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LAW FOR THE PUBLIC INTEREST

Responding to the Erosion of Labour Protection In Canada

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DE-REGULATION: UNDERMINING THE PUBLIC INTEREST LABOUR

Regulation of the Labour Market in the Modern Industrial State

It goes without saying that the labour market is an essential and central feature of every economy. In the midst of the contemporary hue and cry emanating from the corporate world about our economic affairs being over regulated, it may be worthwhile to place the current regulatory schemes affecting labour in their historical perspective. Recalling why regulations were seen to be needed in the first place may provide some grounds for caution against the wholesale dismantling of these regulations today.

Virtually all the labour market regulatory programs which are currently under attack in Canada have emerged since the era of World War II. Regulation of the labour market was an integral part of the broader system of social regulation which is commonly (although somewhat pejoratively) referred to as the welfare state. In Canada, the major components of this regulatory scheme were modelled on the "New Deal" programs of FDR in the United States. They were based upon Keynesian economic principles which prescribed to the nation state a central role in facilitating economic growth and in redistributing wealth.

Popular support for this "New Deal" was based on two related major catastrophes which had brought the western world to the brink of disaster. The first was the near total collapse of the capitalist system in the Great Depression of the 1930's. This "Great

Depression" was itself the culmination of a series of major recessions in the capitalist world which had occurred almost like clockwork every decade since the 1870's. The second cataclysm encompassed the enormous economic and social destruction entailed in the defeat of European fascism and Japanese militarism in World War II.

The point that I want to emphasize is that the system of state regulation of the economy and the labour markets that we know today did not simply fall out of the sky. It came about because of the recurring pattern of economic and social disasters which unfettered free enterprise regularly produced. The enormity of the economic and social upheavals resulting from the Depression and World War II contributed to political and corporate leaders becoming more amenable to placing restrictions on capitalism, if for no other reason than to save the system itself.

It must also not be forgotten that on a global basis, western capitalism was being challenged in the decades following World War II by an expanding socialist economy centred in the Soviet Union. Although by the early 1950's, the threat of communist expansion into western Europe was pretty much curtailed, Soviet style socialism continued to pose a serious threat to capitalism throughout most of the third world up until the mid 1980's.

In the aftermath of World War II, western industrialized capitalist countries overcame the recurring cycles of overproduction and underconsumption, which had reached its climax in the Great Depression, with an array of Keynesian economic policies in which the state played a

central role. These policies set out to "[control] the level of unemployment and the distribution of income by deepening the national markets by a judicious use of managed trade and a commitment to the gradual lowering of tariffs worldwide"[1].

The state regulated the macro side of the economy by creating social programs to act as income safety nets which ensured that a relatively high level of the basic needs of individual members of society were met. These programs were supported by a broad spectrum of the population, on the basis that every member of society should be assured a basic level of the necessities of life - food, shelter, education, and health care.

The state also became more directly involved in channelling and managing social conflict - particularly the conflict between labour and capital. Daniel Drache and Meric Gertler have argued that it is "these institutionalized forms of workplace control linked to a new social structure of accumulation and a much-deepened norm of consumption that ultimately transformed the social fabric of industrial societies, enabling capitalism to experience three decades of unparalleled growth and prosperity"[2].

Drache and Gertler point out, however, that while trade was essential for this expansion of capitalism between 1945 and 1975, the need to export was not allowed to set the agenda for

[1] Daniel Drache and Meric S. Gertler, "The World Economy and the Nation-State: The New International Order", in Daniel Drache and Meric S. Gertler eds. *The New Era of Global Competition*, (Montreal & Kingston, McGill-Queen's University Press, 1991) 5.

[2] *ibid.* 5.

industrial society. Trade was only one dimension and a secondary one to the development of domestic markets through tariffs and the strengthening of consumer demand through such measures as the encouragement of collective bargaining[3].

Given that it was a major economic depression in the 1930's that, in large part, provided the impetus for the emergence of the modern system of state regulation, it is of interest to note that it has been a series of economic recessions since the mid 1970's that has provided the backdrop for the emergence of neo-conservative economic policies which are dismantling most forms of social regulation. Public support for de-regulation - to the extent that the public does support these programs - has been generated largely on the basis of a perceived need to cut the deficit.

But deficit reduction alone could not justify the massive dismantling of social regulation which we are enduring. Over the last ten years international trade agreements have emerged as the most effective tool for politicians and corporate leaders to dismantle the regulatory framework of the welfare state. Harmonization of our standards with those of our trading partners has become the most potent justification for wielding the deregulatory axe.

Forms of Labour Market Regulation

Labour market regulation is multifaceted, targeting both broad economic considerations - such as the level of unemployment as well as procedures that might be specific to an

[3] *ibid.* p. 5.

individual workplace - as in the case of a safety regulation. Some regulations are aimed directly at controlling a certain aspect of the labour market, while others make their impact felt in a circuitous manner. In order to understand how the labour market is regulated it is often helpful to consider the objectives at which the regulation is aimed.

The most easily recognized form of regulation of the labour market is that which is aimed directly at the price paid for labour. Minimum wage legislation is an obvious and longstanding regulation in this category; pay equity legislation is a more modern variant.

Legislation governing collective bargaining is usually treated as a direct regulation of the labour market because collective bargaining has, in most instances, an immediate and significant impact on the price of labour. The collective bargaining regime in Canada is modelled on the U.S. *Wagner Act* of 1935. It was introduced by the federal government as a wartime Order in Council in 1944 and was subsequently adopted by provincial legislatures. The collective bargaining regime consists of certification by cards or majority vote, exclusive bargaining agent status for the union, a defined bargaining unit, protection against "unfair practices" and an enforceable obligation on employers to bargain in "good faith". This regime is driven by a commitment to industrial pluralism and voluntarism which leaves unionized workers and their employers, despite the inequality of bargaining power between them, "free" to set the terms and conditions of employment.

It is this voluntarist aspect of the collective bargaining regime which makes it such an

interesting form of regulation. The collective bargaining regime does not regulate the terms and conditions of employment directly. What it does is lay out the circumstances in which collective bargaining will take place. After that, it is up to the parties to negotiate the terms and conditions of employment.

Thus the collective bargaining regime, although it is the regulatory system which employers fear the most and at which they work most assiduously to undermine, is, in reality, a very indirect form of governmental regulation. It is also a system in which employers individually agree, across a bargaining table, on the precise nature of the regulation that they will live with.

In addition to the system of collective bargaining there are other regulations which affect the price of labour by imposing some basic rules governing the workplace. Employment Standards legislation governing hours of work, statutory holidays, etc. falls into this category. The *Occupational Health and Safety Act*, to the extent that it requires certain procedures and work practices has an impact on the price of labour. Nevertheless, the working conditions negotiated under a collective bargaining regime - such as defined job descriptions, seniority provisions which determine access to overtime, etc. - tend to provide the most substantial protection for workers and consequently have the most impact on the price of labour.

The price of labour is also affected by the presence or absence of social programs available to the population as a whole. It is this so called social safety net - the concrete

manifestation of Keynesian economics - which is being so ruthlessly sacrificed on the altar of global competitiveness. Medicare, the most important and expensive of such program in Canada, has a significant impact on the price of labour. In the absence of a publicly financed program, employers would be pressured to pay all or part of medical insurance premiums in the wage package. Unemployment Insurance and Workers' Compensation are programs, by providing wage loss protection for workers who are injured or who lose their jobs enable workers to be more selective about the working conditions that they will accept. Although education is not usually considered a part of the social safety net, the level of public education provided by the state has an important impact on the labour market. Not only does it affect the rate of entry of young people into the labour market, the level of public education also has a significant impact on the mix of jobs that the economy is expected to produce.

How bad is bad?
The de-regulation of the labour market in the 1990's

Ontario takes the lead

The election of the Mike Harris Conservative government in Ontario in June 1995 has brought to power advocates of, arguably, the most virulent strain of neo-conservative economic policy in Canada today. De-regulation of the labour market is an integral component of their so called "common sense revolution". Indeed, the Harris government campaigned explicitly to repeal the labour law reforms enacted in 1992 by the NDP under Bill 40. But because the Harris government has gone so much further than rescinding NDP

reforms, Ontario provides fertile ground for an examination of the neo-conservative agenda for de-regulating the labour market.

The Harris government presented its labour law amendments (Bill 7) as a means of restoring the "balance" to labour relations in Ontario and of eliminating the "barrier to jobs, growth and investment" which it claimed had been created by Bill 40. However, even a cursory examination of Bill 7 illustrates that these amendments went far beyond repealing the rather modest amendments that Ontario's first social democratic government had made to the law governing collective bargaining.

The ideological underpinnings of Bill 7 are revealed in the new purpose clause it has given to the *Labour Relations Act*. The law is still intended to "facilitate" collective bargaining, but this mandate was downgraded from its longstanding mission to "encourage" collective bargaining. And the seemingly non contentious goal referred to in the purpose clause of providing for fair methods of dispute resolution was replaced with admonitions about "the importance of workplace parties adapting to change," the promotion of "flexibility, productivity, and employee involvement in the workplace" and recognition of "the importance of economic growth".

Bill 7 also rescinded the improved access to first contract arbitration, the power given to the Labour Relations Board to combine bargaining units and the requirement that the Board include full time and part time workers in the same unit where the union had an overall

majority. The legislation rescinded the statutory "just cause" requirement for discipline or discharge and the right to organize and picket on private property that is open to the public (eg.shopping malls). Bill 7 also removed from the Board its discretion to hold expedited hearings into unfair labour practice complaints of discharge or discipline during an organizing drive. These Harris government amendments were specifically intended to make it more difficult for workers to acquire collective bargaining rights and to limit the powers of the Board to ensure that the collective bargaining relationship would get off to a meaningful and productive start.

To no one's surprise, Bill 7 removed the anti-scab provisions enacted by the NDP. (The anti-scab provisions were the only NDP amendments which significantly altered the balance of power between employer and employees). But Bill 7 takes an even more direct approach to limiting access to collective bargaining. This new law eliminates union certification through the process of signed membership cards which has been in place since 1945. This card signing process is replaced with the U.S. system of a certification vote in every case. Under Bill 7 a vote is to be normally ordered within five working days of an application which must still be supported by signed cards representing 40% of the bargaining unit. If a union loses a vote, it is automatically barred from applying again for a 12 month period.

Bill 7 also strips certain groups of professional workers (such as lawyers, dentists,

doctors and architects) from coverage under the law. These groups of workers did not rush to embrace collective bargaining when it was made available to them under Bill 40. But removing access to these professional workers is a symbolic act signalling that an expansion of collective bargaining will not be encouraged. In repealing the *Agricultural Labour Relations Act*, Bill 7 did decertify the one group of farm workers - a mushroom farm in Leamington, Ontario - who had acquired certification under that *Act*.

At the same time that access to certification was being restricted, Bill 7 made the decertification process easier. An application for decertification can now be made with support of 40% (formerly 45%) of the bargaining unit and there is no longer a requirement for the Board to determine that the expression of employee wishes was "voluntary". Interestingly, there is no mandatory bar against repeated decertification applications.

Bill 7 also removed the limited protection won, after many years of struggle, by office cleaners and food service providers whose employers are subject to contract tendering. No longer is a new contractor, who successfully bids on a contract to provide these services, required to offer employment to the previous contractor's employees. Bill 7 also removed the provision which deemed that a tender or re-tender of such a contract to be a sale of a business. Thus, these most vulnerable of workers, lose access to the successor employer provisions of the *Act* and consequently, lose their ability to bargain collectively.

Most of the public discussion about Bill 7 centred on the removal of the NDP's anti-

scab provisions. Although anti-scab legislation was an important gain for workers which strengthened the position of unions at the bargaining table, the impact of the Harris government's rewriting of the *Labour Relations Act* goes far beyond removing the NDP reforms. Bill 7 constitutes a comprehensive restriction on access to collective bargaining. With all its limitations and frustrations, collective bargaining has proven to be the most effective method for workers to exert some control over the price they receive for their labour and the conditions under which they work. Bill 7 undermines the controls which unionized workers have placed on the labour market by insuring that fewer workers will have access to the collective bargaining regime. The U.S. experience shows that when new organizing is made more difficult, the percentage of unionized workers can be cut in half within one generation. This is the route which Mike Harris has set for collective bargaining in Ontario.

Manitoba follows suit

The Conservative government of Gary Filmon in Manitoba, taking a page out of the platform of the Ontario Tories, has come forward with its own set of labour law reforms. Although not as far reaching as Ontario's Bill 7 (in fact, the Filmon government has tried to present the amendments as nothing more than a few housekeeping adjustments to the law), the amendments follow the same neo-conservative agenda for deregulating the labour market.

The most significant amendment is that which replaces union certification by means of

signed cards with the U.S. formula of a certification vote in every instance. Manitoba proposes that the Board be directed to conduct the vote within seven days of receiving the application (compared with five in Ontario). This extension of the period in which a vote is conducted is significant since it gives an employer extra time, at a critical moment, to organize opposition to the union. This departure from the Ontario model may be due to the fact that during the first six month's of Bill 7's operation, unions were more successful in winning votes than was anticipated (although, it must be kept in mind that the number of applications for certification decreased dramatically.

When this legislation is passed, Manitoba will become the fifth province to require a vote in every instance (following Nova Scotia, Newfoundland, Alberta and Ontario). Mandatory certification votes were tried in British Columbia for a short time after being introduced by the Social Credit government in 1984.

But de-regulation also comes in more subtle forms. The cost cutting frenzy which has captured neo conservative governments has led them to dismantle important and highly specialized services which the government has traditionally provided to assist unions and employers to reach an agreement. It is ironic that these mediation and conciliation services are being slashed in the industrial relations area at the same time that they are being proposed as a viable alternative to the expensive and lengthy procedures of the civil courts. Labour law in Manitoba currently provides either party to a collective agreement with a process of expedited

arbitration of grievances. Invoking this process also involves submitting the issue to a mediator who attempts to bring the parties to a settlement prior to arbitration. The Filmon government is concerned that this process is being used where there is no apparent emergency and therefore proposes to limit access to expedited arbitrations to grievances over a dismissal or where the employee has been suspended for more that 30 days.

This move by the Manitoba government dovetails with the Ontario government's decision to eliminate the mediation service provided by the Ministry of Labour. Despite the fact that this service was strongly supported by both labour and management, 14 mediators received lay-off notices in the summer of 1996. The government's rationale was that this would save money ($1.3 million a year) and that the service could be provided just as well by the private sector. But this rationale is extremely short sighted. The Ministry's Mediation Service handled about 5,300 cases a year and its highly skilled staff succeeded in resolving between 80 and 85 per cent of these cases. This works out to an average of less than $250 a case. The standard fee for private arbitrators in Ontario is about $2,000 a day. Thus from a financial perspective, this move does not make sense. But it does make sense if your objective is to undermine the collective bargaining system. By eliminating a governmental service which enables the machinery of collective bargaining to work, the government will make collective bargaining less efficient and more expensive.

The Manitoba government also proposes to amend current provisions of the *Act* which

prevent a scab from voting in an application for certification or de-certification. It is not clear from the materials the government has provided in defence of this measure what its intention is. There is, however, a concern within the labour movement that the government intends to overrule by statute the rulings of the labour board in Manitoba - and in other jurisdictions as well - that scabs have no community of interest with union members and therefore, (although they are employees) they are not eligible to be members of the bargaining unit. If labour's concerns prove to be correct, this amendment would signal that the Manitoba government is taking a major step towards undermining a union's ability to conduct an effective strike.

The Manitoba government appears to be particularly intent on weakening the union movement's effectiveness in the area of political action. This is not surprising given that the NDP in Manitoba continues to be the strongest political opposition to the Conservatives and the NDP is the governing party in neighbouring Saskatchewan.

Amendments would require unions to give advance notice of the expenditure of union dues for political purposes and allow workers who object to their dues being used for political purposes to specify that their dues be used for another purpose. The amendments would also require a union (including a labour central) to file detailed financial reports with the Labour Board itemizing the salary and benefits paid to each officer, political contributions, advertising or publicity expenses and gifts, grants etc.

This foray into requiring detailed financial disclosure by unions is reminiscent of the

Landrum-Griffin Act passed in the United States in the 1950's. It tries to create the impression that union's are corrupt and not accountable to their members on financial matters - a proposition that would be difficult to support with empirical evidence from the operations of the labour movement in Canada. This amendment to Manitoba's labour law would go beyond the long standing power given to the Board in Ontario (and other jurisdictions) to require a union to provide a member with an audited financial statement.

Federal government appears not to be following the Harris model

Shortly after taking office the Chretien government appointed a three person Task Force to review Part I of the Canada Labour Code - Part I covers the collective bargaining regime). The Task Force was chaired by Andrew Sims, the former chair of the Alberta Labour Board and its members were Paula Knopf and Rodrique Blouin, labour lawyers from Ontario and Quebec. The Report of the Task Force, (which is also referred to as the Sims Commission) was released in February 1996, and its recommendations were incorporated into the Bill C-66 amendments to the *Canada Labour Code* introduced in Parliament on November 4,1996. The Report presents a sharp contrast to the frontal attacks on collective bargaining that are taking place in Ontario and Manitoba and which have been around in Alberta for some time.

The title of the Report "Seeking a Balance" reflects the more traditional perspective of "labour relations professionals" who have an interest in preserving the system of collective

bargaining that we have developed over the past half century. Many of the Task Force's recommendations reflect a consensus reached in consultation with high level representatives of management and labour and are directed at making improvements to the system that is in place.

In accepting the recommendations of the Sims Commission, the federal government has diverted significantly from the slash and burn style of de-regulation being followed by some provincial governments. This divergence needs to be watched closely since it is an indication of conflicting viewpoints within the corporate agenda and may provide fertile ground for developing strategies to fight the overarching push for de-regulation.

Having said that, we should not lose sight of the fact that the Task Force frames its review within the context of ongoing government de-regulation and increasing competition. The Commissioners were careful to point out the advantages of a free market economy. Nevertheless, they also made it clear that free collective bargaining "continues to serve our economic needs well".[4] Consequently, most of their recommendations dealt with improving the process that has been in place for half a century and in increasing the efficiency of the Labour Board and the mediation services which the government provides.

The only issue on which the Task Force did not reach a consensus was on how to deal with the hiring of replacement workers during a strike. This was a hot issue for the Task

[4] "Seeking a Balance" Executive Summary p. 5

Force since the labour dispute at Royal Oak Mines in Yellowknife, where twelve strikebreakers were killed in September, 1992 was under the jurisdiction of the federal labour code.

Rodrique Blouin wrote a minority report strongly recommending that replacement workers be outlawed. Andrew Sims and Paula Knopf recommended against such legislation. The Task Force, however, did agree that further legal restrictions should be placed on the use of replacement workers: - that when they are used for the purpose of undermining a union's right to represent employees it should constitute an unfair labour practice. This recommendation has found its way into Bill C-66.

In my opinion, this is the type of distinction that only lawyers can find meaningful. It is difficult for me to envision how the hiring of scabs could not be for the purpose of undermining a union's representational rights. It will be interesting to see what interpretation the new Canada Industrial Relations Board (which will be established under Bill C-66) will give to this new legislation. Nevertheless, considering the direction in which many provinces are heading, it is important to emphasize that the Task Force was unanimous in its belief that permanent replacements are inappropriate and that the right to return to work after a strike should receive statutory protection. In a similar vein, the Task Force recommended that the law should provide a clear right for workers to arbitrate discipline or dismissal imposed during a strike or lockout - an issue which had clearly heightened tensions in the Royal Oak dispute. These recommendations were also included in Bill C-66.

This brief description of current events in Canada highlights the neo-conservative agenda in relation to the collective bargaining regime. While collective bargaining has a significant and direct impact on the labour market both in terms of the cost of labour and in the controls that a collective agreement can impose over job descriptions and workplace procedures, it is, nevertheless, an indirect form of regulation, wherein workers must negotiate and employers must agree to any regulation of the labour market that ensues. The de-regulation strategy which neo conservative governments are following vis à vis collective bargaining is to restrict access to the system by making certification even more difficult. These governments also want to ensure through legislative changes that a union's ability to wage a successful strike is diminished. In addition, they are undermining the collective bargaining system by dismantling specialized conciliation and mediation services which the government has provided.

Employment Standards

Government efforts at regulating the labour market by establishing some basic minimum standards for wages and working conditions date back to the latter part of the 19th century. At that time, the common law governed employment contracts leaving employers free to extract any terms of employment from their workers that their superior economic power enabled them to do. After a number of government commissions publicized the horrific

working conditions prevalent in Canadian factories, governments moved to legislate some basic protections in the area of health and safety, and restrictions on the number of hours of continuous work and minimum wages. These regulations, however, initially protected only women and children. It took the ravages of the Great Depression before minimum wage legislation was extended to men. In 1968, in Ontario, minimum labour standards were consolidated in the *Employment Standards Act*. It so happens, that the agenda of the Harris government in Ontario presents us with a starting point to analyze de-regulation in this area as well.

The *Employment Standards Act* provides basic workplace protection to the vast majority of workers in Ontario. It covers minimum wages, maximum hours of work, overtime pay, paid vacations, public holidays, termination notice and severance pay. Monetary benefits provided by the *Act* are not particularly generous; the *Act* is intended more as a way of preventing abuse.

Bill 49, the *Employment Standards Improvement Act*, was introduced on May 13, 1996. At the time, Labour Minister Elizabeth Witmer euphemistically described the Bill as simply making a few housekeeping changes to the legislation. These changes were being put forward in advance of a year long study of the *Act* after which substantial changes would be made.

But Bill 49 embodied more than simple housekeeping. It's most sweeping measure was the amendment to s. 4(2) of the *Act* which would allow unionized employers to negotiate trade

offs in hours of work, overtime, public holidays, vacation and severance pay as long as the package of benefits was no less in value than the total of the prescribed benefits taken individually.

This proposal takes the legislation a major step away from the original concept of the law which was to provide legal minimum standards that applied to everyone. Once implemented, it would *de facto* pull the rug out from under any effort to make improvements to existing minimum standards. Opposition to this measure was intense and the Labour Minister had to admit that it went far beyond a housekeeping measure. In August, she removed this measure from Bill 49, making it clear, however, that it was still the government's intention to enact this provision. She simply referred the matter to the committee undertaking the broader study of employment standards. We can expect to see this proposal reappear on the government's agenda within the next year.

Bill 49 is aimed mainly at weakening the enforcement provisions of the *Act*. This is insidious, since it is in the area of enforcement that the *Act* is already notoriously weak. Routine inspection of workplaces conducted by the Ministry declined from 1,304 in 1980-81 to a mere 21 in 1994-95.[5] Another statistic reveals even more sharply that employment standards are not enforced. Over 90% of complaints under the *Act* are filed by workers after they have

[5] Employment Practices Branch, 1994-95 Fiscal Year Report (Toronto: Ministry of Labour, 1995 in Judy Fudge, "The Real Story: An Analysis of Bill 49, the *Employment Standards Improvement Act* upon Unorganized Workers", A Brief presented to the Legislative Committee, July 1996 p. 8.

left their employment.[6] Workers know that the Ministry of Labour is not capable of ensuring that the *Act* is followed. The best it can do is collect money owed from the employer after one leaves the job. Even in this limited area, the record of the Ministry is nothing to write home about. In 1945-95, 29% of assessments against employers went uncollected. When looked at in dollar amounts, the Ministry's record for making employer's pay is even less impressive. Of the $64.3 million dollars assessed, $47.8 million - or 74% - was not collected.

Logic might seem to dictate that, faced with such glaring and longstanding weaknesses in the administration of this regulatory scheme, the government would be inclined to beef up enforcement mechanisms. One might even be so bold as to suggest that it introduce improvements to the minimum standards which, for example, would enable workers to keep pace with inflation. Logic, however, is not what is driving the current political agenda.

Bill 49 aims to make the scheme even weaker. It cuts the limitation period in which a worker can file a claim from two years down to six months. The Bill also sets a maximum of $10,000 which can be awarded under a claim.

Bill 49 will allow responsibility for collecting money from employers to be turned over to private collection agencies. Of more serious concern, it also provides for these agencies to negotiate a compromise settlement for up to 75% of the monies owed. This provision seems

[6] Roy Adams, "Employment Standards in Ontario: An Industrial Relations Systems Analysis", 42 *Relations Industrielles* (1987) quoted in Fudge p. 7.

designed to give employers an almost automatic 25% discount on unpaid wages and benefits which they have been found to owe their workers under the law.

In early September, the Conservative government of Alberta announced that it would be applying a similar solution to the enforcement of labour standards. Alberta intends to pay private operators up to $200 for each complaint they resolve - with bonuses available if they can wrap up cases quickly.[7]

On one level the proposals found in Bill 49 appear to be nothing more that a kneejerk approach which sees privatization as the solution to every problem. At times, however, the government has attempted to present a more sophisticated set of arguments to defend its position. It begins by asserting that regulations such as the *Employment Standards Act* have made the Canadian labour market inflexible and goes on to argue that there is a direct connection between labour market flexibility and job creation. In support of its thesis, the government relies on reports such as the *OECD Job Studies* which it interprets to argue that the lower rate of unemployment that Britain is experiencing compared to other European countries is a direct result of the lowering of labour standards and the undermining of collective bargaining that was imposed by Margaret Thatcher.[8]

This argument, while attempting to put a sheen of economic respectability to the

[7] Globe and Mail, September 5, 1996 p.

[8] For an example of this type of argument see the speech of Tony Clement, MPP for Brampton South, *Hansard*, June 6, 1996, p. 3390.

government's position simply begs the question of whether Canada's labour market is inflexible. This is a question that we will return to later in this paper.

Regulating Workplace Safety

Laws and regulations aimed at protecting workers from injury and disease in the workplace and the parallel regulatory scheme for compensating workers who are killed, injured or diseased constitute, next to the collective bargaining regime, the most important example of the modern industrial state's effort at regulating the workplace. Throughout the 1970's and 1980's it has been in this area where - in Canada, at least, and I suspect in other industrialized countries as well, - young, energetic activists in unions and in the broader health care field have found a fertile niche in which to operate.

The politicization of health and safety issues - particularly in the 1970's and early 1980's - was an important element in revitalizing the labour movement of Canada. This political activism lead to the introduction of new legislation - such as the *Occupational Health and Safety Act* in Ontario in 1979, - and similar Acts in other provinces - as well as the federally legislated WHMIS program - the Workplace Hazardous Materials Information System - which came into force in Ontario in 1988.

Employers large and small point to the regulations in the area of occupational health and safety as a prime example of the onerous regulatory burden that they must shoulder. As

with other regulations, they argue that such regulations are inefficient, and expensive and that they undermine their competitiveness in the world economy. I want to examine in some detail the development and content of occupational health and safety regulations in Ontario. I want to do this in order to demonstrate that contrary to the assertions of employers, the real story is that with respect to hazardous substances in the workplace - which are a major cause of death and illness in our society - the problem remains essentially unregulated.

The guiding principle behind Ontario's Occupational Health and Safety Act is the "internal responsibility system". The internal responsibility system was the centrepiece of the recommendations made by Professor James Ham in his 1976 Royal Commission Report on mining health and safety[9]. This system envisions a "complete, unbroken chain of responsibility and accountability"[10] for health and safety from the chief executive officer of a company to the lowliest worker on the shop floor. It is based on the assumption that "the workplace parties themselves are in the best position to identify health and safety problems and to develop solutions".[11] Given the subject matter of this paper, I need hardly point out, that, philosophically, this system fosters a minimalist approach to state intervention over health and safety matters in the workplace.

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[9] *Report of the Royal Commission on the Health and Safety of Workers in Mines*, Toronto, Queen's Printer, 1976.

[10] Ontario Ministry of Labour, *A Guide to the Occupational Health and Safety Act*, Publications Ontario, (Toronto), 1993. p. 2.

[11] *ibid.* p. 2.

To facilitate the operation of the internal responsibility system the *Occupational Health and Safety Act* confers on workers four "rights" which are intended to "balance the employer's right to direct the work force and to control the production process in the workplace".[12]

The first of these rights is the right to participate, - to be part of the process of identifying and resolving workplace health and safety concerns. This right is given concrete expression through membership in the joint health and safety committees which are required under s. 9 of the *Act* for workplaces employing 20 more workers or through a worker health and safety representative for workplaces regularly employing between 6 and 19 workers. It must be noted, however, that there is no decision making power bestowed on these committees by s. 9(18) of the *Act*. Despite the fact that the joint committee is comprised of equal numbers of labour and management representatives, its role is limited to one of making recommendations and of being consulted.

To support participation, the legislature has also granted workers the right to know. This includes the right of the joint health and safety committee to be informed about health hazards, the right of workers to be trained on machinery and equipment, and their right to be informed about working conditions, work processes or substances which may be hazardous. In Canada, the most far reaching manifestation of the right to know is found in the Workplace Hazardous Materials Information System (WHMIS), a nation wide system of labelling of

[12] *ibid.* p. 3.

products used in workplaces accompanied by a mandated educational program for workers on how to understand the information provided and how to handle hazardous materials.

A more important feature of current occupational health and safety legislation is the codification of the right to refuse unsafe work - the third right given workers under the *Occupational Health and Safety Act*. Although this was a right which has long been recognized in the common law,[13] it is worth noting that employers in Ontario - and elsewhere - steadfastly resisted its inclusion in the legislation.[14] As a consequence of employers' opposition, Section 43 of the *Occupational Health and Safety Act* carefully describes the process for refusing dangerous work, reporting to the employer, in-plant investigation followed by an investigation by a Ministry of Labour inspector, and the responsibilities of the employer and the employee subsequent to a work refusal.

The final right - the right to stop work - was granted to Ontario's workers only in 1990 with the passage of Bill 208, the *Occupational Health and Safety Statute Law Amendment Act, 1989*. Incorporated as sections 44 to 49 of *OHSA*, these provisions of Bill 208 created a mechanism whereby, when both a certified worker representative and a certified management

[13] *Priestly* v. *Fowler* (1834), 3 M. & W. 1; 150 E.R. 1030. "The servant is not bound to risk his safety in the service of his master; and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself:" Lord Abinger, C.B.

[14] One of the concessions which opposition parties extracted from the minority Progressive Conservative government during the legislative debates on Bill 70 was broadening the right to refuse provision in the Act to situations where a worker "has reason to believe" the work is unsafe. Bill 139 had used the more restrictive phrase "reasonable cause to believe". However, the Ontario Labour Relations Board in *Inco Metals Co. (Pharand)*, [1980] 3 Can. LRBR 194 gave a broad interpretation to "reasonable cause" which, in effect, gave the same meaning to these two phrases.

representative agree that a "dangerous circumstance" exists in a workplace, they can jointly shut down a piece of equipment or a work process.

Because of the restrictive way in which it has been structured, this right to stop work has, to date, found little practical application in Ontario workplaces. However, the fact that the "certified" worker and management representatives were required by the *Act* to receive special instruction, and that this instruction was to be provided through a bipartite Workplace Health and Safety Agency, these new provisions spawned a small industry for the training of worker and management representatives about workplace health and safety issues.[15]

I think it is safe to say that employers in Ontario have never really accepted the notion that workers in their employ could be certified by the state as having a certain level of expertise in health and safety matters and that this expertise would entitle them to play a prominent role in the decision making process which could halt production. Consequently, it should be of little surprise that one of the first acts of the Mike Harris government was to disband the Workplace Health and Safety Agency (ostensibly because of a deadlock on the Board of Governors between employers and unions) and to bring to a halt the certification process created by the 1990 amendments.

But before I get into a discussion of the de-regulation that has occurred - or is in the

[15] In May 1993, the Workplace Health and Safety Agency estimated that 100,000 committee representatives will have to be certified in Ontario. Preparation of the first phase of the certification course was completed in April, 1993 and certification training began shortly thereafter. See *The Employment Law Report*, Vol 14, Number 5, May 1993. pp. 33-36.

making - in the area of occupational health and safety there is one important point that has to be made: the most serious problem in this area - namely occupational disease caused by hazardous substances in the workplace - remains largely unregulated. Not only are hazardous substances by and large unregulated, industrial disease is only minimally covered by Workers' Compensation plans. Each year in Canada, over half a million lost time injury claims are compensated by workers' compensation boards.[16] However, only a small fraction of these claims (approximately 3%) are attributed to occupational disease.[17]

Over the past quarter century a steadily mounting body of scientific evidence has linked premature deaths to workplace exposure. Cancer deaths were the first to be analyzed leading to conclusions that between 20 and 38 percent of cancer deaths could be traced to the effects of chemicals and other products used on the job. Employers steadfastly challenged the statistical assumptions on which such estimates were based. However, Paul Weiler using the most conservative estimates in his 1983 study of workers' compensation in Ontario still concluded that in this one province 700 cancer deaths a year could be linked to the workplace - yet only 40 were covered by WCB.[18]

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[16] Cynthia Haggar-Guénette, "Work Injuries in Canada, 1982-86" (1988), 66 *Employment, Earnings and Hours* 219.

[17] Between 1980 and 1987, occupational diseases amounted to between 2.8% and 3.6% of the total injuries and diseases which were compensated by the Ontario Worker's Compensation Board. Ontario, Workers' Compensation Board, *Annual Report* (1987).

[18] Paul C. Weiler, *Protecting the Worker from Disability: Challenges for the Eighties*, Ministry of Labour, Toronto, April 1983, p. 24 note 10.

More recently, Dr. Philip Landrigan and Dr. Stephen Markowitz analyzed mortality statistics in New York state over a four year period for death resulting from six conditions: cancer, pneumoconioses, cardiovascular disease, respiratory disease, neurological illness and kidney disease. After applying conservative proportional risk criteria, these doctors concluded that between 4,686 and 6,592 deaths were caused by work related exposures - yet, on average, only 233 deaths were attributed to occupational disease by the New York State Workers' Compensation Board.[19] These estimates mean that three to four percent of all deaths in this industrialized state are work related and that occupational disease is the fourth most common cause of death in New York state.

Doctors Landrigan and Markowitz identified a number of interrelated factors which combine to minimize the impact on public consciousness of the devastation caused by occupational disease. Insufficient and inappropriate education of physicians and workers, the underfunding of state regulatory and enforcement agencies and incomplete surveillance of workplaces were identified as contributing to the ignorance and complacency associated with industrial disease. But the main factor, in their opinion, was that "relatively little is known about the potential health effects of most synthetic chemicals".[20] This ignorance is magnified when one considers that most attention and research is focused on a relatively few, well-known hazards such as asbestos, lead and vinyl chloride. The attention directed towards these

[19] Philip J. Landrigan, M.D. and Stephen B. Markowitz M.D., "Occupational Disease in New York State", A Report to the New York State Legislature, February, 1987, p. 9.

[20] *ibid.* p. 2.

substances tends to hide the fact that there is virtually no information available on approximately 80% of the 48,000 chemical substances in common commercial use.[21]

One might expect that given the enormity of known hazards, the potential for unknown hazards to exist and the general lack of scientific knowledge about the toxicity of chemical substances, governments would want to pursue an aggressive approach to understanding and controlling exposure to workplace hazards. This unfortunately has not been the case. A brief outline of the feeble attempts to regulate hazardous substances in Ontario over the past decade and a half illustrates this point.

The *Occupational Health and Safety Act* gives Cabinet extensive powers to make regulations "for the health and safety of persons in or about a workplace" including "prescribing any biological, chemical or physical agent or combination thereof as a designated substance". When the *Occupational Health and Safety Act* was first introduced into the legislature in 1977, the Minister of Labour at the time announced that six substances - lead, mercury, benzene, vinyl chloride, isocyanates and pentachlorophenol - had been selected for the regulatory process. By 1986, a grand total of 11 substances had worked their way through the designated substances regulatory process[22] leaving the tens of thousands of other substances

[21] *ibid.* pp. 2-3. This information is drawn from the (U.S.) National Research Council, "Toxicity Testing - Strategies to Determine Needs and Priorities, 1984. There was not sufficient information to make possible a complete health hazard assessment of any of the 48,000 commercial chemicals. 10% of them had enough information to do a partial health hazard assessment and another 10% had minimal toxicity information available.

[22] Of the original six substances targeted pentachlorophenol escaped designation. In addition, however, regulations were promulgated for coke oven emissions, silica, acrylonitrile, arsenic, ethylene oxide and two regulations for asbestos - a general regulation and one specific to construction projects.

to which workers are exposed subject only to guidelines which were "unenforceable and provide little protection for workers"[23]

Not only was the process excruciatingly slow, the resulting controls on the designated substances placed little constraint on employers or industry. In a detailed study of the regulation of lead and vinyl chloride in Ontario, Professor Caroline Tuohy concluded that the process incorporated a presumption in favour of current average industrial practice. Hazards associated with current average practice "have been held either to be inconclusively demonstrated or to fall within a range of acceptable risk.[24]

In response to the mounting criticism of the designated substances regulatory process the newly elected Liberal government in 1986 pushed through Regulation 654 - a Regulation Respecting Control of Exposure to Biological or Chemical Agents. This regulation adopted the exposure levels set by the American Conference of Governmental and Industrial Hygienists for over 600 substances that are widely used in industry. Although on the surface, this appeared as a rather bold step towards regulating hazardous substances in the workplace, in substance it was little more than a charade. In the first place, ACGIH standards tend to reflect what is common practice in industry which coincides with the fact that the ACGIH is a self

[23] Linda Jolley, "A Critique of Ontario's Bill 70, An Act Respecting the Occupational Health and Occupational Safety of Workers", Labour Studies Programme, McMaster University, (Hamilton, Ontario), no date. p. 12.

[24] C.Tuohy, "Decision Trees and Political Thickets: An Approach to Analyzing Regulatory Decision-Making in the Occupational Health Area" (Law and Economics Workshop, Faculty of Law, University of Toronto, Number WSVI-15, 1984), 3-15.

appointed body heavily influenced by the corporations which manufacture the substances for which limits are being set. A more serious problem with Regulation 654 was that although the exposure limits contained in the regulation were presented as legal limits, there was no requirement for employers to monitor their workplaces to establish that they were within the prescribed limits. Thus, it was virtually impossible to legally enforce the limits contained in Regulation 654.

It was in this context that the Liberal government embarked on a significantly different process for developing occupational health and safety regulations. In November 1987 it set up the Joint Steering Committee on Hazardous Substances in the Workplace, a bipartite committee comprised of equal representation of employer and labour groups and chaired by the Deputy Minister of Labour.[25] The primary objective of the Joint Steering Committee was "to develop and review regulations for hazardous substances (including biological and physical agents) made under the *Occupational Health and Safety Act*".[26] But for the first time in Ontario's history these regulations were to be arrived at through direct negotiations between management and labour.

Space permits only a cursory synopsis of the work of the Joint Steering Committee.

[25] I wish to note that I served as a member of the Joint Steering Committee from November 1987 until September 1993 as a representative of the Confederation of Canadian Unions. My observations about the work of this Committee are personal ones and may not necessarily be shared by other labour representatives on the Committee.

[26] "Terms of Reference" Appendix 1, *The First Report of the Joint Steering Committee on Hazardous Substances in the Workplace and its Task Forces, December 1, 1987 to March 31, 1990.*

One Task Force which studied Exposure Values and Limits effectively challenged the validity of exposure limits based on time-weighted averages. More importantly, it agreed upon what it labelled as a "fast track" process for setting exposure limits which would incorporate in Ontario the lowest standard in place in five selected European countries. By 1991, this Task Force had produced a list of some 235 chemicals where the exposure limit in Ontario exceeded what was in place in one of these European countries. At this point, employer representatives on the committee began a rear guard action to challenge these more stringent exposure levels on the grounds that there was no scientific justification for the higher standards. By the time the Harris government was elected in 1995 new exposure limits were adopted for only 19 substances.

Another Task Force of the Joint Steering Committee - the Regulatory Framework Task Force - embarked on a more ambitious project. Rather than approaching the regulation of hazardous materials on a substance by substance basis - which was the approach of the designated substances regulations - this Task Force set out to develop a generic regulation which would apply to all substances and all workplaces.

By the summer of 1993 no less than fourteen drafts of a 56 page Generic Regulation had been worked on by the Task Force. The process envisioned by this regulation assumed that substances were hazardous unless demonstrated otherwise. Employers would be required to conduct an initial review of their use of hazardous materials and implement prescribed

controls where workers would likely be exposed. If the initial review indicated no inhalation exposure, the employer would be required to implement Level 1 controls. However, where there was inhalation exposure, employers would have to establish that the exposure was within the limits by conducting air monitoring in the workplace.

There is no question that this generic regulation provided a more comprehensive and realistic method for protecting workers from hazardous substances. Although labour and management representatives were able to reach a negotiated agreement on over 300 specific issues in the regulation, by the summer of 1993 they had reached a deadlock on six items which, in accordance with the procedures governing the Joint Steering Committee, had to be resolved by the Minister of Labour. The NDP Minister waited over a year to hand down a decision and when the decision largely supported the position taken by the labour representatives, the employers balked at adopting the regulation. In the meantime a provincial election returned the Conservative government of Mike Harris and within six months of taking office the new government disbanded the Joint Steering Committee. Given the current social and economic climate there is little reason to expect that any aspect of the Generic Regulation or the other work of the Joint Steering Committee will be acted upon.

This rather lengthy examination of the regulatory process, in which I have had some first hand experience, is presented to offset the conventional wisdom that our labour market is over regulated. Despite the best efforts of a cadre of knowledgeable and dedicated activists in

the field, hazardous substances continue to escape effective regulation in Ontario's workplaces. Furthermore, the process of regulation setting is one in which employers play a dominant role. The power of employers is such that, in most instances, the regulations which are set simply codify the standards that employers have already met. Nevertheless, employers are taking advantage of the current economic and political situation to lower the health and safety protection provided to workers in Ontario workplaces.

So far, this has been largely accomplished by means of the simplest form of de-regulation - not enforcing the regulations that exist. An examination of Ministry of Labour statistics for a five year period between 1988 and 1993 revealed an 11% decline in the number of inspectors, a 42% decline in the number of stop work orders issued and a 69% decline in the number of prosecutions initiated by the Ministry.[27] Activists in the field are unanimous in reporting that this process has accelerated since the election of the Harris government, however hard data is not available because the government ordered the Ministry to cease publishing its statistical reports. Furthermore, they argue that there is a direct correlation between the decline in enforcement and an increase in critical injuries (which, they maintain, have increased by 25% over the past year).

The disasters to which non enforcement of regulations can lead should be evident to anyone who has followed the Inquiry into the Westray mine explosion which killed 26 miners

[27] CAW-Canada, "Presentation to the OFL Health and Safety Enforcement Forum", October 5, 1995, p. 3.

in May, 1992. This explosion was caused by the presence of methane gas and the build up of coal dust in the mine - the two standard causes of explosions in coal mines. For years there have been regulations in place to control the presence of these deadly substances in a coal mine. The evidence presented to the Public Inquiry clearly demonstrated that these regulations were not enforced. Government regulators used the supposed existence of the Internal Responsibility System as an excuse not to inspect the mine and not to enforce the regulations. Coupled with hostile intimidation by the employer against anyone who invoked health and safety regulations and a blatantly pro management bias on the part of senior Department of Labour bureaucrats, the Westray mine was a disaster waiting to happen. But the non enforcement of regulations leads to similar, if less dramatic, tragedies in workplaces across the country on a daily basis.

The Harris government is also dismantling the specialized services provided by the government which support a regulatory regime. Professional staff at the ministry - doctors, engineers, hygienists, ergonomists - will be cut by 65%. Interestingly, - given the struggle we had on the Joint Steering Committee to establish that air monitoring is essential for the control of airborne hazardous substances - all 13 air quality technicians will be let go. Three of the four Ministry labs will be shut down as will the Ministry library.

Amendments to the *Occupational Health and Safety Act* have not yet materialized. The Harris government has indicated, however, that it intends to restrict the right to refuse unsafe

work to an "imminent" danger - which would eliminate work refusals over chronic exposure to low levels of hazardous substances or to work procedures which induce gradual deterioration of the body. Worker representatives will lose the right to participate in the first stage of an investigation and the *Act* will be changed to allow another worker to do the job of a worker who refuses unsafe work while an investigation takes place. Finally, the government intends to introduce the notion of a "frivolous" work refusal, opening the door for employers to discipline workers for invoking the provisions of the *Act*.

Workers' Compensation

The government has, however, shown its hand in how it intends to cutback in the related field of Workers' Compensation. Employers in the province have been lobbying long and hard for cutbacks to WCB. In a survey of 500 corporations and businesses, 59% put WCB at the top of their wish list for de-regulation.[28] The Jackson Report on WCB, which was released in July, 1996, embodies recommendations that will likely find their way into amendments to the *Workers' Compensation Act* that will be introduced this fall.

The primary thrust of these recommendations is to reduce benefits to injured workers. Compensation will be reduced from 90% to 85% of take home pay. Coverage for back injuries, repetitive strain injuries and certain injuries related to industrial diseases will be curtailed. Access to the appeals process will be restricted. In all, over $12 billion will be

[28] "Ontario survey identifies reform wish list", *Globe and Mail*, July 11, 1996, B9.

taken out of the pockets of injured workers and returned to the pockets of employers.

But the Harris government also intends to privatize important sectors of the compensation system. Control over the compensation claim for the first six weeks will be handed over to employers. This will allow employers and private insurance companies to demand their own medical examinations and to determine whether or not a worker returns to work.

The government is also conducting an organizational review of the WCB administration which is due to be released in the fall of 1996. Insiders predict that this review will be used to justify the privatization of major aspects of the WCB such as vocational rehab and the administration of claims.

Unemployment Insurance

Our national system of insurance against job loss is our most tangible legacy of the Great Depression. Despite having vowed that he would never "put a premium on idleness", the Conservative Prime Minister R.B. Bennett was forced by irate Canadians to introduce a program of unemployment relief in 1935. This initial program, however, was based on federal funding of local initiatives which provided, at best, a patchwork solution to a national problem. Popular support for a more comprehensive method of supporting those without jobs was strong enough to force a constitutional amendment transferring authority for

unemployment insurance to the federal government. A national program came into effect in 1942.

Our Unemployment Insurance program expanded gradually with the economy through the 1950's and 60's and the program was significantly expanded with amendments to the plan passed in 1971. Since then, a succession of governments have hacked away at the program - both in terms of the level of benefits and the number of workers covered. Drastic cuts to the program have followed close on the heels of the free trade agreements as our unemployment insurance is being harmonized with the much weaker U.S. program. The most recent amendments, which take effect on January 1, 1997, leave the UI program in Canada as a faint shadow of its former self. Even the name has been changed - to protect the guilty. In an era where no worker's job is secure, - and where official unemployment figures hover at the 10% level - we now have a program called "Employment Insurance".

It is a sobering exercise to trace the extent of the cutbacks to UI over this period. In 1971, the benefit rate was 75% of your insurable earnings; today, it is 55% - and this can be reduced as low as 50% for "repeat users"). It now takes much longer to qualify for benefits. In 1971, one needed to have eight weeks of work to qualify. This was extended to between 10 and 14 weeks (depending on the regional level of unemployment) in 1977. By 1990 the qualifying period had gone up to as much as 20 weeks. Under the system that will kick in at the start of the year, the qualifying period will be based on hours (instead of weeks) of work. This change will exclude many seasonal workers from any UI coverage. It will mean that part time workers who work less than 15 hours a week will now be eligible for benefits - but most will not qualify because they work too few hours.

The 1971 extension of UI meant that about 95% of workers who lost their jobs were covered by the program. Today, less than half of the officially unemployed in Canada qualify for UI benefits. The new regulations will also cut back the maximum duration of benefits to 45 weeks; they will use the tax system to start to "clawback" benefits from those who earn $39,000 or more and family income is being introduced as the test for eligibility. "Repeat users" - a term which conjures up a combination of drug addict and habitual criminal - are targeted for severe cutbacks. Practically speaking, this means that construction workers are being blamed for the fact that, in most parts of Canada, concrete will not set outdoors from December to mid March of each year.

This massive dismantling of our unemployment insurance program has had a devastating effect on the position of workers in our wage economy. The program was designed as a system of social insurance which recognized society's responsibility for economic displacement and which provided workers with dignity and some bargaining power when faced with job loss. The principles guiding what is left of our UI program frees the government of its responsibility for stimulating the economy and providing decent jobs and leaves a shell of a program based on private business insurance principles.

Workers have had to shoulder most of the burden of our economy's inability to produce enough jobs. The extent of this burden can be seen by measuring the cost to a worker of losing his or her job - i.e. the loss in income, after allowing for UI benefits, until a new job is

found. In 1976, (5 years after the 1971 UI reforms) a worker lost on average 5.2 weeks of pay when unemployed. In 1995, (5 years after the Bill C-21 cutbacks) a worker lost 17.5 weeks of pay.[29] Although Canada's UI benefits are still more generous than those provided in the U.S., when you look at the impact of unemployment in terms of the cost of job loss, Canadians are not as well protected as U.S. workers. No matter how you look at it, the dismantling of UI goes a long way to explaining the increased ability for employers to adopt a take it or leave it attitude towards the jobs and working conditions that they offer.

The peculiar thing is that all of this dismantling of UI has taken place despite the fact that the UI system is financially very solid. One must always keep in mind that the program was designed to run a deficit during times of recession which would be paid off when the economy improved. That has, in fact, been how the program has run financially. During the recessions of 1982-86 and 1991-94 the program's accumulated deficit rose to as much as $6 billion. UI premiums rose to record levels in the early 1990s to provide benefits for those laid off due to the impact of the free trade agreement. But Tory and Liberal cuts in benefits dramatically reduced the overall cost of benefits. Today, the plan has paid off all its debt and is turning a profit of about $5 billion a year for the federal government.

Most Canadians are also unaware of the fact that since 1990 the federal government has ceased making contributions to the UI program. But the revenue generating side of the

[29] CAW-Canada, *Economic and Social Action*, Vol 2, No. 1 June 1996, p. 5.

program is too lucrative for the government to pass up. About 6% of every paycheque issued in the country is paid into UI. The surplus from the UI program goes straight into the federal government coffers. Amazingly, since 1991, $9 billion from UI has gone towards the reduction of the federal deficit.

Employers, of course, are demanding a reduction in the premiums they pay - some even maintain that UI should be funded entirely by employee contributions. Although the federal government is likely to agree to some reduction in premiums, the new reforms to the UI program contain a so called "tool kit of active labour market services" which range from wage subsidies, income supplements, training programs and self employment subsidies. These new services promise to provide the federal government with a mammoth pork barrel which will be financed entirely by the UI program. These services will be farmed out to provincial governments with no enforceable federal standards and with the usual dubious impact on job creation.[30]

Is Canada's Labour Market Really Inflexible?[31]

In the midst of all the pontificating about how regulations have made our labour market

[30] See for example Terence Corcoran, "No mystery to job creation" *Globe and Mail*, April 2, 1996 p. B2 where he debunks one of the first products of this "tool kit". It is named *First Jobs*, - a $600 million program, handed out to Liberal party insiders, to set up a system for major corporations to hire 50,000 young graduates at $12,000 a year - which is big on PR and very light on economic impact.

[31] The argument in this section of the paper relies heavily on an article by Jim Stanford, "Bending Over Backwards: Is Canada's Labour Market Really Inflexible?", *Canadian Business Economics*, Fall, 1995. 70.

inflexible it is always interesting to conduct a little empirical research on the subject. The true measure of flexibility is, after all, the ease with which workers move from one occupation or form of employment to another. Jim Stanford, an economist with the Canadian Auto Workers has found that 20% of Canadian workers lose or change jobs each year. Canada, in fact, is developing a "just in time" labour market with a rate of total job turnover which is among the highest in the industrialized world.[32] Conditions of employment are also becoming more flexible which we can see in the increase use of sub-contracting, part-time work, home work and overtime.

Stanford argues that Canada's labour market is more flexible than that of the U.S. In a comparative study of the Canadian and U.S. labour markets he has found that:

- between 1983 and 1994 (a 12 year study period) the average sectoral employment volatility was higher in Canada;
- in the last half of the study period (1988-94), Canadian volatility was higher in 29 of the 37 sectors compared;
- of the 8 sectors where the U.S. was less volatile, four corresponded to public sector activities. Thus of the 33 private sector industries studied, Canada's employment was more volatile in 29 (88%)[33]

[32] *ibid.* p. 72.

[33] *ibid.* p. 74, note 7.

A more significant difference in the Canadian and U.S. labour markets is wage levels. In the U.S. real wages have declined by almost 15% since their peak in 1973; what this means is that real wages are now lower than they were in 1964. During the same period, labour productivity in the U.S. has increased 28%. In stark contrast, real hourly wages in Canada have increased 5% since 1973 and have remained constant since the early 1980's. Labour productivity has increased 12% since 1973.

An important factor in explaining the drop of U.S. wages is the de-regulation of U.S. labour market that has occurred over this period. The decline in trade union representation, the faster relative decline in public sector employment, the erosion of the real minimum wage, and the widespread failure to enforce labour standards are all symptoms of the weakening of institutional and social controls over the labour market. In Canada, however, there continues to be a much greater degree of social regulation which affects the wages workers earn.

Neo-classical economists argue that by abandoning attempts to consciously guide labour market outcomes, lower unemployment and greater labour market efficiency will result. Stanford argues, on the basis of the results of his study, that it is not certain or clear that lower unemployment will result from de-regulation of the labour market.

> "If the growth in demand resulting from enhanced competitiveness is not proportionately greater than the increase in productivity itself, total employment may actually decline - further reducing labour incomes and offsetting negative macroeconomic repercussions." [34]

[34] *ibid.* p. 81

Stanford concedes, however, that in a world of free trade, lower unit labour costs may lead to a positive result because the growth in investment and exports may more than offset the decline in domestic consumption. But this would be a painful and marginal advantage because the increase in employment would be gained at the expense of declining living standards.[35]

Standford's study illustrates that the driving force behind the corporate world's demands for de-regulation is not more labour market flexibility but rather a desire for lower wages. Regulation of the labour market has "assisted Canadian labour in retaining a certain degree of bargaining power, and defending its economic position despite chronically slack macroeconomic conditions and the integration of Canada into a global economy characterized increasingly by downward pressure on costs and wages." [36] Scaling back income support programs (as well as other labour market de-regulation) can be seen as part of a broader strategy to forcibly harmonize Canada's labour market outcomes - the most important of which is wages - with those of our trading partners (especially the United States).

Fighting Back

There is no question that we are in the midst of a vicious onslaught by corporations and their friends in government to dismantle the system of social protection that has been constructed over the past half century. Living in Ontario, there is good reason to be

[35] *ibid.* p. 81.

[36] *ibid.* p. 81

overwhelmed. It is sometimes hard to believe that the Harris government has only been in power for a little over a year; one does not want to think about the destruction they will have caused by the end of their term. It is understandable, then, that in some circles, despair has become the mood of choice.

The situation that we are facing, although depressing, is not unique. In discussing strategy, it is always important to remind ourselves that in our economic system capitalists have always had the upper hand. What we have been able to achieve in the way of economic and social protection has never been a product of the generosity or goodwill of the capitalist elites - it has come about through struggle and our ability to leverage economic and social forces to obtain concessions.

It may be of some limited comfort to remind ourselves, as well, that an unregulated market system has been tried before - in the 1870's, the 1890's, the 1920's and the 1930's - and it did not work. It will not work any better today. We need also to remember that workers and social movements organized effectively in the 1890's to change the system. There's no reason why we cannot do the same. The problem, of course, is that a lot of people will endure a lot of suffering before the dreadful lessons of unregulated capitalism are driven home again.

The fundamental response which I am advocating, is not much different today than it

was for activists a century ago. We need to organize.[37] I know this may sound trite. The real questions are who do we organize or how do we organize? Again, however, I do not think that the answers to these questions have changed much. We organize wherever we are. And organizers have to apply the same techniques - knowing our subject, looking for the weaknesses where pressure can be applied with some effect; developing strategies based on our analysis; building trust among individuals and groups who have had no experience of working together. And we must not forget that organizing takes courage - sometimes personal courage in the face of hostile opposition; always the courage to ask people to take risks.

There are a couple of practical suggestions in this regard that I have to offer that come from my experience in the labour movement. One is that we must focus on *building* the struggle. How close we are to ultimate victory is never as important as where we are today in relation to where we were yesterday. This attitude is particularly important for our current situation where governments and corporations are using their power with such destructive force. We need to stay focused on our agenda and take satisfaction from the successes we have achieved in building a popular opposition.

The other lesson is that you don't get what you don't fight for. The old adage of a union negotiator is that you seldom get something written into the collective agreement until

[37] These observations were written two months before the "Days of Action" which were held in Toronto on October 25 - 26, 1996. The success of this demonstration - and the demonstrations in the five Ontario communities over the previous year - is an indication that building a mass popular movement is not only possible but is well under way. In the context of these developments, my admonitions about the need to organize may rightfully appear to be somewhat dated.

you have already won it on the shop floor. It is worth keeping in mind that none of the regulatory programs that are currently being dismantled were handed to us on a silver platter. We need to struggle to regain them and we need to continue the struggle in order to keep them.

Developing strategies for fighting back is, by its very nature, a intricate exercise. There is no room for orthodoxy here. We need to encourage creativity and be prepared to re-examine long held views. Specifically, I think we need to avoid a knee jerk reaction to de-regulation by limiting our demands to a simple return to the regulatory programs that have been taken away. Most of us, after all, have spent a good deal of energy over the years criticizing the regulations that have disappeared. Sometimes our criticisms have argued that the regulations did not go far enough but often we have also said that the regulatory program did not accomplish what it was supposed to do.

Let me give you an example of what I am thinking of. At least once a year, during my 20 years in the labour movement, I would present a brief to politicians or some government agency dealing with labour law. Those briefs were highly critical of the collective bargaining regime - not simply on specific details, which may at the time have been the target for reform - but also on the inadequacy of the system as a whole. Invariably, I would point out that the certification system that was required by law - signing cards, collecting initiation fees, door to door organizing, plant by plant bargaining - was really a very effective system for preventing

union organizing. Considering the amount of energy and effort that was expended, the numerous legal hurdles that had to be cleared, if it was not a small miracle whenever any group of workers became unionized one certainly could be excused for having the feeling that the process resembled crawling up the down escalator.

No doubt, the intention of neo conservative governments is to make this process even more difficult. But I think there is a danger if labour's response is simply to demand the restoration of the former system. As I have pointed out earlier, a central feature of the Harris government's attack on labour has been to adopt the U.S. model and require a vote in every bid for certification. Five Canadian jurisdictions have now gone this route. Although the law still requires that 40% of the bargaining unit sign cards before an application is filed, my reading of recent Labour Board decisions in Ontario is that the Board will order a vote without examining the cards.[38] The Board has, in effect, adopted the logic of the employers and accepted that a vote is the clearest way to decide the issue. If you are having a vote, - and the law requires it to be held within five days - you do not need to worry about the application cards. What opportunities does this provide for new approaches to union organizing?

There seems to me to be the possibility here for more public, wide open organizing campaigns. In my admittedly limited experience in union organizing, I have noticed that whenever one is organizing in an industrial subdivision, for example, even though you are

[38] See *CUPE Local 79 v. City of Toronto* OLRB 2603-95-R (July 3, 1996) (as yet unreported).

trying to organize in secret, word spreads about what's going on through the coffee trucks, at the bus stops, etc. When we have achieved a victory in one factory, there is often a wave of excitement that goes through a whole string of factories. But the organizing system of secret signups prevented a union from taking advantage of any groundswell of support. I can recall Kent Rowley, one of my mentors in the labour movement, describing how, in the early 1940's in Montreal, textile workers actually lined up outside the union office to sign cards. It didn't happen often, (in fact, it may have only happened once) but the sparkle in his eye as he told me this story conveyed to me the possibilities of public, mass organizing.

It should also be pointed out that the collective bargaining regime provides unions with one fight back strategy that is not available elsewhere. Theoretically, at least, a union can negotiate the contents of regulations and legislation into their collective agreements. But practically speaking, in many situations a union does not have the bargaining strength to accomplish this. The current negotiations in the auto industry provide an example of the bargaining strength that is required. It was only in the final hours of negotiations that Chrysler agreed to contract language incorporating the current *Employment Standards Act* provisions for the eight hour day and a maximum of forty eight hours in a week.[39] This "breakthrough" took place in bargaining with one of Canada's toughest unions and where the company's production schedules have operated on the basis of the eight hour day / forty hour week for a half century.

[39] Other statutory conditions which the CAW had written into the collective agreement In these negotiations were the right to refuse unsafe work, maintaining workers compensation benefits at 90% of pay, preserving the Rand formula principle that everyone in the bargaining unit must pay union dues and maintaining existing pension rules which require companies to make enhanced payments to workers who lose their jobs in large scale layoffs.

But even the CAW will have a lot more difficulty in getting current *Employment Standards Act* protection on hours of work into the language of the collective agreements with auto parts companies where "just in time" production schedules demand that these companies often work flat out to fill the orders of the automakers.[40]

Does a Social Charter Offer a Solution?

In trying to develop a strategy for defending ourselves against global de-regulation some groups have proposed that a Social Charter, which would prescribe minimum conditions and enshrine basic human rights be written into the trade agreement itself. A "social charter" has been adopted by the European Economic Community. In Canada, it has been endorsed by the Canadian Labour Congress and the National Action Committee on the Status of Women. The idea of a social charter, however, has also been endorsed by the Clinton administration in the U.S. and the government of France. Their support has prompted increasing criticism from various organizations in the third world (and some NGO's in developed countries) that a social charter amounts to nothing more than a disguised form of protectionism and would be used to keep low wage countries from participating in the world economy. From their perspective, social development is a function of economic development and low labour standards do not *in themselves* create an unfair comparative advantage.

[40] It will be interesting to watch the extent to which unions are successful in writing into their collective agreements minimum standards that are being removed from legislation. CAW Local 40 at McGregor Hosiery Mills in Toronto - a relatively small local outside the auto industry - succeeded in having *Employment Standards Act* minimums incorporated in an agreement negotiated in November 1996.

This debate highlights the difficulties we are faced with in figuring out how to fight back against the worldwide lowering of social protections that accompanies the global marketplace. Third world popular organizations, which argue that low wages constitute a legitimate comparative advantage, also often maintain that basic rights such as freedom of association, the right to collective bargaining and the elimination of forced labour (including the worst forms of child labour) are not dependant on economic development and therefore these basic rights should apply universally.

In working my way through this debate, I begin by taking the U.S. support for a social charter with a grain of salt. Like Clinton's last minute championing of labour and environmental side deals in the NAFTA agreement, it involves more form than substance. It is designed, primarily, to soften the political opposition to the trade deals. We must not lose sight of the fact that global free trade is inherently adverse to the objectives of democracy and social improvement which inspire activists who propose a social charter. The fundamental purpose for global free trade is to provide multi-national corporations with unfettered access to resources, development and export. The wording of the trade agreement itself promotes a downward harmonization of labour standards, environmental protection and forms of social security. We should not, then, expect much in the way of protection of these values coming from the bodies established to administer global trading agreements. Consequently, it did not come as a great surprise that when the World Trade Organization (WTO) was established at

Marrakech in April 1994, the U.S. proposal to establish a Committee on Trade and Labour Standards was not adopted.[41]

Even if we could imagine some agreement on the nature and level of labour standards, the question of enforcement becomes even more problematic. The general assumption is that enforcement would left in the hands of the World Trade Organization itself. The WTO, however, is far from an ideal forum for administering a social charter. It is a government to government body which administers the contractual obligations contained in the trade agreements and which makes most decisions by consensus rather than by vote. A forum like this is designed to enable the big players to exert their economic and market power; there is no mechanism for workers, unions or social activists to raise or advance issues dealing with labour standards.

On the other hand, the International Labour Organization has been providing such a forum for decades. A United Nations agency based in Geneva, its mandate is to promote an equitable and effective equilibrium between social development and economic development. Annual conferences are attended by delegates from governments, and worker and employer organizations where policy is set through the adoption of Conventions. However, ratification of ILO Conventions by governments is voluntary and the ILO has no enforcement procedures. Its supervisory system is based solely on the pressure of international public opinion and

[41] A Committee on Trade and the Environment was established.

dialogue at national and international levels. Although Canada - and most of the developed countries - have ratified all of the important ILO Conventions, it is noteworthy that the U.S. has not. Even such basic Conventions of the ILO dealing with the right to organize[42] and the right to collective bargaining[43] have not been ratified by the U.S. on the grounds that they could interfere with national sovereignty. It is highly unlikely that the U.S. would agree to a social charter in a trade agreement that would interfere with economic activity on U.S. soil. Given the U.S. record, it might make more sense for social activists to work towards making ILO Conventions (which have been around for decades) legally enforceable than to rest our hopes on a social charter attached to the WTO.

The real value of the notion of a social charter, however, may lay beyond whatever meagre concrete protections might be written into a trade agreement. In the current context, raising the prospect of a social charter may be the most effective means at our disposal of challenging corporate rule by promoting an alternative vision to global trade - a vision which gives priority to the well being of individuals, communities and the environment. From this perspective, a social charter's most useful contribution may be as the rallying point around which opposition to globalization can coalesce.

An underlying assumption behind de-regulation is that corporations can be trusted to

[42] ILO convention 87

[43] ILO Convention 98

regulate themselves. Routine corporate behaviour should lead all but the most jaundiced pro business apologists to question such a proposition. This is probably why we have arriving on the scene corporate self regulation dressed up in a new series of management systems with well publicized labels such as ISO 9000 or ISO 14000. These systems derive from the International Organization for Standardization, an organization established in 1947 to standardize industrial operations across national borders. For four decades, ISO contented itself with establishing technical and engineering specifications on a consensual basis with government and industry so that such things as the thickness of pipe, the composition of alloys or the protocols in telecommunications would conform to an international standard. In this regard it should be made clear that the ISO did not set standards; its goal was standardization. Confusion about the original purpose of the ISO is compounded because the acronym "ISO" is routinely translated in English incorrectly as the International Standards Organization rather than the International Organization for Standardization.

In 1987, the ISO ventured into new fields developing a management system for implementing worker self management or "total quality" into a company's operations. ISO 9000, as the system is labelled, promised a product with zero defects and a workplace that was committed to continual improvement. ISO 9000 sets no specific standards but simply outlines a system which management can use to monitor and improve their production process.

ISO is in the process of developing its 14000 series which is designed to create

standardized global procedures for corporate environmental management which will likely be extended to cover occupational health and safety as well. The ISO initiative is in direct response to moves by European governments to set their own international standards. Unlike governmental regulation setting which allows for public input, the ISO system is developed privately and will go ahead regardless of public opinion or existing international conventions. But ISO 14000 is not regulatory - it just appears to be regulatory. It does not itself set standards and measures only the firm's conformance to ISO's management system - not the firm's *performance* on environmental or occupational health and safety issues. Furthermore, the system requires compliance only with local regulations not with international regulations or even the standards of the firm's home country.

Despite, (or perhaps because of) these shortcomings, ISO 14000 is being promoted as the new wave of global environmental regulation. At the minimum, it is being sold as a justification for giving regulatory relief to companies who are certified. Government inspections, it is argued, should be reduced or eliminated for companies certified under the program. Certification may also provide a due diligence defence in Canada for companies charged for violation of environmental laws. Following the directives of the Supreme Court in *R. v. City of Sault Ste. Marie*[44] Canadian courts have accepted an awareness of industry standards, a corporate environmental policy and a system to implement that policy as essential

[44] (1978) 85 D.L.R. (3d) 161.

elements of the due diligence defence.[45] In a more recent case, the Alberta Provincial Court ordered a defendant company to obtain ISO 14000 certification as part of its sentence.[46] It seems to me that part of our fight in the immediate future will be to expose such systems as ISO 14000 for what they are and to prevent their widespread acceptance as a reasonable alternative to enforceable regulations.

A Closing Thought

At the end of the day, I still feel there is reason to be optimistic abut the challenges that confront us. My basic reason for this optimism is my conviction that de-regulation will fail to produce the type of society that its advocates promise. Even in the last few months I detect a growing awareness of the widespread dislocation which is a direct result of de-regulation. I remain confident that people will refuse to allow themselves to be governed by an unregulated free market. It may be that the de-regulation of the labour market is not receiving a lot of public attention. But people are more aware of what's happening in the capital markets. With all the media that is now directed towards business it is difficult even for the casual observer not to notice that the stock markets and bond markets profit on our misery. People have noticed that the shares of ATT shot up the day after the corporation announced massive layoffs of employees; you do not need to listen that closely to learn that when more jobs are reported,

[45] *R. v. Bata Industries Inc.* (1992), 7 CELR(NS) 245 (Ont. Prov. Ct.).

[46] *R. v. Prospec Chemicals Ltd.* (unreported, Alta. Prov. Ct. Jan. 25, 1996).

the capital markets take a dive. General Motors rewards its workers for helping it produce the largest profits in its history by closing down plants and outsourcing their jobs. I was struck this past September by a news report that luxury car dealers in Toronto were sold out. Apparently it was impossible to buy a Jaguar anywhere in the city. The reason? September is the month when bond traders and fund managers receive their annual bonuses and they were out gorging themselves on Porsches, BMW's and Mercedes. What clearer illustration does one need of the inequality in the system? De-regulation and greed go hand in hand. It is with an understanding of this connection that we are best able to build our alternatives.