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Abstract
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THE MANAGEMENT-CONTROL COLLECTIVE BARGAINING RELATIONSHIP: THREE MODELS

BY ANDREW GOLDSMITH*

This Article seeks to contribute to the theoretical literature dealing with industrial relations and labour law, in particular by addressing the management-control collective bargaining relationship. The author identifies three distinct models (Unitary, Pluralist, and Radical) which may be used to describe and analyze the various facets of this relationship, drawing attention to the values and assumptions of each position. In the instances of the Unitary and Pluralist models, an attempt is made to illustrate the ways in which the models assume legal form, structuring, facilitating and constraining collective bargaining in the workplace, while the Radical model is presented as a necessary and powerful critique of the other two models, pointing to the theoretical and practical limitations of these positions as ways of understanding the significance of collective bargaining as a countervailing force to management authority and control. Each model is discussed in the context of both the public and private sectors.

I. INTRODUCTION

The principal utility of the relationship between management control and collective bargaining models, or “frames of reference” as Alan Fox would describe them,1 lies in the fact that the adoption of a particular model of management-labour relations determines:

1. one’s perceptions of existing management-labour relations in the workplace;
2. one’s evaluation of the status quo in the workplace;
3. one’s responses to the status quo when (if at all) it is sought to change the balance of power in management-labour relations.2

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1 See U.K., Royal Commission on Trade Unions and Employers’ Associations Industrial Sociology and Industrial Relations, (Research Paper no. 3) by A. Fox (London: H.M.S.O., 1966) at 1.

2 Ibid.
A model has a normative and a descriptive significance. That is, every model reflects a particular set of values and assumptions about the proper extent and form of management control in the workplace, as well as about the proper place and scope of collective bargaining, but also provides an account of how management control and collective bargaining operate in practice. The three models presented here are ideal-types, signifying a generalization of viewpoints, and consequently do not necessarily represent in their entirety the perspectives of those persons and groups who would nonetheless fit within a particular model. In other words, one cannot presume an exact homogeneity of views within each model. Nor should it be assumed that there is no overlap between some models.

A model provides not only a "way of viewing the world" of the workplace, but may also serve as methods of self-assurance, instruments of persuasion or techniques for trying to maintain or undermine legitimate authority. Another way to view these models is as ideologies of management control.

The three models presented here by taking fundamentally different positions on most aspects of this relationship in both a descriptive and a normative sense, provide another tool for analysing the relationship between collective bargaining and management control. At a descriptive level, a model allows us to examine the statements and actions of those persons and groups involved in determining the form and content of their relationship: collective agreements (representing the positions of management and unions); arbitration decisions (representing the opinions of third party arbitrators on matters affecting the scope of bargaining and the interpretation of collective agreements); judicial decisions (representing the positions of the judiciary in reviewing labour relations practices); and legislation (embodying the views of politicians and bureaucrats); it should be possible empirically to establish which model, or which aspect of a particular model, has exercised the greatest influence in defining the nature of the relationship.

At the prescriptive level, for example, one model may exert more influence upon certain parties to the collective bargaining management-control relationship (for example, managers and arbitrators), while another may point out issues which other models do not address, providing thereby a source of challenges to conventional wisdoms and thus to the development of theory.

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3 Ibid. at 5.
Models also provide a predictive tool. If it is possible to discover, for example, a judge's attitudes towards management and unions, then a model enables a prediction to be made concerning that judge's likely attitude towards collective bargaining, which can then serve as an aid to interpretation or as a hypothesis for further investigation.

Models also provide a hierarchy of values with which to assess other models and specific managerial and bargaining practices, and also provide "principles of aggregation" whereby discrete events can be interpreted as examples of more pervasive phenomena. In other words, models enable the sorting out and "making sense" of data.

Finally, while "control" is plainly the product of more than mere ideology, models also give some indication about the relative plausibility of each position in terms of securing employee consent to management control. An examination of the concerns of employees expressed in collective agreements, arbitration, or litigation, combined with the critiques offered by the other models (where they exist), would seem to provide a basis for this type of assessment.

A. Points of Departure

The models presented here are based upon three similar models in the labour relations literature: generally referred to respectively as: (1) Unitary; (2) Pluralist; and (3) Radical. This nomenclature is convenient and shall be retained for present purposes. In order to outline the principal features of each model, a number of questions can be asked which are intended to illuminate the significance each model attaches to the role of collective bargaining vis-à-vis management control. These questions are addressed to the various parties to the relationship, and are framed to pursue in more concrete terms the general perspectives addressed in a model or ("frame of reference") approach to analysis which were mentioned earlier.

(1) First, concerning the view of the parties of the workplace organization, is there an identity of interests and objectives shared by members of the organization? If so, how far does it go and what are these objectives? If a divergence of interests and objectives exists, are these differences fundamental or minor? Is there perceived to be an imbalance of bargaining power between management and employees?

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(2) Second, what is the role of collective bargaining ascribed by each model? In particular, what division of decision-making rights and responsibilities, if any, is envisaged between management and employees? How is this division determined? Are the allocations of decision making to joint determination via collective bargaining substantial or marginal?

Each of the two foregoing areas for examination raises the issues of the status of workplace hierarchy and the extent of the division of labour in each model. Both strongly determine the type of organization one is confronted with, and thus will clearly influence the interpretation given to collective bargaining. Each model’s position on these issues therefore needs to be identified.

(3) Third, the role and function of trade unions under each model should be addressed. The trade union role in the management of an enterprise has been viewed alternatively as a needless interference, a valid and necessary countervailing force, and as a managerial instrument of co-optation. Standing as potentially alternative repositories of authority and employee loyalty, and as representatives of collective employee power, the significance of unions for management and collective bargaining is indisputable. Each model’s distinct position concerning their role therefore needs to be considered.

The Unitary and Pluralist models illustrate the influence of each model upon the values, assumptions and decisions of arbitrators, judges, labour boards and also legislators. The characteristics of law and legal institutions also reflect the development of the managerial ideologies associated with the Unitary and Pluralist models. While some might wish to assert that the Unitary model is now merely a matter of historical interest, it still influences thinking about management and collective bargaining issues. Pluralism is important as it would appear to be the most influential contemporary perspective on these matters, and leaves its unmistakable stamp upon the structure and jurisprudence of collective bargaining. In contrast, while few if indeed any arbitrators, judges, managers or even employees appear to subscribe openly to the Radical view, nonetheless it provides a useful interpretation with which to analyse the other models, and particularly Pluralism. In particular, it explicitly invokes the dimensions of power, ideology and employee consent which are important and insightful concepts for making sense of the management-control collective bargaining relationship.

These three models may also be examined in terms of their significance for both the public and private sectors. It would be possible to equate the two sectors with respect to many aspects of the three models, and it is now also widely conceded that public sector bargaining is more
prevalent than private sector bargaining. Moreover, because public agency managers have traditionally exhibited an even greater degree of resistance to unionism and bargaining than their private sector counterparts, the public sector presents an interesting field for the investigation of the impact of collective bargaining on management control. Examination of the Pluralist view of public sector management and collective bargaining will necessitate, however, a separate consideration of legal aspects because of the distinct development of collective labour law in the public sector. Separate treatment of the public sector is also accorded under the Unitary and Radical models to reflect the distinct approaches given to it under these models.

II. THE UNITARY MODEL

A. A General View

1. A “community of interests”

The Unitary Model is without doubt the least sympathetic to the presence of trade unions or collective bargaining in the workplace, which are regarded as an interference in the efficient performance of the managerial function and unnecessary for the protection of employee interests. This is because there is perceived to be a “community of interests” within the organization uniting management and employees. Both are seen to be pursuing identical ends. The “team” and “family” metaphors are frequently invoked in Unitary rhetoric, the vision being one of employer and worker “pulling together.” Employee loyalty is stressed. Elton Mayo, Harvard industrial psychologist and founder of the “Human Relations” approach to management, captured the essence of this relation in the following statement. What should be striven for, he stated, is “a balanced relation between various parts of the organisation, so that the avowed purpose for which the whole exists may be conveniently

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7 England, supra, note 4 at 224.


9 Ibid.
The "avowed purpose" envisaged in the Unitary model, linking and coordinating management and the workforce implicitly if not explicitly, is the maximum profitability and productivity of the enterprise. To this end, all other objectives are required to be subordinated.  

B. One Source of Legitimate Authority

In order to achieve this objective, only one source of legitimate workplace authority can be countenanced, which must extend to all aspects of the enterprise, or at least to those aspects deemed by management to be necessary for the successful pursuit of productivity and profitability. Several implications follow from this view. A hierarchy is inherent in this view of workplace organization, as is a marked division of labour between management and the workforce. Yet despite this hierarchy and the division of labour, because of the "community of interest" between management and workers, "[e]ach accepts his place and his function gladly, following the leadership of the one so appointed." Moreover, because there is only one legitimate authority and management and employees are linked by "shared objectives," there is virtually no room for conflict in this model. Aside from the possibility of minor differences arising over the exact distribution of financial rewards, conflict tends to be viewed individualistically, and as deviant, stemming from some atavistic employee pathology. As Ralph Dahrendorf observed, for Unitary theorists such as Mayo and Peter Drucker:

[C]lass conflict was but a relapse into barbarian conditions, an expression of human imperfections, and it is necessary to render it impossible by the formation of "social skills" i.e. the education of co-operative and peace-loving men . . . class conflict of capitalist society was a (almost psychological) phenomenon of "deviance" from a normal state of integration and co-operation. Post-capitalist society tends toward the "normal state," although a number of educational measures are still required to bring it about.  


11 Fox, supra, note 8 at 371. Philip Selznick has expressly addressed the tension inherent in running an enterprise, between "getting the job done" (administration) and ensuring fairness to all parties (adjudication). See P. Selznick, Law, Society and Industrial Justice (New York: Russell Sage, 1969) at 16.


13 Fox, supra, note 1 at 3.

14 Dahrendorf, Supra, note 10 at 11-12.
In other words, on this view, organizational consensus and harmony is seen as the normal state of affairs in organizations which, to be successful, are directed and controlled by hierarchical organizational structures and subject to a single legitimate authority.

C. The Trade Union Role

This attitude towards workplace conflict, not surprisingly, has influenced the Unitary perception of trade unions and collective bargaining. The tendency for proponents of "Scientific Management" and "Human Relations" theory to see the problems of conflict and workplace deviance as remediable through greater managerial competence, more effective leadership and improved communication, meant that the involvement of unions in management affairs was generally not welcomed. If unions served any valid role at all, which was extremely doubtful, it was as bargaining agents for employees in the labour market. They did not belong in the workplace. In almost every matter affecting the organization and direction of the workplace, trade unionism and collective bargaining constituted challenges to the notion of sovereign managerial authority and were therefore unacceptable. While it might be acceptable for limited consultation to occur between employee representatives and management, having heard the employees' viewpoint, it was solely for management to decide upon the best course of action.

D. Management Theory and the Unitary Model

These then are the principal characteristics of the Unitary model. As will be seen shortly, assumptions concerning managerial sovereignty have characterized to a considerable extent managerial and legal relations in the public as well as the private sectors. However, because both the managerial philosophies underlying the Unitary approach, the "Scientific Management" and "Human Relations" approaches stress the importance

15 This is the school of managerial thinking associated with F.W. Taylor, *Scientific Management* (New York: Harper, 1911). "Scientific Management" was a scheme whereby individual jobs were to be simplified as far as possible, thereby minimizing the skill content of each position and enabling ready substitution of workers. The conception of work was to be removed from the workers and placed in the hands of management, this strengthening management's hold over the production process. Another aspect was the development of time and motion analyses of production tasks so as to rationalize and systematize workplace operations. This managerial approach is extensively reviewed in H. Braverman, *Labor and Monopoly Capital* (New York: Monthly Review, 1974). For a more brief discussion, see S. Hill, *Competition and Control at Work* (Cambridge: M.I.T. Press, 1981) at 24.

16 Fox, *supra*, note 8 at 371.

of a unified, hierarchical authority structure in the workplace, and have attempted to rationalize managerial authority according to "scientific" and "psychological" principles, they can be seen to amount to ideologies justifying traditional superior-subordinate relations in the workplace and the Unitary model generally.

It would be incorrect, however, to see these philosophies as favouring some form of unfettered managerial authority. Rather each approach represents the replacement of such unfettered workplace sovereignty with some form of normative code, whether it be "scientific," "psychological" or of some other derivation, and therefore in some sense effects a curtailment of management discretion. Nonetheless, it must be clearly stated that neither of these two approaches envisaged a substantial shift in the balance of power between management and employees, rather, in the case particularly of the "Human Relations" approach, the appeasement of some fairly trivial employee needs. An examination of these philosophies does point also to the evolving nature of managerial philosophies and practices. Reference therefore to the Unitary model should not necessarily presume a static, non-innovative approach to management-labour relations, nor one which simply seems to legitimate the indiscriminate exercise of managerial authority.

Another significant managerial philosophy, which has left its mark upon management-labour relations is the bureaucratic approach. While it does not appear to have influenced industrial management until post-1945, its historical origins reach back to the European civil service bureaucracies of the nineteenth century and to the principles of military organization developed in previous centuries. While it also stresses unilateral managerial authority and absolute employee obedience to the orders of superiors (and hence the centrality of hierarchy), the bureaucratic approach is distinguishable from the "Scientific Management" and "Human Relations" approaches in that it contemplates the governance of the workplace by a set of promulgated written rules. Written rules constrain flexibility of action by both management and employees, binding both parties to a defined relationship, and provide another example of how the Unitary model is not simply equatable with a managerial carte blanche.

This approach also differs from the others in that, in contrast particularly to "Scientific Management," it envisages each employee

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possessing a measure of discretion in performance of his work duties. Compliance with written rules and other bureaucratic procedures replaces the imposition of direct supervision as a means of achieving objectives. In contrast to the “de-skilling” interpretation of “Scientific Management,”

wherein skilled occupations are seen as being increasingly subdivided into substitutable and less costly forms of unskilled and semi-skilled labour, thereby enhancing management’s control of the work process, the bureaucratic approach accords great trust to the employee in recognition of his particular skills.

Typically, the latter has been an approach to control more commonly found in non-manual rather than manual occupations.

While three different managerial philosophies have been identified here with the Unitary model, others perhaps could be added. The influence of this model in labour law will now be considered. The value of identifying these three approaches lies in recognizing the distinct influences which comprise the Unitary model when they make themselves apparent in legal contexts. As can be seen, each represents also a distinct pro-management ideology with clearcut significance for management-labour relations. It is probably the bureaucratic approach which is most relevant for the analysis of labour law. Because it stresses a promulgated code of rules, this raises questions about the authorship of the rules, and about the substantive and procedural fairness of these rules. Bureaucratic management, in its traditional form, envisaged a hierarchical formulation and application of rules effectively precluding employees from participation on both counts. A summary and punitive method of enforcing these rules also ensured that the hierarchy was preserved. Moreover, because bureaucratic management was concerned with efficiency, the procedural and substantive “rights” of employees were predominantly subordinated to the ends of the organization.

It remains now to see how far these bureaucratic values have been reflected in the law governing management-labour relations.

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21 See Braverman, supra, note 15.
22 For a discussion of high- and low-trust relationships in the workplace, see Fox, supra, note 12.
23 See Edwards, supra, note 19.
24 It has been argued by some that recent developments in “industrial democracy” projects are, in reality, attempts to reformulate and legitimate a Unitary vision of workplace relations. See D. Wilson et al., “The Limits of Trade Union Power in Organizational Decisionmaking” (1982) 20 Brit. J. Indus. Rel. 322 at 327. For a Canadian perspective on industrial democracy, see D. Nightingale, Workplace Democracy: An Inquiry Into Employee Participation in Canadian Work Organizations (Toronto: University of Toronto Press, 1982).
25 Edwards, supra, note 19.
E. **Unitary Theory and Employment Law**

The Unitary influence upon the law of employment precedes the introduction of collective bargaining and the recognition of trade unions. Its first traces may be discerned in the realm of the law of master and servant rather than in that of collective labour law. One can divide the period in which the Unitary influence has been discernible into three eras: (1) the Master and Servant era (prior to the mid-nineteenth century); (2) the Contract of Employment era (mid-nineteenth to mid-twentieth century); and (3) the Collective Bargaining era (post-World War II). Only the first two periods need principally concern us here. The significance of the Unitary perspective during the third phase of management-labour relations shall be examined under the Pluralist and Radical models.

F. **The Influence upon Master and Servant Law**

The growth of economic enterprise in the late eighteenth century, as Bendix notes, was responsible for stimulating a massive demand for labour. These economic changes subsequently reflected themselves in the law in the evolution of the employment contract. However, prior to this, employment relations were largely influenced by the law of master and servant, and reflected broad social inequalities. Employment relations tended to be personal in nature, and at least from the employee's point of view, all-encompassing. In return for fulfilling traditional, basic obligations of remuneration and accommodation, the master was entitled to expect complete loyalty and obedience from his employees with respect to a wide range of matters, even extending beyond the immediate context of the workplace. As Selznick explained it:

> The law of master and servant was rooted in a society in which everyone was presumed to belong somewhere, and the great parameters of belonging were kinship, locality, religion, occupation and social class. In all spheres of life, including spiritual communion, subordination to legitimate authority was thought to be a natural, inevitable and welcome accompaniment of moral grace and practical virtue.

Only a few matters, principally the term of employment and remuneration, were subject to mutual bargaining and assent. As for other issues, "custom and policy, not the will of the parties, defined the implicit framework of rights and obligations. In the routine case, most of the

26 In dividing the recent history of Anglo-Canadian employment relations into these three periods, the dates given are approximate only but sufficient to indicate the relevant chronology. The earlier feudal period shall not be discussed.

27 Supra, note 18 at 16-17.

28 Selznick, Supra, note 11 at 123.
terms and conditions of employment were implied by law rather than set by mutual agreement.\textsuperscript{29} Traditional master and servant law perpetuated, through a series of express and implied terms, a view of the employment relationship in which employees were naturally, and firmly, subordinated to the broad discretion of their employers on a wide range of work-related and nonwork-related matters.

G. \textit{Employer Authority and the Contract of Employment}

Many of these attitudes persisted into the nineteenth century, and influenced employment relations in the Contract of Employment era. The increasing resort to contract as a means of ordering legal relations, together with the spread of egalitarian philosophies during this century, posed distinct problems for ordering relations in the workplace.\textsuperscript{30} Contractual concepts of voluntarism and approximate equivalence of bargaining power threatened to undermine the legitimacy of traditional master-servant type relationships: "The damaging implication of pure contract doctrine for the employer would have been that it could not allow him to be the sole judge of whether his rules were arbitrary or exceeded the scope of his authority."\textsuperscript{31}

The contradiction inherent in this situation, Fox argued, was circumvented or at least de-emphasized by the infusion of the employment contract: "... with the traditional law of master and servant, thereby granting them [that is management] a legal basis for the prerogative they demanded. What resulted was a form of contract almost as far removed from the pure doctrinal form as the status relationship which had preceded it."\textsuperscript{32} In other words, the nineteenth-century courts were able to imply into employment law a range of terms which bore a remarkable resemblance to terms implied in master and servant law. Thus, despite the contractualist forms in which the management-labour relationship was expressed, the law of employment was able to provide for the maintenance of feudalistic managerial authority by "personifying the [employment] relationship in terms of total subordination to command."\textsuperscript{33} Broad philosophical currents, including the notional labour market freedom of classical economics, and the applicability of contractual

\begin{footnotes}
\item \textsuperscript{29} \textit{Ibid.}
\item \textsuperscript{30} \textit{Supra}, note 18 at 440.
\item \textsuperscript{31} \textit{Fosc}, \textit{Supra}, note 12 at 183.
\item \textsuperscript{32} \textit{Ibid.} at 184.
\end{footnotes}
freedom and individual responsibility in arranging one's affairs, also served to commend to employees ideologically the view that their subordination to the authority and direction of management was voluntary and a matter of mutual assent, rather than the product of an inequitable class-divided society in which they possessed little bargaining power. Dissatisfied employees were always "free" therefore to renegotiate the terms of their employment at the end of their contract or to go elsewhere.

The common law position concerning dismissal and the duty to obey perhaps best indicate the extent of legal subordination of workers to management control. First, it may be observed that the power of dismissal directly pertains not only to employee job security, but also to management's interest in labour mobility, and stands as management's ultimate sanction in securing employee compliance. Yet in mid-nineteenth-century England, dismissal often was not an issue, for the practice emerged of "minute contracts," contracts terminable at a moment's notice by the employer or the employee. For a period, this practice replaced the former presumption of a yearly hiring which had characterized previous master and servant law.34 But even when this practice was replaced by a requirement of notice or dismissal for "cause," it seems to have affected only marginally the power legally exercised by the employer over the workplace. The extent of this power is neatly captured by Freedland in his discussion of the employer's right of dismissal for disobedience:

The rule that an employee may be dismissed for wilful disobedience to any lawful order has the effect of allowing the employer a prerogative to issue any work-directions he may please to the employee subject only to the limitations that the order does not expose the employee to immediate danger to life or limb or require him to engage in unlawful conduct.35

The obligation to obey generally represented an implied term of hiring,36 the breach of which typically resulted in dismissal. As Freedland notes, the common law recognized few exceptions. The arbitrary nature of the employer's discretion at law is strikingly revealed in the following passage from Macdonell's The Law of Master and Servant (1908):

The general rule . . . is, as Baron Parke said in Turner v. Mason, that "the obligation of a domestic servant is to obey all lawful commands." It matters not how inconvenient to the servant, or how harsh or cruel the orders may be; they may be even unreasonable; provided they be lawful and within the scope of his employment, he must obey them on pain of dismissal. "The master is to be the

36 The obedience obligation has been described as "a natural and necessary extension of the implied obligation to work." See I. Christie, Employment Law in Canada (Toronto: Butterworths, 1980) at 274.
judge,” as Baron Parke observes in the same case, “of the circumstances under which the servant’s services are required, subject to this, that he is to give only lawful commands.”

Yet the Unitary ideology cannot be simply dismissed as an extinct nineteenth-century philosophy; rather it is clear that it continues to influence employment law today. Two examples of this influence upon private sector employment relationships may be given. First, in distinguishing between a contract for services and a contract of service, the courts have traditionally relied upon the so-called “control test” method of identifying the contract of service (that is the traditional employment contract). The use of the term “control” indicates quite clearly the concept of employee subordination to management which is envisaged and legitimated by this test. Secondly, even in some cases the courts retain the terminology and approach of the courts of the last century. For example, in a 1974 decision of the Alberta Supreme Court, R v. Mac’s Milk Ltd the court ascribed a contemporary relevance to the master and servant concept in modern employment law:

In my opinion, the words “employer and employee” are equated with the words “master and servant.” The word “servant” is, in these modern days, regarded as objectionable or demeaning and workers do not like to think or speak of their employer as “master,” but the principles governing the kind of relationship which exists between persons rendering service and those to whom the services are rendered remain the same.

Historically, then, it cannot be doubted that the general common law of employment has perpetuated a strong view of employee subordination to management control, by adopting a Unitary approach to management-labour relations whereunder terms favourable to management have been routinely implied in contracts of employment. Such a clearcut legal endorsement of Unitary principles raises the prima facie difficulty of its reconciliation with any system based on employee participation in decision making. This aspect will be further discussed.

37 Supra, note 35 at 171. For an example of the harshness with which this rule was applied against servants, see Turner v. Mason (1845) 14 L.J. Ex. 311, 153 E.R. 411 (Ex.).

38 See Yemens v. Noakes (1880), 6 Q.B.C. 530 (C.A. Ex. Div); Performing Right Society v. Mitchell and Brooker (Palais de Danse) Ltd (1922), [1924] 1 K.B. 762 in which McCardie J. at 768 quoted Pollock on Torts (12th ed.) with approval: “A master is one who not only prescribes to the workman the end of his work, but directs or may at any moment direct the means also . . .” at 79-80.


40 Ibid. at 725-26 [emphasis is mine]. See also Master and Servant Act, R.S.O. 1980, c. 257 where s. 3, covering agreements between worker and master which provide for a share in the profits of the business in lieu of wages, states that unless expressly provided, such an agreement does not “(b) give to the workman, servant or employee the right to examine into the accounts or interfere in the management of affairs of the trade, calling or business.”
under the Pluralist model. This problem, however, seems even more acute when the common law of public employment is considered, where a stronger version of the Unitary model has been disclosed.

H. The Law Affecting Civil Servants

In view of the important influence of principles of military organization upon managerial thinking in the nineteenth century, it should not be surprising that the employment position of military servants at common law influenced the legal position of civil servants in the way that it did. It is perhaps more surprising to note that in many ways the law for these groups closely resembled the general law of master and servant already described concerning the question of managerial authority. While the notions of Crown prerogative and parliamentary sovereignty have been used as justifications peculiar to the defence of public employer managerial prerogatives, the justifications used by public and private sector managers to legitimate their traditional role and functions bear marked similarities to each other. However, the distinctive rationales offered for broad public employer prerogatives are nonetheless interesting in demonstrating the apparent need, identified by Bendix, for shifts in the justifications used to legitimate traditional managerial legitimate authority, in order to secure the voluntary compliance of employees.41

The common law position of civil servants of the Crown has recently been described by Wade as being in a “primitive state of legal evolution.”42 To the extent it has been or remains primitive, it reveals that the courts have tended to support public employers in assuming a rather high-handed and autocratic attitude towards civil servants. Despite various judicial interventions and statutory modifications of the common law position of employees since the last century, it shall be submitted later that the Unitary approach continues to influence collective bargaining law in the public sector. But first, the common law evolution of this approach needs to be established and described, so as to best recognize its subsequent influence upon the law of collective bargaining.

Under English common law, “...civil servants of the Crown, and military servants also, have no legal right to their salaries and no legal protection against wrongful dismissal.”43 As defined, this Crown power over its employees is very broad and the potential for its arbitrary exercise

41 See generally Bendix, supra, note 18.
43 Ibid.
would seem considerable. In the past, civil servants took what comfort could be derived, not from the common law, but from the convention of security of tenure associated with employment in the civil service.

The exclusivity and extent of the Crown's common law power over its military servants was demonstrated in obiter of the Court of King's Bench in *China Navigation Co. Ltd v. Attorney General*:

As Lord Kenyon said in *Macdonald v. Steele*, where an officer is asking the Paymaster-General for his half-pay, "His Majesty's pleasure supersedes all enquiry, as he has the absolute discretion and command of the army... the administration of the army is in the hands of the King, who unless expressly controlled by an Act of Parliament cannot be controlled by the Courts.

This power the Crown has over its servants, while presumed to arise as an incident of its prerogatives over the armed forces, has also been recognized by the courts on the ground that there is no employment or other form of contract between the Crown and its military servants.

As Wade has argued, "[i]t was in fact the decisions about military service which provided persuasive precedents for the decisions about civil service," in particular concerning the rule that civil servants are dismissible at pleasure. However, judicial attempts to justify this rule in its application to non-military civil servants have been less compelling, tending to convey the simple message that it is essentially nobody else's business but the Crown's as to how it treats its servants.

For example, the Privy Council in *Shenton v. Smith* held that generally the dismissal at pleasure rule applied not as a matter of Crown prerogative but "because such are the terms of their engagement, as is well understood throughout the public service." If the common law were otherwise, it would "seriously impede the working of the public service," the Privy Council concluded.

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44 However, in Canada, at least since *Reiley v. R* (1934), 1 D.L.R. 434 (P.C.), there seems to have been a judicial reluctance to enforce this principle where an employment contract could be established; and where a conflict arose between the terms of a collective agreement and the statutory embodiment of the dismissal at pleasure rule: see *Crossman v. City of Peterborough* (1966), 58 D.L.R. (2d) 218 (Ont. C.A.); *Nova Scotia Government Employees' Association v. Civil Service Commission of Nova Scotia* (1981), 12 C.L.L.C. 207 (S.C.C.).

45 (1930), [1932] 2 K.B. 197.


48 *Supra*, note 42 at 65.

49 (1895), [1895] A.C. 229 (P.C.).

Another example of the judiciary's willingness to defend almost peremptorily the arbitrariness of the Crown's approach to its servants' employment predicament is provided by the judgement of Rowlatt J. in *The Amphitrite.*51 Here, readiness of the courts to defer to vague "Crown knows best" reasoning in these matters emerged clearly in a discussion concerning the rule that the Crown may not fetter its future executive action by contract or other means:

> It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person upon the terms that he is dismissible at the Crown's pleasure the reason being that it is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable.52

A similar judicial approach emerges when the law concerning local government employees is considered. Note the broad, loose justifications offered by the Court for a right of dismissal of municipal employees in *Ziegler v. City of Victoria.*53 This was a British Columbia decision involving an action for wrongful dismissal brought by a former driver of a city fire truck which had been involved in a collision with a street car. In this decision, Morrison J. opined:

> From the letter of the legislation appertaining to municipalities as well as from the philosophy underlying that legislation, I agree with the submission that the enactment dealing with these powers should receive a liberal interpretation to the end that the department may function effectively. There is nothing in the Municipal Act or amendments thereto which is not in consonance with the principle of law that from the reason of the thing, from the nature of corporations and for the sake of order and government, the power to remove is one of the common law incidents of all corporations. . . .54

This decision is particularly interesting because it suggests a willingness by the courts to resort to this type of policy justification, both in the cause of statutory interpretation and in developing common law doctrine.

While it is clear that in Canada various common law and statutory developments have modified and mitigated certain aspects of the common

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51 (1921), [1921] 3 K.B. 500.
52 Ibid. at 503.
53 (1921), 30 B.C.L.R. 389; also (1922), 70 D.L.R. 722.
law position of public employees described above, the point here has been to illustrate a particular approach to the employment predicament of these employees which is also evident in recent legislative and judicial approaches to public employee collective bargaining law. By establishing a substantial continuity of approach between Unitary individual employment law and Pluralist collective bargaining law in the next section, as it is planned to do, serious doubt is cast upon the significance of Pluralist modifications to the common law in terms of substantially altering the balance of power between management and employees.

III. THE PLURALIST MODEL

A. A General View

It has been observed that the Pluralist view of the workplace, as indeed of society, "probably represents the received orthodoxy in many Western societies." Yet it is by no means a wholly homogeneous perspective. Furthermore, as it has also been observed, it has been a viewpoint probably more often forced upon management rather than warmly embraced by it.

B. Limited Conflict as Natural

Contrary to the Unitary perspective, Pluralism expressly recognizes a divergence of legitimate interests and objectives within the workplace as well as within society. These interests are viewed as being in competition with each other for the attainment of their separate objectives and therefore come into conflict. Often in the workplace, the basic conflict of interests and objectives can be construed as one essentially between employee security and managerial efficiency. These concerns are usually phrased in terms of what percentage of profits is to be devoted to employee

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55 For examples of common law developments, see supra, note 44. In terms of statutory developments, public employees in common with private sector employees have been affected by the enactment of various employment standards, statutes, and human rights legislation. See at the national level, Canada Labour Code, R.S.C. 1970, c. L-1; Federal Fair Wages and Hours of Labour Act, R.S.C. 1970, c. L-3; in Ontario, the Ontario Labour Relations Act, R.S.O. 1980, c. 228; the Employment Standards Act, R.S.O. 1980, c. 137, and the Occupational Health and Safety Act, R.S.O. 1980, c. 321.


57 Fox, supra, note 1 at 6; Flanders, supra, note 17 at 172. Here is an example of an overlap in practice between the Unitary and Pluralist perspectives.

58 England, supra, note 4 at 226.
wages or how productivity and profitability are best ensured through the organization of the workplace.

While workplace conflict is accepted as inevitable, under Pluralism it is tolerable only within certain limits. This is because it is recognized that in the workplace, management and the employees must depend on each other if both groups are to advance their interests and objectives.\(^{59}\) Therefore, a mutual necessity to survive and a shared desire to prosper fosters an interdependence which also constrains the amount of conflict between the parties consistent with their mutual survival and prosperity. Basic shared assumptions about the nature of the enterprise (a "common ideology"\(^{60}\)) serve to integrate the parties into a functional working relationship. Differences of opinion, which separate management from employees, are not seen as being unbridgeable. As Schienstock explains it: "... conflict itself is not viewed as being unresolvable. Conflict is thus not understood to represent an antagonistic antithesis; the ideological premise of this approach is rather a philosophy of mutual survival."\(^{61}\)

Pluralism as an ideology therefore narrowly defines the amount of workplace conflict tolerable as well as portrays the prospects for resolving any differences as being both realistic and necessary for the advancement of both groups. The principal institution whereby conflict is restrained and resolved is collective bargaining.

C. Collective Bargaining as Pluralist Policy

Since World War II, collective bargaining has assumed primary importance in management-labour relations in Canada, both as principal ingredient in the "common ideology" of Pluralism, and as a matter of national labour policy.\(^{62}\) This is scarcely surprising given that the idea of collective bargaining is expressly premised upon an acceptance of the existence of divergent management and employee interests in the workplace and of the need for their mutual accommodation. Collective bargaining lies at the centre of Pluralist labour relations. However, the issues of the legitimate scope of these divergent interests and the extent to which interests can be accommodated within collective bargaining raises a fundamental area of uncertainty in the Pluralist model, namely,

\(^{59}\) Flanders, supra, note 17 at 246.

\(^{60}\) England, supra, note 4 at 226.

\(^{61}\) Supra, note 4 at 174.

the relationship between managerial authority and collective bargaining. Before considering this issue, however, the Pluralist conception of collective bargaining requires clarification.

On this view, collective bargaining signifies a set of procedures whereby management and employees can reconcile their differences concerning the governance of the workplace in some fashion. In order to do so, the parties must share a fundamental commitment to the process of collective bargaining. Clearly both managements and employees must perceive this process generally to be fair if a real commitment is to exist on both sides. Emphasis therefore is laid upon the procedural machinery for resolving disputes, rather than upon the substantive outcomes.63

Bargaining between the parties, it is asserted, should be free and voluntary. The following statement by Pluralist scholar Archibald Cox sums up the reasoning behind this view: “In my opinion the needs of the industrial community would be served best by leaving management and union free to determine by the terms of the collective bargaining agreement what shall be the respective rights of the unions and the individual in its administration.”64

Free bargaining necessarily implies some sort of rough equivalence of bargaining power between management and employees, or at least no clear-cut duress by one side against the other.65 The role of the union under Pluralism is to serve as a “countervailing power” to the power of management, and therefore to contribute to an equivalence of sorts in bargaining power between the parties.66 Some form of equivalence is necessary if employee participation in decision making is to be secured. In order to secure this participation in decision making, however, the subordination of individual employees' claims and interests vis-à-vis the union is required.67 The collective employee power of the union is justified in terms of its necessity in advancing the overall position of the trade union members, that is the employees.

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63 England, supra, note 4 at 227; Flanders, supra, note 17 at 251.
64 A. Cox, "Rights Under a Labor Agreement" (1956) 69 Harv. L. Rev. 601 at 618; Flanders, supra, 17 at 246. For a discussion of the influence of contractual ideas upon collective bargaining, see Selznick, supra, note 11 at 139.
66 This has been the official view of the union role adopted in Canada. See Woods Report, supra, note 56 at paras. 296, 299.
67 Cox, supra, note 64 at 657; England, supra, note 4 at 231.
Implicit in the "countervailing power" thesis, as Hyman has noted,\(^{68}\) is a basic distrust of power. This distrust is reflected in the Pluralist view of collective bargaining as an exercise in bilateral rulemaking.\(^ {69}\) By participating in the formulation of work rules, it is argued that unions contribute to the establishment of constraints upon the exercise of managerial discretion on a whole range of work-related matters. This is a widely shared perspective upon the role of collective bargaining. For example, the Woods Task Force described collective bargaining as "the substitution of the rule of law for the rule of man in the workplace,"\(^ {70}\) while Feller noted that the collective agreement is "commonly visualized as an intrusion on the prerogatives of an unrestrained management — a concession won by the workforce from a resisting employer."\(^ {71}\) The running of the workplace according to a set of predetermined, written rules, which is the essence of collective agreements, of course, is also a feature of the bureaucratic approach to management.\(^ {72}\)

In terms of hierarchy and the division of labour, employee participation in joint decision making and managerial submission to governance by written rules suggests that to the extent of those issues covered by the jointly determined collective agreements, the Pluralist would recognize a less rigidly hierarchical form of governance, under which the employee role was not confined to the execution of tasks, but also extended to the manner in which tasks were performed, and even to participating in broader policy decisions.

Submission of the workplace to rules also emphasizes another strand of the Pluralist collective bargaining philosophy: the importance of industrial peace for the "public interest."\(^ {73}\) On this view, industrial order is self-evidently consonant with the public interest. The submission of \textit{inter partes} conflicts to a formalized dispute resolution machinery, which includes the imposition of restrictions upon the timing and other conditions

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\(^{69}\) Flanders, \textit{supra}, note 17 at 216.


\(^{72}\) See text accompanying notes 20-23.

\(^{73}\) This theme is reflected in many aspects of collective bargaining. For example, see the Preamble to the Ontario \textit{Labour Relations Act}, R.S.O. 1980, c. 228: "[I]t is in the public interest . . . to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."
of conflict, constitutes a means for the "institutionalisation of conflict," whereby conflict is kept within "reasonable" limits and therefore manageable in the sense of not threatening the overall fabric of the industrial order in the workplace. This function attributed by Pluralism to collective bargaining confirms the earlier observation that the degree of workplace conflict tolerable under the Pluralist model is strictly limited.

D. Pluralistic Theory and Collective Bargaining Law

Similar to what was done under the Unitary model, it is proposed at this point to examine the expression of Pluralist values and assumptions in collective bargaining law and to examine ways in which the Pluralist ideology is sustained by the form and substance of this law. Because this law also limits and influences the nature of the relationship between the parties and between collective bargaining procedures and management practices, it pertains directly to the form of management control in any organization subject to these laws, and therefore requires examination.

Separate attention will be given to the legal impact of collective bargaining upon private and public sector managements. Critical questions which should form the basis for the study of this law vis-à-vis management control are: (1) how much shared decision making is envisaged under the system of collective bargaining? and (2) if only a limited degree of sharing is provided for, how are these parameters formulated and in what areas does this sharing take place? These limits may be determined according to normative principles or as the result of a power struggle, or even from a combination of the two. Despite the symbolic voluntarism associated with collective bargaining, it is somewhat paradoxical but nonetheless evident under the Pluralist model that certain limits do exist upon the subject matters deemed suitable for shared decision making by collective bargaining. The nature and scope of these limits, the forms that participation takes, and the justifications used to explain these limits and forms, need to be examined in order to assess the theoretical coherence of Pluralism, and in particular to enable an assessment of the degree

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74 See generally Dahrendorf, supra, note 10 at 64-67:
Organization presupposes the legitimacy of conflict groups, and it thereby removes the permanent and incalculable threat of guerilla warfare. At the same time, it makes systematic regulation of conflicts possible. Organization is institutionalization, and whereas its manifest function is usually an increasingly articulate and outspoken defense of interests, it invariably has the latent function also of inaugurating routines of conflict which contribute to reducing the violence of clashes of interest.

75 Woods Report, supra, note 56 at 106.
of correspondence between Pluralist rhetoric and the way collective bargaining law operates in practice.76

1. The private sector

Whatever the initial reasons for the formation of trade unions and the recognition of collective bargaining, since its introduction, collective bargaining has extended its domain to matters additional to those “personnel” matters with primarily economic consequences, for example wages, pensions, allowances. Collective bargaining legislation commonly has been vague as to which matters are suitable for shared decision making, beyond stating, for example, that collective agreements shall deal with “terms or conditions of employment.”77 As Simmons and Swan point out, in marked contrast to collective agreements in the public sector: “Apart from the few statutory requirements (such as no strike clauses, arbitration clauses and the like) private sector collective agreements are virtually unfettered in Canada: nearly anything can be bargained and become a binding element in an agreement.”78

Furthermore, following the 1978 decision of the British Columbia Labour Relations Board in Pulp and Paper Bureau v. Canadian Paperworkers’ Union,79 the view emerged in Canada that: “the evolution of the subjects of collective bargaining should be the result of pragmatic accommodations worked out by unions and employers in their individual relationships, responding to the nuances of their own situation.”80 This position contrasts with the distinction drawn in American labour law between mandatory and permissive topics of bargaining, whereunder only topics designated as mandatory are subject to the statutory duty of parties to bargain in good faith.81 At least in private sector employment, then, there would seem to exist no substantial legal or other impediment of principle to the parties negotiating as to the scope of bargaining itself. While this situation may be (and has been) prevented from arising by

76 Two Pluralists who have been expressly critical of the shortcomings of collective bargaining practice when measured against the rhetoric of industrial democracy are Clyde Summers and David Beatty. See C. Summers, “Industrial Democracy: America’s Unfulfilled Promise” (1979) 28 Clev. State L. Rev. 29; D. Beatty, “Ideology, Politics and Unionism” in Swan & Swinton, supra, note 4.

77 Ontario Labour Relations Act, supra, note 55, s. 1(1)(e).

78 C. Simmons & K. Swan, eds, Labour Relations in the Public Sector (Kingston: Industrial Relations Centre, Queen’s University, 1982).


80 Ibid. at 79.

81 For a comparison of the American and Canadian law, see W.B. Gould, A Primer of American Labor Law (Cambridge, Mass: M.I.T. Press, 1982); see also Langille, infra, note 94.
other reasons such as economic power, considerable legal authority does exist and can be found to support an "open-ended" form of collective bargaining under which the scope of bargaining is legally amenable to negotiation by management and employees.

Where a defensive attitude by the law towards "managerial prerogatives" in the private sector does emerge is in the administration of the collective agreement. In consideration for a prohibition upon strikes and lockouts during the period of the agreement, it has been usual to provide in bargaining legislation for a binding arbitration mechanism dealing with matters concerning the interpretation, application and alleged violation of the agreement.8 During the course of the collective agreement, the agreement serves as the basic instrument of governance of the management-labour relationship, and therefore deals with initiatives from both management and employees to alter workplace relations in response to changing social, economic, and technological conditions.83 Plant closures, re-locations, lay-offs, subcontracting, and the introduction of new technology have been some of the strategic issues confronted by arbitration in the last two decades. In order to decide how the spirit and letter of the collective agreements are to be interpreted with respect to these issues, arbitrators have been obliged to adopt some theory of managerial prerogatives with which to resolve the inevitable tensions between management and employees on these and other issues.

Canadian labour arbitration, it is agreed, has given rise to two analytically distinct approaches to these problems since the 1950s.84 The less influential approach to the question of managerial "prerogatives" has been that identified with the arbitration philosophy of former Chief Justice Bora Laskin as reflected in the Peterborough Lock arbitration in which he was chairman. It has occasionally been referred to as the "joint sovereignty" theory.86 Pursuant to this theory, collective bargaining constitutes a "new broom" with which the parties must sweep away pre-existing notions concerning the bases of their employment relationship

82 See supra, note 77, ss. 42, 44.
83 This point is succinctly made by Canada Task Force on Labour Relations, Labour Arbitration and Industrial Change (Ottawa: Queen's Printer, 1969) at 1.
85 Re Peterborough Lock Mfg Co Ltd (1953), 4 L.A.C. 1499 [hereinafter Peterborough Lock]. See also Re Sudbury Mine Mill and Smelter Workers; Local 598 and Falconbridge Nickel Mines (1958), 8 L.A.C. 276 [hereinafter Falconbridge Nickel], another award in which Mr. Justice Laskin's approach was evident.
and examine the bases anew. As part of this approach to arbitration, one could not presume in the absence of express terms in collective agreements limiting the discretion of management that management's discretion was necessarily unfettered in these areas, preventing any restraint by employees, their unions, or by arbitrators. On this view, managerial discretion is constrained not just by express words in the agreement but by the context in which the collective agreement emerges and operates, including the "customs and written understandings, established practices and sound industrial relations standards" operating in a particular industry. These contextual considerations in effect provide an extended, industrial "rule of law" to which management must conform. The analytic break signified by the change from common law employment principles to collective bargaining law carried with it, at least for some adherents of the joint sovereignty thesis, a fairly novel presumption concerning open recognition and acceptance of employee participation on an extended range of subject-matters requiring decision making, compared with that previously tolerated at common law.

It is now recognized, however, that for all practical purposes this approach has almost totally disappeared. In its place has come the "management's reserved rights" doctrine or "residual theory." This approach recognizes, implicitly or explicitly, a pre-bargaining era supposedly characterized by complete managerial sovereignty in terms of controlling the workplace. For example, according to the arbitral decision in *Ritchie Cut Stone*... management historically had the power to do anything in relation to its employees that the operation of the business required without restriction." Under the purest form of this doctrine, management's "right to manage" is only limited to the extent expressly conceded by the terms of the agreement and no more. The agreement is the first and last document necessary to be consulted by arbitrators,

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88 See particularly Laskin J. in *Peterborough Lock*, supra, note 85 at 1502.

89 *Supra*, note 84.


judges, and others in determining the will of the parties and therefore
the nature of the relationship between management and the workforce.
In other words, but for the agreement: “management has absolute
discretion in the hiring, firing, and the organisation and direction of the
working forces, subject only to such limitations as may be imposed by
law.”

This is essentially the approach adopted by the Ontario Labour
Relations Board in Re Amoco Fabrics Ltd and some of its other recent
decisions. For example, the Board in Amoco Fabrics approached the
management control collective bargaining relationship in the following
terms:

Collective bargaining under the [Ontario Labour Relations] Act is premised on
the exercise of traditional management rights by employers to the extent that those
rights are not abrogated by statute or by the terms of a collective agreement.
Absent some contractual restriction, it is generally the prerogative of the employer
to finance, organise, plan and direct its enterprise in the way that it sees fit. As
some recent plant closures have demonstrated, errors of judgement in these areas
can be fatal to an enterprise. As part of the scheme of collective bargaining employees
and the trade unions that represent them understand and accept that they are
generally vulnerable to the success or failure of decisions taken by management,
just as they are to market forces beyond their employer's control. Considerable
latitude must be given to management in the exercise of its judgement.

Plainly then, on the face of this approach by the Board one can ascertain
not just the adoption of a “reserved rights” approach by the Board but
also a marked departure from the philosophy and approach exhibited
in the Pulp and Paper decision.

However it must be stated that the judicial and arbitral acceptance
of this restrictive approach has not been uniform or without exceptions.
Some courts and arbitrators have imposed some express limitations upon
the “reserved rights” doctrine, although as Brown and Beatty have
observed, the overall role of the arbitrator on these questions has remained
an “essentially passive” one. In recent years, some arbitrators have
allowed a duty upon management to exercise its unilateral powers in
a fair manner to be implied into many agreements. The duty has been

93 Ibid.


95 Amoco Fabrics, supra, note 94 at 323 [emphasis is mine].

96 Supra, note 79.

97 Supra, note 84 at 13.

98 Ibid. at 202-06; Palmer, supra, note 84 at 589-95.
variously expressed as a duty to act in good faith, to act reasonably,\textsuperscript{99} and to act fairly.\textsuperscript{100} The standard used by arbitrators to determine fairness is revealing in illustrating the close similarities between at least some interpretations of the Pluralist perspective and the Unitary perspective. It was spelled out in \textit{Re United Parcel Service Canada Ltd}.\textsuperscript{101}

In our view the employer's decision making should be assessed against the requirement to act for business reasons and the requirement not to single out any employee or group of employees for special treatment which cannot be justified in terms of real benefit to the employer. When the parties agree that such matters as classification, qualification, demotion, transfers and the scheduling of vacations are to be in the discretion of management they do so in the knowledge that management's decision making in these areas will be made in management's self interest, may adversely affect individual employees, and/or may not impact on all employees equally. However, it is not contemplated as part of the bargain that the employer will exercise his authority in these areas for reasons unrelated to the betterment of his business or to single out employees for the type of special treatment described. If the employer acts in this manner, the results of his actions, as they affect the bargaining unit generally or individuals within the bargaining unit, may be found to be beyond the scope of his authority under the collective agreement.\textsuperscript{102}

This duty to act fairly has been applied to a wide variety of work issues, including demotions, vacations, promotions, shift schedulings, effecting retirements, and settling grievances.\textsuperscript{103} However, some uncertainty continues to surround the scope of this duty and the degree of protection it extends to employees even given the limited significance of the "business" standard and the non-arbitrary criteria set out in decisions such as \textit{United Parcel Service}.\textsuperscript{104} An Ontario Court of Appeal decision and some recent arbitration decisions\textsuperscript{105} have continued to adopt a strict, literal approach to the interpretation and application of collective agreements. This has meant, for instance in \textit{Re Metropolitan Toronto Board of Commissioners of Police},\textsuperscript{106} that the Court of Appeal has refused to imply an obligation upon management to exercise its rights under the

\textsuperscript{99} \textit{Re International Nickel Co. of Canada Ltd and United Steel Workers, Local 6500} (1977), 14 L.A.C. (2d) 13 at 18.
\textsuperscript{100} \textit{Re United Parcel Service Canada Ltd and Teamsters Union, Local 141} (1981), 29 L.A.C. (2d) 202 at 213.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid. For an extensive list of authorities on this point, see the decisions listed in Brown & Beatty, supra, note 84 at 204-05.
\textsuperscript{104} \textit{Supra}, note 100. For a discussion of the ambivalence expressed in the Ontario courts and among arbitrators on this doctrine, see Beatty, \textit{supra}, note 86.
agreement "fairly and without discretion" on the grounds that the agreement in question contained a "zipper" clause which precluded the implication of any terms. Yet a year later, the Court of Appeal on a judicial review in Re Council of Printing Industries of Canada & Toronto Printing Pressmen & Assistants Unions No. 10 et al. refused to find an arbitrator's construction of an agreement unreasonable despite the fact that the arbitrator had resorted to criteria of good faith and reasonableness in reaching his decisions. Thus the precise extent and status of the duty of fairness incursion into managerial prerogatives has remained unresolved.

However, a continuation of the "free bargaining" philosophy exhibited in such decisions as Pulp and Paper and an arbitral concern for business efficiency, as evidenced by decisions such as Amoco Fabrics, seem likely to confine the duty in future to quite narrowly prescribed limits. This seems particularly likely when arbitrators are faced with "zipper" clauses such as that which arose in Re Metro Toronto Board of Commissioners of Police. In sum, there is a clear message arising from the judicial, labour board and arbitral jurisprudence, in both the narrow and broad approaches to arbitration and to the doctrine of fairness, that certain areas of decision making exist, which, for pragmatic if no other reasons, belong rightfully to management and should not be interfered with by others. This narrow, dominant arbitral approach recognizes and values business efficiency clearly above the role of collective bargaining as an "intrinsically valuable experience in self-government." This is despite the obvious fact that an arbitral recognition of a need for a fairness doctrine in interpreting and applying collective agreements, however narrow, plainly concedes the existence of an imbalance of the power relations between management and employees. Conversely, in those cases where arbitrators deem the fairness doctrine inapplicable as contrary to the expressed will of the parties, for example Re Metro Toronto Police, it can be argued that arbitrators in effect are

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107 A zipper clause is one which asserts that the collective agreement is a full statement of the parties' intentions on collective bargaining issues. It may therefore restrict the arbitrator's role quite narrowly. The clause in question was: "17:06 The Arbitrator shall not have any power to add to, subtract from, alter, modify or amend in any way, any part of this Agreement, nor otherwise make any decision inconsistent with this Agreement, which expresses the full and complete understanding of the parties on remuneration, benefits and working conditions." Ibid. at 687.


109 Palmer, supra, note 84 at 594 is quite pessimistic about the future of the fairness doctrine. See also Beatty, supra, note 86.

110 Supra, note 106.

111 Weiler, supra, note 71 at 33. For a discussion of the American case law reflecting this preference, see Feller, supra, note 71 at 689. For a recent discussion of the position in both Canadian and American law, see Langille, supra, note 94.
sanctioning this power imbalance by suggesting that employees are freely and voluntarily submitting to the arbitrary exercise of managerial powers under the agreement.112 Either interpretation points to the relative absence of power experienced by employees in their employment relations and would seem to cast doubt on the "rough equivalence of power" limb of the Pluralist model and to reveal the limited potency of the fairness doctrine as presently formulated.113

E. Workplace Hierarchy and Employee Subordination

1. The private sector

In view of the limited significance of the fairness doctrine, it should not be surprising that Canadian collective bargaining policy and practice expressly recognizes and accepts the notion of workplace hierarchy. In addition to its role as a form of workplace democracy, the Woods Task Force appointed by the Canadian Government saw collective bargaining as a "means of legitimating and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship."114 For as Pluralists such as Kahn-Freund have argued, "there can be no employment relationship without a power to command and a duty to obey."115 Moreover, as Kahn-Freund also observed, the role of labour law is to "attempt to infuse law into a relation of command and subordination."116 Where then are these relations of subordination to be found in collective bargaining law and how are they expressed?

They are principally to be found in the "management's rights" clauses of collective agreements. These clauses vary considerably in length, from the quite short (for example "all normal prerogatives of management shall be retained by the Company except as specifically limited or abridged by the provisions of this agreement")117 to very detailed, comprehensive

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112 Beatty, supra, note 86 at 153 has cast doubt on such an assumption being made by arbitrators: It would be misleading and — the question entirely to assert that the standard management's rights clause reflect a shared understanding that management has (or is desired) the power to exercise the discretion such a provision delegates to it capriciously, unreasonably and in any manner which suits its fancy.

113 See supra, note 109.

114 Woods Report, supra, note 56 at 291.


116 Kahn-Freund, supra, note 115 at 8.

provisions. It is usual practice in the longer clauses to reserve expressly for management rights of hiring, suspension, promotion, demotion, transfer, discharge, and discipline, as well as some broadly defined rights, for example to "manage the plant and direct the working forces," to "maintain discipline and efficiency," to "make such operating changes as are deemed necessary by it for the efficient and economic operation of the plant," or to determine types of schedule of production, methods of manufacture and et cetera. This last group of broadly defined prerogatives provides some particularly clear examples of clauses in which strategic decision making powers are reserved for management. Of course alternatively, and usually additionally, managerial prerogatives often tend to be contained in single-issue clauses in the collective agreements dealing for example with promotion, or discipline and dismissal.

In order to ensure that its orders on work matters are obeyed (and thereby policing its prerogatives), management almost inevitably seeks to reserve for itself the right to discipline and dismiss, subject often to a "just cause" requirement. Employees who intentionally refuse to obey management's orders without "just cause" commit the disciplinary offence of insubordination. Because managerial authority has traditionally relied upon prompt, unquestioning employee obedience and also because at common law few exceptions to the employee's obligation to obey were recognized, the Pluralist attitude towards hierarchy and insubordination is important in understanding the significance collective bargaining has for management control. In order to examine the Pluralist attitude further, we may turn to the arbitral jurisprudence on this question.

Generally speaking, it would seem that arbitrators have viewed employee challenges to managerial authority very seriously. According to Palmer, "insubordination is the most common type of disciplinary action found in the field of labour arbitration." It is taken seriously because it "strikes at the basis of managerial functions: the right to control the workforce." Typically, the insubordinate act must be wilful and designed to subvert managerial authority, or in some cases can merely

118 Ibid.
119 Ibid. at 433.
120 "Just cause" is a restriction upon managerial discretion which tends to appear, when it appears, in the "Management rights" clause.
121 See the discussion of this employee's offence in Palmer, supra, note 84 at c. 7.
122 See Freedland, supra, note 34.
124 Ibid. at 321.
125 Ibid.
reflect a lack of deference or politeness towards the person issuing the order.\textsuperscript{126}

The Pluralist protection extended to employees in these situations is the grievance machinery ending in arbitration. This machinery operates in an \textit{ex post facto} fashion. When a conflict arises in the workplace, the “obey now, grieve later” rule has been deemed to operate: “generally speaking, it is the duty of an employee when given an order by a superior which he may think is contrary to the terms of the collective agreement, to obey the order and then challenge it through the grievance procedure.”\textsuperscript{127}

The justifications offered for this rule accord with the Pluralist values already established in other areas of collective bargaining law. The reasoning is essentially pragmatic: “it is essential that the operation — fundamental to the livelihood of employers and employees — continue uninterrupted, while the redress to which one or other may be entitled can be considered and decided in an appropriate fashion.”\textsuperscript{128}

The justifications thus echo the “common enterprise,” “mutual survival” claims associated with both the Unitary and Pluralist models.

However, in some arbitration decisions, there is the suggestion of a less absolute approach by some arbitrators to employee obedience. In \textit{Re Whitaker Cable},\textsuperscript{129} while it was accepted that an industrial plant should not become a “debating society,” the following approach was adopted:

> the term “insubordination” itself is one which appears to have been borrowed from military circles and, on that basis alone, is perhaps inappropriate to describe the relationship that should exist between employees and their supervisory personnel. We find the term not consistent with the notion of a working partnership between the employees and management personnel. Where the challenge to authority undermines the ability to carry out that object which is fundamental to the partnership, that is, production, the matter may well be viewed seriously. However, where the sole value that is being protected is the maintenance of authority we think the rule should be relaxed.\textsuperscript{130}

Similarly in \textit{Re Dallas and the Crown in the Right of Ontario},\textsuperscript{131} concerning the discharge of a liquor board employee, the Ontario Crown Employees Grievance Settlement Board imputed a standard of reasonableness in assessing whether the discharged employee’s act amounted to insubor-

\textsuperscript{126} \textit{Re Liquid Carbonic Canada Ltd & U.S.W, Local 12998} (1975), 9 L.A.C. (2d) 52 at 54.
\textsuperscript{128} \textit{Re U.A.W., Local 673, and De Havilland Aircraft of Canada Ltd} (1971), 23 L.A.C. 295 at 297-98.
\textsuperscript{130} \textit{Ibid.} at 111.
\textsuperscript{131} (1981), 28 L.A.C. (2d) 369.
dination. Moreover the Board noted: "This is not a case of insubordination but one of disputed facts at a stage when further investigation was possible and warranted. To allow a supervisor to foreclose a reasonable dispute of facts by the exercise of some symbolic authority is, frankly, repugnant."132

It would seem on the basis of these decisions that some arbitrators will not find insubordination unless the employee’s action in some way derogates from the functional operation of the enterprise. Moreover, there are well-recognized exceptions to the “obey now, grieve later” rule. A number of them are merely adoptions of common law exceptions, such as where the performance of an order threatens the physical safety of the employee, or requires the employee to engage in illegal acts.133 There even have been suggestions that the scope of these exceptions is growing.134 But at least two aspects of arbitration practice appear to mitigate the advantages to be derived by employees from these developments. Generally there must be an objective factual basis, the grievor’s fears for his safety or the illegality of the command, for the operation of these common law exceptions. An honestly held belief in a state of affairs, which if true would provide a complete defence, has not been accepted as sufficient.135 Furthermore, in contrast to the criminal law burden of proof, an employee who refuses a proper order is prima facie guilty of insubordination.136 The employee must then bring himself within one of the exceptions just enumerated, or be liable for discipline. Both these arbitration practices would seem to create a presumption strongly favouring management’s position vis-à-vis its employees, even if it is true that they ameliorate to some slight degree the almost feudalistic employment relations tolerated by the common law. While not insignificant in mitigating the plight of individual employees, these developments appear to do little to alter materially the significance of workplace hierarchy.137 So long as the requirement of a reasonably held belief of danger and the presumption of insubordination exist, the continued subordination of the employee under collective bargaining is indicated.

132 Ibid. at 378.
133 See the discussion by arbitrator Arthurs in Re U.A.W., Local 673, Douglas Aircraft Co. of Canada (1967), 18 L.A.C. 149 at 153.
134 See Palmer, supra, note 84 at 323.
135 Ibid. at 324.
136 Ibid.
137 Selznick, supra, note 11 at 167, by no means a Radical, comes to a similar conclusion on the American arbitral jurisprudence: "... in general arbitration has given management a relatively free hand in dealing with insubordination."
Finally, despite the existence of an “extremely large body of jurisprudence”\(^{138}\) on the topic of discipline and discharge in the private sector, there is not sufficient space here to deal with this topic in detail. It may be observed, however, that while employees’ rights have unquestionably been extended and formalized by the introduction of grievance arbitration,\(^{139}\) management’s ability to discipline its employees for insubordination and other industrial offences has not been eroded by arbitration’s adoption of quasi-criminal penalties and procedures in disciplinary matters and, if anything, may have been strengthened. Arbitration has ritualized and individualized discipline, and subjected it to a scale of penalties reflecting severity of offence and the existence of mitigating circumstances.\(^{140}\) While employers have undoubtedly been confined by having to resort to these procedures and penalty scales,\(^{141}\) the form that these procedures take arguably do serve to analogize the disciplinary process to the ritual and ceremony of the criminal law, drawing symbolically on this association to legitimate the overall operation of collective bargaining, including particularly the acceptability of workplace hierarchy implicit in the system of discipline provided for by collective bargaining law. Such a system also offers management the advantages of a greater range of penalty alternatives and the reduction of uncertainty in the way discipline is administered.

2. The public sector

In apparent contrast to the private sector, public sector employers have traditionally exhibited less enthusiasm for collective bargaining with their employees. Whereas the ideas of unassailable managerial prerogatives, justified ideologically by resort to notions of private property, contract and managerial expertise has lost much of its purchase in the private sector, it is still frequently argued in the public sector that the

\(^{138}\) Palmer, supra, note 84 at 231.

\(^{139}\) A Pluralist who would seem to adopt this view, while realizing there is still scope for considerable improvement, is Beatty. See, supra, note 86.

\(^{140}\) Collective agreements usually expressly provide management with powers of discipline over its workforce, whereas at common law the master was actually obliged to dismiss workers who were disobedient, there being no legal right in most instances to discipline. See Palmer, supra, note 84 at c. 7.

\(^{141}\) Ibid. It is true that the arbitration jurisprudence now recognizes a remedial arbitral discretion to order reinstatement whereas previously the aggrieved worker was confined to an order for damages. Palmer, supra, note 84 at 53. The power to substitute a penalty also arises in some legislation. See the Ontario Labour Relations Act, supra, note 55, s. 44(9). Moreover, the onus of proof in disciplinary matters, untypically, is widely acknowledged as being on the employer. Against this must be offset, however, the fact that it is usually a civil standard of proof which is applied. Ibid, at 268-70. Such a low burden of proof is unlikely to reassure many employees during times of high unemployment.
special nature of the public employer and the services it provides to the community warrant a more restrictive approach to collective bargaining than is provided for in the private sector. The public interest is seen to be distinct from public employees' interests and to assume a greater significance. Three potential approaches to the subject of public employee collective bargaining are discernible: (1) absolute rejection; (2) a qualified acceptance, with restrictions on the scope of bargaining, right to strike, grievance procedures; and (3) the unqualified adoption of the private sector model. A fourth possibility, which appears not to have been taken seriously anywhere, is for a more liberal bargaining model than that in the private sector.

Attempts to analyze public sector bargaining in Canada are complicated by the considerable diversity exhibited in federal and provincial legislation on this topic. Most examples, generally speaking, would seem to fall within the second category mentioned, although a few fall within the third category. Municipal employees present something of an exception to this assessment of public employees, for they have tended to enjoy full bargaining rights since the emergence of collective bargaining in Canada in the 1940s.

The traditional arguments used to reject or limit collective bargaining in the public sector appear now inconsistent both with Canadian constitutional principle and with public sector practice. Many of these arguments are based on the notion of political sovereignty, the right of the elected government to act unilaterally or freely in the public interest. As a doctrine, sovereignty has been roundly attacked in Canada. As

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143 See Wellington & Winter, ibid. at 25.

144 See H. Arthurs, Collective Bargaining by Public Employees in Canada: Five Models (Ann Arbor: Institute of Labor and Industrial Relations, University of Michigan-Wayne State University, 1971) at 1011. Although now rather dated, Arthurs' models reflect the diversity of approaches still evident in Canada.


Finkelman observed over a decade ago in his report on labour relations in the Canadian public service: "much of the discussion on this score, couched in terms of principle, is frequently outdistanced by the facts of life. What was unthinkable yesterday has become the conventional wisdom of today."\(^{147}\)

In other words, the political need for practical solutions to public employment problems has tended to qualify and erode the relevance of the sovereignty doctrine in determining the status of public sector bargaining. As a result, there have not been the extensive debates of principle on this issue in Canada which fill the American law reviews.\(^{148}\) With the notable and pervasive exception of a right to strike, collective bargaining has become a widely accepted fact of life in the public sector in the last two decades.\(^{149}\)

Despite a general acceptance in principle, a need to preserve certain public employer managerial prerogatives from collective bargaining has nonetheless been widely conceded at the federal and provincial levels and in the case of certain municipal employees.\(^{150}\) Finkelman has himself admitted that a line must be drawn because some issues are best left to the broader political processes. As one might expect, unlike certain American writers,\(^{151}\) Finkelman's approach to this conceptual issue reflects a pragmatic orientation:

No matter what extensions are made in the scope of bargaining from time to time, some subjects will probably remain in which the public interest will be paramount to any interest that the employees in the Public Service and the organisation representing them may have in bargaining, where the protection and furtherance of these interests cannot be left to shared decision-making by the employer and the employee organisations through bargaining, but must be examined and established by those who are answerable to the electorate. As one scholarly observer of the scene put it "one ought never to confuse the wishes of a limited interest group like a union with those of the entire electorate..." Class size in schools, case load for social workers and doctors, for example, may be legitimate

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\(^{147}\) Finkelman, supra, note 142 at 72.


\(^{149}\) As Weiler, supra, note 71 at 217 points out, by 1980 the right to engage in collective bargaining had actually been exercised by almost 90% of Canadian public sector workers. This is the highest proportion of any industrial classification in Canada.

\(^{150}\) This is particularly the case in occupations regarded as providing essential services such as police officers and firefighters. See Weiler, supra, note 71 at c. 7.

subjects to the extent to which they are aspects of the work load that employees are required to perform, but not when demands with regard to these matters are presented as an aspect of what constitutes good educational policy, or good welfare policy or good medical policy. The quality of education, of welfare and of medical care ought to be decided only through the normal legislative process. At times, it may be very difficult to draw the line between what can be entrusted to collective bargaining and what must be reserved to be dealt with only through the democratic process of legislation. But the line has to be drawn nevertheless to stay within the system as we have it.152

Not unlike the private sector, the question of public sector managerial prerogatives arises most starkly on the issue of the scope of bargaining, and subsequently on the limits to grievance arbitration. The justifications for dividing topics for decision making into non-bargainable and bargainable categories vary, but in many respects resemble private sector concerns with the need to retain managerial flexibility and ensure operational efficiency.153 Ideological resort to the sovereignty doctrine has all but disappeared.154 An argument which has been frequently reiterated is the view that collective bargaining of public employees provides them with the means to exert excessive public influence. This seems to echo the "dangerous weapon" view of collective bargaining held by the Unitary model but on different grounds. Wellington and Winter, for example, have argued that the scope of bargaining should not interfere with the "'normal' American political process."155 On their view, public employee power is enhanced inter alia by the unavoidable proximity of these employees to public officials which enhances unduly their ability to influence these officials, and by the reluctance of politicians to confront taxpayers' wrath concerning the impact of public employee job action.156 For these reasons a Unitary model is urged upon public sector employment relations.

152 Finkelman, supra, note 142 at 75.
153 These objectives, as were seen, emerged in respect of both the Unitary and Pluralist models concerning the private sector. Efficiency is a criterion increasingly shared and articulated by public service managers. As S. Levitan and A. Noden have observed in the U.S., "... policymakers repeatedly portray collective bargaining rights as the antithesis of efficiency in government, an unacceptable infringement of essential management prerogatives." See S. Levitan & A. Noden, Working for the Sovereign: Employee Relations in the Federal Government (Baltimore: John Hopkins University Press, 1983) at 41.
154 But see Petro, supra, note 148.
155 Wellington & Winter, supra, note 142 at 25. This notion, borrowed from the Pluralist theorist Robert Dahl, has been defined to mean "... one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision." See R. Dahl, A Preface to Democratic Theory (Chicago: University of Chicago Press, 1956) at 145.
The Pluralist response has been that this line of argument has lost much of its force in light of the economic recession in the 1970s and taxpayer experience with the public employee job action, wherein the chaos and anarchy predicted by opponents of public sector bargaining generally failed to materialize. Others have suggested that public sector bargaining is even more necessary in order to provide public employees with sufficient power vis-à-vis public employers and taxpayers on employment issues. Whatever the validity of these arguments, in Canada any limited recognition of these arguments has primarily taken the form of limiting the scope of bargaining in public employment, which has had the effect of imposing substantial limits upon the collective bargaining entitlements of public employees.

This has essentially become a legislative task. Section 18 of the Ontario Crown Employees Collective Bargaining Act, for example, includes a detailed statutory “management’s rights” clause, reserving a wide range of matters for exclusive managerial decision making. Moreover, section 7 of the same Act, which is made expressly subject to section 18(1), specifies a long list of employment issues on which bargaining may occur. The difficulty of line drawing is reflected in the potential overlap which exists between some provisions. However the priority of public managerial prerogatives on key strategic issues would seem assured by the subordination of section 7 expressly to the management’s rights in section 18.

Federal collective bargaining legislation, although similar, arguably represents an even more concerted attempt to protect managerial prerogatives in the public sector. In the federal Public Service Staff Relations Act (PSSRA), there is a short management’s rights clause (s. 7), which protects the employer’s authority to “determine the organisation of the Public Service and to assign duties and classify positions therein,” in addition to which section 56(2) expressly preserves those conditions of

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158 See generally Summers, supra, note 151.
159 R.S.O. 1980, c. 108.
160 The list covers traditional working conditions, remuneration, hours, overtime, holidays, vacations, insurance, et cetera, as well as a rather extensive list of personnel issues, including promotions, demotions, transfers, lay-offs, reappointments, and, interestingly, the classification and job evaluation system.
161 For example, while disciplines and dismissals are expressly preserved for management by s. 18(1)(a) of the Crown Employees Collective Bargaining Act, supra, note 159, s. 7 of the same Act states inter alia, that grievance procedures are bargainable.
162 S.C. 1966-67, c. 72. For an extremely detailed discussion of this Act, see Finkelman & Goldenberg, supra, note 142.
employment determined or determinable, under statutes listed in Schedule III to the Act,\footnote{Ibid., s. 56(2)(b). Thus, for example, the Public Service Employment Act, which appears in Schedule III, inter alia entrusts appointments, promotion, election standards, lay-off and reappointment to the Public Service Commission. See ss. 8, 10, and 34. These matters therefore are excluded from the scope of bargaining under the PSSRA.} and prohibits the incorporation in agreements of conditions which require legislative amendment in order to become operative.

Section 70 of the PSSRA regulates bargaining indirectly by limiting the scope of arbitration:

3. Miscellaneous sources of managerial prerogatives

Management control may also derive indirectly from the union in its intermediary role between managers and employees.\footnote{That is as “managers of discontent.” See the discussion of the union role under the Radical model.} Here the union’s statutory duty of fair representation towards its members,\footnote{See supra, note 55, s. 68.} enforced primarily by labour boards and arbitrators, is obviously relevant in helping to define the proper union role. Moreover, the manner in which bargaining units are constituted\footnote{See supra, note 159, ss. 10, 12.} may weaken or strengthen union power and thereby influence management’s control. Another site of managerial prerogatives in the public sector legislation arises where interest arbitration machinery is substituted by legislation in lieu of a right to strike.\footnote{See supra, note 162, s. 101.} In deciding which matters are bargainable, interest arbitrators must inevitably resort
to a particular philosophy or theory of management control in reaching their decisions on this issue, which will be reflected in the terms of their awards. The necessity for such a theory is demanded by the "penumbral uncertainty"\textsuperscript{168} surrounding the legislative, judicial and arbitral attempts to spell out those issues which are properly bargainable as a matter of law and those which are not. As in the case of grievance arbitration, under the Pluralist model interest arbitrators seem likely to adopt some version of the "reserved rights" or "joint sovereignty" approaches as their model.

Where strikes are allowed, these tend to be constrained in ways unparalleled in the private sector, for example, by notice provisions, limits upon those employees who can strike,\textsuperscript{169} so that even here, the prerogatives of management are rendered more secure than if there existed a right to strike along private sector lines. While this discussion of the legal framework for managerial prerogatives has been necessarily brief, it should by now be clear that the study of law as a form of social control in the workplace requires attention to a wide variety of potential sources of managerial power and restraints upon its exercise within the collective bargaining framework if this question is to be pursued in a satisfactory manner.

IV. THE RADICAL MODEL

A. A General View

The term "radical" was chosen for the reason that several strands of thought are subsumed by this term. Grouped together for present purposes are the Marxist and neo-Marxist writers on industrial relations (Richard Hyman, Richard Edwards, Harry Braverman), critical labour lawyers (Karl Klare, James Atleson, Katherine Stone, Duncan Kennedy), and the "radical pluralists" (Alan Fox, John Goldthorpe). For the purposes of analysis a relative homogeneity of perspective amongst these writers may be presumed except where it is appropriate to distinguish between their contributions and is therefore otherwise indicated.

1. The centrality of "control"

Unlike the Unitary or Pluralist perspectives, this model views the issue of control as paramount in developing an understanding of industrial

\textsuperscript{168} By this term is meant the inevitable ambiguity (and therefore scope for alternative interpretations) arising from any attempt to commit to writing normative principles which are intended to guide future action.

\textsuperscript{169} Weiler, supra, note 71 at c. 7.
relations. Indeed, Hyman has defined the study of industrial relations to be the study of "the processes of control over work relations." Work relations are seen at least in part to be the product of wider social, political, and economic circumstances, reflecting a pattern of inequalities which for Marxists represents a fundamental conflict between the capitalist class and the labouring class. Fox sums up well the general thrust of this perspective:

Central to this alternative is the belief that industrial society, while manifestly on one level a congeries of small special interest groups vying for scarce goods, status, or influence, is more fundamentally characterised in terms of the overarching exploitation of one class by another, of the propertyless by the propertied, of the less by the more powerful. From this view, any talk of "checks and balances" however apt for describing certain subsidiary phenomena, simply confuses our understanding of the primary dynamics which shape and move society — as useful confusion indeed for the major power-holders since it obscures the domination of society by its ruling strata through institutions and assumptions which operate to exclude anything approaching a genuine power balance.¹⁷¹

On this view, questions of control and managerial authority need to be understood in the context of these broader social forces which profoundly influence and in large measure (at least) are responsible for these relations of inequality and exploitation in the workplace.

B. Capitalism, Conflict and the Asymmetry of Power

Because of the exploitative nature of capitalism, relations between capital and labour are seen as inherently conflicting. While the non-Marxist Radical might prefer to stress the divergent interests of distinct groups such as management and employees as the significance of conflict, the Radical perspective overall differs from Unitary and Pluralist theories by seeing workplace conflict as inevitable and fundamental.

Capital exploits labour by seeking to obtain labour power at the lowest price, and then to maximize the returns on each unit of labour purchased. On the other side, the employee seeks to sell his only asset, his labour power, for the highest price he can obtain. Work relations are exploitative because the power distribution between capital and labour is asymmetrical, whether labour is viewed collectively or individually, and reflect this fact in the terms and conditions of employment. Whereas capital can usually choose whether or not to invest, in the absence of windfall income, labour has no option but to sell its services to employers on the labour market in return for wages. This power imbalance tends to be compounded during times of relative unemployment because the

¹⁷¹ Supra, note 12 at 274.
competition among prospective employees to sell their labour power intensifies, allowing capital to obtain its labour on more favourable terms.\(^\text{172}\)

For the Marxist, the market relationship between capital and labour is critical in determining the character of relations in the workplace. The asymmetry of the market relationship contributes substantially to the subordination of employees to the demands of management (as capital's agents). As Schienstock explains:

> The fact that labour cannot be seen in isolation from the individual providing it implies that the wageworker, by selling his labour, subjugates himself to the domination of the capitalist. The fact that the capitalist purchases the commodity labour affords him the right — as with any other purchased commodity — to dispose of it at his discretion and therefore use the wage-worker to his own best interest. He can dictate the working conditions and exercise any type of control he wishes.\(^\text{173}\)

While a Pluralist would probably contest the specific accuracy of some of these claims,\(^\text{174}\) the Radical would adopt the position that, as an overall picture, it nonetheless remained correct. Schienstock's statement remains valid from the Radical viewpoint in terms of pointing to the operation of the basic principle that "he who pays the piper calls the tune" both in the marketplace and the workplace. The superior economic power of capital therefore results in a set of circumstances tending to favour the dictation of the terms of employment by management.

However, as Fox obviously realized,\(^\text{175}\) the power of capitalists and managers in practice is subjected to at least nominal checks and balances, collective bargaining of course being a prime example of such a check upon the exercise of managerial discretion. The problem confronting the percipient Radical, and particularly the Marxist, is to explain the persistence of a system of capitalist domination in the workplace in an era which has seen the installation of collective bargaining and various other forms of statutory employment regulation which expressly purport to act as checks upon managerial discretion. How, in other words, is the consent of employees to a system of workplace exploitation and subordination maintained? It is at this point that the Radical perspective must invoke the concepts of ideology and legitimation in order to explain this apparent contradiction.

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172 Schienstock, supra, note 4 at 181.
173 Ibid.
175 Supra, note 12 at 274.
C. A Critique of Pluralist Collective Bargaining

Under the Pluralist perspective, the amount of conflict tolerable was strictly limited, because this was seen to be a necessary condition for the achievement of industrial peace and to guarantee continued productivity. Participation in the collective bargaining system presupposed that those participating had a normative commitment to the system's procedural integrity. Beyond this, the Pluralist model recognized as well at least some substantive issues as being properly the subject of bargaining. However, as Radical exponent Richard Hyman argues, it is only "legitimate interests" which may be subject to negotiation by the parties under the Pluralist model: "Legitimate interests, it is normally assumed, are those commonly identified as such by 'responsible' participants in 'mature' collective bargaining: that is to say, they are interests which can in principle be accommodated in the give-and-take of bargaining between employers and union representatives." This view of limited legitimate workplace conflict is of course not inconsistent with the "reserved rights" theory of managerial prerogatives which was seen to be predominant in Pluralist labour relations. It is this "limited conflict" interpretation of collective bargaining which Pluralists view as most likely to serve the long-term overall interests of society through the preservation of a "modified capitalistic or mixed enterprise economy."

But what are "legitimate interests" for the purposes of collective bargaining and how are they defined? Moreover, how is employee participation restricted to these issues only and then reconciled with the "industrial democracy" rhetoric associated with the Pluralist model? These are all questions of express concern for the Radical model which shall be addressed now.

D. "Free and Voluntary" Bargaining and the "Joint Authorship of Rules"

In order to understand these issues, the Radical argues, an examination of the nature of collective bargaining together with its associated ideologies is necessary. Most Radicals would argue that the sharing of ideologies supportive of managerial interests by employees substantially reduces the problem of control for management. Indeed, many Pluralists would probably make the same admission. However, for the Radical, the Pluralist model's apparent advocacy of, and provision for, a rough equivalence

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177 Hyman, supra, note 68 at 33.
178 See text accompanying note 89.
179 Woods Report, supra, note 56 at 22.
of bargaining power and the joint authorship of rules is belied by the reality of an asymmetrical power relationship between management and employees in which rights of employee participation are extensively circumscribed. Pluralism nevertheless is seen as able to obtain and sustain working class support for management policies and directions which employees through a combination of, or ideological appeals to, broader cultural values (private property, economic efficiency, managerial expertise) and through the granting of some real, economic and non-economic concessions, but only those which do not fundamentally alter the existing power relations between management and employees.180

"Joint authorship of rules" and "free and voluntary bargaining" developed as aspects of contractualist doctrine in the nineteenth century.181 However, to the extent that these notions have some real consequences (that is to say a collective agreement is negotiated on a range of issues in which there has been ascertainable employee participation and some concessions are made in response to union demands), they also legitimize the status quo not only with respect to those issues expressly subject to bargaining and contained in the collective agreement but also, and more significantly, the entire panoply of issues pertaining to the organization and direction of the work process. Katherine Stone notes:

The stress on joint rule determination slides easily into an implicit assumption of self-determination by labour; that is, by helping to frame the rules, the union has "made its own bed". . . . Under industrial pluralism, however, the collective bargaining agreement is termed a system of government. The notion of government by consent of the governed implies that each side has accepted not only the particular terms of the agreement but also the entire network of procedures that surrounds the creation of the agreement, its enforcement and its renegotiation. The particular rules that are generated by these processes are thought to express both sides' participation and both sides' consent to every aspect of the labour-management relationship. The entire panoply of workplace regulations and decision — disciplinary rules, methods and pace of production, hiring policies, and product quality — is implicitly within the union's consent. Thus virtually all management decisions are legitimated by the theory.182

While one cannot isolate the study of ideologies from the study of concrete practices,183 Stone in effect makes the point that these

180 Ibid.

181 See text accompanying notes 30-34.


183 Because employee consent is so fragile and requires ongoing accomplishment, it is not sufficient, or rather it is dangerous, for management to try and rely purely on such ideological claims as "joint authorship" and "free and equal bargaining" for the maintenance of employee consent. If management are to ultimately succeed in controlling the workforce, they must retain the ability also to threaten and carry out economic and/or coercive sanctions against employees collectively and individually. This is a point commonly made by power theorists. See, for example, D. Wrong, Power: Its Forms, Bases and Uses (New York: Harper and Row, 1979) at e. 5.
ideological "positions" on collective bargaining, derived from contract (and thus widely articulated, understood, and accepted), permeate and legitimate the outcomes on a whole range of managerial and labour relations issues, a range far broader and organizationally more significant than those issues usually encompassed by the collective bargaining notion of "scope of bargaining." The implication, of course, is that overall management control is maintained and strengthened at the same time as collective bargaining is seen to operate, in part through granting various concessions to employees. The "scope of bargaining" issue still requires discussion under the Radical model, not only because it is a key aspect of Pluralist collective bargaining, but also because in acting as a limiting device on the possibility of unrestricted collective bargaining by the parties it would seem to require legitimation if employee acceptance of the basic fairness of collective bargaining is to be sustained.

E. The Scope of "Legitimate" Bargaining

Because the Pluralist model of collective bargaining must be made to appear credible, the Radical would concede it is necessary for management to actually make concessions in the process of bargaining with employees for collective agreements. However, the sacrifices required by management to secure industrial peace are essentially and by necessity relatively insignificant: By necessity because if they were not so, then reality would confirm the descriptive validity of the Pluralist model:

Only the margins of power are needed to cope with marginal adjustments. . . . What many see as major conflicts in which labour seems often now to have the advantage are conflicts only on such issues as labour deems it realistic to contest, and these never touch the real roots of ownership, inequality, hierarchy and privilege. Only if labour were to challenge an essential prop of the structure would capital need to bring into play anything approaching its full strength, thus destroying at once the illusion of a power balance. For example, a demand backed by strike action that wage earners receive equal rewards with top management would soon demonstrate which side could, and would, feel impelled to last out longer.184

Thus while the total amount of control in the workplace may be extended, resulting in tangible increments in the degree of employee participation on a variety of issues, the essential symmetry of power distribution in the workplace can be maintained. Significantly, the practice of limited accommodation of employee interests contributes to an appearance of fairness and therefore to the overall legitimacy of collective bargaining as a form of employee participation on a limited range of work issues. It renders concrete, albeit in limited ways, the ideologies of "free and

184 Supra, note 11 at 279-80.
Collective bargaining legitimacy is also encouraged by its economic bias. From any viewpoint, there can be little doubt that those interests most readily agreed as being legitimate subjects of bargaining are those matters pertaining to wages, fringe benefits, and hours. Indeed, because concessions on these issues have in the past been more readily obtained it is well-recognized that there is a tendency for dissatisfaction related to the workplace to be converted or displaced into wage and other similar demands. Because in the past employers have also been able to provide this type of concession relatively easily in collective bargaining, this form of employer largess served to reinforce the vision of collective bargaining as fair while simultaneously preserving more strategically important areas for decision making exclusively for management.

Because also of the economically inferior position of employees, the economic orientation of collective bargaining, which produces visible improvements in response to employee short-term needs, encourages a perception of bargaining which is, if not expressly opposed to a wide-ranging form of employee participation in workplace governance, is pragmatically oriented towards the fulfillment of these short-term, principally economic needs. Employer willingness or ability to meet these needs following a period of bargaining, and possibly a strike or arbitration, contributes to a "myth of achievement" whereby minor improvements in the position of employees are presented as significant gains.

F. The Trade Union Role in Conflict

Traditionally, the trade union role has been regarded by Radicals with some ambivalence. Marxists have alternatively viewed unions as crucibles within which the bases for the overthrow of capitalist forms of production lie (the "optimistic tradition") or as agents of integration, oligarchy, or incorporation, ultimately engaged in furthering the interests

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185 See Hyman, infra, note 186 at 27-28; K. Klare, "The Public/Private Distinction in Labor Law" (1982) 130 U. Pa. L. Rev. 1358 at 1401. But as Hyman has also pointed out, "Economic crisis and recession are in no way an opportune context for the peaceful and orderly accommodation of opposing interests..." As he goes on to say, "In such circumstances, however, 'participation' (though not control) may be offered to subordinate and disadvantaged groups without diminishing the dominance and advantage of those at the top." See supra, note 68 at 35.

186 This is "... an illusion which magnifies fractional changes in wage rates or marginal improvements in employment conditions into resounding successes." V.L. Allen, Militant Trade Unionism (London: Merling, 1969) at 30; cited in R. Hyman, Marxism and the Sociology of Trade Unions (London: Pluto Press, 1971) at 7.

187 Hyman, ibid. at 4.
and forms of capitalist production ("the pessimistic tradition"188). In contrast to the former, the "pessimistic" view casts unions as managerial agents engaged in the control of the workforce on behalf of capitalist class interests.

In view of developments in twentieth-century labour relations, the "pessimistic" tradition has become the orthodoxy. Dahrendorf's "institutionalization of conflict" thesis189 and Wright Mills' concept of the union boss as "manager of discontent"190 have portrayed the union role in terms of its inevitable and at least partial integration into the practices and procedures of capitalist production. The union role is primarily therefore counter-confrontational, although not entirely, so for to suppress employee insurgency completely for managerial ends would endanger the legitimacy of the unions in the eyes of their workers.191

Thus the union role has been characterized as primarily reactive rather than active in dealing with changes, and more firmly oriented towards particular, sectional grievances, especially of individual employees, than towards the collective predicament of employees.192 In assuming the role of "junior partners" to traditional management, collective bargaining law has strongly influenced the union role. According to Karl Klare, this law has sought "... to place unions in the uncomfortable position of serving as fiduciaries of an imagined societal interest in industrial peace and of serving specific managerial and disciplinary functions."193

Through a normative or pragmatic engagement in collective bargaining, the union's "junior partnership" in workplace governance ensures a source of managerial reassurance: "... so long as [the unions] maintain a primary commitment to collective bargaining, they cannot openly attack the predominant right of the employer to exercise control and initiate change."194

On this view, collective bargaining is not primarily an alternative means of employee power (that is the "countervailing power" thesis) but an adjunct of management control exercised on management's behalf by the union (that is rather a "co-optation" thesis).

188 Ibid.
189 Supra, note 74.
191 Hyman, supra, note 186 at 37.
192 Hyman, supra, note 170 at 97.
194 Hyman, supra, note 170 at 97.
Union commitment to collective bargaining procedures can be explained as arising because the availability of concessions and the rights and privileges of union office are predicated upon an acceptance of these procedures. Because of their inferior power position, unions have few options but to pursue short-term, chiefly economic concessions. Moreover it is a set of circumstances which union officials often find is most advantageously exploited through collusion with management rather than by engaging in anything other than symbolic conflict.195

G. Trade Unions and the Handling of Grievances

From the Radical perspective, the union role in handling work grievances epitomizes its role in the control and subordination of rank and file employees. The union serves as a “junior partner” of management, by systematizing employee compliance with grievance procedures and encouraging their acceptance of grievance procedures as the primary means for the resolution of workplace conflict and of the work enterprise as naturally and inevitably hierarchical.196 These outcomes are seen to be brought about in the following way. Because collective agreements usually provide that the handling of individual grievances is to be controlled by unions on behalf of their members, in such cases the intervention of unions in the grievance process is guaranteed. While union power is enhanced by their participation in processing individual grievances, it is at the “price” of co-optation into the collective bargaining scheme. At the same time it provides management with a means of ensuring that the lower ranks in the hierarchy are complying with its policies and directives.197 Unions participate in what is also an educative function: “Modern grievance processes, which normally involve successive appeal steps up the management ladder from foreman to manager to top management, recognise and reinforce a hierarchical structure.”198

On this view, unions may be seen to constitute an integral part of the workplace bureaucracy contributing, by their juxtaposition between management and the workforce, to the instillment of workplace hierarchy

195 See supra, note 186 at 20.


197 For example, Feller, supra, note 71 at 766.

198 Atleson, supra, note 91 at 106. As Glasbeek has stated: “The flexibility of remedial powers given to arbitrators is one of the more significant achievements of trade unions. But, in obtaining it, they have accepted, in large measure, the role of educator in and administrator of, employer-imposed work rules.” H.J. Glasbeek, “The Utility of Model-Building — Collin's Capitalist Discipline and Corporatist Law” (1984) 13 Indus. LJ. 133 at 147.
and the subordination of employees, and to the acceptance of this position by their members as realistic and inevitable, if not always desirable. In this role they are assisted by their ostensible function as representatives of employees' interests and by their "successes" in obtaining concessions from management.

A managerial bias in the handling of grievances is also reflected once grievance procedures are exhausted and grievances are referred to arbitration. Under Canadian labour law, employees are typically prevented from striking or participating in other forms of work disruption over any issue during the course of the agreement. Moreover, the union is usually limited in the issues which it may pursue to arbitration by the terms of the collective agreement. On the Radical view, the exchange of the "right" to disrupt work for a restrictive form of grievance arbitration patently disadvantages the position of employees vis-à-vis management, inasmuch as the union's most patent source of power, the collective withdrawal of labour, is suspended for the period of the agreement. It represents the "quid pro quo" myth of grievance arbitration, conceded even by some Pluralists. But Radicals do not regard the union sacrifice as matched by the availability of arbitration. This arrangement, as with other aspects of collective bargaining, is also seen as designed to secure industrial peace rather than the pursuit of substantive justice for employees. The prime beneficiaries of this industrial peace are seen to be management.

The role of grievance arbitrators in securing this peace through defusing conflict is seen as critical. Stone notes:

Arbitrators function in this power contest as active intervenors in plant life in order to ensure the smooth continuity of operations and the diffusion of tensions, so as to help to preserve industrial order. But, as with any form of social order, it is important to see who benefits from industrial orderliness, and at whose expense it is achieved. It is in disorder that workers experience and exercise their power in the production process.

The elimination of workplace disorder is thus viewed as the primary objective of arbitrators and as necessary for the continued subordination of employees. In terms of the operating assumptions employed by arbitrators in deciding upon grievances, while at least formally the arbitrator conforms to the dictates of the Pluralist model, the Radical would see his motivations, methods, and objectives as deriving from the

199 See S. Lynd, "Investment Decisions and the Quid Pro Quo Myth" (1978-79) 29 Case W. Res. L. Rev. 396. One Pluralist who admits the mythical proportions of this notion is David Feller. See Feller, supra, note 71 at 766.

200 Supra, note 182 at 1565.
Unitary model or a restricted Pluralist\textsuperscript{201} model, or even more likely in view of his formal commitment to Pluralism, a combination of the two.

Finally, the Pluralist might ask: What about the arbitral use of “just cause” requirements and the development of the doctrine of fairness as constraints upon managerial discretion?\textsuperscript{202} What also about the concept of “progressive discipline” and the right of arbitrators to review the appropriateness of disciplinary penalties? Surely these are blows struck in the Pluralist tradition? The Radical response echoes the response which it took towards the concessions to employee demands wrought at the bargaining table, or made following a strike or binding arbitration. Any employee gains in terms of discipline for “just cause” are marginal and do not alter the fundamental primacy of management in governing the workplace nor the essentially inferior, expendable status of employees.\textsuperscript{203} For example, in terms of discipline and dismissal, Glasbeek has argued that little has altered since the nineteenth-century pre-arbitration era and that while the penalties and procedures have become more measured, penalties frequently remain as severe if not more so than before.\textsuperscript{204} While the employee may retain his job, the effect of the new cool, calculating arbitral rationality on disciplinary matters is to exact a very efficient form of control over those who remain employees.\textsuperscript{205} As for the arbitral doctrine of fairness, beyond noting the Pluralist’s own ambivalence concerning the doctrine, its chief significance has been interpreted as being procedural rather than substantive, and therefore subject to the same power-redistributing limitations as some of the other collective bargaining and arbitral procedures already discussed in this section.\textsuperscript{206}

H. Working for the State: the Radical View

While Radical examinations of the role of the state in capitalist societies are quite numerous,\textsuperscript{207} little attention apparently has been devoted to the position of state employees in industrial relations and particularly to those engaged in collective bargaining with their employers. Public

\textsuperscript{201} By “restricted Pluralist,” it is intended to contrast the “reserved rights” approach with the “joint sovereignty” approach. See text accompanying note 86.

\textsuperscript{202} Supra, note 174.

\textsuperscript{203} Supra, note 11 at 279-80.

\textsuperscript{204} Glasbeek, supra, note 196 at 37.

\textsuperscript{205} On the rationalization of forms of capitalist discipline over the past two centuries, see M. Foucault, Discipline and Punish (New York: Pantheon, 1977).

\textsuperscript{206} Glasbeek, supra, note 196 at 60.

employees may include highly trained professional persons, clerks, manual labourers, and any range of other different occupations. Generalization on their predicament is therefore difficult if not impossible. As in the case of the Pluralist model, any Radical analysis of their position must address the essentially triadic public employment relationship, in which the employee is subject both to the direction of his employer and to the demands of the public he is employed to serve. He constitutes thus a "bridge between ruler and ruled."208 This position lies in obvious contrast to the chiefly diadic relationship between the private sector employer and his employee, under which the employee owes no special duties as a result of employment to anyone but his employer.209

Earlier, it was seen that Pluralists have recognized the diffuse and complex management structures encountered in the public sector. The multilateral and multiparty nature of public sector management is rendered more complex by a confusing array of statutory obligations upon managers, towards the public and other agencies, as well as towards their employees. This state of affairs encouraged a reluctance among some Pluralists to condone private sector style collective bargaining in the public sector. Several writers from within the Pluralist tradition, however, notably Sanford Cohen210 and Clyde Summers,211 have suggested that a broad mandate for public sector bargaining may be positively democratic, because it enables employees to confront the combined opposition of government officials and taxpayers more equally and therefore to secure a greater measure of workplace justice. Collective bargaining can also usefully break the "bureaucratic shield so as to enlarge the possibilities of general public influence"212 upon public sector institutions. In other words, it has been seen as a potential means of enhancing public accountability of the State services. It may be asked whether the Radical model sees any similar transformation possibilities in public sector unionism and bargaining for effecting greater employee power and more democratic public services?

The response to this question obviously will depend upon the particular Radical view taken of the state, industrial relations, and labour law itself. The Radical position concerning these institutions in private

208 The concept of civil servants and other white-collar workers constituting a "service class" is discussed in Dahrendorf, supra, note 10 at 255.

209 Employees of course must comply with the normal tortious duties of care owed by citizens towards each other.

210 Supra, note 157.

211 Supra, note 151.

212 Cohen, supra, note 157 at 195.
sector bargaining has tended to be a rather pessimistic one. Generally speaking, the roles of the state, the industrial relations apparatus and labour law in the management-labour relationship were not portrayed except as ultimately supportive of traditional forms of managerial authority. By analogy, one would expect the Radical analysis of the public sector position to be equally pessimistic, given the fundamentally pro-capitalist orientation attached to the state and collective labour law under the Radical model.

A more optimistic, alternative assessment of the predicament of public sector employees would seem desirable on at least two grounds. First, the expansion in state services since World War II has meant that the state has become a major employer, affecting the lives of large numbers of persons. And secondly, and more importantly, state employees are uniquely engaged in securing either the conditions for capitalist accumulation or the legitimation of the state and the accumulation process. This has meant that the very conditions of their working experiences raise inherently political questions about the allocation of state resources. And, as Johnston has noted, “Public workers are brought face to face in their work with the problems of society, as reflections of their own lives.” Because of their direct exposure to political and social dilemmas, the ability of public unions and bargaining to respond to these situations at least to protect employee interests would seem very important.

While the Radical interpretations of private sector bargaining and trade unionism have taken a pessimistic approach, the foundations for a more positive Radical approach to collective bargaining by public sector employees can be found elsewhere. One source stems from the recent work of some American political economists on the nature of State employment; the other from recent developments in Radical approaches to bourgeois law, including the critical legal studies movement.

First, it has been necessary to proceed past the view of the State as a monolithic structure, implacably opposed to the “real” interests of

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213 Although the Radical view of the state vis-a-vis private sector employment was not expressly considered in this chapter, it was nonetheless clear from the view taken of collective bargaining. See Hyman, supra, note 170 at c. 5 for one account of the state’s role in industrial relations.


215 P. Johnston, “Public Sector Unionism” in supra, note 214 at 216-17.


217 Here I am chiefly drawing upon aspects of recent Marxist sociology of law as well as the American critical legal studies movement.
its employees and the community. But in recognizing the "contradictory class location" of state employees, who have distinct interests of their own and direct relationships with the "serviced classes" (the aged, the infirm, the unemployed, the mentally ill, et cetera), the implications of these relationships and these interests have not always been pursued. To return to a concept discussed earlier, the consent of state employees to state programs and to the forms of administration in state agencies has not been questioned.

James O'Connor has identified a need for state employees to align themselves with state dependents to form alliances to resist cutbacks in welfare expenditure. A problem in the past has been a perceived contradiction of interests between these two groups, preventing such alliances. State employees therefore require an approach to collective bargaining and the management of their agencies which recognizes the interests of both themselves and state dependents, and which contributes to the greater public accountability of the agencies. While this task is plainly difficult, as the conditions of economic recession result in fewer economic concessions to state employees, state employees will be obliged (if they do not choose to do so) to address qualitative issues on a larger scale than before. And as O'Connor has noted, it is precisely on these qualitative issues, going to the core of state employees' working lives and to the state-dependents' everyday existence, that the possibility of a common identity of interests between these two groups and their joint engagement in political action is likely. On this view, then, one might predict more forceful use of collective bargaining by state employees to challenge public sector managerial prerogatives on a range of work issues, thereby expanding as far as possible the scope of bargaining between the parties.

218 While this view seems increasingly dated, it still has its adherents. It is clearly stated in the following remarks by Richard Quinney, the American sociologist of law and crime: "... the role of the state in capitalist society is to defend the interests of the ruling class ..." and "[l]aws institutionalize and legitimize the existing property relations ... It is through the legal system then that the state explicitly and forcefully protects the interests of the capitalist class." R. Quinney, Criminal Justice in America (Boston: Little, Brown, 1974) at 21-24.

219 E.O. Wright, "Class Boundaries in Advanced Capitalist Societies" (1976) 98 New Left Review 3. A prime example of a group of state employees who are placed in a contradictory class location, according to this scheme, are police officers. While they are employed as part of the state structure to maintain and protect the capitalist mode of production, police officers tend to be recruited mainly from working class neighbourhoods. On the class location of police officers, see R. Reiner, The Blue-Coated Worker (Cambridge: Cambridge University Press, 1978).

220 Supra, note 216 at 146-48.

221 See supra, note 185.

222 Qualitative issues seem less likely to involve "knee-jerk" opposition from concerned taxpayers. See supra, note 216 at 148.
Other strategies advocated have included public employees serving as sources of information upon the activities of government for the general public\textsuperscript{223} and forging alliances between public and private sector unions.\textsuperscript{224} Again, particularly in the latter instance, this is more easily said than done, due to the public-private worker separation encouraged by private-sector workers in their role as taxpayers being called upon to fund increased public expenditure. Nonetheless, it seems not inconceivable that employee participation in collective bargaining provides not only a channel of influence on matters touching state dependents, but also a source of information on the way the state is managed, and lastly, unites state employees with private sector employees as a class of participants in collective bargaining procedures with management, thereby providing a basis for mutual identity and for employee solidarity. In order for collective bargaining to operate in this way, trade unions would have to discard any co-opted, collective practices and redefine this role.\textsuperscript{225} As a political strategy, the potential of collective bargaining law requires further consideration, given the largely negative assessment by Radical exponents and the reliance upon it indicated implicitly by O'Connor and others.\textsuperscript{226}

Here the question needs to be asked: Is collective labour law simply a means for entrenching, largely unaltered and unfettered, traditional hierarchical forms of management control? Here Radical orthodoxy would tend to argue in the affirmative.\textsuperscript{227} However, there are authorities and arguments which, while themselves requiring perhaps further documentation and proof, do not accept as absolute or accurate the answer given by the Radical orthodoxy.

There exists in Radical legal theory what might be termed the "radical rights" perspective. It does not accept the simple dismissive approach towards Pluralist law and legal institutions, but sees valuable advantages to be derived in actively participating in the forms and devices of Pluralist legality. This perspective receives its most famous and perhaps clearest formulation in the words of social historian E.P. Thompson: "... there is a difference between arbitrary power and the rule of law. ... To deny or belittle this ... is to throw away a whole inheritance of struggle about

\textsuperscript{223} W.D. Yates, "Public Sector Unions and the Labor Movement" in \textit{supra}, note 214 at 230.
\textsuperscript{224} Hart-Landsberg et al., \textit{supra}, note 214 at 257.
\textsuperscript{225} \textit{Ibid}.
\textsuperscript{226} O'Connor, \textit{supra}, note 216. While collective bargaining is not the only strategy open to public employees, it is one readily available which offers a wider legitimacy than less formal, unannounced forms of employee protest.
\textsuperscript{227} See text, \textit{supra}, following note 176.
law, and within the forms of law, whose continuity can never be fractured
without bringing men and women into immediate danger.”  

His study of eighteenth-century English criminal law found that
ordinary, otherwise disenfranchised folk were able to successfully employ
the existing legal forms to redress grievances and wrongdoings and was
thus able to conclude that the law was not simply a power resource
of an elite class. 

The value of contemporary bourgeois legal rights has also been
recognized by some Radical legal theorists, albeit slightly grudgingly:
“...a right encapsulated in bourgeois legal form is certainly better than
no right at all. This approach has also emerged, although far from
unequivocally, in the work of the Critical Legal Studies Movement,
and, most relevantly, in their critique of Pluralist collective labour law.
In the following passage, Duncan Kennedy seems to be advocating active
employee engagement in collective bargaining, including resorting to
existing clearly-defined procedural and substantive rights, as a foundation
for more ambitious challenges to the balance of power and division of
labour in the workplace:

the critique of rights as liberal philosophy does not imply that the left should
abandon rights rhetoric as a tool of political organising or legal argument. Embedded
in the rights notion is a liberating accomplishment of our culture: the affirmation
of free human subjectivity against the constraints of group life, along with the
paradoxical countervision of a group life that creates and nurtures individuals
capable of freedom. We need to work at the slow transformation of rights rhetoric,
at dereifying it, rather than simply junking it.

The indeterminacy ensured by the nature of collective bargaining
law as evidenced in specific outcomes in arbitration decisions, case law,
and collective agreements is important in understanding the production

228 E.P. Thompson, Whigs and Hunters (London: Allen Lane, 1975) at 266.
229 A similar approach is taken by J. Young in “Left Idealisms, Reformism and Beyond: From
New Criminology to Marxism” in B. Fine et al., eds, Capitalism and the Rule of Law (London:
Hutchinson, 1979).
230 S. Picciotto, “The Theory of the State, Class Struggle and the Rule of Law” in Fine et al., ibid. at 172.
231 Stone, supra, note 182, for example, would appear to have little room for this type of
strategy.
506. While they have tended not to focus upon the implications of such admissions, the capacity
of union struggle and collective bargaining to effect “good” has been conceded by a few critical
labour lawyers. See for example Klare, supra, note 193 at 468; also Klare, “Judicial Deradicalization
L. Rev. 265 at 266. For an express adoption of the “rights” approach by a critical labor lawyer,
L.J. 496.
of employee consent to management control. Therefore, if Pluralist collective bargaining rights are agreed to be potentially valuable, and there is scope within the interstices of these rights for conscious employee activity in the pursuit of non-managerial goals, then the possibility for an optimistic Radical interpretation of the operation of contemporary bargaining procedures may be said to be established. The strategies whereby these opportunities are best maximized will differ and remain still rather uncertain, and therefore open to debate and experiment. A necessary preliminary step for making this type of determination, however, is to establish how these rights have been exercised so far, and what degree of “success” has been achieved.

V. SUMMARY AND CONCLUSIONS

In addition to offering a description of the primary characteristics of three models of industrial relations, this paper has sought to illustrate their influence upon employment relations, and particularly their significance for collective labour law in order to test their descriptive powers in outlining the management control collective bargaining relationship, and to identify the distinct normative implications of each model. In this latter role, they serve as three ideologies of the workplace, which may be used to persuade others of the validity or invalidity of a particular set of workplace arrangements. As workplace ideologies, they may manifest themselves through the statements and actions of the parties to the management control collective bargaining relationship, including those third parties (arbitrators, judges) called upon to determine the legal status of this relationship in a particular context. In this last respect, they may also be legal ideologies, influencing the approaches taken by courts and arbitrators in adjudicating on matters in dispute between management and employees, and may also be contained within the terms of legislation, case law, and arbitration awards. It is possible to discover the relative influence each model has had upon legislators, judges, and arbitrators, by examining the terms and outcomes of their decisions and legislation, and also the influence exerted upon the parties themselves, by considering the terms of their collective agreements, and the range of issues taken by either management or the employees to arbitration and judicial review. This would allow us to investigate the hypothesized link between workplace ideologies and employee responses to managerial authority.

The Unitary model was seen to have a lengthy tradition based on military and bureaucratic principles. Though it has assumed different
forms, it has remained a strongly pro-managerial ideology, denying any significant role for trade unions or collective bargaining in the workplace. It has acquired a greater role and influence in public sector employment than it has in the private sector, but has continued to influence individual and collective labour law in both sectors since its legal emergence prior to the nineteenth century.

The Unitary influence upon the Pluralist model was made evident in the recent resurgence of a restrictive Pluralist approach towards collective bargaining law (for example, in *Amoco Fabrics*), as part of which "industrial order" and "profitability" have clearly subordinated "free bargaining" and the "joint authorship of rules" as the determining goals of Pluralism, thereby providing for the continued dominance of traditional forms of management in the workplace on a wide range of issues. By also espousing the criterion of "limited conflict," Pluralism also revealed a tension between the industrial democracy rhetoric with which collective bargaining has been associated in theory and the survival of a hierarchical style of management characterized by a clear cut separation between work conception and work execution. This tension would appear manageable only by the making of concessions to certain employee demands. While these concessions do not challenge the essentials of the existing management structure, the precise scope of concessions allowable has been left open by the way the scope of bargaining is defined, allowing a flexible instrument in the hands of the arbitrators and judges when called upon to define the nature of the relationship between collective bargaining and management control in any given dispute. The way in which this concept is interpreted by them and by management and employees themselves vitally structures this relationship, although it was seen that management control is also potentially affected by other aspects of collective bargaining law, for example, the composition of bargaining units and the doctrines used by grievance arbitrators. The values and assumptions of judges, arbitrators, and legislators concerning the running of the workplace will critically shape the way in which these concepts and doctrines are interpreted and applied, and, in turn, their decisions will "feedback" on the decisions taken by the parties themselves concerning what is possible and desirable in workplace relations. The apparent ascendency of a restrictive version of the Pluralist model in collective bargaining law (the "reserved rights" approach) places clear limits upon the immediate prospect of any substantial alteration to the structural location of employees in the workplace under existing forms of collective bargaining. The Pluralist approach to the public sector management control collective bargaining
relationship once again revealed a tendency towards a more restrictive approach than that taken in the private sector. A broader range of ideological appeals were used to justify the adoption of this more restrictive approach, for example, the "public interest." A more open, pronounced effort to "draw lines" between matters bargainable and those deemed not suitable for bargaining was found in public sector collective labour law. This then raises the prospect of a dialectical tension between this imposition of additional restrictions and the corresponding need for compensating concessions to public employees. While the need for even greater concessions to counterbalance these restrictions would seem apparent, the ability and desire to respond to this need would seem contradicted by the very existence of the restrictions.

Finally, the Radical model provides a valuable battery of criticisms with which to examine any management control collective bargaining relationship ostensibly organized on Pluralist principles. It draws attention to the limits which Pluralist ideology and Pluralist collective labour law places upon the possibility of free, open-ended styles of joint and employee-based management, identifying the potential for trade unions, arbitrators, and others to serve the interests of management control merely by complying with Pluralist collective bargaining procedures. In the discussion of the public sector, an attempt was made to identify the strands of a Radical approach to the study of the management control collective bargaining relationship, one which was not confined by the pessimistic interpretation of Pluralist procedures seen in most Radical analyses of the private sector. This attempt took more the form of a hypothetical sketch, but would seem nonetheless valuable as an analytical proposition in investigating the capacity of Pluralist bargaining procedures, when actively resorted to by employees, to bring about anything other than marginal improvements in their working conditions and the conditions of their dependent clienteles. While this possibility was proposed in the public sector context, its significance should not be seen as confined exclusively to this sector but also as a suitable hypothesis for micro-social approaches to empirical investigation in the private sector. A framework for the evaluation of these "improvements" is provided by the three models considered in this article.

Each model outlined enables different questions to be asked about any specific management control collective bargaining relationship. However, as was noted at the beginning, a number of questions may also be addressed to each of the three models, seeking to specify the constituent elements of each model. Table A (next page) allows comparison between the three perspectives on the issues identified. It indicates,
for example, the points of ideological similarity between the Unitary and Pluralist models, and the marked departure of the Radical model’s perspective on these issues. By arranging the models in this way, it has been intended to provide a convenient format for their use as descriptive and evaluative devices in the study of management control and collective bargaining.
<table>
<thead>
<tr>
<th>VIEW OF:</th>
<th>UNITARY</th>
<th>PLURALIST</th>
<th>RADICAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Workplace Conflict</td>
<td>deviant; inappropriate</td>
<td>within limits normal</td>
<td>fundamental conflict; endemic under capitalist-mode of production</td>
</tr>
<tr>
<td>2. Power Balance</td>
<td>not relevant</td>
<td>rough equivalence or at least no duress</td>
<td>gross imbalance in favour of management</td>
</tr>
<tr>
<td>3. Workplace Hierarchy</td>
<td>natural, necessary</td>
<td>necessary, though scope for more employee participation</td>
<td>repressive; denies role of employee as producer</td>
</tr>
<tr>
<td>4. Collective Bargaining</td>
<td>not acceptable, nor necessary, management acts in interests of all parties</td>
<td>limited shared decision-making mainly on economic and personnel issues both acceptable and desirable</td>
<td>employees only successful concerning 'marginal' issues; power balance remains essentially unaltered</td>
</tr>
<tr>
<td>5. Role of Labour Law</td>
<td>limited, work relationship essentially a private matter; reinforce management authority</td>
<td>place limits upon arbitrary exercise of managerial discretion; ensures rough equivalence of bargaining power etc.</td>
<td>maintains managerial dominance; in work-place; fails to ensure significant substantive justice for employees</td>
</tr>
<tr>
<td>6. Role of Grievance Arbitration</td>
<td>none</td>
<td>keep conflict within reasonable bounds; adjudicate disputes between parties</td>
<td>amount to denial of right to withdraw labour during course of agreement; only marginal, individual protections provided</td>
</tr>
<tr>
<td>7. Supporting Cultural Values</td>
<td>private property contract, business efficiency, expertise</td>
<td>business efficiency, industrial democracy, voluntarism, public interest</td>
<td></td>
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</tbody>
</table>