembled: negotiating collective agreements under duress but otherwise acting as though collective bargaining were a war-time necessity that would not survive the return to peace. Public policy, meanwhile, encouraged but did not require collective bargaining. Uninterrupted production was the over-riding goal of the federal government to which all other considerations were ancillary. Labour relations policy, consequently, was ad hoc and focused almost entirely on the prevention of work stoppages. While the government professed a preference for collective bargaining, it did nothing to ensure its adoption. Indeed, whenever workers successfully increased the pressure on employers, it responded by placing more obstacles in the way of lawful strikes. New orders-in-council further impeded strikes by adding industrial inquiry commissions to the already lengthy conciliation process and, in 1943,

compulsory strike votes. So many were the delays and interventions that labour's new-found bargaining power was often frittered away.

But the push from below was relentless. Even with strictly enforced wage controls, workers flocked into unions. By 1943, the crisis in industrial relations was palpable. The government's temporizing could no longer provide the desired level of economic and social stability. It was forced to concede that coercion was an ineffective policy and that compulsory collective bargaining was the only workable alternative. The balance struck combined the American ideas of certification, duty to bargain in good faith, and prohibition of unfair labour practices with the Canadian pre-occupation with constraining strikes and lock-outs, an amalgam which fell well short of truly 'free' collective bargaining, yet gave labour considerably more scope for the use of economic sanctions. Thus, even though Privy Council Order 1003 was not inspired by a desire to encourage the growth of unions, it did provide a workable framework for the extension of collective bargaining to manual workers in the mass-production industries.

The PC 1003 framework remains the standard model and continues to provide a firm legal base for the practice of collective bargaining. In Ontario, the Labour Relations Act gives employees the right to join a union and participate in its lawful activities, and employers are forbidden from engaging in conduct, such as dismissal for union activity, designed to thwart that right. Once organized, workers may apply to have their union certified. Before certification is granted, however, a union must demonstrate that it has, as members, a majority of the employees in a unit that is appropriate for collective bargaining. Under the Ontario

Act, a union is granted certification automatically, without a representation vote that is, if more than 55 per cent of the employees are members. A vote is necessary if membership falls between 45 and 55 per cent and an application is automatically dismissed if less than 45 per cent of the employees are members. Once certified, a union is legally entitled to compel an employer to bargain in good faith with the object of making a collective agreement and it is unlawful for an employer to refuse to negotiate or to indicate in any other way that it does not recognize the union's status as exclusive bargaining agent. The obligation to bargain in good faith also requires the parties to discuss their differences fully and frankly, make proposals and counter-proposals, and, most importantly, be willing to sign a collective agreement.

Detracting from the effectiveness of the law is the complexity and length of the certification process. Certification in Ontario is far from an informal, quick check of a union's claim to represent a group of employees. Time-consuming verification procedures and full-scale hearings to investigate allegations that the Board's strict rules have not been followed make delays in the processing of applications inevitable. Disputes over the size and composition of a bargaining unit or the weight to be attached to an anti-union petition may also require lengthy mediation and/or adjudication. There are, in short, many opportunities for employers to delay the proceedings and interfere with the outcome of certification. And such interventions have been highly effective. During the 1970s, the likelihood of certification was significantly lower when the Labour Relations Board took longer than five

weeks to process an application. The likelihood of success was similarly lower when a union's application for certification was opposed by a petition that was signed by enough union members to force a representation vote and which the Board accepted as a voluntary statement of the employees' true wishes. Delays and petitions affected the outcome of bargaining as well. A union whose application for certification took longer than five weeks to process was less likely to negotiate a collective agreement. And the likelihood of an agreement was markedly lower when a union's application was opposed by a petition that was rejected by the Labour Board because it was abetted by management.

The effectiveness of the law is also undermined by the inability of the Labour Relations Board to prevent anti-union conduct. Its remedies are simply not effective. By dismissing a union supporter, an employer clearly and forcefully demonstrates to all employees that they organize a union at their economic peril. The Board's standard response, reinstatement with compensation, offers little reassurance; even its most powerful remedy, certification without a representation vote, has proven ineffective. A further problem is the Board's willingness to accept, as lawful, employer conduct which adversely affects the right to associate but which is motivated by economic self-interest. So long as there is no evidence of anti-union animus, an employer has the right to dismiss or lay workers off, cut-back or sub-contract bargaining-unit work, or introduce new technology during an organizing drive.

In these circumstances, the most effective defence of the right to associate is outright certification. By granting bargaining rights on the basis of membership cards rather than representation votes, the Board

minimizes the possibility that anti-union employers can undercut an organizing drive. The protection is short-lived, however, because there is no equivalent procedural protection for collective bargaining. Consequently, even though the use of unfair labour practices had no apparent effect on the likelihood of winning certification, unions that complained of unlawful conduct were substantially less likely to negotiate collective agreements during the 1970s.

The problem of bargaining failure among newly certified unions was far more pervasive than the incidence of employer interference could explain, however. Most of the unions which failed to negotiate collective agreements did not file unfair labour practice complaints, were not opposed by anti-union petitions, and had their applications for certification processed in fewer than five weeks. Unrealistic demands by unions are commonly thought to be the source of the difficulty, but excessive demands by employers bent on frustrating collective bargaining are more likely to blame. By advancing proposals which leave their right to manage unfettered, anti-union employers can ensure rejection of a proposed agreement by the union and force employees into an untenable position: strike or accept terms that effectively negate the union's purpose.

Hard bargaining of this sort is quite lawful. While the right to bargain is integral to the Labour Relations Act, workers have no assurance that the process will result in negotiated changes. The duty to bargain in good faith is primarily a procedural constraint. The Board demands good bargaining practice, so requires the parties to meet regularly, exchange proposals, and so on, but beyond this the OLRB is not

prepared to go. The duty to bargain in good faith does not require the parties to make a collective agreement, or even a concession. Conciliation and mediation are available to help them resolve their differences but, in the end, there is no obligation to compromise. So long as an employer is prepared to sign a collective agreement, albeit only on its own terms, it satisfies its legal obligation. The Labour Relations Board is unlikely to detect any anti-union intent and, in any event, its standard remedy for bargaining in bad faith is a predictably ineffective order to bargain in good faith.

Such a strategy of passive resistance to unionization can be highly effective because unions have few defences. Hard bargaining is a particularly effective strategy against weak unions and many newly certified unions are weak. Because the law obstructs the ability of workers to organize and execute effective, lawful strikes they lack the power necessary to force determinedly anti-union employers to bargain seriously. Not only are stoppages highly predictable, their impact is undercut by the broad definition of strikes. It is impossible for workers to impede an employer's efforts to stockpile or otherwise prepare for a strike within the law. And during a stoppage it is unlawful for workers to interfere with the movement of goods or people. Picketing which goes beyond the simple communication of information is a violation of the Criminal Code or tortious if it is motivated by a wrongful purpose, encroaches on private property or interferes with access or egress, if the number of pickets is excessive, or even if the signs bear untruthful or opinionated messages. Also of dubious legality is picketing away from the site of a primary dispute. The right to trade

is held to be absolute so that unless an employer has allied itself with a struck firm, picketing the premises of a third party violates the law.

Equally unlawful are most appeals for active support directed to the employees of suppliers or distributors, or even other groups employed by the same firm. And even when the appeal itself is lawful, the employees appealed to are likely to find themselves accused of participating in an unlawful work stoppage if they refuse to cross a picket line or handle struck goods. Under the P.C.1003 framework, strikes are lawful only for resolving a dispute over one's own terms and conditions of employment, and then only if there is no collective agreement in force and the conciliation process has been exhausted. During the term of an agreement, any form of concerted activity which restricts or limits output is a strike in Ontario. Even threats to strike unlawfully constitute a breach of the Labour Relations Act.

The impact of these constraints is intensified by the fact that newly certified unions are generally small and restricted to one establishment. Alliances with other groups employed by the same firm are impeded by an interpretation of the Act that permits workers to discuss broader-based bargaining but makes it unlawful for them to push the demand to impasse. In effect, therefore, employers have the right to veto bargaining structures more advantageous to unions than the fragmented units for which they are certified.

Employers, by contrast, have few legal constraints on the exercise of their bargaining power. In response to a strike, they are free to continue production at struck locations and have the right to move goods and people unimpeded by pickets. The jobs of the strikers may be

performed by managerial employees or employees relocated from other establishments. Replacement workers may also be hired, even retained at the end of the dispute, subject to the terms of the settlement and the relatively narrow requirement for the reinstatement of lawful strikers imposed by the Labour Relations Act. Nor does the law curtail the ability of employers to move or sub-contract work, make up production shortfalls at other work sites, or cover strike-related losses out of the earnings of the business as a whole.

Quite clearly, the effect of the law is to institutionalize an imbalance of power between labour and management. The narrow power-base of workers and unions stands in stark contrast to the broadly based power of employers. It is hardly surprising, therefore, that a substantial minority of newly certified unions fail to negotiate collective agreements. The limited sanctions that workers can bring to bear are readily deflected by powerful national and international companies willing to use the resources of the firm as a whole to isolate and defeat the organizing drive of a small group of workers at any one location.

Following the leads of four other jurisdictions, the Ontario Legislature has introduced first-agreement arbitration as a balancing measure. But whether its effect will be significant is, as yet, uncertain. On the one hand, workers whose bargaining position would otherwise be hopeless can expect to win some constraints on management's rights at arbitration. But whether hard bargaining of the sort practiced by Eaton's will justify the imposition of a collective agreement remains to be seen. In any event, the remedy is limited to first-agreement disputes. Once the initial agreement expires, employees must face the

prospect of hard bargaining for a second agreement with no more resources at their command.

From the 1940s to the 1980s

PC 1003 permitted but did not cause the growth of unions among industrial workers. The acute labour shortage brought on by World War II left employers with little choice but to concede recognition and negotiate collective agreements. The terms were rudimentary, however, and managements continued to make decisions without consulting their workers' representatives. Industrial conflict grew as a result. Workers suspected employers of expediency: negotiating agreements in conformity with the law while the labour market was tight but waiting for the war to end to rid themselves of troublesome trade unions. The denouement came in 1945. For two years, labour-management relations were chaotic as workers struck for bona fide collective bargaining and strong union representation on the shop-floor.

Though they were legally constrained in the same ways as workers today, industrial workers in the 1940s wielded more economic power than unorganized workers in the 1980s, not because they were men or brawny blue-collar types but because they were more favourably placed. Despite the constraints imposed by the law, industrial workers were powerful enough to extract the necessary concessions from employers. Single-establishment bargaining posed no insurmountable obstacles because in the key industries of automobiles, steel, and electrical products the major companies were dependent on one or two principal establishments where hundreds, even thousands, of workers were congregated. When they struck, production stopped. Even where the workforce was split, as it was at

Stelco, a strike had a powerful impact. Attempts to move raw materials in and finished goods out were determinedly resisted by mass picketing: in those communities at that time effective picketing could not be stopped. And once unions were firmly established at the main work sites, employers saw little advantage in challenging organizing drives at related facilities.

In the circumstances of the mid-1940s, employers had little choice but to acknowledge the legitimacy of trade unions. Ford, Stelco, and Westinghouse were forced to accept that industry could not function efficiently without their employees' co-operation and that co-operation would not be forthcoming until unions were recognized as equals in the bargaining process. Subsequent disputes, some of them quite bitter, were confined to improvements in the level of wages and other terms and conditions of employment: neither the legitimacy of unions nor the desirability of collective bargaining was at issue.

For unorganized workers in the 1980s, the same legal framework is impeding rather than permitting the growth of unions and collective bargaining. The economic predicament of tertiary sector workers today differs fundamentally from that of industrial workers forty years ago. Throughout the service sector small establishments predominate, each with a territorial claim to provide a uniform set of goods and services. As a result, no group of workers has the ability to impose a serious financial penalty on the firm by withdrawing their labour.

Single-establishment certification and location-by-location bargaining are a particularly weak structure for workers in the tertiary sector. A bid for recognition at any one site, or even a group of sites,

is quickly rebuffed. Strikes are readily contained as appeals to consumers are notoriously ineffective. The strikers are easily replaced: skills are low, turn-over is high, training is on-going, and there is a ready reserve of labour in the managerial workforce. In any event, employers are willing and able to spread any strike-related losses incurred at a small number of establishments over the business as a whole to discourage further unionization.

To be effective, collective bargaining needs to be on a much broader footing. But this is not practical. Organizing invariably begins with a small group of workers and spreads to the whole only when solid gains can be demonstrated. And this is precisely what the law makes difficult. Small groups of workers can be organized and their unions certified, but often they cannot make gains at the bargaining table. The combination of structural fragmentation and ineffective sanctions leaves them vulnerable to hard bargaining. Nor are they allowed to draw on the bargaining power of others. Were they able to solicit the active support of truck drivers and suppliers, tertiary sector workers might begin to match the power of their employers but, of course, this is not permitted. For unions to grow in the tertiary sector, the balance of power must be altered. Yet, apart from the highly controversial ban on the use of strike replacements in Quebec, no Canadian statute has attempted to redress the imbalance of power between labour and management that is inherent in the law.

One source of the imbalance is structural and results from the practice of certifying unions on a single-establishment basis. If employers are permitted to marshall their bargaining power over the firm as a whole, to be even-handed, the law should recognize the right of

workers to mobilize their bargaining power on an equivalent basis. The solution may be to allow workers to amalgamate their bargaining units, at least to the extent of forming company-wide negotiating units. To bring the process under the Labour Relations Act, unions could apply to the Board for a vote to determine their members' preferences. In fact, the OLRB is already permitted to conduct a vote for the purpose of ascertaining employees' wishes as to the appropriateness of a bargaining unit, but as the Board believes it has no authority to restructure existing units an amendment to the Act would seem to be necessary.

It would not be sufficient to simply give the Labour Relations Board the discretion to restructure bargaining units. Labour boards have frequently shown themselves to be purblind to the issue of bargaining power. The assumption, that by simply forming a union workers become an effective countervailing force, is clearly untenable, yet underpins much of their thinking. Neither the British Columbia nor the Canada Board (both of which are empowered to redraw the boundaries of bargaining units) has shown itself to be particularly sensitive to the problems of newly certified unions. The preoccupation of both has been the prevention of leapfrogging and whipsawing where collective bargaining was already well established. Generally, bargaining units have been consolidated when excessive fragmentation has resulted in 'unnecessary' strikes:

> Multiple and fragmented bargaining units are prone to 'competitive bargaining'... One trade union tries to obtain just a little better wage package than its fellow union achieved. One employer tries to obtain a slightly cheaper wage settlement than its competitors accepted. Once the other side resists, once it decides to take a stand, competitive bargaining can generate repeated and escalated work stoppages (Weiler, 1980:158).

When the unions involved cannot agree among themselves on a broader-based negotiating structure, the British Columbia labour code empowers the Minister of Labour to direct the Labour Relations Board to determine whether it should compel the workers to form a legally binding council of trade unions. Railway workers, ferry crews, shipbuilding workers, and miners have been forced to accept all-encompassing negotiating structures whether they wanted them or not. The loss of self-determination was justified, Weiler argued, by the benefits for society as a whole. In any event, elite groups of workers should be required to share their bargaining power with those affected by its exercise (ibid.: 154-178).

Ontario's lone experiment with consolidating bargaining units was similarly designed to bring order out of perceived chaos. Site-by-site bargaining in the construction industry afforded unions many opportunities for leapfrogging and whipsawing which they skilfully exploited during the building boom of the 1960s and 1970s. The solution chosen was to legislate province-wide bargaining by trade so that now if there is a work stoppage all the workers in a trade employed in the industrial, commercial and institutional sector are out.[1]

In other situations where workers were already organized on an all-employee (though single-establishment) basis and there was no possibility of disruptive whipsawing, labour boards have not been persuaded of the need for extending the boundaries of the bargaining unit. Dismissing a union's application for the amalgamation of a number of bargaining units of the Bank of Montreal, the Canada Board failed to see the problem because collective agreements had been negotiated at each location, there were no allegations of bad faith, and no unfair labour practice

complaints. The fact that the employer would not agree to treat all the units as a single seniority district was not evidence that it was using its bargaining power to render the union impotent, the Board concluded. There was no critical imbalance of bargaining power as the union alleged; it was merely seeking to achieve through the Board what it could not win at the bargaining table.[2]

Company-wide negotiating units would partially redress the structural superiority of management over labour by eliminating the unit-by-unit struggle for collective bargaining. Instead of a series of isolated demands for recognition, the employer would be confronted by a co-ordinated effort. Once a collective agreement was negotiated, its terms and conditions would automatically become available to any newly organized group that chose, by majority vote, to affiliate with the established union. If some issues remained outstanding--if, for example, the parties could not agree on a wage rate for a recently organized group of part-time employees[a]--the matter would be deferred to the next bargaining round. There need be no right to strike or lock-out or refer the matter to final and binding arbitration.[b]

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[a]Strictly speaking, the employer is under no obligation to bargain at all once an agreement is signed.

[b]Both the British Columbia and Canada Boards have ruled that workers added to an existing bargaining unit have no right to strike apart from the rest of the workers. In the opinion of the Canada Board, a difference over a matter not included under the terms of the existing agreement--for example, wages for a newly included classification--cannot be referred to arbitration, except by mutual consent. The British Columbia Board, by contrast, is not averse to this masked form of interest arbitration (Dorsey, 1983:181-3).

Restructuring would be of particular importance in the retail trade, finance, and services industries where establishments are typically small and none is critical to the success of the business. Services are frequently duplicated so that in any community a large employer is likely to have more than one establishment. Single-establishment unions, consequently, are weak almost by definition, especially when they are unable to act in concert with other organized groups. Strikes are frequently ineffective because the stoppage is limited to a small minority of employees who are readily replaced.

But whether the Eaton's employees would have benefited from restructuring is uncertain. Though they were divided into thirteen bargaining units, they struck as one group; thus, the collective agreement they negotiated reflected the workers' combined bargaining power. It is conceivable, however, that given the option of company-wide bargaining, the union's strategy might have been different: a long-term plan which emphasized organizing may have been preferred to a short-term plan that hinged on results. Knowing that it could build a more extensive negotiating unit over time, the union might have accepted Eaton's terms of settlement, minimal though they were, in order to concentrate its resources on recruitment while enthusiasm remained high. With leadership, the members might have appreciated the wisdom of a more calculated approach to organizing over the risks of an immediate confrontation. And if, for the sake of argument, a dozen more stores had been organized and brought within the coverage of the agreement before it expired, the union would have been better placed to negotiate more satisfactory terms in its second agreement.

Labour's bargaining power would also be greatly enhanced by a ban on the use of strike replacements. As implemented in Quebec, the prohibition against the use of replacement workers is absolute. Employers are not permitted to place managerial or other employees on strikers' jobs, hire outside replacements, or utilize the services of workers represented by a striking union. Such a ban has the added virtues of greatly reducing the likelihood of picket-line violence and more or less guaranteeing the jobs of strikers.

Though it would be a sharp deviation from the past, the banning of strike replacements would be consistent with the general policy of limiting and controlling industrial conflict. Nor would such a change be fundamentally incompatible with the principle of freedom of contract as some have asserted. After all, the law isolates workers into small, fragmented groups while employers are entitled to mobilize their productive and financial resources over a wide front. A ban on strike replacements would partially undercut the ability of employers to deliberately use their economic superiority to frustrate the bargaining process. Alternatively, workers could be allowed to engage in full-scale, that is, effective picketing. If employers have the right to operate during a work stoppage, to be even-handed, the law should recognize an equivalent right of workers to try to impede production and distribution. That the result of an expanded right to picket would undoubtedly be a dramatic escalation of picket-line violence suggests that a ban on strike replacements would be the more Canadian option.

Another change that would encourage the growth of unions generally is the simplification of the certification procedure to eliminate

unnecessary delays and limit the ability of employers to intervene. Reform will be difficult to achieve, however. Examining the history of the industrial tribunals established in the United Kingdom to adjudicate unfair dismissal complaints, Dickens et al. (1985) described a body very similar to the Ontario Labour Relations Board. Like the OLRB, the tribunals were tri-partite boards separate from, but supervised by, the courts. Also similar was their freedom to make rules and procedures. Yet, like the OLRB, proceedings were court-like more often than not, a result the authors considered unavoidable when the chairpersons were lawyers: 'those trained in the legal profession are likely to see the procedure in which they are trained and with which they are familiar as the best or most appropriate' (ibid.:55). Given the adversarial nature of the hearings, informality was impossible they concluded. The process required the presentation of briefs, the submission of evidence, the calling of witnesses, and cross-examination (ibid.: 74). And though the right of appeal ensured consistency in decision-making, it was at the expense of informality:

> The creation of, and adherence to, guidelines and legal principles are to be expected in a system where higher courts are given appellate jurisdiction,... where lawyers play an important part (in chairing tribunals and representing people appearing before them) and where decisions are reported and available for citation (ibid.: 76).

The impact of the legal rules and proceedings has been counter-productive, Dickens et al. thought: decisions that were technically correct in law were not necessarily helpful in resolving labour relations problems. Accordingly, they recommended that unfair dismissal cases be heard by arbitration panels (which in the UK adopt an entirely accommodative approach) instead of the industrial tribunals. They

acknowledged, however, that the already established expectations of the parties posed something of an obstacle to reform:

> It is, we suggest, perhaps unlikely that arbitrators, or the parties to disputes, would be able now to distance themselves totally from the norms and values concerning fairness in dismissal which the industrial tribunal system has fostered. It is also likely that such safeguards against legalism as no right of appeal and discouraging legal representation at hearing would be argued to be a denial of justice, a deterioration from the industrial tribunal system, particularly by those in the legal profession (ibid.: 296).

The expectations of the parties, and of employers in particular, present an even greater obstacle to the reform of the certification process in Ontario where the Board's procedure has evolved over a forty-five year period. Despite sound industrial relations reasons for excluding employers as active participants in the certification process, any attempt to do so would, apart from the inevitable legal wrangling over the constitutionality of the change, provoke a serious crisis of confidence in the system. As long as unions are entitled to be certified without a representation vote so radical a reform is virtually unthinkable.

A more modest procedural reform aimed at shortening the time required to dispose of certification applications would see the OLRB amend its regulations to require the party requesting a hearing to show cause why it is necessary as is presently done in the construction industry and, more generally, in British Columbia and under the Canada Labour Code. Whether the change would shorten the process significantly is doubtful, however, because the Board's willingness to entertain employers' challenges respecting the composition of bargaining units and so on would likely nullify most of the potential benefits. Indeed, the

initial, positive effect on the time required to process construction industry applications resulting from a similar procedural change seems to have been dissipated over the years.

If attempts to curtail the role of employers directly are unlikely to succeed, what can be accomplished by way of procedural reform? Most obvious is the elimination of anti-union petitions. Petitions are not critical to the vitality of the certification process; the procedure is not necessary to ensure the free expression of employees' wishes. By the simple expedient of closing the gap between the application and terminal dates the Board could prevent the organizing of petitions. Neither the British Columbia nor the Canada Board entertains petitions for the simple reason that the union's membership support is assessed as of the application date. All the same, it must be admitted that the protection afforded by the elimination of petitions would be limited. While the likelihood of winning certification would probably increase, there is no guarantee that anti-union employers would change their ways. Employers bent on undermining their employees' enthusiasm for collective bargaining would not be frustrated simply because the vehicle of the petition is denied to them.

The adjudication of unfair labour practices is another obvious area for reform. The Ontario Board is far too respectful of management's rights. The statutory freezes, for example, could be absolute. Once a union is organized, employers should be obliged to negotiate changes in terms and conditions of employment. Nor is an absolute freeze prior to certification too onerous a condition. Any change initiated during an organizing drive is bound to be interpreted by employees as a veiled

anti-union message. If the period is too long, a deep freeze may be the incentive employers need to forgo raising objections over the size and composition of bargaining units or the validity of a union's membership evidence.

More generally, the Board should find unlawful, conduct which has the effect of disrupting support for collective bargaining. The legal requirement, that to be unlawful conduct must be motivated by anti-union animus, can be discerned from the foreseeable consequences of many employers' tactics. Ideally, for example, dismissal for any reason should be unlawful during an organizing campaign or, at the very least, the Labour Relations Board should judge a dismissal by the 'just cause' standard of arbitral jurisprudence.

None the less, stricter enforcement of the unfair labour practice protections cannot be expected to affect the outcome of certification appreciably and it will have a positive effect on the outcome of bargaining only if employers are prepared to change their behaviour. There is little incentive to do so, however. Even if the OLRB were to increase its compensation awards to include, for example, a pain and suffering component, or were prepared to issue 'make whole' awards with greater frequency, the cost of committing unfair labour practices would seldom exceed the potential benefits. The Board might try reinstating dismissed employees pending the outcome of their complaints. But what it could do to discourage other forms of unlawful conduct is less clear.

Whether a more aggressive, that is, punitive, response to unfair labour practices would be appropriate is hotly debated. The Ontario Board believes that 'two-fisted' enforcement would jeopardize its

mediating role and conflict with the policy of encouraging accommodation and compromise. It is also possible that the Board's legitimacy would suffer from a stricter construction of the law. Because enforcement procedures are fragile, the adoption of a more aggressive stance might be self-defeating. No good would result if, as a result, employers decide to defy the authority of labour boards as they appear to be doing in the United States.

What effect these changes would have on union growth is, of course, uncertain. They should make certification easier to get and unfair labour practices a little less profitable. More importantly, by shifting the balance of power towards labour, changes of the sort proposed should eventually make it possible for workers in the tertiary sector to negotiate acceptable collective agreements. But the purpose of the proposals is merely tactical. It is the underlying social purpose that is critical. Workers in the tertiary sector are some of the most disadvantaged in Canada. Thus, if these changes fail to achieve the higher wages and better conditions to which these workers are entitled, more radical measures should be devised.

Conclusion: The Limits of the Law

No amount of labour law can overcome the fact that, in the end, collective bargaining is undertaken voluntarily. Even Canadian labour law, which is highly intrusive, rests on a voluntaristic base. Labour relations in Canada are highly 'juridified', that is to say, the conduct of the parties is profoundly shaped by the substitution of legal procedures for procedures of the parties' own making (Clark and Wedderburn, 1985:188); yet, for all that, the law can do no more than

encourage employers to bargain in good faith. Strong unions are the best defence of a collective bargaining regime.

Central to the emergence of collective bargaining in the mass-production industries was the tight labour market of the war years. The law played a vital, though distinctly secondary, role. As Kahn-Freund (1977:8) never tired of saying, important as the functions of the law are, 'they are secondary if compared with the impact of the labour market'. Collective bargaining has no firm base unless workers have the power to force employers to make collective agreements and adhere to their terms. 'Where labour is weak -- and its strength or weakness depends largely on factors outside the control of the law -- Acts of Parliament, however well intentioned and well designed, can do something, but cannot do much to modify the power relations between labour and management'. The threat of a strike may be far more powerful than the threat of legal action (Kahn-Freund, 1954:43).

Voluntarism was much championed by Kahn-Freund. The absence of legal intervention was the hallmark of a 'mature' industrial relations system, he argued. And by this measure, industrial relations in Great Britain were fundamentally healthy: 'There is perhaps, no major country in the world in which the law has played a less significant role in the shaping of these relations than in Great Britain and in which to-day the law and the legal profession have less to do with labour relations' (ibid.:44).

Industrial autonomy, to use Kahn-Freund's phrase, was never a politically acceptable option in Canada, however. For whatever reasons -- the fragility of the Canadian economy, extreme reliance on the export

of a few staple commodities, the size of the country, or its climate -- labour-management relations have never been regarded as a wholly private affair. The government representing the 'public' has long been recognized as a legitimate party of interest in the industrial relations system. And the government's role has been an active one. Since the turn of the century the defining characteristic of labour-relations policy in Canada has been its preoccupation with industrial peace. Strikes and lock-outs, particularly in the 'essential' industries of railways, mining, and public utilities, were considered unacceptable threats to economic growth and public safety.

Nor did workers have strong objections to government intervention. The predicament of most unions in the first half of the century was precarious. Consequently, they were prepared to accept intervention if, as seemed the case with the Industrial Disputes Investigation Act, the result was a measure of recognition. Although some groups were adamantly opposed to the government's role as intermediary, opposition was generally confined to craft unions with strong economic bases. The official policy of the Trades and Labour Congress, by contrast, favoured compulsory conciliation; indeed, there was considerable support for compulsory arbitration along the lines of Australia's experiment until international unions threatened to revoke the charters of their Canadian branches.

Until the end of the last century, labour law in Canada mirrored developments in Great Britain. Not only statutes but the judgments of the British courts, including Taff-Vale, were adopted, but not the Trade Disputes Act. Canadian workers were never accorded the immunities from

common law liability which underpinned the growth of unions in Great Britain. In any event, it is unlikely that unionists could have made much of the immunities. With the exception of World War I, labour was chronically weak vis-à-vis employers. The boom and bust economy, constant immigration, ethnic and linguistic divisions, and rivalry between the conservative craft unions of the east and the more radical industrial unions of the west made organizing difficult and effective strikes almost impossible.

It was not until World War II that the habitual power equation between labour and management was upset. But the law that had given modest support to unions during the 1920s and 1930s was repressive in the circumstances of the 1940s. The acute labour shortage gave workers the bargaining power they needed, yet the law impeded its use. The strict constraints on strikes imposed by the IDIA and other war-time orders-in-council helped employers keep unions at bay. PC 1003 was finally introduced only when the policy of voluntary recognition coupled with severe constraints on the lawfulness of strikes failed to provide the desired degree of social stability.

PC 1003 proved to be a workable framework for the extension of collective bargaining to the mass-production industries not because it imposed a legal obligation to bargain on employers but principally because it permitted workers to organize effective strikes. For the first time, industrial workers had both the propensity to unionize and the ability to act on that desire. The limits of the new law were real enough. The constraints on the timing of strikes were far from ideal and favoured management over labour. But even with these constraints labour

was freed from its legal straitjacket sufficiently so that, in the relatively tight labour markets of the immediate post-war years, its bargaining power was felt. In fact, the desire for union representation among industrial workers was so intense that had PC 1003 failed to deliver further changes would have been unavoidable.

World War II was both a blessing and a curse for organized labour. On the positive side of the ledger, the severe labour shortage which the war provoked made collective bargaining practically inevitable in large-scale manufacturing. On the negative side, the legal framework that facilitated the growth of unions in the mass-production industries was deeply flawed. It was no more than a modest concession to labour and stabilized labour-management relations only because those who sought union representation had enormous bargaining power. For less powerful groups at other times, the law has been inadequate defence of the right to associate, most obviously in the tertiary sector where employers continue to reap the benefits of hiring those in the 'secondary' labour market, chiefly women, young people, and immigrants, whose terms and conditions of employment are set by reference to the statutory minima.

No amount of legal intervention can insure that collective bargaining takes root in the tertiary sector, but it can have a profound effect on management's ability to resist unionization. By reshaping bargaining structure and altering the constraints on bargaining tactics, the law could partially redress the imbalance of power inherent in the unregulated labour market. But how these changes might be achieved leads to a pessimistic conclusion. Pluralist values have been a minor force in policy-making in Canada; the over-riding consideration has been the

preservation of industrial peace. Compulsory collective bargaining was not the government's policy by choice but conceded only when it was obvious that industrial workers could win recognition on their own. The callous pragmatism of this approach suggests that collective bargaining will be beyond the reach of most tertiary sector workers for some time to come. Changes to the law which would shift the balance of power significantly in favour of unions are unlikely to be made precisely because unorganized workers in the 1980s lack bargaining power, both economic and political.

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