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Labour Law Reform: Radical Departure or Natural Evolution?

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Executive Summary

- The current proposals to amend Ontario's collective bargaining laws have engendered an acrimonious debate within the labour relations community. Underlying this debate is a realignment of the relative political influence of business and labour in Ontario.
- It is important to view those current proposals in light of the political and constitutional considerations that now influence Canadian labour law reform. The Canadian pattern of labour law reform shows frequent legislative amendments that have gradually strengthened the legal position of trade unions. This pattern can be attributed to the decentralization of legislative responsibility for labour relations in Canada, the Canadian system of parliamentary government, and the growing political influence of trade unions.
- Charter challenges to our existing collective bargaining laws have resulted in a stand-off between those who hoped to entrench our existing collective bargaining institutions in the constitution and those who sought to diminish them. While further Charter challenges are still a possibility, it is now more likely that our collective bargaining institutions will be moulded in the political arena rather than in the courts.
- Over the past twenty years Ontario has seen a series of amendments to its collective bargaining laws that have gradually tilted the legislative balance on the side of collective bargaining. The present proposals to reform the Labour Relations Act are not a radical departure from this past pattern of labour law reform.
- These proposals, however, still need considerable rethinking and refinement. A clear danger is that proposals borrowed from other jurisdictions will be implemented in Ontario without full consideration of the legislative context from which they originated.
- Employers should accept the reality of reform and concentrate their efforts on remedying some of the obvious flaws in the current proposals. Unions, on the other hand, must become aware that the increased rights that they gain through labour law reform also carry with them increased responsibilities.

Introduction

The current proposals to amend Ontario's collective bargaining laws have given rise to a loud, and frequently intemperate, debate that has not only divided Ontario's labour relations community but has now moved to the centre of Ontario's political stage. Underlying this debate is a realignment of the relative political influence of business and labour that came with the NDP's election victory in the fall of 1990. Labour, after it recovered from the initial surprise of seeing its political ally actually form the government, quickly realized that it now had access to the highest levels of government. Business, on the other hand, faced with the cold reality that it, rather than labour, was now on the outside began to feel increasingly insecure. This major political shift in Ontario occurred just as Ontario was on the verge of experiencing the most severe economic downturn since the early 1930s, a factor that has further exacerbated the present debate over labour law reform.

The present debate has now focused on the discussion paper released by Ontario's Ministry of Labour last November. Within this paper are set out a number of 'preferred options for reforms.' These 'preferred options' include a new preamble to the Act that expressly recognizes the right to organize and participate in lawful trade union activities; the desirability of improving terms and conditions of employment through collective bargaining; the need to enhance the ability of employers and trade unions to adapt to change; the desirability of settling collective bargaining differences and providing procedures for the expeditious resolution of disputes.

This proposed preamble sets the tone for what follows. These preferred options include numerous changes to the substantive provisions of the act such as a narrowing of both the managerial exclusion and the agricultural and horticultural exclusion; the complete elimination of the professional exclusion and the domestic exclusion; and the lifting of the restriction that has kept security guards out of the mainstream of the union movement in Ontario.
The list of preferred options continues. It is proposed that organizing activity be permitted on the premises of third parties — a proposal obviously aimed at the problem of organizing businesses within shopping centres. Certification would be made easier by eliminating petitions and requiring just a bare majority of

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Note: This publication is a revised version of a speech given on March 24, 1992, at the EquiNet Conference, 'How to Prepare Now for the Amendments to the Ontario Labour Relations Act.'

The author served as Chair of the Ontario Labour Relations Board from 1976 to 1979 and, from 1985 to 1990, as Director of the Industrial Relations Centre/School of Industrial Relations at Queen's University. He now holds a professorial appointment with both the School of Industrial Relations and Faculty of Law at Queen's University. Recently, he was elected as president of the Canadian Industrial Relations Association for a one-year term commencing in June of 1991.

membership evidence uncorroborated by even a token payment from an employee. The OLRB, moreover, would be given an express authority to consider the need to facilitate employees' access to collective bargaining when determining the appropriate bargaining unit and, as a general rule, would be required to include full-time and part-time employees in the same bargaining unit where a union had overall majority support.

Once it comes to the negotiation of a collective agreement the discussion paper proposes that access to first-contract arbitration be made available without the consent of the labour board, as is now required. As well, it proposes that the OLRB be given the power to remedy a breach of the duty to bargain in good faith by imposing collective agreement terms. Most controversial, however, is the proposal to limit the performance of bargaining unit work during a strike, prohibiting all but supervisors employed at the strike location from performing struck work — the so-called 'anti-scab' law. More will be said about this proposal later.

The discussion paper makes other recommendations that enhance a union's ability to conduct a strike. It proposes that employers be required to continue benefit coverage during a strike where a trade union is willing to pay the employer and employee share of the premiums; it proposes just cause protection for employees during a strike; and it proposes a wider right for employees to return to work at the conclusion of a dispute than is now the case. The paper also proposes that, if expressly permitted by a collective agreement, a refusal to cross a picket line should not be considered as a strike, narrowing slightly Ontario's very broad strike dentition. It also proposes that picketing be permitted on third-party property to which the public has access — a proposal clearly directed at shopping malls.

The discussion paper also makes certain proposals to provide further protection for existing bargaining rights. The most important of these deals with contracting-in and contract tendering in the contract service sector, a situation not caught by Ontario's present successor rights provisions. In this sector, where one contractor replaces another, it is proposed that bargaining rights be attached to the location where the work is performed rather than to a particular employer.

A number of proposals concern grievance arbitration, but these proposals do not appear to be particularly radical. The procedural powers of arbitrators would be expanded and, as well, arbitrators would be given an express authority to interpret and apply employment related legislation, something which the Supreme Court of Canada already requires. As well, all collective agreements would be deemed to include a provision incorporating the employment-related prohibitions set out in the Human Rights Code. It is also proposed that arbitrators have the authority to hear and decide the real substance and merits of issues in dispute, something that in my view most Ontario arbitrators are already doing.

Often overlooked in the present debate over this discussion paper are the proposals for adjustment and changes in the workplace, perhaps the most timely of all the proposals given the present state of Ontario's economy. In the discussion paper it is specifically proposed that employers provide more information to both workers and the Ministry of Labour regarding adjustment measures and processes; that there be a voluntary code of `best adjustment practice'; that the existing ministerial discretion to require employers to discuss adjustment measures be clarified; and that there be a new statutory duty to bargain an adjustment plan, a duty that would require real discussion but would not go so far as to impose a labour adjustment plan or closure agreement.

The present debate within the labour relations community needs to be re-examined in light of political and constitutional considerations.

Most of these proposals for labour law reform have engendered an acrimonious debate within the labour relations community. This debate needs to be re-examined in light of the political and constitutional considerations that now influence Canadian labour law reform.

Political and Constitutional Framework

The Canadian pattern of labour law reform, and particularly the Ontario pattern, shows frequent legislative amendments that over time have gradually strengthened the legal position of trade unions. One reason for this pattern is that in Canada the regulation of labour relations is primarily a provincial responsibility. Decentralization of legislative responsibility for labour relations has made it easier to reform our labour laws than has been the case in the United States. Labour law reform in Canada can occur on a province-by-province basis and, while a particular province might be influenced by labour law reforms in other jurisdictions, it is also free to set its own independent course. The result, as Paul Weiler put it in his book *Reconcilable Differences*, 1 is that the eleven Canadian jurisdictions have become 'laboratories for legal experimentation with our industrial relations ailments.' Within these separate laboratories it has been much easier to reach a political consensus than if we had just one national laboratory. Not surprisingly, therefore, labour law reform has occurred much more frequently in Canada than it has in the United States where legislative jurisdiction over labour relations is more centralized.

Labour law reform in Canada has also been made easier by our parliamentary system of government. The separation of governmental powers in the United States provides a greater opportunity to special interest groups to block legislative reform even where a reasonable political consensus has been reached. In Canada, on the other hand, the lack of separation between the executive and legislative branches of government and the principle of parliamentary supremacy has made it easier to translate political policy into concrete

legislation. The comparative ease with which Canadian jurisdictions have amended their collective bargaining laws is testimony to that political reality.

The introduction of the Charter of Rights and Freedoms into the Canadian Constitution in 1982, however, may now place some restrictions on legislative reform of our labour laws. This entrenched bill of rights amounts to a fundamental qualification of what had been an overriding constitutional principle of parliamentary supremacy, and now both federal and provincial labour legislation is vulnerable to judicial scrutiny. Not only do our courts have the power to review legislation in light of the Charter's guarantees, but they may strike down the offending legislative provision unless it can be justified as a reasonable limit.

Initially, the Charter cast a long shadow over Canada's collective bargaining laws. 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. After the *Labour Trilogy*,[2] 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.

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.

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. The message is that, in the future, 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 after the *Labour Trilogy*, as we in Ontario now know.

Somewhat surprisingly, individual claims challenging the constitutionality of our industrial relations institutions have not fared much better than have 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,[3] 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.

What are the implications of these Charter decisions for labour law reform? 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 signalled 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. It is likely, therefore, that any attempt to rollback these gains will have to be brought about by legislation rather than through Charter litigation. Such legislative rollbacks, however, have only occurred infrequently in Canada.

Where the Charter may still make its impact felt is in the scrutiny of new amendments to our collective bargaining laws. New innovations may be regarded with a more critical eye by the courts and lacking the same legitimacy as the more familiar and established features of our collective bargaining laws. If these reforms come into conflict with the fundamental guarantees of the Charter, I suspect that it may be more difficult to persuade the courts that such encroachments can be justified as reasonable limits. For example, it might be more difficult to justify the encroachment of a new anti-scab law on employee freedom of association than it was to justify union security arrangements in the Lavigne case. The Charter, therefore, may still have some impact when it comes to reform of our existing collective bargaining institutions.

Trade unions have won most of the battles since the advent of collective bargaining legislation in the 1940s.

Despite this potential for Charter review, however, it is still far more likely that the battle over labour law reform will be carried out in the political arena. It is in this forum that trade unions have won most of the battles since the advent of collective bargaining legislation in the 1940s. Why is it that Canadian trade unions have been far more successful than their American counterparts in securing a favourable legislative environment? The answer, in my view, is found in the political alliance that the trade union movement has been able to forge with the NDP and its predecessor, the CCF, and if one looks

to Quebec, the alliance between the unions and the PQ. These alliances have paid political dividends to the unions, either because these social democratic parties have achieved electoral success at the provincial level or because they have been a sufficient threat to the governing parties so as to force these parties to move their labour relations agenda to the left.

By contrast, in the absence of any viable third party alternative in the United States, American trade unions have had to look to the two old-line parties. Even the Democratic Party, the traditional friend of American labour, is a political coalition that contains some very conservative elements. Over the last 40 years these conservative elements within the Democratic Party have effectively blunted much of the political influence of the American labour movement.

Canadian trade unions, on the other hand, through their alliance with a third party, have been able to obtain considerable political leverage. Ontario, for example, has seen a number of amendments to the Labour Relations Act introduced by Conservative and Liberal governments. Granted these amendments have come when these governments were in a minority position, or where their majority status was in jeopardy, but they still demonstrate the very considerable political leverage that Ontario's trade union movement has obtained through its alliance with the NDP.

Past Pattern of Labour Law Reform in Ontario

These political realities may help to explain the past pattern of labour law reform in Canada. Generally speaking, what we have seen is a progression of reforms that over the long run have created a more favourable environment for trade unions and collective bargaining. Until this most recent reform exercise, however, Ontario has never been the leader of labour law reform and has been content to let other jurisdictions do the experimentation. On the other hand, once it was clear that such experiments did not result in industrial chaos, Ontario was prepared to move reasonably quickly to adopt such reforms. Until recently what one could predict with some certainty is that Ontario would never be first, but also that it would never be last.

On balance, unions rather than employers were the main beneficiaries of past reforms to the Labour Relations Act.

The only deviation from this pattern occurred in 1970. Although this package of amendments contained some concessions to labour, it was generally regarded as favouring management because of its attempt to encourage more certification votes and its emphasis on the rights of individual employees. It should be remembered that it was these amendments that introduced the duty of fair representation and the exemption from union dues on the basis of religious conviction or belief. The attempt to encourage more certification votes

was rolled back five years later by the 1975 amendments, but both the duty of fair representation and the religious exemption survived. Rather ironically, the duty of fair representation became much more the target of employer criticism than union criticism. Indeed, during my tenure at the labour board I cannot think of another part of the Labour Relations Act that attracted such vocal criticism from the employer community than did the duty of fair representation.

Over the past twenty years in Ontario what we have seen has been a series of amendments that have gradually tilted the legislative balance on the side of collective bargaining. Reform has been evolutionary rather than revolutionary, but what has been interesting is that, with only a few exceptions, these reforms have survived a change of government. Not all of these reforms have favoured trade unions as attempts were made to provide some balance in the amendment package. As you may recall, the introduction of compulsory Rand Formula in 1980 was accompanied by an amendment providing employers with the opportunity to require a vote on its final offer. On balance, however, it does appear clear that unions rather that employers were the main beneficiaries of these past reforms to the Labour Relations Act.

Comments on the Current Proposals for Reform

It is against this background that I would like to direct some remarks to the current proposals for reform. I realize that I am now entering dangerous waters since these proposals have engendered strong feelings on both the management and union side. However, I would like to assess the extent to which the current proposals fit within the past pattern of labour law reform in Ontario.

These proposals are not the labour relations cataclysm that some would suggest.

In the introduction to the Ministry's discussion paper, it is stated that 'it has been more than 15 years since any substantial review of, and amendments to, the Act.' Not only is this statement grammatically awkward but, in my view, it does not reflect the reality of labour law reform in Ontario over that period. I will concede that the current proposals form the most comprehensive set of reforms since the 1975 amendments, but this does not mean that there have been no significant reforms during the past 17 years. To take this position is to ignore the amendments in 1977, that provided for province-wide bargaining in the ICI sector of the construction industry, the 1979 amendments that introduced expedited arbitration to Ontario, the 1980 amendments that required a Rand formula provision in all collective agreements outside the construction industry, the 1983 amendments prohibiting professional strikebreakers, and the 1986 amendments providing for first-contract arbitration.

I realize that a certain amount of hyperbole can be expected in an introduction to a discussion paper, but I would suggest that this particular statement sets the wrong tone for the proposals that follow. What it appears to suggest is that the current proposals are a far more radical departure from the pattern of labour law reform than is actually the case. Such statements do little to allay the concerns of those forming the management side of our labour relations community.

If one examines the content of the proposals, however, this package is a far less radical departure from Ontario's past pattern of labour law reform than the introductory statement would suggest. For most of the proposals comparable provisions can be found in at least one jurisdiction elsewhere in Canada. Many of the proposals appear to be borrowed from Manitoba's Labour Relations Act and, of course, an anti-scab law has been part of Quebec's Labour Code since 1977. The cumulative effect of all of these proposals does, of course, favour trade unions, but even this policy bias is consistent with the general pattern of labour reform in Ontario over the past forty years. These proposals, in my view, are not the labour relations cataclysm that some would suggest. The revolution has not yet arrived in Ontario.

These proposals need considerable rethinking and refinement.

Having declared that these proposals will not cause the sky to fall on our industrial relations world, I would be less than candid if I did not say that in my view they still need considerable rethinking and refinement. The danger is that those proposals borrowed from other jurisdictions will be implemented in Ontario without consideration of the legislative context from which they originated. For example, Ontario proposes to go the way of Manitoba and not require evidence of any form of payment to corroborate trade union membership. In that latter jurisdiction, however, a union must establish that at least 55 percent of the bargaining unit are union members in order to be certified without a vote. Ontario, however, now proposes that only a bare majority of membership cards, uncorroborated by even a token payment, be sufficient for outright certification. The effect of borrowing only a part of Manitoba's procedures will be to establish a very low standard of proof of representativeness. The problem with such a minimal standard is that employers are given even further grounds for doubting the legitimacy of the union's claim that it does enjoy majority support.

A far more serious example of borrowing without reference to legislative context is the proposal for an anti-scab law set out in the discussion paper. The operation of Quebec's anti-scab law is confined by two important features of the Quebec Labour Code, neither of which is either present in Ontario's Labour Relations Act or being proposed in the discussion paper. First, the Quebec Labour Code stipulates that 'no strike may be declared unless it is authorized by secret ballot decided by the majority vote of the members of the certified association who are comprised in the bargaining unit and who exercise their

right to vote.' In Ontario, however, strike votes are not required by legislation so that the effect of the anti-scab proposals would be to permit a union to force strike action even in a case where a majority of the bargaining unit is opposed to it. In this situation, the employer would still be prohibited from using bargaining unit members even though a majority of that unit might prefer to continue to work. Surely, if a union is given the power to keep bargaining unit members off the job, it should at least be accountable to a majority of these employees.

Perhaps this concern can be met by the procedure for a final-offer vote now set out in s.40 of the Act. According to the past jurisprudence of the Ontario Labour Relations Board, the effect of an affirmative vote is to require the parties to execute a collective agreement containing the terms of the ratified offer since a continuation of strike action by the union would be a breach of the duty to bargain in good faith. While this provision may meet the concern that a union might be able to continue a strike without majority support, it is still important to clarify in any amendments the relationship between the final-offer vote and any provision that would restrict bargaining unit members from working during a strike.

Just as serious is the apparent failure to recognize that Quebec's anti-scab law is only one part of a statute that also contains a comprehensive scheme to ensure the continuation of essential public services during a strike. Ontario's Labour Relations Act contains no such scheme even though its coverage extends to many of the same activities as does the Quebec Labour Code. The Ministry of Labour's discussion paper does allude to this problem but, unfortunately, makes no concrete proposals to address this fundamental issue. Surely, if we are going to make strike action compulsory, we need companion provisions to ensure the continued provision of essential services. In my view, of all the proposals contained in the Ministry's discussion paper, the proposals for an anti-scab law are most in need of fuller consideration and, perhaps, even some sober second thoughts.

The reality is that these proposals are merely an extension of a pattern that is already well established in Ontario.

Advancing the Dialogue on Reform

One often hears the comment that this is the wrong time for labour law reform in Ontario. Given the present economic climate, it is said that the proposals for reform would send the wrong signal to outside investors. Such comments, in my view, do not help to advance the dialogue on labour law reform. The reality is that these proposals are merely an extension of a pattern that is already well established in Ontario, and a pattern already well known to investors. Ontario's labour laws for a considerable period of time have favoured collective bargaining and these proposals simply continue that well known policy bias. To construe them as anything but evolutionary is likely to do more harm to

investment than the amendments themselves. Let us not cry 'fire' when the only heat is from the debate itself.

Indeed, my greatest concern about these amendments is that they have disturbed the normal dialogue between the labour and management communities in Ontario. It is not too late, however, for this dialogue to be restored if both sides are prepared to re-assess their attitudes to labour law reform. It would be a serious mistake, in my view, if management were to adopt the position that reform of any kind is unacceptable. Such a posture is completely out of step with the political reality that has seen collective bargaining legislation become progressively more favourable to unions over the past forty years. It is simply not realistic to expect that an NDP government would do anything but continue this pattern. Employers should accept the reality of reform and concentrate their efforts on remedying some of the obvious flaws in the current proposals.

Unions must become aware that the increased rights they gain through labour law reform also carry with them increased responsibilities.

Unions, on the other hand, must become aware that the increased rights they gain through labour law reform also carry with them increased responsibilities. It is clear that these proposals, as they now stand, will give greater bargaining power to unions in respect of individual employers. This increased bargaining power, however, is still very much subject to the economic constraints within which Ontario must now operate as part of a global economy. Unions must realize that they, just as much as employers, now carry a heavy responsibility for the economic well-being of Ontario when they engage in the collective bargaining exercise.

It is with these considerations in mind that I would suggest that there is a clear need for a more constructive dialogue between management and labour on the important matter of labour law reform. It is my hope that these remarks have made some small contribution to this exercise.

Notes

1 Weiler, *Reconcilable Differences: New Directions in Labour Law* (Toronto: Carswell, 1980).

2 For a discussion of the Labour Trilogy, see Carter, *1991 Report on Charter Cases, The Canadian Charter of Rights and Freedoms: Implications for Industrial Relations and Human Resource Practitioners* (Kingston: Industrial Relations Centre, Queen's University, 1991).

3 *Ontario Public Service Employees Union v. Lavigne* (1989), 89 CLLC para. 14,011.

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