

LARRY SEFTON
MEMORIAL LECTURE

The Representation Gap
In The
North American Workplace

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I. Introduction

For the last six weeks I have been experiencing the distinctly pleasurable feeling of having come home -- to the City of Toronto where I lived for nearly twenty years, and to the University of Toronto, my old alma mater and now the school for two of my children. I have also been having the same enjoyable feeling of having come home intellectually, to the scholarly analysis of problems in Canadian constitutionalism, Canadian personal injury policy and, most pertinent to this lecture, to Canadian labour relations and Canadian labour law.

And while I met and spoke only a couple of times to Larry Sefton in whose honour these annual lectures are given, it was his union, the United Steel Workers, and his protege and colleague, Lynn Williams, who gave me my first several appointments as a labour arbitrator. These helped keep me interested and involved in the subject then dominated by my teacher, Harry Arthurs, when otherwise I might have focused all my research and writing on the study of tort law and of the judicial process.

This, my first extended stay in Canada for ten years, has also given me the chance to think seriously again about a variety of Canadian labour law controversies which I was involved in and wrote about in the 70's -- though hopefully with the advantage of a broader North American comparative perspective. Thus when I recently leafed through Reconcilable Differences, a book I wrote in 1979 about the experience in Canadian labour law policy up to that time, I found little in it that I would now actually want to disavow. However, I can now see more clearly that Reconcilable Differences, like almost everything we were then doing and writing in Canadian industrial relations, was trying to figure out how better to design our labour relations and labour law system so as to promote and civilize the

institution of union representation for purposes of collective bargaining. Rarely did we feel the need to think about, let alone to grapple with, the more fundamental challenge of whether and why there should be such an institution for Canadian workers.

By the end of the 80's that challenge cannot be ignored -- certainly not in the United States, nor in Canada either. In this country the major intellectual critique has come from the left -- e.g. in the law schools from people like David Beatty, a radical liberal, and Harry Glasbeek, a Marxist. Their skepticism is directed not so much at unionism as such, but rather at the institution's focus upon collective bargaining, upon the negotiation by unions of private contracts for their own members. Their concern is that the comparative terms and advantages of these contracts ultimately do depend on the parties' balance of power within the marketplace, albeit a market which has been collectively reconstructed by our labour law. This left critique still does accept the need for some form of union representation to protect employees from the hazards of the labour market, but it aspires to a broader worker movement whose focus would be on the political, rather than the economic, sphere.

One finds, in the United States, as well, examples of that same intellectual persuasion, e.g., among some participants in the Critical Legal Studies movement. But there the more crucial challenge is coming from the right, in the law schools from the exponents of a "law and economics" approach to just about everything, including the world of employment. From the point of view of this paradigm, a union of workers is just as dubious an organization as would be a union of businessmen. Any such organization is said to be a cartel inhibiting the ideal operation of competitive markets,

at the cost not just of allocative efficiency and productivity, but also of distributional equity and fairness. Nor is this conception of work and employment just a quaint academic exercise confined to the University of Chicago. Many of its proponents have been asked to translate their scholarly views into legal policy as members of both the Reagan administration and the federal judiciary. They have also provided an (after-the-fact) intellectual justification for the activities of a large number of American businesses which for thirty years have slowly but steadily been snuffing out collective bargaining from the private sector of the American economy -- thus creating the most severe and most visible representation gap within the North American workplace.

II. The Decline of Private Sector Unionism in the United States.

It is worthwhile spending a few minutes looking at what has happened in the United States, if only to have a clear picture of a scenario that most of us, I presume, would want to avoid here. Back in the early 30's, just before Senator Wagner introduced in the U.S. Congress the first labour legislation in North America which created a broad, legally-protected right to union representation, roughly 15% of private sector employees in the United States were covered by collective agreements. Under the auspices of this new legal policy -- one which was imported into Canada during World War II -- private sector union representation soared to more than 40% by the mid-50's. But then began a period of steady and then steep decline, to a point where now again less than 15% of the employees of American business are members of labour unions.

And these statistics about the aggregate stock of union membership in the United States mirror in turn the dismal performance of American unions in the flow of cases under the NLRA's statutory procedures -- i.e., in the certification process through which the union tries to secure legal bargaining rights and in the bargaining process through which the union attempts to translate its new authority into a first contract that will serve as the foothold for an enduring labour-management relationship inside the workplace. Suppose one put the question of how many of the employees in units in which the trade union had signed up a sufficient number of members to initiate the statutory procedure eventually ended up covered by a collective agreement. In the mid-50's the answer would have been about two-thirds, but it is only about 20% in the mid-80's. And as this bottom-line yield from their organising efforts has dropped so low, more and more union leaders have judged the effort to organize new members to be a less and less sensible investment of the dues monies of their existing members. Thus, the number of initial certification petitions itself began to drop quite sharply by the late 70's.

Of course, these bare statistics will not answer for us the more interesting question of what is the underlying explanation for these trends. Is it a lack of demand for this institution on the part of American workers, or is it a lack of available supply due to the tactics of their employers? To many people, it has seemed plausible to judge collective bargaining to be primarily suited for the male, blue-collar, production worker in the goods-producing industries -- the bastion of unionism in the 50's -- and of little interest to the female, white-collar, knowledge worker in the service industries -- the vanguard of the new labour force in the post-industrial

economy of the 80's. Certainly, to the extent this is an accurate account of what lies behind the statistics, there seems little that labour law can legitimately do about such disinterest on the part of this new breed of worker in that old brand of unionism.

While I am not able here to delve into the details, there is a scholarly consensus, based upon a growing body of empirical research, that this benign explanation for the decline of American unionism is far from the whole story. Actually, on its face that account would seem somewhat implausible, if only when one notes that during the last 30 years, the American school-teacher -- a quintessentially female, white-collar, knowledge worker in the service sector -- has become the most highly-unionised occupation in that country. The additional major explanation for the decline in private sector unionism is the dramatic increase in intense and often illegal resistance by American employers to union representation for their employees, particularly in those units where a union has managed to overcome the initial attitudinal barriers within the work force and signed up a sufficient number of members to launch the entire certification and first contract process.

Consider just these bare statistical indicia of that phenomenon.

1. From 1955 to 1985, the ratio of the number of charges of discriminatory firings of union supporters to certification elections rose more than four-fold.
2. During that same period the analogous ratio of bargaining in bad faith charges to new certifications actually rose at double that pace, to eight times what it was in the 50's.

Of course, these are trends in the number of unfair labour practice charges, not proven violations of the Act. Their relevance might thus be dismissed as reflecting only increased litigiousness on the part of American workers (as also of American consumers, business and the like). In actual fact, though, the proportion of employee and union charges against employers which the NLRB found to be meritorious jumped sharply during this same period when the absolute number of charges was soaring. And the best bottom-line index of what is truly happening in the American workplace is the fact that in 1985, the NLRB secured a right of reinstatement for nearly 11,000 workers who had been illegally fired for supporting their union and its activities, up from 1,000 reinstates a year during the mid-50's. And when one puts that reinstatee number side by side with the total of just under 100,000 employees who voted for the union in a board election in 1985, the current level of employer defiance of the NLRA seems daunting indeed.

Nor is the effect of such activity confined to what is still a minority of employers who engage in such crude retaliation. A large majority of American businesses include in their basic corporate strategy the objective of maintaining and expanding the non-union status of their operations, and this strategy influences their patterns of investment and location decisions, the design of the employment package and the types of employees that will be interviewed and hired. The success of that strategy for all employers has been greatly enhanced by the illegal activities of this sizeable minority. There is a widespread feeling among the American work force as a whole that, e.g. as Gallup found, 70% of employees believe "that corporations sometimes harass, intimidate or fire employees who openly speak up for a union", and, as Lou Harris discovered, 40% believe that their

employer would treat them in that way if they were found to have so exercised their legal rights.

The cumulative result of these several trends is a bleak prospect indeed for the American union movement. Every union undergoes a process of natural attrition through which it loses its membership in particular units whose firm goes out of business, or whose plants are relocated, or whose markets shrink in the face of renewed competition of changing consumer tastes. Thus, just in order to stay even in absolute membership, let alone to grow in tandem with a rising labour force, the union must establish new footholds in a significant number of additional units every year. For the last three decades, American private-sector unions have not been able to make successful use of the national labour laws for that purpose, and the cumulative result of that annual deficit is their steady and now steep loss of ground in the American economy: i.e., from 40% to 15% of the private sector work force. Nor is that anywhere near the end of this process. Projections from current trends estimate that U.S. union density will drop below 10% by the year 2000, and will not "stabilize" until it reaches a point somewhere under 5% by the year 2020. Long before that, no doubt, the members of the National Association of Manufacturers "Committee For A Union-Free Environment", will break open a bottle of champagne and toast themselves on a job well done.

III. The Canadian Connection

However deplorable many of you may find the American developments such as described, it is not immediately clear how pertinent these are to the Canadian industrial relations scene. After all, while overall union density

in the United States, both private and public, was dropping in half from the late 50's to the early 80's, the comparable figure in Canada rose from under 30% to just over 40%. Thus, while it is obvious why American unions and their supporters are eager to learn about and to draw upon the labour law policies in Canada which have helped promote that latter outcome, there seems little that Canadian policy makers will find illuminating for their purposes from events south of the border.

However, for a number of reasons, I believe that rather comfortable sense of self-satisfaction would be a mistake on our part. In the first place, while a number of commentators -- most notably, Martin Lipset -- have argued that our distinctively communitarian value structure has made collective employee action more attractive to Canadian workers and more tolerable to Canadian employers, I believe that diagnosis to be generally invalid. Certainly, any number of Canadian businessmen -- e.g. the banks, the trust companies and the department store chains (such as Eatons) -- have shown themselves just as ready to resist strongly any union intrusion into their branches and stores. What is different about Canada is that its political balance of power -- with the presence of a labour-oriented party like the CCF and then the NDP -- and its governmental structure -- in particular, the allocation to the provinces of constitutional authority over labour in our federal system -- has produced a host of innovative additions to the original Wagner Act labour law model that are designed to foil such opposition tactics of Canadian employers.

That highly favourable legal climate did help extend the coverage of collective bargaining to nearly 45% of non-managerial employees in Canada by the start of this decade. However, in recent years the pace of union growth

first slowed, then plateaued, and for the last four years has begun a gradual but steady decline. Current estimates are that less than a third of private sector employees now have their conditions of employment set by collective agreements. This large representation gap is most visible in the service sector, especially now that employment levels have stabilized in the educational sphere (in the early 70's) and in health care (in the early 80's) where most of the expansion of service-related collective bargaining has taken place. As Noah Meltz has shown, right now and for the foreseeable future the major growth in employment in the Canadian economy is taking place in the private service sector. True, among these downtown office and retail workers, at least the clerical, technical and administrative employees in the head offices of such large manufacturing firms as General Motors or Stelco do receive much of the benefits of employee gains won by the unions representing their blue collar counterparts on the auto assembly lines and in the steel mills. But only about 10% of the employees in Canadian bank branches, department stores, law offices and the like are now represented by unions, and there is nothing I can see on the horizon which will materially close that gap.

Even in the goods-producing sector, the place where collective bargaining does seem fully entrenched in the Canadian economy, perhaps we should also feel somewhat uneasy, especially after the ratification of the new Free Trade Agreement with a United States whose labour market institutions have followed the path I have just described. Let me sketch briefly the reasons why I have some concerns about that new factor in the equation.

1. I am satisfied that some considerable share of the credit (or blame, depending on one's point of view) for the rise and preservation of unionism in Canada has been the development of supportive labour law regimes, containing a variety of novel protections that were pioneered in one province or another and then emulated by other jurisdictions (including the federal government within its limited sphere).

2. When one reflects on that phenomenon in terms of theories of comparative federalism, it might seem rather puzzling. Certainly in the United States, the ability of more mobile capital to (threaten to) move their operations to other states with less protective and less costly programmes but with guaranteed access to the same national market, has always seemed to trump the ability of labour to use its much higher voting strength to press the immediate state government to adopt more favourable policies. That is why people like Governor Dukakis in Massachusetts have at least had to be concerned about the comparative policy stances adopted by his counterpart, Governor Sununu of New Hampshire, for example, a state which sits just 25 miles north of greater Boston.

3. A major reason why Canadians have avoided this Gresham's law of federalism -- under which the "bad" local laws drive out the "good" -- is because of the accident of geography and history. Whereas the United States is divided into fully 50 states, Canada has just 10 provinces carving up an even larger territory (and only six provinces covering the entire country west of the Maritimes). That means that Canadian business has nowhere near as viable an option to (threaten to) move perhaps 2000 miles away from its natural geographic sources of materials, transportation and customer markets in pursuit of more favourable labour (or other public) policies.

4. The new Free Trade Pact will likely alter this equation somewhat by accentuating what already is a more natural north-south axis to the economic geography of this continent. Anil Verma has shown that it is now standard corporate strategy for a firm like General Electric, for example, to plan its capital investment and plant location decisions so as to maximize the chances that its operations will become as non-union as possible. There is no reason to suppose that this corporate strategy will suddenly be ignored when a decision has to be made about whether to locate a new plant north or south of Lake Erie and Lake Ontario, for example, where both sites now promise equal access to the same market but the labour law regime in one jurisdiction is far more favourable to the prospects for union representation of the work force in the proposed new plant.

5. Nor should one take comfort in the thought that the nonunion option is viable only in the Right-to-Work states in the southern and southwestern United States, which themselves are also a couple of thousand miles away from the Canadian border. While it is true that the current stock of union density is still significantly higher in the northern states, that is the residue of the upsurge of unionization from the 30's into the 50's. From the enterprise's point of view the more pertinent question is whether the odds of a new plant being unionised under the same National Labour Relations Act are greater in, e.g., New York, or Ohio or Illinois, than they are in Alabama, Tennessee or Texas, and the answer to that question is in the negative -- and the odds in both American regions are far less than they are in Ontario or Quebec, for example.

6. I do not mean to overstate this point. Even considering just the human resource dimension to these investment decisions, Ontario and the rest

of Canada do have some distinct comparative advantages. Not only are our labour costs somewhat cheaper when one adjusts for the value of the dollar and the method of financing our social welfare benefits, but the quality of our labour force -- at least the high-school educated, semi-skilled worker -- is also somewhat higher. Hopefully, these more tangible factors will count more heavily in such business decisions than the deep ideological aversion felt by American enterprise to any union intrusion upon its managerial prerogatives. I do worry, though, that as these stark differences in comparative union density and organizational success become even more visible, they will play a significant role at the margin in such business decisions. And if that does happen, we should be under no illusion that Canadians are congenitally immune to the political effects (upon their labour legislation or other social programmes) of stiff inter-jurisdictional competition for capital and jobs. We need simply reflect on the nature and rationale of the labour law "reforms" enacted last year in British Columbia to appreciate that there is nothing sacrosanct about the policy achievements of an earlier era.

IV. Is Collective Bargaining Worth Saving?

To summarize, over the last 30 years a huge gap has opened up in union representation of U.S. workers; and while in Canada union density did expand steadily throughout the 60's and 70's, the gap is widening again in the 80's, and there is little prospect that such representation will be available within our private service sector where we can anticipate the largest share of employment growth in the 90's. But these empirical judgments do not by themselves justify the further conclusion that major

policy changes are warranted to try to do a better job at performing labour law's historic role of facilitating the spread of collective bargaining. A different message might be read into both the fierce resistance to this institution being exhibited by so many employers, and also the apparent disinterest on the part of so many employees. Perhaps collective bargaining is not such an attractive institution as we have long supposed, and so the right to union representation may be nowhere near as indispensable to the work force of the 90's.

Within the compass of this paper I cannot begin to address the vast subject of the pros and the cons of collective bargaining. However, some brief observations would be useful about the contending views on that score, if only to provide a frame of reference for some of the other important developments within the North American labour market which are helping to fill the vacuum left by the decline in unionism.

To its proponents, collective bargaining is a mode of employee representation which serves two vital social functions. It secures for workers a measure of protection from the employer and the vicissitudes of the labour market -- protection from substandard wages and benefits and from arbitrary and unfair treatment on the job. In addition, such protection is secured through a process which affords workers themselves a considerable measure of participation in the entire endeavour -- in their initial choice of a union, the election of their union officers, the formation of their bargaining agenda, the decision about whether to accept a contractual proposal or to go on strike, and the settlement or arbitration of grievances during the life of the contract. From the point of view of employers, while labour law does reconstruct the background market by enabling workers to

pool their bargaining resources so as to exert greater leverage vis-a-vis the firm, the law does not dictate from the outside across-the-board substantive solutions to workplace problems. Instead, the parties in each individual relationship are directed to sit down together to devise their own voluntary responses to their particular concerns, through measures which can be specially tailored to their individual needs and priorities, and which they can revise or discard as their situation changed.

To its contemporary critics -- especially, though not exclusively, in the United States -- any such allure to the collective bargaining process has long since been lost. In large part this is because North American unions are typically pictured as having evolved into large, remote bureaucratic organizations. When we think of "union" the image that comes to mind is not an activity engaged in by the member-employees, but rather an external entity run by distant officials. In such a union, inevitably there is considerable reduction in the direct participation and involvement of the employees in their own bargaining, and the process itself addresses only a limited slice of the concerns which employees have on the job. By that I mean that the focus of the union contract has always been on how to protect the employees from the harmful things that the firm might do to them, rather than to engage the employees and their talents in making a positive contribution to the success of the enterprise. To many present-day employees, especially the growing number of professional and technical "knowledge workers", such an orientation simply does not jibe with their own experience and self-conception on the job.

Needless to say, there remain a great many workers who do feel the need for protection from the variety of unpleasant ways in which management may

treat them, and who feel that some reduction in their personal voice and contact is a price well worth paying to be able to draw upon the power and the resources which a large union can deploy in securing and extending the necessary guarantees of a labour contract. But from the point of view of many employers, the presence of such union power and posture is precisely their problem rather than their solution. The North American economy has been undergoing profound changes in its labour force, its technology and its capital and product markets. Continual flexible adjustments to this ever-changing environment are required of any individual firm which wants to survive and to flourish within its own niche in the marketplace. But the current generation of U.S. managers and, I daresay, a good many of their Canadian counterparts, now see the national union as an organization which is even more insensitive to the operational needs of the firm than it is to the concerns and priorities of many of the new breed of employees. Business executives complain that too many union leaders stick rigidly to the language of contracts which may run 500 pages in length, and whose terms have often become as outmoded as the production process and technology which existed at the time this language was first negotiated. That is why these same executives have chosen to pursue a strategy of securing and preserving a union-free environment in as much of their operations as possible, only too often with little scruples about the legality of the tactics that are to be used in that pursuit.

That, in any event, is the critique of contemporary collective bargaining. Personally, I would grant the validity of some considerable part of it. That is why I believe there will have to be sweeping changes in

the nature and orientation of the union organization of the future, if this process is to be revived in the United States and to be expanded in Canada -- even more, if the institution is to be considered as deserving of serious legal help in that objective. I should immediately add, though, that it is a lot easier to diagnose defects in the current union organization than it is to design a better version. Too often, the pet prescriptions of the outside pundits are contradictory: e.g., they exhort union leaders both to afford more direct democratic participation to rank and file employees, and also to stop stubbornly resisting necessary "concessions" to firms from apparently outmoded protections in the labour contract, without appreciating that the former step is usually the major obstacle to the latter. There is also something of an artificial cast to this critique of unionism, at least to the extent it is offered as a justification for the latter's demise. Few major institutions now perform at anywhere near an ideal level -- certainly not business enterprise, government, universities, the health care system or the legal profession -- yet no one suggests that we would be better off without any of the latter (actually, now that I think about it, more than a few people might actually feel that way about the lawyers). The real question that must be asked about any of these institutions, including collective bargaining, is whether there are alternatives available that would do a better job of providing employees with the workplace protection and participation that they still do need.

V. Filling The Representation Vacuum

Over the last two decades a number of contenders for that role have emerged on the North American scene. Within the intellectual and political

spectrum in the United States, one always viable candidate is the individualistic labour market. The assumption of the market devotees is that the rigours of competition would be as bracing a tonic for workers as they now supposedly are for capitalists. And we have seen more than a casual flirtation with that option on the part of the Reagan administration: as evidenced by the great Volcker recession, with its 12% unemployment rates designed to wring inflationary expectations from the wage determination process; the deregulation of the product markets in transportation and communication, with their inevitable impact upon collective bargaining in airlines and trucking; the facilitation by capital markets of more and more corporate mergers, hostile takeovers and leveraged buyouts, all of these putting substantial premiums in the pockets of shareholders, but at the price of a large debt load which has forced firms to pare their labour costs and spur employee productivity in a variety of uncomfortable ways; and just last month the decision by the new Reagan majority on the U.S. Supreme Court effectively to deny blacks and other minorities any helping hand from state and local affirmative action programmes in the competition with whites for scarce jobs and contracts. With the exception of the last, these same market-reinforcing policies have also been pursued in Canada, to some extent or other.

Having said that, there remains a prevailing sentiment in the United States as well as in Canada that "a kinder, gentler nation" -- to use George Bush's expression of noblesse oblige -- does not ultimately leave its work force to the vagaries of a pure and unfettered labour market. That outcome seems intuitively and politically unacceptable because of the human and moral claims of the worker (and family) who is so deeply dependent on what

happens on the job. It has also become analytically much clearer to labour economists how idiosyncratic and imperfect are the processes of the labour market. The contemporary employment relationship inevitably involves the exercise of a quasi-governmental authority within the broad leeways left by external forces of supply and demand. With the decline of collective bargaining as the favoured candidate through which workers may share in and civilise the exercise of such authority by the firm's management, some other instruments have had to emerge to play that role. The two current favorites are government regulation, which tries to provide employees with the protection they need, and management-sponsored employee involvement programmes, which focus on the worker quest for some measure of participation in the enterprise. How have these newer models for representing the interests of employees upon the job stood up by comparison with collective bargaining?

(a) Government Regulation

For the last twenty-five years Canada and the United States have experienced a similar expansion in the reach and intensity of direct government regulation of the employment relationship -- beginning with human rights and fair employment laws, followed by occupational safety and then occupational health programmes, and more recently addressing such issues as pay equity for working women and the security and value of retirement pensions. For much of that time the major developments took place within the legislative and administrative spheres, with government bureaucrats, in effect, taking the lead in representing the interests of workers. More recently, in the United States there has been a major shift of attention to

the courts, with the astonishing burst of wrongful dismissal litigation under which a lawyer representing an individual employee asks a judge and jury to scrutinize some aspect or other of the employer's personnel practices (e.g., its use of mandatory, random drug-testing programmes). Canada, as well, has seen a major increase in such discharge claims in court, and for the last five or six years there has also been a variety of ingenious efforts to have judges use the new Charter of Rights and Freedoms to address some ticklish employment issues, e.g., regarding mandatory retirement.

To the legal mind especially, this regulatory model does exhibit considerable virtues by comparison with collective bargaining. Any one specific issue -- e.g., the use of lie detectors on the job -- will be addressed on its own intrinsic merits, rather than end up buried beneath the more pressing "bread and butter" issues that tend to dominate the final agenda at the bargaining table. Once these issues are addressed, the equal rights and obligations in every employment relationship are defined as a matter of moral and legal principle, rather than allowed to turn on the accident of the relative bargaining power of the parties in the variety of employment settings in the economy. The individual worker whose needs are thereby being protected is given a personal right to (hire a lawyer to) enforce the employer's obligation in front of the appropriate tribunal, rather than left dependent on the goodwill and resources of the union bargaining agent constrained only by a vague duty of fair representation owed the unit members.

But while government regulation does have such potential virtues, in practice it also exhibits a number of characteristic flaws. The most

vociferous objections tend to come from the business community who complain about the inflexibility and costliness of legal directives issued by outside government bureaucrats, and/or about erratic, unpredictable and expensive jury verdicts. Indeed, on that latter score I am struck by how similar are the complaints voiced by American personnel managers to those one hears from American (and now also from Canadian) doctors about their unhappy experience with legal control of medical practice through the vagaries of malpractice litigation.

Less well-known but equally important, this often onerous regulatory burden imposed by government on employers is often not matched by corresponding benefits conferred upon the employees. Thus, the consensus from the research about the enforcement of occupational safety and health legislation in the United States is that so far these laws have produced only marginal reductions in workplace injuries, a drop which is dwarfed in size by the capital expenditures that have been required of American employers to comply with the OSHA standards. Even where the law does produce appreciable gains for employees, too often the bulk of these gains are distributed to the better-educated, better-paid workers who are thereby better equipped to hire lawyers to take advantage of their new, broad-ranging legal rights (e.g., about wrongful dismissal). And in fact there is growing evidence that even among ordinary plant and office workers, the actual utilization of these legal programmes is sharply tilted in favour of the unionised rather than the non-union worker. Each of these characteristics of this new employment law in action is at odds with our initial aspiration which was to have the government provide its legal help

to those employees who did not have the personal and market resources to look after themselves.

(b) Employee Involvement

Over and above these deficiencies in legal regulation as an instrument for protecting the interests of employees, such a mode of representing workers by lawyers and/or government officials does not respond at all to the other vital social need that I mentioned earlier -- for active employee participation in the affairs of the workplace. In an effort to fill this vacuum, a growing number of influential non-union firms (and recently, more and more unionised firms) in Canada and the United States have been developing an array of employee involvement (EI) programmes.

These EI programmes go by a variety of names and have different levels of focus and objective. They range from modest schemes for job rotation and enrichment, to more extensive quality circles and quality of working life committees, to the occasional use of autonomous production teams, and even to considerable degrees of employee stock ownership (though the latter rarely carries with it much real control over the enterprise). The assumption of this entire EI movement is that employees want more than just to have secure protection -- whether legal or contractual -- of their basic financial and personal needs on the job. Workers also want the satisfaction that comes from having their views listened to about the kinds of work they should be doing and what their workplace environment should be like. And at the same time, this new style of human resource management aspires both to tap the often valuable insights and ingenuity which experienced employees can contribute to more efficient and higher quality production, and also to

elicit a much higher level of worker motivation and commitment which is so necessary for the enterprise to be able to compete and to survive in the more demanding business environment of today.

Admittedly, this new brand of EI does sit rather uncomfortably with the traditional adversarial flavour to our system of industrial relations and labour law, and there is reason for some scepticism about what many see as just a fancy modernised version of the old "company union". The basic concern is that while EI programmes do provide non-union employees with some greater or lesser degree of participation in the enterprise, in practice this tends to be participation without real power and thus without meaningful protection -- even any protection of the employee's right to participate as and when management sentiments about the value of EI undergo a change.

The truth of that observation is aptly illustrated by the term used by my colleagues at the Harvard Business School to describe -- and to advocate -- what they call "participatory management". Indeed, such EI programmes are best viewed as part of a broader trend in non-union personnel practice, a trend which has also produced a variety of other benefits and procedures that allow employees to challenge arbitrary and unfair treatment by their supervisors. The tacit assumption of this whole movement is that it is the job of the personnel department -- now sporting the fancy new title of the human resources division -- to represent the interests of the work force within the enterprise, and thereby to function as a substitute for the traditional outside, and supposedly too adversarial, trade union.

One should not downplay the genuine benefits which this more sophisticated and generally more benevolent style of personnel management

has actually secured for employees in their day-to-day relations with other segments of the firm's management, with those who are in charge of its operations, its finances and so on. At the same time, one must be realistic about the inherent limits of such a system of worker representation. As a matter of principle there is something problematic about a model which tells employees that they should entrust their destinies to people who are part of a single management team ultimately accountable only to the shareholders (and the latter's board of directors), a constituency whose interests regularly (and occasionally seriously) come into conflict with those of the work force. And in recent years these limitations upon participatory management have become vividly apparent in a growing number of cases -- involving friendly mergers, hostile takeovers and leveraged buyouts -- in which the firm engages in a major "restructuring" with a view to enhancing the value of the shareholder's equity, but often at some considerable cost to the stake the employees felt they had built up in the enterprise. When put to the test in cases such as these, this more attentive and more participatory style of management -- at People Express, for example -- has usually proven quite unhelpful in defending these vital interests of the employees in the future of the firm.

VI. A New Model for Employee Representation

To my mind there is a common thread to these characteristic failings of both government regulation and participatory management, a similar explanation of why neither such programme has been able sufficiently to satisfy the employee need for effective protection and meaningful participation in the workplace. The reason is that neither of these models

incorporates the kind of independent, cohesive worker base inside the firm which will give individual employees a real opportunity to take full advantage of what each programme sets out to offer. Even granted the limited focus of traditional collective bargaining and the numerous inadequacies of the present-day union organization, the fact is that this institution does entail representation of worker interests through a body selected by and accountable to the employees themselves. A union of and by the employees is far more likely to voice their true needs and secure their major priorities than is the mode of representation that can ever be provided by a government bureaucrat or a personnel manager, no matter how sophisticated and well meaning the latter may be.

When I am speaking on this subject to an American audience, at this point in my lecture I typically segue into a discussion of the kinds of labour law reform that are needed to save collective bargaining in the private sector of that country, where, as I noted earlier, union density has fallen from 40% to under 15% and is still dropping. Indeed, typically in my lecture I will sketch a programme which incorporates a number of key ingredients from Canadian labour legislation: e.g., union certification without an extended election campaign, first contract arbitration, and protection of strikers from permanent replacement. As a Canadian who has gone to the United States, I have found that this comparative perspective is highly illuminating of the possibilities (technical, if not political) of labour law reform south of the border.

But now having returned to Canada, I am equally struck by the limited leverage offered by labour law reform. For the last twenty years the various Canadian jurisdictions have all tried out a host of legal techniques

for fostering and preserving the scope of collective bargaining. These legal provisions clearly were a major help in the substantial expansion in union density in this country to something over the 40% mark by the early 80s. But as I said, in the last four years this overall figure has receded, and in the private sector it is now somewhere under 30%. Those numbers still do look quite good when compared to the United States. However, one must be somewhat less optimistic about the effectiveness of Canadian labour law (and/or unions) when one reflects on the fact that for every private sector worker who is covered by a collective agreement, two or more are not. I am sure that a few ingenious refinements could yet be introduced in the basic Canadian system, and it is also true that a few provinces -- most conspicuously British Columbia under Social Credit -- have recently backslid considerably. However, I am dubious that either of these factors could account for more than a few percentage points of the large representation gap which still faces so many Canadian employees.

When one reflects on the significance of this Canadian - U.S. comparison, it brings home more clearly the crucial common features of the North American model through which employees secure and enjoy representation -- if they do. These features include:

- (i) The "natural" pre-labour law state is for employees to go to work -- e.g., in a bank or an insurance company -- in an entirely unorganized, unrepresented, non-union condition.
- (ii) If any employee is to enjoy representation within the workplace, the majority must first be organized to undertake the process of joining an outside union, securing certification from a labour

board, and then winning a first collective agreement from the employer: at a minimum, this process is lengthy and complicated.

- (iii) Just about every non-union employer will be appalled at that prospect, and from their position inside and in charge of the workplace senior managers can and will deploy a variety of tactics through which to head this incipient unionism off. Even in the more benign Canadian legal setting there likely will be sustained employer efforts at persuasion and obstruction, while only too often in the United States there will be coercion and suppression.
- (iv) In order both to establish an initial degree of interest and cohesion among the employees, and then to overcome this sustained resistance by management, the initiative must be taken by a large existing union, a body which has ample resources but also has a rather distant and bureaucratic flavour. Rightly or wrongly, an awful lot of North American workers would rather not join, contribute to or be "governed" by an organization of that type.
- (v) In the result, some proportion of non-union employees are perfectly satisfied with the type of representation of their interests which is provided by a benevolent human resource management; another segment is highly dissatisfied and chooses to exit from their present firm, one by one, in search of better opportunities elsewhere; still a third group is somewhat dissatisfied by the status quo, but feels locked in to their current jobs in which they have invested so much of their working careers, yet is unwilling to join the kind of big union and to undertake the rather traumatic organising process which will be

necessary if their interests are to be voiced and met through collective bargaining.

- (vi) But these sources of employee concern and discontent remain real, and more and more often are now being voiced through the political process, requiring governments to respond with a growing array of regulatory programs: e.g., about plant closings and plant equity. But as I observed earlier, the Catch-22 of the regulatory option is that only too often such a programme is simply an unfulfilled legal promise to those workers who do not have the indigenous base of representation needed to make the programme a reality in their workplace.

Given that diagnosis of the fundamental underlying problem, I am attracted to a different and more searching change in our North American legal model. Suppose we do believe that employee participation and representation inside the workplace truly is a valuable process, both as a more effective technique for protecting the tangible interests of employees on the job, and also as a key ingredient of our broader aspiration to involve workers in, to democratise, an institution where we invest so much of our adult lives. Suppose also that we believe that we will not likely see enough of this "good" voluntarily provided to our employees by a management which is prodded only by a competitive marketplace. Then, just as our employment standards legislation now mandates more and more substantive protections -- e.g., of our health and safety on the job -- should we not simply require that every workplace afford some such form of employee participation, irrespective of whether this process has been voluntarily adopted by the firm, or the union version has been chosen by a

majority of the employees through the intricacies of our present labour law procedure?

Indeed, in Ontario as in a number of Canadian jurisdictions, the analogy to employment standards protection is even closer, because under our "internal responsibility" model of OHSA, every employer is legally required to establish a health and safety committee as a more effective instrument through which to reduce on-the-job injuries. If, as I believe, employee participation is both a useful lever for securing a variety of such tangible benefits, and is also a worthwhile activity in its own right, we should take seriously the notion that such a process would become a natural feature of every Canadian workplace, rather than left dependent on a rather difficult "choice" made by employees either in dealings with their management or with an outside union.

I do not suggest that the law should establish a full-blown scheme of collective bargaining with exclusive representation rights allocated to the large national and international unions which now perform this function in North America. Many if not most of the present non-union employees in Canada would vehemently object to any such "benefit" being conferred on them by the government, and in any event such a step is not necessary for the objective I have in mind. Rather, what I propose (building on the occupational health and safety model) is that every workplace above a certain size (i.e., 15-25 employees) must have an employee representation committee (ERC) whose members would be rank and file employees elected by secret ballot of their fellow workers. The committee would have jurisdiction across a broad expanse of employment issues, and be entitled to be consulted before management made material changes in these conditions: as

well this committee would play the front-line role in administering the growing number of regulatory programmes for the workplace. Every such committee should be entitled to extensive information needed to perform its representation roles for the employees (analogous to the data which management must now give to the board of directors which represents the shareholders). The committee should also have available to it some financial resources -- jointly contributed by the firm and the employees according to a statutory per capita formula -- so that it could draw upon the advice of people and organizations with experience and expertise in the relevant areas. A prominent source of such assistance would likely be the trade union which functions in that jurisdiction, but so also would be women's action committees, injured worker groups and the like. And in those situations where a union already enjoyed bargaining rights in a workplace, through a local body whose officers were themselves elected by the employees, I would confer upon this local union the responsibility and the resources to so represent the interests of the unit members.

In a book I have just completed, I have elaborated on these design details which I have had time only to sketch briefly here. But I should address the main objection which this idea usually evokes, especially from people who (like myself) are sympathetic to the premises of our existing industrial relations system. At first blush the idea of employee representation committees strikes these people as just a fancy modern version of the old "company union", a programme which may give employees the impression that they are enjoying some participation within the firm, but in reality leaves the employees without any power and thus without meaningful influence upon what actually happens to them. Worse, it is feared, the

experience of such in-house representation is likely to deflect the non-union work force from what the latter really needs, which is participation in a large independent union that has the strength and resources to make management sit up and take serious notice of the concerns thereby voiced by the employees.

Clearly there is something valid and troubling about that line of objection. However, ultimately one's reaction must turn on one's appraisal of the statistics I recited earlier. For my part I start from the fact that less than one-third of Canadian private sector employees now enjoy full-fledged collective bargaining through an established union, this percentage has recently been falling, and there is very little one can do by way of reform of our existing labour laws (in Canada, though not in the United States) which would have a major impact on this representation gap.

The question, then, is which path to follow from that starting point. Should we leave the majority of our employees, especially those in the private services sector, without any organized representation of their own, or at most with the kind of quality of working life or other such employee involvement programmes which the more sophisticated human resource departments unilaterally develop, design -- and confine -- to those settings where such "participatory management" is expected to enhance the productivity of the firm? Or should we decide, instead, that as a matter of social principle and public policy, every sizeable Canadian workplace should enjoy a basic level of worker participation, with the scope and resources that the community believes its workers should have in order to protect their needs even where these conflict with the interests of management and

the shareholders? When the choice is squarely faced in those terms, the answer seems pretty clear to me.

I am also confident that such a programme of indigenous worker participation, one which rests on the mandate of the law rather than the discretion of the firm, will likely be significantly more effective for the employees than was either the old company union or newfangled employee involvement. And in any event, there is nothing in the programme which could confine all employees to that minimum statutory level. True, many workers will likely be perfectly happy with the experience and the results of this new mode of direct dealings with their fellow-employees and their management, and they won't want anything more. To my mind these cases will be a mark of the success of this new public policy -- whose aim, after all, is to improve the condition of employees, irrespective of whether that also serves the interests of existing labour organizations. But just as we have seen with OHSA in Ontario, for this "internal responsibility" model to be fully effective in dealing with an often recalcitrant management team, many employees will likely need the experience and the resources which they get from membership in a bigger union with real bargaining clout. Once employees have been organised and have had the experience of this limited form of collective voice, but then have become dissatisfied with their lack of real influence and results, they may well be more inclined, more confident about casting their lot with a full-blown union, especially if the union movement has itself been prodded to develop a stance and style which is more attractive to the large unorganized sectors of our economy. In sum, I propose not to replace labour unions and labour laws, but rather to expand

and to complement the range of options which we now make available to North American workers.

VII. Conclusion

The gist of my argument can be distilled into these four basic points.

1. The underlying role of labour and employment law has always been to provide some mechanism or other for representing the interests of employees in the governance of the workplace, analogous to the manner in which corporate and securities law now provides for the interests of shareholders in the enterprise.

2. While Canadian labour law has done a much better job than has U.S. labour law in facilitating and encouraging union representation of employee interests through the process of collective bargaining, it is clear that there is a large and now a growing gap in the availability of that institution to the bulk of private sector employees in this country.

3. Neither of the contenders which have emerged in the last two decades to try to fill that vacuum -- neither legal regulation which offers employees representation by lawyers and government bureaucrats, nor employee involvement programmes which offer representation by human resource managers -- is an adequate response to this vital need of Canadian workers.

4. Thus I propose a rather different model to shape our public policies towards the world of work as we near the 21st century. All employees should be guaranteed as an automatic way of life in their workplace a mode of indigenous organization through which, as a group they would represent themselves in their dealings with the firm. Such an Employee Representation Committee structure would be a baseline from which

ordinary workers would be better able to take advantage of the other options which should still be available to them, such as quality of working life programs, government regulation, and, last but certainly not least, union representation for purposes of collective bargaining.