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A Bang and a Whimper: Changing Labour Law in Ontario

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By Harry Glasbeek,
Judy Fudge
and Eric Tucker

a BANG & a Whimper

Changing Labour Laws in Ontario

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a BANG & a Whimper

Changing Labour Laws in Ontario

By Harry Glasbeek, Judy Fudge and Eric Tucker

There is an old Jewish story about a man who was so oppressed and disadvantaged all of his life that he experienced nothing but hunger, cold and misery. When he came to his final reward he was given one wish which, even if it was an extravagant one, would be granted if it was at all possible to do so. The man thought hard and long and then decided to go for it. Firmly he asked for a warm roll with fresh butter for breakfast. (A vulgarization of the story Bontsha the Silent, by I.L. Peretz.)

* * *

Since the New Democratic Party has come to power in Ontario, labour has been champing at the bit. It wants a serious restructuring of the labour law. But how serious is serious?

Organized labour in Ontario is losing members in the manufacturing and resource sectors at a rate which equals that of union losses in the north-east of the United States. And as business flexes its new global muscle, it is increasingly difficult for workers who still have bargaining rights not to make concessions on wages and conditions of work. The pressure is on to make good these losses by organizing the largely unorganized private and quasi-public service sectors.

As a result of some successful efforts, women are the largest group of newly organized workers. But many still remain unorganized. Given current labour legislation, it will be hard to make further advances. And, although business is already howling, it's unlikely that the Ontario Federation of Labour's proposed labour law changes, if adopted, will make much of a difference either.

The existing legislative scheme was designed to work in the near-monopolistic manufacturing, resource and transport sectors where large employers, in return for guarantees of labour peace and productivity, could afford to give some bargaining leverage to unions. In the only growing sectors of Canada's new economy, many employers are small and in very competitive situations. They fiercely resist unionization. Present labour law makes it relatively easy for them to do so.

It permits them to use their property rights to prevent organization from taking place on their premises. It allows them to exercise the right to free speech in a way that makes it easy for them to intimidate their vulnerable workers: women, young, old and part-time workers. Many large employers, such as banks and trust companies, feature small, fragmented and separate workplaces. This allows them to use laws which are ideally suited to protect the individualistic right of small employers to fend off trade unionism. Others, large retailers like Eaton's and K-Mart, have never accepted the legitimacy of unions, and have exploited their legal opportunities to the fullest extent. Indeed, they have frequently exceeded them. This is a well-known story.

It's clear the union movement needs a revamping of the system to help women, immigrants, the old and the young, first to become unionized, and then to have real bargaining leverage. The market, as organized by law on behalf of business, needs to be trumped.

The OFL got an opportunity to make a difference when Minister of Labour Bob Mackenzie, former organizer for the Steelworkers, appointed a blue-ribbon panel with a mandate to examine 30 pro-

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PHOTO: DAVID SMILEY

posed changes to the Labour Relations Act, suggested to him by the OFL. But sceptics might have thought that, given the make-up of this panel, no new vision was likely to emerge. The panel was chaired by Kevin Burkett, a former vice-chair of the Ontario Labour Relations Board, and an active arbitrator and labour consultant. It was made up of leading management and union-side lawyers, and advised by neutrals, two of whom were former chairpersons of the OLRB. Sceptics would have been right. No new vision was brought forward.

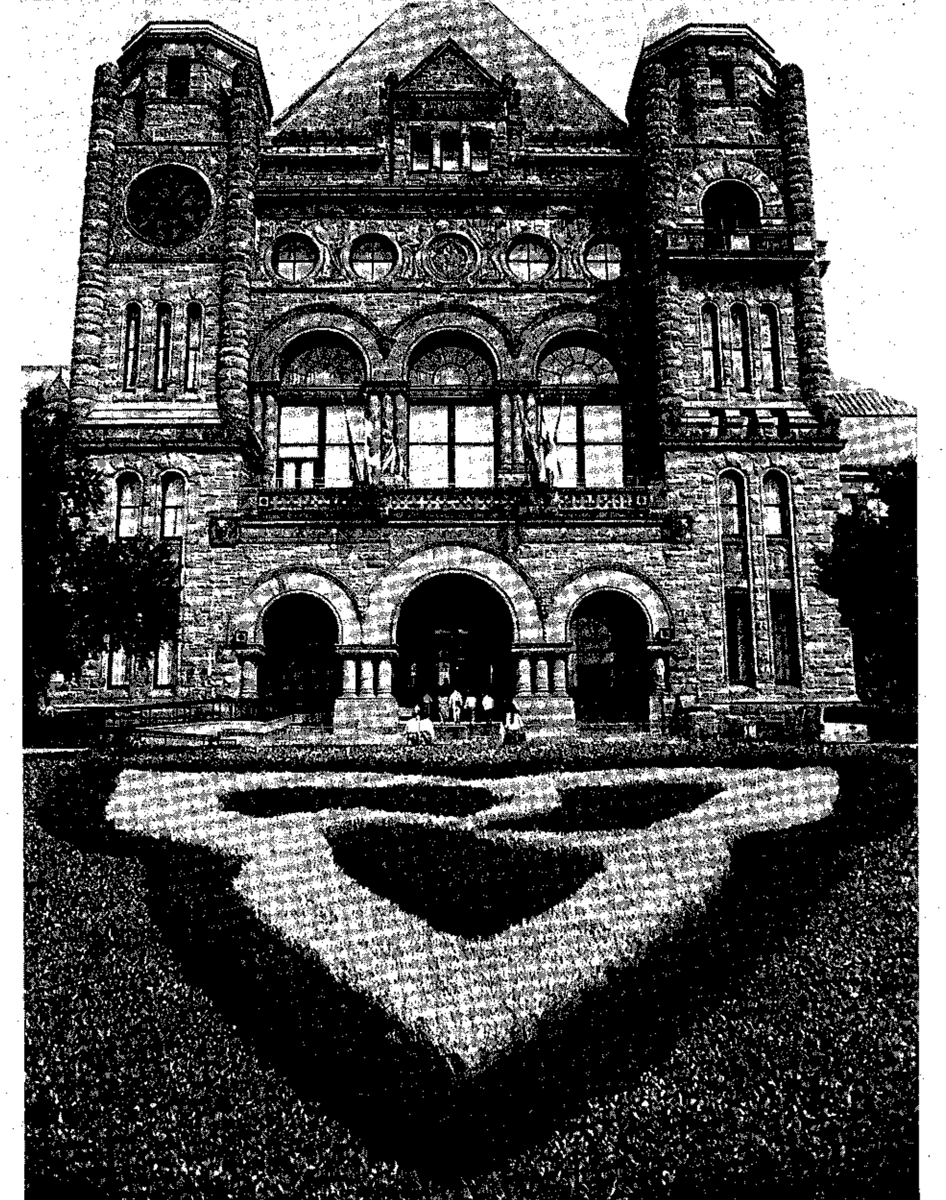
Changes Anathema

For the management representatives, not only was a new vision inconceivable, but changes of any kind were anathema. Despite the presence of Kevin Burkett, a highly-thought-of mediator, management lawyers on the panel refused to entertain any compromise. The result was that the only recommendations for change which emanated from this committee came from the labour representatives alone. Social democrats and labour supporters should have been able to expect labour's proposals to be far-reaching. But were they?

Certainly business has reacted to the proposals as if they are extremely radical. Speaking through its official organ, the Globe and Mail (editorial May 30, 1991), business said that "the proposals would raise the costs and risks of doing business in the province" and would discourage investment, because the proposals required the government to abandon "its traditional position of neutrality in labour-management disputes, and unequivocally throw the power of the state behind labour."

The Ontario NDP government is under siege. No doubt it (and the OFL) feels that, if the NDP implements even some of the proposals put to it, it will be challenging the capitalist lion in his den. But, even if *all* the proposals of change are implemented as legislation, labour would not be able to move very much further forward. It certainly would not be in a position to address the major issues it has to confront; namely, the feminization of labour, and capital's increased mobility and all the power enhancement this implies.

On the positive side, the labour committee made proposals which would increase trade union access to employees on the employers' premises, and which would prohibit employers from interfering with the workers' freedom to



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choose a bargaining representative. (While these are very good ideas, as lawyers we caution that, if these proposals are implemented, employers are sure to invoke what is, after all, *their* Charter of Rights and Freedoms to have the legislation declared unconstitutional because it infringes on the sacredness of property rights and their corporate freedom of expression.)

The labour committee's impulses here are good ones, as are their proposals for expanding the coverage of collective bargaining to groups presently excluded, including agricultural, domestic and some professional workers.

Another welcome number of recommendations centre around the employers' present ability to restructure their business organizations by selling part or all of the assets, or merging with another business, etc., to get out from under obligations owed to workers with bargaining rights. The existing successor rights law is complex, and recently has been interpreted by very senior courts in the land to favour employers who engage in union-avoidance tactics of this kind. Rightly, the proposals are aimed at making it more difficult for employers to use these strategies. But, legal linguistic change just leads to more litigation.

Well-paid lawyers will soon complicate the law again, and willing labour boards and courts will create new loopholes. While these proposals are a necessary step, they are certainly not earth-shaking.

Well-paid Lawyers

The strongest recommendation would prohibit hiring scab labour or using managers to do work normally handled by strikers, during a lawful strike. This directly supports bargaining power and solidarity. Long overdue, this is one recommendation which the NDP cannot

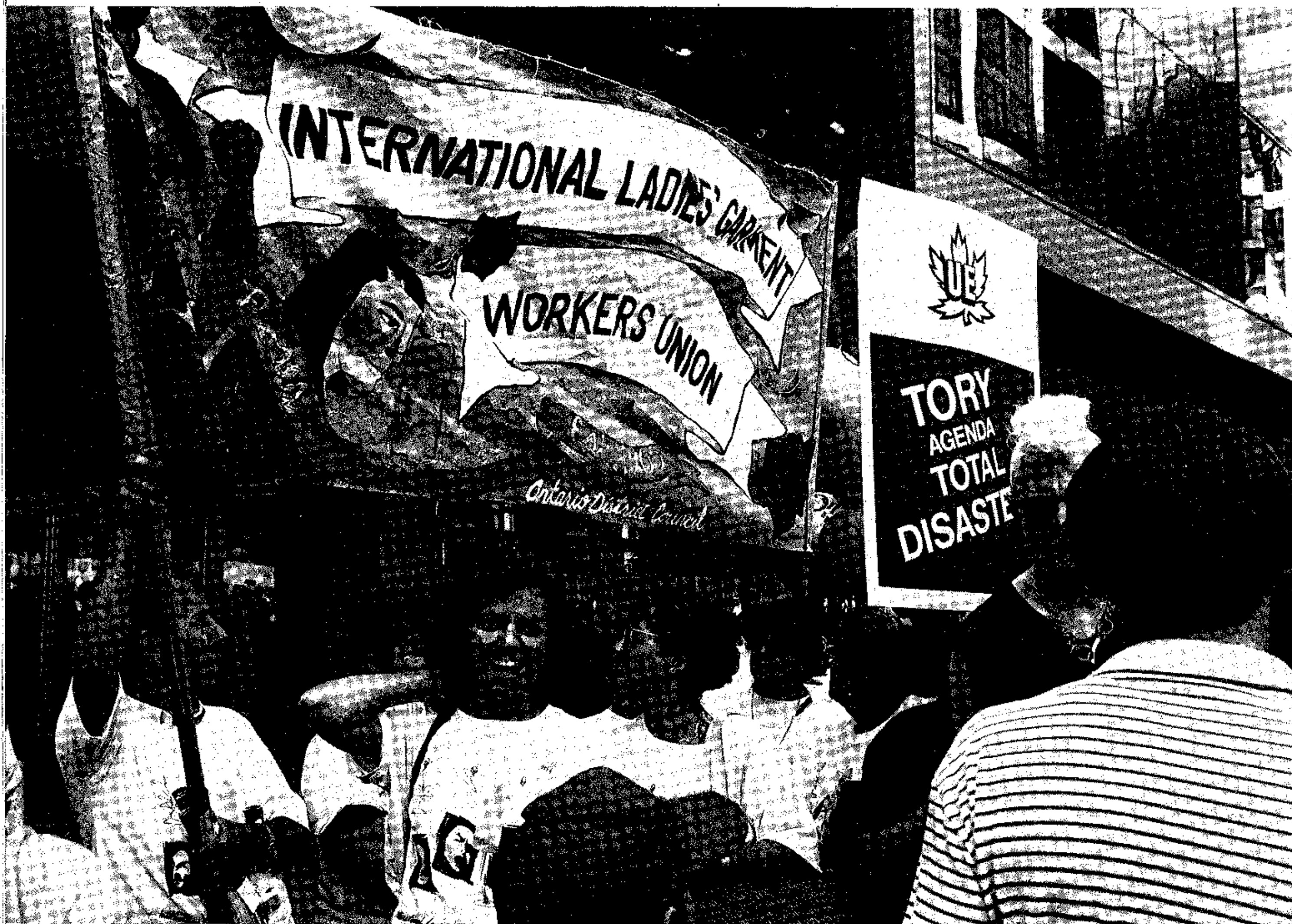

PHOTO: LISA SAKULENSKY

push aside, even if pragmatic politics suggest it do so. In fact, it is not such a radical proposal. Quebec has had very similar provisions for over a decade now without its capitalist world falling apart.

If this was the bang of the report, the rest is a whimper. The report does little to challenge the premises of the existing regime; premises which are aimed at preserving managerial prerogatives and industrial peace.

Capital is trumpeting its need for flexibility, by which it means flexible workers. Workers are to be coerced to adapt themselves to the competitive needs of capital. Technological change and contracting out are the primary means used by employers to this end. Technology, in particular, need not be used in this way. But it is. Workers need to educate employers. They need weapons.

The labour committee's report recommends a right to bargain over technological change and contracting out, if these issues arise during the life of a collective agreement. The committee, however, rejects giving workers the right to strike over these issues, claiming that all that is required is an opportunity for rational discussion. For chit-chat. The hostile response of the employers' representatives on the Burkett committee to even this mild suggestion indicates how silly it is to expect employers to show any willingness to accommodate workers' desires, in the absence of any pressure to do so.

Workers must have the right to strike in these circumstances, even if actual conditions may not allow this weapon to be used all that often. There is a symbolic need to have the right to strike: the only thing that ever brings employers to the bargaining table in any kind of serious mood. As labour itself is fond of saying, "Collective bargaining without the right to strike is just collective begging."

Collective Begging

Although the labour committee recognizes that new structures are needed to overcome the fragmented nature of existing collective bargaining, especially in the service sectors, nothing in its report directly addresses this issue. There is some loose talk of cluster bargaining, and bargaining unit amalgamations, but the more radical and necessary proposals for broader-based bargaining have been left to be resolved by another as-yet-unappointed blue-ribbon task force. The Burkett experience does not instill confidence in this approach to problems. One of the central issues confronting Ontario's workers has been shelved by the labour committee.

Similarly, the expansion of the definition of picketing and the right to conduct secondary boycotts, needed to bolster power and consciousness, have been left to the Ministry of the Attorney General to take care of at some other time.

Finally, in this catalogue of half-hearted recommendations, the labour committee has taken a technocratic and bureaucratic approach to the resolution of the problems arising out of the present grievance arbitration processes. Another informal layer of adjudication (with some new time limits) has been added to the existing costly and slow processes. Arbitrators should be given even more things to do, and greater power with which to do them.

There is nothing in the report about reducing the need for arbitration by limiting the employers' right to exercise power in what is, at the moment, a largely unfettered way. Employers' orders need to be obeyed before they can be grieved. Why not limit the power to give orders? Why not have a justice and dignity clause which requires an employer to establish just cause for disciplining a worker before the discipline is imposed? This would help workers get more control over their lives. This is a minimum condition which organized labour should demand. The labour committee did not do so.

Blocking Reform

The fundamental problem is that the labour committee — despite the shrill protestations of the Globe and Mail and the Metropolitan Toronto Board of Trade — continues to believe in the premises which have suited business well in the past, and which promise to serve them even better in the future.

The committee members continue to believe in a form of voluntarism which allows the state to play only a very small role, leaving the market as unmodified as it is possible to do in an advanced liberal capitalist economy. Based on this belief, the proposals won't leave unions with much more bargaining power than they have now. And if implemented on this basis, the report's recommendations will serve to embed the institutions and market ideology, which will make it harder to achieve the two main aims of the report's authors, namely: (a) to give leverage, respect and dignity to the army of new workers, who are mainly women, young and old people, and who need direct state intervention and (b) to provide an economy for all Ontarians which is restructured on a labour-friendly set of premises.

Equalization of bargaining power cannot be achieved just within the confines of collective bargaining legislation. In any event, the recommendations of the labour committee represent a minimalist set of demands for the reform of collective bargaining. Because of its mandate and narrow vision, it assumes a continuation of the existing scheme. This creates a block to meaningful reform. A broader strategy is required.

Other instruments to regulate the labour market will have to be used, especially to assist women and minorities who are disproportionately represented in "non-standard" employment situations. Reform of employment standards legislation, and the immediate implementation of all the promised increases in minimum wages should be urgent priorities. Other social programs which promote a more egalitarian distribution of income and wealth, and which guarantee a citizen's right to income security, also need to be placed on the agenda.

The development of the broader agenda of social change must be articulated *at the same time* as defensive labour law reform is attempted. Organized labour has put its enthusiasm and resources behind collective bargaining law reform. It must also be the key actor in a strong popular movement for a much broader set of changes, to enable the NDP to move Ontario towards a more democratic future. Not only would it be right for the labour movement to do this: it would also serve its immediate ends. Labour law reform will only be effective if it is linked to the bigger agenda.■

The authors are law professors at Osgoode Hall Law School, York University, in Toronto. They do their scholarly work in labour relations law. The labour committee's report has more recommendations than the ones discussed in this article. A detailed commentary on each recommendation has been forwarded to Ontario Minister of Labour Bob Mackenzie. A free copy will be made available to any reader who wishes to see it, by telephoning Judy Fudge at (416) 736-5578, Harry Glasbeek at (416) 736-5559 or Eric Tucker at (416) 736-5579.

Labour Law Reform Proposals on the Table

This fall the Ontario New Democratic government will be considering a package of proposed labour law reforms. Some people feel the proposals don't go far enough. And with business poised to pounce, many are holding their breath, wondering if any of these proposals will even see the light of day, or be shelved, as were the public auto insurance plans, for example. Here are some of the proposals being discussed.

- Ban the use of strikebreakers, including management doing struck work.
- Let striking workers picket stores in shopping centres and other employer locations which are now off-bounds.
- Make it easier to prove bad faith bargaining on the part of employers, who can now call uncompromising positions "hard bargaining."
- Upon notification of a union drive at a workplace, require employers to provide union organizers with a list of employees, and access to the premises.
- During an organizing drive, require an employer to maintain strict neutrality in its communication with employees.
- During an organizing drive, require an employer to obtain permission from the labour board before discharging or disciplining any worker in the prospective bargaining unit.
- Grant collective bargaining rights to agricultural workers, domestics and some now-excluded professional groups.
- Give unions the right to bargain over technological change or contracting out during the life of a collective agreement.
- Set up a taskforce to investigate possibilities of bargaining between management and unions for particular sectors, rather than on a company-by-company basis.
- Require a one-year notice of closure or major layoff.
- Eliminate the 26-week cap on severance pay.
- Establish a Job Protection Division under the Employment Standards Act for non-organized employees affected by unjustified plant closure.