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LABOUR RELATIONS POLICY AND LAW AS MECHANISMS OF ADJUSTMENT

BY HARRY J. GLASBEK

I. INTRODUCTION

In From Consent to Coercion: The Assault on Trade Union Freedoms, Panitch and Swartz tell us that the savage attacks on labour over recent times have created a permanent exceptionalism in Canada: the free collective bargaining rights of Canadian workers have been eroded to such an extent that they hardly can be said to exist. They argue that more and more groups of workers are permanently losing their rights to participate in free collective bargaining as the state imposes income restraints, denies certification rights to some employees, and uses its powers to declare certain enterprises in government services essential, thereby denying workers the right to use collective power. Moreover, they note that even those workers who have not been directly restricted in these ways have lost some of their advantages, by the downgrading of the ally

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*Copyright, 1987, Harry J. Glasbeek. Professor of Law, Osgoode Hall Law School, York University, Toronto. An earlier version of this paper was presented to the Calgary Sociology Colloquium, "State, Law and Societal Transformation", November 20-22, 1985.

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1(Toronto: Garamond Press, 1985).
doctrine in British Columbia, by labour relations boards reversing their own earlier pro-union policies (as in the Ontario Eaton strike), and by initiating attacks (supported by employers) on anti-scab legislation (as in Quebec).

Their case is an overwhelming one. In this paper I want to further the examination that they have begun. In particular, I want to ask the question: how did the successful attack on collective labour power come about? Panitch and Swartz note that the build-up for the sweeping attacks on labour has been a steady one. But they do not answer an unformulated question: why it is that a state, which did after all bestow benefits on labour, set out to undermine its own initiatives? They also have not tackled an associated problem: how it is that a supposedly strengthened labour sector has not been able to resist the state's onslaughts? This paper is a preliminary attempt to answer those questions.

II. SOME ODDS AND ENDS OF THE RHYTHMS AND CADENCES OF INDUSTRIAL RELATIONS IN CANADA: MUCH ACTIVITY, BUT HOW MUCH CHANGE?

In 1349, the Statute of Labourers was passed in England as a response to the Black Plague. Because of the intense scarcity of labour and the pressure this put on the price of labour as the depleted ranks of workers seemed increasingly unwilling to offer their services to potential employers, it was made mandatory for every non-property owner and non-member of a guild to work for whomsoever should command him to do so. Moreover, the rates were to be set by reference to the rates which prevailed prior to the onset of the pestilence. The law further provided that to leave one's employer without permission was a serious criminal offence, as was the seduction of an employee away from one place of employment by another desperate employer.

In 1987, in a Canada which has a regrettable abundance of labour, every individual is free to refuse to work. Of course, such an unwillingness to work will disentitle the individual to the collection of unemployment insurance benefit payments, while a voluntary quit will disentitle the individual to such benefits for a relatively lengthy period. Servitude and slavery no longer persist;
they have been replaced by the freedom to starve. One wonders what we would do if there were a scarcity of labour in our liberal democratic nation: would we be more generous than the feudal state of the fourteenth century?³

At the beginning of the nineteenth century the formation of trade unions was a criminal offence in itself. Gradually, as trade unions kept on being formed despite the severe penalties which were imposed on labour activists, some legislative relief from criminality per se was granted to trade unions. But courts, both in England and in Canada, persisted in criminalizing trade union activity and, when that was no longer possible, they made such activities actionable in civil court. After World War II, the advanced industrialized countries realized that labour organization was inevitable and, perhaps, necessary.

In 1919 Canada was one of the High Contracting Parties to the Treaty of Versailles which committed itself to freedom of association and free collective bargaining. In 1937, the Ontario government used military and police forces to smash attempts at unionization at Oshawa; the same was done in 1942 at Kirkland Lake. By 1944, P.C. 1003 was passed which, in effect, permitted and encouraged the formation of legally accredited collective bargaining agents. In 1968, the Woods Task Force, set up by the federal government to inquire into why there was still so much labour disturbance in Canada, came out strongly in favour of the retention and furtherance of collective bargaining as developed in 1944, although it suggested some technical modifications be made to the existing schemes.

In 1985, a committee struck by the International Labour Organization began touring the provinces of Ontario, Newfoundland, and Alberta to see whether or not some of the provinces' laws restricted the rights of public sector trade union organization and activity so much that they breached the internationally accepted understandings of western liberal democracies in respect of workers' rights. Normally, the ILO is concerned with countries whose anti-

³The question is rhetorical. Our history gives us the answer. During the war, when there was a scarcity of labour, people in key positions in some manufacturing industries could not leave their employ, under pain of penalty. Moreover, wages were controlled by reference to rates which prevailed at a time when there was an abundance of labour: the Depression.
labour laws are notorious, such as Chile or the Phillipines. The ILO committee found that the Canadian provinces had violated the minimal standards agreed upon by the international committee.

During the war years, the Marsh Report stated that it was the obligation of a country such as Canada to provide full employment and, in as much as it could not do so by enticing the private sector to invest, the government should initiate public projects. For those still not employed it would be necessary to set aside a massive sum for unemployment insurance benefits. In 1944, the federal parliamentary Throne Speech proclaimed that the primary object of post-war policy would be the creation and promotion of "social security and human welfare." This included a national minimum of social welfare, security in employment, the provision of good diet, housing, health and safety on the job, medical care, and adequate retirement protection. With the advent of the first Lester Pearson government, the Economic Council of Canada, in its First Annual Review, advocated that full employment and economic growth be the primary objectives of social policy in Canada. In 1971, the then Liberal government improved unemployment insurance benefits by loosening the rules of eligibility and increasing the duration of entitlement.

In 1985, the federal government announced that workers who were dismissed and who, upon separation from their jobs, were entitled to lump sum payments by way of severance pay or pension benefits, would have to offset these sums against any entitlement to unemployment insurance benefits they might have. There was also much talk about curtailing the Unemployment Insurance Corporation's "bounty" that had been bestowed on workers in the past and a commission (the Forget Commission) was set-up to inquire into the functioning of the unemployment insurance system. Part of its mandate was to determine whether or not the state's unemployment insurance system ought to be turned over to the private sector, and whether or not the system was too beneficial to families which have more than one person on unemployment

\[\text{L.C. Marsh, Report on Social Security for Canada} \text{ (for the advisory committee on reconstruction)(Ottawa: E. Cloutier, 1943).}\]
benefits. The ensuing report suggested sweeping changes which have been interpreted as, on the whole, being bent upon curtailing existing entitlements and benefits.⁶

One of the great achievements claimed to have been obtained through collective bargaining since its advent in 1944 is the curtailment of management's right to dismiss workers arbitrarily. No longer does the whim and will of an employer determine whether or not a worker will be employed. Job security has been enhanced, as have dignity and justice in the work place. Even as these claims began to be made, unemployment figures in Canada were not encouraging.

By the 1960s the Economic Council of Canada considered a rate of 3 percent unemployment to be full employment. By the mid-1970s economists started claiming that 5 or 6 percent unemployment was the best that an economy like Canada's could hope to produce and that this should be considered the equivalent of full employment. Right now, 7 percent is the figure that is bandied about in the same way. Canada's unemployment figures throughout the period that we are considering fare poorly when compared to those of other advanced industrialized nations.

In this context it is somewhat difficult to understand the assertions about increased job security and about justice and dignity on the job in Canada.

In 1971, a Quebec Commission, the Castonguay-Nepveu Commission,⁷ reported that there was a great deal more deprivation in respect of health and welfare in Quebec than had been anticipated. The final report called for a guaranteed annual income system which would provide substantial assistance to the wage-earning poor. In 1968, the Economic Council of Canada⁸ revealed that 27 percent of the Canadian population lived in poverty

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⁶The labour representatives on the Commission had made their dissenting views known before the Commission had reported. In so doing, they detailed what they alleged to be the main cut-backs to be recommended by the majority report. See, for example, "Atlantic regions face exodus if jobless benefits are slashed", The [Toronto] Sunday Star (26 October 1986). In the end, the government felt that it could not act upon the majority's recommendations.


and that 68 percent of the poor families in Canada were headed by workers. In 1971, the Croll Commission\(^9\) came to the same conclusion. Its major conclusion was that Canada needed a federally financed guaranteed annual income. In 1985, the Macdonald Commission Report\(^10\) argued for a guaranteed annual welfare system to clean-up the bureaucratic nightmare of the many social welfare systems which exist and also to guarantee all Canadian people a level of acceptable existence, a guarantee which, it was acknowledged, does not as yet exist.

A recent Organization for Economic Co-operation and Development report shows that Canada lags behind most western nations in social welfare spending. The study indicates that Canada devotes 11.8 percent of its gross domestic product to social welfare spending compared to an average of 14.1 percent for the other western nations.\(^11\)

Each day in 1982 and 1983, 1,100 men, women and children were added to the number of poor people. The number of Canadians who fell below the poverty line increased from 3.5 to 4.3 million between 1981 and 1983.\(^12\) Food banks have an increasing number of clients. Between October 1984 and March 1985, 7,981 adults and 6,470 children received food in Saskatoon. In Regina, it was 7,059 adults and 8,524 children, over a similar period. In Vancouver, in 1983, 71,955 adults and 21,174 children received food.

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\(^10\) Royal Commission on The Economic Union and Development Prospects for Canada (Ottawa: Ministry of Supply and Services Canada, 1985) (Chair: The Hon. Donald S. Macdonald).

\(^11\) Similarly, the *Statistical Report on the Operation of the Unemployment Insurance Act*, CAT. 73-001 (Ottawa: Statistics Canada, Unemployment Insurance and Manpower Section), shows that Canada, in 1981, that is, at the height of the most recent recession, offered less by way of unemployment insurance coverage than it did before the major 1972 changes.

\(^12\) *Poverty in Canada*, a discussion paper prepared for the Primate of the Anglican Church of Canada and the Board of Directors of Stop 103, June 1985.
from food banks; by 1984, there were 144,250 such adults and 53,834 such children.\textsuperscript{13}

III. THE ARGUMENT: THE IDEA OF INDUSTRIAL RELATIONS AS A FORM OF REGULATION

Until the great depression it was customary to let economic cycles run their course. This meant that once a boom in the economy had subsided the deflationary period which followed was used as a way of lowering the cost of production until a climate for renewed investment, and the potential for another boom, had been created. Nineteen-twenty-nine caused so much misery, however, that Keynesianism in one form or another, was embraced by most of the advanced industrialized nations, except those which turned to fascism as a way out of the problem. By Keynesianism economics I refer to the idea that the state should intervene to manage demand by increasing consumption during a time of low demand, by either directly transferring funds to certain economic actors or by creating employment by undertaking projects and developments. The state is to do the reverse during a time when demand outstrips the potential of supply, that is, by transferring funds away from would-be consumers by taxation or by reducing state support for activities which lead to increased demand.

After World War II, European countries which adopted the wisdom of Keynesian economics were faced with the added problem of restructuring the whole of their economy.\textsuperscript{14} By and large, western

\textsuperscript{13}Ibid. More recently a tacit agreement seems to have developed to the effect that food banks are permanent institutions as a National Association of Foodbanks is being created; see G. Riches, Food Banks and the Welfare Crisis (Ottawa: Canadian Council of Social Development, 1986).

\textsuperscript{14}As Adam Przeworski in "Social Democracy as an Historical Phenomenon" (1980) 122 New Left Review 27, has shown, Keynesianism had special appeal to social democrats who had been in the vanguard of change in Europe just prior to the war and often immediately after it. This was so because they felt that nationalization, their initially preferred means, had not succeeded very well when implemented. Keynesianism suggested that the state was in control and that the state could be controlled by the electorate (its majority being workers). This was desirable. Further, Keynesianism made it sensible to promote higher wages as this would lead to higher consumption which, in turn, would lead to greater profits and more investments and, thus, to more employment. And, of course, as consumption could be pushed up by state measures, Keynesian policies also allowed for welfare measures. All of this was dear to social democrats'
industrialized European nations accepted the notion that capitalism had developed to a stage where it should be regarded as a regulated capitalism rather than a competitive one. This was taken to mean that individual employers were no longer to seek profits by maximizing profits at all costs, particularly not by brow-beating workers into a low wage, low benefit situation. Rather, the idea was that the state would, in line with Keynesian principles, ensure that conditions prevailed in which consumer demands would remain at a high level. To do this, the state would help its enterprises conquer its domestic markets. It is in this kind of "regulated" economic climate that it was easy to propose that investors should seek profits by adding value, rather than by profit-maximization in the classic, competitive way. What was envisaged was a high productivity/high wage growth economy. In order to get labour's co-operation for this kind of economic policy, it was necessary for the state to make certain arrangements which would benefit labour regardless of the specific bargaining strength which a group of workers might have vis-à-vis their particular employer. Some of the working and social conditions of workers were to be set external to the factory situation so that these benefits could be guaranteed to all.

For instance, as a hike in productivity might mean that workers would have to accept innovative new managerial techniques or novel technology, the state undertook to provide greater support systems for displaced workers such as retraining and early retirement programs. Understandably, these support systems took different forms in different settings. Participatory schemes in the work place, in respect of all or some of these vital issues of concern, giving workers different, but increasing, degrees of control (often referred to as industrial democracy) evolved. In some cases the state directly provided the measures by which to improve floor guarantees for all workers, in relation to such matters as unemployment, retraining, pension schemes and maternity leaves. Overall, the kinds of economic policies pursued were successful. Lipietz records that, for a while (at least until the late 1960s), increases in wages matched those in productivity. Eventually, this kind of accord began to break hearts. Thus, the kind of restructuring which took place in Europe was bound to get the support of these political arms of working-class movements.
down. Lipietz argues\textsuperscript{15} that one of the reasons for this was that workers, feeling that they were shielded from downward pressures in respect of wages and conditions, got bolder and bolder, causing employers to perceive that there was a real squeeze on their profit-making ability. This led to a re-opening of old style battles and a diminution of the reliance placed on the post-war adaptation of the Keynesian compromise.\textsuperscript{16}

What is of interest here is that, because the compromises were based on making labour an institutional partner in the political economy of each nation state (even if it was often a truly junior partner in some of these countries), it has not been as easy for the state in those countries to attack trade unionism as it has been in North America nor, more importantly from the point of view of this paper, as easy to undermine the social conditions created for labour, despite the fact that the dimensions of the economic crisis are broadly similar. While hardships have been (and are being) imposed on the working classes of Europe, the commitment to universalized welfare policies persist. This is offered as an assertion here and as it is of no further concern to the issues I want to raise in the paper, I will leave this matter for another time and another place.\textsuperscript{17}


\textsuperscript{16} Other reasons, such as the famous political unrest of students in France, also led to a rupture of the compromise. In addition, many of the protections provided under these European compromises were not as attractive, nor as useful, as workers had anticipated. This was particularly so in respect of the amount of control over production which workers had hoped to gain through the various mechanisms of industrial democracy which had been provided. To this list of things which went wrong might be added the fact that, by the late 1960s, the EEC developments had created a highly favourable set of conditions for multi-national capital mobility. While some restraints were imposed on the ability of branch plants of multinationals to close down operations in one of the member states without accounting to that nation (See R. Blanpain, \textit{The OECD Guidelines for Multinational Enterprises and Labour Relations, 1976-1979; Experience and Review} (Boston: Kluwer, 1979)) it was increasingly difficult for nation states to control their own domestic markets. The compromises, originally based on establishing such control, were thus increasingly jeopardized.

\textsuperscript{17} The genesis of this paper is, in fact, my need to work out the thesis that my York University colleague, Daniel Drache, and I are using as basis for the study of Canadian state and labour policy in which we try to argue that social conditions in Canada are, by and large, well below those obtained by the European working classes, precisely because the Keynesian compromise in Canada was of a very different kind to the one which evolved in Europe after the second World War. In that study we will try to provide the evidence which will better found the assertion made in the text above. See also H. Glasbeek and D. Drache, \textit{The New Fordism; Capital's Offensive, Labour's Opportunity} (1988) Osgoode Hall L.J. [forthcoming].
This skeletal outline of post-war European compromises identifies industrial relations as an integral part of state policy. This is not the way that industrial relations is usually perceived in North America (or in the U.K.). Rather the conventional view of industrial relations is based on the work of John T. Dunlop. Dunlop had argued that industrial relations is a system amongst other systems in society, such as the economic one, whose main components are identifiable. Such a theory permits a study of the end results of the interaction of the components of the system, as well as predictions of what the end result will be when variations in the nature and scope of the components occur. Dunlop's major contribution was to list the essential components of an industrial relations system as being comprised of three groups of actors - workers and their organizations, managers and their organizations, and governmental agencies concerned with the work place and the work community. These groups interact within a specified environment comprised of three inter-related contexts: the technology, the market or budgetary constraints and the power relations in the larger community and the derived status of the actors. An industrial relations system creates an ideology or commonly shared body of ideas and beliefs regarding the interaction and roles of the actors which helps to bind the system together.19

This approach has been modified, refined and criticised.19

Note that Dunlop's development of the idea that industrial relations should be seen and studied as a sub-system of politics and economics coincides with the maturation of collective bargaining North American-style. While people who call themselves industrial relations systems analysts argue that the taxonomy is just a heuristic device and, therefore, does not presuppose a particular kind of labour relations model, nor a particular set of political values, it is striking that it is an analytical framework principally used by North American (and, to a lesser extent, English) scholars working in jurisdictions in which a specific form of "free" collective bargaining has become the dominant mode of labour dispute resolution.

At the heart of the North American industrial relations systems theoreticians' belief is the view that industrial conflict must


19 See, for example, J. Anderson and M. Gunderson, Union - Management Relations in Canada (Don Mills, Ont.: Addison-Wesley, 1982) c. 1.
be regulated. It is their understanding of social order that such conflict is a manifestation of the dysfunctionality of social institutions. That is, they do not perceive industrial conflict as arising from irreconcilable differences, a view which is basic to class conflict theorists. Indeed, the genesis of American and English industrial relations schools is that formally legitimated collective bargaining represents the first recognizable attempt at creating a system which regulates industrial conflict arising out of collective action necessitated in a society of competing interests with unequal bargaining power. The pre-existing legitimated scheme, that of individual contract-making arrangements, was premised on the notion that industrial conflict was the outcome of aberrant behaviour by workers who sought to form defensive collectives. That is, the pre-existing set of legal institutions did not allow for the fact that labour had to make a response to the pressures and demands imposed on it by an ever more rapidly changing technological context. The industrial relations systems analysts are characteristically pluralists, in the sense that, while they comprehend that capital and labour will make demands of each other, unlike class conflict analysts, they see this interchange as one which takes place in a political and economic environment whose ultimate goals and objectives are acceptable to these two sets of social actors. Thus the shared perception that it

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20 R. Hyman, *Industrial Relations - A Marxist Introduction* (London: Macmillan, 1975), has pointed out how shallow it is to assume that industrial relations should be treated as a study of the regulation of conflict and how this leads to a superficial preoccupation with the study of organizations and institutions which produce rules which, in turn, bolster the supposed common interest in enhancing stability and equilibrium. For that is what happens: students of industrial relations as a system, no matter how sophisticated they are, tend to concentrate on the institutions which create the web of rules which regulate the relationships between labour and capital. For an acknowledgement that this is what conventional industrial relations studies are all about, see Anderson & Gunderson, *ibid.*

21 See Korpi & Shalev, "Strikes, Power and Politics in the Western Nations, 1900-1976," in Morris Zeitlin (ed.) *Political Power and Social Theory*, vol.1, (Greenwich, Conn: JAI Press Inc., 1980) 301. They argue that the industrial relations pluralist sees conflict as a disruption of various social institutions. These institutions are responses to the reaction of labour to the demands imposed on it by a changing economic and technological environment. Some of the institutions so spawned are means to the development of political democracy, such as universal suffrage. Another, one more directly dealing with the regulation of the contested spoils of production between capital and labour, is collective bargaining of some kind. It is from within this framework that it can be assumed that the social institutions (both of the obviously political and those of the manifestly economic kind) are the result of movements which, from the perspective of industrial relations systems theory, need not be questioned. It is the institutions which are a means to achieve the primary goal, (the control of conflict), which are to be the
is the appropriate goal of an industrial relations regime to seek to regulate (contrast outlay) industrial conflict can be understood. It is from this perspective also that we can see how Dunlop can write that, after an acceptable and appropriate rule-making process has been developed, the competing parties will develop a shared consensus over time.

The dominant approach which English, U.S., and Canadian industrial relations analysts have developed is that the ideal kind of rule-making process assumes that employers and workers are the actors best situated to determine the content and substance of their relationship. As is the case in the more primitive individual contract of employment arrangements, third party intervention should be kept to a minimum. To put this in Dunlopian terms, employers and workers should be left to settle their own affairs. In as much as government, the third actor, is to play a part, it ought to be limited to the creation and maintenance of the rule-making process, that is, its principal role ought to be that of facilitator. It is a thesis of this paper that this holding out of what the dominant institutional arrangements are all about is obfuscating. In particular, the conventional industrial relations view, by reducing the role of the state to that of facilitator and by assuming the development of a shared consensus, draws attention away from fundamental features of the political economy. It is a barrier to the development of another understanding, one which rests on the notion that the state has a positive interest in supporting the existing relations of production, capitalist relations of productions, in the specific state context as best it can and that it does so.

focus of study, reform, and action.

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22 This kind of approach to the state's role in regulating capital-labour relations has been studied by French scholars such as Boyer, who developed a model of "regulation" to help describe and understand institutional arrangements. By regulation he means

The dynamic pattern of economic change determined not only by the strategies adopted by individuals in the context of a given wage labour relationship but also by economic competition, government intervention, and the country's position in the world economy. The term 'mode of regulation' refers to a particular pattern of causal factors and mechanisms which together ensure the overall reproduction of the system with its implicit configuration of economic structures and social forms.

The argument in this paper is that the Canadian state has successfully characterized the industrial relations system as a semi-autonomous set of institutions. This presumes to leave issues between capital and labour to be settled by an evolved private ordering scheme. It has been possible for the Canadian state to continue to follow certain policies inimical to the labouring classes, without having to acknowledge this and, therefore, without being held politically responsible for doing so. The idea is that workers have been given an optimal system with which to resolve disputes with capital in a given political economy. The notion that, as long as they act within that framework, they play no direct part in the development and implementation of the nation's industrial strategies is hidden from view. So too is the fact that the state exploits the industrial relations framework directly to achieve its aims. This argument presupposes that the Canadian state has certain needs and goals and that they can best be, and are, attained by manipulating a supposedly semi-autonomous set of institutions which

dans la crise - Critiques de l'économie politique - #15-16 Avril, Juin, 1981; Rapport salarial et analyses en terme de regulation, Economie Appliquée XXXIII, #2, 1980. Note that the words of the definition of regulation used by Boyer do not, in themselves, differ substantially from the meaning conveyed by the Dunlop formula on their face. The difference is that of the spirit which underlies the offerings. The Dunlop framework is based on abstracting industrial relations from politics and economics. Boyer's 'regulation' is meant to emphasise the integration of industrial relations' institutions into national strategies. 'Régulation' is both less significant than the Dunlopian industrial relations system (because it is merely a component part of a larger scheme) and more important than it because its constituent parts include externally bestowed benefits and policies, external that is to direct capital-labour agreed-upon conditions. This paper's argument rests in large part on this difference of emphasis, albeit it a difference which creates spheres which may, depending on the analysis, overlap to a greater or lesser extent. For an attempt to apply the concept of 'regulation' to the study of collective bargaining in Canada, see the unpublished paper of my collaborator Daniel Drache, "Canada and the Economic Crisis: Industrial Relations As a Mechanism of Adjustment", LEST-CNRS, Aix-en-Provence, France 1983, (available on request); and his more recent article, "The Instrumental Role of Labour in a Staple Economy," forthcoming in Ian Parker, ed., Innis and the Innis Legacy, (Toronto: Coach House Press, 1986). For explanations of the concept of "regulation" and its utility, see J. Holmes and C. Leys, "Introduction" in Holmes & Ley, eds., Frontyard; Backyard (Between the Lines, 1987) and in the same volume, Liepietz, "The Globalization of the General Crisis of Fordism", pp. 23-56; see also M. Aglietta, A Theory of Capitalist Regulation (New York: Schocken, 1979).

2 The idea that industrial relations mechanisms can be used as an instrument of state policy is not a startling one. For instance, as seen, when there was a lack of labour in 1349 in England, the Black Plague statute was enacted to ensure that the employers of the day would not be coerced by the enhanced bargaining power of workers. This was deemed to be "good" for the country. For further discussion of both legislation and the role played by the courts in wage restraints over a long time, see Glasbeek, "TIP: Another Weapon in the Class War Waged against Workers" (1981) 3 Canadian Taxation 94.
are pervasively depicted as the components of a sub-system of the political and economic systems. These assumptions need to be supported.

The next section will set out the economic difficulties the Canadian state has in controlling its own economy. The thrust of the argument is that a resource based economy has created a dependency which leaves the state with few weapons with which to control its destiny and that manipulation of the industrial relations system, narrowly defined, is a chief weapon in its arsenal. The second point will be that the prevailing industrial relations system has left organized labour in a poor position to resist. Institutional fragmentation of labour, false consciousness about the extent of its militancy, the centrality of law and the pervasive ideological belief that liberal pluralism has reached its zenith in the form of Canadian collective bargaining, all play a part in enfeebling labour. Having established this, the paper will go on to detail how the logic of export-led growth policies has gradually caused the Canadian state to limit and diminish its commitment to "free" collective bargaining and social welfarism and how it has been relatively free to do so because labour has never been accepted as a senior political role-player in the development of Canadian labour-capital-state relations. The final section tries to establish the structural coherence of the attacks by the state on what proudly had been claimed to be the established rights of labour in Canada.

IV. THE POTENTIAL FOR THE INDUSTRIAL RELATIONS SYSTEM AS A SET OF SEMI-AUTONOMOUS INSTITUTIONS TO BE USED AS A MEANS OF REGULATION OF THE ECONOMY BY THE CANADIAN STATE

Keynesianism was adopted as a major policy by Canada during World War II. By 1944, the war government was announcing that the ultimate object of a post war Canada would be to provide "social security and human welfare". This, as we have already noted, included a commitment to minimum levels of social security, health
and safety care and to full employment. By then, the government had, in order to obtain labour's cooperation in the war effort, given Canadian trade unions the same kind of legitimacy in respect of collective bargaining that U.S. trade unions had been given by the 1935 Wagner Act. The commitment to Keynesian strategies continued, in the sense that the state gradually—if somewhat slowly—expanded social welfare policies. In addition to unemployment insurance schemes (which had come a bit earlier), by 1945 the federal government had developed proposals on a range of employment and income matters which committed it "to the development of a comprehensive nation-wide social security system". Prior to World War II there had been in existence a federally funded pension scheme and workers compensation schemes in all the provinces. There had also been some welfare programmes for single and deserted mothers. In the 1950s a somewhat restricted, but universal, old age security plan was put into place, as well as one for permanently disabled people and some aid was given to the unemployed who were not receiving unemployment insurance benefits. That is, a universal general assistance plan was being developed. In the 1960s, the spread of a comprehensive health care system was added to this list of programmes, as well as the evolution of the CPP-QPP schemes. The general assistance plan, the


25Note that this Canadian labour legislation came much later. In as much as the Wagner Act was one part of the Keynesian measures of the New Deal, Canada can be seen to have embraced Keynesianism much later. See D.A. Wolfe, "The Rise and Demise of the Keynesian Era in Canada: Economic Policy, 1930-1982" in M.S. Cross & G.S. Kealey, eds., Modern Canada, 1930-1980's (Toronto: McClelland and Stewart, 1984) 46. The remainder of this section relies very heavily on the analysis provided by Wolfe in that article. I am indebted. Note that the late arrival of Keynesian measures in Canada makes sense in the context of the argument which follows in the text to the effect that Canada's primary economic policy is antagonistic to classical Keynesian economics.

Canadian Assistance Plan, was improved and universalized.\(^{27}\) As the Social Planning Council of Metropolitan Toronto writes:

> By the early 1970's, an 'institutional' welfare state existed in Canada. Government spending on income security and social services was tied to the level of unemployment, the aging of the population, the educational requirements of the young, and the medical needs of an industrial society. A vast array of non-discretionary universal social programs was an accepted part of Canadian life.\(^{28}\)

Similarly, on the collective bargaining front, there had been an entrenchment of, and an enhanced scope given to, trade union rights. These statutory schemes, the 1946 ruling which gave unions the Rand check-off-of-dues formula\(^{29}\) (and thereby increased their security), the huge increase in population (mainly through immigration),\(^{30}\) most of which settled in urban and other industrialized centres, combined with the public commitment to the legitimacy of trade unionism, led to a dramatic increase in trade union membership. From a low, induced by the depression, of 16.3 percent in 1940, membership rose to 30.3 percent by 1948 and to 33.6 percent by 1971.\(^{31}\) All of this looked like the implementation of classical Keynesian measures. But Canadian Keynesianism was not of the same kind as that which a restructuring Europe adopted. In particular, Keynesianism here has had to take second place to Canada's major economic plan which, of course, explains why the anti-cyclical economic policies came so much later in Canada than elsewhere.


\(^{29}\) *Ford Motor Co. of Canada Ltd v. International Union of Automobile, Aircraft and Agricultural Implement Workers*, C.L.L.C. 18,001, Jan. 29, 1946.

\(^{30}\) W. Clement, "Canada's Social Structure: Labour and the State, 1930-1980", in Cross & Kealey, *supra*, note 25 at 81-82, has shown that, during the 1940s, net migration contributed less than 10 percent to the population but represented 20 percent of the increase in the 1950s, 22 percent in the 1960s and 34 percent during the mid 1970s. Between 1930 and 1980 Canada's population went from 10 million to 25 million.

\(^{31}\) It now stands at roughly 37 per cent of the work force. Note the relatively slow growth since 1948. Figures derived from Labour Canada, *Labour Organizations in Canada* (Ottawa: Labour Data Branch, 1976-77) at xviii and *ibid.* (1986), at 18.
Canada has always relied on the export of its resources as its major economic motor. The hope has been that the return on the sale of resources would lead (i) to capital investment, which (ii) would spur real growth in manufacturing for further resource capture and for processing of the extracted resources locally and, (iii) lead to the development of a manufacturing industry geared to meeting local domestic consumer demands. In fact, this has never worked out very satisfactorily. Rather, the pattern has been a feverish selling of resource commodities when foreign demand was high and for governments, during such times, to invest heavily in capital spending and infrastructure such as railways and, more recently, refineries and the like. Such governmental capital expenditures are given impetus by the fact that revenues are increased during such boom sales times, both by the inflow of capital which pays for the resources and by the tariffs paid by importers into Canada when consumer demands are high during such buoyant periods. Both government and the private sector run up high debts during such times. When a boom subsided the classical economic policies adopted in Canada dictated that government was to balance its budget by reducing expenditures to accommodate the reduced flow of revenues to it. The resulting bust was always severe. When the Great Depression hit, Canada was very slow to recover because, as we have noted, it did not employ the anti-cyclical remedies of Keynesianism as quickly as did other countries.\textsuperscript{32}

When the federal government, near the end of World War II, finally accepted the logic of anti-cyclical economic strategies and proclaimed its commitment to full employment and a socially protected society, it also announced that it believed that full employment should be created by an export-led economy.\textsuperscript{33} That is, export-led growth was to remain the lynch-pin of Canadian economic policy. Wolfe has shown that this created inevitable contradictions. He argues the boom effect will be fuelled by government’s spending

\footnote{32}{See Wolfe, supra, note 25.}

\footnote{33}{Wolfe, ibid., note 25, reports that the White Paper on Employment and Income, House of Commons, 12 April, 1945, outlined that the four main sources of national income which had to be maintained for the kind of economic growth needed were: "export trade, private investment in capital stock, private consumption expenditures, and government expenditures." (Emphasis added).}
of the revenues generated by resource selling and its tariff collection and this will keep the boom going after it has run its natural course. This will lead to inflation. Consumer demands will continue the pressure for imports (in a country where much of consumer goods and services are imported), leading to trade balance problems. These, in turn, affect currency value and, eventually, interest rates. All of this is aggravated by the fact that much of the Canadian resource and manufacturing sectors is foreign owned or dominated. In respect of the resource sector this is largely due to the inflow of U.S. capital which occurred when the U.S. government identified Canada as a major source for more than half of its key requirements to help it maintain industrial supremacy.\(^{34}\) This was welcomed by an architect of these Canadian economic policies, C.D. Howe who said that "Canada .... welcomed the participation of American .... capital. In Canada, foreign investors are treated the same as domestic investors".\(^{35}\) In addition, it is to be remembered that the export-led growth strategy assumes that it will lead to investment in Canada which will create a manufacturing base for resource extraction, for resource processing and for the development of a self-sufficient domestic product manufacturing sector. Tariff walls have been erected to protect investors who want to undertake such manufacturing. United States branch plants have settled behind these tariff walls to supply these markets. This foreign investment, primarily American, has serious effects on the Canadian economy. This is so because dividends flow out of the country as branch plants send profits back to their parent organizations and as they pay their accounts to their parent organizations from whom they are often forced to buy their materials and machinery for their productive activities in Canada. That is, they frequently do not obtain their supplies by adhering to competitive principles. Canada's trade balance is further adversely affected because these branch plants are not export-oriented, their access to markets being governed by the

\(^{34}\) President's Materials Policy Commission, Resources for Freedom (the Paley Report), 5 vols. (Washington, D.C. 1952). As a result, Canada's manufacturing and resource sectors were changed structurally. Whereas, in 1946, 35 per cent of Canada's manufacturing was foreign controlled, this penetration had risen to 56 per cent by 1957; see W. Clement, supra, note 30.

parent's integrated plans for its world-wide strategies.\(^3\)\(^6\) As if all this were not bad enough, Laxer notes that, very often, branch plants are only located in Canada because their parent firm requires their presence here, rather than because Canadian market demands dictate this kind of investment. This creates inefficiencies, further exacerbating balance of trade problems.\(^3\)\(^7\)

This crude picture of the major thrust of Canadian economic policy has certain implications for the implementation of classical Keynesianism in Canada and the ensuing Canadian compromise which has evolved. The picture being painted follows. The Canadian economy is guaranteed to be a roller-coaster one because it depends so much on the price its resources fetch in unreliable foreign markets. Inevitably, anti-cyclical policies are difficult to apply as the government reacts to the boom and bust patterns of such export-led growth.

This problem is aggravated by Canada's federal structure. Each of the jurisdictions seeks to control its own destiny. National anti-cyclical policies are difficult to implement, given the fact that the resource-based provinces, for example, British Columbia or, more recently, Alberta and Newfoundland, seek to raise revenues from their resources destined for export, using the same approach that the national government uses but subjecting it to their local needs which differ widely from those of other regions at any one time.

The pressures on the balance of payment, and thus on the currency valuations which, in turn affect interest rates, make it even more difficult for one of the other main goals of an export-led growth.

\(^{36}\)See J. Laxer, *Rethinking the Economy* (Toronto: New Canada Publications, 1984) 54 ff. Laxer summarizes the effect of increased U.S. investment and points out its inefficiencies by quoting from a paper done for the Foreign Investment Review Agency in 1982 which, in turn, relied on the Gray Report of 1972. The conclusions were that of 90 percent of all Canadian imports in 1978, 72 percent of the total was accounted for by foreign-owned firms and that foreign-owned firms had a ratio of imports to sales of 22.4 percent, a level which was five times as high as that which pertained to Canadian-owned industry.

\(^{37}\)This non-competitive kind of investment was given impetus when the United States, in 1971, launched its Domestic International Sales Corporation (DISC). This gave tax advantages to American companies which manufactured for export. By establishing Canadian branch plants, American enterprises obtained easy access to Canadian markets for such exports and were thus enabled to take advantage of the tax incentive scheme credit by the American revenue authorities. Such branch plants were even more intense in their non-competitive import practices than those established for reasons other than the stimulus provided by the DISC programme; See Laxer, *ibid.*
growth strategy to be achieved, namely, creating the right climate to attract sufficient investment capital to promote a greater manufacturing infrastructure. To achieve this end, supplementary strategies have to be devised. Logically, the state seeks to make the cost of investment less by passing the burden of an inefficient economy onto the non-investing part of the economy, that is, the working classes. This tendency is reinforced because, as our snapshot of the Canadian economy indicated, it is not possible to develop a coherent national industrial strategy in an economy which is fuelled by export-led growth and which continues to have a weak indigenous manufacturing sector and which is, therefore, heavily reliant on foreign capital to achieve its aims. As the Canadian economy is, by necessity, increasingly integrated into its major trading partner's economy, its policy-makers are left with very few tools with which to manage the economy. Amongst those few tools available is the direct grant of assistance to capitalists which, in Canada, is done by way of allowing accelerated depreciation of capital resources, subsidies for investment here and in other parts of the world, and tax expenditures of all kinds. The second major tool which remains available (in the absence of the capacity to use any fiscal and monetary measures which differ vastly from those of Canada's major trading partner), is to contain the economic and social wage of Canadian workers, thereby attracting investment and maintaining the impetus for export-led growth activity. This kind of policy runs counter to Keynesian institutions and structures introduced in the World War II period and since, such as collective bargaining and social welfare and support systems.

The argument of the paper is now on the table. Given Canada's major economic policy, industrial relations regulation will become one of the more important mechanisms of adjustment. It becomes a central structure in the regulation of our political economy. As the logic of an export-led growth economy makes it increasingly difficult to maintain a steady level of investment and productivity, the costs to investors are to be lowered and productivity is to be enhanced, in part, by shackling the power of labour and by disciplining the work force into greater docility. The commitment to

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38 See text infra, note 116.
treat labour as something of a partner, implicit in post-war Keynesian policies, gradually has had to be abandoned as the possibility of building up a viable manufacturing industry while maintaining both an export-led growth economy and the elements of an enriched welfare state becomes increasingly more tenuous.

The question which must be tackled next is how the attack on post-war compromises has met with such success in Canada, given the fact that there still exists an array of structures which reflect public recognition of the importance of working class legitimacy, organization, and needs, that is, while there remains, to this day, a residual adherence to something of a social welfare state and the legitimacy of trade unionism.

V. THE INHERENT WEAKNESSES OF CANADIAN TRADE UNIONISM

Trade unionism gained its recognition as a legitimate actor in the Canadian political economy when it had the potential for exercising real power, namely, during World War II when there was a relative lack of workers and there was a great need for co-ordinated productivity. This ought to have been the basis for the creation of a very powerful trade union working class organization. It did not prove to be so. What follows is a rehearsal of some very well-known facts about the kind of trade unionism which was legitimated by the Canadian industrial relations system.

A. Fragmentation

The most notable aspect about our trade union organization is that its use of economic power is limited, in essence, to the one employer -- one local setting. The spirit of the industrial relations system is that the amount of countervailing power created in workers is to be that of a collection of workers who happen to be employed by one employer and who, as individuals, would be seriously disadvantaged in contracting with that employer. Whereas we talk about trade unions, rather glibly, as national or international organizations, for the purposes of the statutory collective bargaining
scheme the union is the local agency which has won bargaining rights vis-à-vis one particular employer in one particular place. While the local union may be supported administratively and financially by the whole of the trade union, none of that union's members (who may work all over Canada and in the United States), may use collective action to support the local in any dispute in which it is involved. This fragmentation of economic power is a very serious constraint on the working classes' potential for making gains. Note here that the employer which bargains with the one local is not restricted in any similar way. It may be integrated with a whole number of other employers, horizontally and vertically, and these employers can assist each other, not just administratively and financially in respect of a particular dispute, but also in terms of movement of inventory, the parcelling out of supplies, the making of agreements to take up the slack for each other at various dispute times, etc. Some of this activity may be, because of its close alliance with the employer targeted by the local, the subject of collective action by the local, but not by any other affiliated unions which have binding agreements with the allies, even though they are in the best position to affect such allied employers. Moreover, it should be noted that the unions' countervailing power, which supposedly has been created, is often illusory. This is not only so because most of the legal rights which allocate bargaining power remain with the employer, but also because, in many situations, the power of one employer vastly outstrips that of the whole of the union of which only one local may be its adversary. For instance, in 1978, the Royal Bank had revenues of 3.4 billion dollars, while the total revenue of the largest union in the land, CUPE, was 15.4 million dollars. The same argument can, of course, be made in respect of General Motors, vis-a-vis the CAW, or of INCO and its Steelworkers' Local 6000.

In addition to the fragmentation of the bargaining structure, one of the fortuitous events which occurred when it was decided that, as a matter of public policy, workers should have


American-style legal rights in respect of collective bargaining, was that these schemes in Canada, unlike in the U.S., should be run provincially. This was the result of a 1925 Privy Council decision. But, as Pentland has demonstrated, the granting of labour jurisdiction to the provinces meant that much of the unionization was to take place in the face of opposition from small time employers who had a disproportionate influence in the provincial economies in which they were located. These employers were wedded to the old style capitalist competitive modes of production and were not keen to accept the collective power of trade unionism. Pentland also attributes the failure to develop a national labour market to this fragmentation of collective power. As a result, the relatively great national mobility of the Canadian work force has come to mean very little in terms of creating an efficient and productive labour market. Further, he argued, this fragmentation permitted disparities arising out of regional differences in wealth and resources to be maintained. To this catalogue of weaknesses caused by fragmentation of the labour force, one might also add that trade unions have had to organize their bureaucracies in a replicating way throughout the country, each one with its own institutional interest in remaining different, each one with its own need to influence its own political system, each one with its own peculiar problems in respect of bargaining. In this context, a coherence, in terms of both political and economic activity, has been increasingly hard to develop.

B. Exaggerated Notions of Militance

These built-in difficulties for the development of united collective working class power were hidden from view by two major factors. The first of these is that Canadian unions, on the surface,
because they struck a lot, seemed extremely militant once they had been recognized and promoted by the legitimating industrial relations statutes. Indeed, it is fair to say that the Canadian trade unions think of themselves as being very aggressive and forceful (particularly as they usually compare themselves to their American brothers and sisters).

But, strikes are not a good indication of militance. They may be reflections of pent-up demands created at various stages of the economic cycle, as well as of frustration, rather than of real power. Indeed, it may be noted that strikes in Canada are meant to be, and by and large are, very controlled events. They do not occur until certain time periods have elapsed and certain interventions by state agencies have occurred. I am referring here to the notice periods which must be given and the compulsory conciliation-mediation processes which have been built into Canadian industrial relations since the turn of the century. Strikes, in fact, are only permitted during very restricted periods and then they are to be aimed only at the improvement of the economic conditions of the workers on strike. Strikes are not permitted in order to gain recognition, or to settle disputes which arise during the life of an existing collective agreement. While this is sometimes thought to be a benefit to workers, the limitation on recognition strikes diminishes the raising of consciousness which conflictual organization drives may create, a very important point made by Panitch and Swartz.42 In addition, the requirement that disputes in respect of the interpretation and administration of a collective agreement have to be submitted to a technocratic, legalistic grievance arbitration process sharply reduces worker participation and democracy, while expanding the importance of trade union professionalism and the acceptance by the trade union of its managerial function on behalf of the employer.43

Having said all this, it remains true that Canada has a much bemoaned (by the establishment) record of strike activity.

42 Supra, note 1.

43 I have expounded on this theme elsewhere; see H. Glasbeek, "Voluntarism, liberalism and grievance arbitration..." supra, note 39; "The Utility of Model Building — Collins' Capitalist Discipline and Corporatist Law" (1984) 13 Indust. L.J. 133-152.
Even if we accept the fact that there is a great deal of strike activity in Canada, it does not follow that this must be seen as an illustration of the fact that it is a weapon which trade unions use because they are powerful. Korpi and Shave\textsuperscript{44} theorized that, as workers are always more oppressed at work than they are in the political arena where they can use their franchise power, it should follow that, when they are able to make gains through the political sector they will rely less on collective bargaining with their employers to make advances. That is, there should be a correlation, one which shows a diminution in employer-employee bargaining conflicts as workers gain control over the state's political apparatus. Their study, designed to test this hypothesis found that, in fact, there was such a correlation. As will be argued in the remainder of this paper, it is precisely the Canadian unions' lack of collective political/public power which make them so dependent on private/economic collective bargaining. From this perspective, a high incidence of strikes merely indicates a rather underdeveloped political power rather than a mature partnership position in state-capital-labour relations.

In any event, the actual incidence and number of strikes in Canada tends to be exaggerated because it concentrates on the number of worker hours lost. These are particularly high in Canada because the system is such that, when workers are actually on strike, there is, in theory, no reason why the strike should ever end until the parties so determine. The parties are to be left to their own economic devices and when one of them decides that the cost of not working is greater than the cost of working, a settlement will be reached. That is, a "pure" state of nature is the basis for Canadian collective bargaining. This leads to an increase of time lost as a result of strikes.\textsuperscript{45}

\textsuperscript{44}Supra, note 21.

\textsuperscript{45}While the point is a digression here, it is interesting to note (in this paper which asserts that the industrial relations system is part and parcel of state policy), that the Canadian state seeks to make a strike a real cost to workers by removing their state support systems, such as UIC or welfare benefits, while they are on strike; See R.A. Hasson, "The Cruel War: Social Security Abuse in Canada" (1981) 3 Can. Tax'n: J. Tax Pol'y 114.

There is no such great return to a state of nature attitude in respect of employers who are involved in a labour relations dispute. Their subsidies, their depreciation allowances, their tax expenditures, their access to government contracts, etc. are not imperilled during a strike or lock-out.
The real lack of worker power — despite the appearance of great militancy — is also hidden by the propagated philosophy of the Canadian industrial relations system. In essence, this propaganda has been borrowed from the U.S.A. The assumption is that, once countervailing power has been created on behalf of workers, the whole range of economic and political goals are achievable and are, in fact, achieved. Workers will no longer be oppressed by all-powerful employers and, because of their newly granted collective bargaining power, will have increased job security. Therefore, the argument goes, they will come to view their relationships with employers as being of an indefinite duration, one which gives them a stake in productive stability over time. The participation of each worker in all decision-making about working conditions having been enhanced (by controlling democracy in the union, by the fetters imposed on the employer, by increased security), the worker has been made a more sovereign individual.

This line of argument leads to claims that collective bargaining establishes a semi-autonomous form of government for employers and employees. Yet, the scheme is ultimately based on notions which are inherent to a private, individualistic competitive capitalism. The employer and the workers' bargaining agents are deemed to be isolated on an economic island, acting in their own interest. This atomistic, quintessentially competitive private model is primarily one in which economic claims are to be made. This is so because, by definition, the employer cannot make political commitments to its workers. The scheme is based on the individual contract model, with jumped-up power having been given

46 Unless the employer is the government, a facet to be tackled below.

The pervasiveness of private contract notions is
to the workers. The principle of freedom under the law, in an environment designed
to facilitate individual development and participation, has produced in North America
a pluralistic society reflecting a multitude of cultural backgrounds, values, interests
and goals. The underlying concepts of the free individual, private property and freedom
of contract have produced an essentially capitalistic although mixed enterprise economy.
Subject to certain qualifications, the key element within this system is the corporation,
a legal entity which provides a means both for capital accumulation and for limiting
the risks of enterprise to that capital.

31. The motivating force within this general framework is economic self-interest. Within
the limits of various laws designed to protect the public interest, decisions are permitted to be
made on the basis of individual or institutional gains. These decisions set in motion economic
forces that effect the distribution of available resources among competing ends through the
interaction of capital, labour, and other markets.

32. It is not hard to discover why western societies have, with varying degrees of
doubts, reservations and constraints, accepted the institutions and incentives of the modified
capitalistic or mixed enterprise framework. Despite its faults and shortcomings, the system has so
far provided a greater opportunity for individual and social fulfillment and achievement than any
viable alternative. No effective substitute for the relatively free market has yet been found to
ensure optimum allocation of resources. Nonetheless, it has its deficiencies and detractors.

33. State involvement in the mixed enterprises system has increased. Although it
is still basically a decentralized market-oriented system, the role of the state can be seen in an
increasing number of areas. In some cases government has intervened because of imperfections
in the operation of the system. In other cases intervention has been brought on by inequities
growing out of its unrestrained operation.

34. Cyclical fluctuations have forced the State to intervene in an effort to smooth
out the growth rate for the economy. The early classical economic notions about the
self-correcting nature of the system have been proved unsound. As a result government has
had to employ fiscal, monetary and related policies when the economy proved unable to
produce socially acceptable results.

35. Of more immediate interest have been the efforts by society to curb the worst
abuses of the system. Although state intervention in industrial relations began, in effect, before
the industrialization process, such intervention abated for a time after its introduction and later
reappeared in a variety of forms. Government had to take cognizance of the hardships created
by unemployment, underemployment, sweatshop labour, low wages, long hours, brutal supervision
and unsafe and unhealthy working conditions. The result was a gradual introduction of
protective labour standards legislation to prevent the harsh social consequences that arose from
unimpeded economic determinism. Thus the force of law was put behind what were considered
to be minimum standards to pay and working conditions. Politically determined criteria of
equity were substituted for the terms of employment that would have been produced by
unrestrained market forces. Government thereupon became party to the employment
relationship.

36. At the same time, workers began to join unions and to engage in collective
bargaining with their employers. Although employers resisted this development with all
resources at their command, it eventually became apparent that unions and collective bargaining
were natural concomitants of a mixed enterprise economy. The State then assumed the task
of establishing a framework of rights and responsibilities within which management and
organized labour were to conduct their relations.

37. Government has consequently come to play an integral part in the prevailing
economic system. It is government's expanding role that has made it a "modified" capitalistic
or "mixed" enterprise system. Yet despite this growing state involvement, the economy remains
largely governed by competitive and institutional forces created by individuals and organizations

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48 The Report of the Task Force on Labour Relations (The Woods Task Force), Canadian
Industrial Relations (Ottawa: Privy Council Office, 1968), which represented the conventional
views of Canadian industrial relations, was very clear on this:
such that even when industrial, region-wide bargaining (or even public sector bargaining) takes place, it is seen as nothing but a variant of the contract model.  

That the ideology of private contract making/private ordering is central to the Canadian industrial relations scheme can be seen from the fact that it has left untouched notions of private property which were the corner-stone of nineteenth century individual contract of employment doctrines. This has a major impact on the actual practices of industrial relations and on the kind of ideological scheme which may be used to justify putting fetters on labour. It assumes that private property ownership and its legal attributes and qualities are, in the end, unquestionable. In the collective bargaining setting, this means that those with property rights — that is, employers — can exercise them as they see fit, subject only to agreed-to limitations. That is, what workers do not win through their struggles for control over their working life remains within the domain of those who have bought their labour power and own the assets of the enterprise in the operation of which they will translate that labour power into labour. The ensuing prerogative of management comes to be seen as (i) an inherent right which cannot be disturbed by workers who have not contractually managed to do so, (ii) as a right which cannot be derogated from by the adjudicators who administer collective agreements and, (iii) which cannot be interfered with by a state which, in other jurisdictions with different understandings of the labour-capital accord, would inhibit employers to a much greater extent from using their private property power to browbeat workers by threats of, or by actual, deinvestment.

D. The Centrality and Significance of Law

A major consequence of making private contract/private ordering the central intellectual and ideological construct of the collective bargaining institution is the importance that this gives law. 

\[49\] While layperson language may reflect a lack of sophistication, nonetheless it is interesting to point out that, regardless of how much theorists, especially legal theorists, rebel against the notion, everybody else speaks of a collective agreement as a "contract" in Canada.
The ideology of absolute private property and of freedom of contract between juridically equal people is primarily propagated and effectuated through the legal system. In a context of legalistic industrial relations this means that ideas fundamental to the maintenance of capitalist relations of production are hidden from view but, nonetheless, solidly embedded.  

Questions such as what it is appropriate to bargain about become legal questions, depending for their answers on criteria such as what is "reasonable", "good faith", or "economic" (as opposed to "political") bargaining. All these "criteria" or "principles", in turn, get their meaning from unreferred-to criteria which are based on the sacrosanct, almost absolutist, nature of property as presently understood in law. For instance, labour jurisprudence has developed which makes it an unfair labour practice for an employer to shrink the bargaining unit size, that is, to get rid of unionized employees, if his reason for doing so is anti-union animus. On the other hand, it is perfectly acceptable to get rid of unionized employees if such diminution in bargaining unit size is attributable to the promotion of the employer's economic (read private property) welfare. While discretion is given to interpreters and administrators in these cases, what is clear is that the need to protect the concepts of private property/private contract remains the basis for such decision-making.  

Similarly, disputes as to whether organization can take place on an employer's private property or during the employer's productive time are resolved by legal holdings that such union activity can only take place if the employer has given permission for this. That is, the employer's fundamental property rights are to be preserved and, not incidentally, his right to keep on maximizing his profits. Again, the right of workers to protest, to picket, to combine with other workers and people, are all shackled by legal

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51 Organization may take place on an employer's property where there is no alternative available at all, for example, a logging camp or a ship. It is this kind of "breakthrough" which permits legitimators of the system to argue that property rights are no longer absolute and that our industrial relations systems do not particularly favour employers.
rules which support and replicate property rights, such as trespass rules, or the rules which determine whether or not there is a legal integration of the property of various employers (the rules relating to the ally doctrine), or the rules developed in respect of the right of every individual to be left alone in her or his commercial life in order to pursue her or his contractual and proprietary sovereignty (the labour torts).

Because the law claims to protect all individuals equally by upholding property and contractual rights, many of the fetters put on collective workers' actions are perceived by the community as natural and legitimate. Trade union activity which strays beyond these legal boundaries is easily branded as unacceptable and worthy of repression. Unsurprisingly, the first part of any description of an ongoing labour dispute is a statement as to whether or not the union is as yet in a legal strike position, or whether or not an ongoing strike is itself legal or whether or not unfair labour practices (that is, illegal practices) are engaged in by any of the parties. The question of whether or not demands are just is always secondary in any media discussion of industrial relations disputes. This, of course, was the essence also of the private contract of employment regime under which the overtly anti-working class judiciary developed the rule that no outsiders—in particular no state institution such as a court—should be permitted to determine whether or not the terms of a contract of employment were immoral, oppressive or unacceptable which, in point of fact, they nearly always were.

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52 Examples of this are legion. When this was first being written, *The [Toronto] Globe & Mail*, 10 October, 1985, reported that the newly elected leader of the Parti Quebecois, Pierre Marc Johnson, had publicly stated that, while in the past the Parti Quebecois had allowed a good deal of leeway to unions, under his reign, while he remained supportive of the rights of trade unions to make legitimate demands, he would not tolerate the illegal kind of disobedience of the law in which, at that time, ferry workers were engaging. While the rhetoric is not significant for its content, it is significant for its tone: it is obvious that a politician who is seeking popularity believes that it is important to stress the difference between a legal and illegal strike. Similarly, Newfoundland's politicians who sought to build public support for their stand against striking public servants emphasised the illegality of the strike. Since this article was written, British Columbia politicians, faced by massive opposition to new restrictive labour legislation, made as much as they could out of the fact that the opposition took the form of illegal strikes. Woefully, such attitudes by politicians are notorious.

53 I have made the supporting argument for this assertion elsewhere; see Glasbeek, *supra*, note 39.
A major effect of all this is that lawyers have come to play a disproportionate role in the administration, application, and the description of the scope and understanding of the major industrial relations institutions. Legal theorists, in particular, have come to carry the flag for the existing collective bargaining mechanisms. By arguing that the new collective bargaining regimes are fundamentally different from the previous individual contract of employment ones, they have sought to emphasize that a new dawn has come. In particular, they have stressed that, inasmuch as the outcomes of collective bargaining and some of the practices may look very much like contractual arrangements, they are different because they allow workers to participate more and because they severely reduce the "natural" prerogative of management which used to exist and, perhaps most importantly, that even though the major activities of trade unions seem to be concerned with the making of economic gains, the institution of collective bargaining has given workers a new dignity and justice which, when it is put together with the accretion of rights in the civil sphere, has enhanced their status as real citizens in our societies.\(^5\)

I have sought to critique these arguments elsewhere.\(^5\) Here it suffices to note the kind of smoke screen which is created. Firstly, the emphasis is on the fact that collective bargaining creates a semi-autonomous form of government, one which is not dependent for its working and outcomes on the activities of non-participants. Secondly, the argument says that it is not only true that real gains can be made by relying on this modified kind of private ordering, but also that the limitation put on collective workers' activity, in the sense that it is not to be used in the public/political sphere, is not a serious handicap. "Political" rights at the work place are evolving satisfactorily and workers have political rights as citizens to alter state policies which affect them. This latter kind of argument hides the fact that overall state-capital-labour accords are likely to continue to be made in much the same kind of political power

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setting that they were when the much maligned individual contract of employment regime was the centrepiece of formal labour relations institutions. This is so because capital still has the same power that it always had: as well as participating in the public/political sphere, it can always threaten a capital strike. That is, capital remains as unfettered as it always was and this becomes a real problem as capital becomes ever more concentrated. Labour, however, must find a way to express its collective wishes without being able to utilize, directly, the new power it had won, namely its power to use the strike as a legitimate weapon. This means that penetration of the state by labour is likely to be very limited. In this context, in a state which is no longer primarily interested in linking high wages to high productivity to achieve economic growth — if it ever was — labour is at a serious disadvantage.

The history of World War II developments suggests that labour was to be given new and real power. The form that the grant of that legitimation took made that power illusory because:

(a) It fragmented trade union power internally.
(b) It separated trade unions from one another and made them potential competitors as an increase obtained by one group of workers in an oligopolistic sphere might have to be paid for by other workers.
(c) It separated trade unionists from other workers in the same way. As it is the workers outside the collective bargaining spheres who need most assistance from the state, whereas trade unions have the least need for state intervention, there is no natural incentive for those within the collective bargaining world to protect those outside it by using their muscle to get the state to universalize better floor rights; indeed the opposite may be true.


In part, that form led to more fragmentation than might have been expected because of the referred-to 1925 judicial decision to provincialize jurisdiction; see Toronto Electric Commissioners v. Snider, [1925] A.C. 396, and text accompanying supra, note 41.

While this is not the place to detail it, there are allegations that trade unions in North America have opposed basic employment rights, such as the AFL-CIO's opposition to a minimum wage law or trade unions' resistance to better protection against unjust dismissal for unorganized workers offered by the Canadian government.
(d) The new collective bargaining scheme was posited on a competitive model of capitalism in an economy in which capital was immensely concentrated and continues to be so, making the claim that countervailing power had been created by the one employer/one local bargaining schemes a very distorting one.

(e) The economic-political spheres were separated effectively so that, should the state ever want to change the context in which collective bargaining was to take place, or to interfere directly with a particular bargaining situation, it was always in a position to do so.

(f) This potential was enhanced by the provincialization of the industrial relations schemes, which made it even harder for centralized, economic collectivism to be used effectively in a political manner, especially vis-à-vis a recalcitrant state (a provincial one) egged on by local, rugged-individualist type enterprises. This meant that regional, cultural, political differences and disparities were likely to be accentuated.

(g) The legal-ideological climate in which collective bargaining is to take place has always permitted an argument to be made that the making of collective demands was a privilege which ought not to be abused. Again, this facilitates state intervention whenever abuse of the privilege, either by unions exceeding the legal kinds of boundaries which exist or by their insistence on too stringent an application of their legal rights, endanger the innocent public’s interest, as that public interest is defined by the state which wishes to intervene.

(h) The role of the state as a supposed neutral which promotes trade unionism for this kind of collective bargaining and which is there also to protect the rights of individual employers and individual employees, means that the state has been given the right to determine such issues as what kind of organization will be permitted and what amount of collective power individuals should be given.

(i) Given that the legal-ideological climate in which these institutional arrangements have been shaped is one which is really only a revised version of the one which repressed trade unions so

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efficiently throughout the nineteenth and early twentieth century, it follows that the rules which belonged to that previous era were never totally abrogated. They are there for certain state agencies – in particular courts – to use whenever repression of working class interests is called for.  

(j) The technocratic, fragmented trade union movement which has developed within these regimes is consequently wedded to the restricted nature of an inward-looking focus, one aimed at economic, localized self-advancement. The trade union movement's legitimacy depends on accepting the fetters which restrict it in this way, in particular, an acceptance of the role of the state as a supposed neutral and agenda-setter. Trade unionists have been made to feel more sanguine about accepting their shackled role because they are surrounded by apparently well-meaning propagandists who keep on asserting that "free" collective bargaining devised in North America is the best of all possible systems because it permits economic gains, semi-autonomous government, free from intervention by the state and judiciary (the "real" enemy!), and gives them a great deal of political advancement.

All of this means that, if the Canadian state wishes to contain labour's demands, it is in an ideal position to do so. The argument here is that it does just that whenever the logic of export-led growth leads to a disinclination to use anti-cyclical economic policies because these would be out of step with the staple-led growth phenomenon. In that context, with the state seeking to attract foreign capital as well as investment from local capitalists, there will be a frequent need to dampen the aspirations of the working classes in Canada. As the state is in a position to do just that, it should be anticipated that it will do so.

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60 This is the importance of the recent Supreme Court of Canada decisions in the trilogy of "right to strike" cases, brought down after this paper was written (Reference Re Public Service Employee Relations Act (Alta.) (1987), 87 C.L.L.C. 14,021; Public Service Alliance of Canada v. The Queen in Right of Canada (1987), 87 C.L.L.C. 14,022; Retail Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Government of Saskatchewan (1987), 87 C.L.L.C. 14,023) and of Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd, [1986] 2 S.C.R. 573. While theorists ponder the intricacies of the arguments and their import for Charter applications, the net result is the retention and perpetuation of anti-union doctrines developed in the nineteenth century.
VI. THE RHYTHMS AND CADENCE OF CANADIAN LABOUR RELATIONS FROM AN "INDUSTRIAL RELATIONS AS A MECHANISM OF ADJUSTMENT" PERSPECTIVE

Near the end of World War II there was an outbreak of major strikes by trade unions who had only just recently won Wagner Act-type rights in 1944. The war time restraints were still in place for two years after the war but, eventually, trade union militancy led to a series of new structures and patterns being set. By the 1950s there was a boom in export-led growth as resources were in high demand. This was so because, as we have noted, the European community had recovered somewhat and was in a position to purchase goods. Canada also had obtained some favourable tariff agreements and, in addition, the American economy had identified Canada as one of its main sources of resources. It was in this period that the pattern which exists today in respect of collective bargaining and trade union development was founded. As has already been pointed out, trade unionism grew to just slightly over 30 percent of the work force and this figure remained fairly constant until the early 1960s and, as we shall see, even when it grew a little more, as it has over recent times, this did not denote a staggering change in the density of unionization.

Even at this stage of development, when state policies seem to be straightforward enough in their promotion of a particular kind of collective bargaining, the state was already exercising all the control it could in respect of the kind of unionization it wanted to see promoted. The story has often been told and will not be detailed here. By way of example, I just refer to the fact that the communist and militant national trade union, The Canadian Seamen's Union, was permitted to be ousted by the Seafarers

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61 See H.A. Logan, State Intervention and Assistance in Collective Bargaining: The Canadian Experience 1943-1954 (Toronto: University of Toronto Press, 1956), who argues that, as the end of the war neared, all labour activists were interested in whether the compromise struck during the war was to persist after it and thus they were enticed to chance their arm. In addition, of course, they were very well aware that their new rights had been granted not only because war time production needed to be uninterrupted, but also because the CCF was showing signs of gaining strength and something had to be done to counter its forward progress. See also Stuart Jamieson, Industrial Relations in Canada, 2d ed.(Toronto: MacMillan, 1973).
International Union, an American union, led by business unionists intent on corruption rather than worker protection. Indeed, it is fair to say that the Seafarers International Union was given leeway by the immigration authorities which permitted its felonious leader to come into the country. Various labour relations boards found that communist-led unions were not real trade unions. The Seafarers International Union's cause was further boosted by employers who were eager to break legitimate collective agreements they had with the Canadian Seamens' Union to enable them to enter into bargains with the foreign interloper. Eventually, as is well known, after the Canadian Seamens' Union had been safely ousted, the state declared itself to be outraged by the Seafarers International Union's corrupt practices and, after an inquiry, it was put into trusteeship. It is a dramatic illustration of how the state, through its various agencies, was perfectly willing to manipulate the rules in order to get the kind of unionization that it wanted. A somewhat less celebrated story is found in the co-operation the United Steelworkers of America got for its ousting of the Mine Mill Union, which was a much more militant and politically conscious union than Steel was. This particular battle had a great effect on the history and potential of the CCF.

At this stage, nonetheless, the industrial relations system could be said to be advancing workers' interests and to fit in with a general acceptance of the idea that labour rights should be recognized and that increases in wages were not only possible, but tolerable, in large part because they helped to improve aggregate consumer demand. That is, it was possible to say that the kind of compromise which had been struck with labour was of a similar kind to that which seemed to have been developed in the rest of the industrialized world. But, while workers did make gains in the early 1950s, after difficulties in the late 1940s, the expansion of the economy in the early 1950s which permitted this was, after all,


By the mid-1950s, perhaps even earlier, this post-war boom in resource export was already slowing. Anti-cyclical economic policies would have called for stimulation as the favourable export conditions were fading, but given the nature of export-led growth, it was also a period during which consumer demand and private and public indebtedness was inordinately high. The government, worried about the rising nature of inflation, determined to adopt monetary restrictions rather than fuel the economy. Eventually this monetary squeeze was supported by some fiscal restraint and, inevitably, led to a slow-down, indeed a rather lengthy recession which lasted from 1957 until late 1962. In the result, workers' gains during the late 1950s were minimal.

When the monetary restraints were finally lifted and the value of the dollar artificially was fixed below the American dollar in value, as well as the contemporaneous promotion of some fiscal expansion, trade unions were able to take advantage of their collective power in order to catch up on what they had lost during those six or seven lean years. They became remarkably militant. They were aided by the fact that major gains were made in the economy through the advent of the Autopact, increased oil sales, and two large grain deals with the USSR. There was a huge increase in the number of strikes, many of which were unauthorized wildcat strikes (often induced because workers found themselves locked into two or three year agreements when they felt they needed, and could achieve, an immediate change). The increased incidence of strike

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64 It may be pointed out here that gains were not obtained without struggle. There was an increase of strike incidence over the decade of the 1950s, as reported by Stuart Jamieson, Industrial Relations in Canada (Toronto: MacMillan, 1973). He also reported that there was serious violence from time to time, as at Murdochville in 1957, and that there was some vigorous repression of strike activity by the state, for instance, when rail workers were ordered back to work in 1950. Gains were not handed over on a silver platter, but at least a platter was available.

65 Wolfe, supra, note 25, indicates that this policy may have been the result of the pressure exerted by the then governor of the Bank of Canada, Mr. Coyne.

66 All this took place after the fall of the Diefenbaker government in 1962.

67 There were, of course, many other reasons for the strikes than just purely economic ones. For instance, the work force was a much younger one, which had not experienced a depression directly, and was much more optimistic (and therefore, insistent) about the good life that it could and ought to have. Further, it was a better educated work force which did not
activity was so great that, in Ontario, a commission on the use of injunctions was established. The commission had been set up because employers were using the state mechanisms to fetter trade unions. In particular, as strikes increased, Ontario employers were going to the courts, their old allies, to ask them to order workers to stop doing irreparable damage to their business by inducing breaches of contract. These orders were granted in increasing numbers by Ontario lower level courts, often without hearing any evidence from trade unions. The commission eventually recommended that these practices should be stopped. In the end, an amendment to the *Judicature Act* was passed which made the obtaining of *ex parte* injunctions much more difficult, but not impossible. This point is made to show that although the state can be responsive to working class demands, that although here it was necessary (if it were to do more than just give lip-service to its much publicized positive attitude towards collective bargaining) to do something to curb the employer-led revival of despised common law doctrines, the state is always willing to keep embedded within the law those very precepts which have helped contain the collective power of labour over the centuries.

Similarly, the federal government faced with this upheaval in Canadian industrial relations set up its own task force, the Woods Task Force. This task force reported that there was a sad lack of acceptance by individual employers of the collective bargaining system but that, given a chance, the system could do a good job for both the economy and society. What is of interest here is that there was no pretence by that commission that this would lead to the betterment of distribution of wealth or income from a worker's

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69*Supra*, note 48.
perspective, but rather the emphasis was on the fact that, if capitalism knew what was good for it, it would accept the scheme because it created stability in production. The argument was that disruption was sometimes regrettable but, given the scheme, it was containable and in the long run a means by which to dampen fundamental conflict because it acted as a catalyst and a catharsis.

Indeed, the commission was frank enough to argue that the real objective of the collective bargaining system is to provide "a means of legitimizing and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship" by the creation of a web of rules which would lead to a shared ideology.

What is interesting about this is that these theorists and practitioners held fast to the belief that continuation of the scheme would lead to a shared ideology and, eventually, to a stable enough set of relationships, during a period when the tremendous outbreak of union militance had raised serious doubts amongst politicians as to whether this could ever be true. Yet, as has been stressed in this paper, the liberal ideology which helped sell the scheme (particularly to unions) had its impact on its perpetuation, even when to the public it no longer seemed to serve its overt purposes. A good illustration of this is found in the following passage, written by a couple of men who then went on to detail the state of chaos in employer-union relationships in the 1960s and how much legislation and labour relations board activities had been necessitated by these disruptions:

"I am not a Marxist," said Karl Marx when some radicals justified their idiocies on Marxist thought. If he were alive today, he would repeat this remark. Many premises of his theses have been proven wrong in that the injustices toward labour that he justly complained about are now largely corrected. When he insisted in the Manifesto of the Communist Party, "the history of all societies is the history of class struggles," he had not foreseen the increasing identity - not only in interest but also in person - of labour and capital in the modern industrial states of Western Europe and North America. Capital today is gradually shifting from the hands of a limited few to those of the many; the labourer is slowly becoming a capitalist himself, and

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70 See paragraphs 376-381 in which the commission frankly said that all collective bargaining probably did was to change differentials between certain sectors of workers, but not as between employers and the working classes.

71 See ibid. paragraphs 392-403.

72 Ibid. paragraph 291.
those who control corporate business are assuming the status of employees. Although some unfairness is still evident, wages and dividends today belie the contention that capital exclusively appropriates the product of total social labour. More significant, Marx had gravely underestimated the willingness of democratic society to recognize the injustices and to remedy them, not by a political upheaval, but by accommodation. Labour is no longer the serf of capital, neither is it the ward of a welfare state.... labour relations problems no longer involve struggles for basic principles; rather, they are bilateral experiments to realize accepted principles in a relationship that, by its very nature, requires timely and constant adjustment. These kinds of problems will always be with us for changing events dictate fresh assessment of relations. What is necessary today is imaginative leadership in capital, labour and government to avoid disputes that are bound to benefit no one but likely to hurt the public and the economy.

This notion that industrial conflict could be contained to manageable size if there were only real adherence and allegiance to the principles of the existing industrial relations policy was also put forward by some of the most sophisticated observers during the same period. Crispo and Arthurs,74 having analyzed the many reasons as to why there might be conflict, argued that the trick was to make unions more responsible and thus to have them help employers manage workers. To this end, workers had to be given their head sometimes:

As never before unions and their leaders are functioning as managers of discontent. Their constraints are more rigid and inflexible, their mandate more tenuous, than is generally appreciated. They need a reasonable freedom from external pressure if they are not to become entirely the mere messengers of the discontented. Thus, if union leaders are to do what is responsible in the long run, they may have to do what seems irresponsible in the short run, or the membership will depose them.75

The story, so far, does not show, by itself, that industrial relations was being used by the state as a means to chart its major economic course. It does, however, show two things. Firstly, that there were in existence, at all times, despite the radical changes

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74 J. Crispo & H. Arthurs, "Industrial Unrest in Canada: A Diagnosis of Recent Experience" (1968) 23 Rel. Indus. 237.

75 Ibid. These last ditch cries to streamline the existing industrial relations' system, rather than to abandon it, so that a private ordering scheme, relatively autonomous from macro-political economic considerations could be maintained, had its most tangible result in the 1973 British Columbia Labour Relations Code, R.S.B.C. 1979, c. 212. As we shall see, the spirit of liberal pluralism which inspired this piece of reform was no more capable of withstanding the logic of export-led growth policies than were the other industrial relations regimes in Canada.
which World War II seemed to bring, instruments of containment of working class aspirations which were not all that dissimilar to those which had been used prior to the advent of the modern collective bargaining system. Secondly, that throughout the new period labour has been forced to seek betterment primarily by private ordering means rather than by reliance on the public sphere, that is, than by reliance on its influence on the state. In respect of this point, however, it is to be noted that the state nonetheless was, during these relatively buoyant times, able to give life to the general plan, devised during the latter part of the war, both to promote growth by exports while enhancing consumer demands and to provide a reasonable level of social welfare benefits. Remember that it is during this period that most of the social welfare net was put in place. But, the vagaries of an export-led growth economy were catching up with the policy-makers and their true hand was soon to be shown.

By the late 1960s, inflation was on the rise again. Restrictive monetary policies were introduced, accompanied by restraint in fiscal policies. Indeed, voluntary price-wage restraints were called for in 1969-1970. It is pertinent to note here that it was then that, for the first time, Canadian wages had reached parity with United States wages. It is at this point, therefore, that we can expect to see some real state disaffection with the existing industrial relations policy. To return: these policies of restraint led to heightened interest rates, which led to an increase in capital inflows and currency appreciation (assisted by the existence of a good market for exports). All of this created good trade balances. Inherent in the situation, however, was the threat that the high currency values would undermine the potential for export of resources. The government thus switched course and lifted its monetary restraints. By then, however, the earlier restraints had created a good deal of unemployment.

The government, worried about the political effect of unemployment, liberalized the unemployment insurance entitlement schemes at this stage and, by and large, introduced some stimulatory

76See H.A. Logan, supra, note 61, for the relative wage rates for the early part of the period and see also a report prepared by A.A. Porter et al. for The Wages Research Division of The Economics and Research branch (Ottawa: Dept. of Labour, 1969).
fiscal policies. This was done while the demand for, and price of, Canadian resources remained high. In the economic expansion which followed, inflation rose again. When the 1974-75 recession hit Canada, its policy-makers were faced with some intractable problems as a result of these sequential policy measures. In particular, near the end of the early 1970s boom, trade unions had got themselves into a position where they were aggressively trying to catch up, after their pause in gains in the period 1969-1972. Once again, the incidence of strikes increased. Consumer demand was very high, leading to importation and all the difficulties that created for the Canadian economy, specifically, inflation. Canadian policy-makers needed to dampen this tendency, but had very few tools to do so because, by now, it was clear that much of the inflation was induced by branch plant behaviour, as previously discussed. As this source of inflation could not be tackled by domestic Canadian measures and something had to be done about the fact that, with the onset of the recession, trade balances were once again looking very bad, policy-makers gave up all pretence of following anti-cyclical Keynesian policies. Rather, they chose two other options. The first was to use monetary policy to counter inflationary pressures and to enable them to control the debt which was increasing as a result of the large influx of imported capital. The other was to dismantle the opportunities for the working classes to make gains. The way that this latter policy was sold was to argue that Canada was to be made attractive for capital investment by making it more competitive, in effect, by squeezing labour. The latent ability of the state to intervene if it became necessary was now to be made patent. While the language of industrial relations remained the same, a revolution took place.

The most obvious intervention was the introduction of the federal Anti-Inflation Board legislation in 1975. The stated purpose was to contain inflation. Of course, its real intent was to restrain

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77 A study done by R.S. Letourneau, *Inflation, The Canadian Experience* (Ottawa: Conference Board of Canada, 1980), found that the major source of inflationary pressures experienced in Canada during the 1970s was the practice of non-competitive importing by branch plant operations. The author showed that more than 40 percent of inflation in Canada during the 1970s had its origins outside Canada.

78 *The Anti Inflation Act, S.C. 1974-75-76, c.75.*
labour. The story is well known and only three points will be made here. Firstly, despite overwhelming evidence that wage push was not the major cause of inflation,\textsuperscript{79} and despite the fact that the state claimed that, in its usual neutral way, it would constrain both prices and wages, wages were far more severely restrained than prices.\textsuperscript{80} Secondly, it was clear that the legislation was antithetical to any notion of private ordering. To overcome this, much was made of the fact that the "emergency" made this an acceptable, temporary supervision of the reign of a semi-autonomous scheme of industrial relations. But, the government did not in fact prove that there was anything like an emergency. The Supreme Court of Canada, another state institution, when asked by unions to set aside the wage restraint legislation because there was no constitutional basis for it, found that it was valid legislation because it was a proper response to an emergency. It held that this emergency could be assumed to exist because the government had a rational belief that there was one! Interestingly, as it happened, one of the chief architects and proponents of Canada's version of collective bargaining was the Chief Justice presiding over that court.

Laskin, C.J., upheld the attack on the system he idolized and idealized while lamely claiming that collective bargaining had not been totally abrogated because parties could still bargain about non-wage issues. It is a very instructive, albeit anecdotal, illustration of how shallow the commitment to pluralism really was in Canada. The third point to make is to underscore the importance of the fragmentation of labour power and of the effect of the split between the economic and the politic which is so deeply embedded in the industrial relations system in Canada. It is to be remembered that part of the argument in this paper is that the trade union movement

\textsuperscript{79}See the earlier point about the importation of inflation and also see the brief by the leading economists in Canada put together by Richard Lipsey, offered in evidence in the Supreme Court of Canada in the \textit{Anti-Inflation Reference}, [1976] 2 S.C.R. 373, which is to be discussed below. This brief, which was submitted as an appendix to the factum of the Canadian Labour Congress, made a strong case to the effect that inflation was not a serious problem and that in any event, it was not wage-led. The Supreme Court accepted the admissibility of this evidence and then, by legal manoeuvres, discarded it from its considerations.

\textsuperscript{80}See S. Jelly, "Effect of Wage Controls on Collective Bargaining" (1981) 3 Can. Tax'n: J. Tax Pol'y 90 at 91, citing the Conference Board of Canada to show that wages were reduced by 7.7 percent by the controls and that corporate profits before tax were 9.2 percent higher than they would have been in the absence of the controls.
has accepted this separation of the public and the private. Thus, when the trade unions wanted to indicate their opposition to the anti-inflation legislation they were forced to call for a Day of Protest. What they, of course, wanted to do was to use their economic power for political purposes: they wanted to call a general strike. Both their mindset and their fear of reprisals against such use of economic power led them to disguise the issue by calling it something else and by not being very vigorous in their support of it.81

Panitch and Swartz82 have shown that there has been a steep increase in back-to-work legislation over time. The rate of increase has risen dramatically since the mid-1960s which, of course, fits in with the theme of this paper. The imposition of back-to-work legislation is always a clear indication that the state is willing to intervene in the private ordering system when its sense of public interest is endangered. There are two additional points to be made. The first is that "the public interest", or "the rendering of essential services" as it is sometimes referred to, has had an enlarged definition as direct attacks on collective labour relations have intensified; for instance, see the recent British Columbia and Alberta legislation to this effect.83 Note also the fact that the decision as to whether or not to make an industry or service essential is often made after the parties who believed that they had every right to

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81 While this is an indication of the parlous state of politicization of the Canadian labour movement it is important to note that it is not simply the result of lack of backbone by trade unions. Quite a number of employers sought to inflict and impose damages and discipline on workers who responded to the call for a strike against the AIB. It was relatively easy for them to do so because of the claim that striking workers were in breach of collective agreements when they used their economic power for political purposes. Only in British Columbia was this avoided by a labour relations board holding that political demands did not constitute a trade dispute and that, therefore, the labour relations board was not in a position to make cease and desist orders; see generally P. Weiler, Reconcilable Differences; New Directions in Canadian Labour Law (Toronto: Carswell, 1980) at 57-60. As we shall see, this was to rebound on the British Columbia labour movement when it participated in Operation Solidarity. Meanwhile, it underscores the fact that, at bottom, everybody is always conscious of the separation between the economic and the political.

82 Supra, note 1.

83 See, Essential Services Disputes Act, R.S.B.C. 1979, c.113 (enacted S.B.C. 1977, c.83 and S.B.C. 1978, c.42, s.11) which gives government the power to declare services essential; Public Service Employees Relations Act R.S.A. 1980, c.33, s.93. (enacted S.A. 1977 c.40 s.93); and Police Officer Collective Bargaining Act S.A. 1983, c. 12.05, s.3(1); the latter two acts prohibit strikes.
bargain to impasse, have bargained to impasse. There is, then, in some sectors of the economy always a possibility that organization, militance and costs incurred in pursuit of it, may be for nought. This may very well have a chilling effect on the bargaining postures taken by certain unions.

This point is related to the second one I want to make. Gradually, back-to-work legislation has changed in character as the state's attack on the industrial relations system (still described as a private ordering one, a theology to which the state continues to claim allegiance) mounts in intensity. In cases in which workers are ordered back to work there is usually a provision that they shall go back to work first and a settlement will be put in place later by a neutral tribunal. Now, it will be noticed that the state's stated goal of maintaining services in the public's interest will be served when services begin again. There is little doubt that workers would go back to work if they were given everything they had asked for, leaving it to a neutral assessor to rule, at some time in the future, that they might have to give back some of the gains they had just obtained. But, it is never done that way. Workers are ordered back on terms which, as a result of their legitimate claims as private ordering/freely contracting parties, they had every right to refuse. While individual employees can refuse, legally, to obey a back-to-work order because they want to exercise their legal right to refuse certain conditions of employment, employees cannot do so as a combination, as a union. The only meaningful way of protesting against back-to-work legislation is, therefore, denied to them. In theoretical terms, then, being ordered back to work is not slavery but, in practice, it is awfully close. The supposed commitment to a new industrial citizenship does not look very good from this vantage point. Recently, this has worsened. Arbitrators have been told that when settling a dispute of this kind they ought to be bound by the state's directives as to what is an appropriate settlement. And, even more recently, the government had arrogated the power to set terms in this kind of dispute by regulation.\textsuperscript{84}

\footnotesize{\textsuperscript{84}Panitch and Swartz, supra, note 1 at 45-46, have a full discussion of such measures. Recently, the Quebec government, when faced by large scale upheaval in its public sector, set the conditions by decree for all of the public sector, including a lowering of wages, (An Act Respecting Remuneration in The Public Sector, S.Q. 1982, c.35).}
The wilful overriding of collective labour rights which takes place through back-to-work legislation and orders of this kind, is legitimated by the state by claiming that it acts on behalf of the whole of the electorate, whereas trade unions are merely sectoral interest groups who must not abuse the privilege they have been granted to pursue their narrow economic interests. The handicap fragmentation of labour, its economism (imposed by the system) and its lack of penetration of the state imposed when the state decides to use the containment of labour as a major policy instrument, now becomes even more manifest.

The most pervasive part of the onslaught on collective bargaining since 1975, that is, since anti-cyclical policies have been found to be unworkable in an economy which relies on export-led growth and imported capital, has been the spread of income restraint legislation. The ball was set rolling by the federal government with its 6 and 5 legislation in respect of its own public sector.\(^8\) As Panitch and Swartz have recorded,\(^8\) all the jurisdictions have passed restraining legislation, in one form or another. Some of them are more draconian than others. What is of interest here is the nature and intent of these statutes.

First, one must examine their nature. Principally, these statutes are directed at the public sector, that sector which the state controls directly. The argument justifying this is that the state should restrain its own expenditures. This, of course, means a reduction in the number and quality of services it will render, adversely affecting the social welfare net which it has created. This is a further indication of how, when it is decided to abandon Keynesian measures, this can be done directly by reducing spending and indirectly by using industrial relations policy to attack the wages

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8. In addition, the Quebec government recently has passed "an Act to ensure that essential services are maintained in the health and social services sector" (S.Q. 1986, c.74, in force November 11, 1986). This act kept transit drivers on the job through rush hour during the 1987 transit strike in Montreal; that is, striking was permitted, but only when it would not have too much effect.


8. Supra, note 1. Not only do they provide a good summarized account of the contents of all these pieces of legislation, but they provide a most useful appendix, giving citations and chronology.
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and security of government employees. Second, the state always claims that it is entitled to do as it does because collective bargaining is really a mechanism which protects sectoral economic interests, and that, therefore, it ought not to be used to shackle the political prerogatives of the state.\textsuperscript{87} The separation of the private from the public, of the economic from the political, which is so deeply embedded in what was once thought to be a pro-labour set of industrial relations institutions, now can be seen to serve its purpose.

Turning to the intent of such legislation, the motivation in large part is to set a pattern for private sector bargaining. The idea is that this will create an industrial relations climate in which employers will be encouraged to face down employees, already frightened by huge unemployment, the introduction of new technologies, and the possibility of a deal on free trade which, to them, means further integration into the U.S. economic system, an integration which so far has proven to have cost them dearly. That the demonstration effect to the private sector is one of the major purposes of public sector restraints can be gauged from the candid argument offered by the government's lawyers when the Public Service Alliance of Canada challenged the constitutional validity of the 6 and 5 legislation. The union argued that the legislation did not constitute a reasonable limitation on its fundamental freedom to associate. The government had to prove that it was such a reasonable limitation and, in order to do so, it admitted that, while there was no particular reason to believe that federal public servant wages were the vanguard of the inflationary spiral which had to be contained, the economic situation in the private sector was one which required attention. Therefore, the argument made was that the legislation was meant to be symbolic; it was meant to demonstrate the need for restraint to the private sector.\textsuperscript{88}

\textsuperscript{87} This was guilelessly revealed by the lawyers who appeared on behalf of the government when it was prosecuting Jean-Claude Parrot in respect of what it had declared to be an unlawful strike. See \textit{R. v. Parrot} (1979), 27 O.R. (2d) 333, 51 C.C.C. (2d) 539 (C.A.). Leave to appeal to S.C.C. refused 1980, 27 O.R. (2d) 333n, 106 D.L.R. (3d) 296n (S.C.C.). Counsel for the government told the court that the issue before it was a simple one: Who ran the country, the government or Parrot?

In this paper, in which the intent is to show that the industrial relations system is used as a mechanism of adjustment by the state, it is pertinent to know that the state was thus able to say that it favoured collective bargaining, that it did want to continue to treat it as a relatively autonomous institution but that nonetheless it would like to see outcomes of a particular kind result from such collective bargaining. That is, it could pursue its interest in rolling-back labour demands as part of its macro-economic policies while paying lip-service to liberal pluralism and to the pretence that it wishes to treat labour as a real partner in economic-decision making.

At this juncture, we can refer back to another one of the points made about the inherent weakness of organized labour in Canada. I refer here to the effects of the provincialization of the industrial relations systems and the fact that each province with a resource-based economy follows its own export-led growth policies. Since the middle-1970s, these provinces have encountered difficulties similar to those of the federal government and have attacked them in much the same way. For instance, Alberta’s oil-based economy created very little manufacturing industry. Inasmuch as it created employment, and thereby heightened consumer demand, most of the work was found in construction. Major labour organizations and gains were, therefore, made in that sector of the economy as well as, of course, in the growing public sector as the state supported investment strategies. As catalogued by Panitch and Swartz in their account of recent legislation, the attack was mounted on those very sectors.

In Alberta, the public sector has lost most of its collective bargaining rights and construction companies have been encouraged to set up spin-off corporations which may hire non-union labour. These spin-off companies can bid for the same contracts as the affiliated unionized corporation. The pressure this has put on the construction trade unions has virtually destroyed them. The story is much the same in Saskatchewan and in British Columbia. In 1984 in British Columbia, construction unions lost the right to enforce non-affiliation clauses, that is, clauses which entitled union workers to refuse to work alongside non-union ones. In addition, economic
free zones have been advocated in which non-union contractors can flourish, and the trend continues.89

Finally, note that when public servants were first permitted to unionise, they were never given the "expansive" collective bargaining rights that the private sector workers had been given. Many public servants were not permitted to strike at all,90 many were prevented from making demands in respect of which the state had legislated,91 and many were excluded from bargaining because they were deemed to be essential workers in essential sectors of the economy. Two points emerge from this.

First, the trade union membership growth over recent times is mostly attributable to public sector unionization. Although it is an important development, it is significant to note that it does not involve the same kind of trade union movement as that envisaged after World War II, one which had the right to strike in certain open periods. Second, while paying lip-service to the legitimacy of collective labour power, the state was always careful to ensure that, in the one situation where private, economic demands could not be


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90In Ontario hospital workers, firemen, and police workers were also denied this right. Alberta has adopted a similar approach of late; see generally, Panitch & Swartz, supra, note 1.

91See the Public Service Staff Relations Act, R.S.C. 1970, c. P-35.
differentiated very easily from public/political demands, the impact of the collectivities would be blunted. Again, this tells us how conscious the state has been, and is, of the need to use industrial relations as a restraining mechanism.

Until the late 1960s, it is true to say (and therefore, as we have seen, it was strenuously said by the theorists who propagated the Canadian industrial relations system), one of the central industrial relations state emanations, namely labour relations boards, were favourably disposed towards collective bargaining rights. Certainly, trade unions were given organizational protections by a series of refinements in respect of unfair labour practices and their enforcement. Boards also streamlined certification processes and fashioned remedies against intransigent employers who were unwilling to accept collective bargaining. Indeed, it could be said that the labour relations boards, with their expertise, were committed to establish themselves as neutral facilitators. Nonetheless, while all of this was true, it was also true that these boards understood that their major function was to stabilize capital — labour relations and to contain workers’ power.

One of the central tasks of labour relations boards is the selection of an appropriate bargaining unit; that is, they determine the size and composition of such a bargaining unit. Manifestly, such decisions affect the bargaining power of the parties. While, over time, the processes have taken on a neutral look because they rely on certain well-known criteria, an examination of some of the underlying premisses is revealing. Such an examination shows that it is the employers’ productive needs which provide the basis for most of the criteria used by labour relations boards in the

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92 It is to be noted that major employers, such as, say, General Motors, had accepted the logic and the utility of a stable trade union movement, particularly as it could be made "responsible". Smaller employers, especially localized ones operating at the provincial level, as Pentland has noted, were not so willing to accept the new state of play. They are the ones who seem to fall foul most often of the labour relations board's rules. But it is not always so; establishment institutions such as the banks, Eaton's, K-Mart, provide a counter case. See, Retail, Wholesale & Department Store Union, AFL-CIO-CLC v. T. Eaton Co. Ltd (1985), 85 C.L.L.C. 16,027 (O.L.R.B.); Union of Bank Employees (Ontario), Local 210 v. Bank of Montreal (1985), 10 C.L.R.B.R.(N.S.) 129 (C.L.R.B.); Union of Bank Employees, Local 2104 (CLC) v. Canadian Imperial Bank of Commerce (1985), 10 C.L.R.B.R. (N.S.) 182 (C.L.R.B.); Service Employees International Union, Local 183 v. K-Mart Canada Ltd (Peterborough) (1981), [1981] O.L.R.B. Rep. 50 (O.L.R.B.). In each of these cases the boards found these major corporations guilty of unfair labour cases. Each of the cases is part of a well-established pattern of such conduct by these corporations.
designation of an appropriate bargaining unit. In addition, various boards have made it clear what their objectives are when they are determining an appropriate bargaining unit. They want to promote a trade union which is viable enough to enter into serious collective bargaining but one which is not so powerful that it will inflict real economic harm. Again, while they are eager to show respect for the employees' wishes in theory, they will not permit the fragmentation of an employer's enterprise to such an extent that colluding trade unions could greatly inconvenience an employer's productive efforts. In a similar vein, labour relations boards have had to decide whether employees should be excluded from a bargaining unit because they are managerial in nature. The legislative history shows that, after some initial vacillation, a deliberate decision was made to exclude managers. Further, while lip-service is paid to the idea that workers should be represented by trade unions whenever possible, the routinely applied by boards permit anyone from a foreman on up to be classified as a manager (although there are some exceptions to this). The exclusion of managerial people from bargaining units helps to diminish the size of the bargaining unit, to deny the bargaining agent better-educated people and it helps to enforce both the hierarchical needs of the employer and to bolster the will of jumped-up employees who

93 See R.O. McDowell, "Law and Practice before the Ontario Labour Relations Board" (1978) 1 Advocates' Q. 198, who shows that the Board considers a number of factors: "the nature of the work performed, the skill of employees, the functional coherence of interdependence of work groups, the history of collective bargaining for this group and for groups in similar circumstances, the organizational structure of the employer and the wishes of the employees". Only the last criterion is based on factors within the control of workers.

94 See Insurance Corp. of B.C. [hereinafter I.C.B.C.], [1974] 1 C.L.R.B. Rep. 403 at 407 (B.C.L.R.B.) 43 at 47: "A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur".

95 See CUPE and the Board of Education for the City of Toronto (1970),[1970] O.L.R.B. Rep. 430 at 435-36. Note also that it is fair to say that where there is a region-wide bargaining scheme, as in the construction industry in Ontario, it has usually been created to protect employers from being whip-saved in precisely this manner.

96 The legislative history is summarized in United Steel Workers of America v. Cominco Ltd (1980), 80 C.L.L.C. 16,045.

97 Ibid.
become keen to discharge the white man's burden imposed on them in this way.  

In more recent times, boards — with the help of the legislatures and the courts — have used the same manipulative tools and language which they had previously employed to promote "free" collective bargaining and trade unionism, to help employers in their quest to detooth trade unionism. A few items can be offered to illustrate this:

Item (1) - The Nova Scotia legislature set the ball rolling when it changed the rules in respect of the choosing of an appropriate bargaining unit in the Michelin case. Workers who had secured a majority in one plant were told that, from now on, they would need a majority in both plants of the same employer. This effectively prevented certification of the trade union and allowed Michelin to continue to pay non-trade union benefits in its large plants. The chilling effect of this state policy is obvious. A similar result was reached by the British Columbia labour relations board in the I.C.B.C. case, making organization very difficult.  

Item (2) - When asking for a variance in the designation of a bargaining unit because an employer has expanded elsewhere, it had been the common practice throughout Canada to certify an

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98 See Kootenay Savings Credit Union v. International Woodworkers of American Local I-405 (1976), [1978] 1 C.L.R.B. Rep. 36, in which it was decided that the board could exclude an employee from a bargaining unit if she shared a "community of interests" with management. That is, it was sufficient to show that neither the employee nor management was comfortable with the employee's membership in a trade union. In part, this attitude towards management may explain the fact that Canada has such a high proportion of its labour force engaged in management or supervisory tasks. Nearly 7 per cent of the Canadian labour force is so employed, as compared to 2.4 per cent in Sweden. Most observers put this down to the fact that Canadian management is inefficient and that we are more interested in subjugating our work force than in collaborating with it. But, it may also be due to the fact that we can, by increasing managerial ranks, reduce the effectiveness of trade unionism.

99 See Baigent, "Protecting the Right to Organize", in J.M. Weiler and P.A. Gall, eds. The Labour Code of British Columbia in the 1980's (Calgary: Carswell, 1984) 45. He shows how this requirement (that a union should organize the whole of an employer's organization), was used to foil an attempt at trade union organization in a pulp mill and in a coal mining situation. It was acknowledged by the board in those cases that, in determining an appropriate bargaining unit in this way, it was helping employers to avoid the adverse effects of potential strike activity.

100 Supra, note 94.

101 Supra, note 94.
existing bargaining agent for the additional workers if, in toto, it would still have a majority of employees as its members. This protected existing trade union rights. British Columbia's labour relations board has made this protection a nullity by requiring that a union in such a situation is to obtain a majority in the new unit as well as in the pre-existing one. As, by definition, the two units are really to become one, this means that whereas a simple majority is initially sufficient, it is not so at a later point. The anti-union nature of this is plain.\textsuperscript{102}

\textit{Item (3)} - When American President Ronald Reagan dismissed the Patco workers, he created an outcry in the world, including Canada. Some Canadian air traffic controllers took some supportive action. After a long legal battle, the federal government was able to put a stop to this nonsense by winning the unlimited right to determine which air traffic controllers they could designate as essential and, therefore, unable to use the strike weapon. Indeed, the Supreme Court of Canada ruled that the federal government could decide unilaterally that all members of the unit could be designated essential if it thought this to be a useful decision.\textsuperscript{103} Panitch and Swartz have demonstrated how designations of the kind undertaken in the air traffic controllers case have, with the labour relations boards and the legislatures' assistance, shown a marked

\textsuperscript{102} How deliberately anti-union this decision is can be gleaned from the fact that an existing judicial precedent had to be distorted to make it, and by the fact that a subsequent Canadian Labour Relations' Board decision took issue with the British Columbia board's approach; see Baigent, \textit{ibid.}

\textsuperscript{103} See \textit{Canadian Air Traffic Control Association v. R.} (1982), 82 C.L.L.C. 14,191 [hereinafter \textit{Air Traffic Control}]. This is an example of how Canada often has achieved, in practice, the same kind of draconian results extreme right wing regimes, such as those of Reagan and Thatcher, fashion, without ever having to say that it has abandoned liberal democratic practices. Other such examples include the withdrawing of welfare payments to people on strike, which Canadian governments have always done but which raised a storm of outrage in the United Kingdom when Thatcher did it in the recent coal miners strike. Similarly, the previous federal government removed the "fair contracts" provision which required contractors to pay better than minimum wage rates when bidding on federal contracts. The then minister, Mr. Lalonde, explicitly adopted this stratagem to encourage wage restraints in the private sector, in particular in the construction area, by allowing non-unionized contractors to bid on a competitive footing with unionized ones. Fair contracts provisions have remained untouched, so far, in the U.K. and in the U.S.A.
increase over recent times, in particular in the period during which, as I have argued, Keynesian policies have been abrogated and industrial relations policy has become a major weapon in the maintenance of the export-led economy.

*Item (4)* - Burns Foods Limited was permitted to change its bargaining unit from a national one to province-wide ones by the Ontario Labour Relations Board when this suited Burns' collective bargaining strategies, even though the national bargaining pattern had been long-established and respected by both parties and all the apposite statutory agencies in Canada.  

*Item (5)* - The Ontario Labour Relations Board has, fairly recently, fashioned some forward-looking remedies to keep recalcitrant employers in line. Employers who purported to bargain when they knew that any ensuing collective agreement would not bite very hard because they would be moving their operations away from the site in respect of which the bargaining was taking place have been found to have been bargaining in bad faith because they did not share their knowledge with the union. But, the board never told those employers that they had to stay where they were, which would have granted a real remedy to the bargaining unit members who were likely to lose their jobs because they could not take advantage of the remedies actually offered. That is, the board was very careful, in the end, to respect the economic (read property) rights of employers. Thus, the decisions, although much heralded, did, in the final analysis no more than educate employers in how to do in the future the things they had been doing, but without falling foul of the law. Note that even in the very cases in which these apparently attractive remedies were being fashioned, they were not all that helpful. The *Radio Shack* case illustrates this point. The

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104 Supra, note 1 at 42 where they show an increase in the Treasury Board's proposals to use "designations" to remove the right to strike from public sector workers. Prior to the 1982 Supreme Court of Canada ruling in the *Air Traffic Control* case, *Ibid.*, the Treasury Board proposed to designate, on average, 46 per cent of each bargaining unit; in 1984, proposed designations averaged 75.9 per cent.


initial remedy, much praised in labour relations circles because of the protection it offered unions and their members, was imposed on an employer who had already managed to reduce its workforce by half by the time the dust had settled, thereby rendering the union much less powerful than it had been. Moreover, the labour relations board seems to have retreated. Thus, when the same unit of Radio Shack workers were bargaining for their second collective agreement and failed to win what they sought after a long and bitter strike, they voted to accept an earlier offer made by the employer which they had steadfastly refused to accept for nearly six months. The employer then took that offer off the table and when the employees complained that this was bargaining in bad faith, the board denied their claim.107 Similarly, that same labour relations board has recently strengthened the employer’s hand in the fight to obtain concessions from workers by its decision to permit an employer who had locked out its employees to continue its production with scabs.108 More recently, its interpretation of what good faith bargaining meant sanctioned behaviour by Eaton’s which, in the halcyon days of the 1960s, would almost certainly have been held to be unacceptable. This helped defeat the strikers who were trying to organize this notorious anti-union employer.109

Item (6) - The Ontario labour relations board has recently underscored the fact that legitimate trade unions are not to engage in politics in the public sphere by denying the right of political activists to canvass workers while they are at work. Freedom of speech, freedom of association, and freedom of conviction and belief are to play second fiddle to employer’s property rights and profit maximization opportunities. The wedge between workers as


economic beings and workers in their role as national citizens has thus been made a little bit more effective.\textsuperscript{110}

\textit{Item (7)} - The right to secondary picketing is vital to workers who want to affect the business of their immediate employer. This right has always been seriously circumscribed.\textsuperscript{111} As was noted, the 1973 British Columbia legislation was enacted on the understanding that unions had to be given more collective bargaining powers than had been the case in the 1960s. They were, therefore, given the right to exercise their secondary boycott rights more efficiently than unions had been in other jurisdictions. This right had been rolled back sharply so that, by 1981, it resembled more that prevailing in other provinces.\textsuperscript{112}

\textit{Item (8)} - In British Columbia, the board was a central actor when Operation Solidarity threatened to meld the economic and the political. The board was asked to issue many cease and desist orders, as union after union sequentially went on strike. All those unions which claimed to be acting politically were permitted to continue to strike. This was so because, as was seen in the Day of Protest case\textsuperscript{113}, it had been decided that the labour relations board of British Columbia had no jurisdiction where a strike was overtly political. But, where the strikers were striking in support of another union, as most of them were in the British Columbia upheaval, it was possible to hold them responsible and, therefore, to issue cease

\textsuperscript{110}See \textit{The Adams Mine, Cliffs of Canada Ltd Manager} (1982), 83 C.L.L.C. 16,011 (O.L.R.B.). This is, of course, also the most tangible result of \textit{Re Lavigne and Ontario Public Service Employees Union} (1986), 55 O.R. (2d) 449 (Ont. H. Ct.). Whatever the outcome, the significance of the case is its explicit message that trade unions are only meant to engage in collective bargaining (read private economic ordering), not politics.

\textsuperscript{111}See D. Beatty, "Secondary Boycotts: A Functional Analysis" (1974) 52 Can. Bar Rev. 388; J. Manwaring, "Legitimacy in Labour Relations: The Courts, The B.C. Labour Board and Secondary Picketing" (1982) 20 Osgoode Hall L. J. 274. These writers disagree about the ambit of permissible secondary boycott activity, but not about the fact that there were serious constraints. This was endorsed by the Supreme Court of Canada in its decision in \textit{Dolphin Delivery}, supra, note 60.

\textsuperscript{112}See the \textit{Labour Code Amendment Act, 1984}, S.B.C. 1984, c.24 which also increased the facility for decertifying trade unions and support to non-union construction contractors; remember also the B.C. labour relations board attacks on union strength, discussed in text at note 89. Since then, the British Columbia government has passed Bill 19, supra, note 89, which seems to erode all pre-existing rights.

\textsuperscript{113}Supra, note 81.
and desist orders. The irony of this was that the apparently generous reading renders political action by trade unions legal for the purposes of the governing labour legislation, but made participation in political activity very difficult precisely because it had to be devoid of any economic purposes.

VII. SUMMATION

It has been seen that the commitment to Keynesian economics was never full blown in Canada. In particular, there was no post-war reconstruction of the economy which envisaged that labour would become something like a real partner in the capital-state-labour accords. Rather, there was a granting of a measure of collective bargaining power, which was propagated as being both fair, in that it gave labour real bargaining power — albeit economic and good, because it advanced a pluralist liberalist society. At the same time, the state showed some inclination to provide a real social welfare net. But, when the boom and bust nature of the economy, closer integration into the American economy (which is the largest purchaser of Canadian exports as well as the largest provider of capital into Canada) and a continued weakness of investment in Canada, all made it clear that anti-cyclical policy would not cure the inflation-unemployment manifestations which recurred in the economy, nor the unsettling fluctuations in trade balances which kept on surfacing, the Canadian state began to turn to the more natural policy of supporting capital by shifting the burden of the boom and bust economy to the working classes. It did so by using the structure of the very industrial relations policy which had promised so much to the workers at the end of the World War. It exploited the inherent weakness which existed as a result of the fragmentation of the industrial relations power given to trade unions and by reliance on the cleavage between the economic and the political which enabled the state, while using the language of liberal pluralism and declaring its acceptance of the legitimacy of trade unionism, to act as a direct controller of large segments of the work forces and, by attacking its own workers, demonstrating to the private sector how it ought to behave vis-à-vis labour. In this climate, employers have made the most of rampant unemployment
and generally bad conditions for workers: concession bargaining has become the norm.

Some of the tactics used by employers are relatively primitive, as some of the illustrations set out in the paper show. It is very difficult to speak, as politicians are wont, of any kind of labour-capital compromise which permits labour to hold up its head. There can be no compromise. The oft-heard exhortations to the effect that some co-operative spirit ought to exist between labour and capital are profoundly ironic: they suggest to labour that it should accept a new order, fit-in, become "more flexible" in its demands vis-à-vis capital; yet these are calls which, if heeded, doom labour to defeat. The agenda for a new compromise is one which will make the Canadian working classes victims in the new political economy which will be one of continuing export-led growth and further integration into the U.S. political economic system.

The second limb of the state's role in creating this new world goes hand-in-hand with the attack mounted on workers for the benefit of capital: it is to help capital directly and to entice capitalists to invest in Canada. This is done by implicit guarantees of bailouts should there be large failures, by ensuring low wage cost, and by indirect inducements to capital by a series of tax expenditures, in particular during the period identified as the beginning of the abandonment of the post war compromise.

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114 These are now so legion and so many that they hardly need to be detailed. See M. Trebilcock et al., The Political Economy of Business Bailouts, vol. 2 (Toronto: Ontario Economic Council, 1985). It must be quite comforting for large investors to know that the Canadian state will not let them bear the brunt of any risk that materialises.

115 A recent information bulletin put out by the Ministry of Industry and Trade in Ontario starts off by stating that Ontario is an attractive place to invest in because it has "lower labour costs; in 1983 our average hourly pay for workers in industrial production was $10.53/hr; 36 cents an hour less than the U.S. average; from 36 cents to $3.79 less than the rate in the Great Lakes States adjoining Ontario .... Fringe Benefit costs are 50% less than the European norm and lower than in the United States. .... The minimum hourly wage in Ontario is $4.00. ...." This text is accompanied by dramatic graphics highlighting for foreign investors how "competitive" the Ontario work force has become of recent times. (The pamphlet is available on request).

116 See K.N. Matziorinis, "The Effectiveness of Tax - The Incentives for Capital Investment" (1980) 2 Can. Tax’n: J. Tax Policy, 172. Tax expenditures include accelerated depreciation, corporate tax reductions, and exemptions from tax as well as investment tax credits. The writer shows that the amount of handouts, by way of lost revenue to the state and gains for capitalists, between 1965 and 1975, was 11.2 billion in constant 1975 dollars. From the perspective taken in this paper it is interesting to note that, while there was a lag in direct shifts
Things look very bleak.

of capital during the period 1968-1971, there was a measurable increase in the period 1973-1977, precisely at the time when the attacks on workers began in earnest. The double-barrelled approach used by the state to help Canada's weak capital sector, at the expense of workers, becomes very plain.