



CURRENT ISSUES SERIES

# Canadian Industrial Relations in the Year 2000: Towards a New Order?

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## Executive Summary

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- A rapidly changing external environment could bring about important changes in our existing industrial relations order, characterized by exclusive representation, permanency of bargaining structures, a strong trade union movement, continuing opposition to union organization on the part of employers, and frequent legislative intervention.
- This changing environment is affecting public sector collective bargaining where political action has become more important.
- The *Charter* has been interpreted by the Supreme Court of Canada as neither protecting our existing industrial relations institutions nor diminishing them. In the future, therefore, this industrial relations system will be reshaped through political action rather than by *Charter* litigation.
- Legislation of general application, such as human rights legislation, is also playing an increasingly important role in defining the rights of the organized worker. Unions are more likely to advance employee interests by seeking improvements in this legislation of general application, placing an increased emphasis on union political action.
- The adversarial nature of our existing industrial relations system is deeply rooted and a change of both management and union attitudes is required if we are to develop new approaches to union-management relations.
- A changing economic environment will create strong pressures for changes in our existing industrial relations order, but the political climate is likely to be an equally important influence.

## Introduction

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Canada's industrial relations system faces a rapidly changing external environment in this last decade of the 20th century. Significant and far-reaching changes in our economic, political and legal environment are already being felt and even more changes appear to be on the horizon. The question squarely facing Canada's industrial relations community is the extent to which these important changes will reshape our existing industrial relations order. This existing order, what I will refer to as the 'old industrial relations order,' has been with us since the 1940s. As we approach the year 2000, however, changes in the external environment will penetrate to the very roots of the 'old industrial relations order.' This essay explores the question of how much of this existing system will remain in its present form by the end of the present decade. It begins with an examination of some of the more marked characteristics of the industrial relations system that has served us, for better or worse, for close to half a century.

## Characteristics of Our Existing System

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Exclusive representation is a feature of the Canadian industrial relations system that distinguishes it from many of the European systems where workers have organized along religious and ideological lines, and employers find themselves dealing with more than one union. Exclusive representation, by contrast, has engendered a substantial degree of stability in our Canadian industrial relations system by imposing upon a single bargaining agent the responsibility of reconciling the disparate employee claims within the bargaining unit. At the same time, however, the principle of exclusive representation has raised concerns about the rights of individual employees within this bargaining monopoly. The duty of fair representation, although designed to address those concerns, has been viewed by many as a rather unhappy compromise between the rights of the collective and the rights of the individual, perhaps because the principle of exclusive representation still remains the dominant element in our collective bargaining system.

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Closely related to exclusive representation is a second feature of our collective bargaining system — the permanency of its bargaining structures. Trade union penetration of Canada's public sector in the 1960s and 1970s has particularly enhanced this characteristic of our system by creating large bargaining units that until now have been much less subject to erosion by economic forces than those in the private sector. The size of these bargaining units, moreover, also means that it is a virtual impossibility for the bargaining agent representing such units

to be displaced by another union. This permanency of the present bargaining structure has lent stability to our collective bargaining system but, at the same time, it has introduced certain rigidities making it more difficult for workplaces to adjust to change.

A third element of our existing collective bargaining system is a strong and vigorous trade union movement. Despite developments south of the border and elsewhere in the world, the Canadian trade union movement still showed remarkable strength and resiliency during the 1980s. In particular, during the recession of 1982-83, Canadian trade unions were far more successful in resisting concessions during bargaining than were their American counterparts. It remains to be seen, however, whether Canadian unions will weather the present economic downturn in as good condition. More will be said about this matter later.

A fourth element of our present collective bargaining system, and in some ways a contradiction of the third, is the determined, and continuing, opposition by employers to union organization. Unions are still struggling to make inroads upon a significant sector of unorganized employees in Canada and Canadian employers, both large and small, continue to resist strongly union organization through legal and sometimes illegal means. Not surprisingly, labour boards continue to expand as trade unions seek further legal protection for their organizing and bargaining activities.

A fifth element of our present collective bargaining system — frequent legislative intervention — is closely tied to this expansion of labour boards. Legal regulation is a fact of life for the Canadian industrial relations system and is now beginning to overshadow voluntarism as a dominant element in this system. Admittedly, not all recent legislation has been favourable to collective bargaining — witness the income restraint legislation which is now being imposed on Canada's public sector employees in many of our provinces and the recent back-to-work legislation imposed on federal public servants and postal workers. Taking the long view, however, one can still conclude that the predominant effect of legislative intervention over the past 45 years has been to strengthen our collective bargaining institutions.

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*... Canadian unions continue to wield significant political clout.*

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The fact is that in the past the Canadian trade union movement has been able to wield its political power so as to obtain a favourable legislative environment for collective bargaining. Quick certification procedures based on membership evidence rather than a vote, mandatory union security, and first-agreement arbitration have become common features of our Canadian collective bargaining system and ones that now distinguish it from its American counterpart. The push by unions for legislative reform has not abated, as we can see in Ontario. While the outcome of this most recent exercise in labour relations

reform is still uncertain, it does demonstrate that Canadian unions continue to wield significant political clout.

During the 1980s and now in the 1990s, however, we have also seen very rapid changes occurring in the economic, political, and legal environment. Can our 'old industrial relations order' remain insulated from this changing external environment?

## **New Challenges**

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The reality of our new trading arrangement with the United States under the Free Trade Agreement and the prospect of an even larger free trade area that would include Mexico poses a significant challenge to our present collective bargaining institutions. It is a harsh reality that, for Canada to remain competitive within this North American trading relationship, and indeed as a world trader, its collective bargaining system cannot create a cost structure that compares unfavourable to its other trading partners. This fact of life does not mean that we are required to reproduce the American labour relations system, but it does place considerable pressure upon us to ensure that their own system can produce roughly similar economic results.

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As long as our dollar remained relatively low as compared to the American dollar it appeared possible that our 'old industrial relations order' could survive in its present form. The economic climate, however, has changed and is now much less comfortable than it was during the mid-1980s. As both interest rates and the Canadian dollar have risen it has become increasingly difficult for Canadian industry to remain competitive. Now it is much less easy for Canadian employers to pass on increased costs which in turn has placed a new strain on the collective bargaining process.

Perhaps the greatest shock has occurred in the public sector which, until relatively recently, has been more insulated from the harsh discipline of economic forces than has the private sector, and also less inclined to alter established institutional arrangements. The twin specters of increased financial expenditures to care for an aging population and a mounting government deficit have placed very substantial strains upon public finances and have had profound implications for the public sector collective bargaining process. We now see wage controls in six provinces and at the federal level that have effectively crippled collective bargaining for public employees. It appears that there will have to be a significant improvement in not only the economy, but also in the fiscal position of Canadian governments, before there is any return to a

kinder, gentler form of wage determination in the Canadian public sector.

Indeed, public sector collective bargaining is likely to become even more of a political exercise than it now is. The recent confrontation between the federal government and its employees has serious implications for the future of public sector collective bargaining in Canada. More than ever public sector unions will be looking to political action to enhance their economic position given the failure of traditional collective bargaining tactics and, in pursuing these political strategies, these public sector unions will be seeking to politicize their members who, until now, have been relatively passive.

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A more militant public sector trade union membership will also have greater scope for political activity because of a recent decision of the Supreme Court of Canada. That court has now held that certain restrictions on the political activities of federal public servants are incompatible with the Charter's guarantee of freedom of expression and cannot be justified as reasonable limits. This rollback of these legislated restraints upon the political activity of public servants means that public servants, other than senior policy advisors, can now participate directly in partisan politics. These employees, who form the rank and file of our public sector unions, now have the opportunity to play a much more active role in the political process, a possibility that appears more likely in light of the present constraints upon the public sector collective bargaining process.

Public sector unions, as well, are forming new political alliances with other groups within our community in order to persuade voters of the need to maintain the public services provided by their members. It is clear that the battle for the hearts and minds of the public has become even more important in public sector labour relations and public sector unions are reshaping their bargaining strategies to this new reality. In the future, public sector collective bargaining in Canada more than ever will be a political exercise rather than an economic exercise.

### **Impact of the Charter**

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At the same time as Canada faces a changing economic, political and collective bargaining climate its legal structure has undergone a fundamental change. The amendment of the Canadian constitution over nine years ago which gave birth to a Charter of Rights and Freedoms altered fundamentally the relationship between the legislature and the judiciary. The Charter has enhanced the authority of Canada's non-elected judiciary at the expense of its elected

legislatures, and this fundamental alteration of the constitutional balance initially cast a long shadow over the Canadian industrial relations system.

This shadow now appears to be shortening. The Supreme Court of Canada has issued several important decisions that provide considerable guidance as to where the Charter will take our industrial relations system. For one thing, it is clear that the Court is not prepared to read the Charter as providing protection to the collective action of unions, whether it be bargaining and strike activity or even the acquisition of bargaining rights. The implications of these decisions for Canada's unions are clear.

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What the Supreme Court of Canada has said is that Canada's collective bargaining system is not cast in some rigid constitutional mould but, rather, is contained within a much more flexible framework that can be reshaped by legislative amendment. In the future, therefore, it is political action, not constitutional litigation, that unions must look to if they wish to maintain and expand the existing system of collective bargaining. This message is not necessarily bad news for Canada's unions since it should be kept in mind that over the years trade unions have enjoyed much greater success in obtaining legislative gains than they ever had in obtaining judicial victories. For Canada's unions it is still politics as usual.

Somewhat surprisingly, individual claims challenging our industrial relations institutions have not fared much better than union claims for its constitutional protection. In dealing with these individual claims the Supreme Court of Canada has exhibited a pronounced reluctance to tread upon the established institutional arrangements of collective bargaining. In the recent Lavigne case, for example, a majority of the court was not prepared to view the Rand formula as being inconsistent with the Charter's guarantees of freedom of expression and freedom of association and even the minority, while holding that the Rand formula amounted to an infringement upon the Charter's guarantee of freedom of association, still found this type of union security arrangement to be justified as a reasonable limit.

This reluctance to disturb established industrial relations institutions and practices can also be seen in the mandatory retirement cases decided just a few months before Lavigne. In these four cases the Supreme Court of Canada held that, while mandatory retirement policies were in conflict with the Charter's guarantee of equal treatment under the law, they were still valid as a reasonable limit permitted by section 1 of the Charter.

What are the implications of these Charter decisions for our industrial relations institutions? First, as our unions discovered, the Supreme Court of Canada is not

prepared to treat our existing collective bargaining structures as constitutionally entrenched. The right to strike, the right to bargain, and even the right to acquire bargaining rights are merely defined by legislation and can be altered by legislative amendment. Our existing system of industrial relations, therefore, enjoys no special constitutional protection and those who wish to maintain this system must look to the political process rather than to the courts.

The same conclusion also holds true for those who wish to diminish these institutions. In the Lavigne case the Supreme Court of Canada has signaled that the Charter will not be applied so as to undermine the fundamental underpinnings of our industrial relations system. While it is still possible that the Charter could be used to thwart a further enlargement of these collective rights, the court was not prepared to diminish the past gains made by the Canadian labour movement. Any attempt to roll back these gains, therefore, will have to be brought about by legislation rather than through Charter litigation.

### **Impact of Employment Legislation**

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It is becoming increasingly clear that legislation of all kinds will play an even more important role in defining employer-employee relations in the future. Already the collective bargaining relationship is contained within a tight web of legislation. Human rights legislation, pay equity legislation, employment equity legislation, employment standards legislation, wage protection legislation, health and safety legislation, and pension legislation apply just as much to the organized worker as the unorganized worker. What is important here is that this legislation, because it has an overriding effect in the case of a conflict with the terms of the collective agreement, has come to play an increasingly important role in defining the rights of the organized worker.

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*... public regulation is likely to continue to make inroads on our existing system of private ordering through collective bargaining.*

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This increasing reliance upon legislated solutions, however, has placed additional strains upon the collective bargaining process and the role of the union as exclusive bargaining agent. The implementation of pay equity in Ontario has already shown us the problems of reconciling our existing collective bargaining process with this new legislated scheme that determines wage justice between men and women through job evaluation rather than through traditional forms of collective negotiation. Future efforts to legislate employment equity could lead to the same incompatibility with the collective bargaining process. It is not difficult to predict that attempts to provide more employment opportunities for certain categories of employers could very well collide with the seniority provisions contained in existing collective agreements. In the future, therefore, such public regulation is likely to continue to make inroads on our existing

system of private ordering through collective bargaining.

Nowhere is this development more likely to occur than in the area of human rights. A workforce that has become increasingly diverse has placed an increased emphasis upon the rights of individual workers. The difficult task of reconciling the competing claims of individual workers is no longer an exercise to be conducted by the employer and the union through the traditional collective bargaining process. Claims for equal treatment can now be supported by legislation that prohibits discrimination based on such grounds as religion, handicap, national origin, sex, and sexual orientation. In the future, both the breadth and frequency of such claims is likely to increase and both employers and unions will bear the burden of an increasingly onerous duty to accommodate these claims from individual employees.

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Further evidence of this trend emphasizing individual human rights is the fact that the Charter has now reached that traditional preserve of private ordering — the collective agreement. In both the four mandatory retirement cases, and in the Lavigne case, the Supreme Court of Canada made it clear that the terms of a collective agreement to which government is a party constitutes government action that attracts the application of the Charter. While this determination may not affect the fundamental underpinnings of our industrial relations system, it does have significant implications for grievance arbitration. What is happening is that the public values of the Charter are being emphasized at the expense of the internal values of the parties themselves. Increasingly, therefore, arbitrators must give precedence to external values found in legislation or the Charter even though those values may be inconsistent with the terms of the collective agreement.

### **Implications for Unions**

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This new emphasis upon public regulation has important implications for the role of trade unions in our industrial relations system. If unions are to retain their role as the champion of employee rights, then political action is likely to be given an even higher priority on union agendas. Indeed, a more difficult economic climate in the 1990s may mean that it will be easier for unions to obtain gains through the political process than through the collective bargaining process.

Such an approach, however, has a downside for unions. If legislation is the primary vehicle for the enhancement of employee rights, there would appear to

be less reason for these employees to embrace collective bargaining. Yet it is collective bargaining, and its attendant union security provisions, that provides the financial base for Canada's unions. If unions are not able to extend, or at least maintain, their existing financial base, then it is quite possible that in the future their influence will diminish. Unions must be concerned that in a new environment of increased political and legislative activity the number of free riders could increase dramatically.

What then is the likely future of trade unionism in Canada? Plant closings and layoffs in our manufacturing sector have made serious inroads on the membership of our industrial unions. Since the late 1970s the public sector has maintained the strength and vitality of the Canadian union movement, but now this sector faces severe constraints. Not only are we seeing wage restraints displace collective bargaining in the public sector, but we also see downsizing resulting in a loss of public sector jobs. It is likely that in the 1990s, Canadian unions will be severely tested and this testing will in turn place great strain on our existing industrial relations institutions.

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*New initiatives in 'human resource management' are seen by many as the way of the future ...*

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In this difficult economic and bargaining climate some have argued for a new spirit of labour-management co-operation in Canada. Few would argue against the need for such an approach, but its implementation is much more problematic. New initiatives in 'human resource management' are seen by many as the way of the future, but Canadian unions is still wary of these initiatives. The adversarial nature of our 'old industrial relations order' is deeply rooted and unions are still suspicious that these initiatives will undermine their role as the representative of employees. As well, unions are asking the question whether management really does want labour to be an equal partner in the enterprise, given their past experience with employer opposition to union organization and the tenacity with which employers still claim the privileges of management rights.

These considerations lead me to be somewhat pessimistic about the future for such initiatives in the unionized setting. Perhaps the greatest opportunity for a new spirit of labour-management co-operation, however, is in those situations where the employees themselves become the owners of the enterprise. Employee buy-outs have found favour in the United States and this practice now appears to be spreading to Canada. In these situations employees appear much more prepared to make concessions than in the situation where they have no direct stake in the enterprise. Employee ownership, however, is a concept that appears to be limited to the private sector and, in the public sector, it is likely to be much more difficult to develop a comparable vehicle to encourage greater labour-management co-operation.

## Conclusions

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At this point it is appropriate to stop for a moment to take stock. First, it is unlikely that the present underpinnings of our 'old industrial relations order' will ever disappear entirely. Exclusive representation, the permanency of bargaining structures, a strong trade union movement are all well entrenched components of the existing industrial relations order. While restructuring in the private sector and downsizing of the public sector may weaken these underpinnings, it is highly unlikely that the old order will ever entirely collapse.

As well, there is little evidence to suggest that employer attitudes to unions have changed significantly. While lip service has been paid to new initiatives in labour-management co-operation, in Canada there still exists a wide gulf between management and unions for which management is just as responsible as the unions. Even in the 1990s, we still see determined, and sometimes illegal, management opposition to union organization. Management, moreover, still appears to be clinging tenaciously to its managerial prerogatives, foreclosing the possibility of any real power sharing with unions. Given this reality, we should not be surprised if unions remain skeptical about the possibilities of a new industrial relations order. The continued presence of these elements in our system suggest that we still have a long way to go to reach a new state of labour-management co-operation in Canada. Unions will insist that there be a real sharing of power and wealth and, if management is not prepared to go this far, then our industrial relations process will remain mired in the attitudes of the past.

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*... as we approach the year 2000, the political climate will influence our industrial relations order just as much as the economic climate.*

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The greatest change in our 'old industrial relations order' is likely to occur at the political level. Even if the economy prevents unions from making gains at the bargaining table, it may still be possible for them to improve the position of employees, and their own position, through political action. Employers, on the other hand, are likely to play a more active role in the political arena as they fight to retain what they perceive as their traditional prerogatives.

The fact that the Supreme Court of Canada has virtually exempted our labour laws from Charter control has made political action even more attractive, as has the decision of that court to roll back the legislative restrictions on the political activity of public servants. It appears clear that Charter litigation is not the route to labour law reform. Those who seek to change the existing system, either to enhance it or to diminish it, must look to the political arena and seek legislative reform through the political process.

What all of this is leading up to is a prediction that, as we approach the year 2000, the political climate will influence our industrial relations order just as much as the economic climate.

While economic change will inevitably occur and create strong pressures for organizational changes, it is the political process that will shape the structure through which these changes will be carried out. Moreover, political claims for a greater share of the benefits of our economy will themselves dictate changes in wages and conditions of work. Industrial relations practitioners who ignore this new political reality will do so at their peril.



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