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BILL 40 AMENDMENTS TO ONTARIO LABOUR RELATIONS ACT: AN OVERVIEW AND EVALUATION

By

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Working Paper # 385

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Bill 40 Amendments To Ontario Labour Relations Act: An Overview And Evaluation

1. INTRODUCTION

Bill 40, an Act to amend certain Acts Concerning Collective Bargaining and Employment in Ontario, received its Royal Assent on 5th, November, 1992 and came into force in January, 1993.[1] This paper is intended to provide an overview and evaluation of the amendments incorporated in Bill 40.

The content of the paper is organized under the following headings: Evolution of Bill 40; Government's Objectives; Unions' Views; Employers' Reactions; the Overall Stands Taken By The Opposition Parties, and A Bird's-Eye-View of Major Changes, Eliminations and Modifications to Bill 40. In the light of these preludes, the specific amendments are grouped and dealt with under twelve subheadings in order to achieve some reasonable unity of thought. Each subheading contains of the following: the law prior to the amendments, the substance of the amendments and their operational implications, the unions' and employers' views on, and the governments' rationale for these amendments, and our evaluation. Each subheading is a self-contained unit with necessary links between and among the various amendments. In the

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[1] Labour Relations and Employment Statute Law Amendment Act, 1992, 2nd Session, 35th Legislature, Ontario, 41 Elizabeth II, 1992; 1st, 2nd, and 3rd Readings respectively June 4, July 15, and November 5, 1992; Bill 40, Chapter 21, Statute of Ontario, 1992. Labour Relations Act, R.S.O. 1990, c.L-2, as amended by 1991, c.56 and S.O. 1992, c.21.

final section, a tentative evaluation of the Bill as a whole is made.

2. THE EVOLUTIÓN OF BILL 40

The Ontario Government first declared its intent to amend the Labour Relations Act[2] in its Throne Speech, on 20th November, 1990. This was followed by the formation of a tripartite "Labour Relations Act Reform Committee" on March 8, 1991, by the Minister of Labour, Robert Mackenzie, consisting of three representatives from each side of the industry, under the chairmanship of Kevin M. Burkett. The Minister himself identified some thirty specific issues for consideration by the Committee and invited the Committee to suggest additional options and the Committee was given a period of one month to submit its report.[3]

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[2] R.S.O. 1980. C. 228. as amended.

[3] Specific issues raised by the Minister: Exclusions; Security Guards; Employer Free Speech; Protection for Union Organizers; Access to Employers Lists; Petitions; Code of Organization Conduct; Automatic Certification; Obligation to Collect $1.00 from Employees; Part-time/Full-time Bargaining Unit; Successor Rights in Contract Service Sector; Contracting Out; Preamble; Access to Employer Property; Support Required for a Representation Vote; Employer Involvement in Certification Process; "Runaway Plant" - Successor Rights; Sectoral Bargaining; Bad Faith Bargaining; Collective Bargaining Commission; Requirement to Provide Information; Technological Change; Ministerial Votes; Employer Final Offer Votes; Use of Replacement Workers; Six-Month Limit on Employees' Right to Return to Work Following a Strike; Right of Employee to Arbitration for Discipline/Dismissal during Strike or Lockout; Picketing Code; Mandatory Strike & Ratification Votes; Remedial Powers of the OLRB; Arbitration Costs and Delays; "Justice and Dignity" Protection. (Source: Labour Relations Act Reform Committee: Report of The Management Representatives, April, 1991; Burkett's covering letter,

At the end of this one month deliberation, the Committee as a whole was not able to come up with a consensual report for the following reasons succinctly given by Burkett:[4]

> While the partisan appointees have made every effort to work in a co-operative and constructive fashion you will appreciate that the appointees of both points of view have constituents (albeit unofficial) whose interests and expectations stand to be directly affected by any reform. Apart from public policy considerations, many of the issues that you have asked us to consider raise significant converse implications for their respective constituents. It should not be surprising, therefore, that there has been a reluctance by each side to associate itself with any document that could be read as endorsing options that compromise these interests or expectations. In the result I am transmitting to you a report, comprised of two separate documents, that demonstrates a wide divergence of opinion. I do not endorse either of these two documents. (Added emphasis).

While the ninety-five page Report of the Labour Representatives contained over sixty proposals for labour law reform, the thirty-nine page Report of the Management Representatives did not see any need for labour law reform at all.[5]

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p. 1 and the specific issues identified in the Report p. I and II.

4 Burkett's covering letter addressed to the Minister of Labour, attached with the following separate reports: "Partnership And Participation In The 1990's: Labour Law Reform In Ontario", Report of the Labour Representatives to the Labour Law Reform Committee of the Minister of Labour, April 14, 1991; and "Labour Relations Act Reform Committee: Report of The Management Representative",April, 1991.

5 op cit, note 4.

This was followed by the preparation of a Cabinet Submission by the Ministry of Labour on August 7, 1991 for further discussion.[6]

In November, 1991, the government released a Discussion Paper which raised a number of proposals for possible reform and outlined the government's preferred options.[7] In terms of the foundation for these preferred, and potential areas for reform, the Discussion Paper contained the following observation:[8]

> • The reports filed by the Burkett Committee were not endorsed by Mr. Burkett, nor have they been endorsed by the Ministry of Labour or the government. They were considered by the government as part of the ongoing process of developing policy options.
>
> • Also considered were submissions and letters from employers and employer associations (including the Canadian Manufacturer's Association, the Board of Trade of Metropolitan Toronto and the Council of Ontario Construction Associations), trade unions, employees and other organizations.

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[6] The authors were unable to get a copy of this document. Labour Minister informed Harish Jain that "the Cabinet Submission is not a public document", in his letter dated April 19, 1993. But to our surprise we found this Submission quoted in More Jobs Coalition Submission to the Minister of Labour, Facing Reality, Sharing Responsibility, February 1992, at p. 1 and p. 83-84.

[7] Proposed Reform of The Ontario Labour Relations Act: A Discussion Paper From The Ministry of Labour, November, 1991.

[8] op cit, at p. 9. It is to be noted that the most of the 41 preferred options identified in the Discussion Paper of November, 1991, are also found among the thirty specific issues submitted by the Minister of Labour to the Burkett Committee for its consideration. See note 3 supra for these issues.

More than 20,000 copies of the Discussion Paper were distributed and a three-month consultation process took place. During this process, the Minister of Labour met with representatives from more than 300 groups in 11 communities throughout the province and received 447 written submissions.[9] The result was the package of amendments that formed Bill 40 first tabled in June 4, 1992. Following the second reading, the all-party Committee of the Legislature travelled to seven different locations in the province during August and September, 1992 and heard over 250 presentations. As a result the government introduced 55 amendments to the Bill, meant to answer some of the concerns raised during the consultation process as well as during the clause-by-clause consideration at the legislature. Bill 40 then received third reading and the Act came into force on January 1, 1993.

3. THE GOVERNMENT'S OBJECTIVES

The government's rationale behind and objectives of the labour law reform are as follows:[10] The Ontario Labour Relations Act has not been significantly amended for 15 years. Compared to other

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9 See "Questions And Answers: Labour Reform Act", Ministry of Labour, p. 2 no date.

10 This Summary is based on the following sources: Ministry of Labour Discussion Paper, November 1991, p. 5-8; Ministry of Labour, Labour Relations Act Reform Highlights, no date; Ministry of Labour, News Release, November 7, 1991; Hansard 6 July, 1992, p. 1848-1850; and Ministry of Labour, News Release, November 5, 1992.

jurisdictions in Canada, such as Quebec, B.C., and Manitoba, the Ontario law is out of tune with changes in the nature of work, workplace, and the workforce.

Since 1975, when the Act was significantly amended, the number of part-time workers in the province has almost doubled from 430,000 to 806,000 in 1991 which is almost 17 percent of the total labour force in Ontario. In the last 15 years, an additional 1 million women have joined the workforce in Ontario. Women now make up 46 percent of the total labour force. Sixty one percent of all women in Ontario work outside the home. The Service Sector has grown significantly - in 1975, employment in this sector accounted for 63 percent of the total employment in the province - by 1991 this figure had jumped to 71 percent. Over the last 15 years, there has been an increase of over 1 million additional workers in the Service Sector. Levels of employment in goods-producing industries have dropped nearly 8 percent in the last 15 years.

In 1981, visible minorities made up 7 percent of the workforce with nearly 300,000 employed in the province. By 1986, this number has risen to almost 450,000 or 8.5 percent of the workforce. This trend is continuing upward constantly. More than 70 percent of visible minorities in the workforce is in the service sector where they earn on average 25 percent less than others. Part time workers are among the most vulnerable in the economy. Women and minority workers continue to work in distinct occupational

categories, characterized by low wages, limited benefits, irregular hours and limited promotions.

The hitherto existing Act has had its primary focus on granting the right to organize to workers in large workplace of a manufacturing environment. This Act fails to take into account not only the change in the work and the workforce composition but also the significant changes which have occurred in the workplace themselves.

Larger workplaces, formerly concentrated in core areas of cities and towns, are increasingly located in lower-cost suburban or rural areas. Workplaces are also often located in shopping malls or industrial parks. The number of small workplaces is increasing. For example, in 1990-91, more than half of the bargaining units certified at the Ontario Labour Relations Board had 20 or fewer employees. The rapid growth of part-time and casual work involving irregular hours, the shift from traditional manufacturing to the expanding service, trade and financial sectors, and the physical location and size of many workplaces, combine to make employees' attempts to organize particularly difficult.

The Act was not only found to be unresponsive to these structural and demographic shifts but also to be inadequate in terms of enforcement mechanism and remedies. "The right to organize must be equally accessible to all employees, in particular

to the needs of women, minorities and other low paid workers in vulnerable sectors of the economy."[11]

According to the government, the reform of the Act is designed to:

- respond to new workplace and new workforce
- promote co-operation and partnership
- reduce conflict and
- streamline dispute resolution process.

On a philosophical level, the Minister of Labour offered the following rationale for the reform:[12]

> . . . Access; Equity; Fairness. Those are the standards we've used when coming up with our proposals. The aim isn't to turn the world upside down; it's just to make an existing system work better for everyone (Emphasis added).
>
> . . . .
>
> And I reject the model that says we can only compete by lowering wages. That's a competitive battle we can never win. There will always be some place in the world that can undercut Ontario.

Regarding the probable economic impact of the labour law reform - such as the impact of the proposal on investment, productivity, and competitiveness - the Minister defended the proposals on the ground that "while collective bargaining can increase wage and benefit costs for employers, it also creates pressure for higher productivity and innovative work organization.

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11 Minister of Labour Discussion Paper, op cit, at p. 7.

12 Notes For A Speech by Bob MacKenzie, Minister of Labour to the Canadian Bar Association (Ontario), Labour Law Section, December 12, 1991, at p. 6 and 8.

In other words, cost savings can result from greater efficiency, lower turnover, greater protection and a collective voice in the workplace - all resulting from collective bargaining."[13]

The minister made a distinction between reform options in terms of their potential to have a positive, negative or neutral cost impact on employers and unions, taking into consideration the short-term and long-term impact. In his opinion, the majority of the proposed reform fall under neutral cost categories (eg. procedural reforms) or under cost reduction categories (eg. speedy decisions and reducing litigious matters). Cost increasing reforms (such as the increase in in-scope employees and restrictions on hiring replacement workers) were to be off-set in the long run by lower turnover and higher morale, due to greater protection and a collective voice in the workplace.[14]

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[13] Ibid at p. 7.

[14] In support of these observations, the Minister made reference to the following materials: Ontario Ministry of Labour, "Assessing the Economic Impact of Labour Relations Act Reform options", November 1991; Noah M. Meltz, "The Implications for The Economy of The Proposed Reforms of The Labour Relations Act", Prepared for the Ontario Ministry of Labour, November 1991; G. Adams, "Towards A New Vitality: Reflections on Twenty Years of Collective Bargaining Regulation", Larry Sefton Memorial Lecture, 1991; P.C. Weiler: Governing the Workplace, Cambridge, Harvard University Press: 1990; Ray Marshall, Unheard Voices, New York: Basic Books 1987; R.B. Freeman and J.L. Medoff, What Do Unions Do? New York: Basic Books, 1984; D. Belman, "Unions, The Quality of Labour Relations, and The Firm Performance", in L. Mishel and P. Voos (eds), Unions and Economic Competitiveness, New York: M.E. Sharp, 1991.

On the issue of capital withdrawal and investment loss due to labour law reform, the Minister made the following observation:[15]

> . . . .There are many factors which are currently influencing investment patterns and both the creation and loss of jobs. These include economic restructuring, increased global competition, the Free Trade Agreement, currency exchange rates and interest rate and other federally-driven economic policies. The magnitude of these factors far outweighs any impact the preferred options for reform of the Labour Relations Act can be anticipated to have, either in the short or long term. It would therefore be difficult, if not impossible, to separate-out the impact of the proposed reforms from these broader, and more significant, influences. Indeed, ... there can be expected to be a countervailing positive impact on the economy resulting from increased employee participation in decisions affecting the workplace.

4. UNION'S VIEW

Regarding the necessity for and the overall objectives behind the proposed amendments, the submissions from the unions clearly indicate the existence of a considerable common ground between the Government's position and that of the trade union movement.[16]

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15 Ontario Ministry of Labour, "Assessing the Economic Impact...", op cit, at p. 2.

16 See Report of the Labour Representatives to the Burkett Committee, Partnership And Participation In The 1990's Labour Law Reform In Ontario, April 14, 1991; Submission By The Ontario Federation of labour To The Minister of Labour Regarding Proposed Reform To The Ontario Labour Relations Act, February 6, 1992; and for interviews with selected labour leaders and business executives regarding the Bill, see 1992 McMaster MBA Study on the "Proposed Reform of the Ontario Labour Relations Act;" this study was done under the guidance of Prof. Harish C. Jain.

Labour Representative's submission to the Burkett Committee fully endorsed the following proposed reform contained in the November, 1991, Discussion Paper issued by the Minister of Labour: extension of the right to organize to those who have been excluded under the current Act; changes to union organizing, certification, unit determination process; enhancement of Labour Relation Board's discretionary authority to grant interim orders and other remedial powers regarding unfair labour practices during organizing, first contract negotiation, strike/lockout situations, and recall; access to employer and third party property; provisions on the use of replacement workers, discipline, seniority and other benefits during a labour dispute; proposed deemed provision in collective agreements; and changes in the arbitration process.[17]

The tone of labour's endorsement of the law reform may be summed up that "it is in the right direction but did not go far enough" as indicated in the submission by the Ontario Federation of Labour:[18]

> Between the Burkett Labour Report and the Ministry of Labour's Discussion Paper of November 1991 was a Cabinet submission from the Ministry of Labour dated August 7, 1991. We cannot help but note that this Cabinet submission contained considerably more of the reforms proposed by the Labour Representatives to Burkett than does the Discussion Paper. (at p. 1&2).

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[17] What is given here is only a summary. For more details see the two documents submitted by the labour representatives cited in note 16.

[18] op cit note 16.

. . . .

> The government is to be commended for initiating a full consultation process and presenting significant proposals on labour law reform. The Discussion Paper, which is the subject of this commentary, proposes a more significant package of amendments than any other jurisdiction in Canada has implemented. At the same time, we have tried to point out a number of areas wherein the government's preferred options are either incomplete or do not adequately respond to the problems that need solutions. (at p. 50).

Labour Representatives' Report to Burkett Committee identified additional areas of reform which were not specifically mentioned by the Minister in his Discussion Paper. The total number of additional areas is twenty nine, among which the following are only illustrative:[19] the purpose clause must be more positive and assertive, similar to the Federal Labour Code; an effect based test regarding employers' interference with trade union activities, similar to that of the human rights legislation; number of deemed provisions in the collective agreement must be increased; need protection for those who honour lawful picket line and "hot-cargo"; employers' right to communicate directly with employees either during organizing or bargaining must be further curtailed and an obligation on them to communicate with employees only through union representatives be imposed; and when to conduct a strike vote must be entirely left to the union concerned. "Mandating when a union

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[19] Partnership And Participation In The 1990's op cit, note 16; these additional areas are scattered all through the Report identified with an asterisk mark.

conducts a strike vote is no more appropriate than a strategy provision allowing the trade union to require that shareholders must meet to vote by secret ballot on the union's most recent offer."[20]

Bob White, President of Canadian Auto Workers, did not consider the proposed changes in any way "revolutionary since most of them are already in existence in some other Canadian jurisdictions."[21] On the question of economic viability vis a vis the proposed labour law reform, Leo Gerard, National Director, United Steelworkers of America, has observed that "countries that are using 'Rambo Capitalism' are Canada and the U.S. Others with a more democratic system are doing far better economically now, and it is because they are not trying to 'beat the hell out of workers'".[22]

5. EMPLOYERS' REACTIONS

"You know a lot of people mean well, the premier means well, but in the final analysis we have to be careful when it comes down to wealth creation. . .wrong time and wrong formula. . .Scrap it, scrap the whole thing and start over".[23] This observation by Frank Stronach, CEO of the Magna Corporation, more or less sums up the

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[20] Ibid, at p. 58.

[21] Student interview with Bob White, March 9, 1992, see Appendix II Interview notes in "1992 McMaster MBA Study...", op cit, note 16.

[22] Student interview with Leo Gerard, March 13, 1992, ibid.

[23] Student interview with Frank Stronach, on March 19, 1992, ibid.

thrust of employers' reaction to the labour law reform. Similar are the sentiments expressed by a variety of business organizations such as the All Business Coalition, the Canadian Federation of Independent Business, the More Jobs Coalition, the Project Economic Growth, the Council of Ontario Construction Association, the Human Resources Professional Association of Ontario and the Ontario Division of Canadian Manufacturers' Associations.[24]

Apart from the question of timeliness, the core of the employers' criticism of the labour law reform falls under three interrelated factors, namely, ideology, procedure, and substance.[25] On the basis of these factors, the employers also attempted to reject the rationale behind and the stated objectives of the government in reforming the labour law.[26]

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[24] For employers' reactions see the following: Burkett Committee Report of The Management Representatives, April, 1991; More Jobs Coalition, Facing reality, sharing responsibility, Submission to the Minister of Labour, February, 1992; Report From Ernst & Young, The Impact of Proposed Changes to Ontario's Labour Relations Act, prepared for the Council of Ontario Construction Associations, February, 1992; Canadian Manufacturers' Association, Ontario Division, Submission To The Standing Committee on Resource Development on Bill 40, August 28, 1992, Toronto; Submission Regarding Government Discussion Paper Regarding Labour Relations Act Changes, Human Resources Professional Organization of Ontario, Toronto, January 28, 1992; and Ontario At The Crossroads, Canadian Federation of Independent Business, Toronto, October 1991.

[25] "Bill 40 is objectionable on philosophical, procedural and substantive levels". Canadian Manufacturers' Assn. Submission, supra, note 24, at p. 18.

[26] For these rationale and objectives see the Discussion Paper issued by the Ministry of Labour, supra note 7, pp. 1-9.

On the question of ideological bias, the Canadian Federation of Independent Business has made the following observation:[27] "Indeed, many business owners who have operated firms in the province for decades have noted that they cannot remember a time when so many factors seemed to be conspiring against them... Although political uncertainty is always present to some extent, it has reached a peak in Ontario over the past year with the election of a social democratic government whose policies to date appeared to have an anti-business bias". This premise of "anti-business-cum-pro-union" ideological bias of the Ontario "Social democratic government" is implicitly or explicitly stated in almost all the submissions from the employers' associations which in turn fully magnified in the press. For example, here is the title and the opening paragraph of a labour report:[28] **"Business finds solidarity**

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[27] Ontario At The Crossroads, supra note 24, at p. 1.

[28] Virginia Galt, Labour Reporter, the Globe and Mail, February 4, 1992, A-5. Also see J. Geoffrey Howard, "Reforms enhance union powers - not responsibilities", the Labour Times, Dec. 1991, Vol. 1, Issue 9, p. 9; Paulakulig, "Lawyers on Strikes?", Law Times, March 2-8, 1992, p. 10; Margot Gibb-Clark, "More Strikes feared..." the Globe and Mail, Jan. 29, 1992, B-5; Bob Papoe, "Ontario business gears up to battle Rae's labor laws", the Toronto Star, Feb. 4, 1992, p. c-5; Leslie Papp, "Reform raises layoff warning (Canadian Daily Newspaper Assn)" the Toronto Star, Feb. 7, 1992, A-4; Richard Mackie and Virginia Galt, "Try offering suggestions, Rae tells business lobby", the Globe and Mail, Feb. 5, 1992; Lisa Priest, "Labor law proposals called 'harmful'", the Toronto Star, Jan. 29, 1992; Virginia Galt, "Big Three (car makers) assail changes to Ontario Labour Laws - fear plant closings, loss of business investment" the Globe and Mail Report on Business, Jan. 15, 1992, B.1; Mary Beth Currie, "Much Ado About Nothing - proposed amendments to Bill 40 cosmetic", Human Resources

in war of ideologies: The ideological war over Ontario's proposed labour-law changes rages unabated, with labour accusing business of manipulating public opinion and business contending that the vast majority of residents oppose proposals to give unions more clout".

Once this ideological premise was established and probagated through the press by the various employers' associations, their attack against Bill 40 on the procedural grounds became an easier task. The government's motive behind the unilateral formation of the Burkett Committee, the practicality of requiring its report in a month, and the wisdom of dictating some thirty specific issues for its consideration[29] instead of providing it with a general terms of reference for labour law reform were, in the opinion of the various employers associations, the evidence of procedural flaw in the law reform:[30]

> We also feel that the consultation process was flawed, and did not provide any real opportunity for change or input. The motivating factor behind the consultation process appeared to be one of public relations, as opposed to allowing for a free

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Professional, Nov. 1992, p. 10 & 11; Paul Brent, "Retailers blast NDP labor bill", Financial Post, Sept. 17, 1992; Richard Mackie, "Stronger labour board feared" and "Ontario newspapers, retailers oppose limits on strikebreakers", the Globe and Mail, Aug. 11, 1992, N. 1; "An Act to increase the power of unions", the Globe and Mail editorial, Oct. 2, 1992; and "say goodbye to your rights" an ad put by Ontario members of the Canadian Newspaper Assn., and the Ontario Community Newspaper Assn., which appeared in various newspapers during the last few months of 1992.

29 See supra note 3 for these issues.

30 CMA's Submission, op cit, note 24, at p. 1 and 2. Also see More Jobs Coalition Submission, op cit, note 24 at p. 12 and 13.

> and full discussion of the issues. The employer community was not given any opportunity to input as to the process or to the substantive issues that were to be discussed. The fact that the leaked cabinet document (August 1991) stated business opposition should be "neutralized" left the employer community with little confidence or hope that the consultation process would be meaningful.

To rectify this procedural flaw, the More Jobs Coalition suggested the appointment of a Task Force consisting of "neutrals" to solicit inputs directly from the employer and trade union communities and that such a Task Force at least be given a six-months time for its submission of recommendations.[31] This suggestion in the government's scheme of things was belated and unwarranted. Under these circumstances, the All Business Coalition branded the process of consultation as "insultation" process[32] and the law reform was perceived to be a labour agenda carried out by the NDP government to payback its political debts to the union bosses.

Given the employers' views on the governments' ideological bias and "insultation" process, it is not surprising that they perceived the substantive amendments either as superfluous or mischievous or both for the following reasons:[33]

The necessity for Bill 40 was not fully established by the government. The Ontario Labour Relations Act is one among the

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31 More Jobs Coalition Submission ibid.

32 All Business Coalition "Warning: Business and Jobs at Risk" at p. 2, no date.

33 These are summarized from the documents found in note 24.

various other statutes-such as those dealing with pay equity, worker ownership, wage protection, family support plan, employment standards, occupational health and safety and employment related issues under Workers' Compensation Scheme-dealing with employment related matters. In the opinion of the employers' associations, the government looked at the Labour Relations Act in an isolated manner to justify the necessity for amendments while a cumulative approach would have proved most of the amendments superfluous. If the government were to take the latter approach, it would have found that most of the problems arising from the changes which occurred during the last fifteen years in the workforce and workplace have already been taken care of through other legislative schemes mentioned above. Further, by taking substantive amendments individually and collectively, the CMA came to the following conclusion:[34]

> The Bill 40 amendments have been 'cherry picked' from numerous jurisdictions. There is no one jurisdiction that has all these changes. We object to the amendments on an individual basis, but their cumulative impact would exacerbate the negative consequences.

According to a study conducted by Ernst & Young for the Council of Ontario Construction Association, on the Impact of Proposed Changes to Ontario Labour Relations Act,[35] the employers believed that some 295,000 jobs be lost and $8.8 billion in

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[34] Canadian Manufacturers' Assn. Submission, op cit, note 24, p. 1.

[35] Feb. 1992, at p. 10.

investment forgone in five years because of the labour law changes. Another estimate indicated a loss of half a million jobs and twenty billion dollar investment loss due to the proposed labour reform.[36] The More Jobs Coalition summed up the employers' opposition to Bill 40 in these words[37]

> . . .The business community has been asked to comment on a lengthy agenda of reform proposals developed entirely by the union movement and designed to reinforce the adversarial system in the "opponent's" favour. The negative business reaction was predictable. Trade unions would surely have reacted with the same anger had the Government presented a labour law amendment package developed entirely by employers. (p. 116)
>
> This bundle of reforms . . . neatly illustrates the Discussion Paper's fundamental breach of this simple rule. Balance and fairness are sacrificed to trade union aggrandizement. Meaningful reform gives way to trade union empowerment. This is a recipe for a destructive labour relations climate. (p. 47; emphasis added)

6. THE OVERALL STANDS TAKEN BY THE OPPOSITION PARTIES

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[36] ABC "Warning...", op cit, note 32 at p. 1, no date.

[37] Submission, op cit, note 24. "This simple rule" in the second quote refers to the following statement by Paul C. Weiler, "The Process of Reforming Labour Law in British Columbia in the 1980s", in J.M. Weiler and P.A. Gall (eds), The Labour Code of British Columbia in the 1980's, Vancouver, Carswell legal Publications, 1984, at p. 29: "If the process of labour law reform is perceived to be one-sided and unfair, this will have a corrosive effect on the legitimacy of the law it produces and on the degree of voluntary acceptance of that law by those whom we are trying to control with it. I cannot over-emphasize the importance of this simple point".

The members of both of the opposition parties - Liberals and PCs - in the legislature fully endorsed and echoed the employers' associations' three-pronged criticism, namely ideology, procedure and substance (supra Employers' Reactions), against Bill 40[38] with minor and occasional differences in weighing those three factors. For example, some from the Liberal side took the stand of "I don't think the bill is all bad but..."[39] while the Conservatives' thrust was an unqualified and total rejection of the Bill:[40]

> ...[The Liberals] have expressed the concern that it's the wrong time for this legislation. Give me a break. When's the right time for wrong legislation? I've never heard anything so silly in all my life: not the right time for this legislation. You're either for it or you're against it. It's terrible legislation; it'll destroy jobs in this province; it upsets that delicate balance between management and labour that has existed; it will destroy as much as anything else the future for my children and for others in this province, and the Liberals say it's not the right time. No time is the right time for legislation that is 20 years behind the time...(emphasis added).

But a complete review of the Ontario Legislative assembly proceedings clearly indicate an overwhelming commonality of arguments among the Liberals, PCs and the employers' associations

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38 See for example Mrs. Lyn McLeod, Leader of opposition (L), Hansard, 8 July 1992, pp. 1993-96; Mr. Michael D. Harris (PC), Hansard, 8 July 1992, pp. 1925-28.

39 Mr. George S. Sobara (L), Hansard, 6 July 1992, p. 1850.

40 Mr. Michael Harris (PC), Hansard, 8 July 1992, p. 1928.

against Bill 40.[41] The members of the Opposition extensively relied upon and quoted from the employers' submissions during the debate and their conclusion was that Bill 40 was objectionable on philosophical, procedural and substantive grounds. Bill 40 was branded as a brain-child of "Three Bobs" - Bob Rae, Bob MacKenzie and Bob White[42] - "to meet some ideological basis, ideological finding, ideological principle that is going to harm the future of this province".[43] The harmful measures and their consequences are stated to be the following:[44]

> ...Bill 40 will outlaw the use of replacement workers during a strike; it will give non-unionized employees the right to refuse the work of those on strike; it will make it easier for unions, particularly in the retail and service sectors, to organize and gain certification, and it will make it easier for fledging unions to get their first contract. The law will also override the Trespass to Property Act and permit organizing and picketing on third-party property, such as shopping malls.
>
> Therefore, strikes will paralyse companies. Firms that are small or in fragile economic health will be unable to survive a lengthy strike. Knowing the impact of Bill 40 on businesses, many investors will choose not to do business in Ontario. We are in serious trouble...

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41 Hansard, supra note 39 and 40; also see Hansard, 15 July 1992, pp. 2101-2135; 13 July 1992, pp. 2025-2063; 7 July 1992, pp. 1882-1991; 30 Sept. 1992, pp. 2251-2254; 19 Oct. 1992, pp. 2745-2748; 22 Oct. 1992, pp. 2892-3000; 28 Oct. 1992, pp. 2971-2991; 4 Nov. 1992, pp. 3152-3171; 5 Nov. 1992, pp. 3212-3226.

42 Hansard, 22 Oct. 1992, at p. 2905, Mr. Robert V. Callahan (L); 1 Oct. 1992 at 2280, Mr. Michael Harris (PC).

43 Hansard, 4 Nov. 1992, at p. 3156, Mr. Steven Offer (L).

44 Hansard, 4 Nov. 1992, at p. 3160, Mrs. Margaret Marland (PC).

"Kill The Bill Before It Kills You" is the common theme between the employers' associations and the opposition parties.[45] All the 55 amendments introduced by the government were called by a member of the opposition "The Trojan Horse Ploy" because "they conceal the hidden truth about the intent of Bill 40"[46] and to be truthful and open, the government should change the title of the Bill to "An Act to expand Union Membership and give Unions the Power to take over Companies".[47] To reverse this situation to a status quo ante, the PC party placed 94 amendments on the public record.[48]

The quality of the debates from all sides at times highly accusatory and totally unenlightening. The opposition parties accused the government of "unclean hands"[49] and the ruling party retorted that the opposition was engaged in a "campaign of terror",[50] "misinformation and scaremongering".[51] All were in agreement on a poisoned environment inside as well as outside the legislature resulting in a dialogue among the deaf. There were unidentified billboards popping up all over the province which depicted the pictures of Marx, Lenin and Premier Bob Rae (and obviously Premier Rae takes the place of Stalin). "Kill The Bill

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45 Hansard, 28 Oct. 92, at p. 2973; 8 July 1992, at p. 1928.
46 Hansard, 5 Nov. 92, at p. 3218, Mrs. Elizabeth Witmer (PC).
47 Hansard, 15 July 92, at p. 2117, Mr. Ted Arnott (PC).
48 Hansard, 28 Oct. 92, at p. 2975.
49 Hansard, 15 July 92, at p. 2133.
50 Hansard, 13 July 92, at p. 2031.
51 Hansard, 15 July 92, at p. 2125.

Before It Kills You" campaign through T.V. and flyer ads was reported to be at a cost of $700,000.[52] Premier Bob Rae labelled all these rhetorics and P.R. Campaigns as a "negative, hostile, outdated, antediluvian reactionary attitude that's discouraging investment in the province of Ontario" not the labour law reform.[53] But such rhetoric is not an uncommon part of a democratic process of law making.

7. A BIRD'S-EYE-VIEW OF MAJOR CHANGES, ELIMINATIONS AND MODIFICATIONS TO BILL 40

Before we move on to explain the specific amendments to the Ontario Labour Relations Act (R.S.O. 1980, c. 228, as amended), here we give a point-form overview of the major changes, eliminations and modifications to Bill 40 introduced by the government in response to employers' submissions and to the stands taken by the opposition parties at the legislature:[54]

Major Changes

1. Retain Supervisory Exclusion.
2. Agricultural Exclusion to be studied by task force.
3. No access to employer property for organizing.

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52 Financial Post, 17 Sept. 1992.

53 Ibid.

54 See "Fact Sheet: Changes to Labour Relations Act Reform", Ontario Ministry of Labour, no date. Also see "Labour Minister Announces Further Amendments To Bill 40", News Release, Ontario Ministry of Labour, Sept. 30, 1992, three pages.

4. No access to employee lists for organizing.

5. Retain 55 percent support requirement for certification.

6. Changes to purpose clause.

7. No employee right to refuse to cross a picket line.

8. Non-supervisory, non bargaining unit replacement workers allowed.

9. Designation of essential services; protection of employer property; and protection of health and safety during strike.

10. 60 percent strike vote requirement for access to replacement workers provision.

Other Modifications and Eliminated Proposals

1. Physicians and interns remain excluded from the Act where covered by an existing collective bargaining scheme.

2. Provision for separate bargaining unit for security guards where a conflict of interest arises as determined by the Board.

3. Require that Board commence hearing within 15 days (rather than 7) of the filing of a complaint arising from discipline or discharge during or related to an organizing drive.

4. Organizing and picketing on third-party property modified to exits and entrance; upon application to the Board these activities may be restricted.

5. Information on employers' and employees' rights and obligations provided through extension of publications/services, not through a required posting in the workplace.

6. No requirement for employer to file list of employees following certification application.

7. No provision that the OLRB consider the need to facilitate employees access to collective bargaining in determining the appropriateness of bargaining units.

8. Modification of the requirement that employers continue benefit coverage during a strike or lock-out.

9. Return to work protocol following a labour dispute modified. Where the parties cannot agree, the striking or locked-out employees have a preference in performing bargaining unit work and a right to be reinstated to former employment on a seniority basis provided that an employee has the ability to perform the work.

10. Modification of successor rights provision where there is a sale or transfer from federal to provincial jurisdiction.

11. No change to the related employer provision in the Act.

12. No deemed human rights provisions in collective agreements.

8. NEW "PURPOSES" CLAUSE

Prior to the amendments under Bill 40, there was no purpose clause in the Act, but a Preamble which referred to furthering "harmonies labour relations between employers and employees by encouraging the practice and procedure of collective bargaining".[55] This Preamble is repealed and a new "Purposes" clause (S.2.1) takes its place to reflect the underlying objectives of the Act more explicitly and provide greater guidance to the Ontario Labour Relations Board (OLRB) in exercising its powers under the Act. The following are the purposes of the Act under S.2.1:

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

2. To encourage the process of collective bargaining so as to enhance. (Emphasis Added)

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[55] Labour Relations Act, R.S.O. 1980, C. 228 as amended.

i. the ability of employees to negotiate terms and conditions of employment with their employer

ii. the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and

iii. increased employee participation in the workplace.

3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.

4. To provide for effective, fair and expeditious methods of dispute resolution.

The above provision differs somewhat from the Discussion Paper's "option".[56] At the urging of the employers and the opposition parties the following underlined words were omitted from the Bill:

> To improve terms and conditions of employment, employee participation and workforce skills through collective bargaining;
>
> To promote harmonious labour relations, industrial peace and the ongoing settlement of differences arising in collective bargaining and under collective agreements between employers and trade unions.

The phrase "so as to enhance the ability to negotiate" takes place of "to improve terms and conditions". While there was no

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[56] Discussion Paper, op cit, note 7. Hereafter wherever the phrase "preferred option" or the word "option" is used, it refers to the government's suggested option or preference contained in this Discussion Paper.

mention of "productivity" in the Discussion Paper option, the phrase "promoting workplace productivity" was added to S.2.1. (2.II). These changes did not seem to make the "Purposes clause" more acceptable either to the opposition parties or the employers for the following reasons:

There was no need to repeal the existing Preamble which, in the opinion of employers, addressed the fundamental values inherent in the Canadian collective bargaining legislation, namely, freedom of association, free collective bargaining and the promotion of industrial peace.[57] The lengthy expression of more particular goals or less fundamental values, in their opinion, should be handled directly by the substantive provisions of the Act and that the Purpose clause was perceived to be an active promotion of "the institutional interests of trade unions".[58] "The economic interests of employers and the institutional interest of trade unions, while legitimate, are not the concern of the statute...To include such statements would raise the need for countervailing expressions of interest on behalf of the other parties...Such concerns are properly resolved through collective bargaining, not the Act".[59]

Similar are the objections from the members of the opposition. For example, the use of the words such as "to ensure", "to

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[57] More Jobs Coalition Submission, op cit, note 24, at p. 18.

[58] Ibid, at p. 19.

[59] Ibid at p. 19 and 20.

encourage" and "to enhance" in S.2.1 were objected to on the ground that these are directions to the arbiter, namely the OLRB, which would tip the balance in favour of unions.[60] "The purpose clause, instead of acting as a guide to the Board in the interpretation of the Act, will define the OLRB's mandate or give the Board its marching orders...This section speaks for the first time to the results of collective bargaining, not just to the establishment of ground rules".[61]

Industrial relations statutes in other Canadian jurisdictions do not have a purpose clause, but some of them do have preamble.[62] Preamble is as much a part of a statute as a purpose clause is. But whether or not the former is as much an essential part of a statute as a purpose clause would be is a moot point. A preamble has been held to not be an essential part of an Act in the sense that it neither enlarges nor confers powers.[63] Similarly a purpose clause does not grant rights, and cannot itself be the subject of a complaint that the Act has been violated.[64] However a purpose clause can be relevant in interpreting and applying sections of the Act, particularly when they are unclear. The same is the case with

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60 Hansard, 6 July 1992, at p. 1858, Steven Offer (L).

61 Hansard, 7 July 1992, at p. 1888, Mrs. Elizabeth Witmer (PC).

62 See for example, Canada Labour Code, R.S.C. 1970, C.L-1, Part V, as amended; Labour Code of B.C., R.S.B.C., 1979 C.212, as amended; and Labour Relations Act, S.M. 1972, C.75, as amended.

63 Black's Law Dictionary, 5th Ed., West Publishing Co., St. Paul, 1983.

64 Sack Goldblatt Mitchell, A Guide To The Labour Relations Act Amendments - Bill 40, Dec. 1992, at p. 2.

a preamble. The meaning given to "preamble" as well as "purpose" are interchangeable.[65] Both express certain values and a government's positive commitment to those values and the interpretive effect of them would be the same:[66]

> ...The use of a preamble is largely symbolic and reflects the mix of social and economic values embraced by the legislation.
>
> ...Preambles are a way to express a government's "positive commitment" to a collective bargaining system which establishes rights and imposes duties understandably perceived by many as constituting fundamental rights...

Are the values incorporated in Bill 40 "Purposes" clause a radical departure and a "marching order" to the OLRB which upsets a pre-existing balance of power? We do not think so for the following reasons. To begin with, we doubt very much the assumption of a prevailing balance of power nor do we lend much credence to an absolute neutrality of a Preamble or Purpose clause in a statute such as the instant Labour Relations Act. In 1968, the Report of the Task Force on Labour Relations made the following

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65 See Black's Law Dictionary, op cit, note 63; and D.A. Dukelow and B. Nuse, Dictionary of Canadian Law, Carswell, 1991.

66 George W. Adams, Canadian Labour Law, Canada Law Book Inc., Aurora, Ont., 1985, at p. 222. See, e.g., the decision of the Divisional Court of Ontario in Re Service Employees' Int'l Union, Local 204 and Broadway Manor Nursing Home et al. (1984), 44 O.R. (3d) 392, 4 D.L.R. (4th) 231 (Div. Ct.), affd on other grounds 48 O.R. (2d) 225, 13 D.L.R. (4th) 220 (C.A.) Can. Lab. Rel. Bd. v. City of Yellowknife (1977), 76 D.L.R. (3d) 85, [1977] 2 S.C.R. 729, 14 N.R. 72; and Societe Radio Canada (1983), 1 Can. L.R.B.R. (N.S.) 129.

recommendation regarding Freedom To Associate And To Act Collectively:[67]

> In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system.

After a quarter of a century since this recommendation was made, Bill 40 has at last incorporated the above recommendation in its purpose clause. The purpose clause in no way changes the statutory quid pro quo model of Collective bargaining in Ontario which exchanges the right to strike during the life of a collective agreement for the statutory right to bargain collectively with employers and the supremacy of the "public interest" in industrial peace still remains the core of the statutory scheme.[68]

The industrial relations legislative objectives of all jurisdictions in Canada, with the exception of Saskatchewan, were founded upon the Dominion Wartime regulation, P.C. 1003[69] embodying

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[67] Canadian Industrial Relations, Privy council office, Ottawa, 1968, para 434, emphasis added. For a critique of legislative policy regarding union growth see George S. Bain, Union Growth And Public Policy In Canada, Labour Canada, Oct., 1978.

[68] On the application of this quid pro quo model of collective bargaining in Canadian jurisdictions see Gwen J. Gary, "Restoring An Equal Partnership: A Proposal For Reform of the Saskatchewan Trade Union", Labor Law Policy Seminar Paper, School of Law, Cornell University, 1992.

[69] G.W. Adams, op cit, note 66, at p. 83 and 91.

the above model. Saskatchewan "exceptionalism" was based on its acceptance of the Wagner Act[70] principles and its deviation from the P.C. 1003 model. The purposive institutional slant of the Saskatchewan statute is still reflected in its title and the following preamble: **The Trade Union Act: An Act Respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers**[71] But we do not see any such "deviation" or "institutional orientation" arising form Bill 40 Purpose clause.

The content of the purpose clause neither advocates an "Unchained Collective Action" based on Marxist social theory nor does it induce the negation of managerial prerogatives through a "Universal Joint Governance" of enterprises. What all it does is to update and reaffirm the traditional model of "Regulated Countervailing Power".[72] The Purpose clause falls within the boundaries of Dunlopian pluralistic industrialism.[73]

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70 C. 372, 49 Stat. 449, 1935.

71 R.S.S. 1978, C. T-17, as amended. The contents of the Act has gone through changes in 1966 and in 1984 (under the Liberal and Conservative Governments respectively) but the title and the purpose of the Act remained the same since 1944. Currently the NDP Government is considering amendments to the Act. The employers wanted to change the title and the purpose of the Act but the Conservative Government opted for leaving them on the book but changing the content of the Act in 1984.

72 For a critique of these models see Bernard Adell, "Perspectives of Power and Perspectives of Principle In Canadian Labour Law Scholarship", in Labour Relations Into the 1990s, CCH Canadian Ltd., 1989, pp. 29-52.

73 John T. Dunlop, Industrial Relations Systems, Holt & Co., New York, 1958. For a critique of quid pro quo system of collective bargaining and of pluralistic industrialism

9. **EXPANDED COVERAGE OF EMPLOYEES**

Managerial exclusion remains as it is [s.1(3)(b)]. Professional exclusion [under subsection 6(4)] is repealed and now lawyers, architects, dentists, land surveyors have the right to organize and are entitle to a separate bargaining unit unless a majority desire to be included in a broader unit. But doctors, interns and residents who are covered by a separate statutory provisions remain excluded [s. 2(g)].

Workers in agricultural and horticultural operations may also be certified, subject to regulations that have yet to be issued [s.2(2)]. A separate legislative scheme for these workers may be enacted, with provision for interest arbitration.

Previous restriction on "guards-only" union has been removed [s. 6(6)] and now they have freedom to choose their union. But security guards who exclusively monitor employees (as opposed to those who only monitor property or the general public) may be placed in their own bargaining unit, if such monitoring gives rise to a conflict of interest.

The exclusion of domestics from the coverage of the Act is removed but the rule requiring a bargaining unit to be made up of

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see Karl E. Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, Industrial Relations Law Journal, Vol. 4, No. 3, 1981, pp. 450-482.

two or more employees is retained. It will be possible to organize supplying agencies who act as the employer of domestics.[74]

The proposed inclusion of supervisors was withdrawn because of the opposition from the employers and the Act retains their exclusion.

These extensions of right to organize brings the Ontario Act closer to some of the labour codes in the country, such as Canada, B.C., Manitoba, Newfoundland, Quebec and Saskatchewan.[75] These extensions are also in tune with Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize to which Canada is a signatory[76] and the for this reason Canada Labour Code[77] makes an explicit reference to this convention in its Preamble.

On the question of managerial exclusion, there is a problem with Ontario Act's definition of a manager in terms its undefined

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[74] The government has proposed two actions in future regarding homeworkers and domestics: A Study of broad based bargaining to look at issues of sectoral bargaining and to amend Employment Standards Act dealing with homeworkers and domestics.

[75] For an excellent comparative analysis and critique on this issue see James E. Dorsey, Freedom of Association In Employment, Excluded Employees, And the Canadian Charter of Rights and Freedoms, in Essays in Collective Bargaining and Industrial Democracy, CCH Canadian Limited, 1983, pp. 5-20; also see Isik U. Zeytinoglu, Freedom of Association Conventions: The Impact on Canadian Labour Relations, in Mark Thomsons (ed), Is There a New Canadian Industrial Relations? CIRA Proceedings of 23rd Annual Meeting, 1986, pp. 275-286.

[76] For more details on the ILO Conventions vis a vis Canada see the above sources.

[77] R.S.C. 1970 c. L-1, Part V, as amended.

"effective recommendation" test [1(3)(b)]. Though the OLRB over a period of time has deductively developed its own definition of this term, it is not as clear as the Saskatchewan Trade Union Act, s. 2(f)[78]

> "employee means:
> (i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, any person who is an integral part of his employer's management or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer;

The underlined phrases provide a set of more explicit criteria for the Board to separate the real manager from the camouflaged one than the plasticity of "effective recommendation". Only a restrained managerial exclusion is a justifiable limitation on the freedom of association either under the ILO Convention or under the Charter.[79]

The blanket exclusion of supervisors from the coverage of the Act, instead of at least a restrained exclusion, is questionable because supervisors are afforded the right to organize and engage in collective bargaining in some other Canadian jurisdictions.[80]

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78 R.S.S. 1978, C. T-17, as amended, emphasis added.

79 See J.E. Dorsey, "Freedom of Association in Employment, Excluded Employees, and the Canadian Charter of Rights and Freedoms", Advocate, 41, 1983, 233.

80 Supervisors are placed in a separate unit the Canada Labour Code, s. 27(5); the B.C. Industrial Relations Act, s. 1(1) (a) and 1(1) (b); Manitoba Labour Relations Act, s. 1(a) (b); and Saskatchewan Trade Union Act, s. 2(f).

10. CERTIFICATION RULES AND PROCEDURES

There are a number of amendments under Bill 40 dealing with certification and related matters.

Under s. 8(2), a union applying for certification is now entitled to a vote where 40% (previously 45%) of employees are members or have applied for membership. This threshold for entitlement to a vote in Canadian jurisdictions ranges between 25 and 50 percent.[81] The threshold for automatic certification remains as before at 55%. In other jurisdictions this threshold ranges between a 50 or more and 60%.[82]

The requirement of a $1 payment to provide evidence of membership application in a trade union has been eliminated [105(4.1)]. Hereafter membership evidence will be based on whether an employee is a member of the union or applied for membership in the union. Under s. 8(1), the membership support is to be determined at the date of application for certification, and not as of the terminal date determined by the OLRB under the prior provisions of the Act. The purpose of this change is to reduce litigation through petitions regarding issues related to membership.

Under s. 8(4), membership cards, petitions or revocations and reaffirmations of support for a union cannot be considered by the Board if filed after the application date. If these actions are

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[81] Sask. TUA s. 6(1) (b), 25%; N.S. TUA, s. 25(1), 50%.

[82] For example the Federal Code, s. 28(c) requires a majority, the NB IRA, S. 14(3) mandates 60%.

filed on or before the application date, they will only be relied upon if they are in writing and signed by employees [s. 8 (5)]. the OLRB can consider evidence relating to membership support or opposition for the purpose of [s. 7]:

- determining whether membership evidence was obtained by intimidation, coercion, fraud or misrepresentation;
- determining whether a preapplication petition is voluntary; or
- identifying or substantiating written evidence filed by the application date.

If the above are proved affirmatively, they can only have the effect of causing the Board to order a vote but cannot result in outright dismissal of a union's certification application [s.8(6)].

Prior to Bill 40, the Board had authority to certify a union where the Act was contravened by an employer under two conditions: the true wishes of employees were not likely to be ascertained; and a trade union had membership support adequate for collective bargaining. Now, under s. 9.2, the second condition has been eliminated and union will be certified when the first condition is met.

Hitherto there was no special rules requiring the OLRB to act expeditiously in hearing unfair labour practice complaints during certification. Under the Bill 40 amendments [92.2 (1), (2), (3), (4) and (6)], a trade union can request an expedited hearing if the complaint alleges that

- it relates to the period between the beginning of an organizing campaign and the conclusion of a certification application; and
- an employee has been disciplined or terminated, received notice of discipline or termination or been otherwise penalized contrary to the Act.

Where such an expedited request is received, the OLRB must begin the hearing within 15 days of the request being filed; within 15 days of the request being delivered to respondent, whichever is later. The OLRB must hear such a complaint on consecutive days until the hearing is completed and it must render its decision within two days after completion of hearing, either orally or in writing. The OLRB has the discretion to consolidate other proceedings with a complaint that is the subject of expedited hearing.

The whole set of amendments regarding Certification rules and procedures - threshold for automatic certification, elimination of terminal date, restrictions on petitions, abolition of initiation fee, and expedited OLRB hearing - were opposed by employers on the ground that they were inappropriate, unnecessary and procedurally wrong.[83] They preferred the terminal date over the date of application for certification to determine membership support on the ground that the intermission period (between 8 to 10 days) provide necessary time for the employees to deliberate on and apply their freedom of choice and for the employers to exercise their

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[83] See More Jobs Coalition Submission, op cit, note 24, pp. 32-48 and other sources cited therein.

freedom of speech granted in s. 64 of the Act. In their view, the payment of $1 fee was a mark of informed choice while simply signing the union card was not. Further the expedited OLRB hearing on discipline and discharge cases during certification period was thought to be a fertile opportunity for unions to abuse. Relying on the findings of the Getman study in the U.S. in favour of the total deregulation of Pre-Election Conduct, employers opposed all these regulatory schemes embodied in Bill 40 regarding certification rules and regulations.[84]

There is overwhelming evidence against the above contentions of employers in favour of an open intermission between the union petition and certification and in support of Bill 40 amendments.[85]

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[84] See More Jobs Coalition Submission, op cit, at p. 34, citing J.C. Getman, "Ruminations on Union Organizing in the Private Sector" (1986), 53: 45 University of Chicago Law Review. Also see J. Getman, S. Goldberg and J. Herman, Union Representation Elections: Law and Reality, Russell Sage Foundation, 1976 (Getman Study). For a critique and rejection of Getman Study findings see Bernard T. King, "Pre-Election Conduct - Expanding Employer Rights and Some New and Renewal Perspectives", in Industrial Relations Law Journal, Vol. II, No. 2, Summer 1977, pp. 185-218.

[85] Bernard T. King, "Pre-Election Conduct...", op cit, note 84; G.S. Bains, "Union Growth...", op cit, note 67; D.D. Carter and J.W. Woon, Union Recognition in Ontario: A Study of Union-Management Conflict During the Establishment of the Collective Bargaining Relationship, Labour Canada, 1981; D.D. Carter, Legal Restraints Upon Employer Conduct During the Collective Bargaining Process, in John A. Willis, Labour Relations in Canada, Prentice Hall, 1990, pp. 45-58; Paul Weiler, "Promises To Keep: Securing Workers' Rights To Self-Organization Under the NLRA", Harvard Law Review, Vol. 96, No. 8, June 1983, pp. 1769-1827; Eileen Sufrin, The Eaton Drive, Fitzhenry and Whiteside, Toronto, 1983; G.W. Adams, Canadian Labour Law, op cit, note 66, see Chapter 7: Acquisition of

Hitherto the certification process in Ontario has been marked by greater formality than in some other Canadian jurisdictions. The certification hearing in this Province has been a full-scale adjudicative hearing at which the employer has full scale standing on all issues raised by the certification application.[86] By contrast, in Quebec, s. 24(e) of the Labour Code[87] expressly provides that employers are not to be considered as an interested party where the representative character of the union is in issue.

Apart from the Ontario's legal formality and full-scale adjudication, prior to these amendments, the OLRB had authority to extend the terminal date beyond the usual 8 to 10 days. Longer is this intermission, greater the number of petitions and counter petitions, in effect checking the due payment of a dollar, and the authenticity of petitioners as well as organizers subject to certain secrecy requirements.[88] The history of litigation in Ontario (apart from the genuine cases of intimidation, coercion, and misrepresentation) involving "non-pay", "non-sign", "improperly named union", "irregularities in Form 9" is notorious and mind boggling. Is signing on a Sunday permissible? Can an employee be loaned the requisite one dollar? Did the borrower sincerely intend

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Bargaining Rights; B.L. Adell, Employer Free Speech In The United States And Canada, IR Centre, Queen's University, Reprint No. 8. 1966; and G.W. Adams, Labour Law Remedies, in K.P. Swan and K.E. Swinton (eds) Studies in Labour Law, Butterworths, Toronto, 1983, pp. 55-78.

86 D.D. Carter, Union Recognition In Ontario... op cit, note 85, at p. 4.

87 R.S.Q. 1977, C. C-27, as amended.

88 Adams, op cit, note 85, pp. 358-360.

to repay the loan? Does a payment of a dollar on the condition that it be returned if an application is unsuccessful, amount to a non-pay? Is it necessarily a non-pay where the payment is made conditional on an application for certification being made?[89] The evidentiary requirements of answering these questions along with the time and cost involved during a critical time in union organizing and obtaining certification under the Ontario legal formalism and full-scale adjudication have been cumbersome and counter-productive.

Even though the Ontario approach of fixing a terminal date later than the union certification application date might appear to allow employees time to reconsider (changes-of-heart) their commitment to the union, "unfortunately, it also allows employers time to encourage such reconsideration". It is this latter element that the Provinces of Manitoba and Quebec have sought to avoid by restricting the employer's role in certification proceedings to challenging the inclusion of employees in the bargaining unit on the basis of managerial or confidential exclusion".[90] The "rich" Ontario experience is, according to the former Chairman of OLRB George W. Adams, by and large, the product of employer-generated litigation and that the less adversarial certification procedures in other jurisdictions have resulted in fewer cases in this area.[91]

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89 Adams, ibid, pp. 360-364.

90 Adams, op cit, at p. 354; Que., LC., 55. 32 & 28 (c); and Man., LRA, s. 38(1).

91 Adams, op cit, at p. 366.

The Bill 40 amendments are meant to rectify this "rich" Ontario experience.

The use of political analogy by employers to union representation election, their emphasis on certification only by mandatory voting, their preference for a lengthy American style election campaign based on employers' freedom of speech, their rhetoric of civil libertarian defence of individual employees' rights against the imminent union dictatorship on members upon certification and their conviction that employers' vigourous campaign has almost no bearing on the election results are based on faulty assumptions and found to be empirically unsound.[92]

The corporate governance is presumed to be a purely private matter and hence the political analogy is never extended to its authority structure and decision making process.[93] But when a union knocks at the door, the employers prefer the full fledged application of election process to unions similar to that of a national election. They claim that they should have an <u>equal opportunity to make the case against unionization</u>, to persuade its employees that they would fare better under the existing regime of individual employment relations so that employees will have an "informed choice".[94] Employers' advocacy of this American model is based on the findings of Getman Study which recommended total

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92 See the following: Paul Weiler, B.L. Adell, Bernard T. King, op cit, note 85.

93 See Paul Weiler, op cit, p. 1813.

94 Paul Weiler, op cit, at p. 1812.

deregulation of pre-election conduct and procedures.[95] Subsequent studies rejected this finding on the basis of the study's defects in research methodology, sample size, geographical coverage and the "Hawthorne effect" of the questionnaire survey and of the study itself.[96]

The assumptions behind the regulatory approach of the Canadian system of industrial relations - such as Bill 40 with its preventive and reparative purposes - differ from the U.S. model of superimposing a political analogy over union "election and representation". Professor Paul Weiler has the following to say regarding this issue.[97]

> Still, I think we should not overemphasize the urgency of the legal task of refining the model for union representation decisions. Let us be clear about the nature of the choice being made by the employees. There is an inherent fallacy in the political analogy. The employees are *not* making a momentous choice, one which should be carefully hedged about with ceremonial trappings, ultimately allowing the employees to make up their minds in the solemnity of the voting booth in the same ways that citizens do about their governmental representatives. The fact is that a trade union does not have governmental authority over the unit of employees. The trade union gets a piece of paper - a license to bargain on their behalf - which is by no means the key to the vault. The union must do something in the real world with that license. True, the employer has to sit down at the table and negotiate with the union. But it does not have to agree to any of the demands of the union. How does the trade union extract concessions and ultimately

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95 op cit, note 84.

96 See Bernard T. King, op cit, note 85; Adams, op cit, note 85, at p. 542; P.C. Weiler, op cit, note 86, pp. 1782-1786.

97 Reconcilable Differences, Canswell Co. Ltd., Toronto, 1980, at p. 44. Emphasis added.

> a contract from a recalcitrant employer? Only with the lever of employee pressure, through the threat or the use of a strike. In the final analysis a trade union must be able to get a strike mandate from the employees. In practice there must be not just a bare majority, but a solid one to be credible at the bargaining table. This is the crucible in which the durability of the union's majority will be tested. Unions do themselves no good by flimflamming a group of employees into "instant unionism" which they will shortly regret. The trade union has to maintain - indeed it has to build up - its initial support during the months of the certification proceedings and first contract negotiations.

11. FULL-TIME AND PART-TIME EMPLOYEES: UNIT DETERMINATION

Hitherto the OLRB's policy was to exclude employees regularly employed for not more than 24 hours a week (part-time) from a full-time bargaining unit at the request of either party. The main rationale for this approach was based on the assumption that there was a divergence in "community of interests" between these two categories of employees.[98] Under Bill 40 amendments [s.(2.1); (2.2); (2.4); (2.5)] this situation is changed.

Now, the OLRB must put these categories of employees in the same unit where the union has more than 55% membership support overall. Where such an overall support is less than 55%, the Board is required to consider separate units. Where full-time and part-time units are in a position to be certified separately, either after a vote or otherwise, the Board is required to consolidate both into one. If a separate full-time and part-time unit already exists, represented by the applicant or another union, the Board is

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[98] See Adams, op cit, note 66, p. 348.

granted the discretion to determine that separate full or part-time units are appropriate.

Craft units and units in the construction industry are exempted from the provisions.

With these amendments, Ontario becomes the first Canadian jurisdiction in making explicit provisions regarding the status of part-time workers under the Labour Relations Act. Even though the necessity for such statutory measures have been recognized in a federal Commission Report and in a number of scholarly papers, in all other jurisdictions the matter is still left to labour relations boards' discretionary experimentation.[99] But even in the absence of explicit provisions regarding part-time workers' bargaining unit, the Alberta Board usually includes part-time, causal and full-time workers in the same unit and, if fact, has come to consider a unit that splits up its workers into part-time and full-time as inappropriate. The Alberta Board simply derives its power to do this from its general authority to set appropriate

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[99] See Part-Time Work In Canada: Report of the Commission of Inquiry into part-Time Work, Labour Canada, 1983 (Wallace Commission Report); Geoffrey England, Part-Time, Casual and Other Atypical Workers: A Legal View, Series No. 48, IR Centre, Queen's University, 1987; Norene Pupo and Ann Doris Duffy, "The Ontario Labour Relations Board and the Part-Time Workers", Relations Industrielles, Vol. 43, No. 3, 1988, pp. 660-684; I.U. Zeytinoglu, Part-Time Workers: Unionization and Collective Bargaining in Canada, IRRA 39th Annual Proceedings, pp. 487-495; and David C. McPhillips, "The Appropriate Bargaining Unit: The Need for Policy Consistency by Canadian Labour Boards", Relations Industrielles, Vol. 43, No. 1, 1988, pp. 63-82.

units.[100] In that sense, Bill 40 prescriptions on this matter may be considered as a formalization of certain emerging practices in other jurisdictions. But employers in Ontario do have some concern regarding such formalization.

Employers' main objection to creation or consolidation of bargaining units consisting of part- and full-time employees is based upon the Bill's thrust to facilitate employee access to collective bargaining instead of leaving the whole matter to the OLRB's discretion based on "community of interest" as before.[101] Further they prefer the status quo ante for pragmatic and tactical reasons which are based on a need for flexibility, the question of cost and the complexity of negotiating terms and conditions to meet the divergent needs and aspirations of part- and full-time employees. In their view, the OLRB's power of consolidation is a legislated cure for the union's weak bargaining presence at the cost of part-time workers:[102]

> ... In fact, part-time employees have an equal right to organize under the Act. Present practice requires that the union must enjoy majority support among part-time employees as a separate bargaining unit because they have a separate community of interest and deserve

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100 Heenan Blaikie, Comparative Analysis of Canadian Labour Relations Legislation, Appendices to More Jobs Coalition Submission, op cit, not 24, no pagination, footnote 12. Similar is the practice in Saskatchewan, Manitoba, New Brunswick, and Newfoundland without any requirement to do so in their respective labour relations statute.

101 More Jobs Coalition Submission, op cit, note 24, pp. 49-57.

102 Ibid, at p. 56.

> separate representation. Combining full-time and part-time employees in one unit and requiring the union to establish only "overall majority" support removes the right of part-timers to express their wishes separately. In what sense does this strengthen the rights of part-time employees? The Discussion Paper is really proposing to subsume the part-time employees regardless of their majority's wish as to unionization. Given sufficient support among the full-time employees under this proposal a union could be certified to represent the part-time employees without even bothering to communicate with. Even more offensive is the proposal's willingness to require the single unit approach of the board only when the union has sufficient full-time support to successfully subsume the part-timers without risk to its overall membership position. Requiring the Board to revert to the separation of full and part-time employees when the union fails to establish "overall majority" support makes it clear that the proposal is aimed at facilitating certifications without regard to principle or the wishes of the part-time employees it purports to protect.

In his comprehensive and insightful paper on "Part-time, Casual and Other Atypical Workers: A Legal View", Geoffrey England has identified a threefold argument in favour of including part-time and full-time workers in the same unit.[103] First, it supports the traditional policy against undue unit fragmentation, with the concomitant risks of competitive bargaining, duplication of labour relations services, greater disruption from industrial strife and inflexibility in manning decisions due to conflicting seniority lists. Secondly, a separate part-time unit might not have sufficient bargaining power to achieve a reasonable collective agreement, if any. Thirdly, from the perspectives of the full-timers, they can expect to protect themselves more effectively

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[103] op cit, note 99, at p. 10.

against the dangers of a competitive part-time labour pool by bargaining on behalf of those employees rather than see them have their own unit, whether it be unionized or not. Part-timers can be utilized by employers to undermine the union's collectively negotiated rates and to erode the union's strength in a strike or lockout. A common bargaining unit would also enable full-timers to use their seniority to bid on part-time jobs.

Apart from these reasons, he also rejects the traditional approach for justifying the unequal legal treatment of atypical employees on constitutional - Charter, s. 15 - statutory - Human Rights Codes -, and philosophical and ethical grounds - Kantian Categorical imperative of applying the same rule to all persons in the same situation.[104] Service industry, part-time work, female part-time workers, "female and minority ghetto", differential and non-prorated fringe benefits, less job security, inferior seniority protection, less career development opportunities, unequal reward for equal contribution, lack of due process at the workplace are all synchronized in the part-time labour market.[105] The Bill 40 amendments in this area are a response to rectify some of these problems identified above.

Whether or not these problems will be solved by Bill 40 amendments is difficult to predict. To the extent certain

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[104] Due to limitation of space these grounds are not elaborated. For such elaboration see England, op cit.

[105] For further elaboration of these factors see generally Wallace Commission Report, op cit, note 99.

obstacles against part-time employees' unionization are removed and to the extent they are now in a position to organize themselves along with the full-time employees may be of some help in unifying and stabilizing their bargaining power along with full-timers. But the assumption that the divide-and-rule policy of employers alone has been the sole cause for low union density among them is unfounded. Unions' narrow and sectarian orientation as opposed to a more egalitarian philosophy towards all workers is itself a contributing factor. Both employers as well as unions take a strategic and differential approach to inclusion or exclusion of part-time workers from unit-determination. At times both may be willing to sacrifice the interests of part-time workers. Change in law may not change this philosophy of convenience and situational ethics in industrial relations.[106]

> ... The parties to any give certification application will argue their positions pragmatically. The union, in the short-run for purposes of organizing, may seek smaller bargaining units while the employer, at the certification stage, may argue for a larger multi-location unit to dilute the percentage of union support. On the other hand, if the union has strong support it may argue for a larger unit to secure greater bargaining power and the employer may argue to restrict the number of employees to be included in the unit. For such tactical reasons the parties generally take a position before the Board which is not based on far-reaching theories of harmonious industrial relations...

12. CONSOLIDATION OF BARGAINING UNITS

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[106] More Jobs Coalition Submission, op cit, note 24, p. 50.

There are explicit provisions empowering labour relations boards to consolidate units in Alberta, B.C., and Nova Scotia.[107] The power to revise the bargaining unit under s. 18 Federal Code, coupled with the Board's general power under s. 27 to determine the appropriateness of bargaining unit allows the Federal Board to consolidate bargaining units. Bill 40 amendments [s. 7(1); (2); (3); (4); and (5)] empowers OLRB to consolidate units, as has been the case in the first three jurisdictions mentioned above.

The power of consolidation of units only applies where the same employer and same union are involved. But unions may still be able to use the hitherto existing s. 1 (4) on "related employer" to establish the existence of a single employer. Neither the type of units to be consolidated - namely office, plant location or other classifications - nor the timing of a consolidation application is legislatively restricted. If an application is made during certification the Board may [s. 7 (2)]:

- combine the bargaining unit applied for (the proposed bargaining unit") with existing units:
- combine the proposed bargaining unit with other proposed bargaining units applied for;
- combine the proposed unit with both existing and proposed bargaining units.

Under s.7 (3), the OLRB, in using its discretion of consolidation, is required to consider whether consolidation would:

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[107] Alta. LRC, s. 39(1); B.C. IRA, s.40; and N.S. TUA, s.26(2) (3). In all other jurisdictions, there is no explicit power of consolidation granted to the boards.

- facilitate viable and stable collective bargaining;
- reduce fragmentation of bargaining units;
- cause serious labour relations problems.

Section 7 (4) makes certain special provisions for manufacturing operations. The Board is not entitled to combine units where there are two or more places of operations which are geographically separated and the Board must also consider whether combining units will unduly interfere with:

- the employer's ability to continue significantly different methods of operation or production at each location;
- the employer's ability to operate those places as viable and independent business.

While unions are in favour of these amendments, employers do not see any need for granting such a wide power of consolidation to the OLRB. In their opinion, s. 2 amendments regarding full-time cum part-time employees bargaining units along with s. 7 consolidation provisions cumulatively meant for curing unions' weaknesses in organizing the unorganized and in bargaining.[108] Their assessment is correct. However, neither common unit for part- and full-time workers, nor consolidation of other types of units are unprecedented in some other Canadian jurisdictions.[109]

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[108] More Jobs Coalition Submission, op cit, note 24, at p. 57.

[109] See the opening paragraph of this section as well as footnote 100.

13. ACCESS TO FIRST AGREEMENT ARBITRATION

Since 1973, six Canadian jurisdictions have introduced varying type of provisions for the settlement of a first collective agreement as indicated in Table I.[110] Bill 40 amendments regarding first agreement arbitration (S.41) are added on to the pre-existing two-stage process (see Table I). Under this process, an application for contract settlement may be made after the release of a "No Board" notice by the Minister of Labour following unsuccessful conciliation services, the OLRB must grant a direction to arbitrate the first agreement. With this direction, the parties may then choose to request the Board to do the arbitration or have the arbitration done privately.[111] Unlike Ontario, S.87 of Manitoba's Labour Relations Act[112] prescribes a one-stage process for settling first agreements by arbitration. The Bill 40 amendments are modeled after the Manitoba's as well as Quebec's automatic access to first contract arbitration.

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110 For more details regarding these provisions see Len Haywood, Experience With First Agreement Arbitrations In Ontario And Manitoba 1982-1992, Ontario Ministry of Labour, Jan. 28, 1992; S. Muthuchidambaram, "Settlement of First Collective Agreement: An Examination of the Canada Labour Code Amendment", Relations Industrielles, Vol. 35. No. 3, 1980 pp. 387-407; N. Solomon, "The Negotiation of First Agreements in Ontario: An Empirical Study", Relations Industrielles, Vol. 39, No. 1, 1984, pp. 23-34; and Jean Sexton, "First Contract Arbitration in Canada", Labor Law Journal, Aug. 1987, pp. 508-514 and sources cited therein; P.B. Beaumont, "Comment" on Sexton's paper, Labor Law Journal, Aug. 1987, pp. 515-518.

111 Len Haywood, op cit, note 110, at p. 1.

112 S.M. 1972, c.75, as amended.

The new provision under S.41 entitles unions to apply to the Minister for first contract arbitration thirty days after the parties have been in a position to lawfully strike or lockout. Unlike the pre-existing provision, no grounds need be established[113] other than the passage of time.

Where a union applies either under the existing provision or under the new provision, a private board of arbitration is established to settle the terms of a first contract and hereafter the OLRB will not settle these terms. The arbitration board must be composed within ten days after the application for a first contract settlement. Still the parties may agree to use final offer selection. An activation of S.41 provisions triggers the following:

- Any strike or lockout ceases.
- Employees must be reinstated to employment in accordance with an agreement between parties, and if there is no agreement, then in accordance with seniority. The OLRB may order exceptions to seniority to permit "startup of operations".
- Employees must be reinstated on the terms which existed when the notice to bargain was given.

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[113] The following are the grounds under the two-stage process: S.40 a(2):
a) the refusal of the employer to recognize the bargaining authority of the trade union;
b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
d) any other reason the Board considers relevant.

- No decertification or displacement application (raid) can be made after the date the union applies to the Minister for first agreement arbitration, or the date the Board directs that a first agreement be settled.

- The deemed just cause provision under S.81.2 will be enforced by the OLRB.

Parties' conduct during the negotiation of a first collective agreement (under pre-existing S.40a) is no more a pre-condition[114] to trigger the provision of the new S.41. The only pre-condition to access the benefit of S.41 is the mere passage of time. Such an unconditional and automatic access to this provision is objected to by employers on the ground that it is an anti-thesis of "free collective bargaining" system:[115]

> . . . The proposal gives a union the right to bypass collective bargaining automatically without establishing the employer to be unwilling to negotiate. The proposal is really designed to substitute "interest" arbitration for negotiation whenever a weak union is unable to obtain the improvements it seeks at the bargaining table. <u>In a free collective bargaining system it is illegitimate to interfere in a working bargaining relationship because of an imbalance of power</u>.
>
> . . .
>
> . . .The existence of such a procedure would actually deter first agreement bargaining and would poison, not foster, the parties' long-term relationship.

The employers' thesis that in a <u>free</u> collective bargaining system it is <u>illegitimate to interfere</u> in a working bargaining relationship <u>because of an imbalance of power</u> is unsound. We do

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[114] See note 113 for the precondition under S.40a.

[115] More Jobs Coalition <u>Submission</u>, op cit, note 24, at p. 60. Emphasis added.

not have a free collective bargaining system in a strict sense, and no employer in its right mind move freely and voluntarily from a system of individual to a collective contract unless a law requires it to do so under certain conditions. One of the purposes of an industrial relations statute, such as the instant Act, is not only to require employers to engage in collective bargaining in good faith but also to impose some semblance of balance of power between the parties. The imbalance of power between the parties from the time of union organizing and certification to the stage of securing a first collective contract is overwhelmingly against the union. There is a clear tension and conflict between the requirements of "good faith" on the one hand and freedom to resolve economic disputes by economic power on the other.[116] In this conflict between the statutory duty and economic power, the latter prevails invariably over the former,[117] particularly during the first collective agreement negotiation.

Section 41 rectifies the above situation through its preventive and reparative provisions. These provisions may reduce the hitherto prevailing extensive delays, expensive hearings, and

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116 E.E. Palmer "The Myth of 'Good Faith' in Collective Bargaining", Alberta Law Review, 4, 1966, 409, at 414, cited in B.A. Langille and P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain", Queen's Law Journal, Vol. 13, 1988, 63, at p. 65.

117 Langille and Macklem in their paper cited above fully expand this thesis regarding the settlement of first collective agreement.

the lingering animosity at this stage of establishing a collective bargaining relationship.

Employers' view that S.41 may serve as a disincentive to unions to engage in meaningful bargaining is somewhat questionable. In other jurisdictions it has been found that the terms and conditions as well as the monetary rewards were far better in mutually negotiated settlements.[118] Boards as well as arbitrators were extremely frugal in their monetary awards, though not in non-monetary issues, and they made it a point not to impose any industry breakthroughs. They made their awards in the light of industry collective bargaining standards; they preferred to err on the conservative rather than innovative side in their awards. It will be foolhardy for unions to sit tight for the required passage of time with a hope of winning a windfall deal from frugal arbitrators.

14. ACCESS TO PRIVATE PROPERTY FOR ORGANIZING OR PICKETING

Prior to the amendments union organizing or picketing activities in public malls and other areas open to the public were regulated by common law or the Trespass to Property Act. Subsection 2(1) of the latter Act establishes an offence for a person "not acting under a right or authority conferred by law" to come on private property without the owner's permission or to fail to leave the property when directed to do so by the owner or his

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[118] See Jean Sexton, op cit, note 110.

agent.[119] Hitherto the OLRB had determined that the prohibition on interfering with trade union representation in S.65 of the Ontario Labour Relations Act could, in extremely limited circumstances, allow union organizing on property open to the public.

Section 11 of Bill 40 overrides the Tresspass to Property Act and grants a right to organize and picket on property where the public normally has access to the property such as malls, parking lots and access roads. There are certain restrictions on such activities. The right to organize is limited to employees and representatives of union engaged in organizing. But in case of picketing, it extends to any individual and this right to picket applies during and in connection with a lawful strike or lockout. The organizing activity is restricted to persuading employees to join a union.

There are also locational limitations to organizing and picketing activities. Organizing is restricted to "at or near but outside entrances and exits to the employer's workplace [S.11.1(2)] and picketing activity "at or near but outside the operations of an employer or person acting on behalf of an employer [S.11.1(3)]. Disputes related to either of these activities are to be decided on expedited basis by the OLRB, and not by the Courts.

Employers prefer the hitherto existing OLRB's policy of granting limited access order on a case by case approach to unfair

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[119] Harrison V. Carswell, (1976) 62 D.L.R. (3d) 68 (S.C.C.).

labour practices.[120] In their opinion, the union organizing right takes precedence over the third party property right and that the old policy achieved a better balance between these two competing rights. On the question of picketing rights they made the following conclusion:[121]

> . . . Picketing on premises owned by a third-party raises unique issues. In the typical case of a shopping mall, picketing intrudes not only on the third-party property rights of the mall owner but on the economic interests of neighbouring merchants. Public enjoyment is also disturbed. A shopping mall is unlike commercial or retail space adjacent to public property such as a sidewalk. Shopkeepers through their rents and customers through their purchases pay a premium for being there. As part of that premium, neighbouring merchants and the public have come to expect, and are entitled to receive, an orderly and well-regulated environment. Picketing disrupts this environment.

The concept of "private" property in law, economics, and philosophy has undergone certain changes since the time of Aristotle.[122] These changes reflect the changes in the form and structure of property ownership, possession, occupancy, use and management. There has always been a lag between the concrete changes in the form and structure of property and the legal recognition and accommodation of these changes in resolving the

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120 More Jobs Coalition Submission, op cit, note 24, at pp. 35-36. Employers prefer the Board's approach in T. Eaton Company Limited, (1985) OLRB, Rep. June 941.

121 op cit, at p. 77. Emphasis added.

122 For a review of historical evolution of the concept see R. Schlatter, Private Property: The History of an Idea, Rutgers University Press, New Brunswick, N.J., 1951. For a more recent work see L.C. Becker, Property Rights: Philosophical Foundations, Routledge & Kegan Paul, Boston, 1983.

conflicts of laws. The conflict between industrial relations statutes on one hand and the principles of common law and tresspass statutes on the other with reference to "shopping malls" is recognized, accommodated, and resolved in Bill 40 amendments. Shopping malls are a hybrid not a classic form of a "private" property; they are quasi-public (or quasi-private) property and as such they may not be entitled for a pure form of laissez-fair rights and privileges. "The ancient bonds of real property law is inappropriate".[123] Employers may have to accept the dictum that the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed.

The provisions under S.11 do not grant an absolute and unlimited rights for organizing and picketing activities. They avoid an all or nothing approach to the problem. They prescribe specific limitations on the nature of activities as well as on the location of such activities.

Further, there are provisions [S.11.1(5) and (16)] enabling the OLRB to decide all disputes on these activities on an expedited basis.

15. **RESTRICTIONS ON THE USE OF REPLACEMENT WORKERS**

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[123] See H.W. Arthurs, "Labour Law-Picketing on Shopping Centres", (1965), 43, Canadian Bar Review, 357 at 361; for developments in the U.S.A., see R.B. Huss and R.J. Simmons, "Hudgens V. NLRB; Protection of Shopping Center Picketing Under The Constitution or NLRA", Industrial Relations Law Journal, Vol. 1, No. 3, Fall 1976, pp. 632-655.

Section 73 amendments restricting the use of replacement workers during a lawful strike or lockout are added on to the pre-existing prohibition on the use of professional strike breakers. These new provisions are more extensive and most controversial part of Bill 40 in a substantive as well as symbolic sense. New provisions fall under the following four categories: pre-requisites to the application of restrictions; prohibited categories of persons; prohibition of requiring certain employees to perform struck work; and the exceptions to the prohibition.

To trigger the application of restrictions on replacement employee the following conditions must be met [S.73.1(2), and (3)]:

- a lawful strike or lockout must be taking place;
- a secret ballot strike vote among all employees in the bargaining unit (including employees who are not union members) must have been conducted;
- at least 60% of individuals voting must vote to authorize a strike; and
- in the case of a strike, the union must have notified the employer in writing that the union is on strike.

When the above conditions are met, the employer is prohibited from using in any of its operations [S.73.1(4), (5) and (6)]:

- employees in the bargaining unit on strike or lockout to perform any work;
- persons hired or engaged after notice to bargain is given or bargaining actually commences, to perform the work of striking or locked out employees, or to perform the work of other persons who are performing the work of striking or locked-out employees.

In addition to the above, the employer cannot use any of the following persons at the place where the strike or lockout is taking place [S.73.1(6)]:

- any employee who ordinarily works at another of the employer's place of operations, except managers:
- managers who work at a place where there is no strike;
- volunteers and contractors;
- employees or other persons supplied by contractors.

Where there is a multilocational legal strike, the employer is permitted to transfer and use managers and non-bargaining unit employees among the struck, or locked out establishments.

But Section 73.1(7) and (8) respectively prohibits the employer from requiring "employees" or "persons" (which include managers) to perform the work of the striking or locked out employees and any refusal on the part of such "employees" or "managers" is protected by a no repraisal clause [S.73.1(8)]. In substance, the element of consent is protected and that of coercion is prohibited. In any complaint on this matter the burden of proof is on the employer.[124]

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[124] S.73.1(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.
(8) No employer shall.
(a) refuse to employ or continue to employ a person;
(b) threaten to dismiss a person or otherwise threaten a person;

Bill 40 provides for certain exceptions to the above prohibitions against the use of replacements. These exceptions entitled as "specified replacement workers" [S.73.2(2)] do not include employees in the bargaining unit at struck or locked out establishments. "But only to the extent necessary" is the overall qualification to the use of all "specified replacement workers" which include:

- detention services;
- residential care for children in need of protection, persons with handicaps or with behaviourial or emotional problems, and services to assist those persons to live outside of residential facilities;
- emergency shelter or crises intervention services;
- emergency services for children who may be in need or protection;
- emergency dispatch services, ambulance services and services at first aid clinics or stations and also include those replacements to prevent
- danger to life, health or safety;
- the destruction or serious deterioration of machinery, equipment or premises;
- serious environmental damages.

(c) discriminate against a person in regard to employment or a term or condition of employment; or
(d) intimidate or coerce or impose a pecuniary or other penalty on a person because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or is locked out.
(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

The burden of proof on "but only to the extent necessary" is on the employer [S.73.2(15)]. The parties themselves are permitted to determine these exceptions, including the type of work, the level of service, and the number of specified replacement workers, including the use of bargaining unit employees [S.73.2(4) to (11) inclusive]. The procedures are prescribed in terms of timely notice, discussion and consent between the parties concerned. In case of emergencies, the employer is permitted to use specified replacements for the period of time required to give notice and to determine whether the union will consent.

If the parties themselves arrive at a settlement regarding the use of replacements, it may be executed into a signed written agreement which expires at the conclusion of strike or lockout or when the collective agreement is entered into [S.73.2(16) and (19)]. But "the parties shall not, as a condition of ending a strike or lockout, enter into an agreement governing the use of specified replacement workers or of bargaining unit employees in any future strike or lockout. Any such agreement is void [S.73.2(20)].

Either of the parties may apply to the OLRB either before or after the strike to determine whether specified replacement workers can be used; and the manner and extent to which replacement workers may be used. The Board is granted jurisdiction either to modify any order in the light of changed circumstances or to defer consideration of an application [S.73.2(13) and (14)].

Amendments to S.75 regarding reinstatement of employees after a strike or lockout are complementary to S.73 provisions on strike replacements.

Prior to the amendments, S.73 was silent on the order of return to work after a strike or lockout, except declaring that during the first six months of a strike, an employee had the right to be reinstated to employment under certain conditions. Now this six month limitation on the right to be reinstated has been repealed. Section 75(2) provides that, at the conclusion of a strike or lockout, where the parties are unable to agree on terms of reinstatement, employees must be reinstated to the position held before the strike or lockout, if there is sufficient work. In the absence of sufficient work, the employees must be recalled [S.75(4)]:

- in order of seniority, as defined in the recall provisions of collective agreement and as calculated when the strike or lockout began;
- where there are no recall provisions, in accordance with length of employment as calculated prior to the commencement of the strike or lockout.

The above recall provision does not apply if an employee is unable to perform work required to start up the employer's operations. But this exception applies only for the period of time required to start up operations [S.75(5)]. Employees are now entitled to bump any replacement workers who worked during strike,

except bargaining unit employees who provided essential services and who had more seniority when the strike began [S.75(3)].

Another set of complementary provisions to those of SS.73 and 75 comes under S.81 regarding the continuation of employment benefits or insurance coverage (except for pensions) during strike or lockout where the union tendered the necessary payment either to the employer or a third party who are required to accept such a payment. The union must tender both the employee and employer share. Just cause provision continues to operate during a strike or lockout.

These provisions on restricting the use of replacements (S.73) and those on reinstatement of employees after a strike or lockout (S.75) irrespective of its duration were subject to vehement criticism inside as well as outside the legislature. With these provisions, in the opinion of an opposition member, strike becomes a total "economic blockade".[125]

From the employers' perspective the pre-existing (S.71a) prohibition on the use of professional strike breakers and the right of employees to return to work unconditionally within six month duration of a strike are sufficient protection for employees and unions.[126] Their assessment of a similar provision in Quebec Labour Code[127] is negative: It increased the incident and duration

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125 Hansard, 28 October, 1992 at p. 2975, Mrs. Witmer (PC).

126 More Jobs Coalition Submission, op cit, note 24, at p. 65.

127 R.S.Q. 1977, C-27 as amended, S. 109.1.

of industrial conflict; reduced the union incentive to bargain and compromise; diverted employers' attention from bargaining to developing and implementing contingency plan for operating in the event of a strike or creating alternative sources of production and/or new operations in Ontario or the New England States, close to the Quebec border; and in other cases employers simply closed down their operations permanently.[128]

Apart from these substantive and pragmatic reasons, they object to the whole scheme of eliminating employers' right to hire permanent replacements and to operate the plant during a strike on symbolic grounds. This right, in their opinion, has been fundamental to a market economy and free collective bargaining system based on a well established *quid pro quo*. In support of this contention they approvingly cited the following passage from the Woods Task Force Report:[129]

> As noted elsewhere, the employer's economic sanction equivalent to the union's right to strike rarely is the lockout. It is his ability to take a strike... However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of a strike and to use other employees and replacements to perform work normally done by strikers. Together with the lock-out, these possibilities constitute the employers *quid pro quo* for the employee's right to strike; this is as it should be in our view.

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[128] More Jobs Coalition Submission, op cit, note 24, at p. 66.

[129] Ibid, at p. 64; Canadian Industrial Relation, 1968, at p. 176, para 607.

From the unions' perspective, the ability of an employer to continue to operate by using replacement workers, not withstanding the exercise by employees of their lawful right to strike constitutes a serious restriction upon that right which must be removed[130]. "Rather than tilting economic power in favour of employees, a restriction on replacement workers simply prevents the withdrawal of services from being a near meaningless exercise. In addition, the use of replacement workers is a constant source of tension on picket lines creating resentment and mistrust between the parties, and constitutes a major lightening rod for pick line violence. Finally, the failure to limit the use of replacement workers by an employer involved in a labour dispute penalizes the vast majority of responsible employers who do not engage in such unfair strategies."

Employers' right to hire permanent replacements during a legal strike and the employees' ability to use a statutorily guaranteed right to strike effectively under the North American system of industrial relations are inherently contradictory[131] and the Bill

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130 Labour Representatives' Submissions to the Burkett Committee, op cit, note 16, at p. 57 and 58. Emphasis added.

131 See Geoffrey J. England, "Some Observations on Selected Strike Laws", in K.P. Swan and K.E. Swinton, (eds) Studies in Labour Law, Butterworths, Toronto, 1983, pp. 221-298; R. Hyman and I. Borough, Social Values and Industrial Relations: A Study of Fairness and Inequality, Blackwell, London, 1975; G. England, "Some Thoughts on the peace obligation", 12, Ottawa Law Review, 1980, 521; Jeffrey A. Spector, "Replacement and Reinstatement of Strikers In The United States, Great Britain, and Canada", Comparative Labour Law Journal, Vol. 13, 1992,

40 amendments discussed above are an attempt to bring some coherence to the legal framework.

To illustrate these internal contradictions in the Act, let us consider the following provisions prior to these amendments:

Preamble:

> 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.
>
> S.1(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.
>
> S.66. No employer...(a) shall refuse to employ or continue to employ a person...because that person was exercising any...rights under this Act...or (b) shall seek by threat of dismissal...to compel an employee to...cease to exercise any rights under this Act.
>
> S.73.-(1) Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act. [emphasis added]

184-232; and Norman A. Solomon, "Strikers' Rights In Canada And The U.S.A.: Illusion or Reality", Working Paper Series No. W93-01, Faculty of Business, University of Windsor, May 1993.

Each one of these provisions taken individually appears to be quite rational but cumulatively (in the light of the hitherto existing employers' right to hire permanent replacement) the parts nullify the totality of objectives embodied in the legal scheme. What the law giveth explicitly in one hand, it taketh away quietly with the other. This incoherence has been justified in the name of the following mystical quid pro quo or something for something equipotency between the parties:

- strike/lockout;

- unions' peace obligation/employers' recognition of employees' collective rights;

- employees' right to moonlight or seek alternative jobs/employers' right to operate with permanent replacement;

- unions' incentives to strikers through strike subsidies/employers' inducement to the unemployed (potential strike breakers) through an offer of permanent jobs with guaranteed non-bumping status; and

- strikers' right to picket the struck plant/employers right to truck permanent replacements with police protection.

We perceive the above set of *quid pro quo* as mystical because of the inherent measurement problem of establishing equivalencies in a particular case at a given time, let alone the venture of establishing them for the market place as a whole and over a period

of time. We reject the *quid pro quo* argument because it is too simplistic conceptually as well as empirically:[132]

> ... It assumes that the two "rights" are of exact and universal equivalence in the balance of power. Rather, the delicate point of balance is influenced by too many variables for one to be traded off on a blanket basis for the other. For instance, a struck employer might be part of a large corporate conglomerate so that the parent corporation could bale it out financially either during or after the strike to offset the cost of plant closure. In this, and other conceivable scenarios, the harm of closure would be minimal, whereas the employees may suffer considerably by an equivalent prohibition on "moonlighting". It is true that the union's strike fund and donations from the union movement in general could assist the employee, but these are notoriously low. Conversely, it is possible to conceive of situations where the union's power would be supreme even where its members cannot work elsewhere. Moreover, the cost to the struck employer is purely financial - managers normally continue to receive wages - whereas the cost to many workers must be measured in qualitatively different social and humane terms. Loss of any income may mean disruption of basic personal and family needs, such as housing, food, clothing, educational opportunities and the like. Furthermore, the "equivalence" argument presumably pre-supposes that both sides suffer total loss of income during the strike. It would therefore follow that the employer should be prohibited from farming out struck work to secondaries, distributing during the strike stockpiles made in anticipation thereof, or otherwise receiving material assistance from outsiders or corporate relatives to see it through the strike. Employees would be denied entitlement to union strike pay and other donations, and (arguably) even personal savings accumulated for the "rainy day" of strike action. The intrusion into the personal "freedoms" of both sides, not to mention the practical difficulties of enforcement, would render such a position unattractive. Thus the two weapons are not necessarily equivalents and will not necessarily produce an equilibrium where both are either present or absent. The notion of "matching power" is itself elusive without attempts to isolate particular variables as necessary equivalents on a blanket basis.

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[132] G. England, "Some observations...", op cit, note 131, at p. 281.

There is no valid policy justification to perpetuate employers' right to hire permanent replacements during a legal strike or lockout and to retain the hitherto existing internal incoherence in the Act. "The strike is the employees' essential weapon in the collective bargaining process. Allowing employers to permanently replace those who exercise their right to strike severely hinders the strike weapon and thus weakens the union's bargaining power. This in turn harms the collective bargaining process by reducing the incentive of the employer to negotiate an agreement or even to bargain in good faith.[133]

Hitherto the "employee status" guaranteed in the Act simply vanished during a strike. The Act implicitly permitted the employer to "discriminate" against those who exercised their statutory right. Those common law rights of employment-at-will which had been over ridden by the Act had been activated through the employer's right to hire permanent replacements and thereby the employer was permitted to regain the common law based "private property" rights and absolute freedom of individual contract

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[133] J.A. Spector, op cit, note 131, at p. 197; for case law in the U.S. on strike replacement see J.G. Kilgour, "Can Unions Strike Anymore? The Impact of Recent Supreme Court Decisions", Labour Law Journal, 41, 259, 1990. Currently Clinton Administration is considering amendments to Taft-Heatly Act, Ch. 120, 61 stat. 136 (1947); see Fortune, May 31, 1993, p. 175 and 176, "Unions And Strikers: A Huge Nonproblem". Also see Charles R. Perry et al, Operating During Strikes: Company Experience, NLRB Policies, And Governmental Regulation, Labor Relations & Public Policy Series No. 23, Industrial Relations Unit, the Wharton School, University of Pennsylvania, 1982.

replacing the collective contract. Denial of employee status of strikers, unless they unconditionally surrender their statutory right within six months, is practically an act of legalizing illegality and a camouflaged constructive dismissal.

The Act, prior to these amendments, implicitly reached out to protect employers' perogatives, the rights of non-strikers, potential strike breakers, and the prospective employees and those who chose to abandon the strike in the mid-stream.

The employers' implicit contention,[134] which is explicitly endorsed by some members of the Opposition Parties at the legislature,[135] is that employees who choose to engage in a strike against their employers assume the risk that an employer will permanently replace them. But at the same time, employers as well as some of the members of Opposition at the legislature do not expect or want the replacement workers to assume and accept this risk theory when they step into the shoes of the legal strikers. Here all of them go out of their way to protect the rights of replacement workers and midstream crossovers and justify it in a flowery civil libertarian language.

There is an intellectual quantum leap of faith in this differential application of risk theory. To begin with, the very application of this risk theory in industrial relations context is

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134 See More Jobs Coalition Submission, op cit note 24, pp. 63-72.

135 Hansard, 15 July 92, p. 2121; 4 Nov. 1992, at p. 3155; 8 July 92, p. 1927 and 1934; 13 July 92, p. 2039; 1 Sept. 92, p. R-1009; 1 Oct. 92, p. 2279.

inappropriate because it flies in the face of the statutory scheme and purpose, and secondly, the non-application of the risk theory to replacement workers is illogical, unwarranted, inherently discriminatory and destructive of employees' rights under the Act.

Is strike replacement issues a non-problem? Is the legislative action unwarranted? A negative as well as an affirmative answer could be established depending upon ones' "interest" and "value premise". Available evidence indicate that approximately 95% of all collective agreements in Ontario are reached without recourse to strikes or lockouts.[136] Where strikes do occur, many employers do not attempt to operate, or they maintain production or services by using on-site managerial employees and they prefer not use permanent replacement for various reasons:[137]

First, most employers may have determined that using permanent replacement decreased productivity by disrupting a long-term, stable, and experienced workforce, and decreasing employee morale. Second, employers may have determined that using permanent replacements would damage their image as a corporate "good citizen". Finally the statutory scheme regulating strikes has provided unions with certain circumscribed secondary economic weapons (e.g. secondary strike, peaceful consumer picketing of a struck employer's suppliers or customers, "hot cargo", agreements).

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136 Discussion Paper, Ministry of Labour, Nov. 1991, p. 33.

137 These reasons adapted from Spector, op cit, note 131, p. 220; footnotes omitted.

In this respect majority of employers as well as the thrust of the industrial relations scheme has been and is in favour of quarantining industrial conflict and reducing its intensity and escalation. The use of permanent replacement is an invitation to such an escalation.

Do the above facts make replacement issue a non-problem and the legislative action unwarranted? We do not think so. There are a few hard-core anti-union employers who make it a point to use permanent replacements or strike breakers in order to defeat the union severely in the hope that it will be decertified, mostly in first time collective bargaining situations.[138] The failure to limit the use of replacement workers by this group of employers, however few they may be, indirectly penalizes the vast majority of responsible employers who do not engage in such unfair strategies. The fewness of number in this situation should not be a criterion for legal inaction.

These amendments, though belated, are eminently appropriate to reaffirm the spirit of the Act. Those predominant majority of employers who have not used permanent replacements hitherto are not going to use them because the law prohibits it to do so and therefore this amendment has no bearing on them. The hell-bent hand-core ones caused these amendments and they have no right to

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[138] G. England, "Some Observations...", op cit, note 131, at p. 227. Also see Jonathan B. Eaton, The Flex Strike: Law on the Line, IR Centre, Queen's University at Kingston, 1990-2, and the cases referred to therein.

cry foul now; nor one should shed tears over their predicament in future if they want to continue their past practices.

In addition to reaffirming the purpose of the Act, these restrictions on the use of permanent replacements are directly or indirectly warranted by certain well established principles of international law and convention.[139] Canada is a member of the International Labour Organization, and as such committed to these Conventions: the ILO Constitution and the Declaration of Philadelphia (freedom of association as a fundamental human right); Convention No. 87 (freedom of association and protection of right to organize); and Convention No. 98 (right to organize and to bargain collectively, recognizing employees' rights to engage in concerted activity). In addition, the ILO Governing Body Committee on Freedom of Association has accepted that freedom to strike is legitimate and has held that dismissal on account of a strike constitutes discrimination regarding the employment of those workers involved in legitimate trade union activities, is contrary to Convention No. 98, and infringes on the freedom of association.[140] At last, Bill 40 amendments have synchronized the Act with these ILO conventions.

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139 See Spector, op cit, note 131, pp. 217-219; also see James E. Dorsey, "Freedom of Association...", op cit, note 75 on ILO Conventions.

140 Ruth Ben-Israel, International Labour Standards: The Case of Freedom To Strike, 1988, at p. 122, cited in Spector, at p. 218.

16. **CHANGES TO ARBITRATION PROCESS**

There are a number of amendments under S.45 which alter the hitherto existing arbitration process. Previously where a collective agreement was silent on arbitration, the Act deemed a three person board of arbitration. That tripartite board now is replaced by a single arbitrator [S.45(2)]. Still the parties have the right to opt for a three-person board. In addition there is a provision for the involvement of grievance settlement officers if both parties agree. This procedure links the arbitration provision in the collective agreement with the statutory expedited arbitration [S.45(4.1) and S.46(6)]. Single arbitrator must render a decision within 30 days, an arbitration board within 60 days. This time limit may be extended under certain conditions [S.45(6.1) and (6.2)]. Arbitrators are empowered to give oral reasons after hearing, and the parties are entitled to a written decision and reasons upon request [S.45(6.3)].

The following are the arbitrators' powers and jurisdiction [S.45(8)]:

- determine the nature of the difference to address its real substance;
- determine all questions of fact and law which arise;
- interpret and apply the requirements of human rights and other employment-related statutes;
- grant such interim orders, including interim relief, as the arbitrator considers appropriate;

- enforce a written settlement of the grievance;
- power to substitute a lesser disciplinary penalty in all cases, notwithstanding a specified penalty in a collective agreement [S.45(9)].

The following are the arbitrators' additional powers regarding arbitration procedures [S.45(8.1)]:

- require particulars before or during hearing;
- require production of documents or other things before or during hearings;
- make orders to expedite the hearing;
- mediate difference between the parties at any stage of the proceedings on consent;
- fix dates for commencement and continuation of hearings;
- to consider submissions in a form considered appropriate.

The above changes in substantive and procedural powers of arbitrators have been justified by the Minister of labour for the following reasons:[141] Arbitration has become a time consuming, expensive, and legalistic tangle. Employers and employees are not getting the quick, effective workplace justice they deserve. Therefore there is a need to find ways of streamlining the process, moving away from technical legal arguments and making the process more informal.

Compared to other amendments, changes to arbitration process appear to be less controversial but not without some concern on the

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[141] Notes For A Speech By Minister of Labour, To the Canadian Bar Association (Ontario), Dec. 12, 1991, at p. 6.

part of employers.[142] They are concerned about conferring an express power to interpret and apply the requirements of human rights and other employment related statutes. In their opinion, the practical consequences of directing arbitrators to apply other related legislation would be to authorize arbitrators to, in essence, sit not only as arbitrators but as referees to related legislations. "Collective agreement arbitrators do not, nor can they be expected to, possess sufficient expertise to fulfil these roles. The prospect for confusion, inefficiency, duplication of proceedings and inconsistent jurisprudence are obvious".[143] They are also concerned about enhancing the authority of arbitrators to deal with all questions of fact and law, to extend the time limits, to pre-hearing production orders and particulars and to expedite the proceedings.

These employers' concerns are valid to some extent and there will be considerable litigation regarding these substantive and procedural changes for at least a few years to come. But arbitrators, prior to these amendments, did have a significant jurisdiction and scope in considering related employment legislation where it was necessary and appropriate to do so and hopefully the jurisprudence developed hithereto may be of some use to tideover from the old to the new system.

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142 More Jobs Coalition Submission, op cit, note 24, at pp. 92-104.

143 Ibid at p. 92.

17. BARGAINING ADJUSTMENT & CHANGE DURING THE TERM OF AN AGREEMENT

Prior to the amendments, there was no specific provision to deal with certain changes in the workplace during the term of a collective agreement, nor was there any explicit obligation on the employer to bargain in good faith over matters of workplace changes and adjustment.

Under S.41 of Bill 40, now there is an obligation on the employer to bargain on workplace adjustment plan in good faith and such a duty to bargain may be enforced by the OLRB but it does not have the power to impose terms of such an adjustment plan [S.91(4.1)]. Where there is no collective agreement is in effect, an adjustment plan is enforceable by an arbitrator under S.46.

Under S.41.1(1), there is a duty to bargain an adjustment plan where

- the employer has given notice of termination of 50 or more employees;
- employees have been terminated because of closure of all or part of a business; or
- in other circumstances which may be set out in regulations by the Lieutenant Governor in Council.

In all the above matters, good faith bargaining must commence within seven days of the union's request [S.41.1(2) & (3)]. Such an adjustment plan may include, but not limited to [S.41.1(5)].

- alternatives to termination;

- human resource planning, employment counselling and retraining.
- notice of termination;
- severance pay and termination pay;
- entitlement to pension and other benefits including early retirement benefits;
- a bi-partite process for overseeing implementation of an adjustment plan;
- enforceable in the same manner as a collective agreement [S.41.1(6)].

These amendments have been reinforced in Section 44.1(1) and (2) by a requirement to include a consultation clause in every collective agreement at the request of either party. In the absence of such a clause in an agreement, it is deemed to contain the following provision [S.44.1(3)]:

> On the request of either party, the parties shall meet at least once every two months until this agreement is terminated for the purpose of discussing issues relating to the workplace which affect the parties or any employee bound by this agreement.

These provisions more or less serve as a form of mid-term reopener clause which makes the collective bargaining a continuing process.

From the employer's perspective "labour adjustment plan is unworkable, and a breach of the collective bargaining system. Let the parties decide what they will or will not include in a collective agreement. Furthermore, the Employment Standards Act provides for termination notice and severance pay benefits which

are the most generous overall statutory termination benefits in North America".[144]

Unions differ from the above perspective for the following reasons:[145] In times of major economic restructuring, employers can make business decisions, such as contracting out, partial or full closure of an operation, technological and other organization change, which have significant impact on the rights of union members, yet the unions under the current Act have no effective recourse to participate in and influence those decisions, given the peace obligations under no-strike statutory requirement. This situation, according to unions, causes significant employee frustration, effectively undermines the ability of the bargaining agent to truly represent the interests of its members, and leaves such major decisions in the unilateral, unfettered authority of one of the parties to the bargaining relations. For these reasons unions favour the amendment requirement of an ongoing duty to bargain in good faith where an employer plans significant changes which will affect the working conditions or job security of its employees.

The incongruency of the Act hitherto is that it statutorily imposes a peace obligation heavily on the union and simultaneous it allows the management the prerogative to introduce major changes

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144 Canadian Manufacturers' Association (Ontario Division) Submission, Aug. 31, 1992, at p. 18.

145 Labour Representatives' Submission to the Burkette Committee, op cit, note 16, pp. 67-70.

unilaterally in the establishment. One option is to repeal the statutory peace obligation and make it a negotiable item for the parties, as suggested by one commentator:[146]

> ...Either side would be allowed to give notice to bargain and strike/lockout in respect of any item during the currency of the collective agreement, except for any negotiated peace obligation in the agreement. The statutorily-imposed peace obligation would disappear. It would be for management to win, in negotiations, a voluntary peace obligation which could either be absolute or qualified, depending on the outcome of bargaining. Unlike in jurisdictions presently having statutory reopener provisions, management would have to "contract in" a peace obligation by making concessions to the union in other areas. There is no reason why management should have the automatic benefit of a peace obligation, without having to buy it from the union. Both sides would commence with a presumed right to serve notice to bargain and strike/lockout on anything and it would be for joint regulation to determine whether that right would be abrogated in full or in part. The only exception would be that parties could not re-open a negotiated peace obligation. This would go beyond Professor Weiler's suggestion that the peace obligation be negotiable with respect to items not expressly covered by the agreement. In the interest of furthering bilateral job regulation, there is no reason why the parties should be prevented from agreeing that either could revivify the obligation to bargain, with economic sanctions available regarding the other to exercise its right "responsibly", then it is always free to bargain for "fundamental change of circumstance" to be a prerequisite to any such action. Nor would this approach erode the twin features of legally enforceable agreements and grievance arbitration. Contract administration would simply proceed in the traditional manner until and unless either party elected to go to conflict over items to be changed. Once changes were agreed to, they would be administered in the usual way.

There was no takers for the above policy from any political party nor employers and unions showed any interest in it. A statutorily imposed peace obligation remains to be the corner stone

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[146] Geoffrey England, Some Thoughts on The Peace Obligation, (1980) 12 Ottawa Law Review, 521, at p. 607 and 608.

of Canadian labour policy. Peace is good, but peace at any cost is far worse than a war. Peace obligation and employers' unilateral right to introduce major changes in the establishment during the term of a collective agreement is anachronistic, illogical and unfair. The amendments discussed above have rectified this situation to some extent.

18. SALE OF BUSINESS/CONTRACT SERVICE SECTOR

Section 64 of Bill 40 contains a number provisions which deal with sale of business, successor rights and changes in service contracts.[147]

Under the existing law, S.63 provides that a purchaser of a business is bound by any collective agreement in effect at the vendor's business at the time of the sale and to any pending applications for certification or termination of bargaining rights. Prior to the amendments, the sale of a business provisions did not apply to federal or provincial sales. Now, under S.64.1 amendment a sale of a business which transfers the business from federal to

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[147] This section does not apply with respect to the following services:
1. Construction
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

For more details see OLRB Consolidation; Labour Relations Act, R.S.O. 1990, c.L.2, as amended by 1991, c.56 and by S.O. 1992, c.21, pp. 41-45. There is no date in this document.

provincial jurisdiction is treated as a sale under that Act. The OLRB is granted additional powers in a sale situation.

A sale of business does not alter the position of a union in relation to the new successor employer regarding any proceedings commenced against the predecessor employer and consequently, the union [S.64(2.1), (2.2) and (2.3)]:

- is entitled to continue any interest or grievance arbitration proceedings against the new employer;
- does not have to recommence bargaining with the new employer;
- does not have to go through conciliation or mediation again;
- may be entitled to a remedy against the new employer for unfair labour practices.

Prior to the amendment, service contracts for cleaning, food and security were unprotected by the successor rights provision and unions lost their bargaining rights and collective agreements' protection. The amendments now extends successor rights protection to this contract service sector. For the purpose S.64, the sale of business is deemed to have occurred,

- if employees perform services at premises that are their principal place of work;
- if their employer ceases, in whole or in part, to provide the services at those premises; and
- if substantially similar services are subsequently provided at the premises under the direction of another employer.

Hitherto the OLRB has restrictively interpreted S.63 of the Act as not apply in the case of tendering or re-tendering of a contract to perform work on an employer's premises.[148] Further, the Employment Standards Act imposes no obligation on successor employer to hire the employees of a predecessor. Under Bill 40 the above Act is amended to provide that if a contract for the provision of the covered services is terminated and replaced with a new contract with another contractor, the other contractor is considered to be a successor employer, is bound by any existing collective agreement, and is required to make job offers to qualified employees of the previous contractor. The job offers must be on essentially the same terms and conditions the employees had with the previous contractor. The offers must be made before the new contractor offers positions in respect of the work to its own employees.

From the perspectives of employers, these amendments would destroy the benefits of cost-cutting through public tendering process in the contract service sector and thereby would weaken the competitive free enterprise system. Further, they would encourage unions to achieve what may have been denied them in collective bargaining process.[149]

From unions' perspective, the service sector is the weakest link in the industrial relations system which is known for its low

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148 Metropolitan Parking, (1979) OLRB, Rep. Dec. 1993.

149 More Jobs Coalition Submission, op cit, note 24, pp. 85-89.

pay, poor terms and conditions, and with high concentration of certain disadvantaged groups. Further, this sector is difficult to organize; when a union is certified or when there is a collective agreement in existence, the employer opts for contracting-in of work to nullify these legal status in the name of economy, efficiency, and expeditious performance.[150]

The amendments clarifies "sale of business" and "successor rights" and extends these rights to service contracts sector of cleaning, food and security. Prior to the amendments, there was no such thing as "vested rights". The employer had the benefit of "wiping the slate clean" by opting for service contracts. The union having a collective agreement in existence was placed in a situation analogous to that of a newly certified union; it had to start all over again from the scratch. Service contracts also served as a defacto means of decertifying a newly certified union. In these situations the distinction between a "collective contract" and an "ordinary contract" simply vanished. While the common law contracts have validity only between the contracting parties, the collective contracts usually have certain other legal trappings implicitly or explicitly attached to them. There is no valid reason not to extend these legal trappings to these service contracts.

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[150] Labour Representatives' Submission to the Burkett Committee, op cit, note 16, pp. 70-74.

19. **ENHANCED OLRB POWERS**

Prior to the amendments, the OLRB did not have an authority to determine one or more of the terms of the collective agreements as a remedy to an unfair labour practice finding. Now, S.91(4)(d) grants the OLRB the power in the case of violation of the duty to bargain in good faith to impose such terms of a collective agreement, where it considers other remedies are not sufficient to counter the effects of the breach.

Previously the OLRB only granted relief at the conclusion of a hearing. Section 92(1) of Bill 40 now grants the OLRB power to issue interim relief prior to the completion of any proceedings, on such terms as it considers appropriate.[151] An example is an order from the Board that an employer reinstate an employee who the union says has been discharged contrary to the Act, pending the final decision in an unfair labour practice complaint. The Board may decide the application without holding an oral hearing.

A series of amendments under S.104 enables the OLRB to expedite its hearing and decision making. For example the OLRB may now hear any of the following complaints or applications through a Single Chair or Vice Chair, where the Chair considers it advisable or where the parties consent [S.104(12)1]:

- access to property accessible to the public;
- expedited unfair labour practice hearings;

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151 See OLRB, A Guide To The Labour Relations Act, May, 1993, p. 54.

- replacement worker provisions;
- use of specified replacement workers;
- interim orders;
- duty of fair representation and referral complaints;
- unlawful strike or lockout applications;
- expedited construction grievances.

In all the above matters, the OLRB now has the power to make rules [S.104 (14), (14.1), (14.2) & (14.3)]. The rules may provide that the OLRB is not required to hold a hearing, and may limit evidence and submissions. Rules made under subsection 14 apply despite anything in the Statutory Powers Procedure Act.[152] Another amendment [S.105(2)(a) & (a-1)] grants the OLRB the specific power to require any party to provide particulars for or during a hearing, and to require any party to produce documents or things before or during a hearing.

Hitherto in any jurisdictional disputes between unions, the OLRB was required to hold full hearing before finally deciding a jurisdictional dispute. Now, under S.93(1.1) and (1.2), the OLRB is empowered to dispose of a jurisdictional dispute by consulting with the parties, without having a full hearing or inquiring into the dispute with a hearing. The Board has the power to make interim and final orders after consultation or inquiry. The Board will consider, among other things, the jurisdiction of the

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[152] The OLRB has issued the new rules which took effect January 1, 1992.

competing trade unions as set out in their constitutions and collective agreements with the employer, existing agreements between the competing trade unions as to work jurisdiction, past practice in the area and in the particular industry, the nature of the work, the skills involved and the safety, efficiency and economy in the performance of the work.

While unions are generally in favour of enhancing the remedial powers of the OLRB, reducing the court-like formalities and speeding up the process of decision making through interim orders, the employers' have raised the following concerns and objections:[153]

> The changes related to the Labour Relations Board are a major departure, and should not be considered. For example, the granting of interim orders is an extraordinary or extreme remedy. The courts only use them in cases where substantial or irreparable harm would result. Therefore, it should not be a power that the Board should exercise. There are very significant procedural ramifications for both parties. Also, interim orders could be appealed and this could cause further delays in the system.
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> In no circumstance should the Board be able to determine and impose a term (or terms) of a collective agreement. This is one of the most serious threats to the collective bargaining process. Collective bargaining should be between the parties; a third party intervenor should not determine what is in the contract. It would prevent the development and furtherance of positive, harmonious labour relations.

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[153] Canadian Manufacturers' Association (Ontario Division) Submission, op cit, note 144, at p. 17.

Boards' authority to issue interim orders are in existence in most of the Canadian jurisdictions[154] and exercise of such an authority by the labour relations tribunals in these jurisdictions are found to be operating without undue hardship to the parties concerned and to be in tune with the spirit of the labour relations statute.[155] Similarly, some of the Labour Relations Tribunals in Canada do have authority to settle terms of collective agreement where bad faith bargaining have occurred in first contract situations.[156] What these amendments under Bill 40 do is to extend the authority to issue interim orders to few more specific situations as well as to extend the power to impose certain terms to collective agreement in non-first-collective agreement situations where the Board considers other remedies are not sufficient to counter the effects of the unfair labour practices. But the absence of specific empowerment to impose certain terms of agreement did not totally prevent labour boards from doing so in an indirect and limited fashion in the past:[157]

> Other cases have held that a collective agreement cannot be imposed as a remedy for bad faith bargaining. The "freedom

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154 See for example, Ontario LRA S.91(8); Federal Code, S.20; Alberta, IRC, SS.11(i) (e), 16(1) (a); B.C. IRA, S.28(5); Manitoba LRA, S.31(2); and N.B. IRA, S.87.

155 See generally George W. Adams, Canadian Labour Law, Canada Law Book Inc., Aurora, 1985, Chapter 5: The Labour Relations Board, pp. 217-255.

156 See for example Federal Code, S.83(3); B.C., IRA, S.137.5; Man., LRA, SS 87(1) and (4); NFLD., LRA, SS.80.1 and 80.2; Que., LC, SS.93.1 and 93.9; Ont., LRA, S.41.

157 George W. Adams, op cit, note 155, at p. 598 and 599; footnotes omitted and emphasis added.

> of contract" rationale for this conclusion was first set out in H.K. Porter Co. Inc. v. N.L.R.B. [397 U.S. 99, 73 L.R.R.M. 2561 (1970).], a decision of the United States Supreme Court. While it is true that the wording of the bargaining duty in most Canadian statutes differs from its American counterpart, the very specific remedial provisions in Canadian statutes such as unfair labour practice certification, first agreement arbitration, and the detailing of mandatory collective agreement provisions tend to buttress the H.K. Porter result in Canada. However, specific terms of an agreement or the agreement itself may still be the subject-matter of a remedial order and may be indirectly or obliquely imposed on a violator of the statute. For example, a contract proposal put forward in bad faith may be struck from the bargaining table by a cease and desist order. An existing proposal withdrawn in bad faith may be directed to be resubmitted. So too, the employer or trade union may be directed to execute a collective agreement where there has in fact been agreement to all of its terms, but one party has refused to sign the formal memorandum of agreement. It has been held that any other view "would unduly constrain [labour boards] in fashioning effective relief and amount to an overly technical application of this third general principle [ie. a collective agreement cannot be imposed"].

The amendment under S.91(4)(d) over-rules the blanket principle of "a collective agreement cannot be imposed"; puts an end to the cat and mouse game between courts and OLRB; and the Board has been rescued from the previous discomfort of obliqueness and indirectness. Apart from removing these hindrances, there are positive justifications for these amendments.

The inadequacy or ineffectiveness of existing legal remedies against unfair labour practices - eg. during union organizing, negotiation of a first contract, plant shut down or relocation, contracting-in and contracting-out and the issue of discriminatory dismissals - boils down to a cost-benefit matrix of compliance with the law. "If the benefits from a certain action are greater than

the cost, the action will be pursued by a firm. Since the potential benefit from engaging in unfair labor practices appears to exceed the costs to the violator, unfair labor practices occur".[158] The irony of this matrix is that the law-abiding employer is at a competitive disadvantage relative to the law breaker; the former cannot be judged too harshly if he falls prey to the irresistible temptation of looking for subtle ways and means of evading the law without being caught. In this sense the whole process seems to move in a vicious circle.[159]

These remedial powers of the OLRB are meant to weaken this vicious circle and to strengthen the component of adequate reparation and more effective deterrence. These remedial powers did not convert the OLRB into a criminal court and unfair labour practices still remain to be a civil wrong and hence employers' perception of punitiveness in these remedies is unwarranted.[160]

20. **AFTERWORD**

In the preceding pages we have examined the evolution of Bill 40 and the debates surrounding it [subheading (SH) 2 to 6

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158 Report on the Labour Reform, Committee on Eduation and Labor, House of Representatives, 95th Congress, 1st Session, Report No. 95-637. B.R. Skelton, at p. 9.

159 FANNING, John H., Chairman, NLRB, "Reforming the National Labor Relations Act", Proceedings of the Thirtieth Annual Winter Meeting, Industrial Relations Research Association, (ed: Barbara D. Dennis), University of Wisconsin, Madison, 1978, p. 154.

160 For the weakness involved in the current remedial powers of labour boards and the policy considerations required see G.W. Adams, op cit, note 155, pp. 588-615.

inclusive]. At the end of this, we provided a bird's eye view of major changes, eliminations and modification to the Bill as a result of these debates (SH.7). In the subsequent pages of the paper, we have grouped and examined the amendments into twelve parts (SH.8 to 19 inclusive); and an evaluation of these amendments has been made at the end of each part. In this "Afterword" a repetitive summary of those evaluations are avoided for two reasons: Each part has been developed as a self-contained unit in terms of substantive and procedural components as well as that of evaluation of each amendment. To do justice to a summary, it has to be a lengthy one lest we may fail to bring forth the full flavour and operational implications of each amendment. For these reasons, we have opted for certain general observations regarding Bill 40 as a whole, with necessary references to the body of the paper.

Historically labour law belongs to the generic category of legislations which has been based upon mischief-remedy principles.[161] As such, labour legislations are an attempt to identify the mischief prevailing under a preexisting legal scheme and prescribe remedies against the perpetuation of that mischief. But these legal instruments are time bound and there is a need for

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[161] See Black's Law Dictionary, Abridged Fifth Edition, West Publishing Co., St. paul, Minn., 1983, at p. 517 as a statutory objective; for Mischief-Remedy concept as a rule of interpretation, see Heydon's case [1584]3 Coke's Reports 7a. cited in Craies on Statute Law (sixth ed.), p. 96.

periodic revision and updating either because of certain inherent weaknesses and incoherence in the language used or because of certain external structural changes. In addition, some of those whose conduct is regulated by such enactments usually find ways and means of subtle evasions of the law and continuation of the mischief.[162] Whenever a periodic revision and updating occurs to rectify the above situation, the parties who stand to gain by maintaining the status quo oppose tooth and nail any change. For example, in England the employers' opposed the Ten Hour Act of 1847 (reduction of working hours from twelve to ten), in the name of competition, cost, and profitability.[163] In our view, employers' opposition to Bill 40 is not qualitatively different from the opposition to the Ten Hour Act, inspite of the fact that there was an intermission of almost a century and a half between these two events. Nor should they be expected to react otherwise.

Apart from the above historical perspective, here we raise and explore the following specific questions with reference to Bill 40:

1. Did the procedure followed by the Ontario Government in amending the Act weaken the spirit of consultation ("insultation process", supra SH5)?

2. Did the process and the alleged "Social Democratic Ideology" ("Bill, a brain-child of Three-Bobs", supra SH6) of the Government make the employers' and Opposition Parties' effort to influence the proposed changes totally futile? Are the

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[162] Here the issue involved is pro privato commodo v. pro bono publico.

[163] Richard Human, Marxism and the Sociology of Trade Unionism, Pluto Press Ltd., London, 1971, at p. 13.

amendments introduced by the Government a "Trojan Horse Ploy" (SH6)?

3. Did the Bill change the balance of power in favour of unions? If so, are the amendments of such a magnitude as to grant "power to unions to take over Companies" (SH-6)?

4. Will there be more litigation and conflict?

Our answer to the first question is affirmative. In our opinion, there is nothing wrong in the composition of Burkett (tripartite) Committee. But we question the wisdom of the Government indicating some thirty specific issues for the consideration of the Committee, instead of simply narrating the structural and demographic changes which have taken place in the Ontario market place during the last fifteen years and asking the Committee to come up with law reform recommendations, in the light of legislative changes in other Canadian jurisdictions if the Committee finds them suitable for the context of Ontario. Such an alternative terms of reference could have been specific enough without violating the principles of generality. A total absence of direction makes a committee's function confusingly diffused and a high-specificity terms of reference rigidly ties its hands from engaging in an open dialogue to explore various alternatives.

By opting for a high-specificity terms of reference, the Government implicity pre-judged the role of the Committee, and provoked the partisan representatives to take extreme stands and put Mr. Burkett in an uncomfortable and unenviable situation whereby he had no alternative but to decline from making his own

recommendations. Under these circumstances, to expect a consensus report from the Committee within thirty days, given the complexity and comprehensiveness of number thirty, was nothing less than an expectation of miracle from Mr. Burkett by the Government. Here, we are not asserting that a low-specity terms of reference is a guarantee for a consensus report; even under such terms a split-report could have occurred but the Chair would have been in a better position to come up with his own recommendations. But under this situation, the employers' could not have questioned the integrity of the intentions of the Government.

One might argue that even under a low-specificity terms of reference situation, employers could have taken the same "whatever you are for, we are against it" stand; for them the very fact that a "Social Democratic Government" proposing changes to labour relations law could have been good and sufficient reason to take an uncompromising stand against any change. But under this scenario the Government would have been in a better position to justify its approach than the defensive posture it was forced into under the first scenario.

There was a third alternative procedure the Government could have opted for. Under the Parliamentary system either a Task Force or a full-fledged Commission Report not an absolute condition precedent to introduce legislative changes, though they may serve as a useful tool. The Government could have introduced all the changes to the Labour Relations Act, and the Standing Committee on

Resources Development of the Legislature (an all party committee) could have been used as the sole vehicle to ascertain concerned parties' views on these changes. This approach could have avoided the appearance of alleged "insultation process" directly attributed to the Government and indirectly to Burkett Committee.

Whichever way we look at it, the procedure followed by the Government was unwise and short-sighted.

Our answer to the second set of questions raised above is negative. Inspite of the above procedural bungling, the consultation process did work and the employers and the Opposition Parties at the legislature were able to force the Government to introduce a series of amendments to certain provisions, and drop some of the changes altogether and to compel it to take a second look at other issues through further study and exploration (SH7, supra). The amendments did take some of the objections raised by the employers into full consideration (see Hansard, 15 July 1992, pp. 2121-2124), and we do not endorse the sentiment implied in the observation that the Government introduced these substantive and procedural amendments as a "Trojan Horse Ploy".

Our study of the Hansard gives clear evidence to support our conclusion reached above, irrespective of some of the rhetoric found in the proceedings, such as the following one [Hansard, 4 November 1992, at p. 3164];

> ...I have no intention of debating this bill with my friends opposite because, quite frankly, it would be like debating the virgin birth with the Curia in Rome. It is just

> simply not useful, I think, for me as a pragmatic Liberal to engage in that kind of debate. [emphasis added].

Neither the Government of Ontario is an equivalent of the Curia in Rome, nor Premier Rae a Pope or a Stalin as depicted in unidentified billboards [Hansard 13 July 1992, at p. 2031].

Did the NDP's alleged adherence to "Social Democratic Ideology" make it a "single interest" party of the "working class"? Absolutely not. In fact, the organized labour, inspite of the alleged three-Bobs Triumvirate in Ontario, seems to feel more comfortable to deal with a Liberal or a Conservative government than an NDP regime because the labour knew pretty well where the hearts' of the former two lie while it is not so sure of the latter. Without belabouring this issue, it is sufficient to draw attention to the Ontario NDP Government's current policy of "Social Contract" towards the public employees, which in our opinion, is neither "Social" nor a "Contract" in the traditional sense, nor it is a glowing testimony to its commitment to the "Social Democratic Ideology" in its true sense.[164]

In our opinion, these ideological projections emanating from the employers and faithfully echoed by the opposition Parties served an unwarranted and misleading purpose of converting the

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[164] See "So Long, Solidarity", Cover story, Maclean's, July 12, 1993, pp. 14-21.

whole issue of labour law reform into a last ditch battle been capital and labour.

The third question we raised above is on the effect of Bill 40 regarding the balance of power between the parties. The Bill in fact has changed the balance of power in favour of unions in almost all the amendments (see supra SH9 to 19 inclusive).

Prior to the amendments, the Act granted employees the right to form themselves into unions, to engage employers in good faith bargaining and to invoke meaningful sanctions in support of the bargaining and proscribed certain other activities which would nullify these objectives of the Act. The employees were not able to fully exercise their rights because of certain implicit hindrances in the Act itself. Further, the employers took advantage of these hindrances and diluted the objectives of the Act.

What Bill 40 amendments did was to <u>hinder these hindrances</u>, by making these rights of employees more explicit, by extending these rights to certain excluded categories and by strengthening the remedial powers of the OLRB to rein in companies that skirt the law to run rough shod over unions. Hitherto employers have manipulated the OLRB's procedures in such a way as to cause delays to stall the final decision of the Board. Such delays are death-knell and passing bell to unions, particularly in union organizing and first contract situations. Now the OLRB is empowered with discretionary powers to tailor its procedures in accordance with the urgency of

an issue and to demand full disclosure of pertinent information from the parties at any stage of the hearing; further it has powers to issue interim orders even without a full hearing. Extraordinary delay and excessive litigation based on legal formalism and ineffective remedies are the antithesis of the purpose of an administrative tribunal such as the OLRB. The amendments rectify this situation and unions are more to gain from these changes than employers. In this sense Bill 40 changes the balance of power between the parties and, these changes did not confer any new rights upon unions but simply hinder the hitherto existing hindrances.

The most pertinent question related to the change in balance of power is this: Are the amendments of such a magnitude as to grant "power to unions to take over Companies"? (Supra SH6). We do not think so.

The privileged position of business under our polyarchical system of political bargaining, notwithstanding Bill 40, remains intact[165] "Corporate executives in all private enterprise systems,

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[165] On the Privileged position of business under the system of polyarchy and pluralism, see Robert A. Dahl and Charles E. Lindblom, Politics, Economics and Welfare, Second Edition, University of Chicago Press, Chicago, 1976; Charles E. Lindblom, Politics and Market, Basic Books, New York, 1977; for an empirical examination of this thesis with reference to a specific industry, see Raymond M. Sentes, "The Priviledged Position of Business: An Analysis of Canadian Asbesto Industry-Government Policies Pertaining To Occupational Health, 1887-1982", A Ph.D. thesis, Department of Political Science, University of Regina, Regina, Saskatchewan, Feb. 1988.

polyarchic or not, decide a nation's industrial technology, the pattern of work organization, location of industry, market structure, resource allocation... In short, in any private enterprise system, a large category of major decisions is turned over to businessmen, both small and larger. They are taken off the agenda of government. Businessmen thus become a kind of public official and exercise what, on a broad view of their role, are public functions".[166]

Bill 40 did not dare to alter even an iota of the above relationship between the business's privileged position on one hand and politics and the market on the other. Under this system the government can cajole and influence the business through "inducements" but it cannot "command" and "control" it. Even a "social democrat", such as Bob Rae, has to and did pay his due respect and deferrence to Bay Street and Wall Street, as happened during the evolution of Bill 40. He can legislate a "Social Contract" and impose it on the public employees and he can even take a strike from the "labour" but he cannot take a "capital-strike" (withdrawing investment from Ontario) because of its privileged and commanding position which is buttressed by the precepts of market economy and ideology.

For capital there is no national boundaries; such boundaries are minor irritations but not an insurmountable obstacle; therefore

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[166] Lindblom, Politics and Market, op cit, note 165, at pp. 171-172.

their command is global. But, labour is soil-bound; even interprovincial mobility is not totally free and national boundaries are a formidable obstacle. Unlike capital, labour is a highly perishable commodity; labour unused is lost forever. Unlike capital, labour cannot be saved and stored for use on a rainy day. There is a bank for the unused capital but there is none for the unused labour.

For these reasons, we do not think, there can ever be a balance of power between labour and capital. Whatever that has been done under Bill 40 is only marginal adjustments done in favour of labour, leaving the privileged position of the capital intact, irrespective of the contrary position probagated by the media, particularly by the Press, during the Bill 40 debate.

Conventional wisdom treats freedom of the press and democracy as synonyms and rightly so at a conceptual level. The press is supposed to <u>inform and enlighten</u> the public by exposing the commissions and omissions of a government and to <u>strengthen the democratic forces</u> through its <u>process of civic education</u>. Did the press play such a role during Bill 40 year-long evolution from discussion paper to royal assent on 5th, November, 1992? Our examination of the press reports during this period[167] as well as

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[167] See a sample of press reports cited in note 28.

other empirical evidence[168] do not support the above positive picture of the press vis a vis the democratic process.

Unlike in other situations, in the case of Bill 40 the press was not a disinterested third party engaging in an objective reporting, analysing, and editorializing. In this case, the press had an ax to grinde. The Canadian Daily Newspaper Association represents 44 daily newspapers in Ontario which employ close to 12,000 people on a full- and part-time basis. Another wing of the press industry is the Ontario Community Newspaper Association, representing 276 weekly newspapers.[169] It is important to note that 47% of the employees in this sector are unionized, compared with the approximate 31% of unionization in the overall Ontario workforce. Use of strikebreakers and permanent replacements has not been uncommon in this sector[170] and consequently the press was totally against Bill 40 in general, and particularly against restrictions on the use of permanent replacements.

There is nothing wrong in defending their self-interests. But this self interest induced the blurring of the borderline between an objective reporting and a self-interest based distortion, frenzy and the scare campaign. Here is a cautious confession regarding the fundamental conflict of interests in Bill 40 debate found in a

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168 Garry Wice, "Absence of Balance: How Ontario's Newspapers bent over backwards to knock the NDP's labour reforms", Ryerson Review of Journalism, Summer 1993, pp. 10-13.

169 See Richard Mackie, "Ontario Newspapers, retailers oppose limits on strikebreakers", the Globe and Mail, August 11, 1992.

170 Richard Mackie, op cit, note 169.

Globe and Mail editorial:[171] "...One need not endorse the scare campaign of various industry lobbies, including our own, to ask whether it is in the interest of the province for the whole weight of the government to be thrown so directly behind one narrow sector of society. Nor is it necessary to make impossibly precise forecasts of jobs lost and investment foregone to suggest this bill moves Ontario in the wrong direction" (Emphasis added)

In the episode of Bill 40 debate, the abuse of the right and power of the freedom of the press reached its apex of arbitrariness and abuse of public trust, violating the CDNA's own statement of principles regarding conflict of interest and the proper presentation of opinion and fact.[172] The press as a collectivity, with minor exceptions, did not simply disagree with the proposed labour law reform in a manner of reasoned dialogue but did actively engage in a crusade against Premier Rae:[173] "...Across the province, newspapers large and small demonstrated once again that when corporate interest conflict with fair and balanced coverage, corporate interests always win...Bill 40 was subject to slanted coverage by metropolitan dailies and community weeklies alike. At

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171 "An act to increase the power of unions", October 2, 1992.

172 See James J. Cowan, International Vice-President, Graphics Communications International Union, letter to the editor, "Abuse of Power", the Globe and Mail, 7, October, 1992, p. A-21; on the violation of CDNA's statement of principles, see Garry Wice, op cit, note 168, p. 13. Also see W.J. Puette, Through The Jaundiced Eyes: How the Media View Organized Labour, ILR Press, Ithaca, New York, 1992.

173 Garry Wice, op cit, note 168, at p. 10. Emphasis added.

the smaller papers, reporters charged that their copy was altered or cut to reflect the company line. At the bigger ones, the influence was subtler but the result was the same: only copy that focused on opposition to the bill had a good change of getting in".

The above role of the press in matters related to labour is yet another evidence of the misnomer regarding the presumed balance of power between labour and the industry and regarding the allegation that Bill 40 granted unions the power to engage in total economic blockade against free enterprise system. The press is not unaware of this misnomer, yet they are in a position, given their oligopolistic industrial structure and link with other sectors of the economy,[174] to convert this misnomer into an axiomatic truth requiring no proof. For these reasons, we are in agreement with the following observation made by Premier Rae regarding the role of the media:[175] it is a "negative, hostile, outdated, antediluvian reactionary attitude, that's discouraging investment in the province of Ontario", not Bill 40.

The last question we raised is: Will there be more litigation and conflict as a result of Bill 40? Our speculative answer is affirmative, at least in the short-run.

The Act as amended has enhanced some of the rights of potential union members as well as those of already certified

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174 See F.J. Fletcher and D.G. Taras, "The Mass Media and Politics: An Overview", Chapter 9, in M.S. Whittington & G. Williams (eds), Canadian Politics, Second Edition, Methuen, Agincourt, Ont., 1984.

175 Financial Post, 17, September, 1992.

unions. As a corollary the Act imposes certain constrains and obligations on employers. Unions and employees would like to take full advantage of these enhanced rights (SH9 to 18 inclusive); the employers wold like to circumscribe those rights and protect their perogatives to the maximum extent possible under Act. For these reasons, both parties would like to test the limits of the law through litigation before the OLRB as well as before courts ultimately. While the new OLRB's expedited procedures may save time and cost involved in litigation, the same procedural speed-up will be subject to litigation (eg. full disclosure of documents and information at the command of the Board either at the commencement of or during the hearing; see supra SH.19).

The other potential areas for extensive litigation include access to private property for organizing and picketing (SH.14), changes to the arbitration process (SH.16), bargaining adjustment and change during the term of an agreement (SH.17), sale of business/contract service sector (SH.18), and restrictions on the use of replacement workers and related provisions (SH.15). For example, "specified replacement workers" [S.73.2(2)] are defined illustratively but not exhaustively. This specification is subject to the qualification of "but only to the extend necessary". The burden of proof on this necessity is on the employer [S.73.2(15)]. These are fertile soil for extensive litigation on a case by case basis, and it will be a long time for the Board to develop necessary jurisprudence to cover most situations.

One positive scenario on this question of litigation and conflict is the fact that in 95% of cases, parties have hitherto settled their disputes without applying any economic sanctions and we do not see any change from that trend because in those cases the parties have developed mutual respect and accommodation based on matured relationships and we assume that they will attempt to maintain that posture. But the hard-core anti-union employers may try to use all the weapons in their armoury to challenge these changes and this may contribute to, not just to litigation, some prolonged application of economic sanctions. Law only requires changes in behaviour; it cannot change attitudes. But now the remedial powers of the Board are such that they may not be able to gain by non-compliance with the law and the previous cost-benefit matrix of violators of law has been diluted, if not totally nullified (see supra SH19).

The removal of obstacles towards unionization is not going to result in a mushroom-like growth of unionization as feared by employers. Law cannot command the growth of unions, it can only hinder the hindrances. Public policy is only one among the following variables which will have a greater bearing on union growth: the business cycle, level of unemployment, composition and socio-demographic characteristics of labour force, employment concentration/diffusion, employers' attitude and behaviour, the public image of the Trade Union Movement, union structures and recruitment policies. These latter variables at present are not so

conducive to union growth. Economic buoyancy and structural factors are beyond the control of unions.[176]

The centrality of work in human life has various dimensions: the spiritual and temporal values as well as the intrinsic and extrinsic values. Work has always been connected to moral and ethical, as well as economic values. Although our laws and moral codes do not specifically recognize a right to work, they do acknowledge strong protectable interests in fair work opportunities and freedom from occupational injury and illness. Employees' right to form themselves into unions, to engage employers in good faith bargaining, and to invoke meaningful sanctions in support of the bargaining, is fundamental to achieve dignity and fairness at the workplace. Bill 40 amendments have reinforced this right. We need industrial peace but not peace at any cost. We need a competitive market place but not without compassion. We need structural change and progress to compete in the international market place, but labour should not be the sole party to bear the cost of such a change and progress. Bill 40 is an attempt to find a synthesis between and among these competing values. It may not be perfect but it is in the right direction for right reasons.

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176 See G.S. Bain, Union Growth And Public Policy in Canada, Labour Canada, October 1978.

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