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THE ANTI-INFLATION ACT:
A GOLDEN OPPORTUNITY FOR LABOUR

By J. CAMERON NELSON*

Anyone who has read a newspaper, heard a news broadcast, or viewed a T.V. news program in the past year is aware that the labour movement in Canada has been uniformly hostile to the Anti-Inflation Act\(^1\) program of controls.

The Canadian Labour Congress (CLC), in its highly publicized "Why Me?" campaign, has taken unprecedented action against this piece of government legislation, up to and including calling and organizing the October 14th day of national protest which saw more than one million unionized Canadian workers stay off the job in protest against the Act. The CLC has gone to greater lengths to force the repeal of the Act and has mobilized organized labour for political action in a way never before contemplated by labour in Canada.

Yet, while labour's reaction has been vehement with regard to what it perceives to be the more or less exclusive wage control nature of the Act, it has become ambivalent to the over-all control program.

There has, in fact, been a significant shift in emphasis in labour's approach to the Act in recent months. The initial reaction of absolute opposition was expressed by Lynn Williams, Director, District 6, United Steelworkers of America, when he said:

> It would be calamitous to cave in to the Trudeau policy of wage controls. It would doom hundreds of thousands to a second-rate existence. . . . The labour movement and the members of our union, who will be in the front line in the coming months will stand up, for they understand that an untrammeled union movement is the necessary underpinning of a democratic society.\(^2\)

This has given way in part to the more forward-looking approach set out in the Canadian Labour Congress Manifesto for Canada.

In that document, the CLC, while continuing to oppose the exclusive wage control nature of the present Act, looks forward to a future of "planned economy" and instead of urging a return to the pre-October past of free collective bargaining on a plant-by-plant basis within the existing free enterprise system, accepts the challenge offered in the concept of a planned economy and asks for an equal partnership with government and business in planning the future of Canada. "The price of labour's future support,"

\(^{1}\) S.C. 1974-75, c. 75.

\(^{2}\) L. Williams, Steel Labour, November, 1975.

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the Manifesto states, "must be an equal share in the economic and social decision-making on a national basis with the other partners — business and government."

The reason for this shift is that labour is beginning to perceive many potential benefits in the new planned economy situation begun with the Act. The potential benefits include:

1. the strengthening and centralizing of the extremely fragmented, and thus often ineffective, structure of the labour movement in Canada;
2. gaining a position of real influence in the planning and development of the economy, something which most labour leaders will concede they do not have now;
3. dealing more effectively with the crucial questions of management rights and worker participation in management through the collective bargaining process.

The Anti-Inflation Act and a future planned economy virtually force the labour movement in Canada to centralize itself so that it can deal with government and business from a position of relative strength. A planned economy in Canada would need the support of labour if it were to be accomplished without a drastic departure from our democratic way of life — and this would give labour a much expanded and more important role in the planning and development of the economy.

These two potential benefits, made more available by the Anti-Inflation program, deal with labour's role at the top, at the governmental level of planning the economy and the future of Canada. Equally important, however, is the fact that by limiting increases in compensation, the Act prohibits employers, particularly large corporations, from buying contracts. For perhaps the first time, labour in Canada can devote its attention to gaining a measure of control over and influence in the businesses and corporations for which its members work.

Other short-term benefits have also been important to labour's reevaluation. Foremost among these has been the easing of the tremendous manpower and financial strain on unions resulting from the increasingly frequent negotiations, conciliations and strikes during 1973-1976, when unions were successfully, albeit frantically, trying to keep one step ahead of inflation.

The experience of negotiating large increases only to see those gains lost to an inflation rate set, for whatever reasons, by the pricing policies of

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4 Indeed, Prime Minister Trudeau's New Year's fireside chat concerning the post-control new society (one in which the government will be continuously involved in the planning of the economy) and the program for decontrols presently being mapped out in secret by the Deputy-Ministers have been two of the major reasons for the CLC's shifting policy, for it now appears that some form of controls is going to be a permanent fixture in Canadian life.
the business community, is one that makes the opportunity to gain some control over the planning of the economy at the national level and the management of businesses at the plant level more important.

Before dealing in more detail with the positive opportunities for labour within a controlled economy, we must note that the Act, as it is, and as it is presently being administered, remains completely unacceptable to labour.

With a great deal of justification, labour can argue that the present Act controls only wages effectively. Since the initiation of controls, the Anti-Inflation Board has rolled back more than 500 wage increases agreed to in collective agreements. During the same period, the Board has dealt with only eight price increases and of those eight, only four were not approved.

The administration of the Act has also been woefully inconsistent, though that was perhaps to be expected from a bureaucracy as hastily constructed as the Anti-Inflation Board's was. Further aggravating the situation has been the complete lack of policy guidelines either in the Regulations or in the Board's decisions. Government employees have generally been granted larger exemptions than employees in the private sector even though there have been no articulated reasons for such results, and the Board's decisions have varied dramatically even where the fact situations have been substantially the same. Three decisions of the Board concerning Canadian Brewery Workers local unions indicate the almost inexplicable differences in Board decisions.

In the Chateau-Gai, Brewery Workers Local Union No. 304 decision, discussed in more detail below, newly unionized store clerks negotiated a first year increase of 26.6 per cent. The union attempted to justify this increase mainly on two grounds; the first was the historical relationship between this group and other unionized store clerks in the wine and brewery industry. The contract, which increased a clerk's wages to $4.00 per hour, did not come close to attaining parity with Jordan Valley Wine Store clerks or Brewers Warehousing Store clerks, all of whom belong to the same union. The second ground was the equitable considerations involved in considering a contractual increase which raised wages from a below-subsistence $2.70 per hour to $4.00 per hour. The Board allowed a 16 per cent first year increase, two per cent more than the guidelines allowed.

In the Coca-Cola, Belleville, Soft Drink Workers Joint Local Executive Board, Canadian Brewery Workers decision, the situation was somewhat unique. The Belleville unit was comprised of only 20 of the several hundred Coke employees in Ontario. All the other unionized Coke units received in-

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5 For example, during the first nine months of 1975, average weekly earnings increased by 14.3 per cent, but the growth in real earnings was only 3.0 per cent. Furthermore, between 1961, when the average weekly wage was $74.45, and the third quarter of 1975, when the average weekly wage was $191.97 (but only worth $104.27 in 1961 dollars), there was a real money improvement of just over 40 per cent or 2.66 per cent per year, far less than is usually comprehended when the large increases won by labour in collective agreements are publicized.

6 CCH Canadian Ltd., Canadian Temporary Economic Control (Don Mills, Ont.: CCH Canadian Ltd., 1975) at para. 23351-23389. Figures as of July 31, 1976.
creases in a contract ratified prior to October 12, 1975, and the non-union Coke units were given similar increases shortly after the union negotiated its contracts. The Belleville plant did not receive the increase granted everywhere else in Ontario because the union had applied for certification in September, 1975, and s. 70(2) of the Ontario Labour Relations Act\(^7\) prohibits any change in the rates of compensation after an Application for Certification and before the conciliation process has been exhausted.

The collective agreement between the two parties, ratified in November, 1975, provided nothing more than parity with the rest of Ontario Coca-Cola plants. The Board felt that this historical relationship justified a 16 per cent increase in the first year which meant a roll-back of more than 10 per cent. The Coca-Cola employees, of course, were much better paid than the Chateau-Gai workers, but the amount of exemption over the guidelines was, in fact, more in the case of Coca-Cola.

In British Columbia, two of the three big breweries finished negotiations before the imposition of the controls. Carling O'Keefe, however, finished after the controls, but the contract nevertheless provided for parity with the other breweries. After a reconsideration of their original decision, the Board approved a 17.7 per cent first year increase and a 14 per cent second year increase. This decision, while justified because of the long-standing historical relationship, certainly is not consistent with the other two decisions; in the Coca-Cola case, for example, the historical relationship was closer and much more precise. Interestingly enough, the group that received the greatest exemption was the highest paid. The Carling O'Keefe workers were in the $17,000.00 - $20,000.00 per year range after their increase was approved. The Chateau-Gai employees were only in the $7,000.00 per year range after their increase was approved.

In February, the relatively well paid teachers received by far the largest exemptions. Renfrew Elementary and Renfrew Secondary teachers were allowed 23 per cent increases, the Norfolk Secondary teachers were granted 24 per cent increases, and Peterborough and Prince Edward's teachers received 22 per cent increases.\(^8\) The reasons given here were again the historical relationships between teachers throughout Ontario.

The problem can be traced again to the extremely vague criteria for granting exemptions set out in the Act and the Regulations (such as maintaining historical relationships and being able to attract sufficient employees) and the fact that the Board has refused to articulate more precise and more manageable definitions. Even though the Board's staff has grown to over 800 people, the Board has tended to take a purely arithmetic approach to its decision-making rather than developing a common law case-by-case approach.

The Chateau-Gai, Local Union No. 304, Canadian Brewery Workers case, decided January 16, 1976, is indicative of the problems involved. After negotiations which lasted from April to November 3, 1975, the parties agreed

\(^7\) R.S.O. 1970, c. 232.

\(^8\) Supra, note 6 at para. 22001-22031.
to a collective agreement that standardized wages for each work category and raised a clerk’s wages from an average of $2.70 per hour to $4.00 per hour, on ratification, with a further raise to $4.50 per hour on April 1, 1976, the contract lasting until April 1, 1977. Because of Prime Minister Trudeau’s October 13th announcement, the following clause was included in the Memorandum of Agreement:

It is expressly understood and agreed that the payment of the wage and settlement pay set forth for paragraph 6 hereof are contingent upon obtaining the approval of the Anti-Inflation Board. In the event that approval is not granted, then the wage increase and settlement pay shall be that which is approved by the said Board.

The union’s submission to the Board concluded by stating:

If however, the Board finds that it cannot grant complete exemption, the parties hereby petition it to state what wage and settlement pay package would be the maximum acceptable.

The Board’s decision, completely ignoring the request of the parties, read:

At its meeting on January 14, 1976, the Anti-Inflation Board reviewed the collective agreement recently concluded between Chateau-Gai Wines Limited and the Canada Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304. The agreement has effect for a period of two years and provides for a 26.6% increase in the first guideline year, calculated in accordance with the regulations. This is above the arithmetic formula provided by the regulations. The agreement was reviewed by the Anti-Inflation Board in the light of its discretion to approve an increase beyond the arithmetic formula, where the conditions for special consideration had been met. The Anti-Inflation Board has concluded that it can accept a first year increase up to 16.0% in total compensation of the employees under review, calculated in accordance with the regulations. This is close to two percentage points above the arithmetic formula applicable to them. The Anti-Inflation Board has requested the parties to modify the agreement to give effect to this decision. The Board noted that the second year of the agreement provided increases which were well within the guidelines. Consequently there would be flexibility which would permit the parties to substantially achieve their objectives over the longer term of the amended agreement.9

In arriving at its decision, the Board took a strict arithmetic approach, treated full-time and part-time employees equally, and seemed to ignore the fact that the first increase was to be effective for only six months.

The result of adopting the April 1, 1976 date as the last day of the first guideline year was that the increase allowed by the Board could be paid not from November 3, 1975, as set out in the collective agreement, but from April 1, 1975. The result of the Board’s treating full-time and part-time as equal led the parties to give a larger amount of the permissible increase to the full-time employees. Also, as there were almost as many part-time employees as full-time employees, the parties were able to give the full-time employees wage rates almost exactly equal to those originally negotiated. The clerks were to receive $3.75 per hour, not on November 3, 1975, but backdated to April 1,
1975, and were to receive $4.44 per hour commencing April 1, 1976. The wage rates were then just $.06 per hour less than those negotiated.

When completely worked out, the Board's decision, which ostensibly rolled the increase back by more than 10 per cent, resulted in an increased cost to the company of $1,854.98 over the lifetime of the agreement. The parties ultimately agreed to have the compensation packages balance so that the employees received exactly the same dollar increase as they would have if the originally negotiated agreement had been enforced.10

Criticisms of the substance of the Act, however, are also many, and labour has pointed out and criticized these flaws, some of which the government has since attempted to rectify.

Among the most glaring flaws in the Act was the fact that it treated everyone virtually the same. Ignoring the fortunate few for whom a $2,400.00 a year increase is not 8 per cent, it was arbitrary and unfair, in labour's opinion, to treat workers earning $2.70 per hour like those in Chateau-Gai, the same as other workers whose wage-benefit package exceeds $10.00 per hour. Indeed, as we have seen, highly paid employees, like those in Carling O'Keefe, British Columbia, or teachers in Ontario, have often received higher percentage increases than employees in the Chateau-Gai wage bracket. To the former, an 8 per cent increase is worth 22.6 cents per hour. To the latter, 8 per cent would be worth 80 cents per hour, an increase much more acceptable to the workers involved and an increase which compensates for the relatively high cost of living created by the inflation which the Act was designed to limit.

The government, in response to this criticism, instituted the $3.50 exemption, which exempts that part of any increase which brings the wage level to $3.50 per hour. This response, while recognizing the inequities involved in treating all employees the same, did little to solve the problem, largely because the $3.50 per hour wage rate is so ludicrously low. At a time when the dollar is worth little more than 50 cents in 1961 terms, a yearly income of $7,580.00 is woefully inadequate. Also, because there is no catch-up mechanism in the Act, the low-income earner, with no opportunity of catching up to the wage rates of the rest of society, is virtually locked into his subsistence standard of living by the government.

The Act has also severely hampered the organizing activity of Canada's unions, for even low-paying employers can often grant an 8 per cent increase and inform their employees that the law prevents them from paying more, and that a union, therefore, would only take the employees' dues without being able to improve their wages. The Act, thus, is one which is being used by employers in their attempts to prevent unionization and which, therefore, is one which goes a long way to denying the benefits of unionization to many who could most benefit from it.

10 These three examples are not cited to demonstrate that labour is alone in being dealt with arbitrarily. The decision-making procedure the Board employs surely has been every bit as frustrating for business when it seeks approval for price increases; particularly as the regulations with regard to prices and profits are much more complex than those controlling wages.
It might seem incongruous for organized labour to even consider tolerating a system of controls when the present Act appears to control wages much more effectively and more universally than it does prices; enshrines and makes permanent the present inequitable distribution of wealth, particularly by prohibiting those at the lower end of the economic scale from ever catching up; and goes a long way to preventing the growth of unionization in Canada.

Yet, as indicated earlier, organized labour is becoming ambivalent about controls, and it is the advent of a planned economy, in some sense or another, that the labour movement is seriously considering supporting. A major reason for labour's change of heart is that the Act forces labour in Canada to recognize the need to develop a more efficient and coherent structure in order to be able to deal with government and big business on anything close to an equal footing.

In *The New Industrial State*, John Kenneth Galbraith wrote of American unions:

> In fact the industrial system has now largely encompassed the labour movement. It has dissolved some of its most important functions; it has greatly narrowed its area of action; and it has bent its residual operations very largely to its own needs. Since World War Two, the acceptance of the union by the industrial firm and the emergence thereafter of an era of comparatively peaceful industrial relations have been hailed as the final triumph of trade unionism. On closer examination, it is seen to reveal many of the features of Jonah's triumph over the whale.\(^{11}\)

Unions, he argues, aid the technostructure by helping provide it with long stretches of industrial peace, by standardizing labour costs throughout an industry, by enforcing a collective agreement, by providing companies with a channel of communication to their workers and by institutionalizing and frequently dissipating many of the psychological frustrations generated by assembly-line employment.

The problem of jurisdictional disputes in the construction industry, the subject of many studies, has been universally damned as a great evil, bringing the labour movement into disrepute. It is, however, but a small and particularly graphic example of a far larger and more damaging problem in the labour movement in Canada — that of its chaotic and inefficient organization which robs labour of much of its potential effectiveness and resources and is now perhaps the major factor preventing it from effectively pursuing and developing social and political goals and from becoming a dominant force in the shaping of this country's future. In 1973, there were 96 international unions, 93 national unions, 133 directly chartered local unions, and 158 independent local organizations operating in Canada. There were 480 unions with 10,255 locals servicing Canada's 2,609,636 union members. Of the 96 international and 93 national unions in Canada, 13 had memberships of less than 100; 13 had memberships of less than 500; 41 had memberships of under 2,500; 51 had less than 10,000 members; 44 more had less than 30,000 \(^{12}\) members.


The importance of these figures can be appreciated when one considers the range of duties a union must perform for its members. At the most basic level, a union must provide somewhat skilled negotiators; provide some kind of para-legal services for the enforcement of collective agreements entered into, and have funds sufficient to afford some relief in the event of strikes.

But, beyond this, a union also needs to provide informational and educational services to its members so that they can participate in the union and, through the union, in their jobs. And, of course, a union ought to, and needs to, organize the unorganized. At yet a higher level, the union, or the labour movement as a whole, ought to play an important social and political role within the community and the society as a whole.

To accomplish even the most basic goals of unionism, a union requires fairly large amounts of money and some trained full-time personnel. William Mahoney, Canadian director of the Steelworkers, has stated that a union today needs a membership of 20,000 to 25,000 in order to function effectively on a national basis and to provide the necessary level of service to union members without which disillusionment with the labour is likely to result. While he perhaps overstates the minimum requirement, this feeling is widely shared by union leaders throughout Canada. To accomplish the additional tasks of unionism (to provide educational and informational services, to organize the unorganized and to play a substantial role in the community) the financial and “people” resources of the union must be substantial.

With the present organization of labour in Canada, the labour movement in Canada has failed to organize approximately 65 per cent of the non-agricultural work force. Considering the fact that over 30 per cent of the non-agricultural work force had been organized in 1948, a figure that had declined to 29.4 per cent in 1964 and has increased recently only because of the organization of government employees, the 36.3 per cent figure that was achieved in 1973 is a testimony to the labour movement’s failure to carry out the essential task of organizing the unorganized.

Organizing demands time, people and money, and, in all but exceptional cases, only the large, well-financed unions are able to organize on a large scale. The Steelworkers, for example, who had a membership of 82,000 in 1960 increased that to 150,000 by 1970 and 173,662 in 1973. The UAW, during the 1960's, increased its membership from 60,968 to 109,274. The fastest growing unions have been the government employee unions: CUPE in 1973 had a membership of 167,470 while the Public Service Alliance of Canada had grown to 133,503.

Also, from a practical standpoint, all unions perform substantially the same services for their members. The duplication of machinery providing these services in Canada is simply staggering.

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13 Queen’s University Industrial Relations Centre, *The Current Industrial Relations Scene in Canada 1974* (Kingston, Ont.: Queen’s University Industrial Relations Centre, 1974) at S-U-8.
14 Canada Department of Labour, *supra*, note 12 at xxiv-xxv.
15 *Id.* at 41, 59, 62.
On a theoretical basis, the need for the rationalization of union organization is even more compelling. Conceptually, unions exist to provide a countervail to the social and economic power of employers. Yet, Galbraith talks of unions in America almost as the employee relations arms of giant corporations.

Certainly, at the political and social power levels, unions have but weakly provided a working class balance to the power of the present elite. Also, on balance, unions have been less than over-powering in the economic sphere as well. Control remains with the employer. During periods of economic boom, pricing policies have frequently kept the real wage increase received small or non-existant. During periods of economic recession, unions suffer dramatically and must struggle merely to survive.

There are many causes of this state of affairs, mostly historical, and these are certainly accentuated by some short-sighted, conservative labour leaders who do not envisage a larger social role for labour. But, if the Canadian movement hopes to enter into an equal partnership with government and business, to gain a position of real influence in the planning and development of the economy, or to be able to deal effectively with the vitally important and long-neglected issues of management rights and worker participation in management, it must develop a structure that allows it to provide services at all levels. The present chaotic organization of labour in Canada has been, and remains, a major stumbling block to an effective role for labour and will, if continued, make effective pursuit of these goals impossible.

A. UNION MERGERS

Crispo and Arthurs, in the conclusion to their article on jurisdictional disputes, appropriately titled A Study in Frustration, state:

Perhaps the ultimate solution to the jurisdictional disputes problems lies with the unions themselves. Instead of attempting to eliminate disputes, the solution may be to eliminate jurisdiction. . . . The ability of the labour movement to create internal order may not only be the sole means of resolving jurisdictional disputes, it may be the measure of the movement’s ability to survive as a viable force in the labour market.

The Canadian Labour Congress has also been extremely concerned over problems of jurisdiction and organization. The 1968 CLC Convention was primarily concerned with finding solutions to these problems. At that conference, the CLC established Jurisdictional Disputes Procedures to police what was, in effect, a no-raiding provision. Each affiliate was to respect the organizing jurisdiction of all other affiliates, to refrain from organizing or attempting to represent employees who are represented by another affiliate, and to respect the established work relationship jurisdiction of all other affilia-

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16 Supra, note 5.
17 For example, during the Great Depression, union membership in Canada dropped from a high of 322,000 in 1930 to a low of 289,000 in 1935.
18 Crispo and Arthurs, Jurisdictional Disputes in Canada: A Study in Frustration in (1963) 3 Current Law and Social Problems 20 at 60.
Unfortunately, the CLC has not established any effective sanctions to back its resolutions. Affiliates found in default of the impartial umpires', rulings can have their delinquency published, be denied the protection of future favourable decisions, or be denied use of all CLC facilities. Unfortunately, if a large and powerful union is involved, these sanctions have little effect. The courts have refused to enforce these voluntary agreements on the ground that they interfere with the statutorily guaranteed right of employees to belong to and be represented by the trade union of their choice.20

The CLC also adopted two amendments designed to promote mergers. The first, Article III, s. 2, stated the policy that:

Charters or certificates of affiliation shall not be issued to national and international unions, regional and provincial organizations, in conflict with the jurisdiction of affiliated national and international unions or regional and provincial organizations except with the written consent of such unions.21

However, when the choice is between gaining affiliates in opposition to this principle or not gaining those affiliates, the principle has been the second choice. New groups are frequently admitted notwithstanding the fact that their jurisdiction conflicts with that of a present affiliate. For example, in 1973, the Congress accepted three provincial civil service associations (Alberta, P.E.I. and Newfoundland) as affiliates in spite of CUPE's strenuous opposition. CUPE, of course, had long claimed exclusive jurisdiction over these civil servants.

The convention also made it the "responsibility of the officers of this Congress to actively encourage the elimination of conflicting and duplicating organizations and jurisdictions through agreement, merger and other means."22 However, simple statements like that of Crispo and Arthurs, or the statements of intent made by the CLC seem to ignore the almost insuperable legal difficulties involved in affecting a merger. There are also, of course, the initial problems involved in convincing unions with a long history of independence, with deeply held traditions, and involvement with leaders of their own to merge with another and perhaps larger union, or to delegate part of their autonomy to a central labour body like the CLC.

Despite these statements of intent, labour has never been able to overcome the political and legal difficulties involved in affecting mergers between unions or in having the affiliate unions delegate real power to the Canadian Labour Congress itself.

However, the passage of the Anti-Inflation Act and the possible advent of a planned economy is exactly the kind of occurrence that may force labour


22 Id.
to rationalize its own structure. In fact, at the recent Canadian Labour Congress convention, the executive council was given authority to call a general strike, the type of power it has never had before.

Indeed, until the present time, the majority of important mergers in Canada have come about in one of two ways. First, when technology passes a trade or industry by or when the economic conditions in a certain industry are such that the two unions cannot survive apart, mergers are often eventually dictated by such outside events. Consequently, these mergers are often the absorption of very small and shrinking unions by large ones. In 1973, two printing trade unions, the International Printing Pressmen and Assistants Union of North America (IPPA) and the International Stereotypers' Electrotypers' and Photo-engravers' Union of North America (ISEU) merged to form the International Printing and Graphic Communications Union. In Canada, in 1972, the IPPA had a membership of 10,041, the ISEU 532. Similarly, in March, 1974, the 8 members of the Cigar Makers' International Union of America joined the ranks of the Retail, Wholesale and Department Store Union which had a membership of 20,988 in 1972.23

The other way mergers frequently appear to come about is where one larger union claims the jurisdiction of a smaller union and forces mergers via extensive raiding and other "legal" (read expensive) tactics. These strong-arm tactics frequently continue for many years until the weaker union, drained by the battle, virtually surrenders. The most graphic example of this kind of merger was the United Steelworkers takeover of the Mine, Mill union. These were also the tactics employed by the Teamsters in the U.S. until the Brewery Workers merged with their longtime enemy.

Clearly, there are serious "political" problems involved in convincing two relatively large and healthy organizations to merge. For the membership, there are concerns about facing the potential problems of minority status as well as the giving up of their separate identity and traditions. However, these problems are minor and the real problem is with the leadership for whom minority status has real significance in terms of being able to win elective posts and/or having full-time jobs at all.

Nevertheless, given the present opportunities inherent in a planned economy, none of these practical democratic problems is insuperable and there is no reason why, given a perceived need for unity in labour, reasonable arrangements cannot be made between unions; arrangements that adequately provide for the needs of the membership and leaders of the union involved. There are, however, very serious legal barriers to merger existing in Canada, and these will have to be removed before a move to rationalize the labour structure can be made successfully and without severe loss to the movement.

1. The Legal Climate: The Courts — from Vick v. Toivonen to Astgen v. Smith

In 1949, two Canadian courts were faced with determining the property rights in local union assets following a majority decision by the members of

23 Canada Department of Labour, supra, note 12 at 4-5.
those locals to end their affiliation with one union and transfer to another. Not surprisingly, the courts based their decisions solely on the principles applied to other kinds of "voluntary" organizations.

In *Lakeman and Barret v. Bruce*, a Vancouver local of the national Amalgamated Building and Construction Workers of Canada affiliated with the CLC had, by majority vote, resolved to switch its allegiance and affiliation to the Metal Trades Council and the Building Trades Council affiliated with the American Federation of Labour (AFL). As O'Halloran J.A., in the B.C. Court of Appeal, said:

One result of the resolution was that the office, records and assets (some $2,000) of the local would no longer be held or controlled by a local of the national union affiliated with the C.L.C. but would be held or controlled by a local affiliate with a rival national organization, the American Federation of Labour.

Four days after the resolution was passed, a minority group, wishing to remain part of the Amalgamated Building and Construction Workers union, joined by the provincial representative, sought and obtained an injunction prohibiting the majority group from using or attempting to transfer any assets or property of the local.

It probably could have been sufficient in this case to uphold the injunction granted on the ground that the union constitution, article 17(24) provided:

(1) that funds and other property of the local shall remain the property of the Local Union for all purposes which do not conflict with the constitution or welfare of the national union while ten members remain in good standing there in and (2) that when the Local Union becomes defunct, has its charter revoked or has less than 10 members, its funds and other property shall revert to the Amalgamated Building and Construction Workers of Canada.

This, indeed, was the central holding of the case, the court saying that the appellant defendants had been acting in defiance of the constitution by which they were bound.

However, the court went beyond this in supporting its decision. It cited *Forler v. Brenner*, a 1922 Ontario case concerning a church affiliated with the Evangelical Lutheran Synod of Canada which purported to join the Evangelical Lutheran Syndicate of Missouri, in which Latchford J. stated that:

> [E]ven if those who desired to secede were a majority of the members and had resolved to secede at a meeting duly called, of which proper notice was given, the plaintiffs, as adherents of the body by which the church was governed, were entitled to the use of the property without reference to whether they constituted a majority.

In the *Lakeman* case, O'Halloran J.A. states that "the respondent plaintiffs are adherents of the body, viz., the national union from which the local re-

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25 Id. at 592 (D.L.R.); 889 (W.W.R.).
26 (1922), 21 O.W.N. 489.
27 Id. at 489.
ceived its existence," and, therefore, were entitled to all local funds, and besides, the court continues, "[m]embers of a local who disagree with the policy of the national union can withdraw from membership in their local and form or join another union." It is submitted that the court ought to have limited its decision to the "constitutional" grounds and should not have applied the wider, sweeping analysis of Latchford J. to unions.

In Ontario, eight months later, a similar problem was dealt with by the then Mr. Justice Gale in the Ontario High Court. Following a referendum vote of its members, in which the members voted 624 to 457 in favour of withdrawing from the International, the Port Colborne Refining Workers' Union, Local 637 of the International Union of Mine, Mill and Smelter Workers, withdrew from that union and first attempted to join the Steelworkers and then became an independent affiliate of the CLC. The action at trial concerned the determination of who was entitled to over $15,000 accumulated by the International Nickel Company of Canada as checked-off dues. The dues were claimed by a minority group continuing under new officers as the Mine, Mill local and the new independent union.

Once again there were provisions in the constitution providing that a local continued to exist and could not withdraw from the International so long as at least ten members in good standing objected to its dissolution. This could, it is submitted, have disposed of the case. However, in replying to the "majority control" argument, Mr. Justice Gale, following Vick v. Toivonen and Forler v. Brenner among other cases, stated:

While it is true that in all internal affairs, that is, in action taken within the boundaries of the rules and regulations which govern the conduct of an association and always subject to those rules and regulations, a majority of the members can control and guide the fate of the minority under the authorities, that principle does not apply where the group or association is going outside of its powers by seeking to bring an end to its existence or to sever the cord through which it derives its being.

If attempts of that sort are made, "the entire membership must be in favour of the move before it can be validly enforced."

In the Vick v. Toivonen case, the majority of the Copper Cliff Young People's Society — an organization devoted to absolute temperance and educational work within the Finnish Community — voted to join and become a chartered local of the Socialist Party of Canada. There was, in fact, a complete merger of the two societies, and joining the Socialist Party became a requirement of membership in the Young People's Society. In granting an injunction against the diverting of the property of the society to uses alien and

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28 Supra, note 24 at 532-33 (D.L.R.); 893-94 (W.W.R.).
30 (1913), 12 D.L.R. 299, 4 O.W.N. 1542 (Ont. S.C.).
31 Supra, note 26.
32 Supra, note 29 at 780 (O.R.); 395-96 (D.L.R.).
33 Id. at 781 (O.R.); 396 (D.L.R.).
34 Supra, note 30.
in conflict with the fundamental principles of the society, the Ontario Court of Appeal stated:

"The property of a voluntary society cannot be diverted by the majority of its members against the wishes of the minority, from the purpose for which it is acquired by their contributions and devoted to a purpose alien to and in conflict with the fundamental principles of the society."

The adoption of these clubs and churches cases without reservation, especially when not needed to reach the conclusion reached in either of these two cases — where the voluntary association was the international or national union, of which the local was but a sub-group — was not, I respectfully submit, a wise approach. The effect of this indiscriminate analysis becomes painfully apparent in the much later Astgen v. Smith case.

In the Faulds v. Hessford case, the Federation of Fruit and Vegetable Workers, an independent union with ten locals, merged with the Teamsters union because it was being destroyed as a result of a prolonged and unsuccessful strike. A good deal of controversy arose over the proposed merger, the President of the Federation supporting it while a majority of the Executive Council opposed it. After a strenuous campaign by the President, the ten locals voted to merge and a merger was voted by a convention. However, the Convention call did not mention the intention to deal with the merger question. As a result of this lack of specific notice, the B.C. Supreme Court found the merger invalid, in spite of the fact that it also found that most, if not all, of the delegates knew that the subject of the merger was on the agenda. Maclean J. stated:

"Explicit notice to at least a majority of members was a prerequisite to such a fundamental change as was contemplated here. . . . [Thus] a merger of an unincorporated Trade Union into another existing Trade Union, involving dissolution of the former and transfer of its membership and assets to the latter is invalid, even where supported by a majority of the locals of the merging union, where prior specific notice of the merger proposal and its elements was not given either to the members in connection with the local meetings at which merger was approved or to delegates in connection with the annual convention of the merging Union."

Wisely, Maclean J. felt it unnecessary to determine whether an unincorporated association could ever validly terminate its existence and transfer its property and membership unless by unanimity or near unanimity. He required a high standard of notice, one that clearly made known to each member the differences in structure and "democracy" in the new union, and a merger procedure that was perfectly valid by the "merged" union's constitution, but he leaves open the possibility that such a merger could be consummated.

The practical result of the decision was to preserve the original Federation intact because of the hostility of one of the ten locals. It might also be

35 Id. at 301 (D.L.R.); 1543 (O.W.N.).
38 Id. at 307.
noted that after the purported merger with the Teamsters, many of the employers, who had been so difficult to deal with previously, now quickly gave voluntary recognition to the Federation, so that they would not have to deal with the strong and more effective Teamsters.

The facts of *Astgen v. Smith* are somewhat similar. The merger in question was that between the Steelworkers and the Mine, Mill and Smelter Workers. The Canadian constitution of the Mine, Mill workers contained no provisions concerning merger or the termination of its existence. However, the constitution could be amended either by a convention or, when a matter of "vital importance" was involved, a union-wide referendum could be held, the results of which were to be binding. The question of the merger was made the subject of a referendum vote and the merger ratified by a 5,122 to 2,522 margin.

King J. in the Ontario High Court, citing Justice Gale's decision in *Shedden v. Kopinak*, held that:

In the absence of a constitutional provision an incorporated association, such as a trade union, cannot terminate its existence and transfer its property and membership without a vote of its members which is unanimous or nearly unanimous in its approval of such an action.

He also held that:

A majority of members of an unincorporated voluntary association such as a trade union cannot divert the property of the association from the purpose that had been proclaimed in its charter and constitution against the wishes of a minority of members.

However, King J.'s decision clearly implies that it was within the power of the organization to amend its constitution to empower the union to enter into a merger agreement. Had this been done, it is clear that he would have upheld the merger, for he says that it was "the failure...to first amend the Canadian constitution to permit the Union to enter a merger agreement with the Steelworkers [which] renders the merger invalid."

In the Court of Appeal's decision the majority judgment of Evans, J.A. carries the unanimity requirement to its furthest extreme. Mr. Justice Evans analyzed the case in the following way. He began by stating that:

[The union is] not a corporation, individual, or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract.

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39 *Supra*, note 36.
40 *Supra*, note 29.
41 *Supra*, note 36 at 459 (O.R.); 550 (D.L.R.).
42 *Id.* at 460 (O.R.); 551 (D.L.R.).
43 *Id.*
44 *Supra*, note 34.
45 *Id.* at 134 (O.R.); 667 (D.L.R.).
In support of this proposition, he cited the Supreme Court of Canada decision in *Orchard v. Tunney* in which Rand, J. stated that “each member commits himself to a group on a foundation of specific terms governing individual and collective action.” He also cited *Bimson v. Johnston* where Thompson, J. stated that the contract made by a member when he joins the union:

... the terms and conditions of which are provided by the union's constitution and by-laws ... is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all members thereof.

As the contract of association is in reality a complex of contracts between each member and every other member of the union, these individual contracts are impressed with rights and obligations which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected thereby. Therefore:

There is no inherent power in voluntary association to merge with another and in view of the nature of the relationships one to another of the members of the Mine, Mill group, such an arrangement could have been accomplished only in one of two ways:

(1) by the unanimous concurrence of every member of the Mine, Mill group as a person whose rights existing by virtue of his own contract were sought to be affected; or

(2) by some actions which each of the contracting members of the Mine, Mill group had expressly or impliedly agreed to be binding upon him for the purpose of terminating his existing contractual rights and obligations and to bind him to other contractors in a new contractual relationship.

Thus, where a constitution of a trade union makes no provisions for its merger with another trade union, (and to meet Evans, J.A.'s requirement this may mean the original constitution) and where a purported merger is not unanimously supported by the members, the merger is invalid. Even the near unanimity requirement found in other cases is dropped; Evans, J.A. states clearly “... that a referendum vote which is not unanimous would not be effective to authorize the merger.”

It is important also to note that Evans, J.A. at the end of his judgment states:

There is ample authority for the proposition that the authority of the majority to amend the constitution could not accomplish a change in the fundamental objects of the association. The power of amending the constitution must always be interpreted as limited to the variation of the provisions of the constitution in so far as they are ancillary to the accomplishment of the objects.

Of course, the dissolution of the organization in whatever manner and for whatever purpose is such a fundamental change.

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48 *Id.* at 530 (O.R.); 22 (D.L.R.).

49 *Supra*, note 36 at 136 (O.R.); 664 (D.L.R.).

50 *Id.* at 138 (O.R.); 666 (D.L.R.).

51 *Id.* at 139 (O.R.); 667 (D.L.R.).
Clearly, given Evans, J.A.'s reasoning, unions are trapped by their past so far as effecting mergers is concerned. For, while admitting that the proposed merger might be beneficial to the union movement generally, he states that the rights of the individual members could not be disregarded. Unless unanimity is achieved either in authorizing mergers generally or in approving a specific merger, any attempted merger could be held invalid.

The approach of Laskin, J.A., as he then was, to the problem was much more realistic. Unfortunately, it was a dissenting one. Mr. Justice Laskin argued that as the constitution could have been amended to provide for a merger by referendum and that a second referendum could have ratified this particular merger, no violence would be done either to constitutional propriety or to the will of the membership by treating the single referendum vote as effecting a valid merger.

Further, he argued:

A general constitutional provision for taking decisions by majority referendum vote should not be read restrictively against a change of identity or of affiliation as long as the fundamental objects of the organization remain substantially the same. He persuasively argues that, when one union becomes part of another, the fundamental objects are substantially the same — that is, the improvement of the conditions of workers through collective bargaining, legislation and political activity.

Laskin, J.A.'s detailed judgment properly distinguished the Shedden v. Kopinak case, which, he said, merely "... reaffirms the binding effect of the constitution and charter upon members of a local union . . .", and the Lake-man and Barrett v. Bruce case where a similar conclusion was reached. He also argued persuasively that a trade union, not being a personality-oriented or inner-faith directed organization, is not the same as a club or church group:

In industrial unions, the economic tie is generally formed with an employer before membership is obtained in the union. [And] when one considers the effect of provisions for compulsory union membership, found in many collective agreements and sanctioned by legislation, and the application of anti-discrimination provisions in union constitutions as well as in legislation in respect of union membership, it is difficult to conclude that either the name of a trade union or the choice of fellow members have any significance compared to the significance of the objects to be pursued. . . . Substitutions of allegiance, if I may use that expression, do not, in my view, carry the same dislocation as between trade unions of the kind involved here or . . . as they could as between religious groups and even as between purely social clubs.

Laskin, J.A., in a phrase, looks at the problem in the context of modern
unionism and labour legislation. He affirms two propositions regarding mergers:

First, neither merger nor dissolution nor secession can be effected, even where decisions of this kind are open under the constitution, in the absence of proper notice to the members. Second, if there is nothing to show that authority to merge or dissolve or secede is given under the governing constitution or applicable bylaws, it cannot be arbitrarily exercised by the officers, nor, I would say, even by a majority of the members.57

However, it is clear from his decision that a broad power to amend the constitution can be the authority required by the second rule.

Thus, the membership of a union must be given proper notice of a proposed merger and its full implication and are protected from arbitrary exercises of power. Unions are left free to merge when that is desired by the membership. It is a reasonable and realistic approach. In light of the Astgen v. Smith58 decision, it is clear that unless no one challenges a merger, virtual unanimity is necessary to make it effective unless the original constitution provided for the union’s dissolution or merger. As almost no union contemplates its own demise at the time of its first formation, the Astgen v. Smith approach traps it to its past.

Canadian sections of international unions have an even more difficult problem when a merger with another Canadian union is contemplated, for they are invariably acting in direct violation of a constitution to which they are bound. John Crispo, in his book, International Unionism, A Study in Canadian-American Relations,59 points out the serious difficulties faced by Canadian secession or breakaway groups. A primary obstacle is the fact that a local breakaway group will usually "lose all its assets."60

The Shedden v. Kopinak61 case is clear authority that so long as a local continues to exist according to the terms of its parent union’s constitution, it has title to all funds. In the Raymond v. Doherty62 case, a local of the International Brotherhood of Electrical Workers decided to leave that union and affiliate with another. As a preliminary move, the local executive transferred funds on deposit and securities registered in the name of the local into a trust fund with several members as trustees. On learning of this, the International suspended those officers and appointed new officers. The suspended officers refused to surrender the books or funds to the new officers and the International revoked the local’s charter and demanded transfer to it of the funds and securities in accordance with Article 20, s. 7 which read:

The funds and property are for the legitimate purposes of the Local Union, while five members remain therein. Should a Local Union finally dissolve, its charter, books, papers and funds shall at once be forwarded to the International Secretary.

57 Id. at 157 (O.R.); 685 (D.L.R.).
58 Supra, note 36.
60 Id. at 84.
61 Supra, note 29.
On the local's refusal to transfer the books and funds, the International sued. Both the trial court and the Ontario Court of Appeal found the officers of the withdrawing local liable for conversion of the assets.

As 'reverter' clauses such as the one invoked in this case are almost universal in union constitutions — I have been able to find only two constitutions that had no reverter clauses — title to funds and property will almost always revert to the International union if a Canadian group purports to breakaway. If a Canadian group has accumulated substantial assets over a long period of time, this loss of all assets is likely to be a convincing prohibitive factor.

Crispo points to other problems, such as loss of union-operated benefit plans, and the necessity of seeking the International Unions' de-certification — a lengthy and probably expensive legal contest — as prohibitive factors. There are also the problems of the reaction of the other unions to a breakaway. In the construction field, AFL-CIO-CLC affiliated unions have frequently made construction projects inaccessible to non-AFL-CIO-CLC unions. Outside the construction industry, the CLC and provincial organizations generally ostracize the breakaway group, if the parent group was an affiliate. Thus, in addition to the general legal barriers to merger, the 96 International unions in Canada are also almost totally dependent upon the actions of their parent U.S. unions.

2. The Ontario Labour Relations Board's Approach

Section 54(1) of the Ontario Labour Relations Act gives the Board authority to rule on an application by a trade union that claims that by reason of a merger or amalgamation or transfer of jurisdiction "it has succeeded to the bargaining agent rights of a predecessor union." The Board "may make a declaration that the successor has or has not acquired the rights, privileges and duties under this Act or its predecessor." The Board may also hold such representation votes as it considers appropriate. Subsection (3) states that where the Board makes an affirmative declaration under subsection (1), the successor shall, for the purposes of the Act, be conclusively presumed to have acquired the rights, privileges and duties of its predecessor.

Prior to the Astgen v. Smith decision, the Board required proof that the merger, amalgamation or transfer of jurisdiction has been agreed to by the predecessor trade union. If the merger was approved at a meeting of the members of the predecessor union, the Board would "require that the members of the predecessor be given effective notice of the calling of the meeting preferably, although not invariably, in writing. In addition to the time, date and place of meeting, the notice should state the purpose for which the meeting is being called."

In International Association of Machinists and Aerospace Workers v. 

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63 Supra, note 59.
Travelade Motors Ltd., the Board found that the applicant was the successor of the predecessor over the objection of a group of employees who argued that they would lose certain autonomy if the application succeeded and who felt that the new union could not properly represent them. These objections were held to be superfluous and, as there was no objection to the propriety of the procedures of the merger, the application was granted.

The strict notice requirement was emphasized in the 1969 Board decision in United Electrical Radio and Machine Workers of America v. Canadian Metal Workers Ass'n. v. Lakeshore Die Casting Ltd. The notice given there included the time and place of the meeting and everyone was urged to attend. The Board said that "a heavy onus lies upon the applicant to show that all members of the predecessor union knew the purpose for which the meeting was called." The application therefore failed.

The effect of Astgen v. Smith was considered by the Board in Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO-CLC v. Beef Terminal Ltd. v. Butcher Workers Employees Ass'n. The events leading to this merger were relatively straightforward. The employees of the Beef Terminal Ltd. had formed an association and been certified on August 29, 1969. They attempted to negotiate a satisfactory agreement, but were having difficulties. A merger with the Amalgamated Meat Cutters was discussed and an in-plant meeting voted 27 to 3 to have the executive transfer the association into the Meat Cutters. A further meeting was called to discuss and vote on the proposed merger. The purpose of the meeting, its time and place, as well as the background events, were clearly stated in the notice which was handed out to employees as they entered work. Thirty-five to forty-five copies were passed out. At the second meeting, the result of the secret ballot vote was 35 to 1 in favour of the merger. At the Board hearing, not one employee voiced opposition to the merger.

It was the company that appeared in opposition, arguing that Astgen v. Smith operated to render the merger a nullity. The Board quoted Evans, J.'s judgment at length, but found that it could base its rejection of the application on the grounds of insufficient notice. There was no proof that every employee had received notice and only 36 out of 73 employees attended the meeting.

Thus, the stated object of Astgen v. Smith, which was to protect individual members' rights at all costs, had the effect here of protecting only the employer. In two consecutive votes, the employees' Association voted 27 to 3, and 35 to 1 to merge with a stronger union for the express purpose of increasing their bargaining strength with the employer. Not one employee appeared before the Board urging that the merger be held void. Surely it is a travesty of common sense to base this kind of decision on the lofty ground of protecting the individual member's rights.

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07 Supra, note 36.
09 Supra, note 36.
A much better approach to the problem was taken by the Board in its June 14, 1971 decision in *Retail Clerks International Ass'n v. Mavco Food Services Ltd.* There, the evidence established that all members had received notice, by mail and in their pay envelopes. However, at the meeting called, only 22 of 81 members appeared and they voted unanimously in favour of the merger.

Once again, the employer was the only one appearing in opposition, and again his argument was based on *Astgen v. Smith.* Because the amendments to the constitution attempted to accomplish a fundamental change in the objects of the Association, the company maintained that the merger was invalid and that a declaration ought not issue.

The Board, however, found that the resolutions were authorized by and were in compliance with the provisions of the constitution, including voting procedures — the meeting had first amended the constitution to allow for merger and then voted for the merger — and that the fundamental objectives of the Association were not changed by the merger. In finding no change of fundamental objectives in a merger of two unions, the Board went a long way in lessening the negative impact of the *Astgen v. Smith* decision.

The company had also argued that no declaration could be made because a majority of the employees did not vote, and it based this argument on the *Beef Terminal Ltd.* case. This time the Board relied on *Astgen v. Smith* to maintain that if the merger were carried out in conformance with the constitution, the percentage of employees voting became irrelevant. It is hard to understand how *Astgen v. Smith* could be an authority limiting the voting requirement — which had been developed in *Beef Terminal Ltd.* and *International Chemical Workers Union, Local 798 v. International Chemical Workers Union, Local 741 v. Union Gas Co. of Canada Ltd.* cases.

This conclusion is reinforced in the December, 1973 Board decision in *CUPE v. Peel County Board of Education v. Peel County Board of Education Employees' Ass'n* where the Board stated that, as notice had been given to each member and the constitution was properly amended, it was immaterial that only a few chose to participate in the deliberations causing the merger to be brought about.

Two recent cases demonstrate the difficulty the Board has had in interpreting and applying the *Astgen v. Smith* decision to s. 54 applications. In *United Steelworkers of America v. Canadian Industries Ltd. v. International Union of District 50, Allied and Technical Workers of U.S. and Canada,* the

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71 Supra, note 36.
72 Supra, note 68.
73 Supra, note 36.
76 Supra, note 36.
Board dealt with a situation in which a union constitution, which did not contain provisions for merger, was amended to permit merger on a majority vote of the membership in a referendum, immediately after which a merger with the Steelworkers was approved by a 37,289 to 26,733 vote margin (2,800 Canadian members had voted and also supported the merger by a majority). The employer and a group of dissident employees argued that Astgen v. Smith — citing Evans, J.A.'s statement that "the authority of the majority to amend the constitution could not accomplish a change in the fundamental objects of the association" prohibited and rendered void both the amendment and the following merger.

Accepting the "fundamental objects" approach from Astgen v. Smith, the Board asked whether the amendment permitting merger was "such a provision that would require the unanimous consent of all the members." In finding that it was not, the Board said:

The amendment merely sets out an agreement between the members of the trade union to adopt the wishes of the majority as found under a rigorously conducted vote as to whether there should be a merger. It would be ludicrous to suggest that an amendment proposing majority rule on an issue is outside the power or the objects as set out in the Constitution. . . . In fact, such an amendment cannot be regarded as a fundamental change in the relationship of the members of the Union inter se, but rather, a reiteration that the relationship between the members is to be a democratic one.

This approach, while doing violence to the spirit of the majority Astgen v. Smith decision, is a good one from the labour relations standpoint. It gives unions the power to merge while protecting the individual members by strict requirements of notice and the requirement that "an applicant satisfy the Board that a majority of the members of the Predecessor Trade Union have signified their approval."

The July 12, 1974 decision of the Board in Brewers' Warehousing Co. Ltd. v. Teamsters v. Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CLC approached the problem from a completely different perspective. This case arose out of a merger of the Brewery Workers with the Teamsters ratified at a special convention of the Brewery Workers held at Cincinnati in November, 1973.

The Teamsters and the Brewery Workers had, for many years prior to the merger, been engaged in expensive representation battles, which were, naturally, more harmful to the much smaller Brewery Workers. Over the course of many years, mergers and/or affiliations with other, larger unions had been discussed by the Brewery Workers as a way to protect themselves from Teamster raiding but no acceptable mergers were found.

On July 19, 1972, the battle between the two unions ended with an

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78 Supra, note 36 at 139 (O.R.); 667 (D.L.R.).
79 Supra, note 77 at 331.
80 Supra, note 36.
81 Supra, note 64.
agreement to merge the two unions. In many ways, this was, in effect, the surrender of the Brewery Workers to the pressure of their longtime enemy. The agreement to merge was, of course, subject to the adoption of a merger proposition at a convention of the Brewery Workers.

The relevant constitutional provisions included Article X, s. 13(a) which read:

The Convention shall have the right to adopt new laws; make changes in or rewrite the International Constitution; designate dues and assessments; change the forms of Organization of the International Union and make such provisions and rules as may become necessary for the best interests of the International Organization.

Article XIII, s. 1 read:

The International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America cannot be dissolved as long as three affiliated Local Unions are desirous that it be kept in existence.

And Article IV, s. 2 read:

Any Local Union chartered by the International Union shall continue to exist as a Local of the International Union, unless its charter is revoked or suspended, as long as seven or more members who are willing to comply with the Constitution of the International Union desire to remain with the Local Union.

The merger proposal was the subject of an October 13, 1973 special Canadian conference in Calgary, but virtually every one of the 89 Canadian locals was opposed to the merger and made its opposition known at both that conference and the Cincinnati convention. Thus, it was clear that more than three local unions wished the International union to continue in existence. Therefore, the Cincinnati convention first proposed to, and did, amend Article XIII, s. 1 to remove the guarantee of existence, substituting in its place:

Any other provision in this Constitution notwithstanding, this International Union may be dissolved and/or merged or affiliated with or disaffiliated from another organization.

The Canadian delegation attempted to introduce another amendment which would have allowed local unions to reject the merger, retain their property, and leave the ‘merged’ International. When the Chair ruled this amendment would not be considered until after the first amendment, the Canadian delegation walked out of the convention — which proceeded to pass the amendment and then to ratify the merger.

The Board, in protecting the right of the Canadian members from a merger affected wholly in the United States, cited Astigen v. Smith83 and held that the amending power of a convention under Article X, s. 13(a) did not grant the convention “specific powers to merger or otherwise dissolve the International Union.” Article XIII, s. 1 is, the Board said, “a very vital and fundamental guarantee.”

The attempt by the Special Convention to remove the guarantee in the face of the known opposition of at least three locals is tantamount to an attempt by the Convention to alter a fundamental provision which goes to the very root of the or-

83 Supra, note 36.
organization and to clothe itself with the powers of dissolution which the membership reserved to themselves in adopting the guarantee. The guarantee is not given by local nor by locals to the International but by members to members. The guarantee is thus revocable only by the individual members and not by the locals or their delegates.84

The Board also supported this conclusion on Article IV, s. 2 which guaranteed the continued existence of local unions so long as seven or more members, willing to comply with the constitution, desired to remain in the local union.

While the Board’s decision in this case was a good one in that it served to protect the workers from absorption by a very large U.S. union, in which they would have little or no influence or power; however, this sweeping application of what seems to be the fundamental breach of contract doctrine to union merger, poses the same kind of problems the Astgen v. Smith85 decision did for union mergers and leaves the state of the Board’s jurisprudence in this area rather ambiguous.

The Board, in resting its decision on the special guarantee of existence in Article XIII, was on very solid ground. It is unfortunate that it also found support for the fundamental guarantee doctrine in the continued existence of locals provisions. Article XIII of the Brewery Workers constitution is a very rare provision and a decision based solely on its provision would not be unduly restrictive to future mergers. Article IV, s. 2, however, is a universally used provision and if its existence makes mergers or dissolution impossible, the Board has made merger almost as impossible as the Astgen v. Smith decision did.

While the internal “political” problem is one which the union movement must solve itself, the legal climate must be changed to make any future move towards the rationalization of the Canadian labour movement possible.

Given the present jurisprudence, any such change will have to be legislated. A statutory merger machinery, similar to the present certification machinery, ought to be legislated as the sole means of effecting mergers between unions. Merger could be effected by the successor union’s satisfactorily proving to the Board that 55 per cent of the absorbed union wish to merge (for example by having signed membership cards in the successor union, or by a majority vote of the absorbed union’s membership in a Board supervised referendum). Where the two parties to the merger are relatively equal in membership or resources, the merger would have to be ratified by the memberships of both unions. Such a mechanism would serve both to make mergers possible and to protect the rights of the membership in a merger situation.

However, to overcome the special problems of Canadian sections of International unions — both the problem of their inability to break away and merge with other Canadian unions without losing title to all funds, and the problem, graphically demonstrated by the Brewery Workers86 case, of a U.S.

84 Supra, note 82 at 473.
85 Supra, note 36.
86 Supra, note 82.
union dragging an unwilling Canadian section into an undesired merger — additional legislative action is needed. Legislation should be enacted that would make Canadian sections of International unions completely severable from their American parents for the limited purpose of merger. With this kind of provision, Canadian sections of International unions could make advantageous mergers in Canada without forfeiting their property or other rights, and Canadian sections of International unions which are merging could, if the majority desired, disassociate themselves from the merger and attain a separate identity, again without loss of funds or other rights.

This kind of legislative provision would be instrumental in achieving two basic policy objectives; it would both encourage mergers and promote, within that context, the national autonomy of Canadian labour. Thus, the nationalism of many Canadian trade unions would become a strong incentive promoting mergers, while the perceived need to rationalize labour's structure would help promote Canadian union autonomy.

It cannot be suggested that either a legislative reversal of Astgen v. Smith nor a subsequent rationalization of the trade union movement, resulting ideally in perhaps fifteen major trade unions (enough to provide employees with choice in the selection of the type of trade union they wish to represent them) would be a panacea for the Canadian labour movement. What it could do is make it possible for the labour movement to operate as a truly effective power in the developing and governing of this country. It could make it possible for labour to become a real counter-balance to the economic, social and political power of capitalism in our society and reverse the gloomy predictions and assessments of the trade union movement made by John Kenneth Galbraith.

B. UNION DIRECTORSHIP

In the past few years, as the incidents of labour unrest have increased, many people in business, government and the labour movement have expressed interest in, and admiration for the European labour-management model.

The key to the post-war European labour experience is the statutory introduction of worker representation into the decision-making process of the

87 Supra, note 36.
88 Indeed, many writers openly advocate Canada's adoption of a European model. In a recent study for the Canadian Government, Charles Conaghan, Vice-President of the University of British Columbia and former President of the Construction Labour Relations Association of British Columbia, strongly urged the involvement of the Canadian labour movement in the management of the economy by means similar to those employed in West Germany. Paul Mixson, writing in the Canadian Business Magazine (March, 1976) spoke convincingly of the desirability of the West German system from the corporation's point of view. Two books, edited by Gerry Hunnius, former editor of Praxis-Research Institute for Social Change, Industrial Democracy and Canadian Labour (Montreal: Black Rose Books, 1970) and Participatory Democracy: Worker and Community Control (Montreal: Black Rose Books, 1970) deal with the need for and the possibilities of achieving industrial democracy from labour's point of view.
corporation. There have been two separate aspects of this process: first, the introduction of works councils which act as the mechanism for providing each employee with a voice in the business affairs of his or her employer with control equal to management in such matters as setting rates of pay, starting and finishing times, vacations and health and safety regulations; and second by requiring worker representation on the boards of directors of all large and medium-sized corporations.

If the Canadian labour movement is to become responsibly involved in the management and development of the economy, unions will have to be given an effective voice in the management of Canada's business corporations.

While much can be accomplished by the establishment of effective labour-management joint committees for health and safety, hiring practices and shift management, it is also important that labour assume a role on the boards of directors of Canadian corporations, for both the Ontario Business Corporations Act and the Canada Business Corporations Act state that “the Board of Directors shall manage or supervise the management of the affairs and business of the Corporations.”

It is extremely important that the impulse for any union involvement in management come from the unions themselves and that the process be instituted via the collective bargaining route. The Canadian labour movement, which is not yet itself convinced of the desirability of its being in any way involved in management, would scarcely welcome the imposition of such a system by government or by business.

But serious questions exist as to whether union representatives can serve as directors of corporations. Two distinct questions must be answered in solving this problem. The first is whether a collective agreement between a union and a corporation can validly provide for union representation on the board of directors; that is, could the board of directors which enters into the contract with the union, commit the corporation to providing for union representation on its board? The second is whether, considering the fiduciary nature of the position of the director, union representatives (who will, after all, continue to owe their primary duty to the employees of the corporation) can act as directors at all?

Ever since the seminal Salomon v. Salomon case when Lord Halsbury L.C. said:

I am simply dealing here with the provisions of the statute and it seems to me essential to the artificial creation that the law should recognize only that artificial existence... once the company is legally incorporated, it must be treated like any other independent person, with its rights and liabilities appropriate to itself.

It has never been doubted that the company is an artificial entity completely separate from its members. Of course the separate artificial entity that is the company must be operated and controlled by men, the board of directors.

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80 The Business Corporations Act, R.S.O. 1970, c. 53, s. 132 (1). Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 97(1) states “subject to any unanimous shareholder agreement, the directors shall manage the business affairs of a corporation.”

Under both the Ontario and the Canada Business Corporation Acts, the board of directors is charged with the management or supervision of the management of the affairs of the corporation. Many more specific powers may be, and usually are, included in the Articles of Incorporation. The board, in exercising its powers, is not normally subject to the will of a majority of the shareholders of the company. E. E. Palmer, in his article Directors' Duty and Power,\(^91\) points out the difficulties involved in formulating a clear definition of the position and power of directors. Analogies have been drawn between directors and trustees, for like trustees, directors have care and control over the property belonging to another (the company), and between directors and agents, for directors act for the company and carry its mandate. However, such analogies have never been satisfactory. Gower writes:

> The duty of the trustees of a will or settlement is to be cautious and to avoid all risks to the trust fund. The managers of a business contract must, perforce, take risks, one of their primary duties is to carry on a more or less speculative business in an attempt to earn profits for the company and its members. . . . In truth, directors are agents of the company. . . .\(^92\)

Palmer, on the other hand, points out that the agent analogy “is inaccurate for the reason that a normal ‘agent’ is one who is subject to another’s control. However, a corporation does not control its directors; rather the directors control it.”\(^93\)

With power comes responsibility and because directors exercise such control over the property of another, the law has treated the director as a fiduciary of the company.\(^94\)

As stated, a director is a fiduciary because, like a trustee or agent, he exercises control over the property of another. In a recent article, Professor Weinrib explains the fiduciary relationship in a slightly different, but illuminating, light:

> [The fiduciary] . . . holds a mandate which cannot be circumscribed within narrow terms. His duty to bargain or to advise requires leeway for the exercise of individual judgment. The control of the principal is necessarily attenuated, for the exercise of that control would necessitate his intervention in the details of the transaction and would stultify the very reason for which the agency was instituted. Thus there is a relation in which the principal’s interests can be affected by, and are therefore dependent on the manner in which the fiduciary uses the discretion which has been delegated to him.\(^95\)

Because the traditional Canadian labour-management relationship has been an adversary one, it would appear at first glance that a union representative serving as a director would be involved in a continuing, automatic and disqualifying conflict of interest.

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\(^{93}\) *Supra*, note 91 at 367.

\(^{94}\) *Supra*, note 89. *The Business Corporations Act*, s. 144; *Canada Business Corporations Act*, s. 132.

The most obvious cases of conflict of interest have been found in those
cases where directors have had an interest in contracts made with the com-
pany, and in those cases the fiduciary duty of directors was most rigorously
enforced.90

Two other fact situations have resulted in fiduciary obligations being im-
posed on directors because of the nature of their office: the issuance of shares
by directors to retain control or defeat a takeover bid, and the corporate op-
portunities cases.

The case law is clear that directors cannot use the power to issue shares
solely for their own personal benefit. However, when the personal benefit
motive is mixed with other and proper business reasons, the courts have been
inconsistent.

There have been two distinct lines of cases in the share-issuance area:
one of which, characterized by the Bonisteele v. Collis Leather Co. Ltd.97 and
the Hogg v. Cramphorn Ltd.98 cases, holds that directors are not entitled to use
their powers of issuing shares merely for the purposes of maintaining their
control, and that such a wrongful act could not be justified by the fact that the
directors genuinely believed that it would benefit the corporation if they re-
tained control; and the second, characterized by the Mills v. Mills,99 Harlowe's
Nominees Pty. Ltd. v. Woodside Oil Co.,100 and the Teck v. Millar101 cases,
holds that if the directors act in what they believe are the best interests
of the company, they are not chargeable for breach of trust merely because in
promoting the interest of the company they were also promoting their own
interest.

Prior to the Can Aero Service Ltd. v. O'Malley case,102 the corporate
opportunities doctrine also had an uneven and checkered history. However,
unlike the issuance of shares situation, the statement of the principles to be
applied has been uniform.

The courts have always been at considerable pains to force all those in
fiduciary relationships with others to maintain a high standard of loyalty. The
basic proposition has been that a fiduciary shall not profit from a breach of
his duty of loyalty, nor shall he be allowed to put himself in a position where
loyalty and self-interest may conflict.

90 See Transvaal Lands Company v. New Belgium (Transvaal) Land and Develop-
ment Company, [1914] 2 Ch. 488. The Ontario Legislature, recognizing the paralyzing
effect a strict construction of the section would have on the business community, particu-
larly on those individuals who sit on the boards of many companies, added the proviso
in s. 134(2) that disclosure is only required if the interest of the director is material.
99 (1938), 60 D.L.R. 150.
100 (1968), 42 A.L.J.R. 123.
When dealing with the fiduciary obligations of trustees, which are similar to those of directors, Hanbury writes:

The office of trustee is an onerous one . . . in the performance of his office a trustee must act exclusively in the interests of the trust . . . he is required to observe the highest standards of integrity . . . nor may he compete in business with the trust, or be in a position in which his personal interests conflict with those of the trust. He may thus be forced to forego opportunities which would be available to him if he were not a trustee.\(^{103}\)

The problem in this area of the law is basically that the courts have tended to deal with all kinds of fiduciaries and all types of breach of the duty in the same way; that is, they have imposed the strict remedies exacted against trustees to the other kinds of fiduciary relationships and breaches.

That kind of result has been, in many instances, the complete antithesis of what might loosely be termed business morality and common business practice. Because the penalties imposed on the finding of breach of duty have been severe, the courts have been hesitant to find a fiduciary relationship,\(^{104}\) and when a fiduciary relationship exists, to find a breach of that obligation.\(^{105}\)

The possible solution to the extremely unsatisfactory developments of the law was articulated by Mr. Justice Laskin in *Can Aero Service Ltd. v. O'Malley*, where he stated that the strict tests articulated in earlier cases:

... are not the exclusive touchstones of liability and new situations demand a flexible approach in finding liability. The question to be determined in each case is: a duty to be implied from the relationship. The 'in the course of duties as such' approach is simply too narrow. The general standards of loyalty, good faith and avoidance of conflict of duty and self-interest must be tested in each case by many factors, for example, the position held, the nature of the corporate opportunity. ...\(^{106}\)

The judgment clearly offers the courts a way out of the all-or-nothing straight-jacket approach which previously existed. Laskin, C.J.'s flexible approach to the problem allows the court to consider the realities of the relationship when determining the extent of the fiduciary obligation, and clearly in the case of the outside director, the obligation is less pervasive and less onerous. Similar considerations ought certainly apply to the unique situation of the union representative directors. This is not to suggest that union representatives would not have to act in good faith throughout, just that the reality of the relationship, if considered by the courts, would permit them to function as directors even though there would always exist a potential conflict of interest.

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\(^{106}\) *Supra*, note 102 at 383 (D.L.R.).
There would be situations, of course, where the union nominee would be required to refrain from exercising his vote. The language of s. 134 of the Ontario Act for example, and the rationale of the Transvaal case would clearly prohibit union directors from voting on the acceptance of a collective agreement between the company and the union.

However, even in that kind of situation, the union and the employees would gain in that they would have, for the first time, direct input into the decision-making process at the very top level of management. In other areas, the corporate investment, plant or store relocation, automation, hiring practices, and pricing policies, the union representatives’ activities on the board could be of significant benefit to and provide much improved protection for the employees.

If union nominees can serve on boards of directors, the question of whether a union can negotiate for such position remains to be determined and, if possible how it could best be done.

Unions negotiate collective agreements with the management of the corporation, not with the shareholders, and it is the board of directors that gives ultimate approval. The election of directors is a power reserved to the shareholders of the corporation. However, directors could agree to recommend such an election to the shareholders, solicit proxies in favour of the election of union representatives and vote their personal shares in favour of the proposal.

To guarantee more effective union long-term participation on the board, the director could propose and solicit proxies and vote for an amendment in the articles of incorporation of the corporation which would create a class of shares which would be sold to the union (or a trust fund of the employees administered by the union) at a nominal cost to which a certain number of directorships would be attached. To guarantee compliance, the union could make the collective agreement subject to the change in the articles or at least terminable on the failure of the corporation to make the necessary changes.

It would appear that nothing in this kind of arrangement violates the rule against binding the directors’ discretion: in recommending union participation, the board would merely be exercising its managerial functions, and in agreeing to vote their shares and proxies, the directors would be acting as shareholders within the Ringuet v. Bergeron decision.

The passage of s. 101 of the Ontario Business Corporations Act poses a problem for unions negotiating this kind of provision, however. This section gives “persons holding equity shares carrying at least 10 per cent of the voting rights attached to equity shares” the right to requisition the directors to “call a meeting of the directors for the purpose of passing any by-law or resolution that may properly be passed at a meeting of the directors.” Where the direc-
tors do not call and hold such a meeting and pass such a by-law or resolution, the requisitionists may call a general meeting, if the by-law or resolution would have required confirmation at a general meeting of the shareholders, and validly pass the by-law.

It has been suggested that s. 101 provides a method for enforcing what is, in effect, a shareholder agreement. Thus, if the elected directors do anything contrary to the shareholder agreement, a meeting could be requisitioned under s. 101, and at a general meeting a contradictory by-law validly passed. This kind of manoeuvre, it is argued, would bypass the “fettering of directors’ discretion” doctrine as set out in the Ringuet v. Bergeron, and Motherwell v. School cases. Indeed, because the shareholders would be combining to exercise their rights as shareholders, such an action seems to be clearly authorized by the Supreme Court of Canada’s decision in Ringuet, for there the court held that:

Shareholders have the right to combine their interests and voting powers to secure control of the company, and to ensure that the company will be managed by certain persons. What they cannot do is tie the hands of the Board of Directors by, as here, requiring unanimity.

Therefore, s. 101 could be used by shareholders hostile to the acts of a board partly composed of union representatives to render meaningless the union’s participation on the board.

To counter that possibility, the first, and each subsequent, collective agreement should ideally provide for a continuing personal responsibility on the members of the board to do everything feasible to make union participation a meaningful reality.

While it would be foolish to suggest that representation on the board of directors would solve all the serious labour-management problems that exist today, the European experience suggests that it would be a positive first step.

From the union point of view, their representatives would have knowledge of and influence over the economic decision of the company. This could provide a very real and much needed protection in the fields of corporate reorganization, technological change, investment patterns, hiring practices and pricing policies.

As important would be the shift in the responsibilities and allegiances of the professional managers of the corporation. No longer would that class of skilled employees be responsible solely for maximizing the profits of the company for the company’s owners. They would also be responsible to the representatives of the employees (who invest their time and lives instead of money in the corporation). This responsibility could have a very real and positive impact on the employees whom the managers manage.

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110 Id.
112 Supra, note 109 at 684 (S.C.R.); 458-59 (D.L.R.).
C. CONCLUSIONS

There are, as indicated, many potential benefits inherent in the idea of a planned economy for the Canadian labour movement. The opportunity exists for labour in Canada to assume an expanded and much more meaningful role in the development of this country. It can move towards the kind of real influence and control in social and economic policy that is exercised by the labour movement in much of Western Europe. In doing so, it can better serve the interests of its constituents. However, labour must make the effort to achieve these benefits. The opportunities are there; government seems willing to co-operate and business cannot buy continued dominance with large wage increases. However, labour must organize to meet the challenge. It must centralize its chaotic structure, define its objectives clearly, and be willing to take the burden of increased responsibility and a wider political, social and economic role in the development of Canada.

It has not done so yet, but the labour movement is now seriously considering its future role. The Labour Manifesto indicated a willingness by the Canadian Labour Congress to participate in a real partnership with government and business in the planning of the economy. The Canadian Labour Congress also started to discuss the need for a reorganization of the labour movement, particularly the strengthening of the central bodies, to meet the challenge of dealing with government and business on an almost equal footing.

Indeed, at its convention in May, the affiliates authorized the CLC executive to call a nation-wide work stoppage to protest against the controls. On October 14, 1976, such a protest was held and, while some affiliates of the Congress did not participate, over one million workers across Canada did stay off the job.

The protest had two stated aims: first, to protest the unjust and inequitable nature of the controls as presently conceived and, second, to demonstrate labour's strength so that it can participate effectively in any future tripartite partnership for the planning of the economy.

The issues of worker participation in management at the plant and company level are becoming major topics of discussion within the labour movement. Some unions are even now beginning to include demands for participation on the board of directors, joint labour-management committees for hiring practices, health and welfare, and safety.

Labour remains opposed to the *Anti-Inflation Act* as it is now written and administered. The October 14, 1976 day of protest clearly demonstrated that. But it is beginning to see the real benefits to it within a planned economy and the debate over labour’s future role in society is underway. It is hoped that labour will respond positively to the challenge facing it and at last assume the expanded social role that unions can, and ought to, play in the development of our society.