Job Security in a Recessionary Economy-Income Support or Re-Employment: Canada 1981-83

John Irvine

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Job Security in a Recessionary Economy-Income Support or Re-Employment: Canada 1981-83

Abstract
In Canada, near full employment in the 1960s was followed by cyclical economic recessions throughout the seventies, culminating in the severe recession of 1982. This led to employment and economic dislocation among large sectors of the labour force. The disruption caused was compounded by the introduction of new technology rendering existing worker skills redundant. The combined effect of these factors led to a large increase in the number of lay-offs of both a temporary and permanent nature during the period from 1981 to 1983. Due to the extent of workforce reductions during that period and the fact that job loss causes not only immediate financial hardship but is often accompanied by large social costs, protections against redundancy and alleviation of the adverse effects of job loss have attracted increased attention in the employment setting. Redundancy, temporary and permanent, has enormous social and economic ramifications affecting personal legal rights and duties. Given the apparent conflict of interest which exists between the economics of industrial competitiveness on the one hand and the employee's financial and psychological need for security in employment on the other, the purpose of this article is to examine the extent to which this conflict has been resolved by examining the legal and institutional protections available to employees facing redundancy in the early 1980s. The term "lay-off" which is used throughout this article is conceptually imprecise. Usage of that term is not confined to its often applied context which is a temporary suspension of the employment relationship, but is used in a generic sense to cover lay-offs of both an indefinite and permanent nature. Consequently, in many parts of the text, the terms "redundancy" and "lay-off" are used synonymously.
In Canada, near full employment in the 1960s was followed by cyclical economic recessions throughout the seventies, culminating in the severe recession of 1982. This led to employment and economic dislocation among large sectors of the labour force. The disruption caused was compounded by the introduction of new technology rendering existing worker skills redundant. The combined effect of these factors led to a large increase in the number of lay-offs of both a temporary and permanent nature during the period from 1981 to 1983.

Due to the extent of workforce reductions during that period and the fact that job loss causes not only immediate financial hardship but is often accompanied by large social costs, protections against redundancy and alleviation of the adverse effects of job loss have attracted increased attention in the employment setting. Redundancy, temporary and permanent, has enormous social and economic ramifications affecting personal legal rights and duties.

Given the apparent conflict of interest which exists between the economics of industrial competitiveness on the one hand and the employee's financial and psychological need for security in employment on the other, the purpose of this article is to examine the extent to which this conflict has been resolved by examining the legal and institutional protections available to employees facing redundancy in the early 1980s.

The term "lay-off" which is used throughout this article is conceptually imprecise. Usage of that term is not confined to its often applied context, which is a temporary suspension of the employment relationship, but is used in a generic sense to cover lay-offs of both an indefinite and permanent nature. Consequently, in many parts of the text, the terms "redundancy" and "lay-off" are used synonymously.

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* John Irvine, LL.B., LL.M., Solicitor.
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I. INTRODUCTION

The large increase in redundancies and lay-offs\(^1\) which occurred
in Canada in the early 1980s focused considerable attention on the issue
of job security. Traditionally, in periods of adverse economic conditions,

\(^1\) In this paper the term 'lay-off' is used in a generic sense to cover both temporary and
permanent interruptions in employment due to the exercise of management prerogatives.
employers resorted to lowering employee levels to reduce costs. Workforce reductions, while necessary from the employer’s perspective, not only create immediate income difficulties for employees, but are often accompanied by psychological and physiological problems. The prolonged economic recession of 1981–83 compounded many of those problems and fuelled debate over the adequacy of legal and institutional protections provided in a redundancy situation. This article examines those protections, focusing attention on the difficulties faced by lower-level employees.

In the first section, reference is made to statistical sources to assess the nature and extent of the redundancy problem from 1981 to 1983. The second section is divided into two parts. First, the legal restrictions imposed on the employer’s right to lay-off under common law, collective-bargaining law, and labour standards legislation are examined. In the second part, the available institutional protections are outlined. Emphasis is placed upon the programmes designed to relieve economic hardship caused by termination, to promote re-employment, and to create new jobs.

In the third section, possible alternatives to lay-offs and redundancies are discussed, principally work-sharing and early retirement policies. Finally, in the concluding section, some suggestions are made in light of the material discussed.

II. MEASUREMENT OF LAY-OFFS AND REDUNDANCIES IN CANADA

Data on the extent of lay-offs and redundancies are available from numerous national and provincial sources. At the national level, the most comprehensive labour force coverage is provided by Statistics Canada and the Canada Employment and Immigration Commission surveys. At the provincial level, only Ontario and Quebec conduct surveys to measure the extent of redundancies and lay-offs. None of these surveys provides complete information on the redundancy problem.

A. Statistics Canada Data

The Statistics Canada Labour Force Survey conducts interviews in about 56,000 representative households across the country and publishes labour market data monthly. These data describe the situation of unemployed persons before they were unemployed and divides them into four groups: Job Losers, Job Leavers, Labour Force Re-Entrants, and New Entrants to the Labour Force.

The Job Loser category is the most relevant in assessing the extent of unemployment that may be attributed to workforce reductions. It is
composed of unemployed persons who were involuntarily separated from their last job. The figures include employees laid-off through lack of work, illness, or as a result of physical disability; employees who have been discharged for cause; and employees who have lost their jobs for a variety of other reasons. Without an accurate breakdown of the actual reasons for job loss, the figures might not provide particularly accurate information in terms of the level of unemployment that may be attributed to lay-offs for economic reasons. A recent Statistics Canada survey emphasized, however, that while the Job Loser figures include employees discharged for a variety of reasons, economic factors such as business failure, decreased market demand, and technological change are by far the most important.

The recorded data relating to unemployment indicate that in the period from 1978 to 1981, job loss accounted for just under half of the total unemployment figures each year. In 1982, job loss as a percentage of the total national level of unemployment rose considerably. The published data indicate that in 1982 the incidence of job loss was higher among workers employed in goods-producing industries than in the service industries, with mining, forestry, and manufacturing industries being most affected. By occupation, job loss accounted for a higher proportion of unemployment among blue-collar workers than among white-collar workers. In blue-collar occupations, job loss was most marked in manufacturing and construction. Regionally, the level of unemployment due to job loss was highest in Newfoundland, Prince Edward Island, Quebec, New Brunswick, and British Columbia.

Although Job Loser figures do not provide scientifically accurate data on the extent of unemployment for economic reasons alone, the figures do indicate that the decline in levels of economic activity, particularly in goods-producing industries, contributed significantly to the large increase in the number of people who lost their jobs or were laid-off in the period 1981–83.

---


3 Job Loss as a Percentage of Total Unemployment

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>48.4</td>
</tr>
<tr>
<td>1979</td>
<td>46.8</td>
</tr>
<tr>
<td>1980</td>
<td>48.3</td>
</tr>
<tr>
<td>1981</td>
<td>48.5</td>
</tr>
</tbody>
</table>

(Statistics Canada data).

4 By September, 1982, the figure had risen to 60.3 percent from 50.1 percent in January 1982. (Statistics Canada data).
B. Canada Employment and Immigration Commission Data

The Canada Employment and Immigration Commission (CEIC) publishes monthly information on all lay-offs of fifty or more workers that have been brought to the attention of local Canada Employment Centres, some 500 of which are situated throughout the country. The published information includes the name of the firm involved, its location, type of business performed, industry, actual number of workers laid-off, total workforce prior to lay-off, date of lay-off, reasons for lay-off, and where applicable, date of recall.

Only employers within federal legislative jurisdiction are required to notify the Commission of planned lay-offs and only then if the lay-off involves fifty or more employees in any four-week period. Collection of data on the number of employees laid-off within provincial jurisdiction depends upon the efforts of Canada Employment Centre managers.

Reporting practices vary from one Canada Employment Centre to another, as well as from one month to another, resulting in large monthly fluctuations in reported lay-offs. It is to be expected that more difficulty will be experienced in obtaining information on all lay-offs that occur in larger cities where there may be a large number of undertakings than in smaller centres with only one or two major industries. Consequently, the coverage of actual lay-offs that have occurred is not complete, and the published figures should not be totalled and used to represent the number of workers laid-off in Canada in any given period. Despite this limitation, the published data do provide a general picture of the nature and extent of lay-offs in Canada, and a comparison of the figures published over a particular period may indicate significant changes in lay-off practices during that period.

The CEIC figures cover permanent, indefinite, and temporary lay-offs. A permanent lay-off involves a complete severance of the employment relationship. An indefinite lay-off is generally one of undefined duration lasting for more than thirteen weeks, while a temporary lay-off is a suspension of the employment relationship for any period of up to thirteen weeks in a twenty-week period. The annual figures from 1978 to 1981 were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of Persons Laid-Off</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>75,158</td>
</tr>
<tr>
<td>1979</td>
<td>114,517</td>
</tr>
<tr>
<td>1980</td>
<td>193,042</td>
</tr>
<tr>
<td>1981</td>
<td>154,685</td>
</tr>
</tbody>
</table>

In the first ten months of 1982 there was a dramatic increase in the number of recorded lay-offs with more than 271,000 employees being
laid-off, over three times the total number of lay-offs recorded in 1978.\(^5\)
Of that figure, almost 78 percent occurred in Ontario and Quebec.\(^6\) By
comparison, the Statistics Canada data referred to earlier indicated that
job loss as a percentage of levels of unemployment was highest in
Newfoundland, Prince Edward Island, Quebec, New Brunswick, and
British Columbia. The more industrialized provinces were particularly
badly affected, but because the CEIC data covers only lay-offs involving
fifty or more employees, many lay-offs occurring in the Atlantic provinces
may go unreported since employment there is often carried on in units
of fewer than fifty employees. The concentration of the published data

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Total Number of Persons Laid-off in Canada: January-October 1982</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Temporary</td>
</tr>
<tr>
<td>January</td>
<td>26,902</td>
</tr>
<tr>
<td>February</td>
<td>30,051</td>
</tr>
<tr>
<td>March</td>
<td>29,628</td>
</tr>
<tr>
<td>April</td>
<td>10,252</td>
</tr>
<tr>
<td>May</td>
<td>8,703</td>
</tr>
<tr>
<td>June</td>
<td>24,495</td>
</tr>
<tr>
<td>July</td>
<td>21,611</td>
</tr>
<tr>
<td>August</td>
<td>17,070</td>
</tr>
<tr>
<td>September</td>
<td>12,070</td>
</tr>
<tr>
<td>October</td>
<td>28,764</td>
</tr>
<tr>
<td>Total</td>
<td>209,546</td>
</tr>
<tr>
<td>As a percentage</td>
<td>77.3</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Table 2</th>
<th>Persons Laid-off by Province</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nfld.</td>
<td>N.S.</td>
</tr>
<tr>
<td>January</td>
<td>—</td>
</tr>
<tr>
<td>February</td>
<td>—</td>
</tr>
<tr>
<td>March</td>
<td>851</td>
</tr>
<tr>
<td>April</td>
<td>150</td>
</tr>
<tr>
<td>May</td>
<td>—</td>
</tr>
<tr>
<td>June</td>
<td>—</td>
</tr>
<tr>
<td>July</td>
<td>5,231</td>
</tr>
<tr>
<td>August</td>
<td>975</td>
</tr>
<tr>
<td>September</td>
<td>277</td>
</tr>
<tr>
<td>October*</td>
<td>1,300</td>
</tr>
<tr>
<td>Total</td>
<td>8,784</td>
</tr>
</tbody>
</table>

\(^5\) See Table 1.
\(^6\) See Table 2.
on lay-offs in Ontario and Quebec is perhaps also explained by more strictly observed reporting practices.

Of the 271,084 lay-offs recorded in the period January to October 1982, 97,535 lay-offs (35.9 percent) were directly related to the depressed state of the automobile industry in Ontario and to a lesser extent in Quebec. Poor market conditions in all of the provinces, accounted for 80,785 lay-offs (29.8 percent), while a lack of orders, mainly in Nova Scotia, Quebec, Ontario, and the prairie provinces, accounted for 35,693 lay-offs (12.8 percent). A high inventory (24,980 lay-offs - 9.2 percent) and declining sales (12,587 lay-offs - 4.6 percent) also influenced lay-off practices in many of the provinces.

Plant closures were responsible for 7,718 lay-offs and accounted for 2.8 percent of the recorded total. The main reasons necessitating closure were financial difficulties and poor market conditions (70 percent). Somewhat surprisingly, the lay-offs resulting from technological or organizational change were rare. Only 1,334 lay-offs (0.5 percent) were attributed to the introduction of new technology, perhaps because technological change may be introduced gradually over a period of time. Where resulting lay-offs do not involve fifty or more employees within a period of four weeks, they will not fall within the scope of the CEIC survey and may not, therefore, be included in the published figures.

\[ This \text{ represented } 74 \% \text{ of the total of 19,423 permanent lay-offs that occurred between January and October, 1982. (Canada Employment and Immigration Commission monthly data).}\]
The declining economic environment and the major structural changes affecting certain industrial sectors, in particular the automobile, textile, clothing, and footwear industries, appear to have been responsible for the vast majority of lay-offs that occurred during the survey period.

C. Provincial Lay-off Statistics

In Prince Edward Island, Nova Scotia, New Brunswick, Alberta, and British Columbia, data on the measurement and extent of lay-offs are not kept by a provincial agency. In Newfoundland, Manitoba, and Saskatchewan, provincial lay-off statistics are based on information provided by local Canada Employment Centres and only deal with lay-offs involving fifty or more employees. The statistics are thus very similar to the figures published by the CEIC.

The provincial labour ministries in Quebec and Ontario gather some data on lay-offs as a result of the legal obligation imposed on employers in those provinces to notify the ministries of large-scale lay-offs. In Quebec, employers are required to notify the Ministry of Labour and Manpower of all lay-offs involving ten or more employees. However, many lay-offs go unreported, and consequently the published data do not indicate the full extent of lay-offs in the province.

In Ontario, the Plant Closure Review and Employment Adjustment Branch of the Ministry of Labour collects data on permanent and indefinite lay-offs that occur in the province. Employers are required to notify the Ministry of Labour of all permanent and indefinite lay-offs of fifty or more employees occurring in any period of four weeks or less. The Employment Adjustment Service also attempts to collect data on permanent and indefinite lay-offs involving twenty-five or more employees. The extent of this information is limited and does not provide complete coverage of lay-offs involving fewer than fifty employees.

The reported figures do not include any information on temporary lay-offs, defined as a lay-off of thirteen weeks or less in any period of twenty consecutive weeks. Furthermore, in those instances where statutory exceptions deem lay-offs in excess of thirteen weeks to be temporary lay-offs, there is no duty to inform the Ministry, and the lay-offs will not be included in the statistics on permanent and indefinite lay-offs.
As in the case of both the Statistics Canada and the CEIC data, the Ontario figures for 1982 show a significant increase in lay-offs over those published in previous years.\footnote{Total Number of Employees Affected by Indefinite or Permanent Layoffs in Ontario:}

\begin{tabular}{ll}
1977-78 & 17,052 \\
1978-79 & 10,559 \\
1979-80 & 21,636 \\
1980-81 & 25,869 \\
1981-82(Nov.) & 42,857 \\
\end{tabular}

This information was provided by the Plant Closure Review and Adjustment Branch of the Ontario Ministry of Labour.

D. Summary

Although data on redundancy and lay-off figures are available from a number of sources in Canada, none of the studies provide complete information on the nature and extent of the redundancy problem. The Statistics Canada figures for Job Losers provide perhaps the most extensive nation-wide coverage. The figures would be more useful, however, if the category of Job Losers was broken down into specific groups based on the reasons the job was lost. Information on the extent of job loss due to workforce reductions could be obtained by including a question in the household survey which required individuals to specify how they came to lose their jobs.

The CEIC data provide very incomplete coverage of lay-offs. Although information on temporary, permanent, and indefinite lay-offs is available, this does not indicate the full extent of the problem since only employers within the federal jurisdiction are required to report lay-offs and only then if the lay-off involves fifty or more employees in any four week period.

At the provincial level, there is a general absence of data on the extent of lay-offs and redundancies. With the exception of Ontario and Quebec, reliance is generally placed on information collected by Canada Employment Centres for CEIC. As stated, this information is very incomplete. In Ontario, while the data collected by the Ministry of Labour is much more comprehensive than that collected by any of the other provinces, the accuracy of this data as a measurement of redundancies and lay-offs is also of limited use since information on temporary lay-offs is not collected. Moreover, employers are required to notify the Ministry of Labour of proposed lay-offs only when fifty or more employees are to be laid-off in any four week period. While efforts are made to gather information on lay-offs involving twenty-five to fifty employees, the reporting of actual lay-offs occurring in this category is limited.
It has not been possible to obtain an accurate figure for the number of workers who were laid-off, either temporarily or permanently, during the survey period because of the reporting practices outlined. Clearly, however, the problem was one of growing proportions in 1981–83. Although increased demand for labour in energy-related sectors was anticipated, the manufacturing industry, upon which a number of the provinces depended heavily, was facing increased foreign competition. This was particularly strong in labour-intensive standard technology sectors where developing countries were concentrating their efforts to increase industrialization and raise export volumes.

Ontario and Quebec, the largest and most industrialized provinces, appeared to bear the brunt of this competition since labour displacement was most marked in import-competing domestic sectors of the economy, such as the automobile and textile industries. Both large and small-scale lay-offs that occurred in vulnerable branches of industry were therefore expected to continue, at least in the short term. Given this fact, the inadequacy of available data raised a number of issues. Perhaps most important is the extent to which the lack of comprehensive data may have hindered labour market adjustment measures that were designed to help employees who had been laid-off. This issue will be particularly relevant to subsequent sections of this paper.

III. THE LEGAL FRAMEWORK

The legal protections governing termination of employment in Canada are derived from three main sources: the common law, collective-bargaining law, and labour legislation. Each will now be considered.

A. Restrictions Upon Lay-offs Under Common Law

Under the common law, it is generally recognized that an employee may not be laid off, temporarily or permanently, without being given reasonable notice, even where a lay-off is necessary for economic or financial reasons. Business exigencies do not relieve the employer of the obligation to give due notice unless the contract of employment expressly or impliedly allows for summary dismissal or temporary suspension of the employment relationship as a result of lack of work. In such cases, the employer may dismiss an employee by providing proper notice of dismissal or, alternatively, by paying the employee the wages or salary he or she would have earned during the notice period.

The issue of what may or may not be deemed reasonable notice will depend upon individual cases. The impact of prevailing market conditions on employment opportunities has had a significant bearing on the length of notice required by the judiciary. Recent case-law emphasizes the availability of similar alternative employment opportunities as an important factor to be considered in assessing notice entitlement.

Advance notice of termination is intended to facilitate job search and help the employee organize his or her personal affairs prior to the actual date of dismissal. Accordingly, the period of reasonable notice has a direct bearing on labour mobility by providing an opportunity to secure re-employment before being affected by a drop in income. In pursuing this objective, the judiciary in Canada have been quite generous to employees, quite frequently providing for periods of notice of up to one year. For the most part, however, the determination of an appropriate notice period has been influenced by the employee's previous qualifications, experience, training, and by the nature and importance of the job function performed. In the case of managerial-level employees of moderate seniority, a presumption has emerged that at least one year's notice of termination be given. For lower-level employees, it would appear that one to two months notice would be the exception rather than the rule. Clearly, therefore, one of the major obstacles preventing lower-level employees from receiving adequate protection has been judicial interpretation of the concept of reasonable notice rather than the concept itself. Other factors have also restricted the impact of the common law. Many lower-level employees are unaware of their rights at common law, and this has prevented reliance on the court system to enforce the notice requirement. Even where employees are aware of these rights, the uncertainty surrounding the concept of reasonable notice coupled with the cost of bringing an action has discouraged litigation.

14 See R.J. Harrison, "Termination of Employment" (1972) 10 Alta. L. Rev. 250 at 265, where he suggests that the courts have placed too much emphasis on the grade and character of employment in assessing notice entitlement.
For this reason, the case law has almost exclusively featured managerial and executive-level plaintiffs.\textsuperscript{15}

B. Restrictions Upon Lay-offs Under Collective Bargaining Law

Throughout the nineteenth and early twentieth centuries, the common law remained the primary source of employment rights and duties in Canada. The law of contract applied in the employment setting demonstrated clear inadequacies, however, and led to the growth of trade unions and legislative encouragement of a system of free collective bargaining. In the last fifty years, the impact of the common law has been reduced considerably by the emergence of a legislated collective-bargaining system.

Currently, slightly more than half of the Canadian workforce is covered by collective agreements negotiated by trade unions. For these employees, collective bargaining has had a significant impact in improving their terms and conditions of employment, particularly in relation to the employer's right to terminate employment. The abstraction of contract law under which all employment rights and duties may be reduced to a period of notice or pay in lieu of notice provides little protection to the employee. As a result, the vast majority of collective agreements now contain a clause requiring the employer to show cause for dismissal. This prevents the employer from terminating employment merely by providing a period of reasonable notice.

Through the development of the 'just cause' concept in collective agreements, the collective bargaining system appears to have provided an element of security in employment not present under the ordinary law of contract applied at common law. Yet, this element of security must not be over emphasized. While, on one hand, cause for dismissal must be shown under the grievance arbitration process, on the other hand, employee rights may be frustrated by \textit{bona fide} business considerations necessitating lay-offs of either a temporary or permanent nature. During economic downturns and periods of decreased market demand, employers have traditionally relied upon reductions in employment levels as a cost-reducing measure. A temporary lay-off involving suspension, on the employer's initiative, of the employee's obligation to work and the employer's obligation to pay is itself largely a creation of the collective bargaining system and is not normally recognized at common law. Permanent lay-offs, on the other hand, involve a complete severance of the employment relationship, and are normally relied upon where

technological developments, a departmental re-organization, or a plant closure have rendered all or part of the workforce superfluous.

When temporary or permanent lay-offs are instituted, considerable controversy arises between the employer's attempts to secure optimum economic efficiency and the employee's right to some degree of employment security. This conflict of values created severely strained union-management relations in the period 1981–83 as the number of lay-offs steadily increased.

1. The impact of collective bargaining on the employer's right to lay-off

The employer's 'right to manage' not only requires that the cost of labour be a variable factor (thus ensuring prompt response to economic change) but provides a justification for lay-offs and redundancies. The assessment of the effect of lay-offs, as of other social and economic phenomena, is primarily a question of values. The process of industrial mutation, euphemistically known as progress or advancement, is essential to individual enterprises and to society in general. Concentration on the benefits of industrial change, however, ignores many of the attendant social and economic costs that change generates, particularly for the individual employee for whom redundancy often means hardship and insecurity.

In Canada, a large majority of collective agreements include a 'management rights' clause which reserves for management the right to operate the enterprise, contract out work, assign work within the bargaining unit, determine work methods, and direct the workplace generally. Even without an explicit 'management rights' provision, it is generally accepted by arbitrators that these functions, as the essence of management, properly belong to the employer, if only on the basis of economic logic. Thus, limitations upon the managerial prerogative to control the use of labour must be expressly bargained for during the negotiation of a collective agreement. Traditionally, management has resisted any encroachment into these decision-making rights, including the right to lay-off. It regards union incursion as a serious abridgement of its established authority. Consequently, only through hard bargaining have concessions been achieved by trade union negotiations. This has considerably circumscribed trade union influence in the traditional areas of management discretion.

From the outset, trade union representatives concentrated their efforts on achieving immediate tangible benefits for their members, such as improved wage and overtime rates and vacation pay. As a result, less emphasis was placed on long-term security in employment and the
imposition of restrictions on management's right to lay-off, contract out or assign work, introduce new technology, or close down operations entirely. During the industrial growth of the 1960s, these goals may have seemed less important, but now the preservation of employment has become perhaps the most critical job concern of the employee. Employment protection, however, must be bargained for, and in this process unions may be required to make concessions on other issues.

Until now, trade unions have been reluctant to make such concessions in return for greater job security. Rather than attempting to prevent lay-offs, union negotiators have concentrated on cushioning their impact by achieving the best possible terms available in the situation. It has been suggested that the principal reason trade unions have failed to negotiate more effective restrictions on the employer's right to lay-off is the relative bargaining power of the parties. In many cases, an inequality of bargaining power has precluded bargaining on such issues and has contributed to the dearth of collective-dismissal clauses in collective agreements.

The essence of bargaining power lies in the ability to withhold something of value from the other party. Even organized employees have little inherent bargaining power, however, and often can only gain concessions through inflicting economic costs on management by strike action. The difficulty with bargaining over issues of job security is that accurate information on the long-term plans of the enterprise is often not available, and, during the negotiations period, plans for change may not have emerged. As a result, trade unions may often have problems gaining support for the imposition of economic sanctions as a response to job security issues that may only arise many years hence. When union negotiators consider the possible adverse publicity associated with striking over issues that may not even materialize, job security may be traded-off to gain more immediate financial benefits. Additional reasons for concentrating on short-term benefits may include the fact that, in the past, lay-offs have not been perceived as a major problem by trade unions in Canada, the possibility of government intervention in the form of unemployment insurance, manpower services, and re-training programmes has been regarded as an adequate solution to the problem.

---

2. Negotiated provisions related to lay-offs

In spite of difficulties such as those cited above, the collective bargaining process has produced restrictions on the employer's right to lay-off. An analysis of the terms of the 2,205 collective agreements on file with Labour Canada in April 1982, covering some 2.4 million public and private sector employees in enterprises involving two hundred workers or more, indicates that these agreements left the employer relatively free to decide whether to call a lay-off, but restricted the choice of who was to be laid-off. The data show that advance notice of lay-offs not attributable to technological change was provided for in 1,231 agreements (55.8 percent) covering 54.1 percent of the 2,444,976 employees affected. Of these 1,231 agreements, 822 (66.7 percent), covering 32.1 percent of the employees who fell within their scope, provided for notice of ten days or less.

Table 3
Content of Collective Agreements

<table>
<thead>
<tr>
<th>Notice of Lay-off</th>
<th>Agreements No.</th>
<th>%</th>
<th>Workers No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>974</td>
<td>44.2</td>
<td>1,122,035</td>
<td>45.9</td>
</tr>
<tr>
<td>5 days or less</td>
<td>568</td>
<td>25.8</td>
<td>525,316</td>
<td>21.5</td>
</tr>
<tr>
<td>6-10 days</td>
<td>254</td>
<td>11.5</td>
<td>259,915</td>
<td>10.6</td>
</tr>
<tr>
<td>11-15 days</td>
<td>31</td>
<td>1.4</td>
<td>74,045</td>
<td>3.0</td>
</tr>
<tr>
<td>16-20 days</td>
<td>62</td>
<td>2.8</td>
<td>116,960</td>
<td>4.8</td>
</tr>
<tr>
<td>21-25 days</td>
<td>64</td>
<td>2.9</td>
<td>76,235</td>
<td>3.1</td>
</tr>
<tr>
<td>26-30 days</td>
<td>39</td>
<td>1.8</td>
<td>35,205</td>
<td>1.4</td>
</tr>
<tr>
<td>31-40 days</td>
<td>41</td>
<td>1.9</td>
<td>47,505</td>
<td>1.9</td>
</tr>
<tr>
<td>41-60 days</td>
<td>15</td>
<td>0.7</td>
<td>13,775</td>
<td>0.6</td>
</tr>
<tr>
<td>61 or more days</td>
<td>30</td>
<td>1.4</td>
<td>46,280</td>
<td>1.9</td>
</tr>
<tr>
<td>Graduated</td>
<td>53</td>
<td>2.4</td>
<td>47,420</td>
<td>1.9</td>
</tr>
<tr>
<td>Other</td>
<td>74</td>
<td>3.4</td>
<td>80,285</td>
<td>3.3</td>
</tr>
</tbody>
</table>

Distribution of Work During Slack Periods

| Total             | 2,205          | 100.0 | 2,444,976  | 100.0 |
| No Provision      | 2,065          | 93.6  | 2,317,451  | 94.7  |
| Provision Exists  | 140            | 6.4   | 127,525    | 5.3   |

Bumping Rights

| Total             | 2,205          | 100.0 | 2,444,976  | 100.0 |
| No Provision      | 1,161          | 52.7  | 1,370,014  | 56.0  |
| Unrestricted Right| 288            | 13.1  | 259,345    | 10.6  |
| Restricted Right  | 756            | 34.2  | 815,617    | 33.4  |

---

18 Provisions in Collective Agreements in Canada Covering 200 and More Employees (Ottawa: Ministry of Supply and Services, April 1982) at 18-20, 22, 17, 144-45, 147, 150, 154, 146, 152-53.
### Table 3 (cont.)

#### Technological Change

<table>
<thead>
<tr>
<th>Agreement/Workers</th>
<th>No.</th>
<th>%</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
</table>

**Advance Notice and/or Consultation with Employees and/or Trade Union Prior to the Introduction of Technological Changes**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,542</td>
<td>1,491,428</td>
</tr>
<tr>
<td>Less than 3 months</td>
<td>158</td>
<td>188,076</td>
</tr>
<tr>
<td>3-6 months</td>
<td>262</td>
<td>453,955</td>
</tr>
<tr>
<td>6-12 months</td>
<td>18</td>
<td>58,675</td>
</tr>
<tr>
<td>12 months or more</td>
<td>5</td>
<td>5,470</td>
</tr>
<tr>
<td>Other</td>
<td>220</td>
<td>247,372</td>
</tr>
</tbody>
</table>

**Notice of Lay-off**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,990</td>
<td>2,218,066</td>
</tr>
<tr>
<td>Less than 3 months</td>
<td>81</td>
<td>108,265</td>
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<tr>
<td>3-6 months</td>
<td>87</td>
<td>82,645</td>
</tr>
<tr>
<td>Other</td>
<td>47</td>
<td>36,000</td>
</tr>
</tbody>
</table>

**Labour-Management Committee on Technological Change**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provisions</td>
<td>1,978</td>
<td>1,939,243</td>
</tr>
<tr>
<td>Committee Studies Problem</td>
<td>209</td>
<td>493,153</td>
</tr>
<tr>
<td>Committee Administers</td>
<td></td>
<td>20.2</td>
</tr>
<tr>
<td>Funds Programs</td>
<td>9</td>
<td>5,825</td>
</tr>
<tr>
<td>Committee Studies Problems and Administers Funds/Programs</td>
<td>9</td>
<td>6,755</td>
</tr>
</tbody>
</table>

**Re-opener Clause**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provision</td>
<td>2,150</td>
<td>2,368,116</td>
</tr>
<tr>
<td>Wage Re-opener</td>
<td>40</td>
<td>41,395</td>
</tr>
<tr>
<td>Working Conditions Re-Opener</td>
<td>6</td>
<td>30,725</td>
</tr>
<tr>
<td>Wages and Working Conditions</td>
<td>9</td>
<td>4,740</td>
</tr>
</tbody>
</table>

**Training or Re-Training**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,726</td>
<td>1,766,476</td>
</tr>
<tr>
<td>Training on New Equipment</td>
<td>246</td>
<td>343,395</td>
</tr>
<tr>
<td>Training for Another Job</td>
<td>154</td>
<td>216,370</td>
</tr>
<tr>
<td>Other</td>
<td>79</td>
<td>118,735</td>
</tr>
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</table>

**Contracting Out**

<table>
<thead>
<tr>
<th></th>
<th>Agreements</th>
<th>Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>2,444,976</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,332</td>
<td>1,241,034</td>
</tr>
<tr>
<td>Permitted</td>
<td>316</td>
<td>480,882</td>
</tr>
<tr>
<td>Prohibited</td>
<td>31</td>
<td>15,430</td>
</tr>
<tr>
<td>Prohibited if Leads to Lay-off</td>
<td>479</td>
<td>661,680</td>
</tr>
<tr>
<td>Prohibited if to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-Union Employer</td>
<td>26</td>
<td>26,805</td>
</tr>
<tr>
<td>Prohibited if Leads to Lay-off and if to a Non-Union Employer</td>
<td>13</td>
<td>14,585</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>4,560</td>
</tr>
</tbody>
</table>

A distribution of work during slack periods to prevent or minimize lay-offs was provided in only 140 agreements (6.4 percent) affecting 5.3 percent of workers. Wage or employment guarantees were provided in only 10.1 percent of the agreements covering 14.4 percent of employees. Provisions governing additional monetary protection such as supplementary unemployment benefits, severance pay, and guaranteed earnings did not provide significantly greater protection.19

<table>
<thead>
<tr>
<th></th>
<th>Agreements No.</th>
<th>%</th>
<th>Workers No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Severance Pay and Supplementary Unemployment Benefit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,300</td>
<td>59.0</td>
<td>950,414</td>
<td>38.9</td>
</tr>
<tr>
<td>Severance Pay Plan</td>
<td>736</td>
<td>33.4</td>
<td>1,109,637</td>
<td>45.4</td>
</tr>
<tr>
<td>Servance Pay and Supplementary Unemployment Benefits</td>
<td>62</td>
<td>2.8</td>
<td>179,380</td>
<td>73.0</td>
</tr>
<tr>
<td>Supplementary Unemployment Benefits</td>
<td>107</td>
<td>4.9</td>
<td>205,545</td>
<td>8.4</td>
</tr>
<tr>
<td>Guaranteed Employment or Earnings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,981</td>
<td>89.8</td>
<td>2,092,859</td>
<td>85.6</td>
</tr>
<tr>
<td>More than 1 day but less than 1 week</td>
<td>72</td>
<td>3.3</td>
<td>179,520</td>
<td>7.3</td>
</tr>
<tr>
<td>On a weekly basis</td>
<td>69</td>
<td>3.1</td>
<td>44,217</td>
<td>1.8</td>
</tr>
<tr>
<td>On a monthly basis</td>
<td>14</td>
<td>0.6</td>
<td>24,690</td>
<td>1.0</td>
</tr>
<tr>
<td>On an annual basis</td>
<td>45</td>
<td>2.0</td>
<td>82,035</td>
<td>3.4</td>
</tr>
<tr>
<td>On a seasonal basis</td>
<td>3</td>
<td>0.1</td>
<td>5,500</td>
<td>0.2</td>
</tr>
<tr>
<td>Other</td>
<td>21</td>
<td>1.0</td>
<td>16,155</td>
<td>0.7</td>
</tr>
</tbody>
</table>


The most common form of protection against lay-off and redundancy secured through collective bargaining is that of seniority. Labour Canada data from 1982 dealing with both the role of seniority in determining who was to be laid-off and the retention of seniority during lay-off is shown below in Table Five.20

---

19 See Table 4.
20 See Table 5.
Table 5
Seniority Provisions on Lay-Off

<table>
<thead>
<tr>
<th>Seniority on Lay-off</th>
<th>Agreements No.</th>
<th>%</th>
<th>Workers No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>364</td>
<td>16.5</td>
<td>623,196</td>
<td>25.5</td>
</tr>
<tr>
<td>Straight Seniority</td>
<td>324</td>
<td>14.7</td>
<td>382,378</td>
<td>15.7</td>
</tr>
<tr>
<td>Seniority and Other Factors</td>
<td>846</td>
<td>38.4</td>
<td>937,522</td>
<td>38.3</td>
</tr>
<tr>
<td>Straight Seniority if the</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Factors are Equal</td>
<td>671</td>
<td>30.4</td>
<td>502,060</td>
<td>20.5</td>
</tr>
</tbody>
</table>

Retention of Seniority During Lay-Off

<table>
<thead>
<tr>
<th>Retention of Seniority During Lay-Off</th>
<th>Agreements No.</th>
<th>%</th>
<th>Workers No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>541</td>
<td>24.5</td>
<td>805,136</td>
<td>32.9</td>
</tr>
<tr>
<td>Up to 6 months</td>
<td>199</td>
<td>9.0</td>
<td>170,955</td>
<td>7.0</td>
</tr>
<tr>
<td>6–12 months</td>
<td>594</td>
<td>26.9</td>
<td>557,805</td>
<td>22.8</td>
</tr>
<tr>
<td>12–18 months</td>
<td>140</td>
<td>6.3</td>
<td>131,305</td>
<td>5.4</td>
</tr>
<tr>
<td>18–24 months</td>
<td>337</td>
<td>15.3</td>
<td>372,590</td>
<td>15.2</td>
</tr>
<tr>
<td>Over 24 months</td>
<td>179</td>
<td>8.1</td>
<td>208,875</td>
<td>8.5</td>
</tr>
<tr>
<td>Graduated by Length of Service</td>
<td>135</td>
<td>6.1</td>
<td>91,695</td>
<td>3.8</td>
</tr>
<tr>
<td>Not Specified</td>
<td>72</td>
<td>3.3</td>
<td>95,465</td>
<td>3.9</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>0.4</td>
<td>11,150</td>
<td>0.5</td>
</tr>
</tbody>
</table>


The basic principle of seniority is that employees who have worked for a company for a long period of time are more deserving of company benefits than are employees who have been with the company for a shorter period. It is most often of importance in promotion, transfer, lay-off, and recall decisions, providing a rudimentary property right in employment. Regarding seniority and lay-off, it has been stated that,

[m]ore than any other provision of the collective agreement ... seniority affects the economic security of the individual employee covered by its terms. In industries characterized by a steady reduction in total employment, the employee's length of service is his principal protection against the loss of his job. In cases of mass lay-offs, his chances of being retained or recalled will very likely depend upon such factors as the basis for determining seniority preference (e.g. plants, departmental, or crafts) ... and the extent to which 'bumping' is permitted.21

The greater the emphasis placed on seniority alone, without attempting to consider merit, skill, ability, and qualifications, the greater the restriction on management decision-making rights. Collective agreements, including non-competitive seniority promotion and lay-off clauses, had actually increased slightly in numbers in the late 1970s and early 1980s.22

22 W.D. Wood & P. Kumar, The Current Industrial Relations Scene In Canada: 1980 (Kingston: Industrial Relations Centre, Queen’s University, July 1980) at 391.
In almost 40 percent of the agreements covered by the Labour Canada data, seniority rights were reinforced by 'bumping' provisions which allow a senior employee who is being laid-off to displace a more junior employee, provided the senior employee can perform the relevant tasks. Bumping rights may be restricted to the job classification, the department, or the plant in which the senior employee works, depending on the wording of the agreement.

While the application of the criterion of length of service remains the most common means of curbing management arbitrariness, the danger is that as departmental seniority systems 'wall-off' specific plant sections, resistance to change affecting any of these sections is heightened. This in turn accentuates conflict between management rights and employee job security demands.

3. Technological change resulting in lay-offs and redundancies

Many trade union negotiators have attempted to bargain for protection against lay-offs due to technological change. The difficulty they face is that changes occur very infrequently and bargaining in advance requires a long-sighted negotiation policy. Nevertheless, protections were increasingly bargained for by the early 1980s.\textsuperscript{23} Clauses included in the collective agreement generally required advance notice of the introduction of new technology and accompanying lay-offs, possibly coupled with a duty to consult and, in a number of cases, a provision requiring a re-opening of the agreement for renegotiation. This latter form of protection was quite rare and it appears that clauses of this nature were declining.\textsuperscript{24}

\begin{table}[h]
\begin{center}
\begin{tabular}{lrrrr}
\hline
 & Agreements & & Workers & \\
 & No. & No. & & \\
 & & & No. & \\
\hline
October 1973 & & & & \\
Total & 844 & 100.0 & 1,705,000 & 100.0 \\
Provision & 12 & 1.4 & 21,600 & 1.3 \\
No Provision & 832 & 98.6 & 1,683,400 & 98.7 \\

October 1980 & & & & \\
Total & 1,028 & 100.0 & 2,114,100 & 100.0 \\
Provision & 2 & 0.2 & 3,100 & 0.2 \\
No Provision & 1,026 & 99.8 & 2,110,900 & 99.8 \\
\hline
\end{tabular}
\end{center}
\end{table}

\textsuperscript{23} \textit{Ibid.} at 388 for the relevant figures for March 1980. Compare with the figures for October 1980 in W.D. Wood & P. Kumar, \textit{The Current Industrial Relations Scene in Canada: 1981} (Kingston: Industrial Relations Centre, Queen's University, July 1981) at 345.

\textsuperscript{24} The table below shows the collective agreement provisions for all industries across Canada employing 500 or more employees, excluding construction, that have technological change reopener clauses.

Labour Canada data indicate that advance notice of technological change, or consultation with employees or the trade union prior to the introduction of new technology, was required in only 663 agreements (30 percent) covering some 953,548 employees (40 percent). Notice of lay-off due to technological change was required in only 215 agreements (9.7 percent) covering 226,910 (9.2 percent) of the 2,444,976 employees affected. In 37.6 percent of those agreements covering 47.7 percent of employees entitled to advance notice, the period of notice was less than three months.

A joint labour–management technological change committee to study the problems created or administer funds and programmes to combat these problems was required in only 227 agreements (10.3 percent) covering some 505,733 employees (20.7 percent). 'Reopener' clauses to facilitate renegotiation of the terms and conditions of employment were provided in only 2.5 percent of the agreements covering 78,860 employees (3.2 percent). Employment security guarantees were included in less than 17 percent of agreements covering 23 percent of workers. In cases where lay-offs actually occur the employee may require retraining to return to the work-force. Labour Canada figures show that retraining provisions were included in 479 agreements (21.7 percent) covering some 678,500 employees (27.7 percent).

The available data indicates collective bargaining's limited impact in imposing restrictions on the employer's right to lay-off in Canada. Few of the agreements contained clauses that were intended to prevent or minimize lay-offs from the outset, the most widespread form of protection being provided by the requirement that seniority be recognized

---

Table 6

<table>
<thead>
<tr>
<th>Agreements</th>
<th>Workers No.</th>
<th>%</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment Security (Technological Change)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2,205</td>
<td>100.0</td>
<td>2,444,976</td>
<td>100.0</td>
</tr>
<tr>
<td>No Provision</td>
<td>1,824</td>
<td>82.7</td>
<td>1,898,216</td>
<td>77.6</td>
</tr>
<tr>
<td>Wage or Employment Guarantee</td>
<td>363</td>
<td>16.5</td>
<td>514,685</td>
<td>21.1</td>
</tr>
<tr>
<td>Attrition</td>
<td>4</td>
<td>0.2</td>
<td>1,825</td>
<td>0.1</td>
</tr>
<tr>
<td>Distribution of Work</td>
<td>2</td>
<td>0.1</td>
<td>1,180</td>
<td>0.0</td>
</tr>
<tr>
<td>Employment Guarantee or Attrition or Distribution of Work</td>
<td>8</td>
<td>0.4</td>
<td>27,315</td>
<td>1.1</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>0.2</td>
<td>1,755</td>
<td>0.1</td>
</tr>
</tbody>
</table>

when the choice of those to be laid off was being made. The vast majority of the collective agreements considered seem to accept the economic justification for redundancies and lay-offs and to this extent provide mainly economic buffers to alleviate the hardships arising from the drop in real income that almost invariably accompanies job loss.

Due to the failure to secure effective protections through the collective bargaining process, a number of legislatures have enacted technological change provisions in their respective Labour Codes. These provisions require adequate notice of change to be given to the employees and permit collective agreements to be reopened in mid-term for renegotiation. Part V of the *Canada Labour Code* contains provisions to this effect. Employers wishing to effect technological change which is likely to affect a significant number of employees are required by section 150(1) to notify the employee's bargaining agent at least ninety days before the change is scheduled to take place. The bargaining agent must seek permission (section 152) from the Canada Labour Relations Board to renegotiate for the purpose of revising the existing provisions of the collective agreement or to draft new provisions to assist employees affected. The proposed changes are stayed until the Board either grants or refuses permission to renegotiate. The legislation does not, however, provide the affected employees with an outright veto on technological change. The employer may proceed with the proposed changes as soon as there has been compliance with the relevant procedures under sections 150 and 152.

The reopener provisions were intended to enhance the opportunities for union negotiators to influence technological change decisions. However, from 1973, when the legislation became effective, until the beginning of 1982, the Canada Labour Relations Board received only eleven applications to reopen collective agreements and none were accepted for formal hearing. In 1982 the provisions of the *Code* were reviewed for the first time, almost ten years after they had become effective. The Board undertook an extensive review of the reasons for the enactment of the relevant sections. Significantly, a number of the sources referred to suggested that the reason why so few cases had been brought under Part V of the *Code* was the fact that many of the collective agreements subject to the provisions of the *Canada Labour Code* contained escape clauses. These clauses provided, in accordance with the legislation, that

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there would be no recourse to the Board where the agreement contained specific provisions governing the effect of technological change.

In those jurisdictions that have not introduced similar requirements, the prohibition on strike action during the currency of the collective agreement prevents recourse to measure of self-help. In Ontario, for example, section 42 of the Labour Relations Act provides,

(1) Every collective agreement shall provide that there will be no strikes or lock-outs so long as the agreement continues to operate.
(2) If a collective agreement does not contain such a provision as is mentioned in sub-section (1) it shall be deemed to contain the following provision: “There shall be no strikes or lock-outs so long as this agreement continues to operate.”

This prohibition appears to assume that the collective agreement provides an exhaustive charter of agreed terms and conditions. In fact, various issues, including technological change, may have been raised at the bargaining table and then dropped when management asserted that it did not have any immediate plans pertaining to those issues. Where technological change resulting in lay-off subsequently occurs, the absolute prohibition on strike action is substantially unfair. Moreover, if the agreement is silent on the issue of technological change, then recourse to grievance arbitration by employees facing lay-off would likely prove ineffective, given the reluctance of arbitrators to add to the terms of the collective agreement.

Proponents of the adversarial collective bargaining system argue that it gives rise to a dichotomy of function. Management acts as initiator in introducing change and trade unions reserve a right of appeal through the arbitration process. What proponents of the system fail to take into account, however, is that there can be no right of appeal against employer action in areas not covered by the collective agreement. Arguably, therefore, the mandatory no-strike clause should not be an absolute bar to industrial actions during the currency of a collective agreement.

In the British Columbia Labour Code, provision is made for the reopening of the agreement and recourse to strike action is made available. However, reliance is not placed on the latter. Instead, the real response to the problem is evidenced by a statutory requirement that the parties negotiate a contract clause dealing with the issue of technological change. If the parties fail to produce an adequate clause themselves, the Minister of Labour can intervene and impose one. This form of compulsory interest arbitration on the issue of technological change underscores the more

29 Labour Relations Act, S.O. 1980, c. 228, s. 42.
30 R.S.B.C. 1979, c. 212, ss 74-78.
general sentiments held by Canadian legislators against mid-contract work stoppages.

While legislative reform in the area of technological change does provide a measure of additional protection of employees, it does not address the more general criticism that all the disputes and dissatisfactions that might arise during the term of a collective agreement cannot be provided for in advance. The inclusion of a clause permitting trade unions to proceed to arbitration over disputes relating to the terms of the collective agreement has been proclaimed as the quid pro quo for a clause forbidding strikes during the agreement’s currency. Since the collective agreement does not provide an exhaustive charter of rights, it is apparent that the commitments of management and labour are not coextensive. It may be said, therefore, that the ‘no-strike’ provisions of labour relations legislation in most Canadian jurisdictions constitute something considerably in excess of the agreement to arbitrate.

4. Summary

The requirement that an employer have cause in order to discharge an employee is a significant improvement on the common-law position of virtually unlimited exposure to termination. The measure of additional protection that this requirement provides, and the extensive remedial powers acquired by grievance arbitrators, have considerably improved the employee’s position. However, given the employer’s right to terminate for economic reasons, the rights of individual employees have obviously been subordinated to the goal of economic efficiency. The Labour Canada figures outlined above indicate that apart from seniority requirements, the collective bargaining process had a limited impact on the entire question of workforce reductions arising from lay-offs or redundancies in the early 1980s. Lay-off problems and processes can be brought to the bargaining table but the practice is not extensive in Canada. Even where such issues were raised in the past, they appear to have been traded off for more immediate financial benefits such as increased wage and overtime rates.

The whole issue of a ‘management rights’ philosophy goes beyond the four corners of a collective agreement, and, in circumstances of material change, currently claimed prerogatives may be impeding socially satisfactory and rational manpower adjustments. Generally speaking, employers’ commitments to the social and economic well-being of their employees are less than their commitments to business efficiency. Because job rights are negotiated in collective agreements, the right to employment security is also deemed to be a bargainable issue. There are practical limitations to securing acceptable levels of employment security through
collective bargaining. These include the low priority given to this issue in the past by trade union negotiators, difficulties in obtaining information about potential changes, hard bargaining by management, and the low-trust relationships that exist between management and unions.

Fundamental to the question of bargaining for protection in employment is the fact that the collective bargaining system as it currently operates is far from comprehensive in its coverage of the labour force or in its coverage of subject matter. Regarding the latter, it has been suggested that the touchstone of a system of collective bargaining is the move from an autocratic, contractual system to a participatory decision-making process. Free collective bargaining is said to advance a pluralistic social conception which excludes the traditional *a priori* property justification for unilateral decision-making by management. To the extent that it is deemed to permit an employee to participate in the establishment of rules governing the working environment, collective bargaining is analogized to citizen participation in the political arena. In the vast majority of cases, however, the subject matter dealt with in collective agreements is restricted. The analogy drawn with rights of political citizenship may not, therefore, be particularly appropriate.

A number of commentaries argued that the major factor preventing the emergence of a truly participatory system of decision making is a lack of bargaining power. While this is undoubtedly true in many sectors of industry, it is not the only relevant factor. Collective bargaining in Canada is based largely on a structure composed of single-employer, single-location bargaining units. Consequently, collective agreements are of local application only and may not extend sufficiently far to deal with major corporate initiatives, in particular those dealing with technological change and plant closures. Moreover, the scope of subject matter has seldom ranged beyond the issues of immediate tangible benefit into the areas of managerial direction of the enterprise.

Hence, there are limitations on the role that collective bargaining can play in ensuring protection of employee interests in critical areas such as incumbency in employment. Indeed, lay-offs may occur more frequently in unionized sectors where the low-trust relationship that the adversary system perpetuates may cause a reluctance to accept downward adjustments in wage rates. At the height of the economic recession of the early 1980s, the collective bargaining system in Canada was  

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31 In 1981 in Canada, 39 percent of non-agricultural workers were unionized. See Wood & Kumar, *The Current Industrial Relations Scene in Canada: 1981*, supra, note 23 at 220.


33 J.L. Medoff, "Layoffs and Alternatives under Trade Unions in U.S. Manufacturing" (1979) 69 American Econ. A. 380.
ineffective as an instrument for employees to make their views on job security issues known. It provided neither an effective method of participating in the discussion of such issues, nor a means of exercising control over the resolution of problems arising from the issues.\textsuperscript{34}

C. Lay-offs and Minimum Standards Legislation

The requirement that all disputes arising out of the terms of collective agreements be submitted to a process of compulsory binding arbitration for resolution has greatly reduced the influence of the courts on employees falling within the collective bargaining system. However, almost half of the Canadian workforce is not covered by collective agreements. For many workers in the marginal labour force, collective bargaining is not a realistic possibility, due primarily to problems of organization. Recognition of this, coupled with the fact that the subject matter dealt with in most collective agreements is not always comprehensive enough, has prompted legislative intervention to provide minimum standards for terms and conditions of employment of both organized and unorganized employees. In the last fifteen years, the development and expansion of employment rights under legislative aegis has superceded total reliance upon contractual or collectively bargained agreements. The regulation of the employment relationship through statutory intervention has reached such an extent that it has been suggested that the creation of a minimum level of employment rights and duties in this manner has led to the “retreat of Canadians from contractual freedom to the more secure advantages of status.”\textsuperscript{35}

Among the most significant developments along this line have been the restrictions imposed on the employer's right to terminate the employment relationship. In several jurisdictions, legislation has provided unorganized employees some protection against arbitrary discharge. More widespread, however, has been the protection provided against job loss for economic reasons. The ineffectiveness of the common-law notice requirement for lower-level employees and the lack of protection provided against economically motivated terminations under collective agreements have led almost all Canadian legislatures to specify a minimum period of written notice prior to termination. Moreover, a number of these jurisdictions require extended notice periods where a larger group of employees is affected, whether or not a collective agreement applies.\textsuperscript{36}

\textsuperscript{34} See Beatty, \textit{supra}, note 16 at 325-38.


\textsuperscript{36} See Table 7.
In Ontario and the federal jurisdiction, severance pay provisions have also been enacted. Perhaps somewhat surprisingly, the provisions found in minimum standards legislation usually exceed the protections provided in collective agreements, and in some cases provide a higher level of protection than that provided by the common law.

### Table 7
**Individual Notice Requirements (1982)**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notice Required</th>
<th>Coverage of the Scheme</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>2 Weeks</td>
<td>Employees employed in federal work or under-taking who have been employed for more than 3 months.</td>
</tr>
<tr>
<td>Alberta</td>
<td>Employees with more than 3 months' but less than 2 years' service are entitled to 7 days' notice. Employees employed for 2 years or more are entitled to 14 days' notice.</td>
<td>All employees with more than 3 months' service except those employed in the construction industry.</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Employees with more than 6 months' but less than 2 years' service are entitled to 2 weeks' notice. If employed for more than 2 years, employees are entitled to 2 weeks' notice plus 1 week's notice for each additional year of employment up to a maximum of 8 weeks' notice.</td>
<td>All employees with more than 6 months' service.</td>
</tr>
<tr>
<td>Manitoba</td>
<td>A period of notice equivalent to the normal pay period.</td>
<td>All employees employed for more than 2 weeks, except farm workers.</td>
</tr>
<tr>
<td>Newfoundland</td>
<td>Employees employed for more than 1 month but less than 2 years are entitled to 1 week's notice. Employees employed for more than 2 years are entitled to 2 weeks' notice.</td>
<td>All employees employed for more than 1 month, except those employed in the construction industry.</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Employees employed for more than 3 months but less than 2 years are entitled to 1 week's notice. Employees employed for more than 2 years but less than 5 are entitled to 2 weeks' notice. Between 5 and 10 years, 4 weeks' notice is required and where an employee has more than 10 years' service, 8 weeks' notice must be given.</td>
<td>All employees employed for more than 3 months except those employed in the construction industry.</td>
</tr>
</tbody>
</table>
### Table 7 (cont.)

**Individual Notice Requirements (1982)**

<table>
<thead>
<tr>
<th>Province</th>
<th>Notice Requirements</th>
<th>Additional Notice Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ontario</strong></td>
<td>Employees employed for more than 3 months but less than 2 years are entitled to 1 week's notice. Employees employed for more than 2 years but less than 5 years are entitled to 2 weeks' notice. Between 5 and 10 years, 4 weeks' notice is required and where an employee has more than 10 years' of employment, 8 weeks' notice must be given.</td>
<td>All employees employed for more than 3 months except those employed in the construction industry.</td>
</tr>
<tr>
<td><strong>Prince Edward Island</strong></td>
<td>In all cases 1 week's notice is required.</td>
<td>All employees employed for more than 3 months except farm workers and construction workers.</td>
</tr>
<tr>
<td><strong>Quebec</strong></td>
<td>Employees employed for less than 1 year are entitled to 1 week's notice. Employees employed for more than 1 year but less than 5 are entitled to 2 weeks' notice. Employees employed for between 5 and 10 years are entitled to 4 weeks' notice and those employed for more than 10 years, 8 weeks' notice.</td>
<td>All employees employed for more than 3 months except those under a fixed term contract and executive officers.</td>
</tr>
<tr>
<td><strong>Saskatchewan</strong></td>
<td>Employees employed for more than 3 months but less than 1 year are entitled to 1 week's notice. Employees with more than 1 year but less than 3 years seniority are entitled to 2 weeks' notice. For those with between 3 and 5 years' of employment, 4 weeks' notice is required; between 5 and 10 years, 6 weeks' notice is required, and 10 or more years, 8 weeks' notice.</td>
<td>All employees employed for more than 3 months except those employed in farming, ranching, and market gardening.</td>
</tr>
<tr>
<td><strong>New Brunswick</strong></td>
<td>Has not enacted legislation governing notice requirements upon termination of employment.</td>
<td></td>
</tr>
</tbody>
</table>

Source: The information in this table was compiled on the basis of information provided by the labour ministries of the federal and provincial governments.

The individual notice requirements are quite modest, although up to eight weeks’ notice may be required in the case of long-serving employees. In jurisdictions where additional notice periods are provided in the case of large-scale terminations, up to sixteen weeks’ prior notice may be required if three hundred or more employees are to be dismissed.
in any four-week period. The simultaneous release upon the labour market of large numbers of employees, many with similar trade skills, creates greater problems than individual terminations. The group notice requirements are intended to avoid some of the anticipated lay-offs. They temper the effects of redundancy by giving employees an opportunity to prepare for it in the period between the time when notice is given and the actual date of termination.

The underlying purpose in providing advance notice of redundancies and lay-offs is to reduce the adverse effects of labour displacement on both workers and the community. A study by Schulz and Weber recommended that the requisite notice period should range between six months and one year in the case of permanent lay-offs.\(^3\)

Regardless of the particular labour market framework, advance notice of major displacement to the workers, the union, and the appropriate government and community agencies is a procedural prerequisite for constructive action. It gives the various organizations some time to organize their programmes and permits individuals to adjust their own plans as well as to consider the various available options with care.\(^4\)

The Canadian Task Force on Labour Relations likewise recommended a minimum six-months' notice period in all "technological and related changes likely to lead to significant labour displacement."\(^5\) Like Schulz and Weber, the Task Force cited advance notice as necessary if programmes to assist workers and communities affected by large-scale lay-offs are to be established.

Although neither the federal nor provincial governments have enacted legislation that provides for notice of up to six months, where group notice provisions have been provided, the impact of mass terminations on dependent communities is well recognized. Advance notice of labour displacement can provide a period of respite during which the adverse effects of redundancy and lay-offs can be avoided or mitigated. The question that must be asked, however, is whether prior notice of termination was utilized to its full extent between 1981 and 1983. This issue will be particularly relevant in the following section dealing with the institutional protections available at that time.

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D. An Assessment of the Legal Protections Provided

In Canada, legal restrictions on the employer’s right to lay-off are imposed at common law, under collective bargaining law, and by existing labour standards legislation. Perhaps the most significant observation that can be made is that there appear to be no absolute restrictions imposed on the employer’s right to lay off all or part of his labour force for economic reasons. Although a number of procedural safeguards are provided by the law, none of these can be said to provide an employee with any absolute right to job security.

Lower-level employees facing redundancy in the period 1981–83 received little protection from either the common law or collective bargaining law. The common law did not provide an accessible means of protection, while apart from seniority requirements and relatively short periods of advance notice of lay-off, collective agreements had a limited impact on the entire question of workforce reductions. In fact, under the collective bargaining system, less protection would appear to have been provided than at common law since, in the absence of express restrictions in the agreement, an employer is free to lay off employees without notice. This situation contrasts with the position at common law where the employer has in general no legal right to suspend the employment relationship without notice.

Because of the inaccessibility of the common law and the limited application of the collective bargaining system, increased reliance has been placed on the federal and provincial governments to provide necessary protection. By the early 1980s, legislation providing for minimum periods of notice of termination for both unorganized and organized employees had been enacted in all of Canada, with the exception of New Brunswick. The extent to which federal and provincial authorities should be expected to intervene to fill the gaps left by the collective bargaining system is problematic, however, as is the success of such legislative intervention.

Of the six jurisdictions that provide group notice protection, four exclude lay-offs involving fewer than fifty employees. This exclusion has been justified on the grounds that if the figure was set at a lower level, extended notice periods would impose an unduly heavy economic burden on small employers. In Nova Scotia and Quebec, \(^{40}\) however, the notice requirements applied to lay-offs of ten or more employees. The decision of the other four provinces to adopt a threshold figure of fifty left smaller groups of employees all the more vulnerable because trade

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\(^{40}\) Labour Standards Code, S.N.S. 1972, c. 10, s. 68(2); Manpower Vocational Training and Qualifications Act, S.Q. 1969, c. 51, s. 45.
unions, through which notice protections might have been negotiated, find it uneconomic to organize groups of employees of fewer than twenty to twenty-five people. The problem was exacerbated by the fact that many employees did not receive adequate protection under the individual notice requirements. One solution to the problem might have been to extend the length of the individual notice provisions for those employees with less than ten years continuous employment. Alternatively, the group notice requirements could have been applied to all lay-offs involving ten or more employees.

One major criticism of the notice provisions was that only the federal government had introduced legislation requiring the establishment of consultative arrangements between employer and employee representatives prior to lay-offs actually taking place. In this respect the most significant distinction between the position in almost all of the Canadian jurisdictions and those in many Western European countries and Japan, for example, was not the procedure governing the selection of employees for lay-off, nor the length of notice required, but the requirements placed on the employer in the period between deciding to lay off and the terminations actually taking effect.

In both Western Europe and Japan, considerable importance has been placed on joint consultation prior to redundancies occurring. Emphasis has been placed on establishing an 'early warning' system and providing the notice of termination to which employees are entitled. The limitations on effective consultation through the collective bargaining process have been offset in some countries, such as Belgium, France, West Germany, and the Netherlands, by developing a 'works council' system. In such a forum, consultation on mass lay-offs frequently occurs directly between management and employees, rather than through unions. This is significant since in many of those countries the trade union movement has concentrated primarily on the acquisition of direct, material benefits, such as rates of pay and hours of work, rather than employment security protections. In Canada there is no direct counterpart to the works council, and, as a result, consultation procedures for dealing with large scale lay-offs have been less highly developed.

The Carrothers Commission reported to the federal government on the economic, institutional, and social dimension of lay-offs in Canada and the inadequacy of protections negotiated through the collective bargaining process. It concluded that the hitherto accepted philosophy

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42 See Carrothers, supra, note 17.
that economic efficiency justified lay-offs was being challenged by the idea that management had definite and definable social and economic responsibilities and obligations. The report emphasized that, other than notice and severance pay protections, there were no requirements concerning redundancy management in Canadian legislation. The Commission stressed that the purpose of advance notice is not merely to allow a period of time to locate alternative employment: "[I]t is essential to any socially responsible and rational process of human resource management that there should be sufficient time and effort to carry out a program aimed at avoiding or reducing lay-offs arising from redundancies."  

It was recommended that a 'period of notice of intent' be required as a type of early warning system, similar to that mentioned above. During this period the parties would jointly research the implications of technological and other change likely to result in lay-offs. Regarding the actual decision to introduce changes in production techniques, cut-backs in the labour force, or whatever, the Commission said that employee representatives should be consulted prior to the final decision being taken to provide them with the opportunity to influence management. Where lay-offs were necessary, consultation procedures should be codified in law in order to limit the number of people laid-off and mitigate accompanying hardships. This recommendation was implemented by amendments to the Canada Labour Code in 1983.  

At the height of the recession in 1982–83, the existing pre-termination notice requirements were found to be inadequate as a means of achieving structured procedures for implementing adjustment measures. The establishment of joint consultative procedures might possibly have led to a recognition of the responsibilities of each of the parties and a willingness to assume those responsibilities. The need for a shift away from the traditional adversarial approach of collective bargaining towards the development of a more co-operative approach to the problems created by large-scale labour displacement must be recognized.

The question whether or not legislated consultation requirements would have provided any greater protection in a lay-off situation than the protections that were available in the early 1980s remains unanswered. Without a doubt, redundancy and lay-off should be matters of joint concern and discussion. Despite this, in the absence of a genuine commitment from both employer and trade union representatives, consultation alone does not provide a real guarantee of added protection. A strong argument

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44 See, supra, note 41.
could be made that all management decisions likely to create lay-offs, not merely those relating to technological change, should ultimately be subject to joint bargaining processes and the possible imposition of economic sanctions. The use of economic weaponry, however, may give rise to other problems. Even with mandatory consultation prior to lay-off, the availability of economic sanctions could destroy any possibility of a co-operative approach being taken to the redundancy problem.

As an alternative to allowing strikes or lock-outs where agreement is not reached, there remains the possibility of submitting all disputes to third-party arbitration for resolution. This form of interest arbitration is fraught with many practical problems, not least of which is that the accepted neutrality of the entire arbitration process may be undermined if it fails to satisfy the demands of both sets of disputants.

Joint consultation and collective bargaining raise many issues of legal definition. If consultation is to be made mandatory, in which instances should it be required? At which stage should it become effective? What should happen in cases where an impasse is reached? Should bargaining and the right to strike or lock out come into play at this stage? How can unorganized employees be provided greater protection? What percentage of the employer’s workforce would have to be affected before the duty to consult and bargain would become operative? If consultation and the right to reopen the collective agreement for bargaining were required in every case in which lay-offs may occur as a result of managerial initiative, would it be necessary to distinguish between decisions which result directly in lay-offs and those resulting indirectly in lay-offs? Would the duty to consult and the bargaining alternative apply equally to both cases? Perhaps the major issue regarding reopener clauses is the effect that legislation of this nature would have on what has traditionally been viewed in Canada as the sanctity of the collective agreement. Management would likely vigorously oppose legislative reform in this direction.

IV. THE INSTITUTIONAL FRAMEWORK

Recognition of the fact that redundancies and lay-offs are issues of general public concern has prompted federal and provincial government action to alleviate the adverse effects of job loss and labour market adjustment. This task has been complicated by the division of legislative powers between Parliament and the ten provincial legislatures under the Constitution Act, 1867. The legislative boundary is far from clear and

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45 Labour Code, R.S.B.C. 1979, c. 212, ss 74-78.
46 (U.K.), 30 & 31 Vict., c. 3.
the responsibility of each level of government for particular aspects of the lay-off problem has not always been evident.

Jurisdiction over industrial and labour relations is divided between Parliament and the provincial legislatures. The federal government has jurisdiction over the federal public service and federal works or undertakings in the private sector. Examples of the latter include interprovincial and international trade, transportation and communications, and banking. In areas under its control, Parliament has been able to impose restrictions on the employer's right to lay off. Generally, however, industrial and labour relations issues are deemed to be matters of property and civil rights and therefore within provincial jurisdiction. Only about 10 percent of Canadian private sector employees fall within federal jurisdiction. Consequently, for the remaining 90 percent, federal government influence has been exerted only indirectly through the federal spending power and control of the national purse strings.

Constitutional limitations and the decentralized nature of the federal system in Canada have prevented mandatory manpower planning and centralized policies. As a result, the federal government response to the problem of redundancies and lay-offs has been essentially reactionary, in the sense that its impact has been felt almost entirely after redundancies have occurred. The reactionary response can be seen in the relief of economic hardship through the unemployment insurance scheme and the recently enacted *Labour Adjustment Benefits Act*, programmes designed to fill existing job vacancies and create new jobs.

A. Relief of Economic Hardship

1. Unemployment insurance

The unemployment insurance scheme operates as a social insurance programme and is designed to provide temporary income support to workers between jobs. The scheme is exclusively within federal legislative jurisdiction and is financed by employer and employee premium contributions and the federal government. Benefits are portable across the country and are not subject to artificial geographical barriers. Entitlement under the scheme depends upon a claimant having worked under a contract of employment and suffered an "interruption of earnings." For regular benefit entitlement this is defined under the Unemployment Insurance Commission (UIC) regulations as a separation from employment of seven or more consecutive days during which no work is performed.

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and in respect of which no earnings are received. Consequently, employees placed on short-time work arrangements will rarely meet the qualifying criteria. The benefit ceiling is revised annually. In 1983 the maximum payment provided was $210 per week.

Unemployment insurance (UI) plays an extremely important income maintenance function to supplement notice and severance payments and thus reduce the economic hardship that accompanies job loss. The scheme provides a basic underpinning to the labour market by ‘buying time’ for implementing other adjustment measures such as job placement, training, and mobility programmes. A number of drawbacks are, however, associated with the provision of UI benefits. The fact that an income cushion is provided may make it easier for employers to lay-off workers as a cost-reducing device. This is particularly true in the case of seasonal workers laid off in response to annual variations in economic activity. Moreover, the income protection provided may increase measured duration through longer job search periods and may create an element of dependency on the scheme inhibiting mobility of labour.

Although it is difficult to assess the impact of UI on the labour market, in recent years the negative effects of benefit payments have attracted much attention in Canada. Reflecting recessionary trends, the qualifying rules were tightened in the 1980s in response to employer arguments that readily available benefit payments may have reduced labour force attachment and the incentive to seek re-employment, particularly in multi-earner families.

The alleged dangers of abuse and the problems created by the ‘work-shy’ is a very subjective concept. No doubt abuses do occur. Proponents of the argument that benefit levels had, for some people, decreased their incentive to find work were able to point to the paradox of manpower shortages occurring simultaneously with persistently high levels of unemployment. While this hypothesis was supported by some empirical evidence, it was by no means decisive, and equally cogent evidence to the contrary could be found.

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48 Unemployment Insurance Regulations C.R.C. 1978, c. 1576; cf. SOR/81-117, SOR/81-562, SOR/81-625, SOR/81-1108, SOR/82-44, SOR/82-245, SOR/82-246.


50 The Paradox of Unemployment and Job Vacancies: Some Theories Confronted by Data (Study No. 9) by M.L. Skolnick & F. Siddiqui (Toronto: Research Branch, Ontario Ministry of Labour, 1974).
Doubtless UI benefits can result in a cycle of dependency where individuals alternate between short-term employment and unemployment insurance. However, the Task Force on Unemployment Insurance in the 1980s published in 1981 tended to over emphasize the disincentive effect of UI benefit payments. The argument that levels of payment undermine the work ethic should not be overly stressed. The vast majority of unemployment cases are caused by conditions beyond the influence of the individual worker, as was apparent from the Statistics Canada data considered in Section II.

While the unemployment insurance scheme is not specifically directed to the problems caused by large or small scale lay-offs, it is, nevertheless, the primary source of economic support for employees who have been made redundant in Canada. In recent years, a growing awareness has emerged that the provision of income maintenance alone is not a sufficient response to the unemployment problem. Recognizing the need for alternative solutions likely to encourage and facilitate long-term job attachment, three developmental schemes for use of unemployment insurance funds were included in the 1975–76 employment strategy. These were work sharing (which will be considered subsequently), occupational training, and job creation.

The goal of UIC-sponsored training was to develop new skills and upgrade existing ones to help claimants return to productive employment. Some 100,000 claimant-trainees annually received about $200 million in UI benefits. This represented almost 60 percent of the trainees in institutional training courses sponsored by the Canada Employment and Immigration Commission in 1981. Application of the UI subsidized program created administrative difficulties due to the inconsistent treatment of trainee and non-trainee claimants and the overlap with the principal federal government training scheme under the Adult Occupational Training Act.

The use of unemployment insurance funds for developmental job creation projects was not particularly successful. The main criticism made by the Task Force was that while considerably higher costs were involved, demonstrable benefits that might justify increased expenditure were difficult to evaluate or assess. A total of $20 million was set aside for job creation purposes in 1982.

53 Job Creation Benefits 1982, Order, SOR/82-256.
While schemes of this nature may indicate that a more positive approach to unemployment was being taken and that a shift away from the provision of purely impersonal economic assistance had occurred, the impact would appear to have been fairly minimal. Increasingly, it appeared that employees who were unable to find employment were having to rely on provincial welfare assistance when their unemployment insurance benefits were exhausted. A survey conducted in 198254 showed that one-third of all welfare recipients were considered employable, whereas a few years earlier, "unemployed employables" accounted for between 5 percent and 10 percent of total welfare cases. This increase may have been a direct result of retrenchment in the unemployment insurance scheme under the 1979 amendments which created higher entrance requirements for repeaters, re-entrants, and new entrants. The extent of the spillover from unemployment insurance to welfare was such that provincial social assistance was fast becoming a second-level unemployment insurance system.

2. The Labour Adjustments Benefits Program

Growing reliance on provincial welfare assistance may have been one of the reasons why the Labour Adjustment Benefits Act55 was passed. The Act was intended to supplement existing labour market assistance programmes by providing financial support for workers laid off from federally designated industries. The legislation was primarily directed to lay-offs in the clothing, textile, and footwear industries, particularly in Quebec and Ontario. It was one of the few programmes that dealt specifically with employees and communities affected by mass lay-offs.

Workers who had been laid off were eligible for benefits equalling 60 percent of their pre-lay-off average insurable earnings if the lay-off involved either fifty or more employees, or at least 10 percent of the plant labour force. Additionally, the employee must have been laid off from an industry situated in a designated community, a Canadian citizen resident in Canada between fifty-four and sixty-five years of age when laid off, and have been employed in the industry for at least ten of the fifteen years prior to the lay-off.56

If an employee satisfied the criteria, he or she could apply to the Canada Employment and Immigration Commission (CEIC) for labour adjustment benefits. Furthermore, if the employee had claimed and exhausted all unemployment insurance benefits, was not receiving a retirement pension under

55 Labour Adjustments Benefits Act, supra, note 41.
56 Ibid. ss 3,10,13,14.
the Canada or Quebec Pension Plans, and was deemed to have no present prospect of employment (with or without training or relocation assistance), then he or she was entitled to receive adjustment benefits.\footnote{Ibid. s. 16.}

The scheme's effectiveness in alleviating the disruptive effects of mass terminations is open to debate. It would appear that both the complexity and plethora of qualifying criteria that had to be satisfied before assistance would be provided may have restricted its impact. Financial constraints due to cut-backs in federal government expenditures may also have had an effect.

\subsection*{B. Programmes Aimed at Filling Existing Job Vacancies}

Employees who are laid off may receive assistance in obtaining re-employment through numerous federal government programmes administered by the CEIC. The Commission carries prime responsibility for employment-related programmes. The following were among the more important services provided in 1982.

\section*{1. The Canada Employment Service}

The CEIC operates more than five hundred employment centres offering job information, counselling, and contacts with employers. The major priority of the employment service is to help job seekers to find jobs and employers to find suitable workers. A Central Labour Market Unit was set up in 1978 which, among other things, attempts to provide information on labour shortages and surpluses. Other employment information services included 'Choices', a computerized information centre which compiled occupational data, and 'Jobscan', an automated system aimed at improving placement services, monitoring the occupational aspects of the unemployment insurance programme, and providing forecasts of labour market supply and demand. The most recent addition at that time, the 'National Job Bank', a Canada-wide telephone-computer hook-up, provided an inventory of jobs that could not be filled locally and was aimed at relieving the supply–demand imbalances causing critical skill shortages.

Despite the apparent comprehensive nature of the services provided, it would appear that their quantity far exceeded their quality. Employers were particularly critical of the lack of adequate screening of job applicants before referral.\footnote{Manpower Requirements And Hiring Plans Of Ontario Employers In Manufacturing Industries: Survey Results (Toronto: Office of the Secretariat, Ontario Manpower Commission, October 1979) at 18.} This criticism may be reflected in the fact that of a
total of 1,043,316 job placements made in fiscal year 1980–81, 209,507, or just under 21 percent, lasted less than one week. Studies of job-hunting behaviour have shown that employees were also critical of the services provided and often preferred to rely on informal methods of job search through, for example, personal contacts. Since employers were not required to register job vacancies with Canada Employment Centres, very incomplete listings of available employment opportunities may have been kept on record.

2. The Canada Manpower Consultative Service

The Manpower Consultative Service has particular relevance to group dismissals. When a large-scale lay-off is likely, the Consultative Service attempts to set up a manpower adjustment committee composed of employer and trade union representatives with an independent chairperson. The committee’s main purpose is to facilitate joint labour–management research and planning to further opportunities for re-employment. Attempts may be made to arrange for transfers of employees to other branches in the existing corporate structure and to contact customers, suppliers, and competitors of the immediate employer in the hope of finding job openings.

Various provincial authorities, CEIC, and employers share the cost of these committees. In Ontario, for example, the Ministry of Labour normally contributes 15 to 25 percent of the cost of these committees up to a maximum of $1,000. CEIC usually pays up to 50 percent and the employer pays the remainder. In Ontario, in those cases where adjustment committees were established in 1978–79 and 1979–80, efforts to secure re-employment for workers who were being laid off appear to have achieved a reasonable level of success. In 1978–79, 64.6 percent of laid-off employees were relocated in alternative employment as a direct result of the efforts of committee members, while in 1979–80 just over 60 percent were relocated.

While undoubtedly the placement service had been of considerable benefit in lay-off situations, its effectiveness was hindered by a failure to fully co-ordinate federal and provincial manpower policies. The major drawbacks were a lack of available data on job vacancies and the lack of an inventory of the occupational skills of redundant workers. The impact of the placement service may have been further restricted by


the fact that its effectiveness depended upon the availability of employment vacancies similar to those previously occupied by employees who were laid off. In many cases these simply were not available, particularly in regions experiencing structural unemployment. To overcome this problem it was essential that the placement service be supported by re-training and mobility assistance schemes.

3. The Canada Manpower Mobility Program

The Canada Manpower Mobility programme encourages the geographic mobility of workers who are underemployed, unemployed, or about to become unemployed and for whom work is not available locally. Various exploratory, relocation, and travel assistance grants are provided. Given regional diversity, varying rates of regional unemployment, population dispersion, and Canada's size, mobility of labour is particularly important. However, it is also particularly costly. In the 1980–81 fiscal year, almost $7.8 million was spent under the mobility programme.\(^6\)

The underlying object of the programme is to defray relocation and job search costs. In the case of relocation grants, the recipient must demonstrate that he cannot find comparable work in the immediate locality and that he is moving to a job in the nearest area where suitable positions are available. The amount of payment a person receives depends upon family size, number of dependants, and the length of time the employee has been unemployed.\(^6\)

While regional disparities in job opportunities and the impact of mass lay-offs on dependent communities require increased geographic and occupational mobility, a number of factors have prevented the achievement of this objective. Age, a lack of adequate educational training, and family ties always weigh heavily when deciding whether or not to move. Research has shown that older workers and low-wage employees are least inclined to move even though they experience the most difficulty in finding work.\(^6\) To overcome some of these problems, the Task Force on Labour Market Development recommended in 1981 that the government provide wage subsidies to offset employer reluctance to employ workers falling within these categories and to ensure that those workers were provided with short-term training packages to update their skills.

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61 See Annual Report, supra, note 59.

62 Generally, see the Labour Mobility and Assessment Incentive Regulations, C.R.C. Vol. 3, c. 330; cf SOR/80-112, SOR/80-778, SOR/81-582.

Institutional barriers such as the differing provincial requirements for licensing, certification, and qualifications for practicing a trade also created artificial impediments to freer movement of labour. As well, increasing prevalence of multi-earner families and the availability of UI benefits may have reduced the need to move to obtain employment.

The combined effect of personal and institutional factors added considerably to the difficulties involved in ensuring greater labour mobility. In the early 1980s, rather than address these difficulties directly, emphasis was placed on the creation of make-work schemes in areas suffering particularly high levels of unemployment. This approach merely perpetuated the existing problems and detracted from the need to provide medium or long-term strategies likely to have a more lasting effect. If an adequate manpower mobility programme was to emerge, increased training programmes to enable laid-off employees to acquire portable trade skills and greater co-operation between the federal and provincial governments in employment and education policies to remove a number of the existing institutional barriers had to be sought.

4. The Canada Manpower Training Program

Employment training is perhaps the key element in the process of labour market adjustment, and the most constructive response to layoffs. The primary object of manpower training programmes is to ensure that the unemployed worker returns to productive employment. The Canada Manpower Training scheme was governed in 1982 by the Adult Occupational Training Act, and provided two distinct training programmes. The first was the provision of institutional training courses at colleges and vocational schools. The second was the Canada Manpower Industrial Training Programme (CMITP). It had five subsidiary goals relevant to this paper: encourage employers to establish new employee training programmes and improve existing ones; alleviate persistent skill shortages; prevent lay-off of workers due to technological or other changes; increase employment opportunities for unemployed workers who lacked marketable skills; and provide incentive for employers to hire and train ‘special needs’ clients or train present employees who met this definition.

Under CMITP, agreements regarding on-the-job training schemes were drawn up between CEIC and employers. Each agreement normally provided that the employer would be reimbursed for the cost of training and for a portion of the trainees’ wages, usually up to 40 percent for employees who had been previously hired by the employer, up to 60 percent for new hires.

64 See, Labour Market Development in the 1980s, supra, note 49 at 231.
percent for persons hired specifically for training, and up to 85 percent for special needs workers. In fiscal year 1980–81, almost 80,000 trainees enrolled in the industrial training programme, costing the federal government $106 million.65

In each province, federal–provincial Manpower Needs Committees established the priorities that determined the sectors in which subsidies would be granted for institutional and industrial training purposes. From a number of surveys, it appears that the training programmes had limited impact in matching the demand for skilled labour with an over-abundant supply. The major problem was the mismatch between worker skills and the skill requirements of available jobs. The seriousness of this imbalance was emphasized in the following passage: "One of the most critical human resource problems that Canada faces in the 1980s is the shortage of skilled tradesmen. Despite high unemployment in the country, many sectors of the economy are experiencing a serious imbalance between the supply of and demand for skilled workers...."66

5. The Critical Trade Skills Training Program

Industrial skills training under the Canada Manpower Training Programme had concentrated largely on providing fairly basic skills to improve the general employability of the unemployed. As a result, the programme may have performed a certain income maintenance function while removing individuals from the register of unemployed. This may have obscured the need to provide training in the skills required in the labour market and necessitated increased reliance upon skilled immigrant labour. Although industrial training expenditure as a percentage of total training expenditures gradually increased from 9.6 percent in 1975–76 to 15.2 percent in 1979–80, this was not sufficient.67 Shortages continued to exist, most often in a number of highly skilled occupations.

A number of surveys emphasized the severity of the skilled labour problem. The results of a study done by the Ontario Manpower Commission in October 1979 indicated that employers were becoming increasingly concerned about the shortage of skilled tradesmen in the manufacturing sector.68 Of the employers who responded to the study, approximately 50 percent reported recruitment difficulties. Almost 68 percent of available job openings were for machine operators, general

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65 See Annual Report, supra, note 59.
66 See Wood & Kumar, supra, note 23 at 39.
67 See Labour Market Development in the 1980s, supra, note 49.
68 Manpower Requirements And Hiring Plans Of Ontario Employers In Manufacturing Industries: Survey Results, supra, note 58.
machinists, labourers, electricians, tool-die and mould makers, welders, assemblers, fitters, and analysts. Fifty-four percent of the respondents reported plans to expand their manpower during the following twelve months. Of these, 88 percent anticipated further recruitment difficulties, mainly due to a lack of specialized skills and on-the-job experience.

In response to the shortage of skilled labour, a Critical Trade Skills Training Programme was included in the Canada Manpower Training scheme in 1979–80. The scheme was specifically designed to produce the highly skilled blue-collar workers then in short supply. Financial assistance for a period of two years, or half the time required to reach a specific level of occupational proficiency, was provided. In the 1980–81 fiscal year, $7,504,983 was spent under the programme to train 4,102 employees. Although shortages of critical trades people may have been infrequent, they were capable of causing severe bottlenecks and disrupting entire production processes.

Alleviation of the problems caused by existing shortages would have required industry as a whole to shoulder a greater responsibility for employee training and apprenticeship programmes. A study conducted by the Ontario Ministry of Universities and Colleges showed that of seventy-nine companies surveyed, 39 percent provided no training whatsoever, 41 percent used 'in-house' training, 10 percent used an apprenticeship system, and 10 percent used both. Significantly, among non-training firms, 84 percent reported shortages of skilled labourers.

After it was accepted that increased training focusing on comprehensive long-term skill development was needed, two issues arose. First, who was to be responsible for supervising training programmes, and second, who was to be responsible for training expenditures. The cost of training had always been a major deterrent to employers, particularly to small businesses. Outlays on training were never seen as particularly secure investments due to the predatory recruiting practices of non-training firms.

One possible solution was government-instigated training. Manpower counsellors seemed, however, to have been unable to match occupational training to occupational need. If greater emphasis had been placed on employer-instigated training schemes, this problem might have been overcome. Individual employers who were more aware of existing shortages in their workforce could have directed training efforts to remedy these.

69 See Annual Report, supra, note 59 at Appendices 3, 4.
70 Wood & Kumar, supra, note 23 at 40.
On the issue of cost, the Commission of Inquiry on Educational Leave and Productivity recommended in its report in 1979 that a levy-grant system of subsidized training be implemented.\textsuperscript{71} Under the proposal, the employer would have been required to spend 0.5 percent of his or her payroll on vocational training. An employer spending this amount could reduce tax liability by an amount greater than that spent on training. Those who spent less would be required to submit the difference to the government, the object being to increase general or transferable skill training by spreading the burden of cost.

In 1981 the Task Force on Labour Market Development in the 1980s\textsuperscript{72} recommended against adopting a levy-grant system in Canada. The Task Force considered the British Industry Training scheme which had been operated on a levy-grant basis for a number of years. It concluded that the enormous administrative difficulties and lack of evidence that it reduced 'poaching' of trained employees limited the value of such a scheme.\textsuperscript{73}

Since most other forms of institutional training were financed out of general revenues in Canada, skills acquisition in industry should, arguably, have been financed in a similar fashion. A significant factor to be considered in this respect is the impact that cyclical instability has had on employer-sponsored programmes in the past. During an economic downturn firms often implement cost-cutting measures which can include laying off apprentice-trainees and curtailment of training programmes. This in turn leads to shortages of skilled tradesmen during an upturn and contributes to market tightness. On this basis, public expenditure was required to reduce the impact of cyclical swings on training schemes, reduce disparities in costs to individual employers who provided on-the-job training, and promote greater equality of access to trades training.

Increased use of public revenues for industrial skills training would have served two related purposes. First, employees who were laid off would have been provided with the opportunity to acquire the trade skills necessary to enable them to return to gainful employment. Second, by emphasizing the importance of industrial trade training, the existing emphasis on post-secondary institutional training would have been reduced, providing a better balance of incentives for appropriate career selection. The combined effect would have reduced future shortages in

\textsuperscript{72} Supra, note 49.
\textsuperscript{73} Ibid. at 165.
critical trade skills. To overcome those problems, a better balance of employer-instigated and government-financed training schemes was required.

C. Programmes Designed to Create New Jobs

In recent years, considerable emphasis has been placed on job creation at both the federal and provincial government levels. In the past, this was intended to deal more generally with the problems created by a growing labour force and declining employment opportunities. Increasingly, direct job creation is being relied upon to alleviate some of the problems caused by plant closures and mass lay-offs in regions experiencing structural employment difficulties. By the early 1980s, a number of schemes had been implemented to provide both medium and short-term employment. Although some of these schemes have been abandoned or replaced, a number remain in effect.

1. The Canada Works Program

The Canada Works Program provided funding in regions of high unemployment for short-term job creation projects proposed by local organizations. The fourth and final phase of the programme was carried out in fiscal year 1979-80 with total federal funding of $100 million. Funds were allocated to those provinces that had labour surpluses of greater than 9 percent.

Canada Works had an emergency procedure designed to provide a fast response to sudden large-scale job loss caused by unforeseen events such as major plant closures in small communities. The emergency response feature was not widely used. In 1977-78, thirty-two projects were approved involving approximately 230 jobs. In 1978-79, only three projects were approved, all in Quebec, for a total federal government contribution of $178,786, which created nineteen jobs.74

The entire Canada Works Program ended in March 1981 and was replaced by the Canada Community Development Scheme, which provided financial aid for community employment projects proposed by local organizations. These projects usually lasted from three to nine months in duration and were designed to create jobs in areas of high unemployment. By March 1982, a total of $110 million had been contributed to the labour, material, and overhead costs of approved projects.

2. The Employment Tax Credit Program

The Employment Tax Credit Program, introduced in March 1978, was designed to stimulate employment in the private sector. The programme provided employers with a tax credit if they hired unemployed workers in addition to their normal workforce requirements. The employees involved had to be unemployed when hired and safeguards were set out to ensure that credit was given only for employees whom the employer would not otherwise have hired. The tax credit was worth up to $4,160 per year for each eligible employee, depending upon the particular region where the employee worked. In fiscal year 1979–80, over 50,000 jobs were created at an estimated cost of $100 million. The Tax Credit programme expired in March 1981 and was not replaced.

3. The Local Employment Assistance Program (LEAP)

LEAP provided funds to individuals, groups, or organizations in an effort to create long-term employment opportunities for the chronically unemployed. Like the Community Development scheme, LEAP operated through specific projects which were screened by provincial review boards. In fiscal year 1980–81, the 875 LEAP projects cost a total of $58.7 million. These projects created almost 7,000 medium to long-term jobs for seriously disadvantaged people throughout Canada.

4. Miscellaneous job creation schemes

In addition to the Canada Community Development scheme, three other job creation projects were established in fiscal year 1980–81. Under the New Technology Employment Program, subsidies were provided to firms that hired unemployed or under-employed post-secondary graduates to work in areas of research or development. The Local Economic Development Assistance Program was an experimental scheme intended to help increase business development in slow growth communities. The programme was designed primarily to stimulate private sector employment through developing local enterprises. The third project, the Canada Community Services Program was another pilot scheme aimed at creating new jobs for the unemployed while at the same time attempting to improve social and cultural services.

The most significant developments in direct job creation occurred in 1982. Under the New Employment Expansion and Development (NEED)
Program, the federal government committed $500 million to promote employment opportunities for unemployed persons experiencing significant hardship. The first phase of the scheme came into existence in the fall of 1982 and was scheduled to run until the end of March 1983. The scheme was to be supplemented by provincial contributions. In Ontario, for example, the Canada-Ontario Employment Development Program was established. The programme was equally funded by the governments of Canada and Ontario. Applications for support could be registered by non-profit organizations, registered businesses, partnerships, corporations, and Ontario government ministries and agencies. Federal and provincial agencies were not required to contribute to the costs of the programme, whereas private sector employers were normally required to provide from 25 to 50 percent of the necessary funding.

The projects approved were essentially labour intensive and were directed primarily to help employees who had exhausted their unemployment insurance entitlement. The projects had to last between twelve weeks and twelve months and provide employment for three or more workers. The scheme provided on average $400 per week per employee to meet wages and other costs. In Ontario, the scheme was scheduled to create 8,000 jobs before the end of March 1983, when the combined federal and provincial commitment of $200 million would be exhausted.

While job creation projects of this nature were not primarily designed to combat the problems faced by employees who had lost their jobs due to a workforce reduction, increasing numbers of these workers became eligible for assistance as their UI entitlement expired.

D. Summary

In Canada, recognition of the fact that the problems created by lay-offs and redundancies is an economic and social issue of general public concern has prompted federal government action. Because of the division of legislative powers under the Canada Act, 1867, highly centralized economic policies and mandatory planning have not been possible. The federal government can only directly intervene and impose restrictions on the management prerogative to lay-off in federal work or undertakings. For the vast majority of employees, therefore, the influence of the federal government has only been felt indirectly through the Unemployment Insurance and Labour Adjustment Benefits schemes and re-employment programmes administered by CEIC.

Unemployment insurance benefits are substantial by international standards, and this may be one of the reasons why lenient restrictions have been imposed on the employer's right to lay-off in Canada.\(^77\) In

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\(^77\) See Labour Market Development in the 1980s, supra, note 49 at 32.
the late 1970s, however, a growing awareness emerged that economic assistance alone was not sufficient. Large quantities of public funds were spent on schemes designed to create increased employment opportunities for employees who had been laid off.

For a number of reasons, however, the services provided were not as effective as they might have been. The existing structure appeared to lack cohesion and resulted in a jumble of disjointed and overlapping schemes. These were severely criticized by the Carrothers Commission,

Too often... individual expectations would be crushed by word that institutional training places were unavailable or that there were no job vacancies registered with the local employment office. Manpower counsellors seem unable to match concrete occupational development efforts (training, job search, mobility, etc.) with specific occupational vacancies except in the most highly skilled categories. All of this is discouraging to the job seeker and in the absence of extraordinary efforts he is likely to join the ranks of the unemployed.78

Many of the problems were compounded because jurisdiction over employment and education is shared between the federal and provincial governments. Quite often this resulted in inaction or, at the other extreme, duplication of function. To improve the rather \textit{ad hoc} approach that was taken, it was necessary to devise and implement manpower policies aimed directly at the correction of supply and demand imbalances in the labour market. This would have required improved data collection on existing job vacancies and the occupational qualifications of workers who had lost their jobs, more reliable forecasting, the establishment of uniform training, certification, recognition standards among the provinces to promote greater labour mobility, and increased domestic training that emphasized the need to acquire portable trade skills.

Faced with the spectre of unprecedented levels of unemployment in 1982 and 1983, both the federal and provincial governments placed considerable emphasis on direct job creation to offset the existing slack in labour demand. Undoubtedly new jobs were needed in some areas. However, since there were current shortages in the skilled trade occupations, greater emphasis should have been placed on matching current job vacancies with the unemployed labour force, rather than attempting to create entirely new jobs.

Too often, direct job creation provides short-run employment and fails to produce a solution to long-term structural problems. Schemes of this nature are essentially labour intensive. The result is that support for non-wage elements such as physical and financial capital, that would be likely to have a longer-term impact on the social and economic

\footnote{78 See Carrothers, \textit{supra}, note 17 at para. 547.}
infrastructures of targeted communities, has been minimal.\textsuperscript{79} Since job creation schemes have little permanent impact on demand conditions, they may have merely cycled people back to the ranks of the unemployed with renewed unemployment insurance eligibility.

Job creation is appealing in that it offsets, in the short-term, earlier labour market failings in training and education policies. While supply-side deficiencies may be temporarily resolved, the danger is that short-term job creation schemes generate an acceptance of periodic lay-off and promote greater reliance on the unemployment insurance scheme when work is not provided. Make-work schemes tend to detract from the importance of providing adequate job training and related skills acquisition that can produce a more secure attachment to jobs and the labour force as a whole.

As a counter-cyclical measure, direct job creation is undoubtedly useful since it can be phased in and out relatively quickly. However, in regions with high levels of unemployment and little prospect for future economic recovery, a longer-term developmental approach was needed. Relevant and accessible training and mobility assistance may have provided a more appropriate response.

V. ALTERNATIVES TO LAY-OFFS AND REDUNDANCIES

The legal and institutional protections discussed above reflect an essentially reactionary response to the problems created by lay-offs. Much of the protection provided has been of a negative sort, coming into effect after the decision to lay-off was taken. Legislative emphasis on advance notice, severance pay, and re-employment measures appeared to treat lay-offs as the most appropriate response to decreased levels of economic activity. This attitude was also reflected in negotiated protections under collective bargaining law. Increasingly, however, as unemployment figures grew, alternatives to lay-offs as a means of maintaining fuller employment levels were attracting greater attention. The two major thrusts in this direction were work sharing and early retirement schemes.

A. Work Sharing

Labour Canada data on the content of collective agreements indicate that work sharing, by either a reduction in hours or a division of work, was not widely used to prevent or minimize lay-offs.\textsuperscript{80} The Canadian

\textsuperscript{79} Labour Market Development in the 1980s, supra, note 49 at 138 seriously questions the applicability of the widespread job creation projects as a multi-purpose tool to tackle unemployment.

\textsuperscript{80} See the Labour Canada data on the content of collective agreements in Table 3. See also R.W. Crowley, "Worksharing and Layoffs" (1979) 34 Relat. Ind. 329.
labour movement has generally been hostile to the whole concept of work sharing. This hostility may have been largely due to the fact that work-sharing arrangements negate accrued seniority rights. More senior union members who were unlikely to be affected by lay-offs were often unwilling to participate in schemes involving wage reductions. The emphasis placed on job rights acquired through long-service and the sanctity of negotiated seniority protections cannot be over-emphasized.

Employers may have been hostile to work sharing because of the possibility of increased costs arising from the obligation to maintain full fringe benefits while productivity was lowered by a reduction in hours worked. The administrative difficulties involved, and the possibility that a shorter work week might become the norm may also have deterred interested employers.

From the trade union perspective, work sharing which results in a retention of employees may maintain union membership levels and consequently union dues. This could conceivably prevent the decertification that might occur if a large number of unionized employees were laid off. Weighed against the importance of seniority in a lay-off situation, however, these arguments are unlikely to prove particularly persuasive.

From the employer's perspective, the arguments in favour of work sharing appear more convincing. Increased costs accompanying work sharing through the maintenance of fringe benefits might offset both potentially higher costs arising from the obligation to provide notice and severance pay and future recruitment costs if lay-offs resulting in a dispersion of the workforce were instituted.

Despite the lack of enthusiasm for schemes of this nature, the federal government began considering the possibility of work sharing as an alternative to temporary lay-off in the mid-1970s. As a result of the amendments to the *Unemployment Insurance Act* in 1976 and 1977, a pilot project was introduced. Under experimental agreements, employers and employees facing short-term employment reduction agreed that all employees would work between one and three days less per week and receive unemployment insurance to offset wage loss. The scheme was intended to sustain employment in periods of short-term, adverse economic conditions with the object of maintaining a stable labour force by preventing the erosion of worker skills and a permanent dispersion of the workforce.

Work sharing using unemployment insurance funds was designed as an alternative to unemployment insurance, and, although based on

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the UI benefit structure, a number of the entitlement provisions were amended. Most significantly, the normal seven-day waiting period was not applied. Moreover, receipt of work-sharing benefits did not reduce the regular unemployment insurance entitlement of the participants. Under the scheme, payment of partial unemployment compensation depended on the employer establishing that at least 20 percent of the employer's workforce would have their hours of work reduced by at least 20 percent for four weeks. In 1982, $30 million were committed to the project. Federal government commitment was subsequently increased to $190 million, with a further $150 million allotted for 1983. By the beginning of 1983, it was estimated that approximately 209,000 workers across Canada had taken part in the scheme and that 89,430 lay-offs had been avoided.82

In evaluating the success of work-sharing schemes much depends upon the criteria used. While work sharing may appear to offer a more equitable response to reduced labour demand than lay-offs, the federal government scheme was not assessed very favourably in the Report of the Task Force on Unemployment Insurance.83 The Task Force concluded that while the theoretical aims of the work-sharing projects may have been justified, the programme did not accomplish what was expected.

It was felt that the scheme was simply another way of paying regular unemployment insurance benefits since, in most instances examined, there was little risk that the firm's workforce would have dispersed had there actually been a lay-off. The Task Force found that the payout for work-sharing arrangements was about two and a half times the normal benefit payment rate and that on average an employee's working time was reduced by 30 percent while gross earnings were reduced by only 7 percent. The Report states, "[t]he conclusions from the evaluations are distinctly negative on a cost-benefit basis for financing work-sharing agreements through Unemployment Insurance."84

While arriving at the conclusion that payout increased by two and a half times the normal benefit rate, calculations failed to include additional costs incurred through the provision of other social services to the unemployed. Empirical evidence has shown that unemployment is invariably accompanied by an increase in the cost of community assistance

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82 D. Dodge, Address (Conference on Canadian Labour Markets in the 1980s, Queen's University, Kingston, 25 February 1983) [unpublished].
83 Task Force on Unemployment Insurance in the 1980s, supra, note 51.
84 Ibid. at 82.
support measures. If it were possible to assess these additional costs and include them on the unemployment insurance costs side of the equation, the difference between work-sharing costs and expenditure incurred as a result of lay-offs might not be as marked.

Using a purely cost-benefit analysis raises a more fundamental issue. In many cases, job loss resulting in economic hardship is accompanied by numerous psychological, physiological and social problems, not merely for the individual worker concerned, but for his immediate family and friends also. The social costs of unemployment are rarely considered in assessing the effectiveness of work sharing and accompanying support programmes. Undeniably there are large social costs associated with job loss, and these should be considered in any evaluation of a work-sharing scheme aimed at avoiding lay-offs. The problem in the past has been that these costs are neither easily identifiable nor easily reduced to a purely dollars and cents calculation.

Work-sharing schemes are appropriate where decreases in production levels are merely temporary, arising, for example, from a cyclical downturn in market demand. While protection may be provided against short-term employment reduction, there is a danger that over-reliance might be placed on schemes of this nature. Work sharing is a transitional measure and is not appropriate in cases of long-term structural unemployment. It may ‘mask’ long-term business inefficiency and prop-up enterprises that are not economically viable. To this extent the effect will be purely cosmetic and may even impede necessary labour market adjustment to structural unemployment problems.

Nevertheless, if an effective screening process was devised to ensure the long-term profitability of individual industrial concerns, work sharing as a means of avoiding recurring lay-offs has a role to play. Until the recession, little incentive for partial employment as a short-term solution had been provided. Increasingly, however, the pilot project adopted began to attract considerable interest. Perhaps the greatest stumbling-block preventing widespread acceptance of the concept were the attitudes of the two major participants, employers and trade unions.


86 See the Task Force on Unemployment Insurance in the 1980s, supra, note 51 at 82. Cf. E. Yemin, Workforce Reductions in Undertakings (Geneva: International Labour Office, 1982) at 46, where Professor Adell argues that work sharing may become “an artificial impediment to the demise of economically unsound enterprises.”

87 The United Auto Workers Union was one of the few major trade unions to give approval to the program. In April 1982, 66 percent of plants on work sharing were non-union, while 34 percent were covered by union agreements: W. List, “Pay Cuts 4-Day Week: Worksharing Helps Avoid Layoffs” The [Toronto] Globe and Mail (27 May 1982) 15.
B. Early Retirement

In Canada, the number of older employees in the labour force and the participation rate among their members has been declining gradually over the last two decades. Given this fact, the question to be considered is whether the retirement of older employees before normal retirement age might be used in a redundancy situation as a form of induced attrition to prevent younger workers being laid off. Since empirical evidence has shown that older employees are less mobile and less easily trained for new jobs, the possibility of early retirement might appear to offer at least a partial solution to the problems created by a growing labour force and declining employment levels.

Table 8
Percentage Distribution Figures for the Labour Force Over the Last Twenty Years

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Table 9
Participation Rate by Age (Canada)

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<td>14-19 years</td>
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</tr>
</tbody>
</table>

Source: Statistics Canada, The Labour Force Cat. 71-001

There were, however, a number of problems associated with retirement in the early 1980s, not the least of which was the issue of income protection. Deficiencies in existing pensions legislation and, in particular, the inadequacies of private employer-sponsored retirement income systems were the major drawback.

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88 See Tables 8 and 9.
89 See Portis & Suy, supra, note 63.
91 P. Kumar & A.M.M. Smith, Pension Reform in Canada: A Review of the Issues and Options (Kingston: Industrial Relations Centre, Queen's University, 1981).
Under much of the existing pensions legislation in Canada, to acquire a non-forfeitable right to pension benefits arising from employer contributions, an employee must be over forty-five and have worked for the same employer for ten years. This was very often the minimum vesting requirement, although individual pension plans negotiated under the collective bargaining system may have contained more liberal vesting provisions. Attempts to have the courts extend vesting rights beyond the statutory minimum were not successful. A number of decisions in Ontario show that the judiciary was not prepared to strain the wording of regulations or of a pension plan document to grant vested pensions before entitlement arose where there was no statutory or contractual power to do so, however equitable or desirable this may have appeared.

A second problem was the issue of portability of accrued pension credit from one pension plan to another. Normally pension plans did not provide that an employee’s pensionable service with a prior employer would be included in calculating the pension to be provided by a subsequent employer. Thus, where an employee left or was retired from one job, normally his accumulated pension entitlement was not transferable unless there was a reciprocal agreement among employers to recognize credits.

<table>
<thead>
<tr>
<th>Normal Retirement Age</th>
<th>1978</th>
<th>1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>5.6</td>
<td>5.3</td>
</tr>
<tr>
<td>61-64</td>
<td>0.6</td>
<td>0.6</td>
</tr>
<tr>
<td>65</td>
<td>92.2</td>
<td>92.6</td>
</tr>
<tr>
<td>66-69</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>70</td>
<td>0.8</td>
<td>0.7</td>
</tr>
<tr>
<td>(Other)</td>
<td>0.4</td>
<td>0.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Early Retirement Provision</th>
<th>1978</th>
<th>1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>At Employee’s Option</td>
<td>12.4</td>
<td>14.2</td>
</tr>
<tr>
<td>At Employer’s Option</td>
<td>5.6</td>
<td>4.9</td>
</tr>
<tr>
<td>By Mutual Consent</td>
<td>78.1</td>
<td>77.2</td>
</tr>
<tr>
<td>Other</td>
<td>1.6</td>
<td>1.4</td>
</tr>
<tr>
<td>No Provision</td>
<td>2.3</td>
<td>2.1</td>
</tr>
</tbody>
</table>

Table 10
Profile of Pension Plans in Canada, 1980 (%)

Source: Statistics Canada, Pension Plans in Canada, Cat. 74-001.

92 See, for example, Pension Benefits Act, R.S.O. 1980, c. 373, s. 20.

Another problem was that vested pension contributions were often locked in and had to be used to purchase a deferred annuity payable upon retirement. The annuity was purchased from an insurance company and the interest payable may have been significantly less than current market rates. Where pension plans were not indexed to the rate of inflation, when entitlement arose, the actual value of the interest vested may have declined considerably.94

The lack of a cohesive retirement income system in Canada considerably discouraged early retirement policies. Most private pension plans did provide early retirement options on an actuarially reduced basis.95 However, unless the employees covered by the plan had made sufficient prior arrangements to maintain an adequate level of income after retirement, actuarial reductions in pension entitlement would have discouraged early retirement. It is unlikely that many of those employees most vulnerable to large-scale lay-offs would have had sufficient surplus capital to enable them to participate in private investment schemes of this nature. While severance payments may have compensated to a certain extent for reductions in pension entitlement, they cannot possibly have provided other than short-term financial support.

A number of other factors militated against early retirement policies, especially against mandatory early retirement. Recent jurisprudence suggests that compulsory retirement below the established retirement age may be discrimination on the basis of age and a breach of human rights legislation. In Ontario Human Rights Commission v. Borough of Etobicoke96 the Supreme Court of Canada held that mandatory retirement at age sixty constituted a breach of the existing Ontario legislation. The Supreme Court emphasized that the Human Rights Code is, "a public statute and constitutes public policy in Ontario" and that a person may not contract out of his rights guaranteed thereunder, either individually or through a collective agreement.97

In Ontario and Quebec, one factor in particular may slow the withdrawal of older workers from the labour force in a number of industrial sectors. Recent studies on shortages of highly skilled workers in construction, manufacturing, and tool and die operating indicate that an aging, skilled labour force, coupled with the decline in the supply of skilled

94 Both the Canada and Quebec Pension Plans provide for full and immediate vesting and complete inflation adjustment.
95 See Table 10.
immigrant workers, will increase the pressure to retain the skills of older employees. Consequently, rather than early retirement, retention of employees beyond age sixty-five may be necessary. If this is the case, the apparent conflict between the need to provide added employment opportunities for younger workers and the need to retain the skills of older workers may be resolved by adopting more flexible work arrangements providing perhaps longer vacations graduated by age, part-time work schedules, and a gradual reduction of working hours for persons over sixty-five.

Since early retirement will usually be accompanied by a drop in income, it would seem likely that only those employees who are particularly dissatisfied with their work will find the option attractive. If this is the case, the impact of early retirement as a form of induced attrition and a means of preventing lay-offs among younger members of the workforce may be fairly minimal. Nevertheless, given the magnitude of the lay-off problem in Canada, the opportunities that an early retirement policy provides are worth pursuing.

The impact of both work sharing and early retirement policies as alternative responses to lay-offs could have been increased by a number of other possible approaches. A restriction or elimination of overtime and the option of recalling or reducing the amount of work that had been sub-contracted out might have increased the demand for labour during normal working hours. Natural attrition, accompanied by a recruitment freeze, could also have provided added job opportunities for existing members of the workforce, enabling employees who were facing lay-off to be redeployed in the existing enterprise structure. This might have required increased emphasis on short-term training to meet the requirements of available job vacancies and also an easing of negotiated work rules.

While alternatives to lay-off might appear to be relatively attractive concepts, many of these seem to prejudice the interests of older employees wishing to retain their jobs. Consequently, the success or failure of schemes aimed at avoiding lay-offs may depend upon the importance of seniority systems in unionized firms, the number of older workers employed, and whether a particular firm is in a position to make early retirement a more attractive proposition through larger severance payments and other retirement income supplements.

Increasingly, it must be recognized that there are only a limited number of jobs available. The choice will, therefore, have to be made between giving priority on the basis of length of service alone or taking into account the wider social implications arising from the greater financial burdens of younger workers. The choice may not be an easy one to
make, but if more adequate provision for income maintenance upon retirement is provided, social equity surely dictates the appropriate course to be followed.

VI. SUMMARY AND CONCLUSIONS

In Canada, redundancies and lay-offs have been largely accepted by employers, employees, and government as a necessary, if undesirable, consequence of an industrial society. As a result, the legal and institutional protections adopted have used economic buffers and measures that are designed to improve re-employment opportunities to alleviate the adverse effects of job loss. The severity of the economic recession from 1981–83 led to a large increase in redundancies and lay-offs, raising considerable debate over the adequacy of those protections. One must ask if the available legal and institutional protections were adequate or if more could have been done to help the redundant worker in Canada.

Diagnosis of the problem and prescription of a remedy may depend upon the political and economic policies one adopts. Critics of the existing scheme might argue than an emphasis on lay-offs provides a positive endorsement of the commodity view of labour. From this standpoint it might also be argued that deference to the norms of economic rationality and to the assumed 'industrial logic' justifying lay-offs may have obscured the nature and consequences of the problem. Taking this line of argument, it can be asked whether layoffs in Canada were simply an unfortunate by-product of the efficient operation of the free enterprise system and job loss a purely personal misfortune for individuals affected during the survey period.

In attempting to address that argument, it is important to point out that the vast majority of redundancies and lay-offs which occurred at that time were necessary to either stave off complete economic collapse or to reorganize existing plant processes in order to remain competitive in domestic world markets. Large sectors of Canadian industry were undergoing structural changes which had serious adverse consequences for many workers. It must be clearly emphasized, however, that the long-term costs of non-adjustment for industry, workers, and the Canadian economy in general would almost certainly far outweigh the costs of adjustment. Support for this argument is found in the recent reversal of the approach taken by many western European countries.

In response to rising unemployment in 1974–75, caused by the dramatic increase in oil prices in 1973, emphasis in Western Europe was placed on job maintenance measures through employment subsidies, short-time work subsidies, inventory build-ups, and direct government financial support for specific industrial sectors. The various governments
believed that the period required for economic adjustment would be relatively short. This was not in fact the case. As low growth and high unemployment continued, it became increasingly apparent that job maintenance measures were impeding necessary labour market adjustments and had to be phased out. In many of these countries, emphasis is now placed on measures designed to reduce the supply of labour to declining sectors of industry and to redistribute available employment. Considerable emphasis has been placed on early retirement, work sharing, and subsidized short-time work schemes. This approach has been supported by a significant expansion in publicly funded re-employment and retraining schemes designed to generate new employment opportunities for those employees who have lost their jobs.

In a number of these countries, the recent emphasis placed on measures designed to promote labour market adjustment has not been well received. This is especially true in those sectors of industry where job maintenance efforts have been most intensive. Many of the problems that have arisen may be directly attributed to governments because, for political reasons, they promoted a retention of the existing workforce rather than making the needed adjustments.

In Canada, emphasis has been placed on adjustment to economic and technological change. While undoubtedly this has been the more appropriate course of action, until very recently the costs of adjustment, both economic and social, were borne primarily by workers who had lost their jobs. By the beginning of the present decade, however, it increasingly appeared that the problems faced by redundant workers were being recognized. Much of the debate at that time centred on whether greater protection could be provided and how the external social and economic costs of labour displacement could be distributed more equitably.

In several Canadian jurisdictions, a distinction is drawn between lay-offs for economic reasons, where the employer can no longer afford to maintain full productive capacity, and lay-offs arising from production rationalization, where job loss arises as a result of technological innovation. In those jurisdictions, legislation has been introduced requiring a re-opener clause is intended to facilitate consultation and negotiation designed to avoid lay-offs and to mitigate the adverse effects of job

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loss by requiring the employer to participate in re-employment efforts and provide compensation to employees who have lost their jobs.

Because of the short-term focus of the vast majority of collective agreements in Canada, it may have been difficult, or indeed deemed unnecessary, to bargain for the inclusion of a reopener clause.

However, the inclusion of a legal obligation to negotiate in cases where lay-offs are directly attributable to technological developments may be justified on a number of grounds. Both economically and socially it is important to reduce the apprehension concerning possible job loss that exists among workers at present. Economically it makes sense to do so in order to prevent the ingrained resistance to any form of industrial conversion that arises from such apprehension. Socially it is a matter of urgent necessity. It is unacceptable for those who expect to benefit from change to require a minority of workers to bear the burden of that change through lay-offs. A purely utilitarian approach to the question of labour displacement is no longer appropriate. Nor is the pursuit of economic efficiency the sole social policy that society should require from corporations. Employers have definite and definable social obligations to their employees. The cost of reasonable proposals to protect employees from the adverse consequences of industrial change is a proper charge against employers’ benefits and savings. If prior consultation on proposed technological change had been made mandatory, an element of security in employment greater than that which exists at present could have been provided.

Where the employer stands to gain a substantial financial saving by installing new technology, it may be possible to extract concessions regarding lay-offs and redundancies. Where production rationalization is necessary merely to stay in business, or where labour displacement is due to other economic difficulties, a number of different considerations are raised. Bargaining in these cases may exacerbate the problems.

In Canada, available data indicate the vast majority of lay-offs which occurred from 1981 to 1983 arose as a direct result of conditions created by the economic recession. As has been seen, the response to the problem was essentially reactionary and was characterized by protections coming into effect after redundancies and layoffs occurred. The question raised is whether greater security in employment could have been provided by imposing more stringent restrictions on the employer’s right to lay off in those circumstances.

It has been suggested that the more onerous restrictions imposed on the employer’s right to lay off in other jurisdictions should be adopted in Canada. Comparisons may be drawn with many western European countries which impose a legal duty to consult employee representatives.
prior to lay-offs. Consultation in certain circumstances can be useful as a means of reducing the number of lay-offs necessary and as a means of mitigating their adverse effects. It may be especially useful where the immediate problems necessitating lay-offs are confined to a particular firm or a particular branch of industry. In a general economic recession, however, this is not normally the case, and consultation in these circumstances may provide little more than a procedural safeguard when selection of those to be made redundant is being made.

In a number of European countries, prior government authorization for lay-offs is required. In Canada, legal restrictions of this nature are largely incompatible with a private enterprise system promoting as it does, decentralized control, minimum government interference, and market adjustment. Reform of this nature would likely have been met with considerable opposition from the private sector. Notwithstanding this fact, it is questionable whether a requirement of this nature is particularly useful. In those western European countries where justification for lay-offs is required, government departments have not been in a position to discuss issues of business economics put forward by employers. In the vast majority of cases, if the employer can show that the reasons for lay-off are real, the government will not intervene.99

The growing concern for job security in Canada created a basic conflict between employee interests and the employer's right to manage. How might this apparent inherent conflict be resolved? On the one hand, to provide no protection to an employee's right to employment is a denial of the social values the law is designed to protect. On the other hand, to provide an absolute and entrenched right not to be removed from employment would likely promote stagnation in the economy through an inability to adapt to changing economic conditions and technological developments.

If we accept that the fundamental purpose of contract law is to protect expectations reasonably created by the contract and that job security is a reasonable and rational expectation, we must also realize that full effect cannot always be given to reasonable expectations. In certain circumstances their achievement may have to be subordinated to some other value. Putting the employee's desire for security in employment on the one side of the scale, and the harsh facts of economics and innovation on the other, the latter must prevail. In order to retain

the benefits of a dynamic industrial society redundancy must be cause for termination.

This is not to say that the right to an element of job security should be discarded. The goal of protecting reasonable expectations must remain lest the expectations become abstract concepts with neither meaning nor function. Redundancy should be cause for termination, but only after all possible alternatives have been examined by the parties, and both an adequate level of income support and opportunities for re-employment are provided for the employees.

Job loss will inevitably continue to arise as a result of the pervasive changes currently experienced by industrialized countries where vulnerable branches of industry continue to suffer from increased foreign competition. Both the large and small-scale lay-offs that occurred in recent years are, therefore, likely to continue in the foreseeable future.

To combat the problems created by lay-offs, employers and employees must recognize common responsibilities that transcend the law. It is unlikely that legal intervention alone would have proved particularly effective in 1981–83. As has been seen, there are limitations on the role that the law can play in ensuring that action will be taken to avoid lay-offs and resulting hardship. Alleviation of the problems created by lay-offs requires a radical change in traditional employer–employee attitudes to the whole issue of labour displacement. Increasingly, the parties themselves must recognize that lay-off and redundancy is a recurring phenomenon. Because of foreign competition, technological innovation, changes in patterns of consumption, changes in domestic and world markets, resource repletion, and cyclical economic trends, job loss is inevitable.

Employers, employees, and government must all place added emphasis on developing medium and long-term planning to aid employees affected by significant changes in business and industry. In Canada, the adjustment processes that have been adopted have been hindered in recent years by prevailing economic policies. It is beyond argument that the priority given to the fight against inflation has severely constrained the impact of the labour market policies that have been implemented. We should therefore be wary of prejudging the effectiveness of these policies in terms of their apparent failure to bring down unemployment levels.

This is not to say that the need for considerable improvements in the range of adjustment measures available should be over-looked. In the final analysis, effective redundancy management cannot be brought about by legal intervention alone. It will require the co-ordination of both short and long-term policies and programmes at all levels to avoid or reduce the adverse effects of job loss. If greater priority is given to
these problems, the danger that must be avoided is the indiscriminate adoption of a wide range of potentially distortionary and ineffective programmes. Increased public expenditure to alleviate some of the existing problems must be directed towards cost-effective remedies. Perhaps the major stumbling-block to implementing effective strategies are the political difficulties involved in minimizing or ignoring job maintenance demands in a period of high unemployment, and in trying to simultaneously fulfil economic and social goals. Resolution of the problems that this creates will provide a significant challenge for policy-makers in the years ahead.