
THE POLITICIZATION OF THE ONTARIO LABOUR RELATIONS FRAMEWORK IN THE DECADE OF THE 1990s

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Those with a stake in the functioning of sound and productive labour relations in this province will look back on the decade of the '90s and conclude that our politicians made a mess of things. They will see that faced with the challenges of rapidly advancing technology, globalization of the economy, free trade with the United States, the growth of secondary labour markets, chronic youth unemployment and a labour relations act that had not had a major overhaul since 1975, our politicians chose the path of partisanship. Instead of engaging in balanced and constructive labour law reform, as part of a comprehensive strategy designed to respond to these challenges, the politicians chose instead to turn a political advantage into a labour relations advantage. The effect, easily predictable, has been to sow the seeds of dissension within the labour relations community. Absent meaningful dialogue we see ongoing conflict and the absence of common approaches or collaborative mechanisms to deal with the problems we face. Instead of accepting and relying upon the strength and neutrality of the institutions and individuals charged with applying and enforcing labour relations statutes, these politicians have exhibited a small-minded focus upon results rather than process. After all, goes their thinking, what is the point of amending the statutes to the advantage of your supporters if they are not also interpreted to the advantage of your supporters?

This paper critically reviews the labour relations initiatives of both the NDP government in the first half of the decade and the incumbent Conservative government during the second half of the decade. More specifically, the nature and substance of statutory reform together with the specifics of appointments to neutral adjudicative positions are reviewed against the backdrop of a tradition in this province of consultative and balanced labour law reform, coupled with respect for the impartiality of the tribunals that underpin the statutory structures. This paper confirms that free collective bargaining remains as the preferred method for determining terms and conditions of employment in a democratic society, demonstrates that we have been badly let down by our politicians and, I hope not naively, suggests that labour and management should, in the future, act together as a countervailing force in the promotion of balanced labour law reform, with the necessary study and consultation, and respect for the adjudicative institutions that are so important to the integrity of any system of free collective bargaining.

A useful starting point is the 1968 Woods Task Force Report¹, a federally commissioned task force charged with charting the course of future labour relations in the federal jurisdiction. The task force, comprised of highly respected labour policy scholars, conducted a full inquiry, drawing on labour, management and academia. The report laid the groundwork for a series of labour law reform initiatives throughout the 1970s. The single most important conclusion reached by the task force was that "as imperfect an instrument as (collective bargaining) may be, there is no viable substitute in a free society." The task force concluded, therefore, that the

¹Canadian Industrial Relations, Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968).

existing systems should be "improved, extended and preserved." In both explaining and endorsing the conclusion of the Woods Task Force, George Adams has stated:

Collective bargaining was therefore seen as the preferred instrument of labour market regulation for distributive issues. This procedure was deemed superior to a process of government-imposed and administered employment standards because it could better adapt itself to individual workplaces and to the conflicting interests of employees and employers in those workplaces. In this sense, collective bargaining best identified and accommodated both market forces and employee needs. Importantly, collective bargaining also provided employees with countervailing bargaining power and, thus, a greater "voice" in fashioning the terms and conditions of their employment. This led many scholars to analogize collective bargaining to democratic or participatory political institutions. From this perspective, collective bargaining was said to be a mechanism of "industrial democracy" providing to employees rights of "industrial citizenship." But as morally uplifting as this analogy is, it tends to obscure from view the more pragmatic attraction of collective bargaining in a mixed-enterprise liberal democratic society — that it purports to accommodate such a society's concerns for both the welfare of individuals and the preservation of competitive markets, private property and freedom of contract.²

The collective bargaining system endorsed by the Woods report and by the governments that subsequently entered into labour law reform and more recently by Adams is one that, firstly, facilitates, by providing access to collective bargaining through certification mechanisms and protections for those who seek to organize. Secondly, it establishes the ground rules under which the parties to collective bargaining may exercise economic power in support of their respective self-interest. I refer to the former as the facilitative provisions while the latter are referred to in the Adams paper as the "power-broking arrangements." The distinction between the facilitative provisions and the "power-broking arrangements" is of considerable significance

²Geo. W. Adams, *Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation* (1991) 23 Ottawa Law Review, 139.

in comparing the Ontario reform efforts of the 1990s to those that were undertaken in the 1970s and early 1980s.

Labour law reform poses a difficult and delicate problem for any government. In this province, where organized labour supports a particular party and where business aligns itself with the other mainline parties, the government, of necessity, is formed by either a "labour party" or a "business party." In this political environment there will always be a strong tendency to include in the spoils of political victory one-sided amendments to the existing labour legislation. However, the history of labour law reform demonstrates, firstly, that one-sided reform is both shortsighted and corrosive³ and, secondly, that for the most part governments have resisted the urge to reward their supporters in this way and have opted, instead, to travel down another path; a path marked by meaningful consultation, earnest problem solving and balanced initiatives. These governments have understood that it is more important to maintain a collective bargaining régime that, within the context of the common good, accommodates the legitimate expectations of labour and management than it is to reward one side at the expense of the other.

Successful and enduring labour law reform requires the input of both sides to the collective bargaining process, coupled with an in-depth comparative study and analysis of the existing system. It is only in this way that problems that are real to the parties can be identified, solutions devised and a balanced package formulated that responds to the legitimate needs of both sides. This is not to say that the role of government is simply to rubber stamp shopping

³P.W. Weiler. "The Process of Reforming Labour Law in British Columbia" in J.M. Weiler and P.J. Gall The Labour Code of British Columbia in the 1980s (Vancouver: Carswell Legal Publications, 1984).

lists submitted by each side. Rather, it is to say that government, through a process of meaningful consultation, coupled with careful analysis, must weigh the various alternatives and, to the extent warranted by economic considerations and labour relations norms, enact reforms that are responsive to the issues raised.

Professor Paul Weiler explains why it is imperative that "elected governments restrain their own supporters from the all too human bent to translate a victory in the political arena into major gains in the legal balance of power against its opposite number at the bargaining table."⁴ He explains, firstly, that if one side induces its party in office to use a current legislative majority to push through one-sided reform, this will serve as a precedent for the other side to reciprocate in kind when it is elected to office; the so-called "pendulum effect." He explains, secondly, that if the process by which the law is reformed is perceived to be unfair, the effect is to undermine the concept of voluntary acceptance by those institutions that the law is attempting to control; such that there will be harmful impacts upon society that might otherwise be avoided (i.e. increased incidents of grievances and strikes, relocation of work, not to mention missed opportunities for collaborative approaches). He explains, thirdly, that in so far as a labour board requires the tacit understanding of both parties to the process that rogues from either side will be treated severely, that support evaporates if the law that the Board is attempting to enforce is perceived as unfair either in substance or because of the way it was developed.

Given what is at stake, it is not surprising that most governments have tried to get it right. The 1968 Woods task force was comprised of the Dean of the McGill Faculty of Arts and

⁴Ibid, p.29.

Science, the Dean of the University of Western Ontario's Faculty of Law, the Director of the Centre for Industrial Relations at the University of Toronto and a learned professor at the Department of Industrial Relations at Laval University. The members of the task force were "preeminent Canadian labour policy scholars." They engaged in an extensive process of consultation, study and deliberation that brought forth a report upon which the government of the day could act in the knowledge that there had been the required consultation, study and analysis.

Professor Weiler's description of the coming to power of the NDP government in British Columbia in 1972, following a period of 20 years under a Social Credit labour law, and the process of labour law reform that followed is instructive.

The leadership of the B.C. Federation of Labour fervently believed that it would write the script for the brand new legal régime promised by the NDP in this 1972 campaign....

What actually happened was entirely different, due primarily to the personality and views of Bill King, one of the greater Ministers of Labour in Canadian history. King simply was not prepared to concede that kind of goal to the Federation. An early harbinger was his attempt to create a Royal Commission on Labour Law Reform.... The president of the Federation refused to serve on such a commission since it was totally at odds with his view that the new labour law should be fashioned through a closed dialogue between government and unions alone. Rather than accede to that sentiment, King created a committee of inquiry composed of three neutrals...the "three wise men"...went around the province receiving briefs from and talking to individuals and groups of various persuasions. Through this instrument the government was able to display genuine sensitivity to the needs and concerns of a broad array of organizations involved in industrial relations.⁵

This takes me to the 1975 amendments to the Ontario Labour Relations Act; labour law reform that was undertaken in this jurisdiction in a manner that should have served as an

⁵ibid.

example to the politicians of the '90s. A ministerial committee was struck comprised of the deputy minister, the assistant deputy minister, the chair of the OLRB, two vice-chairs, the Ministry's directors of research and legal affairs and the assistant to the chair of the OLRB. What is important to note is that the chair of the OLRB, recently appointed by the Conservative government of the day, was Tim Armstrong; a highly respected union side counsel. How better to confirm to the other side that the process was to be transparent and that labour's point of view was to be considered than to appoint one of its own, not just to serve on the committee but to act as chair of the Labour Board. The two vice-chairs of the Labour Board who served on the committee were George Adams and Don Carter, both of whom continue to enjoy wide acceptability as neutrals. The assistant to the chair was Vic Pathe, recently retired Director of Conciliation and Mediation Services and presently active as a mediator and facilitator. The assistant deputy minister was the legendary Bill Dickie. Their objectivity and commitment to balance in the system was beyond challenge. The committee engaged in an extensive series of meetings and consultations over a period of some eight months before tabling its proposals. In its own words their proposals were designed to respond to concerns that the Act was not as effective as it should have been in facilitating the acquisition of bargaining rights, ensuring fairness in the conduct of the bargaining parties and in minimizing industrial conflict.⁶

The legislative amendments that resulted from the work of the ministerial committee included a reduction in membership evidence requirements, provision for interim certification, the reversal of the legal onus in unfair labour practice complaints, the reversal of the evidentiary onus in successor and common employer applications, an expansion of the Board's remedial

⁶Amendments to the Ontario Labour Relations Act. Background Briefing Book, 1975.

authority in dealing with unfair labour practices and unlawful work stoppages and an extension of bargaining rights to dependent contractors. All of these amendments pertain to the facilitative provisions of the Act. Except for the outlawing of professional strikebreakers, the amendments did not alter the "power-broking arrangements." The amendments did not restrict the use of strike replacements nor deal with secondary picketing nor so-called "hot cargo." The package, notwithstanding the status quo in respect of the power-broking arrangements, was accepted by the parties to collective bargaining as the product of a genuinely consultative process and as a balanced result. The amended statute, except for further modest changes in 1981 and 1986, also balanced, , formed the basis under which labour relations was conducted in this province until the amendments of the '90s.

It is against the backdrop of a history of consultative and balanced labour law reform in this country, dating from the late '60s, and the implementation of the free trade agreement with the United States in 1991, that we turn to Ontario of the 1990s. In regard to the impact of free trade upon our system of labour relations, Professor Carter succinctly captured the essence of the challenge when he stated:

The Canadian industrial relations system operates within the North American competitive context and if Canadian labour laws deviate too far from American legislation, then Canada runs the risk of being put at a competitive disadvantage. The challenge for Canadians is to maintain the uniqueness of their own industrial relations system while at the same time ensuring that this system produces economic results which compare favourably in a North American competitive context.⁷

⁷P.D. Carter, "The Comparative Effects of U.S. and Canadian Labour Laws and Labour Environments in the North American Competitive Context" (1987) 12 Canada-U.S. Journal, pp.241-245.

One could reasonably have expected that Ontario labour law reform of the 1990s would seek to meet this challenge by means of an open and deliberative process that would draw upon the best that labour, management and academia had to offer. Instead, we received something quite different; one-sided labour law reform produced without meaningful consultation that has since spawned a second round of one-sided labour law reform also produced without meaningful consultation which has left a legacy of division, one-upmanship and uncertainty. Ontario deserved better.

The Ontario New Democratic Party came to power in an upset election victory in the summer of 1990. Labour law reform was at the top of the agenda. In the face of criticism from the management side that the process was proceeding to a predetermined result, without any meaningful study or consultation, an external committee was appointed on March 8, 1991. The committee was comprised of three management side representatives (respected lawyers from the management side of the labour bar), three union side representatives (two respected lawyers from the union side of the labour bar and a highly regarded national representative) and a neutral chair. I was the chair. On the surface a promising start. However, this committee was not charged with the open ended responsibility for examining the Act in consultation with the community in order to determine where, if at all, the provisions of the Act lagged behind North American norms and what new initiatives might be appropriate in responding to the challenges of the day; rather, the Minister identified some 30 topics for consideration, constituting significant areas of change, all seen by the management side as being in favour of unions. Moreover, the committee was not provided with staff or a research budget and was given 30 days to report. Contrast these arrangements with those in respect of the previous labour law

reform efforts that I have described. Compare these arrangements with those of the Sims Committee that undertook a review of the Federal Code in 1995 and tabled its report, "Seeking a Balance" in 1996. This was a full-blown inquiry conducted by a panel of three highly respected neutrals over a period of some seven months. This commitment to balance and evenhandedness is clearly expressed in the executive summary to that report, as follows:

Our approach has been to seek balance: between labour and management; between social and economic values; between the various instruments of policy; between rights and responsibilities; between individual and democratic group rights; and between the public interest and free collective bargaining. We seek a stable structure within which free collective bargaining will work. We want legislation that is sound, enactable and lasting. We see the too frequent swinging of the political pendulum as being counter productive to sound labour relations. We looked for reforms that would allow labour and management to adjust and thrive in the increasingly global workplace.⁸

The current NDP government in British Columbia, perhaps wishing to avoid the Ontario experience, has appointed a committee of neutrals to renew its statute. That committee has issued a discussion paper that emphasizes consultation and a commitment to balance.⁹

Indeed, compare these arrangements with those under which I undertook (along with a labour and a management representative) an inquiry into mine safety in 1981; an important inquiry but with a much narrower impact than labour law reform. I was given an eight-month leave from the OLRB, provided with an executive secretary, a technical advisor, a research budget, secretarial assistance and an office. These arrangements reflected the genuine concern of the then provincial government that the issues be thoroughly canvassed and that real solutions

⁸Sims, Blouin and Knopf (1996), Seeking a Balance (Government Services, Canada).

⁹Ready et al. "Managing Change in Labour Relations — A discussion paper", B.C. Labour Relations Code Review Committee, January 22, 1998.

be found. The unanimous report of the committee, "Towards Safe Production"¹⁰ tabled in both the federal and provincial Houses of Parliament in 1981 formed the basis for a series of initiatives by labour management and government and continues to influence policy-making in the area of occupational health and safety.

One could reasonably ask why, in the face of such restrictions, I agreed to serve. My view was that whereas an in-depth inquiry was impossible, it might nevertheless be possible to mediate between the labour and management appointees to the committee and thereby present the government with a balanced package. I had badly misread the situation. With the Minister having already tipped his hand and labour intent on rewriting the Act to its liking, there was little appetite for compromise. Not surprisingly, the committee report filed with the Minister on April 19, 1991 took the form of two diametrically opposed documents; one from the union members of the committee containing over 60 reform proposals and one from the management members recommending essentially the status quo. I dissociated myself from both documents and in the covering letter made a plea for meaningful consultation. The Minister then prepared a Cabinet submission dated August 7, 1991 with some 61 proposals for reform, even though there had been no meaningful consultation to that point and even though there had been no meaningful economic analysis of the impact of these proposals upon capital investment and/or job creation or job loss within the province. The Minister was content to say, without the benefit of economic analysis, that factors such as the Free Trade Agreement, exchange rates, increased global competition, interest rates and other federally-driven economic policies "...far

¹⁰K.M. Burkett (1981), "Towards Safe Production" (Ontario Government Publications).

outweigh any impact of the preferred options."¹¹ In addition, the submission to Cabinet, that was leaked to the public, called for a communication strategy designed to neutralize opposition from the business community. Although 20,000 copies of a government discussion paper were subsequently distributed and a three-month consultation process followed, during which the Minister and his aides met with representatives from some 300 groups, the damage had been done. Consultation that follows the tabling of preferred options is hardly the type of consultation that breeds trust and confidence in a thoughtful and balanced outcome.

Much of what was done to amend the facilitative provisions of the Act in 1992, although born of a tainted process, is, in my view, defensible. Given the structural and demographic changes within the province since 1975, with more part-time employees, more female employees and more service industry workers, the amendments that streamlined the certification process and made it easier for unions to organize and those that allowed for both part-time and full-time employees to be certified as a single unit are defensible reforms designed to extend the reach of collective bargaining to those most in need. The easier access to arbitration for a first collective agreement is also supportable on the basis that it promotes the establishment of collective bargaining relationships for those same employees. The reforms that provided for more expeditious Labour Board hearings and which gave the Board power to reinstate on an interim basis anyone terminated during a union organizing campaign and before a full hearing are supportable on the same basis. It must be added, however, that none of these amendments were

¹¹H. Jain and S. Muthchidamberum (September 1993), Bill 40 Amendments to the Ontario Labour Relations Act; an Overview and Evaluation. Hamilton, Ontario: McMaster University Research and Working Paper Series.

the result of the in-depth comparative study, nor part of a balanced package; hallmarks of prior labour law reform efforts.

Apart from the defects in process, the difficulty with the content of the amendments is, firstly, the absence of any semblance of balance. Management groups had asked that at the very least measures be enacted that would make unions more accountable in their dealings with members and in the exercise of bargaining power. There was nothing in the package for management. Indeed, the extensive rewrite of the preamble to the Act was an invitation to the Labour Board to revisit 20 years of jurisprudence, hardly an initiative designed to promote certainty and stability.

More ominously, without any independent study and without any evidence that Ontario's unionized workers were suffering under substandard wages and benefits these amendments, in contrast to those of prior reform, substantially altered the balance of power at the bargaining table. The Woods report concluded, correctly in my view, that the real economic power of the employer stems not from the right to lock out but from the ability to carry on business during a strike; a critical capability for both purchaser and supplier in a free trade economy marked by branch plants and "just-in-time" deliveries. Under the prior régime and that of every North American jurisdiction, except Québec, employees on strike were entitled to receive strike pay and/or to work elsewhere during a strike while employers were entitled to use non-bargaining unit employees to operate. Striking employees, had the right to return to work upon application for a period of six months from the start of a strike. The public policy consideration was that after six months the dispute should come to an end. The Bill 40 amendments, in addition to providing an indefinite right to return to work, limited those who could perform struck

bargaining unit work to other non-bargaining unit employees (hence the important link to consolidation of bargaining units — another Bill 40 amendment) who work at the struck location and managers and supervisors who work at that location. All other replacement workers including new hires, transferred employees, contractor's employees, managers and supervisors from other locations and members of the bargaining unit who may wish to return to work were prohibited from working. The government justified the ban on replacement workers on the basis that it would defuse the so-called "flash points" of collective bargaining; where the use of replacements to defeat union bargaining rights triggers picket line violence. However, over 95 % of collective agreements are and continue to be settled in Ontario without a strike or lockout¹² and of the strikes that do occur, very few are of the type that might justify a fundamental alteration in the balance of power. The point is that the government, in the clear knowledge of deeply felt management resistance, forged ahead without adequate study of either the necessity for or the impact of a blanket ban on replacement workers.

The 1995 Sims task force was also confronted with the question of whether a ban on replacement workers was required. It concluded as follows:

Replacement workers can be necessary to sustain the economic viability of an enterprise in the face of a harsh economic climate and unacceptable union demands. It is important in a system of free collective bargaining that employers maintain that option, unrestrained by any blanket prohibition. If this option is removed, employers will begin to structure themselves to reduce their reliance on their permanent workforces for fear of vulnerability, to the detriment of both workers and employers alike.¹³

¹²Ibid, p.72.

¹³Sims, Seeking a Balance, p.130.

The Sims task force went on to find that it is only in "exceptional circumstances" that replacement workers are used for an inappropriate end; that is to undermine support for the bargaining agent. The response of the Sims task force was to recommend, firstly, that a strike vote be held in relatively close proximity to the start of any strike and, secondly, that it be an unfair labour practice to use replacement workers to undermine union representation rights. In contrast to and in some measure because of the Ontario experience some three years before, the Sims task force attempted to find a balanced solution for what it identified as the real problem. It attempted, within the context of seeking a balanced overall package of reform proposals, to find a solution that would maintain the integrity of a union's bargaining rights in the individual cases where that is required, without upsetting the overall balance of power across the broad spectrum of bargaining relationships. Could Ontario not have sought a similar compromise?

Not only did the NDP politicians turn their backs on the hallmarks of sound labour law reform in this country, they borrowed from the American experience in their approach to appointments, even though there is a fundamental difference between the two systems that makes the American approach inappropriate in the Canadian context. In the United States where, because of legislative paralysis, there has been no major labour law reform for 50 years, the government in power influences the direction of labour relations policy through its appointments. In Canada, where it is much less difficult to amend the statute, the practice has been to affect labour relations policy through legislative amendment and trust the adjudicators to apply and interpret the statute as enacted. For the first time ever, an Ontario government failed to reappoint a sitting OLRB chair who wished to continue in office; one who, having transcended his management side background, had and continues to have a high degree of mutual

acceptability. Instead, in a move that further divided the labour relations community, it appointed a vice-chair with a union-side background; albeit one who had been appointed by the predecessor Liberal government six years before. Contrast this move with that of the Conservatives 20 years before when they appointed Tim Armstrong as chair of the Board.

If labour law reform is open and balanced there is little inclination or need to assess the composition of the Labour Board. There was no public criticism from labour in 1980; of which I am aware, that the composition of that Board, of which I was the alternate chair, was tilted in favour of management, even though only one of the 12 vice-chairs was from a union background. Six vice-chairs were from a neutral background and five vice-chairs were from a management background. However, one of the by-products of one-sided labour law reform is close scrutiny of Labour Board appointments. While bald numbers can be both unfair to adjudicators and misleading as an indicator of government intention, the inescapable conclusion here is that the composition of the Board was tilted in favour of the union side. When the NDP came to power there were seven vice-chairs with management backgrounds, seven vice-chairs with union backgrounds and three vice-chairs with neutral backgrounds. When the NDP left power there were six vice-chairs with a management background, 14 vice-chairs with a union background and four vice-chairs with a neutral background. The legacy of partisan one-sided labour law reform was compounded by a partisan one-sided appointment process.

The politicization of the Ontario labour relations framework continued with the coming to power of the Conservative government in the summer of 1995. The Conservative government rushed headlong into a repeal of Bill 40 — without any thought as to whether some of the facilitative provisions of Bill 40 should be preserved, without any attempt at the kind of analysis

and study that had marked prior labour law reform and without any attempt to go forward on the basis of a consultative process. The pendulum effect that Prof. Weiler had warned against in 1972 had struck Ontario. Repealed were the

- restrictions on the use of replacement workers,
- picketing and organizing on third parties' properties,
- the combination of bargaining units,
- the power to grant interim relief,
- automatic access to first contract arbitration
- unfair labour practice certification regardless of the level of union support,
- the duty to bargain an adjustment plan and
- the right of certain professionals and domestics to organize.

In addition, the preamble to the Act was again rewritten: certification was made conditional upon a vote in every case where a union demonstrates that 40% of eligible employees have signed membership cards; certification where the employer has contravened the Act was again made contingent upon membership support adequate for collective bargaining and only where no other remedy, including the taking of a representation vote, is sufficient to counter the effects of the unfair labour practice; parallel provisions were introduced to apply where a union breaches the Act in the course of an organizing campaign; the threshold for decertification was lowered from 45% to 40% apparent support in the bargaining unit, without any scope for challenge of the petition in support of decertification; ratification of collective agreements by a majority of the bargaining unit on a secret ballot vote was introduced; and a strike vote to be held no more than 30 days before a strike was mandated.

Some of these amendments will, no doubt, prove beneficial to the process. However, the point to be made is that in the space of five years Ontario has undergone two major revisions of the Labour Relations Act without the benefit of in-depth study and analysis and full consultation with both sides of the collective bargaining process. The legacy of this shortsighted and partisan political intervention has been to create a climate of uncertainty, to the detriment of all, and to accentuate divisions within the labour relations community such that there have been negative impacts upon society and opportunities lost for collaborative approaches to the economic challenges of the day.

Unfortunately the sad history of one-sided Ontario labour law reform in the decade of the '90s did not end with Bill 7. In early 1996 the Conservative government, in its Savings and Restructuring Act, codified "ability to pay" as a criterion to be taken into account in public sector interest disputes. As anyone with even a passing knowledge of interest arbitration understands, "ability to pay", in the public sector, where purse strings are controlled by government, is an inappropriate criterion if used to undermine the link between public sector wage levels and what is paid in the private sector for work of comparable value. "Ability to pay" may be relied upon to stage or delay wage increases so as to lessen the immediate economic impact upon a public sector employer, but it ought not to be used as a mechanism by which government influences public sector wage levels by unilaterally limiting the funds made available to public sector employers. Where free collective bargaining is the norm and where it is generally accepted that public sector employees ought not to subsidize taxpayers by working for substandard wages, the appropriate criteria for determining the absolute level of wages centre on the wages paid for comparable work in the private sector and general economic conditions. Where the overriding

public good dictates that interest arbitration be used as a substitute for free collective bargaining, the objective is not to make public sector wages and benefits conform to government fiscal policy but rather to reflect private sector norms for work of comparable value. Not surprisingly, most arbitrators, if they relied upon "ability to pay," did so only to the extent of delaying or staging wage increases. This was not good enough for the government.

The government then introduced Bill 136 in June 1997 under which a Dispute Resolute Commission, with jurisdiction over all public services governed by interest arbitration, was to be established. The intention was to remove arbitrators from the interest arbitration process and replace them with government appointees to the Dispute Resolution Commission. Indeed, as inconceivable as it may seem, persons serving as interest arbitrators on the basis of established acceptability were to be barred from serving on the Commission. The appointment of the commissioners was to be by order in council with no involvement of the parties in the appointment process. Clearly, commissioners appointed without either mutual acceptability or security of tenure, by a government that had already codified "ability to pay" as a criterion in public sector wage determination, are not independent adjudicators. Furthermore, in apparent disregard for the rules of natural justice, the Commission and its panels were to be given the authority to accept the submissions of "experts" without any obligation to expose these submissions to the scrutiny of the disputing parties. The panels assigned to individual disputes were to be encouraged to follow the policy statements of the Commission and were to be insulated from judicial review if they did so. The lack of sensitivity to and understanding of the interests at stake is appalling.

In addition to the issues surrounding interest arbitration, the government planned to strip public sector employees in non-essential services of their right to strike during a transitional period following restructuring of school boards, hospitals and municipalities and to assign successor rights issues to a public sector labour relations transition commission instead of the Ontario Labour Relations Board. Needless to say, there had been no consultation in respect of any of these initiatives.

Not surprisingly, labour commenced a media campaign accusing the government of, among other things, undermining the interest arbitration process for the purpose of cutting public service wages in order to honour its election promise of tax reduction. An emergency convention of the OFL was called and the delegates voted to commence political protest actions and work stoppages across the province. The Ontario Conference of Catholic Bishops wrote to the Minister of Labour on June 24, 1997 complaining about Bill 136. The Ontario Labour-Management Arbitrators' Association wrote to the Minister for the same purpose on August 22, 1997. Both the Toronto Star and the Globe and Mail questioned the motives of the government in topical editorials. Most importantly, and in keeping with the major theme of this paper that the parties must come together on matters of common interest, the Association of Municipalities of Ontario, a major employer organization, asked the government to withdraw the bill pending a "meaningful dialogue" with labour and management. Without going into further detail, it is sufficient to note that the government withdrew many offensive features of the bill on September 18, 1997. However, the "ability to pay" criterion remained.

The expectation was that even though the "ability to pay" criterion remained on the statute books, the use of traditional interest arbitration under mutually acceptable neutrals would

guarantee fairness in the system. I have been led to believe that in the Bill 136 discussions, the government agreed that it would not alter the list of mutually acceptable arbitrators kept by the Minister without consultation and that it would restrict the appointment of interest arbitrators to those on the list or to those who otherwise enjoyed wide acceptability in the labour relations community. The written response of the Minister of Labour to the president of the Ontario Labour-Management Arbitrators' Association dated February 2, 1998 confirms that this undertaking was made. The Minister stated, in part:

In response to concerns raised, reference to the Dispute Resolution Commission was deleted from the Act. The police and hospital sectors will continue under existing systems for appointment of arbitrators. The fire services sector will now be covered by a process similar to that contained in the Hospital Labour Disputes Arbitration Act.¹⁴

Less than three weeks later, the Minister appointed four retired judges to sit as interest arbitrators in hospital sector disputes. He did so without consultation even though none of the judges appear on the list of mutually acceptable interest arbitrators. The clear implication is that the government, improperly concerned with outcome rather than process, and not at all concerned with its undertakings, did not trust the mutually acceptable interest arbitrators to come to the "right" result. By way of postscript, the Honourable Charles Dubin, one of the retired judges who had been appointed, could not proceed because of a conflict in his firm. He wrote to the president of the OFL by letter dated March 11, 1998 that "if I had continued to serve, I would first, as has always been my practice, have satisfied myself that my appointment was satisfactory to all parties."

¹⁴Letter from Mr. J. Flaherty, Minister of Labour, to Mr. Ken Swan, President of Ontario Labour-Management Arbitrators' Association, February 2, 1998.

The government has also dealt with the OLRB in a manner that demonstrates a profound ignorance of the concept of quasi-judicial independence and a lack of respect for the tribunal upon which we all depend for adjudication that is not only fair and evenhanded but is seen to be fair and evenhanded. Whereas the government's removals and appointments of vice-chairs may be seen as restoring a measure of balance following the NDP rule, it is the nature of the removals and appointments that is at issue. We are left with seven vice-chairs with management backgrounds, nine with union backgrounds and three with neutral backgrounds. However, three vice-chairs were removed prior to the expiry of their fixed term appointments and two others were appointed "at pleasure" and without a recommendation from the chair. Quasi judicial tribunals, such as the OLRB, "are the face of justice seen by the largest numbers of Canadians,"¹⁵ and as such must operate free from the influence of government. Just as "the independence of the judiciary is a foundation upon which our entire legal system is based (so that) the integrity of the judicial process depends upon the judge being, and being seen to be, completely impartial and independent of government in their decision-making,"¹⁶ so also independence from government is a prerequisite for labour relations adjudication that is not only fair and impartial but is seen to be so.

This government, unlike any past government, has taken it upon itself to remove vice-chairs of the Labour Board in mid-term at its whim and to reappoint others, without the recommendation of the chair, to serve not for fixed terms but "at pleasure." There is only one reasonable conclusion as to why a government would do such a thing, and that is to exert control

¹⁵Edward Ratushay, "The Independence of Federal Administrative Tribunals and Agencies in Canada" (Canadian Bar Association, Ottawa 1994), p.12.

¹⁶Ibid, p.8.

over the Board and to influence its decision making. It goes back to the rhetorical question I asked at the outset. What is the point of amending the statute for the benefit of your supporters if it is not also interpreted for the benefit of your supporters? The words of Ron Ellis, former chair of the Workers' Compensation Appeal Tribunal, in his 1997 address to the Canadian Bar Association, bear repeating.

To come to the essential point, it is my submission that, in an agency environment where reappointments are a necessary and integral part of the system, a government's assertion of its right to use its reappointment power selectively for the purpose of screening out individual adjudicators for undisclosed reasons apparently personal to them is — must be — fundamentally incompatible with the principles of natural justice.¹⁷

He was speaking about the government's reappointment decisions at both WCAT and the OLRB.

He concluded that:

...the nature and pattern of the government's current round of reappointment decisions are such as to reasonably suggest to adjudicators in Ontario's administrative justice system agencies — and at least as significantly to the parties that appear before them — that Ontario adjudicators no longer have reason to be confident that they can make their decisions without fear of personal consequences.

He explains, rightly in my view, that adjudicators will take from the government's approach to appointments and reappointments that their livelihood may depend upon not making decisions that inconvenience the government or those with access to the corridors of power. Indeed, even if adjudicators turn a deaf ear to the message, the parties will have no confidence that the decisions made do not reflect these extraneous considerations.

The Chief Justice of Ontario and a former Progressive Conservative Attorney General, in an open letter published in the Toronto Star, confirming that the legal principles had been

¹⁷Ron Ellis, *An Administrative Justice System in Jeopardy*, September 24, 1997.

accurately stated by Ron Ellis, expressed his concern over the government's appointment process and concluded:

Fundamental to a high level of administrative justice is the requirement that tribunals be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way that reflects respect for their independence.

If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite either a passive commitment or create a deterrent to courageous judgement calls.¹⁸

The unfair labour practice complaint brought against David Johnson, the chair of Management Board, drives home the delicate balance between administrative justice, the appointment process and the power of government. In May 1996, the Service Employees International Union named the Minister as a respondent in an unfair labour practice complaint alleging that the Minister's office had manipulated the tendering process to ensure that a non-union contractor would be awarded the contract to clean the Queen's Park offices. In the middle of those proceedings, the Board issued a decision in an application by the Toronto Transit Commission (TTC) to prevent an unlawful strike during the October 25, 1996 day of protest. The Board's decision did not prevent the shutdown of the TTC. The press reported that in response to the Board's decision, the Minister "promised a review of the Labour Board" and that the Labour Board would "undergo a reassessment." The SEIU then filed a second unfair labour practice alleging that the Minister's statements constituted an attempt to intimidate and coerce the members of the Board and to influence their decisions by means of threatening them with loss of employment. The complaint set out the government's recent actions in terminating four

¹⁸Roy McMurtry, "Tribunals Bring Justice to the People," the Toronto Star, February 3, 1998.

vice-chairs without cause prior to the expiry of their fixed term appointments and the appointment of replacements "at pleasure." In a decision dated November 27, 1996 Vice-Chair Kevin Whitaker held that a reasonable apprehension of bias disqualified him and all other adjudicators at the Board from hearing the second unfair labour practice complaint against the Minister. Whitaker noted that all of the Board's adjudicators were in possession of information with respect to the manner in which the previous vice-chairs had been terminated which contradicted the pleadings of the respondent. The Minister of Labour subsequently refused requests by the SEIU to appoint a neutral adjudicator to hear the matter. An application was made to the Ontario Court (General Division) for the appointment of a neutral adjudicator. In a judgement dated September 5, 1997, the Court found that given the knowledge to which they were privy a reasonable apprehension of bias existed in respect of all the Board's adjudicators and the Minister was directed to appoint a neutral adjudicator. It must be apparent to any fair-minded person with a concern for the integrity of the Labour Board that governments who have a direct stake in many of the Board decisions and an indirect stake as a government supported by business, cannot appoint and/or remove at will those charged with making the "hard calls" that must be made if the system is to function as it should.

As you will recall, I referred at the outset to a plea that I would make that in the face of what has transpired, labour and management should act together as a countervailing force to the partisanship, insensitivity and ineptitude of our politicians. The decision of John Murray, of the management side of the labour bar, and Michael Mitchell, of the union side of the labour bar, to jointly represent the vice-chairs of the OLRB who had been terminated by the government serves as a positive example of the type of the bipartisan response that is required

of the labour relations community. In that case, the Ontario Court of Appeal in its judgement dated February 27, 1998 held that:

There can be no doubt about ... the importance of enhancing and supporting the decision-making powers of tribunals which stand beside the courts, dealing with specialized areas of dispute and regulation

The Ontario Labour Relations Board in its quasi judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions

The image of independence is undermined when government commitments to fixed appointments are breached. The court should not, by its orders, encourage repetition of this conduct.¹⁹

A further example of bipartisan response that bodes well for the future was the November 13, 1997 letter to both the Premier and the Minister of Labour over the signatures of Jamie Knight, of the management side of the labour bar, and Alan Minsky, of the union side of the labour bar, as the OLRB Appointments Sub-committee of the Canadian Bar Association. They wrote:

We are concerned that what should be the key objectives of the appointments process have not been met; the creation and maintenance of an OLRB which is built on the values of excellence, independence, impartiality and accountability to the labour relations community and to the public at large.²⁰

They went on to recommend that appointments be for a five-year term with removal for cause only, with automatic renewal, and that there be a consultative process for appointments involving the chair of the OLRB and the labour relations community. In the past few weeks the

¹⁹Hewat et al v. Her Majesty the Queen in Right of Ontario. Ont. C.A., February 27, 1998 (unreported).

²⁰Letter to Premier and Minister of Labour from OLRB Appointments Sub-committee of the Canadian Bar Association Labour Law Section, dated November 13, 1997.

government has reappointed the chair, who had been left hanging, and all seven of the vice-chairs due for reappointment in 1998; all for fixed terms.

The decade of the '90s has seen successive governments, through partisan labour law reform and disrespect for the concept of impartial adjudication, sow the seeds of division and mistrust within the labour relations community and, at the same time, undermine the predictability and credibility upon which the institution of free collective bargaining depends. The Sims task force identified the disadvantages of undue politicization of our labour relations. First, such involvement by government distracts the parties from their primary role of negotiating collective agreements with individual employers, tempting them instead to seek political "fixes." Second, it introduces political confrontation into bargaining relationships, which undermines the ability of the local parties to deal with one another. Third, it creates the habit of seeking legislative intervention into collective bargaining disputes. Fourth, it implies that labour relations is simply a political question which denies the higher elements of self-determination and distributive justice that underlie the process of free collective bargaining. I would add that it also destroys the opportunity for collaborative approaches to the challenges that face us at the macro level. This is what the politicians of the '90s have wrought upon us. As I said at the outset, Ontario deserved better.

We should be encouraged by the decision of the Association of Municipalities of Ontario to seek the withdrawal of Bill 136 in favour of meaningful consultation. We should be encouraged by the decision of John Murray, a management side lawyer, to join with a union side colleague in seeking to reverse the terminations of the three vice-chairs of the Labour Board who were terminated without cause. We should be encouraged by the decision of Jamie Knight,

another management side lawyer, to join a union side colleague in writing to the Minister to express concern about the nature of the government's appointments. In each of these instances, the coming together of the labour relations community caused the politicians to step back.

The lesson is that just as war is too important to be left to the generals, labour relations is too important to be left to the politicians. We who understand that free collective bargaining is the best mechanism to reconcile the competing interests of employees and employers in the thousands of individual workplaces of a democratic society and who appreciate the delicate balance between individual rights and market forces must realize that we are more than mere drones who work in the field of labour relations. Rather, we work in the service of freedom of thought, civility in conflict and the dignity of the greatest and least among us. It is incumbent upon all of us to recognize attacks upon the collective bargaining system and the independence of our tribunals for what they are; a profound threat to the most basic values that we have inherited from our scholars, from the wise legislators of a bygone era, from sensitive and concerned practitioners on the management side and from caring and courageous union leaders, such as Larry Sefton. It is incumbent that, in future, labour and management act together to blunt the partisan work of politicians who would seek to transform our system of collective bargaining and discredit its institutions in the pursuit of narrow political advantage.

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