Document generated on 12/13/2024 9:42 p.m.

Relations industrielles
Industrial Relations

The Role of the State in Canadian Labour Relations.

Jeffrey Sack and Tanya Lee

Volume 44, Number 1, 1989

L'avenir des relations industrielles dans les Amériques
The Future of Industrial Relations in the Americas
El Porvenir de las Relaciones Industriales en las Americas

URI: https://id.erudit.org/iderudit/050480ar
DOI: https://doi.org/10.7202/050480ar

See table of contents

Publisher(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (print)
1703-8138 (digital)

Explore this journal

Cite this article

Sack, J. & Lee, T. (1989). The Role of the State in Canadian Labour Relations. *Relations industrielles / Industrial Relations*, *44*(1), 195–223. https://doi.org/10.7202/050480ar

Article abstract

The authors examine the role of the State in industrial relations in Canada. They address themselves particularly to the questions in which circumstances and to what extent the State should intervene.

Tous droits réservés © Département des relations industrielles de l'Université Laval, 1989

This document is protected by copyright law. Use of the services of Érudit (including reproduction) is subject to its terms and conditions, which can be viewed online.

https://apropos.erudit.org/en/users/policy-on-use/

érudit

This article is disseminated and preserved by Érudit.

Érudit is a non-profit inter-university consortium of the Université de Montréal, Université Laval, and the Université du Québec à Montréal. Its mission is to promote and disseminate research.

https://www.erudit.org/en/

The Role of the State in Canadian Labour Relations

Jeffrey Sack
and
Tanya Lee

The authors examine the role of the State in industrial relations in Canada. They address themselves particularly to the questions in which circumstances and to what extent the State should intervene.

The purpose of this paper is to examine the role of the State in industrial relations in Canada. It proceeds from the conviction that there can be no absolute statement valid for all circumstances as to the desirability of State intervention in labour relations. It makes little sense to say that the State should never intervene in labour relations for, by failing to intervene, the State may assist one of the parties just as effectively as if it stepped in to lend its support to one side or the other. Moreover, although a policy of non-intervention is rationally supportable, where both sides are equal in power, such a policy is not so readily defensible if as a result the government leaves business to "fight it out" with a weak labour movement. In short, the decision not to regulate must be seen as a deliberate policy choice. The question, therefore, is not whether the State should intervene, but in which circumstances and to what end.

In this regard, it must not be forgotten that in Canada, where a federal system prevails with a divided jurisdiction in labour relations, governmental intervention is not monolithic: the State acts through various agents including the federal and provincial governments, courts and labour relations boards, and these bodies may on occasion work toward the same, and on occasion toward different goals[1]. Moreover, this complex web of intervention in labour relations is the product of a particular historical evolution which must be appreciated if the purpose and impact of State intervention is to be correctly assessed. Indeed, as comparative labour law teaches us, collective bargaining institutions cannot be understood if they are wrenched from their particular social and political context[2].

---

* SACK, J. and T. LEE, Sack, Charney, Goldblatt and Mitchell, Toronto, Canada.

THE HISTORY OF STATE INTERVENTION IN CANADA

The State's attitude toward trade unions in Canada has changed over time. Nevertheless, several distinct phases can be identified and for the sake of convenience can be described as follows: (1) hostility, (2) an attempt at pacification through mandatory conciliation, (3) the fostering of collective bargaining combined with neutrality regarding the outcome, and (4) currently, in some jurisdictions, retrenchment.

Hostility

In the eighteenth century, the English courts created the doctrine of criminal conspiracy which made it an offence for workers to organize. This doctrine was enshrined in two *Combination Acts*[3] at the turn of the nineteenth century. Although a third *Combination Act*[4] was passed in 1825, which ameliorated conditions to a limited extent,[5] because of judicial interpretations it remained a tall order for labour to satisfy legal restrictions surrounding the right to strike. In 1871, however, the British Parliament enacted two important statutes, the *Criminal Law Amendment Act*[6] and the *Trade Union Act,*[7] the first of which legalized peaceful strike action, although it remained a penal offence to use threats of violence, and the second of which immunized union members from prosecution for criminal conspiracy even though the trade union's objectives might be in restraint of trade.

Canada, with close ties to Britain, soon followed suit. In 1872, after the unpopular prosecution of striking Toronto printers on conspiracy charges, the Canadian Parliament followed the lead of the British Parliament, and passed the *Criminel Law Amendment Act,*[8] which permitted peaceful picketing, and the *Trade Unions Act,*[9] which declared that the purposes of a trade union were not unlawful merely because they were in restraint of trade. However, this purported legitimation by the State of union activity was more apparent than real[10]. Peaceful picketing was not finally removed from the ambit of criminal prosecution until 1934, and the courts resorted with increasing frequency to a truly astonishing array of tort remedies in order to issue labour injunctions against striking workers. This practice, of course, served only to confirm labour's perception of a historical association of the judiciary with business. Not until the 1970's did Ontario, the most heavily industrialized province in Canada, move to restrict the issuance of *ex parte* injunctions, and vest some powers to regulate picketing in the labour board.

Pacification through Mandatory Conciliation

In the face of growing class conflict, and with a view to securing industrial peace, the Canadian government, in the early 20th century, began to experiment with the notion of conciliation of labour disputes. In 1900 the federal Parliament passed an act which promoted conciliation, but because conciliation was voluntary, it did not enjoy a great success. Then, in 1903 the *Railway Disputes Act*[11] was passed, which provided for the *compulsory* investigation of disputes in the railway industry and the issuance of non-binding awards. Finally, in the most significant legislative intervention during the pre-World War II period, Parliament in 1907 enacted the *Industrial Disputes Investigation Act*[12].

The basic outlines of this act had been proposed by William Lyon Mackenzie King who was then the Deputy Minister of Labour and later became Prime Minister of Canada. Like much other labour relations legislation in Canada, it was an attempt to cope with a controversial labour conflict, in this case a strike of Alberta coal miners which threatened prairie residents with a mid-winter coal shortage. Under the act, if a conciliation board, composed of representatives of the parties and an independent chairman, failed to induce a settlement, the board's report containing recommendations was made public. Although the report was not binding on the parties, Mackenzie King hoped that publication would pressure the parties to abide by the board's recommendations for fear of alienating public opinion. Nonetheless, until this point the parties were not free to engage in industrial conflict.

How was it that this legislative initiative, which set a precedent for State intervention, was acceptable in a laissez-faire economy? According to Professor Craven, Canadian business was already accustomed to an active governmental role in the development of the infrastructure necessary to support Canada's natural resource-based economy. Be that as it may, King's strategy of industrial peace was only partly successful, since most Canadian employers failed to see any need to extend recognition to unions. As Professor Craven notes, liberal policy was ultimately not to interfere with management rights, and, when disputes proved intractable, King was left to utter "bromides about the importance of right attitudes"[13].

The shortcoming of the act, from labour's viewpoint, was obvious: it concentrated on protecting the *public* from work stoppages without protecting the right of *employees* to organize, negotiate and resort to economic sanctions. The act established no mechanism to resolve contests over union security and recognition, which were frequently the core issues in dispute. Unions were deprived of their main weapon, the strike, while the employer

was free during the cooling-off period to stockpile, discriminate against unionized employees, import strikebreakers and hire private police. As a result, "many strikes were broken before they had even begun"[14].

Indeed, as Professor Morton points out, the pattern of board reports under the act was to secure improved conditions and wages at the expense of and without granting union recognition. Thus, rather than laying the issue of union recognition to rest, the act introduced a long, turbulent and ultimately destructive period of union-management conflict. In Morton's view, by failing to resolve the recognition issue, the act contributed to continuing industrial and social conflict. It did nothing to address the problem of jurisdictional strife and dual unionism. Instead, it was used to legitimate agreements between employers and company-dominated employee organizations, at the expense of independent trade unions[15].

Fostering Collective Bargaining

The Private Sector

During World War II, when the federal government assumed nationwide jurisdiction over labour relations, the federal government headed by Mackenzie King introduced the Wartime Labour Relations Regulations (P.C. 1003). This Cabinet Order, issued in 1944, is generally perceived as a significant milestone because it contained a comprehensive framework for the recognition of trade unions, thereby rendering recognition strikes unnecessary. P.C. 1003 was influenced by earlier experiments with mandatory conciliation,[16] the U.S. National Labour Relations (Wagner) Act of 1935, and various provincial precursors (including Ontario's 1943 *Collective Bargaining Act*).

Why did Mackenzie King, who was previously more concerned about industrial peace than about the right of employees to be represented by independent trade unions of their own choosing, finally move to institute a system which would require collective bargaining? The enactment of P.C. 1003 must be considered against a background of political and economic organization by labour. In 1932-1933 a political party called the CCF (Cooperative Commonwealth Federation) was formed. Its program, as outlined in the *Regina Manifesto,* was basically socialist. While in its early years it did not have the support of organized labour, the CCF grew steadily, especially in the west of Canada. By the end of 1941, it was the official opposition party in Saskatchewan and, in 1944, the government. By 1942, a poll indicated that the CCF could claim support from 23% of all Canadians; by September 1943, the CCF led all parties in the polls. In the 1943

Ontario election, the CCF won 32 percent of the popular vote in Ontario and formed the opposition. The growth of the CCF, by now endorsed by the Canadian Congress of Labour, constituted a threat to the traditional parties, both Liberals and Conservatives,[17] and to the government of Prime Minister Mackenzie King. In the face of this threat, although not because of it alone, King moved to implement P.C. 1003.

Another element, adding to the pressure for change, was a dramatic increase in industrial conflict. In 1943, the year prior to the introduction of P.C. 1003, there were more strikes than in any previous year in Canadian history. Indeed, the number of work stoppages and striking workers exceeded figures recorded in following years until 1965[18]. In 1943 one out of 3 workers engaged in strike action[19]. Thirteen thousand steelworkers went on strike. Nine thousand coal workers went on strike. Twenty-one thousand aircraft workers went on strike. Faced with an industrial relations crisis, the King government sought the advice of the National War Labour Board, and adopted the recommendations of its chairman, Justice C.P. McTague, who urged a national labour code, as in the United States, to settle the union recognition issue.

Given the turbulent labour situation in 1943, several academics have recently argued that the government was motivated, in passing P.C. 1003, not by a commitment to collective bargaining, but rather by a desperate attempt to restore industrial peace[20]. Whether or not this was the governments motivation, P.C. 1003 had the effect of promoting collective bargaining and, in subsequent federal and provincial legislation, the commitment to collective bargaining was made explicit[21].

The central features of P.C. 1003 and successor labour codes can be described as follows: (1) non-managerial employees (other than excluded categories, such as agricultural workers) have the right to form and join unions; (2) acts by employers to prevent employees from exercising the right to unionize are prohibited; (3) labour boards are authorized to certify unions, on proof of majority support, as bargaining representatives in appropriate (usually plantwide) bargaining units; (4) once certified, the union becomes the exclusive bargaining representative of *all* employees in the bargaining unit whether or not they are union members; (5) employers are required to bargain in good faith; (6) prior to a resort to economic sanctions, the parties are required to participate in government-sponsored conciliation; and (7) during the term of a collective agreement the parties cannot engage in strikes or lockouts, but must instead submit differences arising under the collective agreement to grievance arbitration by a neutral third party.

This scheme, which since the War has been entrenched in labour relations legislation across Canada, is commonly administered by labour boards, rather than courts, since the latter are not only regarded as traditionally unsympathetic to labour, but are also considered ill-suited for performing administrative functions, have no expertise in labour relations, and are encumbered by lengthy and costly procedures[22]. In general, representation rights are determined by labour boards and collective agreement disputes are adjudicated by arbitrators, while the courts exercise a narrow power of judicial review over board decisions and arbitration awards, and deal with areas which legislatures have not addressed, e.g. in most jurisdictions, the regulation of secondary picketing.

Most students of industrial relations would agree that the Canadian certification process has fostered employee organization. Prior to the passage of P.C. 1003, many unions failed in their recognition strikes, but after the passage of P.C. 1003 the pace of union organization soon accelerated[23]. In 1942 union membership stood at 578 000; by 1947 it had reached 912 000[24]. This represented an increase from 20,6% of the civilian, non-agricultural, labour force to 29,1%. From 1945 to 1983 union membership in Canada, as a proportion of all non-agricultural workers, increased from 25% to 40%[25]. In the United States, in the same period, the proportion declined from 35% to below 20%[26]. As of 1987, union membership in Canada numbers 3 781 485 (37,6%)[27]. Although of the 2 million increase in union membership between 1961 and 1987 more than 50% can be attributed to the public sector,[28] the increase is not linked solely to the growth of public sector unionism, for growth has also occurred in the private sector[29].

Yet, while the policy of the Canadian State, from the 1940's to the present, has been to create a framework which will facilitate collective bargaining, when it comes to bargaining outcomes the State remains resolutely neutral. In effect, the government establishes conditions which entitle unions to enter a boxing ring where minimal Marquis of Queensbury rules apply. There is to be no hitting below the belt. The employer must recognize the union, discuss the union's proposals, and intend to enter into a collective agreement. However, the State will not force either side to make concessions. The terms of the deal are for the parties themselves to decide. Subject to the innovation in some jurisdictions of first contract arbitration, the government will not intervene directly, or through a labour board, to equalize the balance of power or to prevent one party from driving another through economic force to accept a hard, even a harsh, bargain. In Canada, as in the U.S., the State's collective bargaining policy is founded on the principle of voluntarism.

The Public Sector

The evolution that occurred in the private sector was subsequently repeated in the public sector, at an accelerated pace and in a compressed time period. Although the first legislation providing for public sector bargaining in Canada was introduced in Saskatchewan by the socialist CCF government in 1944, it remained an anomaly for 20 years. However, between 1965 and 1975 all ten Canadian provinces and the federal government passed legislation allowing their employees to collectively bargain.

The massive unionization of the civil service that ensued swiftly after the passage of public sector labour relations legislation resulted in two significant trends: first, unionization of white-collar occupations that had previously been unorganized; second, the increase of Canadian national union membership relative to international union membership as a percentage of total union membership[30].

Although there is general (albeit increasingly grudging) acceptance by governments across Canada of the right of public sector workers to bargain collectively, there is, in some jurisdictions, an unwillingness to accept the public sector worker's right to strike. At the present time, while half of the provinces grant the right to strike in some form to government employees, the other half (Nova Scotia, Prince Edward Island, Ontario, Manitoba and Alberta) deny this right to government employees under any circumstances and require that an impasse in bargaining be resolved by "interest" arbitration. Only the federal government allows its employees to choose between the interest arbitration process and the conciliation/strike route at the outset of each round of bargaining.

Even in those jurisdictions which allow public sector workers to strike that right is not accorded to employees who provide so-called essential services. Yet there is no uniformity in the designation of essential employees. Thus, in 1982, the Supreme Court of Canada interpreted the federal *Public Service Staff Relations Act* to hold that the federal government could designate as essential *all* employees whose duties are related to the safety and security of the public, and not just those specific employees whose continued attendance at work would be necessary for the safety of the public during the strike. This ruling enabled the federal government to declare all air traffic controllers as essential and thus undermine their ability to take strike action[31]. In contrast, the (now defunct) B.C. Labour Relations Board, when faced in 1976 with a strike at Vancouver General Hospital, the largest general hospital in Canada, designated only a limited level of services as essential and directed that as much of this work as possible should

be done by employees of the hospital who were not members of the bargaining unit (i.e. administrators), so that only a minimal number of striking workers were compelled to work[32].

Retrenchment

Outlined above is the Canadian State's general approach even today to private sector and public sector labour relations. However, Canada has not been immune from the international trend in the 1970's and 1980's of government intervention in wage determination as a tool of macroeconomic policy[33]. The 1975 federal *Anti-Inflation Act*[34] imposed a three-year program of mandatory wage and price controls in the private and public sectors across Canada under the administration of an anti-inflation board. In a period of double-digit inflation the government allowed a maximum 10% increase in the first year, 8% in the second and 6% in the third. On October 14, 1976 the Canadian Labour Congress sponsored a one-day general strike protesting the controls, but they remained in place until 1978. Again, in 1982, the federal governement resorted to wage controls, this time applying them to the federal public sector only, even though federal government wage settlements in previous years had been moderate and consistent with settlements in the private sector. This time, under the *Public Sector Compensation Restraint Act*[35] increases could not be greater than 6% in the first year and 5% in the second. Many, though not all, provincial governments likewise imposed wage controls on their public sector employees. As in 1975, the legislation suspended collective bargaining and the right to strike; however, the suspension of bargaining applied not only to wages, but to all non-monetary working conditions as well. In effect, the normal functions of trade unions were "put on ice" by the State for a two-year period, surely unnecessarily and arbitrarily, since even during World War II, when wage controls were imposed, the right to strike over non-monetary matters was not suspended.

In addition to these broad-based assaults on collective bargaining, there has been an increasing incidence of ad hoc interventions by governments in labour disputes in Canada. The table 1 shows a disturbing increase in the number of occasions on which federal and provincial governments have employed emergency back-to-work legislation since 1950.

At the provincial level, the vast majority of these ad hoc statutes have been directed at the public sector (i.e. teachers, police, transportation, hospitals), although some have been directed at the private sector (i.e. construction, forestry, dairy workers). At the federal level, the legislation has been directed at transportation industries and postal services[36].

Table 1

Back-to-Work Legislation, 1950-84

Years	*Federal Jurisdiction*	*Provincial Jurisdiction*	*Total*
1950-54	1	—	1
1955-59	1	1	2
1960-64	2	1	3
1965-69	2	8	10
1970-74	4	9	13
1975-79	6	16	22
1980-84	1	18	19
1984-88	4	11	15

Source: Canada, Department of Labour, Federal-Provincial Relations and Liaison Branch (Ottawa).

On occasion back-to-work legislation has been accompanied by severe punitive measures directed against those who engage in illegal strike activity. For example, when the federal government legislated the postal workers back to work in 1987, it provided that any union official who violated the legislation would be excluded from union office for five years. Québec's *Essential Services Act,* dubbed the "sledgehammer bill" when it was passed in 1986, provides, not only for substantial fines, but also the loss of one year of seniority for each day of an illegal strike by employees. Such draconian measures, which clearly interfere with freedom of association, threaten to become permanent fixtures of the labour relations scene. Thus, proposed revisions to the Alberta *Labour Relations Act* would allow the provincial Cabinet to decertify a union, should it engage in an illegal strike.

The temptation for the State to use its legislative power to advance its position as employer has been seemingly impossible to resist. Thus, recent amendments to Newfoundland legislation enable the provincial government to designate up to 49% of government employees as essential without having to afford access to arbitration. Under these amendments the government can undermine the efficacy of a strike while thwarting access to alternative dispute resolution. Nor is the abuse of legislative power limited to the public sector. In 1979, the Nova Scotia government enacted the "Michelin Bill" to guarantee to a multinational tire company a union-free environment by requiring majority support for unionization at geographically distant locations. Some provincial governments have gone so far as to change the composition of their labour boards in order to ensure the unquestioning implementation of intrusive labour policies.

Clearly, the most extreme example of retrenchment in Canada is supplied by recent labour legislation in British Columbia, enacted by a Social Credit governement. Under this legislation, which establishes a permanent framework for what would otherwise be exceptional State intervention, the Cabinet has the power to end strikes and impose binding arbitration when it decides that a major dispute is contrary to the public interest or a threat to the province's economy. This power applies to both the private and public sectors. Furthermore, the B.C. legislation abolishes the province's labour board and gives the commissioner of a newly established industrial relations council sweeping powers to intervene during collective bargaining. The B.C. Federation of Labour has boycotted the council, so that for the time being, management and labour are resolving their disputes outside the legislative framework.

Some analysts say that the trend toward intrusive State intervention is restricted to the public sector, but differ as to whether it is a temporary phenomenon or a permanent repudiation of the social experiment which began in the 1960's with public sector collective bargaining[37].

The rise of unionism in the public sector calls for the development of a new principle, or rather the extension of a traditional principle of administrative law, to the field of labour relations. If the State ought not to abuse its power, surely it ought not to use its legislative power to enhance its own position as employer. In this regard, public sector workers should not be singled out for special, adverse treatment,[38] should not be required to subsidize services to the public through substandard wages,[39] and should not be limited in their ability to bargain collectively either by the government budgeting process (which then surfaces as a claim of limited "ability to pay") or by a requirement to submit settlements for government review.

Moreover, depriving employees in the public sector of the strike weapon cannot be justified on the basis that the government is the employer. As Justice Wilson of the Supreme Court of Canada recently observed in a Reference regarding the constitutionality of a federal public sector wage control program:

> In discussing the rationale advanced by the government in support of the *Act* — its leadership function — it is important to keep in mind the two roles of government: the government as legislator and the government as employer. In both these roles the government may indeed have a responsibility to set an example for the country. However, the government as employer has no greater power vis-a-vis its employees than a private sector employer. As the Chief Justice pointed out in the *Reference Re Public Service Employee Relations Act (Alta.)* (unreported, released concurrently), the Canadian policy has rejected the notion that public sector collective bargaining and strike action threatens the sovereignty of the elected government. Instead, we have allowed collective bargaining and strikes to play an important role in public sec-

tor labour relations. The rationale is clear; in most circumstances it is eminently reasonable that the government bargain with someone from whom it wants to purchase a service[40].

While these remarks formed part of a dissenting judgment, the plurality of the Court did not address this issue. Justice Wilson concluded that, "if both public and private sector employees are free to engage in collective bargaining, which generally speaking they are, then public sector employees should not be deprived of this freedom as a means of government getting across its message, no matter how worthwhile that message may be". In the case of essential employees, where arbitration is substituted for the right to strike, there is similarly no justification for undermining the scope or independence of the arbitration process.

Further, there is a danger that intervention in public sector bargaining may be the harbinger of incursion by the State into the entire collective bargaining system, including the private sector:

It is arguable that the greater extent, scope, centralization and militancy of Canadian public-sector unionism has provoked the most recent cycle of exceptional legislation in Canada, notably temporary 'emergency' controls, beginning in 1975 and more recently, comparatively frequent back-to-work legislation to end strikes. Paradoxically, labour's very success since the 1960's has provoked an even higher level of interventionism during the 1970's and 1980's as Canadian governments at all levels attempt to contain public sector spending. Public sector unionism may have rounded out the post-war labour settlement, while at the same time putting it in jeopardy[41].

Indeed, Leo Panitch and Donald Swartz argue that the Canadian State has retreated from its generalized endorsement of collective bargaining:

This new reliance on back-to-work legislation was part of a broader pattern of developments, which characterized the onset of a new era in state policy towards labour. What marked this transformation was a shift away from the generalized rule-of-law form of coercion (whereby an overall legal framework both establishes and constrains the rights and powers of all unions) towards a form of selective ad hoc discretionary state coercion (whereby the state removes for a specific purpose and period the rights contained in labour legislation[42].

Are we, as Panitch and Swartz suggest, in an era of "permanent exceptionalism"? It is too early to tell. In general, the picture is mixed: against a tide of conservative political victories, privatization, deregulation, and upward redistribution of wealth, the post-war collective bargaining settlement has not been dismantled, although there are storm warnings in British Columbia. Although Conservative governments now dominate in most Canadian jurisdictions, and the NDP (successor to the CCF) governs in none, in most jurisdictions it is business as usual. First contract arbitration, in effect in many jurisdictions, has not been repealed; Ontario has, in fact, recently amended its legislation to make access to this remedy easier. It re-

mains to be seen whether the newly-elected Conservative government of Manitoba will repeal legislation, previously enacted by an NDP government, which makes final offer selection available for the *renewal* of contracts in the private sector, if approved by a vote of employees.

Most Canadian jurisdictions continue to leave to unions and employers the ability to negotiate strong forms of union security. None have passed "right to work" laws, permitting employees to work without complying with union shop provisions. Indeed, a number of jurisdictions (the federal government, British Columbia, Manitoba, Ontario, Québec and Saskatchewan) have made the payment of union dues mandatory for bargaining unit employees, whether or not they are members of the union[43].

In virtually all Canadian jurisdictions employers are not permitted to hire permanent strike replacements. Indeed, in Québec an employer cannot use the services of anyone but management to do the work usually done by striking employees if the latter are in a situation of legal strike or lock-out[44]. Although this legislation, unique in North America, was initially enacted by a Parti Québécois government, it is noteworthy that it has not been repealed by the current Liberal administration.

The Canadian Charter of Rights and Freedoms

In 1982 Canada acquired a Charter of Rights which entrenches fundamental freedoms in the Canadian Constitution, including an explicit guarantee of freedom of association, subject to such reasonable limits as are demonstrably jusfified in a free and democratic society. Since this basic law operates to invalidate legislation or government action that is inconsistent with its provisions, the courts are in a position, if they assert their authority, to intervene in the labour relations field. Thus far, however, the approach of Canada's Supreme Court has been characterized by caution and restraint. As a plurality of the Court recently observed, constitutionalizing rights in the labour relations field would involve the Court "in a review of legislative policy for which it is really not fitted"[45]. Applying this approach, the Court held that the right to strike is not protected by the guarantee of freedom of association in the Charter.

The reaction of labour has been mixed. On the one hand, it is disappointed that the Supreme Court has failed to pour into the Canadian Charter of Rights the content of international treaties guaranteeing freedom of association, such as ILO Convention No. 87, which has been interpreted by the ILO's Freedom of Association Committee to protect the right to strike[46]. The perception of one judge of the right to strike as economic only,

equivalent to a property right, does indeed appear to undervalue the social and political role of trade unions, and their function of providing a means for individuals to participate in self-government at the workplace[47].

Moreover, the Court has a mistaken understanding of labour history. The notion, for example, that the right to organize and collectively bargain is a modern right, created by legislation of relatively recent vintage,[48] does not accord with labour's perception that the right to bargain collectively, while reinforced and regulated by P.C. 1003 and successor legislation, is of a fundamental order[49]. While collective bargaining is a phenomenon that coincides with the industrial revolution, so too is mass suffrage; yet it can hardly be said that the right to vote is not fundamental, but merely the creation of legislation.

On the other hand, labour has a deeply rooted suspicion of the judiciary, based on its experience that the courts have never vindicated the rights of labour. To quote the President of the Canadian Labour Congress:

> The failure of the courts thus far to give recognition to the fundamental importance of trade union freedoms should not, in retrospect, have really come as a huge surprise to organized labour. From their very beginnings, trade unions have been viewed by the courts as illegal conspiracies in restraint of trade, and it took repeated pressure by working people on elected representatives to overturn judicial decisions and to protect trade union activities from constant attack in the courts. Moreover, it was democratically elected governments, and not appointed judges, which the trade union movement persuaded to erect the modern day collective bargaining system, so as to provide working Canadians with the collective power to counterbalance the otherwise un checked power of employers[50].

Indeed, as Professor Arthurs notes, an examination of the common law demonstrates that judges have virtually never created a right that could be asserted on behalf of unions:

> [...] Anglo-Canadian courts have been dealing with issues of individual and collective labour law for at least two hundred years. During that entire period, the courts virtually never, not on any given occasion, created a right which might be asserted by or on behalf of working people. Nor have they since the enactment of the Charter. Nor — I conclude — is it likely that they ever will [...] those who call for or anticipate such a development must be inspired by faith; they are surely not instructed by historical experience.
>
> [...] Under the Charter labour has lost the natural advantage of numbers, but gained neither explicit recognition of its agenda nor legitimation of its status. This was a poor exchange[51].

While there is no necessary connection between past practice and current behaviour, continuity is a likelier prospect than discontinuity. In this regard, a judicial policy of deference to the legislature in labour relations holds at least the promise that the clock will not be set back to the pre-P.C. 1003 era.

But does it? If the Charter cannot be successfully invoked by labour to strike down regressive laws and stem the tide of exceptionalism, will the same result follow where the Charter is used as a basis for attacking the collective rights of labour? At this point, indeed, it remains an open question as to how the Supreme Court will deal with attacks on the validity of exclusive representation rights, first contract arbitration, union security provisions, or the use of non-members' dues for social or political causes, to cite a few of the issues currently before Canadian courts. Professor Carter is right in voicing alarm:

> The application of the Charter to Canada's industrial relations system is bound to be a long and protracted process, making it difficult at this time to predict any final result. The extent to which the Charter will re-shape our labour relations system is still uncertain, and it is not yet clear whether Canadian courts will place a new emphasis on individual rights or take a more traditionally Canadian approach of giving precedence to collective responsibility. Nevertheless, the Charter has already cast a long shadow over our industrial relations system.
>
> Perhaps the greatest concern is that the Charter could reshape the Canadian industrial relations system in a form more closely resembling the present American model[52].

The prospect of spending years in the courts defending trade union rights is of great concern to labour, especially given the mixed response from provincial superior courts[53]. It must now direct substantial resources to fighting off campaigns, funded in part by right-wing groups, aimed at using the Charter to dismantle the labour movement. In these circumstances, victory in the courts for labour means at best the preservation of what it has taken forty years to develop.

STATE INTERVENTION AND INTERNATIONAL LABOUR STANDARDS

In assessing Canada's system of labour relations, it is helpful to have regard for the standards developed by the ILO, of which Canada is a member. The International Labour Organization has been active in establishing international norms through the mechanism of conventions. The primary conventions dealing with labour relations are the *Freedom of Association and Protection of the Right to Organize Convention No. 87* (1948), which provides in Article 2 that "Workers and employers, without distinction, whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization", and the *Right to Organize and Collective Bargaining Convention No. 98* (1949), which seeks to protect workers against anti-union discrimination in respect of their employment. Canada is a signatory to Convention No. 87, and is bound by the interpreta-

tions given to it by various ILO bodies, including the Committee on Freedom of Association, the Committee of Experts and Commissions of Inquiry.

ILO decisions may be said to reflect a consensus among member States as to the desirable characteristics of a labour relations system, having regard for the different socio-political cultures of different nations. Among these characteristics are the right of workers to establish and join organizations "of their own choosing", which have the right to freely draw up their constitutions and rules, elect representatives, and administer their organization without government interference. In this regard, the ILO has held that certification of the *most* representative union as the *exclusive* bargaining agent for the unit, as occurs in North America, does not violate that right as long as number of safeguards are observed. Thus, certification must be granted by an independent body and the representative organization must be chosen by a majority vote of the employees in the unit concerned[54].

The right to strike is recognized by the ILO as one of the essential means through which workers and their organizations may promote and defend their economic and social interests. This right may be restricted only where employees are engaged in essential services (i.e. services whose interruption would endanger the life, personal safety or health of whole or part of the population), or are civil servants engaged in the administration of the State, provided that such restrictions on the right to strike are accompanied by adequate, impartial and speedy conciliation and arbitration proceedings[55]. According to the ILO, any restriction on bargaining over wages, pursuant to a wage stabilization policy, should be imposed as an exceptional measure and only to the extent that it is necessary, without exceeding a reasonable period; moreover, it should be accompanied by adequate safeguards to protect workers' living standards[56].

While the merits of particular ILO decisions may be open to debate, its general approach of seeking to advance collective bargaining and freedom of association, taking into account differing national contexts, is one worthy of respect. In this regard, how has Canada fared? The answer is, in recent years, not too well. Relatively few complaints emanated from Canada in the 1960's and 1970's, but there has been an explosion of litigation during the period of retrenchment that has characterized the 1980's. Thus, the ILO has criticized Nova Scotia and Ontario for removing the right to strike from non-essential employees (Cases Nos. 1070 and 1071), Québec for imposing a wage control program that lasted too long, and for restricting the right to strike of teachers (Case No. 1171), B.C. for blocking negotiated increases through the exercise of its budgeting authority and for subjecting settlements to governmental review (Case No. 1173), Ontario again for rolling

back negotiated wage increases and suspending bargaining on non-monetary matters, as part of a wage control program (Case No. 1172), Alberta for removing the right to strike from non-essential employees (Case No. 1234), and Newfoundland for improperly restricting access by essential employees to arbitration (Case No. 1260). Indeed, barely two months ago, for the second time in two years, the ILO has castigated B.C. for violating international labour standards, this time in inacting an Industrial Relations Act limiting the right to strike and fettering arbitration (Case No. 1430). This catalogue is not exhaustive, but it is sufficient to demonstrate a pattern of repeated interference by Canadian governments with workers' freedom of association.

STATE INTERVENTION AND COMPARATIVE LABOUR LAW

Western Europe

In assessing State intervention in Canada, ought we to apply standards from Western Europe? In this regard, one must not forget that the Canadian labour relations system, which shares many features with the American system, is radically different from the systems common in Western Europe. First, under the North American system, the union chosen by the majority of employees in a unit becomes the exclusive representative of all the employees in the unit, while in most countries in Western Europe competing unions represent only those employees who are members of the union, although in some European countries collective agreements can be extended to bind other employers in the same industry. Also, bargaining in North America, while conducted by national and international unions, takes place at the plant or local level. There is no system, as there is, for example, in West Germany, of national bargaining, on an industry-wide basis, which in turn supports and complements representation by works councils at the local level[57].

As the eminent comparative labour law scholar, Otto Kahn Freund has observed, collective bargaining institutions are system-specific, and are not easily portable from one culture or country to another[58]. This point should be borne in mind in assessing the view of one Canadian academic who has urged the abandonment of our system of exclusive representation in favour of a West German works council or some other European model of plural or voluntary representation that would permit each worker to be represented by the union of his or her choice[59]. It is worth remembering that the principle of majoritarianism was adopted in order to assure the solidarity necessary to prevent employers from establishing company-dominated

unions and exploiting dual unionism. Indeed, were the system of exclusive representation to be abolished, there is no reason to expect that Canadian governments would immediately force a system of industry-wide bargaining upon a reluctant business community, and displace local unions with works councils. Instead, it is rather more likely, at least in those provinces where governments are sympathetic to employer interests, that erosion of the principle of exclusive representation would result in the encouragement of a union-free environment[60].

Again, whereas in Europe the practice of social concertation — involving the participation of business and labour, together with the State, in macro-economic decision-making through consensus — has recently gained considerable ground, as a result of inflation, recession and unemployment,[61] the idea has yet to gain wide support in Canada. Business and labour have danced "years of minuets [...] with government in efforts to mould a consultative framework. So far each dance has ended when one of the three finds an excuse to drop out"[62]. In 1976 the Canadian Labour Congress at its convention approved a manifesto calling for a tripartite National Council for Social and Economic Planning which would have on its agenda investment, housing, manpower, income distribution, industrial development, social security, and health. However, in the atmosphere of hostility and distrust engendered by wage and price controls, the prospect for any such broad-ranging tripartite enterprise has dimmed, perhaps indefinitely. At the 1978 CLC Convention, the manifesto was discarded as a policy[63].

Apart from creation of a Canadian Labour Management Productivity Council, whose focus is, as its name implies, restricted to concerns related to production, the idea of tripartism has so far failed to take root in Canada. Important segments of business fear that it would interfere with their ability to advance their shareholders' interests, while some unions are convinced that labour could be co-opted into a regime where business has more clout, with the result that workers would bear the burden of the economy's failure, but would not receive a fair share of its success.

The United States

Although Canada's labour relations system has been strongly influenced by the United States, there are major differences between the two countries[64]. Thus, comparing the increase in union membership in Canada with the decline in the U.S., many scholars have attributed the different experience to more favourable labour legislation in Canada[65]. Significantly, in

most jurisdictions, in Canada, a union may obtain certification without a vote if a sufficient number of membership cards are signed by employees in the bargaining unit; in the several jurisdictions which call for a vote, the vote is expedited. In the United States, on the other hand, an "election campaign" takes place during which the employer has an opportunity to launch an anti-certification campaign designed to influence the employees at the workplace; when this occurs, the union's record of success falls sharply.

The contrast is, indeed, dramatic. Since the Second World War, Canadian labour legislation in the more densely populated provinces has undergone incremental, progressive change, including a strengthening, during the 1970's, of the remedial power of labour boards to deal with employer unfair labour practices. On the other hand, the provisions of the U.S. National Labour Relations Act have been trapped in a time warp, because of a political deadlock at the national level. The decisions of the Supreme Court, and Reagan-appointed members of the NLRB, have been such that to many trade union leaders in the U.S. the NLRA is a "dead letter".

Professor Tribe has vividly captured the U.S. Supreme Court's attitude toward labour in the following passage:

> In theory, of course, employers and employees are supposed to get even-handed treatment in the legal administrative framework within which labour disputes — including those involving free speech — are handled. In reality, however, workers found themselves at a substantial disadvantage. When unions speak out in political matters, for example, they must (upon request) refund to dissenting members the pro-rated cost of such activity. Corporations do not have this problem; corporations may speak out on political subjects in spite of shareholders' dissent. Corporations also speak with a far louder voice, heavily out-spending labour on the dissemination of their views. Indeed, the proof of this imbalance of power can be seen in the result: 'the failure of labour to pass any legislation affecting the basic structure of private sector bargaining since 1935', and the decline in the rate of union representation of American workers from 35 percent in 1940's, to barely 20 percent in 1980.
>
> The Court's apparent unwillingness to give unions the full measure of First Amendment protection cannot be justified by the argument that unions pursue narrowly economic goals. In the first place, this is simply not true of all unions, many of which, like the Longshoremen's Union and *I.L.A.* are willing to 'hit the bricks' on issues other than wages and benefits. In the second place, to the extent that unions have foresaken broader issues, the current orientation has been shaped to a large degree by the Supreme Court itself — for example, in the Court's highly restrictive subject-of-bargaining doctrine[66].

Professor James Gray Pope has spoken in cosmic terms to make the same point:

> In a black hole, '[o]ur common sense notions and our cherished scientific laws take a very heavy beating, and right in the centre [...] they cease to have any meaning at

all'. Over the past three decades, the Supreme Court has, in effect, relegated labor protest to a black hole, not by casting it down, but by building up a body of first amendment protections outside the labour area while leaving labor to the doctrines of the past.

Certainly, the anti-union environment in much of the U.S. (though some states, such as New York and Michigan have a relatively high union density) is reflected in concerted campaigns to defeat attempts at organization, and in the prevalence of right-to-work laws which prohibit union shop provisions. Professor Barbash speaks of a New Industrial Relations era, in which business has decided to rid society of collective bargaining because it believes that union interference with the free operation of the labour market creates inefficiency, and inhibits the ability of business to adapt quickly, through changing personnel policies, to the economic exigencies of the moment[67]. Whether this era is short-lived or not may well depend upon the policy of the State in the post-Reagan period.

Critical Legal Studies scholars, too, while they extoll the Wagner Act of 1935 as an "extraordinary historical achievement", have tracked the narrowing of the U.S. National Labour Relations Act caused by judicial interpretations which, in their view, effectively "cabin" union organizing efforts[68]. These critics argue that the law treats workers and their employers as juridical equals when they are not equals in fact,[69] and that the process of collective bargaining amounts to a form of contractualism which keeps substantive discontent within the parameters of what is considered tolerable by the dominant class, and transforms unions into guardians of industrial peace[70].

However, this analysis is not so readily applicable to Canada. For one thing, the Canadian labour movement has not been distracted by legalism from political action. Unlike its American counterpart, it has maintained a commitment to social democracy, by supporting the New Democratic Party,[71] which has been the governing or official opposition party in several provinces, and has played an important role at the federal level. Moreover, there is no reason to believe that Canadian courts will blindly follow American precedent, rather than creating (as indeed they have) a distinctive Canadian approach, based on Canada's greater concern for collective rights.

CHOICES FOR THE FUTURE

Since the passage of the U.S. Wagner Act, followed by similar legislation in Canada, it has been accepted that the State should seek to protect the right of workers to organize, so as to strengthen the bargaining power of

employees vis-a-vis their employers. Indeed, few would argue against the notion that the State should establish a labour relations system that results in the substantive improvement of workers' economic conditions in their daily lives. It should protect workers from arbitrariness by management, and enhance workers' ability to participate in industrial self-government[72].

How does Canada's labour law system measure up? To the extent that the Canadian labour law system fosters certification, it has clearly strengthened workers' bargaining power. However, a substantial portion of Canadian employees remain unrepresented, and the response of one academic to this dilemma has been to urge the abandonment of the notion of exclusivity[73]. In the view of another academic, an application of the political process analogy would be to give collective bargaining rights to the union which enjoys the most support in a unit, even if that support does not amount to a majority[74]. An alternative remedy could be to extend collective agreements to unorganized employees in the same industry, a practice that, in fact, has roots in Québec, where a system of collective agreement decrees, applicable to certain industries in designated economic zones, has been in place since 1934.

Professor Adell speaks of "the pressing need for an overhaul of Canadian labour relations law to provide effective machinery for employee representation in the workplace"[75]. It is in fact unacceptable that substantial segments of the workforce are denied collective bargaining rights altogether. In this regard, such rights should be extended to groups currently excluded, e.g. agricultural workers, domestics, and supervisory staff. In those jurisdictions where prohibitions apply to professional employees, they should be removed.

Another source of continuing resentment on the part of labour is the inability to deal with situations — plant closings, relocation, reorganization, contracting out or out-sourcing — that are not addressed in the collective agreement. The resentment is exacerbated by the fact that, while arbitration is available for disputes arising during the term of a collective agreement, arbitrators are unanimous that, in the area of managerial decision-making, what isn't specifically taken from management by the collective agreement is reserved to management. As Professor Langille points out, this principle is contrary to even the minimum notion of juridical equality of the parties[76]. It strengthens the employer's position during bargaining and leaves the union helpless to respond to corporate decisions, no matter how arbitrary, in areas not expressly covered by the agreement. Moreover, although arbitration is useless in such circumstance as a remedy, Canadian labour legislation bans all work stoppages during the term of the agreement, in the interest of preserving industrial peace.

In Professor England's view, "it is no answer to say that the union should have protected its position in the current collective agreement. The most astute negotiators cannot foresee at the table all developments that may occur during the lifetime of the agreement"[77]. Even if such events could be foreseen, management jealously guards such decisions as coming within its sole prerogative, and is reluctant to bargain over anything other than such matters as notice of layoff, severance pay, pension rights, and retraining opportunities. Indeed, employers have no obligation even to inform the union of major corporate decisions unless at the time of bargaining (and then only) a corporate decision that impacts upon the employees has effectively been made, and the union has made a request for such information.

There seems indeed to be a consensus among labour law and industrial relations scholars that the State should intervene to expand the scope of bargaining between the parties, and to enhance the ability of trade unions to participate in decision-making, at the workplace level and at the level of strategic planning[78].

CONCLUSION

While unions have been successful in Canada (leaving aside B.C.) in preventing the wholesale sabotage of labour legislation and in resisting the revages of concession bargaining, as has occurred in the U.S., the past decade has not been without its shadows. Although the State has generally remained committed to the principle of collective bargaining, it has wavered in that commitment, especially during recessionary periods, in its treatment of public sector employees. Exceptional *ad hoc* intervention has grown more frequent and threatens, at least in one province, to become permanent. The growing tendency on the part of the State to erode collective bargaining rights must be resisted, and further steps should be taken to enhance those rights, if the State is to deliver fully to workers on the original promise of equality of bargaining power, economic well-being and self-determination.

NOTES

1 Canada is a highly decentralized federal State. Although its Constitution does not specifically assign jurisdiction over labour relations to the federal or to the ten provincial governments, the courts have held that the provinces have primary jurisdiction over labour relations pursuant to their jurisdiction over "property and civil rights" under s.92 of the Constitution Act: see *Toronto Electric Commissioners v. Snider,* [1925] A.C. 396 (Privy Council). Each province has enacted its own labour relations legislation, although a considerable measure of uniformity exists. The federal government has power to regulate labour relations only where they are an integral part of a business or industry that is otherwise within the legislative authority of the federal Parliament (navigation, shipping, interprovincial or international transportation and communications, aeronautics and the production of atomic energy): see *Re Industrial Relations and Disputes Investigation Act (Canada),* [1955] S.C.R. 529. Fewer than 10 per cent of Canadian workers fall under the national government's jurisdiction: M. GUNDERSON and N.M. MELTZ, "Recent Developments in the Canadian Industrial Relations System", (1987) 16 *Bulletin of Comparative Labour Relations* 77, p. 80.

2 Otto Kahn FREUND, "On Uses and Misuses of Comparative Law", (1974) 37 *The Modern Law Review* 1; see also R. BLANPAIN, "Comparativism in Labour Law and Industrial Relations", in *Comparative Labour Law and Industrial Relations* (third edition), ed. R. BLANPAIN, Deventer, Kluwer, 1987.

3 *Combination Act,* 1799 (U.K.) 39 Geo. 3, c.81; *Combination Act,* 1800 (U.K.) 39 & 40 Geo. 3, c.106.

4 *Combination Act,* 1825 (U.K.) 6 Geo. 4, c.129.

5 The 1825 Act permitted employees to meet with their employers and bargain over wages and hours of work, but it prohibited acts aimed at persuading workers to join a union or employers to change working conditions if these acts amounted to violence, threats, intimidation, molestation or obstruction.

6 (1871) (U.K.), 34 & 35 Vict., c.32.

7 (1871) (U.K.), 34 & 35 Vict., c.31.

8 S.C. 1872, c.31.

9 S.C. 1872, c.30.

10 See Desmond MORTON, "Labour and Industrial Relations History in English-Speaking Canada" (to be published as part of the Canadian Industrial Relations State-of-the-Art Project, School of Industrial Relations, Queen's University, Kingston, Ont.). The *Criminal Law Amendment Act* until 1892 was limited to registered trade unions of which there were few. Moreover, peaceful picketing was again made illegal in 1892 and remained so until 1934. The common law doctrines of civil conspiracy in restraint of trade, and inducing breach of contract, continued in full force, and formed the legal basis for the issuance by the courts of injunctions limiting picketing. The fact is that Canada never enacted the equivalent of the *English Trade Disputes Act* of 1906 (U.K.), 6 Ed. 7, c.47, which repealed the doctrine of civil conspiracy and relieved unions from liability in tort for actions relating to trade disputes.

11 S.C. 1903, c.55.

12 S.C. 1907, c.20.

13 Paul CRAVEN, *An Impartial Umpire', Industrial Relations and the Canadian State 1900-1911,* Toronto, University of Toronto Press, 1980, p. 369.

14 Irving ABELLA, "The Canadian Labour Movement 1902-1960", Ottawa, Canadian Historical Society, Historical Booklet No. 28, 1975, p. 6.

15 See Desmond MORTON, Affidavit dated August 28, 1986, filed in the *Arlington Crane* case (Ontario Supreme Court file No. RE2745/85). Morton notes that King, who acted as a consultant to the Rockefellers, following an electoral defeat, subsequently pioneered

"Employee Representation Plans" as a means of saving employers from having to deal with *bona fide* trade unions. Rechristened the "American Plan", the strategy was widely used following World War I to defeat or supplant legitimate unions.

16 Mandatory conciliation persists to this day as a feature of labour law in many Canadian jurisdictions (federal government, New Brunswick, Newfoundland, Nova Scotia, Ontario), although its effect is no longer so detrimental to unions because the cooling-off period is generally brief and other provisions of existing labour codes offer protection against unfair labour practices.

17 Desmond MORTON and Terry COPP, *Working People: An Illustrated History of the Canadian Labour Movement,* Ottawa, Deneau, 1984, pp. 179-180.

18 Mark THOMPSON, "The Future of Voluntarism in Public Sector Labour Relations", *Essays in Labour Relations Law: The Death of Voluntarism,* ed. G. ENGLAND, CCH Canadian Ltd., 1986, p. 104.

19 Laurel Sefton MACDOWELL, "The Formation of the Canadian Industrial Relations System During World War Two", *Labour/Le Travail,* 1978, p. 195.

20 Judy FUDGE, *Voluntarism and Compulsion: The Canadian Federal Government's Intervention in Collective Bargaining From 1900 to 1946,* Ph.D. dissertation, University College, Oxford, 1988; W. Craig RIDDELL, *Canadian Labour Relations: An Overview,* Toronto, University of Toronto Press, 1986, p. 7.

21 The preamble to Part V of the *Canada Labour Code,* R.S.C. 1970, c.L-1, as amended by S.C. 1972, c. C-183, reads as follows:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the basis of effective industrial relations for the determination of good working conditions and sound labour-management relations;
>
> And Whereas the Government of Canada has ratified convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibility in this regard;
>
> And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
>
> Now Therefore, Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows [...]

The preamble to the *Labour Relations Act,* R.S.O. 1980, c.228, provides as follows:

> Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

22 H.D. WOODS, *Labour Policy in Canada,* 2nd edition, Toronto, MacMillan, 1973, p. 101.

23 Desmond MORTON and Terry COPP, *op. cit.,* p. 184.

24 H.W. ARTHURS, D.D. CARTER and H.G. GLASBEEK, *Labour Law and Industrial Relations in Canada,* 2nd ed., Kluwer Butterworths, 1984, p. 41.

25 Pradeep KUMAR, "Union Growth in Canada: Retrospect and Prospect", *Canadian Labour Relations,* ed. W. Craig RIDDELL, Toronto, University of Toronto Press, 1986, pp. 108-109.

26 W. Craig RIDDELL, "Canadian Labour Relations: An Overview", *Canadian Labour Relations,* ed. W.C. RIDDELL, *op. cit.,* p. 5.

27 LABOUR CANADA, *Directory of Labour Organizations in Canada,* 1987, pp. 18-19.

28 Pradeep KUMAR, "Union Growth in Canada: Retrospect and Prospect", *Canadian Labour Relations,* ed. W. Craig RIDDELL, *op. cit.,* p. 115.

29 HUXLEY, KETTLER, STRUTHERS, "Is Canada's Experience 'Especially Instructive?'", in *Unions in Transition,* ed. Seymour Martin LIPSET, San Francisco, ICS Press, 1986, p. 120; Pradeep KUMAR, *op. cit.,* p. 129.

30 Shirley B. GOLDENBERG, "Public Sector Labour Relations in Canada", *Public Sector Bargaining,* second edition, eds. AARON, NAJITO, STERN, Washington, BNA Books, 1988, p. 270.

31 *C.A.T.C.A. v. The Queen,* (1982) 44 N.R. 123.

32 Paul WEILER, *Reconcilable Differences,* Toronto, Carswell, 1980, pp. 209-214.

33 Wouten van GINNEKEN, "Wage Policies in Industrialized Market Economies from 1971 to 1986", (1987) 126 *International Labour Review,* Geneva, ILO, p. 379.

34 S.C. 1974-75, c.75.

35 S.C. 1980-81-82-83, c.122.

36 A.W.R. CARROTHERS, *Collective Bargaining Law in Canada,* (2nd ed.), Toronto, Butterworths, 1986, pp. 115-125.

37 W. Craig RIDDELL, "Canadian Labour Relations: An Overview", *op. cit.,* p. 20.

38 Thus, for example, as Paul WEILER states in *Reconcilable Differences, op. cit.,* p. 286, governments, like private employers, should engage in free collective bargaining with their employees. Governments do not need and should not use the crutch of external regulations to accomplish their objectives. No principled case can be made for singling out public employees for wage controls, while leaving their private sector counterparts to extract all that the market will bear.

39 *British Columbia Railway,* Labour Arbitration News, June, 1976, Arbitrator O.B. Shime, Q.C.

40 *PSAC v. Canada,* [1987] 1 S.C.R. 427, p. 456 (dissenting).

41 HUXLEY, KETTLER, STRUTHERS, *op. cit.,* p. 128. A similar thesis has been advanced in the United States: Daniel MITCHELL, "Collective Bargaining and Compensation in the Public Sector", *Public Sector Bargaining, op. cit.,* p. 128.

42 Leo PANITCH and Donald SWARTZ, "Towards Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations", 13 *Labour/Le Travail,* Spring 1984, 133, p. 149. M. GUNDERSON and N.M. MELTZ, *op. cit.,* p. 77.

43 The remaining jurisdictions require check-off by the employer if authorized by employees.

44 Ontario, Manitoba and British Columbia have enacted limited provisions prohibiting the use of professional strikebreakers.

45 *Re Public Service Staff Relations Act,* [1987] 1 S.C.R. 313.

46 As Chief Justice Dickson stated, in a dissenting judgment, the various sources of international human rights law are relevant and persuasive sources for the interpretation of the Charter, "which should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified", *Re Public Service Staff Relations Act, op. cit.* See John CLAYDON, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms", (1987) 2 *Conn. Journal of Int'l Law* 349.

47 Compare the reasoning of the California Supreme Court and, in particular, the concurring judgment of Chief Justice Bird who held that the right to strike involved a constitutionally protected civil liberty: see *County Sanitation District L.A. County Employees' Assn.,* 699 p. 2d 835 (Cal. 1985). See also C.W. JENKS, *Human Rights and International Labour Standards,* Stevens & Sons Limited, 1960, p. 49.

48 *Re Public Service Staff Relations Act, op. cit.,* per J. LeDain p. 391, and per J. McIntyre p. 413.

49 Labour's position was supported by Chief Justice Dickson who held, in a dissenting judgment, that P.C. 1003 merely recognized the workers' right to bargain collectively, and that legislative regulation of the right did not deprive it of its constitutional status. *Re Public Service Staff Relations Act, op. cit.,* per J. Dickson, Addressing the history of worker's right to associate, the Chief Justice observed:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers.

50 Shirley CARR, "Equality Rights: Labour's Perspective", *Employee Relations and the Charter of Rights,* DeBoo, 1985.

51 H.W. ARTHURS, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter", (1988) *Queen's Law Journal,* (forthcoming).

52 Donald P. CARTER, "Canadian Labour Relations Under the Charter", (1988) 43 *Relations Industrielles* 305.

53 *Re Lavigne and Ontario Public Service Employees' Union et al.,* (1986) 29 D.L.R. (4th) 321; *Re Bhindi et al.,* (1986) 29 D.L.R. (4th) 47.

54 Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Third Edition, 1985, p. 51.

55 *Id.,* p. 78.

56 *Id.,* p. 117. For a general discussion of these issues, see HODGES-AEBERHARD and Odero de DIOS, "Principles of the Committee on Freedom of Association Concerning Strikes", (1987) 126 *International Labour Review* 543. For a critical review of Canada's compliance with internationally accepted norms on freedom of association, Isik Urla ZEYTINOGLU, "The ILO Standards and Canadian Labour Legislation", (1987) 42 *Relations Industrielles* 292.

57 For a further comparison of these systems, see Clyde SUMMERS, "American and European Labour Law: The Use and Usefulness of Foreign Experience", (1967) 16 *Buffalo Law Review* 210; Derek BOK, "Reflections on the Distinctive Character of American Labour Law", (1971) 84 *Harvard Law Review* 1394.

58 O. Kahn FREUND, *op. cit.*

59 David BEATTY, *Putting the Charter to Work: Designing a Constitutional Labour Code,* McGill-Queen's University Press, 1987.

60 For a critique of Professor Beatty's views, see Bernard ADELL, "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship", in Proceedings of Conference on Labour Relations, University of Lethbridge, to be published by CCH Canadian (1988).

61 Georges SPYROPOULOS, "What is the Future of Social Concertation", (1987) 12 *Labour and Society* 451, pp. 459-460.

62 Mark THOMPSON and Hervey JURIS, "The Response of Industrial Relations to Economic Change", *Industrial Relations in a Decade of Economic Change,* ed. H. JURIS, M. THOMPSON, DANIELS, Industrial Relations Research Association Series, 1985, p. 392.

63 Roy ADAMS, "Industrial Relations and the Economic Crisis: Canada Moves Towards Europe", *Industrial Relations in a Decade of Economic Change,* op. cit., p. 130.

64 The social and political differences between Canada and the United States are explored in Jeffrey SACK, "The Impact of the Charter of Rights on Labour Relations in Canada: Learning from American Experience", Sefton Lecture, University of Toronto, 1986.

65 Paul WEILER, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA", (1983) 96 *Harv. L. Rev.* 1709; Noah M. MELTZ, "Labour Movements in Canada and the United States", *Challenges and Choices Facing American Labor,* MIT Press, 1985, p. 315; J. Rose and G. CHAISON, "The State of the Unions Revisited: the U.S. and

Canada", Proceedings of the C.I.R.A., McMaster University, 1987, p. 576. For a review of legislation strengthening administrative regulation, see D.D. CARTER, "The Expansion of Labour Board Remedies", Kingston, Industrial Relations Centre, 1976.

66 Laurence TRIBE, *Constitutional Choices,* (1985), p. 202; see also James Gray POPE, "Labour and the Constitution: From Abolition to Deindustrialization", (1987) 65 *Texas Law Review* 1071.

67 Jack BARBASH, "The New Industrial Relations in the U.S. Phase II", (1988) 43 *Relations Industrielles/Industrial Relations* 32.

68 Karl KLARE, "Judicial Deradicalization of the Wagner Act", (1988) 62 *Minn. L. Rev.* 265; "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law", (1980) 4 *Ind. Rel. L.J.* 453; "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining: A Reply to Professor Finkin", (1985) 44 *Md. L.R.* 731; "The Labour-Management Co-operation Debate", (1988) 23 *Harv. Civil Rights L.R.* 39; see also Katherine van WEZEL STONE, "The Post-War Paradigm in American Labor Law", (1981) 90 *Yale L.J.* 1509; "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities", (1988) 55 *Univ. Chic. L.R.* 73; and see Christopher L. TOMLINS, *The State and the Unions,* Cambridge University Press, 1985; "The New Deal, Collective Bargaining and the Triumph of Industrial Pluralism", (1985) 39 *Ind. and Lab. Rel. Rev.* 19.

69 Harry G. GLASBEEK, "Voluntarism, Liberalism, and Arbitration: Holy Grail, Romance and Real Life", *Essays in Labour Relations Law — Papers Presented at the Conference on Government and Labour Relations: The Death of Voluntarism,* ed. G. ENGLAND, CCH Canadian Ltd., 1986.

70 Richard HYMAN, "A Critical View of Industrial Democracy Schemes", *Essays in Collective Bargaining and Industrial Democracy,* eds. G. ENGLAND and G. LERMER, CCH Canadian Ltd., 1984.

71 For a discussion of this see: Gad HOROWITZ, *Canadian Labour in Politics,* Toronto, University of Toronto Press, 1968.

72 The preamble to the U.S. National Labour Relations (Wagner) Act, enacted in 1935, reads as follows:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

73 David M. BEATTY, *op. cit.;* see, for a critique, Bernard ADELL, *op. cit.*

74 *George S. BAIN, "Union Growth and Public Policy in Canada", Labour Canada, 1978, pp. 41-42. For an extended discussion of this issue, see Bernard ADELL, "Law and Industrial Relations: The State of the Art in Common Law Canada", ed. G. HÉBERT, H. JAIN and N.M. MELTZ, The State of the Art in Industrial Relations* (1988), to be published by Queen's University School of Industrial Relations.

75 Bernard ADELL, "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship", *op. cit.*

76 *Brian A. LANGILLE, "Equal Partnership" in Canadian Labour Law", (1983) 21 Osgoode Hall Law Journal* 497.

77 Geoffrey ENGLAND, "Some Thoughts on the Peace Obligation", (1980) 12 *Ottawa Law Review* 521, p. 593.

78 T.A. KOCHAN, H.C. KATZ and R.B. MCKERSIE, *The Transformation of American Industrial Relations,* Basic Books, 1986; T.A. KOCHAN and R.B. MCKERSIE, "Future Directions for American Labor and Human Resources Policy", published in this issue Katherine van WEZEL STONE, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities", *op. cit.*

Le rôle de l'État dans les relations du travail au Canada

La présence ou l'absence de l'intervention étatique peut favoriser les intérêts d'une partie ou d'une autre. Ces institutions que sont l'intervention étatique et la négociation collective ne peuvent pas être réellement bien comprises si elles sont isolées de leur contexte social et politique particulier. L'attitude de l'Etat vis-à-vis les syndicats au Canada s'est manifestée de façon différente selon les époques: hostiltion de la négociation collective doublée d'une attitude de neutralité par rapport au résultat et présentement, dans quelques juridictions, le retranchement.

L'État canadien a commencé à protéger la négociation collective en adoptant en 1944 le P.C. 1003 basé en partie sur la loi Wagner américaine. La législation canadienne du travail protège le droit d'association, établit la pratique du monopole de représentation au syndicat majoritaire, impose à l'employeur l'obligation de négocier et protège le droit des salariés à la grève afin d'obtenir une convention collective, mais demeure neutre eu égard au résultat de la négociation. Ce cadre général fut appliqué au secteur public canadien dans les années 1960 et 1970, avec cette réserve cependant que certaines provinces ont refusé d'octroyer le droit de grève aux employés du secteur public.

Au cours de cette période qualifiée de retranchement, i.e. la fin des années '70 et les années '80, l'Etat s'est immiscé dans le processus général de négociation, incluant même l'utilisation de la loi de retour au travail. Même s'il n'y a aucune distinction de principe entre le régime du secteur public et celui du secteur privé, il est à noter que ces interventions de l'État ont surtout visé le secteur public. C'est durant ces années qu'on assiste à une explosion d'accusations contre le gouvernement canadien auprès de l'O.I.T. qui rendit des décisions critiquant la plupart des mesures législatives des différents niveaux de gouvernements au Canada pendant cette période.

Malgré cette approche de retranchement des gouvernements, l'approche générale à la négociation collective est demeurée en grande partie intacte. On peut même noter la présence de certains changements progressifs.

Adoptant une approche prudente, les cours se sont montrées réticentes à intervenir dans le système de relations du travail en appliquant la *Charte canadienne des droits et libertés*. Cependant, les syndicats craignent que cette approche des cours ne s'applique qu'à leurs contestations du système actuel et non aux attaques des employeurs.

Le système canadien a mieux protégé la négociation collective que le système américain. Alors que récemment la proportion de syndiqués par rapport à la main-d'oeuvre non-agricole s'est accrue à près de 40% au Canada, cette même proportion diminuait à moins de 20% aux Etats-Unis. Cette expérience américaine s'explique en partie par le fait que le *National Labor Relations Act* s'est enlisé dans le statu quo et par le fait que les employeurs ont mené de façon concerté des campagnes pour empêcher l'organisation syndicale.

Le système canadien diffère également de celui qui prévaut en Europe de l'Ouest. Le monopole de représentation et la négociation décentralisée (au niveau de la firme) constituent les principales différences entre le système canadien et les modèles européens. Il est cependant utile de se rappeler que le principe de la majorité prévalant en Amérique du Nord fut adopté pour assurer la solidarité nécessaire et ainsi empêcher les employeurs de former des syndicats de boutique,.et d'exploiter la rivalité syndicale.

Le système de base de négociation collective au Canada a besoin d'être amélioré à certains égards. Il faudra éliminer les obstacles à l'organisation syndicale des travailleurs; abolir les interdictions législatives à certains groupes, tels les travailleurs agricoles, d'utiliser la négociation collective; abandonner la théorie arbitrale des droits de gérance durant la vie d'une convention collective; étendre la portée de la négociation entre les parties. Finalement, la participation syndicale à la prise de décision au niveau de l'atelier et au niveau de la planification stratégique devra être élargie.

El rol del Estado en las relaciones de trabajo en Canadá

La presencia o la ausencia de la intervención del Estado puede favorizar los intereses de una parte o de la otra. La intervención del Estado y la negociación colectiva como instituciones, no pueden ser comprendidas si se les excluye del contexto social y político. La actitud del Estado frente a los sindicatos en Canadá, se manifiesta de manera diferente según las épocas: hostilidad, tentativa de pacificación por la conciliación obligatoria, la protección de la negociación colectiva paralela a una actitud de neutralidad en relación a los resultados y actualmente, en algunas jurisdicciones el atrincheramiento.

El Estado canadiense comenzó a proteger la negociación colectiva, al adoptar en 1944 el P.C. 1003 parcialmente basado en la ley americana Wagner. La legislación canadiense del trabajo protege el derecho de asociación, establece la práctica del monopolio de la representación al sindicato mayoritario, impone al empleador la obligación de negociar y protege el derecho de los asalariados a la huelga con la finalidad de obtener una convención colectiva, no obstante es neutral en relación al resultado de la negociación. Este cuadro general fue aplicado al sector público canadiense en los años 60s y 70s, con la exclusión de ciertas provincias que le rechazaron el derecho de huelga.

Durante el período considerado como atrincheramiento, a fines de los 70s y los años 80s, el Estado intervino en el proceso general de negociación, utilizando incluso la Ley de regreso al trabajo. A pesar de que no existe ninguna distinción de principio en los regímenes del sector público y del privado, es notable que estas intervenciones del Estado se concentraron en el sector público. Fue durante estos años que se observó una explosión de acusaciones contra el gobierno canadiense en la OIT, cuyas decisiones criticaron la mayor parte de las medidas legislativas de los diferentes niveles de los gobiernos en Canadá. A pesar del atrincheramiento de los gobiernos, la negociación colectiva en general quedó en gran parte intacta. Incluso podemos notar la presencia de ciertos cambios progresivos.

Adoptando un enfoque prudente, las cortes se han mostrado reticentes a intervenir en el sistema de relaciones de trabajo, aplicando la Carta Canadiense de Derechos y Libertades. Sin embargo, los sindicatos temen que esta actitud de las cortes se aplique a sus protestas contra el sistema actual y no a las de los empleadores.

El sistema canadiense ha protegido mejor la negociación colectiva que el sistema americano. La proporción de sindicalizados en relación a la mano de obra no agrícola creció cerca de 40% en Canadá, mientras que esta misma proporción disminuyó a menos de 20% en los Estados Unidos. Este hecho se explica porque el Acta Nacional de Relaciones de Trabajo se estableció dada la situación social americana y por el hecho que los empleadores han realizado campañas para impedir la organización sindical.

El sistema canadiense difiere igualmente del que prevalece en Europa occidental. El monopolio de representación y la negociación decentralizada a nivel de la empresa, constituyen las principales diferencias entre el sistema canadiense y los modelos europeos. Sin embargo, es necesario recordar que el principio de la mayoría que prevalece en América del Norte, fue adoptado para asegurar la solidaridad necesaria y asi impedir a los empleadores de formar sindicatos de fachada y explotar la rivalidad sindical.

El sistema de base de la negociación colectiva en Canadá tiene necesidad de ser mejorado. Es necesario eliminar los obstáculos a la organización sindical de los trabajadores; abolir los impedimentos legislativos para ciertos grupos, como los trabajadores agricolas, de utilizar la negociación colectiva; abandonar la teoria del arbítrio de derechos de gerencia durante la vigencia de una convención colectiva; extender la negociación entre las partes. Finalmente, deberá ser extendida la participación de los sindicatos en la toma de decisiones al nivel del lugar de trabajo y la participación en la planificación de estrategias.