THE LEGALITY OF THE NEW INDUSTRIAL RELATIONS

by

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B.A., The University of Winnipeg, 1980
LL.B., The University of Manitoba, 1984

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAW

in
THE FACULTY OF GRADUATE STUDIES
(Law School)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA
April 1992

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ABSTRACT

This paper examines the extent to which industrial relations innovations stressing individual employee participation in workplace decision-making conflicts with labour law in the United States of America and Canada. It begins with an overview of the economic imperatives facing North American business enterprises which compel them to adopt industrial relations innovations stressing employee-involvement in decision-making. The overview also highlights the potential conflict between these innovations emphasizing individual employees and labour law which emphasizes collective relations with employees. Next, the paper details the economic landscape that makes innovation necessary in industrial relations. The paper then describes the operation of specific innovations: Quality of Working Life Programs, quality circles, joint labour-management committees and semi-autonomous work groups. The paper emphasizes the need to examine the relationship between these innovations and labour law in historical context. Thus, the paper next details the history of fundamental elements in North American collective bargaining which cause particular tension for these industrial relations innovations: the exclusion of managerial personnel from collective bargaining, a trade union's exclusive bargaining agent status, and the prohibition of employer domination of or interference with trade unions. Next, the paper examines in depth the American and Canadian legislation and jurisprudence
surrounding these doctrines. This results in predictions as to the extent to which these doctrines render illegal certain aspects of the industrial innovations. The paper concludes that there is a strong potential for conflict between labour law and these innovations.
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I thank Professor M.A. (Tony) Hickling for his unwavering support and patience over the years as this thesis grew and grew. Let it be known it was not his idea to have a thesis of 300 plus pages. I also thank Professor J.M. MacIntyre, Q.C. for reading the thesis and for his timely suggestions. While this thesis may not do justice to the intellectual influences underlying it, the following influences must be acknowledged with deep thanks (some may be aghast to find their name listed in the company of some others): Professor Hickling, Gina Fiorillo, Wayne Moore, Leo McGrady, Gavin Hume, Don Jordan, Nathan Nemetz, Matthew W. Finkin, Karl Klare. And who can forget Sir Otto Kahn-Freund (1900-1979)? Otto had sadly passed away before any inkling of law school ever entered my thoughts. But his writing and intellectual tradition continues to inspire. And finally, I save my fondest and most heartfelt thanks for my spouse, Mary Anne Crabtree. It will be impossible to repay the love, patience and understanding she so unselfishly provided as the pages of this thesis, instead of we, multiplied. At minimum, I can offer this promise: a doctorate will not soon be on the agenda.
Introduction

Labour Law and the New Industrial Relations

Big business is facing its most dramatic - and traumatic - transformation of the post-war era. All large companies will eventually be affected by the coming changes whether they want to be or not because they're powered by a series of irreversible forces: rapid technological innovation, intensifying global competition, new employee attitudes. The term "downsizing" is often used to describe the phenomenon, since one of the first symptoms of the transformation is that companies become leaner. But that word is misleading, for it suggests a change in quantity and not in the quality of organizations. By the time this upheaval is finished, not only will companies be leaner but the way they do things will be different and the roles of managers and managed will be transformed beyond recognition.¹

Broader employee involvement in planning and decision making can result in improved productivity, better product quality and more competitiveness.²


of employee involvement and participation within enterprises.³

[A]ll [legal] doctrines which separate and make rigid distinctions between those who have a voice in how any institution is run and those who do the work might well become increasingly suspect. Many of the most promising experiments in labor-management cooperation deliberately set out to blur distinctions between manager and worker.⁴

New imperatives are facing North American enterprises, imperatives which will require transformation of these enterprises at their roots. Among the most radical transformations will be in the labour and industrial relations of these enterprises. The attributes of an enterprise necessary for it to compete in an ever-shrinking globe will be those which emphasize substantial involvement by individual employees in the decision-making processes of the enterprise, from the shop floor to the boardroom. This thesis considers these coming changes and their implications on the legal edifice that surrounds the contemporary avenue through which

³ R. Long, "Patterns of Workplace Innovation in Canada" (1989), 44 Relations Industrielles 805 at 806.

employees are encouraged to participate in enterprise decision-making - collective bargaining through independent trade unions.

It is important to consider these implications at this relatively early stage of transformation. As will be seen, the operative premise of this industrial relations transformation are at odds with the corresponding premise of the current collective bargaining regime. While the proponents of these new industrial relations strategies assume great similarity of interests between enterprise management and labour, collective bargaining legislation has been tempered by the fire of conflict that is assumed to lie at the heart of labour-management relations. These underlying assumptions foreshadow a variety of conflicts between contemporary collective bargaining law and what has been termed the "New Industrial Relations". If aspects of the New Industrial Relations are at odds with the legal regime governing collective bargaining, it is best to anticipate the problems and debate possible solutions now, before the conflict explodes immediately before us, prompting ad hoc and hasty answers. This thesis attempts to open that debate by articulating some of the intersections at which a collision is possible between collective bargaining law and the New Industrial Relations. It is hoped that the thesis will also inform the needed debate by placing matters in their historical and economic context.
Chapter One provides an overview of the issues, and the currents of political theory and history that must inform any reasoned debate. Chapter Two then reviews the economic data that makes an industrial relations transformation apparently inevitable. As well, Chapter Two identifies a variety of the industrial relations innovations that represent a sample of the shape of industrial relations to come. Chapter Three then turns to an analysis of the historical roots of North America's collective bargaining regime, with particular emphasis on those aspects of the regime which may cause the most risk for the New Industrial Relations. It is only with a firm grounding in this history that one can grasp the reasons we have a legal regime which may appear, by contemporary standards, unnecessarily to inhibit industrial relations innovations. Chapters Four and Five then deals with the specific collective bargaining laws of, respectively, the United States of America and Canada so as to assess the likelihood of conflict between those laws and aspects of the New Industrial Relations.

The thesis will establish that there is significant risk of conflict between the law and the innovations and, while the risk is less in Canada, both jurisdictions will need to address this risk in a timely manner.
Chapter One
Labour Law and the New Industrial Relations:
Introduction and Overview

Any society governed by democratic principles must ensure that employees of the society's enterprises have an effective voice in not only the terms and conditions under which they work, but the entire management of the enterprise. Justification for this proposition can be found in the philosophical roots of democratic theory and by tracing the historical development of government to the most recent democratic movements and developments in eastern Europe and what was then the Soviet Union. At their heart, these democratic developments bespeak the importance of people having direct power in shaping decisions which intimately affect their lives and well-being.¹

Extensive power-sharing in the workplace, however, is not deeply embedded in the North American vision of democracy, imbued as it is with the importance of property ownership rights. This is so despite the direct impact strategic

enterprise decisions\(^2\) have on the lives of employees affected.

The history of business enterprises and their relationship with their employees has consistently been one of conflict and wrestling for power.

Nineteenth-century enterprises were often subject to the autonomy of skilled craftsmen and the consequential control they exercised over their work processes.\(^3\) Although resistance from the trades was strong, employers were eventually able to overcome the workers' control by use of such methods as "scientific management" as a direct means of appropriating knowledge from skilled craftsmen and systematically making skill less necessary in workers.\(^4\) When skilled craftsmen resisted this exercise of property rights by management, employers had access to, and used, the law and

\(^2\) Decisions affecting the short-term and long-term strategy of an enterprise, including its business and investment strategies (for example, what product will be produced or service provided, what markets will be entered, what technology will be used, what plants will be opened and closed, etc.) and its human resources strategy. See, for instance, T. Kochan, H. Katz & R. McKersie, *The Transformation of American Industrial Relations* (New York: Basic Books, 1986) at 3-20.


state-supported force to undercut employees' job action.\textsuperscript{5}

It must be remembered, however, that skilled craftsmen were greatly outnumbered by the masses of unskilled labourers who fuelled the fire of industrialization. These latter employees were generally left unorganized by the skilled craft unions and, not having empowering skills, were subjected to what Sumner Slichter called the "drive" style of management.\textsuperscript{6} It was the unrest found within their ranks, together with the reaction of the skilled craftsmen to scientific management, that sporadically, but consistently, challenged the authority of management through organization and strikes that often turned violent when faced with the uniquely North American, intense employer antipathy to unions and collective

\textsuperscript{5} I. Bernstein, "Labor v. The Law" in I. Bernstein, The Lean Years: A History of the American Worker 1920-1933 (Boston, Mass.: Houghton Mifflin, 1960). Describing the organizing efforts in the American south during the late 1920's, an experience which he called "a microcosm of all America" during that period, Bernstein said as follows, at 41-42:

The Courts issued injunctions whenever employers asked for them, all \textit{ex parte} and some extraordinarily sweeping in their prohibitions. Similarly, governors were perfectly willing to order troops into struck communities to break strikes.


bargaining. Workers sought bargaining power so as to face their employer on a more equal footing and thereby extract a greater share of the wealth created in the enterprise for which they worked. Framed in the terminology of democratic ideals, workers argued and fought for a type of economic democracy in their day-to-day work-life to complement the political democracy they enjoyed.

But it is well established that North American workers did not strive for the type of worker control of industry and the economy that characterized class-conscious unionism and

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8 Derber, supra, note 4 at 29-59, 141-72. See also, C. Summers, "Industrial Democracy: America's Unfulfilled Promise" (1979), 28 Cleveland State L. Rev. 29, where the author stated as follows, at 29 (footnotes omitted):

In 1797, when Albert Gallatin, later Secretary of the Treasury, established a profit sharing plan in his glass works, he declared, "The democratic principles on which this nation was founded should not be restricted to the political process, but should be applied to the industrial operation as well." The theme that our system of political democracy should be matched by a system of industrial democracy has been an irrepressible one in our history. This theme is not ours alone, for in every political democracy there is recognition that decisions of the work place may be more important to the worker than decisions in the legislative halls. Democratic principles demand that workers have a voice in the decisions that control their working lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions. A review of the history of organized labor in the United States illuminates the tenacity of this deeply rooted idea.
socialist movements in parts of Europe during the same period.9 Control of the business itself, as opposed to the terms and conditions of employment, was to be left to the owners and their management agents.10 What is unclear is how much the victory of the collective bargaining form of industrial democracy, and the failure of more radical alternatives, was due to the uncoerced choice by workers for that more limited role, or instead the lack of any realistic chance of success for more radical alternatives in light of the intense employer hostility to even that less radical form.11 In any event, it was the collective bargaining form of industrial democracy which firmly took root in North America during the early decades of this century. The historical compromise by employers, and in context, the

9 Derber, supra, note 4 at 111-40.


11 W. Galenson, "The Historical Role of American Trade Unionism" in S.M. Lipset, ed. Unions in Transition: Entering the Second Century (San Francisco, Calif.: ICS Press, 1986) 39 at 42. See also, Slichter, supra, note 6 where he states as follows, at 398-99:

The employers' alarm [over labour trouble in the 1920's] was accentuated by the belief that American labor was in danger of becoming radical...The dread of radicalism was encouraged by interested groups...and even by Mr. [Samuel] Gompers [, president of the American Federation of Labor from the late 1800's to the mid 1920's,] and his lieutenants, who skilfully fostered the country's fears in order to present conservative unionism as a bulwark against irresponsible and dangerous groups.
victory by workers, by passage of the National Labor Relations Act\textsuperscript{12} in 1935, and later Canadian legislation modeled after it, ushered in a period of legitimization of collective bargaining by independent\textsuperscript{13} trade unions as the primary means by which workers' influence in enterprises was to be realized or channelled. This was not an insignificant victory for workers. But that legitimization did not end employer opposition to collective bargaining or other more far-reaching incursions into the government of enterprises.

While many employers accepted the legitimacy of unions, and others merely tolerated their presence, few employers would accord their organized employees anything more than opposition status in directing the workplace. In this form of democracy the opposition could only effectively vote with their feet by striking, usually at great personal loss to themselves and the enterprise as a whole. By right of property ownership, or agency of ownership, management was entitled to direct the enterprise and its workforce;\textsuperscript{14} the only fetters placed on this employer power were those the


\textsuperscript{13} "A hallmark of a democratic country is an organized labor movement that is independent of government and employers." W. Galenson, \textit{supra} note 11 at 39. See also, S. Salny, \textit{Independent Trade Unions Under the Wagner Act} (Boston, Mass.: Hildreth, 1944).

\textsuperscript{14} See, for instance, G. Dion, "Property and Authority in Business Enterprise" (1961), 16 Relations Industrielles 30, and S. Young, "The Question of Managerial Prerogatives" (1963), 16 Industrial and Labor Relations Review 240.
employees were able to gain through collective bargaining and strike action.

And of course there were those employers committed to fighting unionization at every step and only to give in collective bargaining that which was essentially taken from them by economic pressure through strikes and other concerted job action.

The history of employer opposition to unionization is well-documented, an opposition that has reached unprecedented proportions in the past two decades, particularly in the United States. Perhaps coincidentally, the proportion of the United States workforce which is unionized has dramatically decreased over the same period, with predictions that by the year 2000 less than 10% of the American workforce will be represented by an independent trade union. Less dramatic, but similar losses are predicted for Canada's unions. A committee of the United States House of Representatives has been the only governmental body to investigate the significance and cause of this decline. Its conclusion, with a minority dissent, was that the legal structure aimed at preserving employee rights to collectively bargain with their

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Thus, the primary means by which the law has attempted to democratize the workplace is faltering. Recent changes to collective bargaining legislation in Canadian jurisdictions, like British Columbia in 1987,\footnote{E. Jamieson, "Labour Law Reform in British Columbia: Part of the Problem or Part of the Solution?" unpublished paper, University of British Columbia, May 1988.} show an increasing unwillingness to provide collective bargaining with the kind of support that had characterized Canadian public policy in the preceding five decades.

Against this background it would appear that the prospects for greater employee involvement in workplace decision-making are dim indeed. Given the consistent employer opposition to the collective bargaining model of industrial democracy, or any other model providing workers with equivalent or greater power in the government of the enterprise, it appears unlikely that employers will, without some measure of pressure being placed upon them, provide...
workers with anything nearing an equal partnership in managing the enterprise.\footnote{19} That would constitute too much of a reversal of historical patterns of behaviour.

Surprisingly, however, we see a movement toward greater employee involvement in the decision-making processes of North American enterprises.\footnote{20} Most of the changes resulting in greater employee participation have their roots in the intense foreign competition North American industry has faced since the early 1980's and, in the unionized sector, the threat of nonunion competition which had begun to adopt a number of innovative labour relations practices to make themselves more efficient, productive and nonunion.\footnote{21} The changes started

\footnote{19} This is merely a restatement of the settled industrial relations truism that "few persons like to surrender power, and the more absolute their authority has been, the more reluctant they are to let it go." A. Cox, D. Bok & R. Gorman, Labor Law: Cases and Materials, 10th ed. (Mineola, N.Y.: Foundation Press, 1986) at 12. And as stated in T. Kochan & H. Katz, Collective Bargaining and Industrial Relations, 2nd ed. (Homewood, Illinois: Irwin, 1988) at 936:

Unions and employers will generally be reluctant to embark on significant efforts to change their established practices unless they are experiencing strong external or internal pressures to do so. There is tremendous inertia in any collective bargaining relationship.

\footnote{20} Kochan, Katz & McKersie, supra, note 2; Long, supra, Introduction, note 3 at 812 (the majority of employee participation innovations introduced in Canadian enterprises have occurred in the six years immediately preceding the 1985 survey discussed in this study); J. Mansell, Workplace Innovation in Canada: Reflections on the Past...Prospects for the Future (Ottawa: Economic Council of Canada, 1987).

\footnote{21} See, for instance, Kochan, Katz & McKersie, supra, note 2.
out with a focus on increasing the involvement in enterprise decision-making of individual workers and informal work groups and thereby increasing employee motivation, commitment and problem-solving. A smaller number of innovations have altered the roles of labour and management at the strategic levels of decision-making in ways that represent fundamental departures from the New Deal industrial relations system. Although such changes have been advocated for many years, and attempted unsuccessfully on numerous occasions, the intense economic need for change in the early 1980's sparked relatively more successful efforts in these areas. Line managers and an increasing number of top executives began then to see participation and workplace innovations as key to addressing two bottom-line objectives they were under increasing pressure to enhance: productivity and product quality.

Greater employee participation has manifested itself in a variety of ways.

First, participation in top level management decisions is rare in the nonunion sector, and only marginally more frequent in the unionized sector. This level of participation ranges from, at its mildest, information sharing and prior consultation between management and labour before a major strategic decision is taken, to its most extreme - minority representation of the employees on the corporate board of

22 Kochan & Katz, supra, note 19 at 403.

23 Kochan & Katz, supra, note 19 at 404.
A second form of employee participation is through joint labour-management committees both in the unionized and non-union sectors. This has been by far the most common method of increasing employee participation in enterprise decision-making. Joint committees can vary considerably in their make-up, purpose, authority and the level in the organization at which they operate. Common characteristics of such committees include an ability to gather information about the organization's problems within the workplace and, less frequently, competitive problems faced by the enterprise in the market. This information-gathering process is usually matched with the power to recommend solutions to the problems identified, but seldom the power to require these recommendations be implemented. The lack of power generally held by such committees tends to cause organized labour to view management efforts to widen the use of such committees in

24 Kochan & Katz, supra, note 19 at 408-09.


26 Riddell, supra, note 25 at 9.
recent years with a great deal of suspicion. The main impediment to increasing the numbers of such joint efforts aimed at making labour relations more cooperative has been "the consistent rejection by large corporations of the concept of collaborative decision-making and its implicit diffusion of responsibility and control."  

A third type of innovation is essentially a variation on the theme of joint labour-management committees. Quality of Worklife Programs ("QWL programs") can include joint labour-management committees, but they usually include much more than that. QWL programs is a phrase used to describe a variety of industrial relations practices originating from theory developed by industrial psychologists, sociologists and

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There are still many problems for the labour-management committees to overcome. Foremost among these is the question of the authority of the committees...With unclear and minimal authority to affect change, the labour-management committee risks being labelled as a time consuming, unproductive pretence of cooperation.

28 Marshall, supra, note 27 at 205.

organization theorists.\textsuperscript{30} It is these sources, plus the QWL emphasis on the individual worker rather than the collective body of workers, which cause organized labour to suspect QWL programs to be merely sophisticated behaviour modification techniques rather than a sincere effort by management to share decision-making power.\textsuperscript{31}

Such programs aim to draw upon the knowledge and ideas of workers to design a work process that both enhances the enterprises performance and provides workers with a large measure of autonomy so as to facilitate tapping their knowledge and ideas. In its most advanced form, QWL programs result in the establishment of semi-autonomous work teams which have broad authority over the conduct of their own work. Such work groups are said to make traditional hierarchical managerial roles on the shop floor non-existent.\textsuperscript{32}

A fourth industrial relation innovation potentially resulting in greater employee participation in the management of enterprise are employee stock ownership programs


\textsuperscript{31} M. Parker & J. Slaughter, Choosing Sides: Unions and the Team Concept (Boston: South End Press, 1988) 8-15.

\textsuperscript{32} Long, supra, Introduction, note 3; Newton, supra, note 30.
"ESOP's". Primarily designed to elicit greater employee commitment to their corporate employer by providing them a stake in the enterprise, ESOP's are perhaps the highest profile innovation to achieve renewed emphasis in the 1980's. Although the positive effect of ESOP's on enterprise productivity may be overstated, such programs have the potential to provide employees full ownership and thus management of enterprises or, more often, at least some voice at shareholder meetings.


A fifth innovation consists of placing nominees on the board of directors of corporate employers, drawn from the employees or their collective bargaining agent. Such representation is relatively rare and tends to arise from circumstances when unions agree to major collective agreement concessions. Unless it is a union buy-out situation, union representatives are in the minority on corporate boards on which they sit. However, they can provide employees with a voice in a forum where theirs was not directly heard before.

All these innovations are said to point to a new-found cooperative spirit developing in North American enterprises and a corresponding decline of adversarial relationships that have traditionally characterized industrial relations. Organized labour, faced with substantially declining membership roles, and employers facing the recession of the 1980's and early 1990's and heightened international competition and sluggish productivity growth, are said now to have matured sufficiently to restructure their relationship, emphasizing what common interests they have and de-emphasizing


39 Kochan & Katz, supra, note 19.

the conflict in their interests.

The innovations introduced on the previous pages have reached such a high incidence\(^{41}\) that industrial relations writers are speaking of a fundamental transformation of industrial relations so significant as to compare with the period when collective bargaining took hold as a primary means by which employer-employee relations were governed.\(^{42}\) By appreciating the historical context within which this transformation is occurring - lessened power of organized labour and consistent employer opposition to power-sharing with employees through collective bargaining - this apparent transformation becomes a particularly fascinating topic of study. Many earlier industrial relations observers have thought their time marked the commencement of a fundamentally new beginning.\(^{43}\) This historical context leads one to wonder about the sincerity of employers participating in such a transformation, the effectiveness of these initiatives in


\(^{42}\) Kochan, Katz & McKersie, supra, note 2.

\(^{43}\) Canada, Canadian Industrial Relations: Report of Task Force on Labour Relations (Ottawa: Privy Council Office, 1968) (H.D. Woods, Chairman) at 38 ("These changes may well work a transformation in the nature and role of employment, trade unionism and collective bargaining, particularly in relation to decision making."). See also, J.T. Dunlop, "Industrial Relations - Old and New", First Annual D. Wood Visiting Lectureship in Industrial Relations (19 November 1987), Reprint Series No. 74, Industrial Relations Centre, Queen's University at Kingston, Ontario, 1988 at 1.
providing employees with greater say in the enterprises, and the longevity prospects of these new initiatives, originating as many are in economic crisis of enterprises; the developments are just so at odds with the attitude employers' have historically exhibited towards increased employee power. Scepticism must therefore temper the optimism that these initiatives will substantially alter the balance of power in the workplace.

The scepticism that this power-sharing will actually occur is important to pursue since it appears many of these initiatives potentially conflict with legal doctrines that have developed around the traditional adversarial collective bargaining process. Consequently, in an effort to encourage what appears to be a breakout of workplace cooperation, scholars and government representatives have suggested adjusting these legal doctrines when in conflict with new industrial relations initiatives.44 The significance of such

Suggestions becomes apparent as one appreciates the fundamental nature of some doctrines suggested for reform. Some writers suggest, for instance, that the doctrine of trade union exclusivity in dealing with the employer over terms and conditions of employment must be relaxed. Other areas of reform include the managerial exclusion from bargaining units, the definition of employer domination or


interference with the formation or administration of a trade union and the duty of fair representation owed by a union to those it represents. In short, some of the central doctrines of the collective bargaining model of employer-employee relations are being measured for their consistency, or lack thereof, with the needs of the "New Industrial Relations."

The debate contains more than a passing resemblance to that which accompanied Congress' consideration of the original National Labour Relation Act in 1935. There too the debate pitched cooperative labour relation programs in the form of shop committees or representation plans initiated by employers against the need for legal doctrines shaped by the realities of the embittered conflict that often infected employer-

1775.


49 "A significant determinant of the growth of economic democracy and worker participation will be the extent to which these arrangements are compatible with existing labor laws, especially the National Labor Relations Act." Marshall, supra, note 27 at 207. He adds, at 211: "High priority should be given to amending labor and other laws to remove these legal obstacles."
employee relations.\textsuperscript{50}

Even the terminology of the New Industrial Relations echoes that of the human relationists of that earlier era. For instance, Sumner Slichter, writing in 1929, described then-developing industrial relations policies:

Possibly the most important determinant of post-war labor policies, at least during the last four or five years, has been the growing realization by managers of the close relationship between industrial morale and efficiency. When the severe drop in prices and in sales during 1920 and 1921 caused managers to search meticulously for methods of cutting costs and of increasing sales, many ways were found in which the workers could help if they would. Spurred by financial necessity, managers sought the aid of their employees to an unprecedented extent in saving material, reducing the wear and tear on equipment, diminishing the amount of spoiled product, improving the quality of workmanship and even soliciting additional business. Some concerns...have used their shop committees to reduce costs. The committees have suggested ways of saving labor and materials, they have made improvements in the location of the tool rooms and in the methods of issuing tools, they have helped increase the value of scrap by segregating materials of varying composition, and they have assisted in raising the quality of workmanship...[T]he workers responded to appeals for their help with almost startling generosity. And naturally this response has profoundly affected the labor policies of employers. The more plainly the workers have demonstrated the value of their cooperation, the greater has become the interest of managers in labor's good will.\textsuperscript{51}

In 1928 Charles M. Schwab, the veteran head of industrial relations at Bethlehem Steel (whose career dated back to the


\textsuperscript{51} Slichter, \textit{supra}, note 6 at 401-404 (emphasis in original).
bloody Homestead strike of 1892),52 spoke of the human engineering theories in this way:

[H]appiness ... lies in the doing of the days work with a zest and good-will, under the spur of encouragement and rewarded with the satisfaction of achievement. This requires the cooperation of labor itself, not merely of the hand but of the heart as well. To obtain that cooperation requires leadership in industry that regards itself not as partisan but as a trustee striving to guide the efforts of both capital and labor into profitable channels.53

The industrial relations practice Schwab identified as the "cornerstone of Bethlehem's relations with its employees ... [was] the employees' representation plan,"54 similar in structure with many current joint employer-employee committees. Regarding these representation plans, which were generally no more than company-dominated associations,55 Schwab said:

It is true that just as in any human relationships there are day-to-day problems arising in industrial relations which, if not settled with full justice to each, will threaten this bond of friendship [between employers and employees]. But the need for a medium for preventing or adjusting breaches in relations is not the whole objective of employees and employers. Essentially these two parties have been seeking a medium that would provide a common meeting ground. They have really been seeking for a way of living together which

53 C.M. Schwab, "Human Engineering" (1928), 10 Law & Labor (New York City) 14 at 14.
54 Schwab, supra, note 53 at 16.
55 Brody, supra, note 53 at 58.
would permit an expression of their personality and yet cement and increase this friendship. The employee-representation movement is such a constructive medium, permitting not only settlement of questions on which there is a conflict of interest, but, of even more importance, offering an unobstructed channel through which their unity of interest may be promoted. ... The [representation] plan, in its essentials, provides for the election by ballot of representatives by and from among the employees. It has for its purpose four fundamentals: to give the employees a voice in the determination of the conditions under which they work, to promote cooperation between employees and management in matters of efficient and economy, to furnish machinery for the prevention and adjustment of differences, and so far as possible to provide and foster continuous employment.56

During Senate debate on the National Labor Relations Act in 1935, employer representatives lamented the damage the Act would do to company unions, or representation plans - which they described as effective and fair instruments of employee representation - by the Act's prohibition on employer interference or domination of any labour organization which deals with the employer over terms and conditions of employment.57 Irving Bernstein summarized the employers' arguments before the Senate Committee:

[The Act], industry charged, assumed an unalterable conflict between employee and employer which could

56 Schwab, supra, note 53 at 16. This idyllic model of cooperation, however, was tempered by Schwab's knowledge of who ultimately was the boss; in reference to Bethlehem's widely praised representation plan, Schwab said as follows: "I will not permit myself to be in a position of having labor dictate to management." (Quoted in Brody, supra, note 52 at 58.)

not be changed or abated except through government intervention. Business, on the contrary, asserted an identity of interest between management and men. "Existing satisfactory relationships" would be upset, with detrimental results to operations. Bethlehem Steel, a pioneer in company unionism, asserted [company unions or representation plans] to be "the most practical method by which labor relationships may be carried on, not only from the standpoint of employers and employees but also from that of the public welfare." Employers defended it as an efficient system for dispensing of complaints, as conforming with employee wishes (as elections of representatives attested), and as being conducted without discrimination based on membership. While the trade union drew the line of battle between the classes, the company union assumed that "the best interests of labor can be served by having the employee and employer sit down together in a friendly and constructive atmosphere and, with a firsthand practical knowledge of their problems, work out a fair and equitable solution."58

Compare those comments with the rhetoric of the New Industrial Relations and one has a difficult time determining whether the writer writes now or then. For instance, in 1986 William E. Brock, a Secretary of Labor in the Reagan Administration, stated:

The years I have spent as a member of Congress, as the U.S. Trade Representative, and now as Secretary of Labor, have convinced me that adversarial, legalistic, inflexible labor-management relationships are no longer serving the best interests of the worker, the employer, the enterprise or the economy. Especially when companies ... with cooperative labor-relations demonstrate competitive strength, increased productivity, better labor relations, and production of a quality product at a competitive price ... Adversarial labor relations may have been an important factor in the maturing of our economy, but I am committed to the proposition that future prosperity will be built on the foundation of

58 Bernstein, supra, note 57 at 338.
cooperative labor relations.\textsuperscript{59}

Jack Barbash is perhaps more candid when he states:

The carrot side of union avoidance is union substitution. Management's union substitution recognizes the need for equity in the workplace but without a union. Management buys out, so to speak, union-proneness by "human resources management" (HRM). HRM "bypass[es] the union and deal[s] directly with the worker and his needs." ... On the money side HRM "compete[s] with the compensation and benefits existing in collective bargaining." On the human side, management looks to "the design of the organization and the workplace, the leadership performance of superiors and the involvement of individuals and small groups of workers in workplace problems and decisions" to bring about a fair, agreeable and participatory work environment.\textsuperscript{60}

Contrasting traditional adversarial labour relations with the New Industrial Relations, an industrial relations commentator recently wrote:

Slowly, but steadily, management has been learning that quality, not only cost, is key to market success. Understanding either by looking at their Japanese counterparts or by probing into their own past practices, the potential embodied in "productivity through people" management has adopted a new outlook toward their role and industrial relations function in the workplace ... Managers are now seen as culture builders. They are expected to manage their subordinates' commitment and motivation, thus inducing them to raise their efforts at work and concern for product quality ... Once this notion has made its way into managements' frame of reference, managements recognize (a) the inevitable link between the quality of industrial relations in their own house and the quality of the product they produce, and

\textsuperscript{59} W.E. Brock, "New Cooperation Between Labor and Management" (1986), 3 Detroit College L. Rev. 689 at 690-91.

\textsuperscript{60} J. Barbash, "The New Industrial Relations in the United States: Phase II" (1988), 43 Rel. Ind. 32 at 36-37 (footnotes omitted).
(b) the importance of the individual worker to quality production, because "the people down in the pits are the ones who really understand what's wrong with the system." Consequently, managements have been trying to better manage their workers' motivation in an attempt to make them invest more energy in producing better products.

But, one cannot extract higher worker motivation and commitment, arguably indispensable ingredients for manufacturing better quality products, without creating a supportive environment of high trust, openness, cooperation, and easy communication ...

Growing managements' awareness of the link between worker motivation and commitment and a company's competitiveness underlies a radical change in a major assumption long-held by management and unions - that industrial relations are adversarial by nature.\textsuperscript{61}

The close parallels in rhetoric and substance between the New Industrial Relations and the employer-dominated representation plans and company unions described by Schwab, Slichter and Bernstein, highlight the care which must be taken before fundamental collective bargaining doctrines - formed from the desire to avoid company unionism and employer domination - are radically altered or jettisoned altogether in an effort to embrace more cooperative labour relations. It may well be that the adversarial model of labour relations evident in the collective bargaining model hinders cooperative labour relations initiatives which are key to future economic prosperity. But workers may never experience their fair share of the fruits of that prosperity if the primary mechanism by

\textsuperscript{61} Y. Reshef, "Changing Environments and Management Industrial Relations Practices: Implications for United States Trade Unions" (1988), 43 Rel. Ind. 43 at 48-49 (footnotes omitted).
which they have obtained a share in the past - collective bargaining through independent trade unions - is substantially weakened by legal reform aimed at encouraging cooperative labour relations.

This is not to say, however, that recent industrial relations innovations should not be given an opportunity to establish that they are more than reincarnations of earlier practices that were hostile to employee rights and real employee power in the decision-making processes of the enterprise. In their best light, these recent initiatives create encouraging possibilities for greater democratization of the workplace.62 Coupled with the inherent limits on employee power through collective bargaining as practised in North America over the past five and one-half decades,63


these new initiatives could be warmly embraced by workers. But this is likely only if, unlike earlier similar innovations, real power is given up by management and transferred to employees through these initiatives. Interestingly, commentators have suggested that what distinguishes these recent initiatives from their earlier cousins is the real transfer of power which is intended to accompany them. Indeed, the positive economic effects promised by these innovations is said to be dependent upon management transferring real decision-making power to employees. If power is in fact transferred through these initiatives, policy makers may have a stronger appetite to adjust the underpinnings of entrenched collective bargaining legislation to accommodate these new innovations.

Thus, the first matter that must be determined is whether, and if so, to what extent, these innovations run contrary to legal doctrines underlying our collective bargaining system. In this regard, the law of four North American jurisdictions will be considered. These are the federal United States, British Columbia, Ontario and the Canadian federal collective bargaining legislation. The American experience is examined because the literature and case law on such issues is much further advanced than that in Canada. The British Columbia, Ontario and federal legal regimes are used because of their historic bell-wether role in

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Canadian labour legislation history.  

If legal problems are likely, as I believe they are, the debate must begin about the wisdom of adjusting these legal doctrines to accommodate the innovations. A key factor in determining the wisdom of such a move is the degree to which workers are empowered by these innovations as compared to the empowerment provided by current labour law doctrines. Only then will we be able to properly gauge the wisdom of accommodating legal reform.

While comparing the degree of worker empowerment available through the New Industrial Relations and undiluted collective bargaining legislation is an important consideration if democratizing the workplace is a goal, it cannot be the only comparison made. Enterprise economic performance under each must also be gauged. A democratic workplace is only a useful ideal if it is also economically viable. This should not prove to be a level of analysis workplace democracy advocates will have a difficult time surviving. There appears to be a general consensus in the literature that many of the innovations included within the New Industrial Relations have at least some positive effect on productivity and overall economic performance of the enterprises that use a number of these innovations in tandem

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with each other. Although there is evidence that totally democratic workplaces (i.e., those run entirely by and for the benefit of its employee/owners) experience competitive problems in the market, the consensus appears to be that a more democratic workplace than is currently common is more economically viable. In fact, it is the close correlation between increased democratization of the workplace and greater enterprise economic prosperity which has attracted employers to the New Industrial Relations. For employers and business commentators it is the economic promise of "the new industrial relations" which catches their imagination and attention; fulfilling democratic ideals is seen as a beneficial side effect. As Charlotte Gold has stated in reference to one aspect of "the new industrial relations" (joint employee-employer committees):

Some proponents of joint committees are interested primarily in greater productivity, but see employee satisfaction as an added benefit. Others consider increased employee satisfaction, achieved through improving the quality of work life, to be the main purpose of these efforts, with increased efficiency and improvement in the quality of goods produced as

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66 For example, see Kochan, Katz & McKersie, supra, note 2.

fortuitous side effects.68

It should be neither surprising nor distressing to find that employers and workers are motivated by different considerations in embracing the possibilities of "the new industrial relations." It merely illustrates the conflict of interest that has always fuelled their relationship. However, these conflict of motivation and interest are important illustrations of why we must be wary as we approach efforts for legal reform aimed at achieving more cooperative labour relations; when premised as these efforts are, on different goals as between employers and employees, the result of these efforts may be to the liking of neither party. The disappointment of that result should not be compounded by the difficulty of retrieving a collective bargaining legal framework that was modified to encourage such cooperative labour relations.

While assessing the wisdom of adjusting collective bargaining legislation to accommodate the New Industrial Relations is beyond the scope of this paper, the paper will serve to illustrate that such a debate is necessary by identifying the conflict between the law and the New Industrial Relations. Specifically, those aspects of the New Industrial Relations to be examined for their legality will be the second and third innovations introduced above (joint

employee-employer committees and Quality of Work Life programs, including semi-autonomous work teams). The legal doctrines against which they will be measured will be: (i) those prohibiting employer domination of or interference with the formation or administration of labour organizations; (ii) those excluding managerial personnel from the protection of collective bargaining legislation; and (iii) those providing exclusive bargaining agent status to unions selected by a majority of employees in a bargaining unit.
Chapter Two

The Innovations at Issue

"Concession bargaining" was the over-riding theme of collective bargaining in North America during the 1980's. Unions were regularly pushed to, and often did, agree to explicit reductions in labour costs through wage cuts, loosening work rules and the like, in an effort to improve job security. Not since the 1920's and 1930's had there been as much bargaining over union give-backs.¹

Despite its proportions, however, this practice was merely one of the more obvious effects of deep-rooted and fundamental changes and challenges faced by the North American economy that became apparent during that period and which has since inspired technological and industrial relations innovation in a variety of key enterprises.

No one event or factor in isolation fully explains the nature and extent of adjustments that have been required of North American enterprises in order to survive. However, taken together, a variety of developments over the past quarter century help explain the economic realities faced by North American enterprises and the impetus for the transformation in industrial relations currently under way.

Before detailing these developments, it is important to appreciate just how pressing were the economic difficulties facing North American enterprises. As will be seen later in this Chapter, the economic imperatives facing North American enterprises in the 1980's and early 1990's represented much more than the down side of the natural ebb and flow of the economy. Fundamental and permanent economic changes had occurred and it was imperative that equally fundamental and permanent changes occur in the way enterprises conduct business. Such imperatives represent the single most significant factor in motivating fundamental enterprise changes in industrial relations practices. Because the new economic imperatives are permanent in nature, there is a greater likelihood that resulting industrial relations change will last and diffuse across the economy as a long-term survival tactic. Since these industrial relations changes are more than a passing fad, we must take seriously their implications for North American labour law. If the law presents a serious impediment to adoption of industrial relations innovations prescribed for economic well-being, the call for labour law reform will come quickly and loudly. This call must be answered in an informed manner, with a full understanding of both what the innovations entail, and what protection of labour law may be lost.

This Chapter will explain what the innovations entail. The Chapter will begin by explaining the economic pressures
which have spurred fundamental changes in industrial relations practices. Next, this Chapter will explain details of the industrial relations innovations that have been adopted in response to economic pressures, and which, as we shall see in later Chapters, challenge the legal underpinnings of North American collective bargaining.

While a variety of industrial relations innovations have resulted from the economic pressures of our times, this Chapter will only discuss those innovations that both enjoy a relatively wide-spread use, and which may prove most vulnerable under collective bargaining law. These innovations are: (i) joint employee-employer committees/quality circles; and (ii) other Quality of Work Life program, including semi-autonomous work teams.

The United States Scene

The United States entered the 1980's reeling from the steady loss over the previous two decades of its dominance in the international economy.

During the post-World War II era, the U.S. was unmatched in its command of, and yet its domestic independence from, world markets and trade. Although only a small fraction of its productive capacity served foreign markets, it dominated the world economy.² For example, in 1950, the United States

provided almost half of the world's industrial output. And on the home front, with its high-volume, standardized production methods, it faced virtually no competition from foreign-made goods.

However, the period from 1960 to 1980 ushered in an end to America's hegemony and insulation.

By 1980 more than 70 per cent of all the goods produced in the United States were actively competing with foreign-made goods. Newly industrializing countries, with the poor bargaining power and hence wages of their workers and the consequential ease with which such countries could attract investment capital, turned high volume, standardized production methods against the Americans.

Eighty-five per cent of the 36 million new entrants into the world labour force each year from 1980 to the year 2000 will be from developing nations.

Beginning in the mid-1960's, foreign imports claimed an

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4 Reich, supra, note 2 at 121.


increasing share of the American market. During this period the American share of world trade dropped nearly 40 per cent. While the United States rested on its laurels, other industrialized nations were preparing to challenge American competitors. The 1960's saw nations such as Japan and West Germany shift their emphasis and resources away from "Fordist" mass-production methods into more flexible, specialized, short-run types of production methods that required workers with greater skill. Thus, starting in the

8 Reich, supra, note 2 at 121-22 where the author states as follows:

[b]y 1981 America was importing almost 26 per cent of its cars, 25 per cent of its steel, 60 per cent of its televisions, radios, tape recorders, and phonographs, 43 per cent of its calculators, 27 per cent of its metal-forming machine tools, 35 per cent of its textile machinery, and 53 per cent of its numerically controlled machine tools. Twenty years before, imports had accounted for less than 10 per cent of the U.S. market for each of these products. Between 1970 and 1980 imports from developing nations increased almost ten fold.


10 "Fordist" or "Fordism" refers to the type of production methods pioneered by the Ford Motor Company and characterized by long runs of uniform products produced on an assembly line. Labour is generally unskilled and conception of the work is separated from its execution. See, Sabel, supra, note 6 at 32-33, 194.

11 Sabel, supra, note 6 at 204 et seq. Reich, supra, note 2 at 127-33.
mid-1960's the economy, as well as the productivity rates, of these countries began to grow at a pace greater than that of the United States, to the point where, at the end of the 1970's, the United States lost its place as the world's economic leader. And that was before the extreme world recession that began in the late 1970's and early 1980's, a shock which Japan and West Germany survived with lower unemployment and inflation rates, and higher economic growth rates, than did the United States.

This recession was not just a regular downturn in the ebb and flow of the business cycle. It constituted the most severe depression since the 1930's and, perhaps more significantly, it marked the demise of traditional government policies aimed at dealing with downturns in the economy. Keynesian economic theory had called on government to prime the economy's pump during low ebbs of the business cycle. However, with the 1980's recession, this method was not working as high unemployment became coupled with high

12 Reich, supra, note 2 at 118.

13 Reich, supra, note 2 at 118. See also P. Passell, "America's Position in the Economic Race: What the Numbers Show and Conceal" The New York Times, 4 March 1990, Section E, p. 4-5, where the author states, at 4: "The rate of growth of United States productivity has lagged far behind Japan's for four decades and has declined by half since the 1960's."

14 Reich, supra, note 2 at 118.

inflation rates. In response, the United States adopted a monetary policy, which Canada quickly followed, that was aimed primarily at inflation by reducing, rather than expanding, demand. While the policy had the desired result of reducing inflation rates, there was a tremendous cost in terms of lost employment, lost output, bankruptcies and business failures.\textsuperscript{16} The implications of this type of policy are clear: businesses have to possess an enterprise flexibility for adjusting to change so as to avoid, as much as possible, the negative implications of a slowed-demand monetary policy.

This bleak picture of the United State's position in terms of international competition was compounded by something hinted at above - a fundamental shift in the type of production methods and goods and services that would succeed in the international marketplace. Whereas the United States had risen to prominence with large, standardized, mass-production facilities, the high-growth industries that are fuelling America's competitors are those that depend upon skilled workers and the most current technological innovations to produce specialized goods and services in a manner that is fluid and flexible enough to shift quickly with market demands.\textsuperscript{17} Success in the international marketplace has depended on the ability of Fordist industrial enterprises to

\textsuperscript{16} Riddell, supra, note 15 at 6-7.

\textsuperscript{17} Reich, supra, note 2 at 127-33. See also, Sabel, supra, note 6.
up-grade themselves into such "flexible-system" enterprises. 18

A problem mentioned briefly above, but deserving of particular emphasis, is the low level of enterprise productivity growth 19 in the United States relative to its major trading partners over the past two decades. Some have suggested this is the most important reason for the loss of competitiveness by U.S.-based industries. 20 Between 1948 and 1965, productivity grew a respectable 3.2 per cent. Between 1965 and 1973, however, this growth slowed to 2.4 per cent, and then to 1.1 per cent between 1973 and 1978 before falling into negative growth in 1979 and 1980. Productivity growth came out of deficit levels again in 1981, but did not rise above 1 per cent between that year and 1987, 21 edged up

18 Reich, supra, note 2 at 129-30.

19 "Productivity" is essentially the ratio of outputs (eg. products produced by the enterprise) to inputs (eg. capital costs, labour costs). Along with labour and capital costs, productivity is an efficiency measuring tool. See, for instance, Marshall, supra, note 3 at 73. It has been forcefully argued that the further bureaucratization of management during this period contributed significantly to the productivity growth problem. Bluestone & Harrison, supra, note 9 at 159-60 and D. Gordon, "Capital-Labor Conflict and the Productivity Slowdown" (1981), 71 American Economic Rev., Papers and Proceedings 30 at 30-35.

20 Marshall, supra, note 3 at 73.

21 Reich, supra, note 2 at 118 and Marshall, supra, note 3 at 74-75. While American productivity levels are probably, on average, still higher than found in many industrialized countries, the slow growth relative to such countries is indicative of the slow stagnation that has characterized the American economy in recent years. It also holds ominous overtones for the future since it foreshadows the eventual
slightly to two per cent in 1988 and then slipped back to nine-tenths of one per cent in 1989. And it has been suggested that these increases in productivity growth was largely due to fewer workers being employed. These rates of productivity growth are to be contrasted with the 7.1 per cent growth rate in Japan between 1976 and 1981, and the 3.9 per cent rate in France and the 3.4 per cent rate in West Germany over those years. Between 1950 and 1980, the United States had the lowest overall productivity growth rate of any industrialized country.

A final related problem for American enterprises facing stiffened international competition was the type of worker needed to make the adjustments needed to alter productivity rates and enhance enterprise flexibility. The process of Taylorism had to be reversed. This was the process by overtaking of any current American productivity advantage in the near future. See Marshall, supra, note 3 at 73-80.


23 Reich, supra, note 2 at 118.

24 Reich, supra, note 2 at 118.

25 Marshall, supra, note 3 at 73.

26 The "scientific management" processes of Frederick W. Taylor. See F.W. Taylor, Scientific Management (1911). See also, K. Stone, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities" (1988), 55 U. Chicago L. Rev. 73 at 143 where she states as follows: Taylorism had an enormous impact on the way people in the 20th century have thought about industrial relations. The radical separation of thinking and doing that he advocated lies at the heart of the
which workers were systematically de-skilled, where conception was separated from execution, and where production was broken into component parts with each worker performing only a portion of the work needed to create a finished product.\footnote{27}{See Sabel, \textit{supra} note 6.}

The type of enterprises necessary to compete in today's international economy are those that specialize in high quality goods and rely heavily on the skills of their employees in their use of innovative technological systems. Such enterprises merge conception of a job with its execution and the production employee then performs all component tasks in producing the end product.\footnote{28}{See, for instance, Sabel, \textit{supra}, note 6 at 194 et seq..}

In the result, enterprises need employees who will not necessarily work harder, but, instead, work smarter. This is consistent with the theme one finds in the labour economics literature that suggests "we as a society, and management in particular, do not utilize well the skills, talents and knowledge of many members of the labour force."\footnote{29}{Riddell, \textit{supra}, note 15 at 14.}

Drawing upon the dramatic success of the Japanese economy in the past quarter-century, such literature posits that many of the economic woes, particularly in the areas of productivity and enterprise flexibility, could be successfully dealt with if conception of the industrial world in which labor and management perform entirely separate functions.
enterprises made better use of their human resources.\textsuperscript{30}

The Canadian Scene

The dependence the Canadian economy has on the health and well being of the American economy has been well documented.\textsuperscript{31} Canada sends three-quarters of its exports to the United States and obtains over two-thirds of its imports from American suppliers.\textsuperscript{32} A key stated justification for the 1987 Free Trade Agreement between the two countries was a perceived need to maintain ready access to Canada's largest trading partner at a time when protectionist sentiment was overtaking American legislators.\textsuperscript{33} Historically, business cycle downturns faced south of the border sooner or later make their way north. If the American economy is in trouble one can be sure the same sort of trouble is not far behind for Canada.


\textsuperscript{31} For a historical perspective, see, for instance, Ian Lumsden, ed., Close to the 49th Parallel (Toronto: University of Toronto Press, 1970).


\textsuperscript{33} See, for example, Government of Canada, The Canada-U.S. Free Trade Agreement: An Economic Assessment (Ottawa: Supply and Services Canada, 1987) 15.
Over and above the close economic ties between Canada and the United States, Canada must also compete in the same international marketplace as the United States and has faced all the attendant problems mentioned earlier in reference to the United States.

Canada's productivity growth rates have also been dismal, peaking in the 1947-1956 period at 3.5 per cent, dropping during the period 1957-1973 to about 2.25 per cent, until hitting 0.1 per cent in the period 1974-1981. A marginal improvement to 1.7 per cent occurred in the period 1981-1986.34 Growth in Canadian gross domestic product in the period 1978-1981 averaged just over 13 per cent each year; however, between 1981-1989 growth averaged 7.9 per cent.35

Strong concern over the Canada's economic future led to the Royal Commission on the Economic Union and Development Prospects for Canada (the "Macdonald Commission"). Its Report, released in 1985, stressed the need for the kind of economic flexibility described earlier in reference to the United States.36 Canadian economists have forcefully argued, like many of their American counterparts, that staying abreast

34 Riddell, supra, note 15 at 7.

35 British Columbia Ministry of Finance and Corporate Relations, Planning and Statistics Division, Economics Statistics Report, 26 September 1990 (Table 1.5, Provincial Gross Domestic Product for Canada and Provinces).

of technological developments holds "the key to improvements in productivity, global competitiveness, and, ultimately, employment." Further, the successful adoption and utilization of new technology is largely dependent on the ability of management to develop a more participatory approach to employee-management relationships. The Economic Council of Canada recently stated:

\[E\]qually important for the process of adjustment is the way in which labour is reallocated within firms in response to foreign competition and technological change.

Effective labour adjustment inside the firm requires a willingness to move away from traditional industrial relations and human-resource management practices. New approaches to work organization, labour relations, decision-making structures, and management style are essential to sustained improvements in productivity and competitiveness.39


39 Economic Council of Canada, Transitions for the 90's (Twenty-Seventh Annual Review) (Ottawa: Minister of Supply and Services, 1990) 53 (emphasis in original).
have dramatic effects on employees. The recession of the early and mid-1980's provides a classic example. Unemployment in Canada during the period 1982-1986 reached its highest recorded levels, averaging almost 11 per cent, compared to the three to five per cent figures that characterized the period from 1947-1973.\textsuperscript{40} The monetary policies followed both in the United States and Canada to deal with inflation only exacerbated, as noted earlier, the unemployment problem related to the poor economic performance during this period.\textsuperscript{41}

The level of concession bargaining, as noted at the outset, was the highest it had been since the 1920's and 1930's.\textsuperscript{42} Employers faced with intensified international competition and out-dated production processes leaned on their workers to change protective work rules and to roll back wages in an effort to provide short-term relief. Even employers which did not need concessions during this period tried to take advantage of the opportunity to demand them of their workers.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{40} Riddell, \textit{supra}, note 15 at 7.
\item \textsuperscript{41} Riddell, \textit{supra}, note 15 at 7.
\item \textsuperscript{42} \textit{Supra}, note 1.
\item \textsuperscript{43} Cappelli & McKersie, \textit{supra}, note 1 at 228. The authors report on a 1982 \textit{Business Week} magazine survey which found that 11 per cent of the firms that had asked for concessions were taking advantage of the then current business environment and did not really need them. Further, they report about a union official they interviewed who contended that when unions asked firms to document their need for
\end{itemize}
The ability of workers to resist concessions has been especially low in the past decade, particularly in the United States where the law and its enforcement mechanisms have failed to provide collective bargaining as a viable defence mechanism for workers. But even in circumstances where the law is more supportive of collective bargaining, as in Canada, the pervasiveness of the recession, the resultant loss of union members and the fundamental adjustments caused by the recession and the sharpened international competition have all added up to an inability on the part of labour, concessions, the incidence of concession negotiations fell off significantly, by about two-thirds.


But one should not be overly sure that Canada represents an unassailable bastion for union growth. As Paul Weiler has pointed out, the rate of unionization in Canada seems to have plateaued in the mid 1980's and has been in slow, but steady, decline since. See Weiler, "The Representation Gap...", supra, Chapter One, note 15 at 8-9.
organized and unorganized, to maintain past gains.\textsuperscript{46} And further clouds can be seen on the horizon for organized labour in that the sector of the North American economy growing the fastest, the service sector, has consistently proven to be an extremely difficult sector to organize, resulting in invariably low rates of unionization in that sector.\textsuperscript{47} In addition, the number of women in the workforce has dramatically increased in the past two decades. Women have not been historically drawn to organized labour. Taken together, organized labour faces a daunting challenge of increasing its appeal among these constituencies if it hopes to remain an important force in North American society.

Organized labour in North America has been very much on the defensive and, like employers, they are anxious about their future.\textsuperscript{48}


\textsuperscript{48} See, generally: Bluestone and Harrison, supra, note 9; W. Huang, ed., Organized Labor at the Crossroads (Kalamazoo, Mich.: W.E. Upjohn Institute, 1989), especially S.
Another problem faced by workers has been the very nature of work in North American enterprises, based as it still often is, on Taylorism. Workers today are much more educated than their counterparts even 20 years ago, when the concept of "alienation" came into vogue. And the high degree of democracy in the political sphere, compared to the relative absence of democracy in the workplace, appears to be resulting in a great deal of worker dissatisfaction.

Dealing with the new reality

As can be seen from the above, all parties concerned about labour relations - employees, employers and unions -


49 G. Cook Johnson & R. Grey, "Trends in Employee Attitudes: Signs of Diminishing Employee Commitment" (1988), 15 Canadian Business Rev. 20. This article is based on surveys conducted by Hay Management Consultants which revealed that employees in North America are feeling more pressed to perform than they did ten years ago, yet they have fewer rewards available to them and they are less informed about what is going on in their organizations. This imbalance has contributed to declining commitment to employers.

have, for sometimes divergent reasons, an appetite for change.

Employees need work which is interesting and draws upon their skills and creativity and in which they have a greater say in the day to day decisions that affect their lives. Recent empirical data confirms the interest workers have in contributing to decisions in the workplace which intimately affect them.\(^5\) Employees also want the economy to be strong in as much as this translates into greater job security.\(^5\)

Unions also want their members to have job security and a greater say in employer business practices, especially those which will directly affect their membership or the fortunes of the union.

Employers seek greater competitiveness in today's economy through increased productivity and a greater ability to adapt to changing environmental pressures.

By historical experience, each party may well feel threatened by the goals of the other parties. Unions and employees facing employers seeking greater productivity, and employers facing employees and unions seeking greater influence over the enterprise, have often resulted in bitter

\(^5\) Richard, Mauser & Holmes, supra, note 50. See also, G. Adams, Worker Participation in Corporate Decision-Making: Canada's Future?, Queen's Papers in Industrial Relations 1990-3, Industrial Relations Centre, Queen's University at Kingston, 1990, at 6-10.

struggles and confrontation. However, on at least a theoretical level, one can see a certain convergence of interests among these disparate parties— all want their enterprises to prosper so as to provide, at minimum, profits, and consequently, jobs. Advocates of what has been termed the New Industrial Relations promise that innovations included under the umbrella of that phrase will not only deliver on that agreed upon need, but will also address the specific pressing needs of the parties articulated earlier. In short, these innovations are said to constitute the perfect marriage of the economist's concern for economic growth, the sociologist's concern for healthier workplace relations and political theorist's concern for democratic traditions.

At its most basic, the New Industrial Relations (and as we shall see, few of the innovations included within that phrase are genuinely "new" to the industrial relations scene) literature asserts that enterprises can become more productive, and thus more competitive in the world economy, if they are able to tap the knowledge and skills of their employees; this is done by facilitating employee participation in the decision-making processes of the workplace and the enterprise. All the innovations to be discussed share the common characteristic of encouraging and facilitating greater employee participation in those decision-making processes.

The following catalogue is not exhaustive of the
practices comprising the New Industrial Relations. The practices that will be discussed are those which are threatened most by legal doctrines surrounding collective bargaining. Thus, the following discussion will leave to one side such practices as employee stock ownership plans,\(^{53}\) variable compensation,\(^{54}\) and employee representatives on corporate boards of directors.\(^{55}\) A wealth of materials have


\(^{55}\) See, for instance: D. Nightingale, Workplace Democracy: An Inquiry into Employee Participation in Canadian Work Organizations (Toronto: University of Toronto Press,
been published examining the details of these practices and their economic ramifications, some of which are referred to in the accompanying footnotes.

**OWL and Committees**

Kochan, Katz and McKersie\(^56\) identify three levels at which industrial relations systems operate, all of which affect each other symbiotically, and all of which have experienced a form of transformation in the past decade. The top level is where strategic activities take place. It is here that long-term strategy and policy-making in areas such as investments and human resources take place, usually through

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senior management and/or the corporate board of directors. The next level encompasses collective bargaining or personnel-function activities, where strategy decisions are made about how the enterprise will relate to the employees as a group through collective bargaining or, in nonunion enterprises, through general personnel policies. At the last level there are the activities of the day-to-day workplace where matters such as job design, work organization and supervisory style is worked out.

The economic imperatives discussed earlier have affected each of these levels in substantial ways.

At the top level, the limited range of possible options have compelled enterprises to press for new ways of making their enterprises more profitable and stable in an increasingly global economy. This has been the impetus for changes at that highest level, changes which may include employee representation on corporate boards of directors. We have also noted the greatly increased interest in employee stock ownership and other gain-sharing arrangements.

The economic imperatives have also caused enterprises to press for substantial changes in traditional outcomes at the collective bargaining/personnel functions level. Concession
bargaining is a manifestation of that pressure for change.

But the most concerted effort for change has occurred at the lowest level, on the shop floor, where the organization of work, the management and motivation of individuals or work groups, and the nature of the workplace environment is determined. While the effects of decisions at the higher levels are felt at this lowest level, the activities occurring at this level are not normally directly affected by the generality of collective agreement provisions, formal personnel policies or broad business strategies. Yet it is here that the most intense attention has been directed over the past decade, likely spurred on by the success of Japanese industrial relations practices in assisting that country's industries to the pinnacle of international economic success. Those practices emphasize the importance of joint consultation and workers as a source of knowledge about the processes of production and what can be done to improve those processes.

In the result, the most activity in introducing innovative industrial relations practices is occurring at this level of industrial relations in North America, both in the unionized and nonunion sectors. And the activity at this

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57 Kochan, Katz & McKersie, supra, note 56 at 18.

level has required complimentary adjustment at the top and middle levels of enterprise industrial relations systems.

The activities at the shop floor level can generally be said to be directed at improving the quality of working life, and thereby enterprise performance, through the use of job enrichment/rotation/enlargement, "quality circles", semi-autonomous work groups, quality of working life programs (in its specialized sense), and joint labour-management committees. The material that has acted as a catalyst for innovation in this area has been the strong empirical data from case studies indicating that such innovations make a strong contribution to enterprise productivity and

59 Thus explaining in some measure that these efforts have often been referred to under the catch-phrase "QWL" (or Quality of Working or Work Life programs). As we shall see, however, it is somewhat of a misnomer to refer to all of these innovations as QWL programs, since that phrase now tends to have a very specialized meaning, referring to particular type of program within the realm of increased worker participation in the decision-making processes of the enterprise.

efficiency. However, the data is clear that the simple adoption of one or two of these innovations, in the absence of a much broader shift in management attitudes, policies, and practices at higher levels of an enterprise, is unlikely to have such a positive impact.

Historical Background

The details and elements of the above-mentioned innovations are best understood when discussed in their historical context. Such historical context shows movement and progression in the development of these innovations and thereby provides a fuller picture of the current state of industrial relations. Therefore, the following represents a historical survey which, in its telling, provides an


62 See, for instance, Long, supra, note 60 at 819; Lawler, supra, note 61.
elaboration on the nature of current innovations.

Perhaps the earliest example of efforts to draw upon the knowledge of workers was the process of scientific management introduced through the writing and work of Frederick Winslow Taylor. At the heart of scientific management was the process of transferring the knowledge and skill workers had in the production process to management through the systematic study of the production process, breaking down that process into its simplest elements through such tools as time motion studies, and rebuilding the work process in such a way that management firmly controlled the precise manner in which workers performed their work. Taylor appreciated that the knowledge of the production process possessed by skilled


"The managers assume...the burden of gathering together all the traditional knowledge which in the past has been possessed by the workmen and then of classifying, tabulating, and reducing this knowledge to rule, laws, and formulae..." Taylor, The Principles of Scientific Management, supra, note 63 at 36.

workers gave those workers a tremendous amount of discretion and control over that process and, consequently, their day-to-day worklives. 66 Taylor was intent on transferring control to management by systematically separating discretion, knowledge, thinking - in short, control - from the act of doing the work. 67 Although Taylor argued that application of his theories would make enterprises more democratic since work would be judged in accordance with the "scientific" rules and standards established through his studies, rather than the capricious and sometimes arbitrary whim of a foreman 68. However, there is nothing in scientific management that resembles more contemporary efforts to increase worker participation in the decision-making processes of enterprises by providing workers with avenues through which they could contribute.

The next significant development in efforts to gain the assistance and cooperation of employees in the production process came in the form or "employee representation plans."

66 D. Montgomery, Workers' Control in America (Cambridge, U.K.: Cambridge University Press, 1979), especially Chapters 1 and 2, "Workers' Control of Machine Production in the 19th Century" and "Immigrant Workers and Managerial Reform".

67 "All possible brain work should be removed from the shop and centered in the planning and laying-out department..." Taylor, Shop Management, supra, note 63 at 98-99. See also, Braverman, supra, note 65 at 90-91.

The history of such plans, and their metamorphosis into company (or employer-dominated) unions, will be discussed in greater detail in the next chapter dealing with the history of central collective bargaining legal doctrines. That history bears some mention here in order to fully appreciate more contemporary developments in QWL.

Although there were sporadic experiments with worker committees and representation plans at the turn of the century,69 it was not until the labour shortage crisis of World War I,70 the increased level of labour unrest immediately after the War,71 and the consequential adoption of government labour policies encouraging representation plan growth,72 that such a form of non-union representation began to be widely practised. The number of such plans in operation

69 See, for instance, Derber, supra, note 68 at 206-19.


71 See, for example, D. Bercuson, Confrontation at Winnipeg: Labour, Industrial Relations and the General Strike (Montreal: McGill-Queen's University Press, 1974).

72 In Canada the 1919 Royal Commission on Industrial Relations appointed by the federal government noted in its report that "there is an urgent necessity for greater cooperation between employer and employed" and recommended that joint industrial councils and works committees be set up as a means of achieving labour-management cooperation. See W.D. Wood, "The Current Status of Labour-Management Co-operation in Canada", Industrial Relations Centre Research Series No. 3, Queen's University at Kingston, 1964 at 10-13. In the United States, during World War I, the National War Labour Board fostered the creation of employee-representation plans in non-union enterprises. See Derber, supra, note 68 at 213-14.
in the United States increased by 600 per cent between 1919 and 1926 and covered over 1.1 million workers. The 1920's were characterized by the rapid decline in trade union fortunes and increased employer enthusiasm for a form of employee representation that would tap employees' desires for organization, but would displace unionism with a less threatening substitute. Representation plans filled the need. Such plans also helped enterprise efficiency and this theme can be seen to this day in explaining why employers have been interested in means to gain employee cooperation. Describing developments at that time, Sumner Slichter neatly summarized the position in a 1929 article:

Possibly the most important determinant of post-war labour policies, at least during the last four or five years, has been the growing realization by managers of the close relationship between industrial morale and efficiency. When the severe drop in prices and in sales during 1920 and 1921 caused managers to search meticulously for methods of cutting costs and of increasing sales, many ways were found in which the workers could help if they would. Spurred by financial necessity, managers sought the aid of their employees to an unprecedented extent...Some concerns, such as Bethlehem Steel Corporation and


the International Harvester Company, have used their shop committees to reduce costs. The committees have suggested ways of saving labour and materials...and they have assisted in raising the quality of workmanship...

Of course, the efforts of managements to reduce costs and increase sales by persuading wage earners to go out of their way to help would not have persisted had the results not been satisfactory. But the workers responded to appeals for their help with almost startling generosity. And naturally this response has profoundly affected the labour policies of employers. The more plainly the workers have demonstrated the value of their cooperation, the greater has become the interest of managers in labour's good will. During the war, and to a great extent during the post-war depression, managers sought labour's good will largely in order to avoid labour trouble. As the fear of strikes has diminished and as labour has demonstrated its willingness to cooperate, the desire for labour's help has become the most important single influence moulding the labour policies of American employers.75

Interestingly, the blueprint for representation plans, both in the United States and Canada, was developed by William Lyon Mackenzie King, the future and somewhat anti-union Prime Minister, in his work as a labour relations consultant for the Rockefeller-owned Colorado Fuel and Iron Company.76

The plans varied in their details from establishment to

75 Slichter, supra, note 70 at 401-404 (emphasis in original).


77 Derber, supra, note 68 at 212-14.
establishment, but there were a number of key common characteristics.

Their purpose was two-fold. First, they were intended to improve communication and understanding between employees and their employer. The committees consisted of employer representatives and employees who were sometimes selected by the other employees or, more often, indirectly chosen by management, because of the qualifications management placed on committee membership, to represent employees. Their topics of discussion were generally broad, ranging from health and safety to mere housekeeping issues such as cleanliness of the production area, and from personnel matters, to reducing costs and making the enterprise more efficient. The other, less commonly acted upon purpose of these committees or representation plans was to provide a forum through which employee grievances could be considered and a conclusion recommended.

The characteristic common to seemingly all representation plans and committees of this era was their lack of power. "More often than not, the employee representatives were given the opportunity only to express their views, while the final

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78 Wood, supra, note 72 at 10.


80 Slichter, supra, note 70 at 413.
decision remained with management.\textsuperscript{81} Further, employee members were reluctant to take a stand on any particular issue before the committees because of the distinct possibility of employer-reprisals.\textsuperscript{82} This latter characteristic was less prevalent in unionized enterprises where committees operated since the union acted as a countervailing force.\textsuperscript{83}

In short, the amount of influence employees had over the decision-making process through such committees or plans depended entirely upon the good will of the employer. Nonetheless, the committees and representation plans "exposed employees, often for the first time, to a collective discussion of a wide range of issues, including wages, hours, and employment conditions, grievances and complaints, problems of production and waste, and activities having to do with both in-plant and out-of-plant life."\textsuperscript{84} It was hoped by those who believed collective bargaining through trade unions was the only feasible means by which employees could influence the decision-making processes of enterprises, that this exposure to participation, and its inherent limits, would encourage the drive to unionization. In fact, encouraging unionization was an express purpose for the support given to representation

\textsuperscript{81} Derber, supra, note 68 at 266.
\textsuperscript{82} Gold, supra, note 79 at 15-16.
\textsuperscript{83} Gold, supra, note 79 at 16.
\textsuperscript{84} Derber, supra, note 68 at 266.
plans by the American National War Labor Board.\textsuperscript{85}

Despite the lack of power given employees through representation plans and other humanistic innovations used by employers during the period of welfare capitalism in the 1920's, these policies appeared to be working in the sense of satisfying many employees and making the enterprises more efficient. Some historians have suggested that, but for the havoc racked by the Great Depression, which made it impossible for employers to continue many of the popular practices of welfare capitalism, such policies could have continued and would have remained a strong substitute, and perhaps permanent antidote, to unions.\textsuperscript{86} But the accepted wisdom of labour historians about that period is stated by Irving Bernstein as follows:

The central purpose of welfare capitalism - avoidance of trade unionism - could be achieved only temporarily because paternalism failed to come to grips with the main issue: a system of shop government placed in the climate of democracy and universal suffrage.\textsuperscript{87}

As the above suggests, the 1930's were not a time of great innovation in the use of joint committees. It was not

\textsuperscript{85} Gold, \textit{supra}, note 79 at 15, and Derber, \textit{supra}, note 68 at 213.


\textsuperscript{87} Bernstein, \textit{supra}, note 74 at 187.
until World War II that they again rose in popularity, but their focus was primarily ensuring that production was maintained at the highest of levels to support the war effort.88 Both in the United States and Canada, most of the committees that enjoyed war-time resurgence died shortly after the war ended.89

This can partly be explained in the United States by the vigilant post-war enforcement of the 1935 National Labour Relations Act, which encouraged independent unions by outlawing employer-dominated labour organizations.90 Canadian jurisdictions also enacted laws more encouraging for independent trade union development.91

But another explanation, both in Canada and the United States, lies in the reasons why employers tend, then as now, to be initially attracted to such innovations.

With some exceptions, an employer's primary motivation is economic and it is most pronounced when the employer is facing a business crisis; if such innovations will assist the business outlook for the enterprise, then employers will try


89 Wood, supra, note 72 at 14, and Gold, supra, note 79 at 18.


91 See, for example, Wartime Labour Relations Regulations (1944), P.C. 1003.
them. But such employer efforts are seldom rooted in any kind of philosophical commitment to a process of democratizing business enterprises. If innovations enhance the economic prospects of an enterprise, employers will generally not be adverse to them, even if such innovations also incidentally afford employees more of a role in the decision-making processes of the enterprise. However, as the late 1940's and 1950's illustrate, once the economic imperatives are less pressing, employers are less interested in processes which enhance employee participation in enterprise decision-making. Since virtually all joint committee activity was initiated by the employer in the relationship, the withdrawal of employer enthusiasm for such efforts would inevitably mark the demise of the committee. And this appears to be what happened in the late 1940's and 1950's. There was very little in the post-war era to encourage employer support for innovative employee participation strategies.

It was not until the late 1960's and early 1970's that a new wave of cooperative ventures began to develop.

During the 1960's and early 1970's new concerns arose for employers and unions about aspects of work which were "alienating" or "dehumanizing" for the worker. See, for instance, Canada, Canadian Industrial Relations: Report of Task Force on Labour Relations (Ottawa: Privy Council Office, 1968) (H.D. Woods, Chairman) at 97-101 and 121.
came mostly from social scientists, many of whom had become particularly concerned during this period about the workplace as a social institution and the effects of Taylorist production methods on human development.93 From the work of Herzberg94 and Likert,95 to the wide-ranging studies for the United States Department of Health, Education and Welfare,96 social scientists and managerial theorists were stepping up the march to fill the gap in Taylor's work regarding workers' psychological needs and motivation.97 Bok and Dunlop sum up this development well, with an indication of why employers

93 A good description of the move to social scientists by "progressive" employers can be found in D. Bok & J. Dunlop, Labor and the American Community (New York: Simon & Schuster, 1970) 354-57.


became interested in such work:

As time went on, it grew increasingly clear that Taylor's principles often went awry because they failed to take adequate account of the psychological and group reactions of employees. In silent protest against the system, workers set informal production norms far below their real potential. If only to relieve the tedium of work, they invented all manner of artful dodges to befuddle the company engineer into setting easier quotas on their jobs. They were absent too often from work; they quit too frequently for other jobs; they were involved in too many accidents and unwittingly broke too many tools. In the face of these difficulties, research teams were called in by many of the more progressive companies. As these investigators got more deeply into the problem, they began to discover a whole battery of desires and discontents that colored the attitude of workers towards their jobs.  

In the result, the shape of workplace innovation began to change. Joint committees remained a staple element in relations on the shop floor. But their focus widened beyond purely production issues, which had been their focus during the World War II era, and they began to resemble the types of committees found during the height of welfare capitalism during the 1920's. Their purpose became more to facilitate open communication between employees and employers as a means of creating a more satisfied workforce.

Like those committees in the 1920's, their reincarnation in the late 1960's and early 1970's dealt with a wide range of issues, with employers hoping this would resolve morale

98 Bok & Dunlop, supra, note 93 at 355.
problems they now believed were at the root of their labour relations problems. And like the 1920's, the use of committees seldom involved any significant transfer of decision-making power from employers to employees. This lack of committee authority has continued to characterize such committees and tends to be listed most often by employees when asked about their committee experience. Nevertheless, many parties involved with such committees tended to speak positively of their experiences with them, stating that committees enabled them to understand each other better, to deal more directly with problems before they fester and grow, and to pool their information and expertise in tackling difficult issues.

But such committees only went so far in dealing with the problems identified by the social scientists. These problems related specifically to the tasks workers were obliged to perform in their day-to-day work. Taylorism had rendered task performance a mundane, routine and limited function, leading to a demoralized workforce. Better communication systems

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100 L. Darby, Labour Management Cooperation: A Study of Labour-Management Committees in Canada School of Industrial Relations Research Essay Series No. 3 (Kingston: Industrial Relations Centre, Queen's University at Kingston, 1986) 39-40.

101 Mansell, supra, note 60 at 5; Cunningham & White, supra, note 60 at 307-55.
within an enterprise had inherent limits in dealing with problems of this sort. Reform was needed in the specific tasks employees were to perform in their day-to-day work experience.

The answer many enterprises responded with as a supplement to committees was job redesign or "enrichment", either through job rotation or job enlargement.\textsuperscript{102} Such efforts at task-redesign generally came at the direction of management with little employee participation in the mechanics of the redesign process.\textsuperscript{103} The basic thrust of such job enrichment programs was to increase the number of tasks employees performed in one of two ways. Employees may be rotated into different jobs at regular intervals.\textsuperscript{104} Alternatively, the number of tasks that an employee would perform in their current position would be increased so as to perform a production process from beginning to end instead of only a piece of the production process.\textsuperscript{105}

Although these efforts in the late 1960's and early 1970's had some positive impact on the individual firms using them, they neither diffused across the economy, nor dealt with the tougher competitive issues facing North American enterprises towards the end of the 1970's and into the early

\textsuperscript{102} Mansell, \textit{supra}, note 60 at 3-4.

\textsuperscript{103} Mansell, \textit{supra}, note 60 at 3.

\textsuperscript{104} Mansell, \textit{supra}, note 60 at 3-4.

\textsuperscript{105} Mansell, \textit{supra}, note 60 at 3-4.
and mid-1980's. The lack of diffusion can perhaps be explained by the response seasoned industrial relations practitioners gave to "humanistic" social science perspectives; it was not uncommon for them to regard with great scepticism the contribution social science research and analysis could make to their enterprise when they were simply aimed at making work more pleasant for workers.\(^{106}\) And the problems faced by North American enterprises, as described in detail above,\(^{107}\) were becoming too much to be dealt with by way of the relative minor adjustments these innovations represented.\(^{108}\)

Now enterprises were not only looking for ways to make individual job holders more satisfied in their work; they were looking for ways to make the total organization more

\(^{106}\) See, for instance, Kochan & Katz, *supra*, note 55 at 403-404.

\(^{107}\) *Supra*, text accompanying notes 1 to 39.

\(^{108}\) See, for instance, Mansell, *supra*, note 60 at 5-6.
effective overall and more competitive in the challenging international economic order.\textsuperscript{109} And it was clear technological change would have to be a major element of the modifications required.\textsuperscript{110} Mansell states the situation at the end of the 1970's in the following manner:

It was becoming obvious, from both theory and practice, that approaches focusing on the single job and limited primarily to the shop or office floor could not deal with the more serious challenges of the 1980's. Managers also realized they would need more than "satisfied" employees in order to achieve the more fundamental technological and organizational changes required. They knew that change would be extremely difficult, if not impossible, unless all employees, management and non-management, were willing and able to be open and flexible. By the mid-1970's, one of the key things that had been learned from both European and North American experience with organizational change was that active participation is one of the most effective ways of overcoming resistance to change. In addition, many managers also realized (admittedly, aided by a popular fascination with Japanese management techniques) that the chances of finding workable solutions to many organizational problems would be greater if the experience and expertise resident at all levels of the organization could be drawn upon.\textsuperscript{111}

In the result, the emphasis began to expand in workplace innovations from identifying and addressing employee concerns and humanizing work, to learning what employees at all levels could teach the enterprise about making the enterprise better, and to including employees at all levels in the process of technological and organizational change that enterprises were

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\textsuperscript{109} Kochan & Katz, \textit{supra}, note 55 at 404.
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\textsuperscript{110} Mansell, \textit{supra}, note 60 at 6.
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\textsuperscript{111} Mansell, \textit{supra}, note 60 at 6 (footnotes omitted).
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called upon to make in the new environment. In a sense, the
fundamental problems faced by North American industries in the
1980's brought about a unprecedented marriage of ideas between
social science theories about organizational behaviour and
effectiveness, and the prescriptions offered by economists and
business leaders for reform within enterprises and industries
if North American industry were to flourish in the new
international economic order.112 Whereas before, as
mentioned above, there was a great deal of scepticism about
what contribution humanist social scientist could offer the
economist and business leader dealing with major economic
challenges, an intellectual reorientation was occurring which
brought together these formerly disparate groups.113
Employers began to appreciate that if they hoped to deal with
the economic challenges, they would need to provide social
scientists a wider berth than was represented by, for
instance, job enrichment.

This reorientation has led to the type of shop-floor
innovations being attempted today, innovations which stress

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more than ever before the participation of employees in the
decision-making processes of the enterprise. Mansell puts the
matter this way:

Given the concerns being expressed by management, labour and government..., [increased employee participation] is a logical extension of the communications-oriented joint committee approach common in the 1960's and early 1970's. Management clearly wanted more than purely "motivational" approaches to productivity. They were anxious to deal directly with productivity and product quality issues on the shop-floor and were, therefore, fascinated by the Japanese experience with quality circles ... Management also saw participation as a way to get more worker support for necessary changes in both technology and work methods.\textsuperscript{114}

What has resulted is an array of innovations, all falling under the rubric of Quality of Working Life Programs (hereafter "QWL"). They can be categorized into two groups; one is a new set of structures for increased union and/or employee participation in the decision-making processes of the enterprise; the other is what is referred to as the "socio-technical systems" approach to job and organizational design and redesign.\textsuperscript{115} The former group is characterized by quality control circles, or quality circles (hereafter "QC's"), and similar types of joint employer-employee committee structures. The latter is most commonly characterized by the establishment of semi-autonomous or self-regulating work groups. The common thread through them all is the aim of increasing both the organization's effectiveness

\textsuperscript{114} Mansell, \textit{supra}, note 60 at 7 (notes omitted).

\textsuperscript{115} Mansell, \textit{supra}, note 60 at 7-19.
and the satisfaction employees obtain from their work.

QC's have been a particularly popular development.116 As practised in Japan, QC's are informal forums for discussion in which eight or ten employees, together with the relevant supervisor, meet regularly and make suggestions for improving the organization of work, the production process, the product line, the work area and such matters.117 Although employers are not bound to follow these suggestions, there is an incentive to do so, if only to keep the process credible. They have been credited with increasing productivity, efficiency and profitability, as well as improving the quality of life for employees in the workplace.118

By far the most popular participatory structure continues to be the joint labour-management committee. A recent study determined that such committees were the most common innovation among a list including QC's, semi-autonomous work

116 Long, supra, note 60 at 816, where the author states as follows:

Clearly, the innovation enjoying the most dramatic surge in popularity has been quality circles. Virtually unknown in North America prior to 1970, they were implemented at an astonishing rate during 1982-85. Virtually all (92%) were introduced during the last six years.

See also, E. Lawler & S. Mohrman, "Quality Circles After the Fad" [Jan.-Feb. 1985] Harvard Business Rev. 65, where the authors report that over 90 per cent of the Fortune 500 companies in the United States then had some form of QC program.

117 Riddell, supra, note 15 at 22, and Weiler, supra, note 58 at 137-39.

118 Weiler, supra, note 58 at 138.
groups, profit-sharing and pay-for-knowledge. More than half their number were established between 1979 and 1985.

Most committee-based participatory structures operate as a two-tiered system with one establishment-wide "steering committee" and one or more area-level committee. The steering committee is usually composed of several senior managers and either the local union executive or, in nonunion settings, elected or management-appointed employee representatives. Normally, the role of the steering committee is to oversee the operations of the area-level committees and to deal with establishment-wide issues. The area level committees are almost always voluntary in the sense that no area is required to have a committee and no individual, except area management, is required to participate. Most area level committees deal primarily with issues related to immediate working conditions and productivity. Committees established by consensus what their recommendations to management will be.

Two features of such committees are of particular importance. First, committees in unionized enterprises are commonly limited in the topics which they can consider.

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119 Long, supra, note 60.

120 Long, supra, note 60 at 816.

Matters normally dealt with in collective bargaining or matters already dealt with in the collective agreement are considered out of bounds for committee discussion, as are issues related to corporate policy and basic management systems. Second, committees are normally advisory in nature and thus have no formal decision-making authority. Management is generally free to reject committee recommendations.

The other group of innovations fall under the umbrella of the socio-technical systems (hereafter, "STS") approach to workplace organization. The STS approach seeks to enhance an enterprise's performance by focusing on the symbiotic relationship between organizational structure/technology, and the characteristics and attitudes of workers and managers. The STS approach aims at letting the physiological, psychological and cultural characteristics of workers and managers shape the organizational structure and technology used and, in turn, use organizational structures and technology in the workplace to help shape the attitudes, motivation and commitment of managers and workers so as to enhance the enterprise's effectiveness. Effectiveness is generally judged by productivity and profitability which is said to be enhanced when workers are highly motivated and committed to the product's quality and the enterprise, results which occur with use of an STS approach.

STS programs generally consists of two broad strategies: "sociotechnical design" of jobs and work organization, and
"industrial democracy" in the sense of affording employees a share in the decisions which are taken concerning the process of production. Sociotechnical design describes designing jobs so as to meet not only the material needs of the enterprise (for instance, having pieces of material assembled to produce a commodity), but also providing workers with: (i) an opportunity to exercise a variety of skills; (ii) control of the work flow; (iii) an ability to identify with the product of their labour by involvement in all aspects of its production; and (iv) an opportunity to assume greater responsibility for their work.

The theoretical foundation of STS is that, for an organization to be optimally effective, not only do both the technical and social subsystems each have to be effective in and of themselves, but, more importantly, they must be co-designed to fit together in such a way as to accommodate and support each other. Technological determinism, in which labour must meet the pace and job design established by the technology used, is to be abandoned. The second major aspect of STS approaches, industrial democracy, is aimed at providing workers with the opportunity to participate in decisions affecting the production process. This aspect of STS manifests itself ultimately in semi-autonomous work groups

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122 Newton, "Quality of Working Life...", supra, note 61 at 74-76.

123 Newton, supra, note 61 at 76.
which generally makes traditional hierarchical manager roles on the shop-floor nonexistent.\textsuperscript{124} Semi-autonomous work groups are considered "the basic building block of the socio-technical systems approach."\textsuperscript{125}

Mansell describes semi-autonomous groups in the following manner:

These groups are teams of workers who have collective responsibility for a natural, whole unit of work. The teams are self-regulating in that they exercise considerable autonomy in planning, integrating, executing, and monitoring the set of interdependent tasks within their work unit. As semi-autonomous groups mature, they also take on some of the support functions (e.g., maintenance, financial control, personnel, etc.) required for the functioning of their unit. Most workers in such groups do not have separate job assignments or classifications. Ideally, all workers in the group are multi-skilled and can perform all the tasks within the work unit....

The semi-autonomous work group is a powerful innovation because of the concepts of group responsibility and self-regulation. The group orientation allows for more variety, enhanced opportunities for learning, and social support - all in relation to an inherently meaningful, whole piece of work. However, the group orientation also greatly increases the flexibility and problem-solving capacities of the organization. Similarly, self-regulation means not only that the wide range of problems that always occur in a work system can be controlled more directly and quickly, but also that it provides for greater worker dignity and

\textsuperscript{124} Long, supra, note 60 and Newton, supra, note 61.

\textsuperscript{125} Mansell, note 60 at 12.
organizational democracy....

As a total systems approach, the socio-technical systems (or "socio-tech") approach demands that both the primary work system and all support systems be designed according to the same values and goals. Therefore, in a socio-tech design all of the "management systems" (such as finance, engineering, personnel, industrial relations, etc.) must be designed to support the characteristics of the semi-autonomous work groups.\textsuperscript{126}

The most commonly cited example of semi-autonomous work groups in operation is at a Shell Chemical manufacturing plant in Sarnia, Ontario.\textsuperscript{127} The plant operates continuously as a single operating department by teams made up of 19 to 21 people. Each team is responsible for its own work assignment, technical training, overtime authorization and scheduling, and vacation scheduling. Management's interests are represented on each team by a co-ordinator, as opposed to a supervisor, who acts as a resource person and facilitator for the team. Co-ordinators are often bargaining unit members, on the premise that management's interests and those of the team are not substantially opposed.\textsuperscript{128} Teams interview and hire new members from a short-list provided by management. The teams

\textsuperscript{126} Mansell, \textit{supra}, note 60 at 13.


\textsuperscript{128} Kochan & Katz, \textit{supra}, note 55 at 407.
also play a large role in the selection of co-ordinators. The management systems at the plant have also been designed to support self-regulation. For example, one whole level of management has been removed. The workers at Shell Chemical in Sarnia are represented by a strong union whose cooperation and participation in the process has been integral to its success. For instance, to maximize the flexibility of the operations, the governing collective agreement between Shell Chemicals specifies only the absolute minimum and a framework and a set of guidelines for the employees to work within. Negotiations and discussions between management and the union are on-going, not centred around bargaining over renewal of a collective agreement every few years.

As can be seen from this outline of the STS approach and resulting semi-autonomous work teams, such methods represent a radical departure from the hierarchical structure of most workplaces. Workers become an integral part of the process by which decisions are made not only in the day-to-day operation of the facility, but in governing their own work relationship with the enterprise. The role of the union is also greatly altered from that of a reactive representative to a pro-active participant in the operations of the enterprise. The fundamental nature of the changes brought about by use of STS approaches is not lost on its proponents. As Mansell has stated: "[t]he socio-technical systems approach challenges not only basic union and management power structures, but also the
very definition of what it means to manage or to represent workers."\textsuperscript{129} With a significant increase in the popularity of such an approach since 1979, the strong survival rate for semi-autonomous work groups,\textsuperscript{130} and the economic success of enterprises using them,\textsuperscript{131} the challenges presented are not easily dismissed as mere fancy.

But semi-autonomous work groups are to be contrasted with the other forms of direct worker participation in the decision-making processes of the workplace, such as QC's or joint labour-management committees. These other forms of direct participation can be characterized by the distinct lack of decision-making authority workers possess through their operation. In unionized enterprises, they are also characterized by the way in which the parties have gone to great lengths to ensure these parallel participatory schemes remain just that - parallel. In other words, they are not to deal with matters that are the subject of the collective bargaining agreement or in subject areas dealt with by those agreements.

Some good reasons can be put forward explaining why these characteristics are necessary. For instance, regarding the

\textsuperscript{129} Mansell, \textit{supra}, note 60 at 13.

\textsuperscript{130} Long, \textit{supra}, note 60 at 816.

separation of these innovations from collective bargaining, in a collective bargaining relationship, a union does not want to be faced with individuals in the bargaining unit, through their activities in a QC or joint committee, altering in a piece-meal and an uncoordinated fashion the collective agreement terms the union has often fought hard to obtain. Thus, as a condition of the union's support for the management initiative of QC's or joint committees, the parties agree that these innovations will operate outside of the collective bargaining structure. And regarding the lack of decision-making power of QC's and joint committees, employers are ultimately responsible for the enterprises and they want some assurances that at the end of the day they will be able to take the course of action they believe is in the best interests of the company, whether or not the QC or joint committee agrees with that course.

However, it is clear from the literature that such limits not only threaten the longevity of these workplace innovations, but they also substantially detract from the benefits enterprises can obtain from them. It is cogently argued that the competitive advantages these innovations are supposed to bring to enterprises will not be forthcoming unless the subject areas these innovative bodies can touch upon are broadly defined, and unless they are empowered to make more than recommendations that may or may not be followed.
It seems clear that one of the main reasons innovations like joint committees and QC's have been popular with many employers is that they do not pose a threat to the power structures of the enterprise.\textsuperscript{132} With only a power to recommend action, and only a mandate to deal with matters in a circumscribed area away from corporate policy and basic management systems, the employer is not faced with having to make any fundamental shifts that it does not agree with wholeheartedly.

However, an essential problem with this approach is that the joint committee or QC will soon become frustrated with the lack of impact they are having. "With unclear or minimal authority to effect change, the labour-management committee [or QC] risks being labelled as a time consuming, unproductive pretence of cooperation."\textsuperscript{133} This is a serious concern in that study after study has articulated the lack of power in such committees or QC's as being the primary drawback of the innovation for employees who participate.\textsuperscript{134} The inevitable result of an innovation being labelled in this way is its early demise, either by employee apathy or formal withdrawal.

\begin{flushright}
\textsuperscript{132} Mansell, \textit{supra}, note 60 at 11.\\
\textsuperscript{133} Darby, \textit{supra}, note 100 at 40.\\
\end{flushright}
by the relevant union, if any.

An equally fundamental problem for joint committees and QC's, and having the same inevitable result, is their limited mandate. Innovation programs which are circumscribed in the topics they can deal or in the areas of the enterprise's operations that are open for consideration, have a general tendency to sooner or later "plateau-out". After an initial flurry of joint committees or QC activity, participants soon hit a wall established by the parameters of the program beyond which they cannot deal with. They find they have dealt with all the pressing considerations in their physical area and they cannot go further to deal with the enterprise as a whole or deeper strategic issues of the enterprise. In addition, or alternatively, they run into the wall established by the premise that they are not to deal with matters normally the subject of collective bargaining. Any sort of limit will create frustration, but such a limit in this context is particularly problematic because of the phenomenon of an increased desire among employees for participation once the participation process begins. The frustration is further heightened by the artificial nature of subject-matter limitations. The natural tendency of committees or QC's is to deal with the problems they perceive, whether or not they had been previously addressed in collective bargaining. Since collective bargaining tends to

135 Mansell, *supra*, note 60 at 11-12.
deal with the most serious problems in the relationship between management and employees, these are likely going to be problems that participatory program participants will also want to consider.

Thus, it should come as no surprise that the cases where committees have flourished and have made for a more satisfied workforce have been those where the distinction between collective bargaining and the processes of these innovations have been blurred, whether intentionally or inadvertently.\textsuperscript{136}

The failure to effectively deal with these problems of limits on worker participation processes will likely lead to their marginalization and eventual death.

Examining these problems and examples of failed innovations, a few vital prerequisites become apparent for the survival of individual innovations and the overall success of using these innovative industrial relations practices to enhance the economic position of the enterprise.

First and foremost, the more closely joint committees and QC's come to resemble semi-autonomous work groups, the more likely the enterprise will experience the type of product quality and productivity increases that have been the promise

\textsuperscript{136} W. Moore & R. Miljus, "Integration of Collective Bargaining and Formal Worker Participation Processes: Boon or Barrier to Worker Rights" (1989), 2 Employee Responsibilities and Rights Journal 217.
of the New Industrial Relations. In other words, management must be willing to give up part of its power in running the enterprise, whether it be by actually giving full authority to the participatory bodies, or, alternatively, by making the power of recommendation a power of effective recommendation where in substantially all cases, recommendations arising from the participatory structures are followed. As Mansell points out, "the advantages to management of socio-tech design are so great that there is considerable incentive for them to consider certain trade-offs in the area of management prerogatives."  

Second, as an extension of the first, piece-meal use of these innovations will not have the positive economic effects sought; the commitment of the enterprise to these types of participatory industrial relations practices must be exhibited by the use of several of these innovations and their diffusion throughout the organization, from the shop floor to the highest levels of strategic planning. The literature clearly establishes that using only one or two of the innovations mentioned above - from QC's to joint committees to semi-autonomous work groups, to profit-sharing, etc. - will result neither in a sustained use of the innovation nor the positive

137 See, for instance: Kochan & Katz, supra, note 55 at 410; P. Goodman, Assessing Organizational Change: The Rushton Quality of Work Experience (New York: Wiley, 1979); Mansell, supra, note 60 at 23.

138 Mansell, supra, note 60 at 23.
economic effects sought by management from their use. There must be a definite commitment exhibited by the use and integration of a variety of these innovations. Further, the principles of participation must diffuse throughout the three levels of industrial relation identified by Kochan, Katz and McKersie earlier.

Third, the mandate of these innovations cannot be isolated from topics normally the preserve of collective bargaining. This is particularly necessary for QC's and joint committees which are often founded on a principle of a limited mandate. However, while semi-autonomous work groups do not suffer from this initial limited mandate, there is still room for expansion in this area.

Finally, in order for this full form of participation to take place, there must be a strong union in place in the workplace able to compel the employer to give up the necessary power. Without a union, that will not likely occur.

It is clear from an examination of the current practice of industrial relations in Canada and the United States that these prerequisites are not being yet practised on a wide scale. But it is equally clear that unless they are met the likelihood of success of these innovations in assisting North

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139 Lawler, supra, note 61.

140 Kochan, Katz & McKersie, supra, note 56, especially Chapter 9.

141 Kochan & Katz, supra, note 55 at 418. See also, Marshall, supra, note 3 at 205-06.
American enterprises is slim, as are the chances that these innovations will be any more than a passing fad. Thus, it will be assumed for the balance of this paper, that most of these prerequisites will be met. If they are not there is little likelihood there will be a serious need to consider the legality of the innovations since the issue may largely be moot.
Chapter Three

The Historical Roots of Central Collective Bargaining Principles

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment". The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation... must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

Probably it was inevitable that employers would oppose the rise of labor organizations, some bitterly. Unions not only increased the power of employees to demand and secure higher wages, shorter hours and other benefits increasing labor costs, and so seemed to threaten the company's profits; they also curtailed the power of corporate management to make unilateral decisions. Few persons like to surrender power, and the more absolute their authority has been, the more reluctant they are to let it go.

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The proposition that employers and employees have conflicting interests is not controversial. Distributive issues, those concerning how the economic pie produced through the enterprise will be divided, show that conflict in sharp relief. The conflict may be less pronounced on integrative issues, those concerning whether the enterprise will survive to create the so-called pie. However, even on those integrative issues employees are normally subordinates in deciding the course of action the enterprise will take in its efforts to survive. For example, faced with competitive pressures which threaten the survival of the enterprise, management can adopt a strategy that draws upon the similar interests employees have on the question of enterprise survival so that all parts of the enterprise pull together as a team to see the enterprise through the crisis. But equally clear, management can adopt a strategy that subordinates the interests of employees to that of the enterprise, resulting in, for instance, temporary or permanent lay-offs. Thus, even in employment relationships where the parties clearly appreciate the close alignment of their interests on integrative issues, this neither eliminates the conflict on the distributive issues nor makes it inevitable that the parties will choose to resolve integrative issues in the same manner, with the same effects. At the end of the day,

however, the subordinate position of employees ensures that it will only be by coincidence that their interests are addressed by management's decision.

These propositions are particularly clear in employment relationships where the only independent source of power employees possess is their individual right to quit the relationship. Freedom of contract is a myth when the bargaining power of the parties is substantially weighed in favour of one over the other. And an employee's right to quit, when exercised individually, has historically provided too little power compared to that of employers to achieve an employment contract characterized as much by free will than by subordination. However, when employees exercised their individual right to quit in a collective, concerted fashion, the bargaining power equation shifts dramatically.4

If employee commitment to this concerted action was strong, employers would be faced with a powerful inducement to provide employment on terms more favourable to employees.

4 As the United States Supreme Court stated in American Steel Foundries v. Tri-City Council (1921), 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189:

A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer.

Quoted in Cox, Bok & Gorman, supra, note 2 at 5.
With this rule of thumb firmly in mind, employees from the earliest times of industrialization have sought to collectively bargain with their employer, whether or not that relatively recent term of art was used to describe the process.\(^5\)

As equally well-rooted in history is employer opposition to such activity by employees, for reasons generally described by Cox, Bok & Gorman above.

The history of relations between employers and employees is a history of power struggles as employees have attempted through collective action to have their interests count and employers have attempted to maintain control over how they will use, and how much they will pay for, the services of employees.

The past contours of the relationship between employees and employers are of much more than merely historical interest. Appreciating the historical experience is key to understanding the current relations between employers and employees, as well as the law surrounding those relations. Though there are numerous commentators today, not to mention judges, suggesting that labour relations laws which assume adversarial relations between employees and employers are

anachronistic, such observations are not unique to our era and have usually been made without a full appreciation of the roots of our labour law. Appreciating the historical background to our law, and perhaps the parallels with our current situation, will enable us to understand why these so-called anachronistic provisions are in our law and their relevancy in today's situation.

This Chapter will attempt to provide that perspective by exploring the historical roots of those aspects of collective bargaining law which comes most directly into conflict with the types of innovations discussed in the preceding chapter. First will be discussed the history of those provisions found both in American and Canadian collective bargaining legislation protecting the right of employees to bargain collectively with their employer by prohibiting employer activities which undermine that right, such as interfering, restraining or coercing employees in the exercise of that right. At the same time the outright prohibition in the United States of employer-dominated or company unions will be discussed, together with the Canadian prohibition on certifying labour organizations that are dominated by the employer. Next, I will outline the history of the exclusive bargaining agent status of trade unions in their

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representation of employees. Finally, I will discuss the managerial exclusion from protection of collective bargaining legislation, found both in American judicial decisions and Canadian legislation.

Much of the source material of this Chapter is American, largely because of the relative dearth of detailed Canadian sources. While Canadian sources would be preferable, the major historical trends to be discussed were also experienced in Canada, resulting in Canada's adoption of the American labour law framework. Where available, Canadian sources are cited.

Freedom of Association

The law's protection of collective action by employees in the United States and Canada was virtually nonexistent at the end of the last century. By statute and common law in both countries workers interested in combining their bargaining strength with others of like mind risked substantial criminal and civil sanctions, if not for the act of joining an association of fellow workers, more likely for taking any steps acting in association that might work a pressure on an employer, such as striking, to provide workers with a better

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7 An extreme example is that of the "Tolpuddle Martyrs" who were workers in England who joined with others in a trade union and swore an oath of allegiance to their association. They were convicted under a 1797 statute and transported to Australia. The resulting public outcry resulted in their pardon two years later. R. v. Lovelass (1834), 172 E.R. 1380.
deal.\(^8\) By the time criminal law sanctions against the activities of workers associating through trade unions began to wane the availability of civil actions against workers and trade unions continued to cause workers great difficulty. The development of the torts of conspiracy and inducing breach of contract benefitted employers. This was particularly true in light of the judiciary which was generally hostile to collective bargaining and such associated activities as picketing and strikes.\(^9\)

Despite the legal adversities, however, membership in trade unions greatly increased in the first two decades of

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this century. And the conditions that caused these membership advances, as well as a general employer antipathy to such organization and the resulting demands, resulted in a great deal of open conflict between employers and employees, with the aid of the state coming to employers. As Stuart Jamieson has stated, specifically in reference to the 1900-1913 period, these years are "viewed as a classic period of widespread unrest and violence" in North America.

The amount of employer antagonism to the development of trade unions cannot be easily overstated. As Bok has argued, the open hostility by employers towards trade unionism, and the resulting violence and unrest that accompanied efforts by


11 Jamieson, *supra*, note 10 at 72.


13 As suggested by use of the Jamieson material, many of the same trends were shared in the Canadian and American experience, not only at this time, but over the course of the development of labour law and policy after the turn of the century. As Joseph Weiler has stated:

The Canadian industrial relations setting closely resembles its U.S. counterpart not only in terms of its geographical and historical environment, but also in terms of the identities of the companies and unions in the system.

trade unions to gain employer recognition of their representation of employees, is a distinctly North American phenomenon. Although Bok was writing specifically about the American experience, it is clear Canadian labour history over the same period exhibits the same characteristic, although perhaps to a lesser degree, and perhaps more at the hands of the police and military than the employers themselves through company police and Pinkerton agents.

The violence accompanying trade union activity at this time is only the most obvious reminder of this sorry period in our continental history. Somewhat more subtle, but perhaps more effective in achieving employers' longer-term goal of eliminating the independent power of collective action through trade unions, was the development of employer-dominated union substitutes, or "company unions".

Employers were led to broaden their attack on trade unions. Employers likely sensed the growing desires of employees for a better deal, as manifested through trade union activity. Further, employers were faced with the labour shortages caused by World War I. Finally, employers understood the inherent waste from the violent struggle with workers. The most widely successful methods developed were those which tried to address the underlying discontent of


15 Jamieson, supra, note 10 at 50-52, 69.
workers, but by a means which, unlike trade unions, was firmly under the control of the employer. As Slichter puts it, "employers suddenly became interested in gaining labor's good will." The "shop committee" became the method of choice, not only in the United States but also in Canada.

The use of shop committees was not unheard of before 1915, but it was not until that year that a large American company, Colorado Fuel & Iron Co., successfully implemented the committee alternative in response, as was often the case with such committees, to a recognition strike - "one of the

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18 Canada experienced much the same phenomenon of company unions, or employer-dominated unions, or representation plans as was experienced in the United States. See, for instance, R. Storey, "Unionization Versus Corporate Welfare: The "Defasco Way"" (1983), 12 Labour/Le Travail 7 and A.W.R. Carrothers, Collective Bargaining Law in Canada (Toronto: Butterworths, 1965) 167. In fact, as noted below, William Lyon MacKenzie King, Deputy Minister of Labour in the Dominion government in the first decade of this century, Minister of Labour in 1909, successor of Sir Wilfred Laurier as leader of the federal Liberals in 1919, Prime Minister more times than not from 1921 to 1948, is credited with designing the first representation plan for use in a large sized enterprise in 1915 which became a prototype for others to follow. Thus, the following comments and descriptions of such organizations in the United States can be applied as well to Canada.

19 The phrase "shop committee" will be used interchangeably with "employer-dominated union" or "representation plan" or "company union". Each describe much the same type of organization. See, for instance, H. Millis & R. Montgomery, Organized Labor (New York: McGraw-Hill, 1945) 830-90 (Chapter 15, "Employee-Representation Plans and Independent Unions").
bitterest industrial conflicts in the history of the country."^{20} William Lyon Mackenzie King, hired for the purpose by the company's owner, John D. Rockefeller, Jr., designed the following outline of the committee structure:

A board on which both employers and employed are represented, and before which, at stated intervals, questions affecting conditions of employment can be discussed and grievances examined, would appear to constitute the necessary basis of such machinery.\(^{21}\)

Clearly a substitute for collective bargaining, it sparked much interest among businessmen.\(^{22}\)

The operating philosophy of such committees was a mutuality of interests between employers and employees\(^{23}\) with the need, from time to time, to smooth out the rough edges that would sometimes surface in workplace relations. Committees would, it was promised, facilitate communication between the employer and employees and would thereby increase the levels of trust and desire to cooperate among the parties. When employees discovered they and their grievances could be heard through the medium of committees, turnover would

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\(^{21}\) Quoted in United States Department of Labor, supra note 20 at 9.

\(^{22}\) T. Kohler, "Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)" (1986), 27 Boston College L. Rev. 499 at 522.

\(^{23}\) Kohler, supra, note 22 at 524.
decrease, morale would increase and, consequently, so would productivity and product quality. In virtually all instances, the committee plan was formulated and initiated by the employer. As the United States Department of Labor observed:

The great majority of company unions were set up entirely by management. Management conceived of the idea, developed the plan, and initiated the organization...Almost never was it established without the assistance of management.

Where management set up company unions or supported their establishment, it sometimes exerted no pressure other than stating its own wish in the matter. More frequently, however, it applied varying degrees of additional pressure, including in some cases discharge of trade-union members and threats to close down the plant unless the company union was established. Since in so many instances the presence of a trade-union had inspired the movement to organize a company union, one phase of the work of setting up a company union was to attack the trade-union or to hamper it by delay and manipulation.

The form of such plans was not uniform from establishment to establishment, but a common element was always some form of joint committee consisting of employer and employee representatives. The committee in the Colorado Fuel case, as was


25 Kohler, supra, note 22 at 524.

26 United States Department of Labor, supra, note 20 at 199.

27 Kohler, supra, note 22 at 524.
typical, was made up of equal numbers of employee and employer representatives with an equal number of votes. But as was characteristic of all such committees or representation plans, the committee could only make recommendations to management and management had no obligation to follow the recommendations. As one observer with an extensive background in the study of such committees stated, representation plans "have involved little or no sacrifice in control on the part of management." 28 There was no contemplation in the constitution of such representation plans for employees to strike to compel an employer to abide by a committee recommendation. 29 Striking was seen as inconsistent with the spirit of such representation. 30 And since the employer provided representation plans with whatever funds the employer believed were necessary for the plan's operation, there were no resources upon which workers could rely in the event of a strike. 31 Dues were not collected from plan members.

Representatives for employees on these committees were generally selected by the employees themselves by way of a


29 United States Department of Labor, supra, note 20 at 159.

30 United States Department of Labor, supra, note 20 at 159-60.

31 United States Department of Labor, supra, note 20 at 114-19.
vote.\textsuperscript{32} However, requirements established by many constitutions required that representatives had to be employed with the company for a certain specified period, usually no less than one year and that representatives had to be American citizens.\textsuperscript{33} This latter requirement tended to leave many new immigrants without representatives who were sensitive to their particular needs. Other factors affecting the quality of representation were the requirements in most constitutions that representatives only served for a term of one year, and that representatives be drawn from the current employee roster of the enterprise.\textsuperscript{34} Thus, expertise among employee representatives was rare.

The matters these committees dealt with varied from committee to committee, but typically the matters considered most were individual employee grievances and housekeeping/safety issues.\textsuperscript{35} More than half the committees surveyed by the United States Department of Labor considered the specific wage rates of particular occupations, but only about one half of those committees considered wage rates

\textsuperscript{32} United States Department of Labor, \textit{supra}, note 20 at 120.

\textsuperscript{33} United States Department of Labor, \textit{supra}, note 20 at 121.

\textsuperscript{34} United States Department of Labor, \textit{supra}, note 20 at 121-22.

\textsuperscript{35} United States Department of Labor, \textit{supra}, note 20 at 162-63.
generally.\textsuperscript{36} In rarer instances committees would deal with such tasks as hiring, promoting and discharging employees, as well as other managerial matters.\textsuperscript{37}

It was uncommon for any of the arrangements recommended by the committee and accepted by management ever to be reduced to writing or otherwise form the basis of a contract between the employees and the employer.\textsuperscript{38}

The rapid growth of representation plans was assisted by government policy in the United States during World War I. In the United States there were periods of intense industrial conflict in 1917 caused by, according to a government commission, "the insistence by employers upon individual dealings with their men" which precluded the development of a healthy relationship between them, as well as the inability of each side to grasp the problems of the other because of the lack of collective bargaining.\textsuperscript{39} In the result, the National War Labor Board encouraged the development of collective dealing between employers and employees, but only through imposition of shop committees. The Board consistently refused

\textsuperscript{36} United States Department of Labor, \textit{supra}, note 20 at 162-63.

\textsuperscript{37} Kohler, \textit{supra}, note 22 at 525-26.

\textsuperscript{38} United States Department of Labor, \textit{supra}, note 20 at 154. Less than one-fifth of the company unions surveyed by the Department had any sort of bilateral agreement.

\textsuperscript{39} Kohler, \textit{supra}, note 22 at 522.
to order employers to recognize trade unions.° Labour members of the Board acquiesced to this position on the shared understanding with other members that the shop committees would eventually evolve into legitimate trade unions.° However, this was not to be as many employers which had representation plans imposed upon them eliminated them after the war. Nevertheless, the use of such plans by the Board gave greater exposure to them and thereby assisted their spread in the years immediately following the war.°

Between 1919 and 1922 the number of plans in the United States increased more than three-fold.° Their use became so widespread that by 1928 the American Social Science Research Council was able to report in its annual review of industrial relations, "that while unionism was practically the only form of collective dealing two decades ago, since that time there has been rapid spread of other forms of group representation."" And as Kohler stated, "[i]ndeed, it is correct to say that from roughly 1915 until 1935, there were

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40 Kohler, supra, note 22 at 523.
41 Derber, supra, note 17 at 213-14.
42 Derber, supra, note 17 at 213-14; Kohler, supra, note 22 at 523.
43 Derber, supra, note 17 at 214.
44 H. Feldman, A Survey of Research in the Field of Industrial Relations A Preliminary Report to the Advisory Committee on Industrial Relations of the Social Science Research Council (New York: Office of the Council, 1928). Quoted in Derber, supra, note 17 at 229.
two labor movements in the United States, one consisting of self-organized employee associations, the other being the management sponsored "employee representation" movement. The significance of this development is appreciated when it is remembered that the prime function of these representation plans was to undermine the introduction of collective bargaining by independent trade unions.

As the decade proceeded it seemed representation plans and general welfare programs adopted by employers were here to stay as a firmly established alternative to collective bargaining model.

The only legal prohibition against company unions at this time was on the American railway which had, since the turn of the century, been effectively organized, resulting in the unions having an effective voice in the passage of the Railway Labor Act of 1926. The Act included a provision stating that management and labour should designate their respective representatives to bargaining "without interference, influence

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45 Kohler, supra, note 22 at 526.


48 Bernstein, supra, note 46 at 40.

49 Cox, Bok & Gorman, supra, note 2 at 79.
or coercion exercised by either party over the self-organization or designation of representatives by the other. The chief architect of that Act noted that the "keystone of [the Act] lay in the provision guaranteeing freedom of association and the right of collective bargaining." The United States Supreme Court interpreted the Act in 1930 so as to make company unions unlawful in that industry.

This same freedom of association provided for in that Act, and which had found some favour in reports of industrial commissions, court decisions and rulings of administrative bodies decades before Franklin D. Roosevelt became President of the United States in 1932, became the generalized policy of the United States government with the dawn of Roosevelt's New Deal era.

The new administration's ambitious plan to revitalize an America ravished by the Great Depression translated into the National Industrial Recovery Act of 1933. Roosevelt was anxious to have the backing of both business and organized labour for any recovery legislation he was going to propose.

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50 Quoted in Cox, Bok & Gorman, supra, note 2 at 80.

51 D. Richberg, The Rainbow (Garden City, N.Y.: 1936) 51. Quoted in Bernstein, supra, note 46 at 23.


53 See, generally, Bernstein, supra, note 46 at 18-28.
Without the support of both groups, he believed, any recovery plan would not succeed.\textsuperscript{54} Organized labour's strongest ally within Roosevelt's inner circle of advisors was Senator Robert Wagner of New York.

Wagner was firmly committed to the idea of free collective bargaining through independent trade unions, arguing that "[t]he denial or observance of this rights means the difference between despotism and democracy."\textsuperscript{55} Wagner was called upon by Roosevelt to assist in the drafting of the legislative program making up the President's recovery program.

Labour's push for some form of generalized legislative guarantee for the right to organize and bargain collectively, and Wagner's support of that principle, resulted in one of the four cornerstones of the recovery program being support for the collective bargaining model of employee representation.\textsuperscript{56} The resulting language in the National Industrial Recovery Act, signed by the President on June 16, 1933, read as follows:

\begin{quote}
Section 7(a): Every code of fair competition...issued under this title shall contain the following conditions:
(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the
\end{quote}

\textsuperscript{54} Bernstein, \textit{supra}, note 46 at 32.

\textsuperscript{55} Quoted in Bernstein, \textit{supra}, note 46 at 28.

\textsuperscript{56} Bernstein, \textit{supra}, note 46 at 29-39.
interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing;...57

The labour provisions of the National Industrial Recovery Act represented a strong statement of policy favouring the freedom of employees to join together in independent trade unions for the purposes of collective bargaining with employers. However, the Act faced a host of problems making it ineffective in advancing the cause of collective bargaining. Because the Act was of doubtful constitutional validity, and because it contained little in the way of effective enforcement mechanisms,58 there was not a great deal of incentive on industry to comply with decisions of the NRA under the Act. And the Act's provisions were so ambiguous that industry could maintain its interpretation that the Act did not prohibit many of industry's activities which stifled the prospects of collective bargaining. The labour boards established under the Act promulgated such "cloudy and inconsistent" decisions that industry's arguments were never

57 Quoted in Bernstein, supra, note 46 at 37.
58 Bernstein, supra, note 46 at 64.
firmly defeated.\textsuperscript{59}

For example, the American Federation of Labor's position on Section 7(a) was that it showed clear Congressional intent making illegal those employer activities that undermined the prospects of collective bargaining through independent trade unions, such as the maintenance of company union. However, the advice the National Association of Manufacturers gave its tens-of-thousands manufacturer members\textsuperscript{60} was that the provisions only prohibited employers from requiring its employees join company unions. Otherwise, individual bargaining, company unions, inducements to join company unions, refusal to recognize "outside" trade unions, and other such tactics were still permitted.

Indeed, the \textit{Act} had the unintended effect of making employers somewhat more sophisticated in their use of company unions. So as to avoid allegations of interference or restraint on the rights provided by Section 7(a), employers changed the joint committee structure of company unions. Provision was made for separate meetings of only the employee representatives and, like the independent trade union on which they were patterned, the company union would now have its own constitution, elected officers and representatives, by-laws,

\begin{footnotesize}
\footnote{\textsuperscript{59} Kohler, \textit{supra}, note 22 at 527 and references cited therein.}

\footnote{\textsuperscript{60} In 1937 the N.A.M. represented, through its allied groups, over 30,000 manufacturers with nearly 5 million employees. Bernstein, \textit{supra}, note 46 at 14.}
\end{footnotesize}
a membership and other such attributes. The employee representatives would meet with management on the pretense of "bargaining", but the nature of the relationship between the company union and the employer did not substantially depart from tradition. As with the pre-N.I.R.A. company unions, management still initiated the process, formulated the union's constitution and by-laws (which almost never made provision for general membership meetings), and controlled whether any proposals arising from the employees would be acted upon.

In short, the drive to company unionism barely missed a step under the N.I.R.A. As Bernstein points out, "[a]s a matter of policy...employers selected the company union as best designed to frustrate the A.F.L. interpretation since it was employer controlled and yet appeared to be "collective" bargaining." Thus, while the N.I.R.A. sparked the most intense organizing to that date by independent trade unions, it also ushered in a period of even greater development of company unions. For example, of 635 manufacturing and mining companies surveyed at the end of 1933, 400 established

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61 Kohler, supra, note 22 at 528.
62 Kohler, supra, note 22 at 528-29.
63 Kohler, supra, note 22 at 528-29.
64 Bernstein, supra, note 46 at 57.
65 United States Department of Labor, supra, note 20 at 27-28.
company unions under the N.I.R.A..\textsuperscript{66} By 1935, 2.5 million workers belonged to company unions, about two-thirds the number that belonged to trade unions.\textsuperscript{67} Three-fifths of the company unions in existence in that year had been organized since 1933 and the rate of growth of company unions was greater than that of independent unions.\textsuperscript{68}

In the early 1920's when, for the first time, the number of company unions was on the rise while membership in independent trade unions began to fall, the A.F.L. became "seriously alarmed".\textsuperscript{69} The A.F.L.'s concern increased exponentially over the next decade so that by 1935 the A.F.L.'s sights were exclusively directed at purging all industries of company unions. This aim resulted in a vigorous organizing campaign. More pointedly, the A.F.L.'s goal was sought to be achieved through legislation that would make good on the promises it believed had been made in the N.I.R.A..

Their pressure for labour law reform came at an opportune

\textsuperscript{66} Bernstein, \textit{supra}, note 46 at 57.

\textsuperscript{67} The percentage depends on the source relied upon. Kohler, \textit{supra}, note 22 at 530, says 60 per cent. However, using his figure of 2.5 million company union employees and comparing it with the figure of 3.045 million American Federation of Labor members in 1935 noted in United States Department of Labor, \textit{supra}, note 20 at 28, the percentage works out to just over 82 per cent.

\textsuperscript{68} Kohler, \textit{supra}, note 22 at 530.

\textsuperscript{69} United States Department of Labor, \textit{supra}, note 20 at 25.
time, immediately on the heels of Railway Labor Act reform resulting from the strong concern administrators of the Act had about, inter alia, the roadblocks posed by company unions for employee self-organization. The reform included provisions aimed directly at eliminating employer domination of bargaining representatives by, for instance, positively prohibiting employer interference with self-organization, employer contributions to bargaining agents, and employer inducements to join a company union. Elimination of the company union on the railway was inevitable as a result of the reform. And although the legislation applied only to workers on the railways, the example presented for reform of the N.I.R.A. did not escape contemporary observers.

Against this background, Congress was ready to deal with labour relations matters on a broad scale. In the November, 1934 elections, President Roosevelt and the New Deal won the most overwhelming victory to that date in the history of

70 Bernstein, supra, note 46 at 47.
71 Bernstein, supra, note 46 at 50-55.
72 Bernstein, supra, note 46 at 55.
73 As George Harrison, president of the Railway Clerks Union and member of a special advisory panel to President Roosevelt, put it, the legislation was "a precedent in the extension of these same rights and privileges to employees of other industries. I don't see how the next Congress can refuse the demand of the American Federation of Labor for more specific legislation to implement the labor sections of the National Industrial Recovery Act." Bernstein, supra, note 46 at 56.
American politics. The legislation that was to become the National Labor Relations Act was introduced in 1935. Its chief sponsor, Senator Wagner, and key supporters within Congress, were keen to protect the rights provided under the N.I.R.A. with substantive legislation possessing the enforcement teeth capable of doing the job. As Wagner stated upon introduction of the first version of his bill, the N.I.R.A. "attempted to open the avenues to collective bargaining by restating the right of employees to act through representatives of their own choosing, free from the influence of employers." Section 7(a) did not provide this freedom because it "did not outlaw the specific practices by which some employers set up insuperable obstacles to genuine collective bargaining." Wagner's first priority was to remedy that deficiency.

Wagner was clear on the problems company unions had created for the cause of independent employee representation and upon what was needed, in his view, to alter that situation. "The very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages,

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74 Bernstein, supra, note 46 at 88.
75 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935 Vol. 1 at 15.
76 Legislative History, supra, note 75 at 15.
rules, or hours of employment," Wagner stated. 77 "[The N.L.R.A.'s] promise of free and unhampered development of real employee organizations, and their complete recognition should be guaranteed by the enactment of the new legislation which is being proposed today." 78

Although it can fairly be said that the entire bill was aimed at protecting the right of employee self-organization by eliminating company unions, two particular provisions, operating in tandem, specifically called for that result. The first was what would become Section 8(a)(2) of the current legislation:

Section 8 (a): It shall be an unfair labor practice for an employer -
...
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

Section 2: When used in this Act -
...
(5) The term "labor organization" means any organization of any kind, or agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor

77 Legislative History, supra, note 75 at 16.
78 Legislative History, supra, note 75 at 18.
disputes, wages, rates of pay, hours of employment, or conditions of work.

The legislation did not take its mark against company unions in the certification process. In other words, the certification provisions in the Act did not deal at all with company unions. This, as we shall later see, is to be contrasted with the parallel Canadian legislation which denies certification rights to company unions. Instead, the American approach was to prohibit company unions outright, whether or not they apply to be certified as bargaining agent under the Act.

By its approach, the Act exhibited a clear, conscious choice between two models of employee representation. The Act's elimination of company unions left open the field to the only other alternative vying then for support - the independent trade union existing at arm's length from the employer. This is not to suggest that the public policy choice for such representation arose only by implication under the Act. On the contrary, repeatedly throughout the debate over the bill, Wagner made clear that "the genuine freedom of self-organization" was the basic underlying principle of the Act, and that such freedom was only possible with a representative independent of the employer in the ways articulated in Section 8(a)(2). As Sumner Slichter put it, testifying before the Senate Committee dealing with the

79 See, for instance, Kohler, supra, note 22 at 532-33.
legislation, the "basic policy" of the Act, "if I understand it correctly, is to prevent the growth of employer-dominated unions." 80

The positions taken by employers appearing before the committee clearly indicates they appreciated the choice being made in the legislation. As well, their positions, viewed in retrospect, help to establish just the sorts of organizations the legislation intended to eliminate.

One employer witness urged the committee to delete the language that later laid the base for Section 8(a)(2), stating that it would have the effect of instituting a "single form of unionism." 81 Kohler summarizes this witness's view:

"Employee representation," Dennison stated, "is an essential supplementary

80 Legislative History, supra, note 75 at 89. See also, Bernstein, supra, note 46 at 102. Slichter sardonically added the following during his testimony:
I have been trying to find some of these employer-dominated unions, and I have talked with many employers, and thus far I have been unable to discover a single employer who admits that he has an employer-dominated union. In fact, every employer with whom I have talked has been outspoken in expressing the principle - the belief in the principle that employee organizations should be entirely independent of employer control. So I should be greatly surprised were any employer to appear and oppose this bill, except in matters of detail.
Legislative History, supra, note 75 at 89 (quoted in Kohler, supra, note 22 at 531).

81 Legislative History, supra, note 75 at 436. Quoted in Kohler, supra, note 22 at 531. The witness was Henry Dennison, an industrialist and National Labor Board member under the N.I.R.A.
and a necessary competing type of unionism," through which "a sound system of joint and mutual participation in management has developed or is developing." Wagner's bill, Dennison warned, would cause these schemes "for a wholesome mutual business relationship between management and workers" to be "dug up with the tares" instead of permitting them "to be cultivated as seeding ground or laboratories from which we may learn." Out of the "slowly freeing competition and the gradual comparison of the two forms," stated Dennison, "we shall be able to develop modifications of each" that will permit the "realization...of the truth that any business organization that can knit itself into a single organism will prove superior as an institution of broad social value, to one which must exist in two somewhat stiffly cooperating and sometimes actively conflicting segments." A bill that would "cramp all systematic contact...as this bill cramps it," Dennison admonished, ought "to be considered most carefully" before it is enacted.82

The position taken by employer groups during Senate consideration of the original 1934 version of what would later become the N.L.R.A. took the view that company unions should not be outlawed since, "[i]n view of the objective of promoting cooperative relations[,] participation of both workers and employers in company unions was proper."83 The same tack was taken during debate over the 1935 version that became the N.L.R.A.. An industry spokesman said as follows at those hearings: "[the company union assumed that] the best

82 Kohler, supra, note 22 at 531-32 (footnotes omitted).
83 Bernstein, supra, note 46 at 70.
interests of labor can be served by having the employee and employer sit down together in a friendly and constructive atmosphere and, with a firsthand practical knowledge of their problems, work out a fair and equitable solution."

At root, the position put forward by employers was that, while the then proposed legislation assumed unalterable conflict of interests between employers and employee, industry believed that there existed an identity of interest between management and labour. By prohibiting company unions, industry charged, Congress would be committing "a deliberate attempt to fasten upon industry in this country a system of organized labor affiliated with the...American Federation of Labor." In the process, the legislation would upset "existing satisfactory relations" which had greatly assisted production in the enterprises where they had been practised.

Kohler sums up the hearing process, and the legislative intent exhibited by it, in the following manner:

Throughout its consideration of the Act's terms then, Congress was confronted with a clear choice between two distinctly different models of group dealing. In enacting the NLRA, Congress endorsed one, and thereby adopted a scheme for the private ordering of the employment

84 Quoted in Bernstein, supra, note 46 at 109.
85 Bernstein, supra, note 46 at 108.
86 Quoted in Bernstein, supra, note 46 at 108.
87 Bernstein, supra, note 46 at 108.
relationship that is based on collective bargaining through self-organized and autonomous employee associations. 88

Providing an effective freedom to choose collective bargaining was the touchstone of the legislation. But in employment relationships, freedom of choice cannot be presumed merely because employees have a secret ballot vote to choose, for instance, a company union over a legitimate trade union independent of the employer. Employees will tend to be particularly sensitive to the desires of the employer and will often feel that they dare not cross an employer which has made it clear that it wants, for instance, a company union and wishes its employees to reject an independent trade union. 89

88 Kohler, supra, note 22 at 535.

89 This statement is not as uncontroversial as it intuitively appears. A major attack on the proposition was made in 1976 with publication of J. Getman, J. Goldberg & J. Herman, Union Representation Elections: Law and Reality (1976) which asserted that the adverse effects of employer activities on the ability of employees to exercise their free will in representation elections had been grossly overstated. They made a strong case for a total deregulation of the process by which employees chose whether they will be represented in their relations with their employer, and by whom. The study has been the subject of numerous attacks, the most effective of which have used the study's own statistics to show why its conclusions are not valid. See W. Dickens, "The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again" (1983), 36 Industrial and Labor Relations Rev. 560 and W. Dickens, "Union Representation Elections: Campaign and Vote", unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology, October 1980 (summarized and discussed in P. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983), 96 Harv. L. Rev. 1769 at 1784-86). At best, we can conclude at this point that the evidence one way or the other is ambiguous and that, consequentially, we would be wisest to follow instinct in the matter which tells us that those with power over others can, at least in the short run, cause those
So while freedom of choice is the heart of the legislation, the legislation is shaped by the realization that freedom of choice is only really possible by outlawing employer interference, whether it be in the form of discriminatory discharges of union sympathizers or organizers, or by the employer's creation of a model of employee representation in which it plays any part.

Telescoping back to Chapter Two, the basis of possible legal problems for innovations discussed there can be seen. Each represents a structure for presenting the ideas, concerns and desires of employees to the employer and each is initiated by the employer, who retains a strong role in their administration. Chapters Four and Five will explore these issues more fully.

**Exclusive bargaining authority**

While Section 8(a)(2) went very far in its protection of employees rights to organize within independent trade unions, it alone would have been insufficient to undercut other employer tactics which frustrated the effective exercise by employees of their freedom to bargain collectively through the representative of their choosing. Bargaining by individual employees with their employer over the terms and conditions of their employment was the hallmark of the common law regime in labour relations. It was the lack of fair results through others to act in a manner contrary to their interests.
this regime which, as earlier discussed, led to union organization on the premise that bargaining as a group with the employer afforded employees a better chance of striking a more favourable deal for themselves. But the ability of employers to continue bargaining with individual employees, or organizations purporting to represent a group of employees who had not joined the trade union, provided the employer with a strong weapon with which to divide the workforce into factions, thus weakening the bargaining power of any particular group. Francis Biddle, the first chairman of the National Labor Relations Board predating the Wagner Act Board, made the following statement to Congress during consideration of the Wagner Act:

The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interfering with collective bargaining and not for the purpose of preserving the individual liberty of contract of the American workman.90

Speaking specifically about employers bargaining individually with employees over wages, the United States Supreme Court in J.I. Case Co. v. N.L.R.B., noted the divisive power of such a practice:

[Adv]antages to individuals may prove as disruptive of industrial peace as

90 Quoted in R. Weyand, "Majority Rule in Collective Bargaining" (1945), 45 Columbia L. Rev. 556 at 567. See also, Bernstein, supra, note 46 at 109 where he comments, "[b]usiness attacked the majority rule for denying the rights of minorities".
disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.\textsuperscript{91}

Besides the divisive effects of individual bargaining, there is the perhaps more significant consequence that trade unions will lack the credibility and economic power that can be exerted when a union approaches an employer speaking for all employees. The enticement of some individual employees with relatively greater bargaining power to strike a better individual deal for themselves, and the ability of employers to pressure individual employees in relatively weaker bargaining positions to accept less than the union demands, both play into the hands of the employer and make the union weaker. When such employees are taken together with those who just do not want to associate with the union for ideological or religious reasons, and will thus be willing to strike individual deals, the employer is provided an important and powerful weapon to undermine whatever positive results were promised by the freedom to bargain collectively.\textsuperscript{92}

It was consequently clear to the framers of the N.L.R.A.\textsuperscript{91} J.I. Case Co. v. N.L.R.B. (1944), 321 U.S. 332 at 338-39.

that their reform, to be effective, would have to deal with this divisive employer power to negotiate individually with employees, or with a variety of groups. Western European models of plural representation, whereby unions would only represent those employees who specifically selected that union, were believed not capable of working in the United States in light of the intense employer antipathy for collective bargaining and their desire to undermine it.\textsuperscript{93} The first Roosevelt National Labor Board had tried such pluralism, calling on employers to bargain with groups pro rata to their membership.\textsuperscript{94} But later, commenting on its effects, Bernstein stated:

Proportional representation fragmatized [sic] and destroyed unions, creating jealousy, friction, and division within the plant. Millis[, one of the members of the pre-N.L.R.A. National Labor Relations Board,] observed that employers proposed it as a short-term device to break unions...\textsuperscript{95}

The answer the N.L.R.A framers provided was the principle of majority rule. As Senator Wagner put it during Senate debate:

[C]ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of

\textsuperscript{93} See, for instance, Bok, \textit{supra}, note 14, esp. at 1426-1427.

\textsuperscript{94} Bernstein, \textit{supra}, note 46 at 60.

\textsuperscript{95} Bernstein, \textit{supra}, note 46 at 103. See also, Millis & Montgomery, \textit{supra}, note 19 at 542-43.
majority rule. 96

Majority rule in representation was not an extraordinarily novel idea. Not only was it the basis of American electoral politics, but it was also the basic organizational structure of such anti-union groups as the National Association of Manufacturers, which led the employer fight against the N.L.R.A., and the American Chambers of Commerce. 97 And there were settled examples of its use in earlier American labour policy under the Railway Labor Act, 1926 and the War Labor Board. 98

The implications of applying majority rule principles to collective bargaining were fundamental to any success the new legislation would have in institutionalizing collective bargaining. They were neatly summed up ten years after enactment by Weyand:

In contrast to the concern of the common law with the assumed intent of each employee, the majority rule principle makes the intent of any or all the individual employees immaterial. Instead, by analogy to the political process, each employee, union and non-union alike, who falls within the unit over which the elected representative has jurisdiction, is subject to all provisions respecting his employment upon which the representative and the employer agree. Like the legislative branch of government, effecting changes in the law,

96 Quoted in Weyand, supra, note 90 at 567. See also, Weyand, supra, note 90 at 565-66.

97 Bernstein, supra, note 46 at 103.

98 Bernstein, supra, note 46 at 103.
the union and the employer, by changing from time to time the rules governing hours, wages and conditions of employment, bind the employee to each change effected irrespective of the employee's intent in the matter. Nor can the employee by any individual contract alter the rules governing his employment fixed by the collective agreement entered into by the union elected by a majority of the employees in the unit any more than a citizen by private contract alter the laws enacted by the legislature. Majority rule replaces whatever rights an employee theretofore had to bargain individually by establishing a democratic procedure by which he and his fellow workers in the appropriate unit participate in making the decisions governing their working conditions by voting as to which union shall represent them and by shaping the policies of that union through membership therein.99

The United States Supreme Court, in an early decision contemplating the ramifications of the majority rule principle, accepted the above implications by stating:

The practice and philosophy of collective bargaining looks with suspicion on such individual advantage. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always

99 Weyand, supra, note 90 at 561.
creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantage or favors will generally in practice go in as a contribution to the collective result.  

Canadian jurisdictions, in the late 1930's, similarly adopted majority rule to provide bargaining agents with exclusive bargaining authority. And like the United States Supreme Court, the Supreme Court of Canada gave effect to the implications of exclusivity by stating:

The union is, by virtue of...its certification...the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. ... It is not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.


Management exclusion from collective bargaining

As noted earlier in discussing freedom of association, the conflict of interest between employers and employees on distributive issues underlies the rationale for legislatively preventing employer influences from infecting employee decisions on whether to bargain collectively with their employer. Preserving employee autonomy in exercising that choice is vitally important if distinct employee interests are to be advanced.

Conversely, employers are vitally concerned that their distinct interests, relative to employees, are adequately protected when employees decide to bargain collectively. Specifically, employers have a strong interest in ensuring that those individuals in the enterprise who determine or give effect to the employer's policy and personnel decisions, many of which may adversely effect the bulk of the enterprise's employees, will not be part of that bargaining unit designed to advance employee interests. If these individuals belonged to the bargaining unit, they would be faced with an intolerable conflict of interest as between the employer and their fellow employees whenever they were required to make or give effect to decisions that might adversely affect the other employees.

Consequently, employers have consistently sought to have excluded from collective bargaining units any individuals who supervised employees in such units or who determined or gave
The 1935 National Labor Relations Act did not contain provisions expressly dealing with the status of supervisors and managerial employees. It simply gave collective bargaining rights to all "employees", only specifically excluding from that definition agricultural workers, domestic servants and individuals directly related to the employer.\textsuperscript{103}

Taken literally, the Act provided the right of collective bargaining to any employee, including high level executives and supervisors of other employees.

However, the National Labor Relations Board was faced almost immediately with employer arguments that placing supervisors in bargaining units would divide these individual's loyalties as between the employer and the union. The Board was never directly faced with a certification application for a unit composed of managers (i.e., individuals who were responsible for developing the enterprise's policy in relation to, for instance, suppliers, customers, and employees).\textsuperscript{104} But supervisors, such a foremen and others who represented the first line of supervision over employees, often sought certification in the early years of the Act, either as part of a unit of employees which they supervised or

\textsuperscript{103} National Labor Relations Act, infra, note 113, s. 2(3).

\textsuperscript{104} D. Rabban, "Distinguishing Excluded Managers from Included Professionals Under the NLRA" (1989), 89 Columbia L. Rev. 1775 at 1787.
as a separate unit. Whether or not they should be permitted to collectively bargain was "one of the most contested areas of labor law during the 1940's."\textsuperscript{105}

The difficulty of the issue was illustrated by the Board reversing itself twice in a four year period between 1942 and 1946\textsuperscript{106} before settling with the conclusion that supervisory employees were entitled to collectively bargain. The United States Supreme Court, in 1947, supported the Board's resolution of the issue.\textsuperscript{107}

The arguments that were ultimately successful before the Board and the Supreme Court were those that stressed the similar adverse interests supervisors and rank-and-file employees shared as against the employer on issues of wages, hours and working conditions. No matter where an employee is situated within the enterprise hierarchy, that employee does not owe a duty of loyalty to the employer on such issues.\textsuperscript{108}

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\textsuperscript{105} Rabban, supra, note 104 at 1783.
\textsuperscript{106} Union Collieries Coal Co. (1942), 41 N.L.R.B. 961 (supporting certification supervisors); Godchaux Sugars Inc. (1942), 44 N.L.R.B. 874 (same result); Maryland Drydock Co. (1943), 49 N.L.R.B. 733 (overruling Union Collieries and Godchaux); Packard Motor Car Co. (Packard I) (1945), 61 N.L.R.B. 4 (overruling Maryland Drydock); Packard Motor Car Co. (Packard II) (1946), 64 N.L.R.B. 1212 (ordering bargaining in accordance with Packard I). See Rabban, supra, note 104 at 1783.
\textsuperscript{108} Packard I, supra, note 106 at 19.
\end{flushright}
such issues would arise whether or not the supervisor was entitled to collectively bargain.\textsuperscript{109} Thus, to deny supervisors the right to collectively bargain would undermine the central purpose of the Act to further an inclusive democratic philosophy entitling all to the benefits derived from collective bargaining.\textsuperscript{110} Allowing supervisors to advance their "independent and adverse" interests regarding wages, hours and working conditions would not adversely effect the supervisor's ability to loyally assert the employer's interests in performing daily duties.\textsuperscript{111} If for some reason individual supervisors had difficulties in this regard, it would be open to the employer to appropriately discipline the supervisor.\textsuperscript{112}

While a majority in the United States Supreme Court found favour with many of these arguments, and upheld the Board's conclusions allowing supervisors to collectively bargain, Congress acted immediately to reverse the Supreme Court and Board decision by way of the Taft-Hartley Amendments\textsuperscript{113} to the National Labor Relations Act in 1947. Those amendments specifically excluded from the Act's protection "any

\textsuperscript{109} Packard II, supra, note 106 at 1214.

\textsuperscript{110} Packard (Supreme Court), supra, note 107 at 490.

\textsuperscript{111} Packard (Supreme Court), supra, note 107 at 490.

\textsuperscript{112} Packard I, supra, note 106 at 19.

\textsuperscript{113} 61 Stat. 136 (1947) (codified into the National Labor Relations Act, 29 U.S.C. paras. 151-166 (1982)).
individual employed as a supervisor". Further, the Amendments defined "supervisor" as meaning "any individual having authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."  

The arguments that laid the base for this Congressional action were those which stressed that unionization of supervisors posed unacceptable dangers to enterprises of divided loyalties among supervisors. The authority they exercise over other employees makes supervisors "an instrumentality of management in dealing with labor." If supervisors were able to unionize they would be allied with rank-and-file employees, thereby placing themselves "in the impossible position of having to enforce the employer's rules against the very employees to whom they were pledged in labor

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114 National Labor Relations Act, supra, note 113, s. 2(3).
115 National Labor Relations Act, supra, note 113, s. 2(11).
116 Rabban, supra, note 104 at 1785.
117 Maryland Drydock, supra, note 106 at 740.
solidarity."\textsuperscript{118} This would pose tremendous difficulties for employers in effectively managing their enterprises.

One argument which fuelled the dissent in \textit{Packard II} at the United States Supreme Court, and which captured the imagination of Congressional members, was the speculation that allowing supervisors to unionize would lead to collective bargaining by the highest level executives of enterprises, a prospect that would lead enterprises to abandon the interests of stockholders and investors, causing irreparable harm to free-enterprise.\textsuperscript{119}

Hyperbole aside, however, Congressional concern for the long-term interest of business stability played an important role in its decision to exclude supervisory personnel from the \textit{Act}'s protection. The following passage, summarizing the views of the Senate Committee which drafted the supervisory exclusion, has been identified as the crux of Congressional concern in excluding supervisors from collective bargaining protection:

The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the


\textsuperscript{119} \textit{Packard} (Supreme Court), \textit{supra}, note 107 at 494.
free-enterprise system. The Board's rationale for this exclusion was seldom express, but had to be drawn from decisions, for instance, in which the Board contrasted true managers from supervisors in order to establish the latter's eligibility for collective bargaining under the Act. From such decisions it became clear that the Board considered employees who helped establish policy for enterprises were in a fiduciary relationship with the enterprise which was owed a degree of loyalty commensurate with the trust and discretion placed in them by the enterprise. Thus, individuals who helped determine the employer's policies related to, for instance, the conduct of labour relations, the establishment of wage rates, or who had authority to establish wage rates or select production techniques, were considered managerial and

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120 93 Congressional Record 5014 (1947) (quoted in Rabban, supra, note 30 at 1795 n84).


122 See, for instance, Maryland Drydock, supra, note 106 at 745.
thus ineligible for bargaining under the Act.\textsuperscript{123} The Board, in 1946, summarized the developed rule as follows:

We have customarily excluded...executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be "managerial" in that they express and make operative the decisions of management.\textsuperscript{124}

The Board, however, narrowed the exclusion in 1970 in light of growing sympathies for the growing number of managerial employees seeking the Act's protection and the failure of Congress to expressly exclude policy-making managers, as they did with supervisors. Further, the Board concluded that the conflict of interests rationale only had compelling force when the policy-making functions of the individuals in question were in relation to the enterprise's labour relations policies.\textsuperscript{125} Thus, only individuals having policy-making functions in that area would be excluded from the Act's protection.

The United States Supreme Court, however, rejected the Board's narrowing of the exclusion in the appeal from the

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\item \textsuperscript{124} Ford Motor Co., (1946), 66 N.L.R.B. 1317.

\end{footnotes}
Board's 1970 decision. In *N.L.R.B. v. Bell Aerospace Co.* \(^{126}\) the Court determined that Congress intended, despite the absence of any relevant legislative provision, that all policy-making managers be excluded from the protection of the Act. This intent was derived, *inter alia*, from Congress's failure to act in relation to such managers in 1947 when, at that time, the Board's jurisprudence clearly excluded all policy-making managers. The Court remanded the case back to the Board which then articulated the following definition of excluded managers which has since governed:

> [T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy... [M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management. \(^{127}\)

In summary, individuals acting either in supervisory or policy-making positions were excluded from collective bargaining protection due to the perceived conflict that would arise for those individuals as between their union and their employer if they were permitted to collectively bargain. The interests of employers to have individuals in such positions aligned solely with the enterprise overcame opposition which favoured enfranchising such individuals in the collective

\(^{126}\) \((1974), 416 U.S. 267, 73 L.C. 14,465.\)

\(^{127}\) *Bell Aerospace Co.* \((1975), 219 N.L.R.B. 384.\)
bargaining regime.

The historical survey presented in this Chapter lays the groundwork for the next two Chapters, which will explore the application of the doctrines introduced in this Chapter to specific industrial relations innovations. That exploration will show a degree of tension between the law and the innovations, a tension which may tempt governments to jettison those aspects of the law causing that tension. The question posed by this Chapter in addressing that temptation is whether the historical purposes served by the doctrines no longer represent valid concerns for labour law policy-makers.
Chapter Four

Legal Implications in the United States

The preceding Chapter illustrated the two primary themes of North America's collective bargaining legal framework. First, the interests of labour and capital conflict on issues concerning how the employment relationship will operate on a day-to-day basis and how the fruits of enterprise prosperity will be shared between them. Second, individual employees have substantially less power in the employment relationship than employers and this has the undesirable result of employee interests being subjugated to the interests of employers.

The consequential labour law doctrines acknowledge these themes by creation of a legal edifice that supports the collectivization of labour so as to address the second truism, and attempts to keep labour and capital at arms-length in dealing with each other so as to address the first reality.

This legal edifice works reasonably well in the typical North American enterprise of the 20th century. However, when labour and capital incorporate changes into their relationship which do not fit comfortably with these over-riding themes and resulting doctrines, such as those innovations canvassed in Chapter Two, the parties risk running squarely up against that legal edifice.

Exactly what problems do these doctrines pose for the new industrial relations? This Chapter and the next will address that issue by articulating some of the legal problems faced by
the New Industrial Relations. The answer will be addressed in the following manner. First, the statutory, and in some cases, common law basis of the doctrines placing the New Industrial Relations at risk will be identified, together with a brief explanation as to how those doctrines normally operate in cases without any new industrial relations complications. Next, the paper will discuss how these doctrines have been applied or, in cases where there is little applicable comparison, how the doctrines would be applied, when faced with some of the innovations identified earlier.

This Chapter will deal with these issues from the perspective of the collective bargaining law of the United States, with the next Chapter focusing on the Canadian experience. This is as much an effort at comprehensiveness as comparative study; however, comparing and contrasting experiences will be an inevitable result.

The United States Experience

There is a wide variety of doctrines and principles in American labour law which may be hostile to industrial relations innovations that depart from the strict adversarial, hierarchical structure of workplace management. For example, the prohibition against employer domination or interference in

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1 The Canadian spelling of the word "labour" will be used in the text. However, where the word is used in a quotation from American materials, the spelling found there ("labor") will be used without constantly using the designation "[sic]" after each use.
labour organizations found in Section 8(a)(2) of the National Labor Relations Act (hereafter, the "N.L.R.A.") may outlaw quality circles and joint employee-employee committees in non-union workplaces where such innovations are introduced at management's initiative. In unionized workplaces, innovations blurring the distinctions between management and those managed may collide head-on with the "common law" exclusion of managerial personnel from bargaining units and the statutory limits on the participation of supervisory personnel in the affairs of the union. Further, if use of industrial relations innovations transform employees into managers and supervisors in the eyes of the law, will their participation in union affairs transform the union into an employer-dominated labour organization?

Not every legal issue raised by the New Industrial Relations can be effectively covered in a work of this size. However, three of the most contentious areas will be covered. First, this Chapter will deal with the issues raised by the prohibition found in Section 8(a)(2) of the N.L.R.A. against employer domination or interference with the formation or administration of a labour organization. Next, the Chapter will consider the implications of the exclusion of management and supervisors from the definition of "employee" under the N.L.R.A. Finally, the Chapter will examine the doctrine of bargaining agent exclusivity which provides the trade union selected to represent the employees in a bargaining unit the
exclusive authority to bargain with the employer on their behalf.

(1) **Employer domination**

Section 7 of the *N.L.R.A.* sets out the fundamental rights the Act was intended to protect and enhance. That Section states in part:

Employees shall have the right to self organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...

Section 8 of the *N.L.R.A.* creates a number of unfair labour practices intended to give effect to the rights established in Section 7. The five unfair labour practices listed under Section 8(a) apply to employer conduct, while the four found in Section 8(b) apply to union conduct.

Section 8(a)(1) provides a general prohibition on employer interference, restraint or coercion of employees in the exercise of their Section 7 rights. Section 8(a)(2) is narrower in its focus and provides:

Section 8(a) It shall be an unfair labor practice for an employer -

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the [National Labor Relations] Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time
or pay;

As is clear from the wording of this provision, the prohibition against domination, interference and support only applies if the body affected is a "labor organization". A definition for "labor organization" is provided in Section 2(5) of the Act, and it states:

Section 2. When used in this Act -

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(a) Section 8(a)(2)

As discussed at length earlier, the purpose of Section 8(a)(2) was to outlaw the "company union" - the type of labour organization that was under the control of management. The very existence of such labour organizations (whether they be called "representation plans", "representation committees", "grievance committees", "employee committees" or "joint labour-management committees") acted as a barrier to the development of a truly independent collective bargaining representative. The data before Congress in 1935 when Section 8(a)(2) was enacted clearly showed the extreme difficulties trade unions had in organizing employees when the employer had
in place a dominated labor organization. Full freedom of self-organization would not be possible if company unions were permitted to compete in the workplace with legitimate independent trade unions. Thus, Section 8(a)(2) set out to eliminate this hollow competitor.

The characteristics which made company unions and representation plans so ineffective in advancing the interests of employees were the same characteristics the N.L.R.B. and the Courts looked for in determining whether the representative system established at the workplace was employer-dominated. The Sixth Circuit Court of Appeals articulated the characteristics in 1968:

The problem of managerial interference and domination is not new to this Court. Among the factors which this Court has, in the past, considered significant in determining the existence of unlawful management domination of a labor organization are the following: lack of any written governing instrument and lack of any independent means of financial support on the part

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3 As the Board stated in *Grafton Boat Co.*, 173 N.L.R.B. 999 (1968) at 1003:
The vice of a dominated labor organization, and the reason for its outlawing by Congress, is that any employer can discourage collective bargaining by holding it out to his employees as an instrument for that purpose which they can adhere to without incurring his disfavor.


4 Cox, Bok & Gorman, *supra*, Chapter Three, note 2 at 199.
of the labor organization, the fact that its meeting are only held on company property, the attendance at these meetings of high management representatives, the taking and distribution of minutes by a management official, the fact that meetings could be called by a management official, the fact that employees were paid for the time spent at meetings, management participation in elections, management preparation and distribution of ballots, management determination of employee electoral units, management determination of time of election, managerial prerogatives which may affect the status of an employee for election purposes (such as promotion, transfer and discharge), absence of independent legal advice on [the] part of labor organizations and general reliance on the advice of management for its functioning and activities.5

While this represents a useful catalogue of company union attributes, the jurisprudence is clear that, at least in theory, the determination whether a labour organization is employer dominated depends on the facts and circumstances of each particular case.

The issue is whether the structure and operation of the labour organization leads to the conclusion that the organization is not capable of acting as an autonomous voice and bargaining representative for employee concerns and is thereby not the freely chosen representative of the employees.

Particularly during the first twenty years of the N.L.R.A.'s administration by the N.L.R.B. and the Courts, this

conclusion would be reached in an automatic fashion\(^6\) if the evidence established some level of employer or managerial participation in the establishment or formation of the organization,\(^7\) its funding,\(^8\) its meetings or its selection of representatives that would deal with management. During this period, employer domination would be inferred by the employer providing free use of company facilities or premises by the organization, by the employer paying employees for time spent on the work of the labour organization or meetings on company time, or by the participation of supervisors or other managerial employees in any aspect of the organization's creation or administration.

A Section 8(a)(2) violation would also be found when the employer unilaterally initiated an employee representation plan, notwithstanding that the employees accepted and

\(^6\) The per se nature of conduct which constituted violations of Section 8(a)(2) is discussed in: Note, "New Standards for Domination and Support Under Section 8(a)(2)" (1973), 82 Yale L. J. 510 at 511-15; Note, "Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act" (1983), 96 Harv. L. Rev. 1662 at 1663-64; S. Gardner, "The National Labor Relations Act and Worker Participation Plans: Allies or Adversaries?" (1988), 16 Pepperdine L. Rev. 1 at 14-16.

\(^7\) Note, "Section 8(a)(2): Employer Assistance to Plant Unions and Committees" (1957), 9 Stanford L. Rev. 351 at 359.

\(^8\) See, for example, Pacemaker Corp. v. N.L.R.B., 260 F.2d 880 (7th Cir. 1958), N.L.R.B. v. Sharples Chemicals, 209 F.2d 645 (6th Cir. 1954) and N.L.R.B. v. General Shoe Corp., 192 F.2d 504 (6th Cir. 1951).
participated in the plan without complaint.\(^9\) One commentator, writing in 1957, stated:

Employer initiation seems to be the "death-kiss" to employee associations. There have been few cases where the Board has not found domination where this factor was present. Even a mere suggestion that the employees form a plant representation plan has often been considered "initiation" of the employee organization, especially if made in a coercive context.\(^10\)

All such employer conduct, the N.L.R.B. concluded, would have the effect of defeating the right of employees to freely choose a representative to engage in collective bargaining with the employer. Early in its administration, the Board expressed its logic in the following manner:

Activities, innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees. For this reason the Board has been guided by the disparity in economic power between employer and employee in evaluating the significance of the an employer's conduct as an unfair labor practice under section 8[(a)](2). The purpose of section 8[(a)](2) is apparent. The formation and administration of labor organizations are the concern of the employees and not of the employer.\(^11\)


Certainly the landscape of employment law for individuals provided additional justification for the close scrutiny of employer conduct in relation to the formation and administration of labour organizations. Unless a collective agreement provides otherwise, and subject to recently developed public policy exceptions, employees are vulnerable to the "employment-at-will" doctrine which provides that their employment can be terminated by their employer without notice for any reason whatsoever or no reason at all. In that context there is little surprise in employees being particularly sensitive to the employer's wishes such that conduct which, in another context, might appear harmless is considered to exhibit domination or interference when encountered in the employment relationship.

This explains why there was little need in these cases for the charging party to establish by direct evidence that employees were in fact dominated or interfered with in their choice of bargaining representatives. Such evidence would likely be extremely difficult to provide since the greater the domination by the employer the less likely employees would feel free to act against the employer's interests, especially through evidence in a public forum like an N.L.R.B. hearing. This was implicitly acknowledged by the United States Supreme Court when it articulated a test under Section 8(a)(2) as follows:

It would indeed be a rare case where the finders of fact could probe the precise factors of motivation
which underly [sic] each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates.\(^{12}\)

Thus, the fact that there was demonstrated employee support for the labour organization and that the employer had the most benevolent of intentions in implementing the organization, was not relevant to the Supreme Court when it otherwise determined that the labour organization was under the employer's control.\(^{13}\) The key consideration for the Court was whether the organization was in any position to exert economic pressure so as to advance the interests of the employees. The Court concluded that a labour organization affected by employer domination or interference would be unwilling or unable to exercise economic weapons against the employer.\(^{14}\) And in the result, the interests of employees would be little more advanced that was the case with individual bargaining.\(^{15}\)

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\(^{12}\) N.L.R.B. v. Link-Belt Co., 311 U.S. 584 (1941) at 588 (emphasis added).


\(^{14}\) Newport News, supra, note 13 at 249-51.

\(^{15}\) This is not to suggest that employer-dominated labour organizations had no redeeming qualities whatsoever in terms of assisting employees in the workplace. As Cox, Bok & Gorman point out, "[w]hile representation plans did significantly stem the advance of independent union organizing
There is little doubt that if the standards noted in the preceding paragraphs were applied to the industrial relations innovations raised in Chapter Two, many of them would be found to be inconsistent with Section 8(a)(2). In the nonunion sector virtually all such innovations were initiated by the employer who, often with the assistance of consultants in socio-technical design, fashioned the manner in which such innovations were to be implemented and operated on a day to day basis. Further, the employer is generally involved in establishing the parameters of the committee's or circle's mandate, although, as noted in Chapter Two, there is often a great deal of pressure from employee participants to broaden the body's mandate. These characteristics, together with the absence of an independent source of funds for the group and the longevity of the innovation dependent on the employer's good will, would clearly cause these bodies to run contrary to the rigorous enforcement of Section 8(a)(2) that characterized the Act's administration well into the 1950's.

Developments in the Section 8(a)(2) jurisprudence since that time, however, makes it much less certain whether this result would occur today. The strict approach discussed above began to wane among the judiciary in the latter part of the 1950's. This was perhaps due to the fading memories of efforts, ...they did provide many workers for the first time with a voice concerning their working condition." Supra, Chapter Three, note 2 at 199.
rampant company unionism in the 1920's and 1930's, the lack of labour relations expertise among the judiciary needed to enforce the decisions of the Board, or the uncomfortable feeling of adjudicators when their strict application of Section 8(a)(2) caused the disestablishment of a representation plan to which no employee affected objected and which was not tainted by an anti-union animus by the employer.

Whatever the reason, a definite shift has occurred in the judiciary's approach to Section 8(a)(2) questions. This change occurred on two fronts, both of which provide hope for industrial relations innovations related to committees and quality circles. First, the courts developed a less searching standard of domination and interference by distinguishing such conduct from "cooperation", which they held was not prohibited conduct. Second, the courts began narrowing the definition of "labor organization" as that phrase is used in Section 8(a)(2) and defined in Section 2(5), with the effect of excluding from the scrutiny of Section 8(a)(2) some industrial relations practices similar to those discussed in Chapter Two. As noted earlier, Section 8(a)(2) only prohibits domination or interference if the body at issue is a "labor organization".

The first shift in Section 8(a)(2) interpretation - distinguishing domination and interference from cooperation -

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16 Kohler, supra, Chapter Three, note 22 at 545 ("In short, it appears that as time has passed, the meaning and basic purposes of the Act have been forgotten by the bodies charged with enforcing and applying its terms.")
began with the Seventh Circuit Court of Appeals' decision in Chicago Rawhide Manufacturing Co. v. N.L.R.B.\footnote{221 F.2d 165, 27 L.C. 69,052 (7th Cir. 1955).}

The employer had opened a new plant and during its first year of operation no attempts were made by a union to organize the employees. During this first year the employer set up a system for handling grievances.\footnote{Chicago Rawhide, supra, note 17 at L.C. 88,458.} That system was not satisfactory to the employees, resulting in the employer and a group of employees working together to create a representation plan which included a Grievance Committee and an Employee Shop Committee.\footnote{Chicago Rawhide, supra, note 17 at L.C. 88,458.} Finally, these committees were merged under the name "Elgin Rawhide Employees Association". The employer "let its employees meet during working hours so that those who had worked out the grievance procedure with management could explain it to the others."\footnote{Chicago Rawhide, supra, note 17 at L.C. 88,458.}

Members of the Shop Committee were elected by the employees without the knowledge of management.

About a year later a union affiliated with the A.F.L.-C.I.O. began an organizing drive which resulted in the N.L.R.B. conducting a representation election. While the union was organizing a petition with unknown origins was circulated among the employees in support of the Employees Association. This petition garnered the support of 80 per
cent of the employees. Both the union and the Association demanded recognition from the employer, but the Association declined the opportunity to have its name on the ballot for the representation election. The union was defeated in that election by a six to one margin. A few weeks after the election, the Association sought, and was provided, recognition by the employer as bargaining agent for the employees.21

The N.L.R.B. determined that the employer dominated and interfered with the formation and administration of the Association under Section 8(a)(2).22

The Seventh Circuit Court of Appeals refused to enforce the decision. To their mind, it was important to draw a line between, on one hand, control, influence and support of a labour organization, and, on the other hand, mere cooperation with that organization.23 The heart of their analysis is their unqualified assertion, without reference to authority, that "the principal purpose of the Act...is cooperation between management and labor."24 The only guidance the Court provided in precisely how to distinguish lawful cooperation from unlawful support, interference and domination, is their comment that such unlawful acts "constitute some degree of

21 Chicago Rawhide, supra, note 17 at 88,458.
22 Chicago Rawhide, supra, note 17 at 88,458.
23 Chicago Rawhide, supra, note 17 at L.C. 88,459.
24 Chicago Rawhide, supra, note 17 at L.C. 88,459.
control or influence" while "[c]ooperation only assists the employees or their bargaining representative in carrying out their independent intention."25

The Court also articulated a test for domination which required that a Section 8(a)(2) violation be based on a finding of actual domination of the labour organization, not just a possibility or potential for domination.26 The Court's logic, which incidentally speaks the logic which requires truly independent bargaining representatives, was that "[t]he employer-employee relationship itself offers many possibilities for domination, which is one of the reasons for the original enactment of the Wagner Act".27 The Court went on, "[t]he Board is quite correct in pointing out that employer assistance may be, and often has been, a means of domination."28 But, the Court added, "[a]ssistance or cooperation does not always mean domination, however, and the Board must prove that employer assistance is actually creating

25 Chicago Rawhide, supra, note 17 at L.C. 88,459.

26 Chicago Rawhide, supra, note 17 at L.C. 88,459. As an aside, this test is to be contrasted with the test the Courts apply when the allegation is that the union is in a conflict of interest situation in seeking to represent a group of employees. This becomes an issue, for instance, when the union has some financial interest in the employer. In such cases the Courts only requiring a showing that the union has potentially conflicting loyalties; actual instances of the union acting against the interests of the bargaining unit need not be shown.

27 Chicago Rawhide, supra, note 17 at L.C. 88,459.

28 Chicago Rawhide, supra, note 17 at L.C. 88,459.
company control over the union before it has established a violation of Section 8(a)(2).”

The Court also rejected the objective reasoning test that had been the basis of many previous Section 8(a)(2) violations — whether an objective person looking at the circumstances of this case would conclude that the employer has control over the labour organization. Instead, the Court adopted a purely subjective standard — whether the employees perceive or believe the organization is controlled by the employer. The Court then drew great comfort from the wide margin of rejection of an affiliated union.

The Court summed up its reasons for decision in the following manner:

The Company and the great majority of its employees are now, as they always have been, in complete accord as to the bargaining representative. We are not going to permit the destruction of a happy and cooperative employer-employee relationship when there is absolutely no evidence to support a finding of unfair labor practice.

In short, the Court appeared to adopt a test that primarily turned on what the court perceived to be employee free-choice. Notwithstanding that many of the circumstances pointed towards a dominated labour organization, if the employees selected that organization without apparent overt coercion by the employer, the organization would be found to

29 Chicago Rawhide, supra, note 17 at L.C. at 88,459.

30 Chicago Rawhide, supra, note 17 at L.C. 88,459.

31 Chicago Rawhide, supra, note 17 at L.C. at 88,461.
be an instance of cooperation rather than employer control or domination. The freedom of choice the Court felt Section 8(a)(2) gave employees was the freedom to ratify an organization that was not free.32

This test is confirmed in a number of subsequent decisions which found that, although the labour organization at issue was extremely weak and unlikely to act or support action or goals that lacked employer approval, the organization was the uncoerced expression of the employees' free choice and thus was not violative of Section 8(a)(2).

For example, in Federal-Mogul Corp. v. N.L.R.B.,33 the Sixth Circuit Court of Appeals concluded that the weakness of the labour organization at issue, here exhibited by their lack of a charter, constitution, by-laws, independent formal structure and independent source of financing, was not a relevant consideration under Section 8(a)(2) when the evidence otherwise suggested that the organization was supported by a majority of the employees.34 The Court acknowledged that "[a]n affiliated labor union, by means of its high degree of organization and financial resources, is more equipped than a poorly organized employees' committee to withstand

32 Kohler, supra, Chapter Three, note 22 at 545.
33 394 F.2d 915, 57 L.C. 12,706 (6th Cir. 1968).
34 Federal-Mogul, supra, note 33 at L.C. 21,688.
managerial attacks on its integrity and independence. The employees' freedom of choice was found to be the paramount consideration and where, as here, the organization had been present for a long period of time and there were no examples of the employer using the admittedly great potential for domination, a Section 8(a)(2) cannot be supported. The Court did not consider evidence as significant which indicated the employer controlled the topics the committee could deal with and had advised a committee member that a safety concern he attempted to raise was none of his concern.

Similar comments can be found in the Sixth Circuit Court of Appeals decision in Modern Plastics Corporation v. N.L.R.B. where the Court stated as follows in rejecting the Board's finding of domination:

The evidence, taken in its entirety, may support the inference that the Employees' Committee was a weak organization. But the evidence clearly shows that this was the desire of the employees. They were free at any time to refuse to accept any of the services rendered, and to control attendance at their meetings, without any threat or coercion or interference on the part of the Company.

This conclusion was reached despite the fact that on several occasions the employer refused the Committee Chairman time to discuss particular grievances with employees. Further, the

35 Federal-Mogul, supra, note 33 at L.C. 21,688.
36 Federal-Mogul, supra, note 33 at L.C. 21,689.
37 379 F.2d 201, 55 L.C. 12,004 (6th Cir. 1967).
38 Modern Plastics, supra, note 37 at 19,318.
employer denied the Chairman's request to meet with employees after work in the company lunchroom because the employer did not feel the employees would attend such a meeting. Although the employer did not tell a new Committee Chairman how to run the Committee, the Chairman was told by the employer how the Committee operated in the past.\textsuperscript{39}

A further example is found in the Ninth Circuit Court of Appeals decision in \textit{Hertzka & Knowles v. N.L.R.B.},\textsuperscript{40} where the Court concluded employee committees were not dominated or interfered with, notwithstanding that a management representative attended each committee meeting. Although that holding by itself is significant, the means by which the Court reached it is particularly notable for the future of the New Industrial Relations.

Immediately after a Board representation election, a meeting of management and the employees resulted in creation of five committee structures serving as a forum for discussion and formulation of proposals for changes in employment terms and conditions. The idea was based on a proposal the unsuccessful union had put to management.\textsuperscript{41} Each committee would have five employees and one management representative and would have a particular zone of competence, such as

\textsuperscript{39} \textit{Modern Plastics}, supra, note 37 at L.C. 19,317.

\textsuperscript{40} 503 F.2d 625, 75 L.C. 10,334 (9th Cir. 1974).

\textsuperscript{41} \textit{Hertzka}, supra, note 40 at L.C. 17,162.
remuneration, minimum standards, or efficiency.  

The Court began its discussion of the Section 8(a)(2) issue by stating:

Central to the National Labor Relations Act is the facilitation of employee free choice and employee self-organization. Indeed, Section 8(a)(2) is, in part, a means to that end, for it seeks to permit employees to freely assert their demands for improvements in working conditions. Literally, however, almost any form of employer cooperation, however innocuous, could be deemed "support" or "interference". Yet such a myopic view of Section 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole - fostering free choice - because it might prevent the establishment of a system the employees desired....

For this same reason courts have emphasized that there is a line between cooperation, which the Act encourages, and actual interference or domination considered from the standpoint of the employees, which the Act condemns....The sum of this is that a Section 8(a)(2) finding must rest on a showing that the employees' free choice, either in the type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue.

Based on this framing of the test, the Court dismissed the assertion that Section 8(a)(2) was violated by meetings of the committees on company time and on company premises, and management calling the original meeting where the committee system was established. The Court then said:

The question essentially comes down to the significance of having management partners on the committees. True, this may mean bargaining is "weaker" than if there were a formally organized union. Yet this feature too was chosen by the employees, and it is one with which, for all the

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42 Hertzka, supra, note 40 at L.C. 17,160, 17,162.
43 Hertzka, supra, note 40 at 17,162-63.
record show, they are not dissatisfied.\textsuperscript{44}

The Court's ultimate rationale was expressed in the following paragraph:

For us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.\textsuperscript{45}

The decision has been firmly condemned in the following words:

As can be seen, Hertzka & Knowles works a radical transformation in the meaning of Section 8(a)(2), one that cannot be accommodated with the Act's basic purpose. In the framer's usage, free-choice referred to removing all obstructions to the exercise of employee initiative to exercise their associational rights to organize - if they so chose - self-directed and self-controlled autonomous groups through which employees would participate in promulgating the code that governs their relationship with their employer. To the Hertzka & Knowles court, free choice becomes the freedom not to self-association, but to ratify an "organization that is not free" and thus incapable of functioning in the collective bargaining process. In effect then, the Hertzka & Knowles decision is tantamount to the judicial repeal of Section 8(a)(2). It returns the law to its pre-Texas & New Orleans Railway [(1930), 281 U.S. 548] state, and permits employers to implement substitutes for self-association and collective bargaining so long as some sort of employee assent is manifested. Ironically, this holding adopts the interpretation of the NIRA's Section 7(a) which management had forwarded, and which led Senator Wagner to frame the Act in the first place.\textsuperscript{46}

\textsuperscript{44} Hertzka, supra, note 40 at L.C. 17,163.

\textsuperscript{45} Hertzka, supra, note 40 at 17,163.

\textsuperscript{46} Kohler, supra, Chapter Three, note 22 at 545.
The difficulty of the paramountcy of employee free choice that runs through the Chicago Rawhide - Federal-Mogul - Modern Plastics - Hertzka & Knowles line of authorities is that the resulting decisions seem to defy common sense. It would be difficult to argue, in the abstract, that freedom of employees to choose their bargaining representative is not and should not be a central feature of labour law policy. However, these cases do not arise in abstract or in a vacuum.

First, they arise in a context extremely similar to that of the 1920's and 1930's when, in the name of cooperation and harmonious long-standing relationships, Congress was asked by employers to preserve room in the N.L.R.A. for the continued existence of representation plans and the like.47 There is little doubt such organizations did perform useful functions for both employers and employees and that they enjoyed support among employees covered by them, even if only because some form of representation was better than none at all. But in Congress' considered view, the good they did was far outweighed by the damage they did to the opportunity of employees to have independent labour organizations with a power base and a capacity to function as bargaining representatives separate from the employer.48

47 Supra, Chapter Three, note 82.

48 See, for instance, Note, "Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act" (1983), 96 Harv. L. Rev. 1662 at 1675, 1679.
Second, they arise in a context where such factors as the employment-at-will doctrine and the mobility of capital provide employers with infinitely greater power to command the compliance of individual employees than the opposite. As noted in Chapter Three, the British labour lawyer Sir Otto Kahn-Freund stated:

> [T]he relations between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".49

This inevitable power inequality cannot but help to influence employee actions in their relationship with their employers. When one lacks the means of compelling the compliance of another adverse in interest, one is much more willing to accept what is provided as good fortune and make the best of it rather than risk the exercise of the power held by the person adverse in interest. Such truisms provide the prism through which one must scrutinize apparent approval by employees of a representation plan, committee system or other labour organization established by an employer in the workplace. Only by viewing matters in this way is there hope of determining whether the type of organization representing employees is truly the manifestation of employee free choice.

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These two aspects of the context within which one must decide whether a labour organization is prohibited under Section 8(a)(2) calls for a searching and rigorous scrutiny of such entities.

Such scrutiny, of course, is much easier to articulate than practice. As noted by the Supreme Court earlier, "[i]t would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." It is perhaps futile to attempt determining whether employee acceptance of a representation plan etc. is the result of a free or coerced choice, in light of the employer's economic power over employees.

Instead, in adopting Section 8(a)(2), Congress made a choice that it would not require the Act's administrators to gauge the desires when the issue is whether the labour organization is employer-dominated or not. Employer dominated or sponsored labour organizations were considered inherently wrong. Whether or not employees agree to their subordination to an employer dominated organization would not be a relevant consideration. The test would be whether the organization is employer dominated or interfered with. The answer to the test would be discerned by analyzing the relationship between the employer and the organization and, drawing upon experience, deciding whether the organization can function as an effective collective bargaining agent. Doubtless, such a per se approach would have the effect in some instances of denying
employees their sincere and uncoerced choice in bargaining representative. However, erring on the side of empowering employees through collective bargaining was the policy choice made in the N.L.R.A. and it would be difficult to find fault in such a choice. As the Supreme Court stated in Newport News, "[i]t was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force."\(^50\) As Millis, the former Chairman of the N.L.R.B. between 1940 and 1945, and Montgomery stated:

The evidence forces one to the general conclusion that, although collective bargaining has been found in exceptional cases [in relations between company unions and their employers], there has not been much of it in the past between company unions and management in the proper sense of the term. After more or less discussion, when there has been discussion at all, what management has wanted to do has usually been acceptable to the company unions. In any event, the company unions have generally acquiesced. In only a limited number of cases have the workers strongly protested, much less revolted and gone on strike or changed the company union over into a really independent and a more or less militant trade union.

All this one would expect, even without the substantial evidence found in many National Labor Relations Board cases, for it is quite obvious that, even when expected to function as a collective-bargaining agency, the company union is in several respects weak as compared to the typical trade union. In the typical case, the working assumptions are against the presentation and stout support of what workers may really want and feel they are entitled to in respect of wages and hours. Most company unions have been organized and operated for the purpose of cooperating, not bargaining with management. In so far as there is truth in the oft-made statement that a union cannot cooperate effectively because of the emphasis placed upon collective bargaining, there is truth

\(^50\) Newport News, supra, note 13 at 308 U.S. at 251.
in the statement that a cooperating organization cannot bargain effectively. 51

It is also difficult to understand how it can logically be said that only actual acts of domination or interference will attract Section 8(a)(2) censure and that in the absence of such clear manifestations of domination, employee free choice will rule the day. The logical difficulty lies in the fact that the more complete the domination the less likely Section 8(a)(2) censure will be attracted. If employees are in the palm of the employer's hand, there will be little need or occasion for the employer to have to exercise his control overtly and thereby provide a manifestation of actual control. Equally, the less likely it will be that employees will have, or at least exhibit, any misgivings about the nature of their labour organization and the relationship it has with the employer. Thus, the test derived from the Chicago Rawhide - Federal-Mogul - Modern Plastics line of authorities leaves the door open for a wide range of abuse. It is to be recalled that all three cases resulted from findings by the N.L.R.B. - the expert labour relations administrative tribunal - that the labour organizations at issue were employer dominated.

(b) Definition of "labor organization"

The second change in Section 8(a)(2) interpretation that provides further hope for new industrial relations innovations

is the narrowing of the meaning placed on the phrase "labor organization".\textsuperscript{52} As indicated earlier, the narrower the definition of "labor organization" the more limited is the application of Section 8(a)(2) since that section only prohibits domination and interference of a "labor organization".

As the definition in Section 2(5) suggests, a wide variety of entities would fit comfortably within the statutory definition. So long as employees participate in the entity in some manner and one of its purposes is to deal with their employer over any one of the matters listed in the provision,\textsuperscript{53} the entity would be considered a "labor organization".

The Board and Courts have generally given the definition the wide application suggested by its wording. For example, there is no need for the entity to have any sort of formal structure or indications of structure such as a constitution,

\textsuperscript{52} For convenience, the definition of "labor organization" found in Section 2(5) is reproduced here:

Section 2. When used in this Act -

\( \ldots \)

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

\textsuperscript{53} \textit{Mercy Memorial Hospital Corp.}, 231 N.L.R.B. No. 182, 1977-78 C.C.H. N.L.R.B. para. 18,546 (1977) at 30,820.
by-laws, regular meetings, membership dues or initiation fees. Further, there is no need for the entity to engage in collective bargaining, as traditionally understood. The Supreme Court has recognized that the operative phrase "dealing with" contemplates a considerably lesser extent of contact between the employer and the entity than collectively bargaining. Thus, the fact that the entity does not make "demands", but rather only suggestions or recommendations to the employer with no power to secure the employer's agreement does not make the entity any less a "labor organization". Even an association that only presented employee views to management without specifically recommending action for management to take was considered to be a "labor organization".

In G.O. Parachutes, Inc. the Board determined that a


56 See, for example, Kaiser Foundation Hospitals, Inc., 223 N.L.R.B. No. 51, 1975-76 C.C.H. N.L.R.B. para. 16,719 (1976) (registered nurses' committee with the purpose, according to its by-laws, of acting "as liaison between registered nurses and administration...[t]o provide better understanding between staff and administration" found to be "labor organization"). N.L.R.B. v. General Shoe, 192 F.2d 504, 20 L.C. 66,696 (6th Cir. 1954).

"Works Committee" was a labour organization since the employer's stated purpose in announcing its formation was to "to have better communications between employees and management." In Center for United Labor Action, the Board determined that so long as the entity is "expressly or implicitly seeking to deal with the employer over matters affecting the employees" it will be considered a "labor organization."

From this brief review, it should be clear that it has generally taken very little for an entity to attract the "labor organization" label. The implications of this for industrial relations innovations using quality circles and joint committees is that they would seem to fall squarely within the statutory definition. As Kohler states:

Under the terms of this definition, the framers' demonstrated intent, and the broad reading it has been given by the Court, joint worker-management committees and like participatory devices plainly appear to constitute labor organizations for the purpose of the Act. Employees, of course, participate on these bodies, which exist for the express purpose of involving workers with management in making determinations concerning, inter alia, working conditions and employee grievances.58

Notwithstanding the attraction of this conclusion, there have been indications in the jurisprudence, particularly in the past decade, that a narrowing of the definition is in the offing in the name of encouraging greater employer-employee cooperation.

58 Kohler, supra, Chapter Three, note 22 at 536.
Perhaps the most significant of these decision is that of the Sixth Circuit Court of Appeals in N.L.R.B. v. Streamway Division of the Scott & Fetzer Co..\(^5\) In this case an in-plant representation committee, organized and established by the employer just after one union organizing drive and just before another, was found by the Court not to be a "labor organization". The Court determined, contrary to the Board's findings, that the committee did not "deal with" the employer as that phrase is used in Section 2(5).

The In-Plant Committee was established as a part of the employer's program to develop "more readily accessible channels of communications within Manufacturing Operations" and "to provide coordination between plant personnel and management." The expressed goal of the In-Plant Committee was "to provide an informal yet orderly process for communicating Company plans and programs; defining and identifying problem areas and eliciting suggestions and ideas for improving operations."

Eight employee representatives from various departments would be selected and they would be present at a monthly general meeting and their respective monthly departmental meeting. Management personnel would be present at each of these meetings. Management sought to have as much direct employee input as possible, so the plan had provision for rotation of employees out of representative positions every

\(^5\) 691 F.2d 288, 95 L.C. 13,810 (6th Cir. 1982).
few months. The Court accepted the determination of the Board that the In-Plant Committee was interfered with and dominated by the employer. Thus, if the Committee was a "labor organization", a Section 8(a)(2) violation would be established.

Purporting to take a more "enlightened view of the Act", the Court determined the Committee was not a labour organization. Despite the all-encompassing nature of the language in Section 2(5), and the earlier jurisprudence giving wide meaning to the provision, the Court concluded that it was still very much an open question precisely how much interaction between employees and management would be required to constitute the Committee as a "labor organization". The Court prefaced its determination of that issue with the following instructive comments:

[L]ogic and experience under the Act...dictate that not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act. An overly broad construction of the statute would be as destructive of the objects of the Act as ignoring the provision entirely. Thus there is particular force in the logic of Judge John Minor Wisdom, dissenting in N.L.R.B. v. Walton Manufacturing Co., 289 F.2d 177, 182 (5th Cir. 1961):

To my mind an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent,

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61 Scott & Fetzer, supra, note 60 at L.C. 22,341.
honest, constructive relationship between management and labor. The Act encourages collective bargaining, as it should, in accordance with national policy....The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in the particular plant, if there is so much as an intention by an employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their "general welfare".62

The Court went on to draw a distinction between what they saw as a "plan to determine employee attitudes regarding working conditions and other problems in an accurate and effective way for the Company's self-enlightenment" from "a method by which to pursue a course of dealings."63 While admitting that "the difference between communication of ideas and a course of dealings at times is seemingly indistinct, we believe nevertheless, that it is vital here."64

"Dealing", the Court said, "involved a more active, ongoing association between management and employees" than was present here where there was a continuous rotation of employees onto the Committee. Because of this, the Court felt the employees were speaking to management directly rather than through a representative committee. This had been a crucial distinction drawn in the Board's decision in General Foods

62 Scott & Fetzer, supra, note 60 at L.C. 22,341.
63 Scott & Fetzer, supra, note 60 at L.C. 22,343.
64 Scott & Fetzer, supra, note 60 at L.C. 22,343.
Corporation where it was determined that "employee teams" made up of all the employees in a particular area were not "labor organizations" because the teams did not act in an agency or representative relationship with the employer. Instead, team members would individually raise their concerns with management during team meetings when a management representative was present. The essence of a labour organization, the Board there said, is it standing in an agency relationship to a larger group on whose behalf it is called to act. When the team does not act in such an agency relationship, but instead acts in essence like a staff meeting, the team is not a labour organization under the Act. The Court in Scott & Fetzer felt this reasoning was applicable since the In-Plant Committee system contemplated every employee, at some point, serving on the Committee.

The Court also considered the Committee's "limited functions" as being significant. These functions were more a process of determining employee attitudes regarding working conditions and other problems, than they were pursuit of a course of dealings. The former functions, as noted

68 Scott & Fetzer, supra, note 59 at L.C. 22,343.
69 Scott & Fetzer, supra, note 59 at L.C. 22,343.
earlier, were not considered by the Court as constituting "dealing with" the employer.

The Court buttressed its conclusion by noting that this case had no overtones of an anti-union animus on the part of the employer. Further, the Court noted as further justification that neither the employer nor the employees felt the Committee was a labour organization; otherwise they would have held it up as a bar to the organizing union's effort to seek certification of the employees.

The Sixth Circuit Court of Appeals' decision in Scott & Fetzer has come under severe criticism for what has been described as the decision's intellectual dishonesty. Critics have suggested that it is difficult to understand how the Court could have reached the conclusion it did, in light of the clear wording of the legislation, the clear direction given by the Supreme Court in Cabot Carbon, and the similarity of the facts in Scott & Fetzer with that Supreme Court decision and other Court and Board decisions where a "labor organization" has been found. For example, it is

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70 Scott & Fetzer, supra, note 59 at L.C. 22,343.

71 Scott & Fetzer, supra, note 59 at L.C. 22,343-44.

difficult to accept that the employer in Scott & Fetzer intended only to gather the views of the employees and did not intend the next logical step of "dealing with" or acting upon the information so obtained. Such illogical conduct on the part of the employer is, however, implicitly assumed by the Court.

Logic and commitment to the principles and policy of the Act therefore cannot explain the Court's decision. One must look elsewhere than at the legal principles articulated in the decision for its rationale. And the Court is very forthright in identifying its ultimate reasoning when it states: "our court join[s] a minority of circuits indicating that the adversarial model of labor relations is an anachronism." This comment, taken together with the Court's earlier adoption of the dissent in Walton Manufacturing, clearly shows that the Court is dissatisfied with legal doctrine and principle rooted in the 1930's that it feels is acting as a hindrance to the develop of more cooperative, less adversarial labour relations. So as to encourage such cooperative ventures, the Court is willing to revise doctrine and legislation to a more enlightened level, a level at which the law accommodates employers and employees who wish to find a new way to shape their relationships.

As much as the decision can be criticized for having

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73 Scott & Fetzer, supra, note 59 at L.C. 22,342.
forgotten the meaning and basic purposes of the Act, the decision has been applauded in many quarters for its sensitivity to the current needs of employees and the future of the American economy. Commentators suggest that the Court has taken a much-needed bold new step in labour policy.

The primary question raised by the developing accommodation in American labour law for the cooperative approach which would include many of the innovations discussed in earlier Chapters is whether the underlying rationale of these decisions - that adversarial industrial relations is an anachronism - is an accurate picture of the industrial relations scene. Has the current system of collective bargaining - which, history shows, requires for its existence the type of legislation found in Section 8(a)(2) and

74 Kohler, supra, note 72 at 545.

75 See, for example: B.A. Lee, "Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act - Part I" (1987), 38 Labor Law Journal 206 at 215 ("N.L.R.B. v. Streamway is an important decision because...if followed by the Board and federal appellate courts in other circuits, [it] could result in substantially more employee participation programs being found acceptable under the N.L.R.A.. The Sixth Circuit's opinion appears to follow industrial trends toward greater cooperation between labor and management..."); Klaper, "An "Enlightened" View of Employee Committees Under the Taft-Hartley Act" (1983), 9 Employ. Rel. L. J. 474 (the court's decision is truly enlightened); M.S. Beaver, "Are Worker Participation Plans "Labor Organizations" Within the Meaning of Section 2(5)?: A Proposed Framework of Analysis" (1985), 36 Labor Law Journal 226 at 237 (although disagreeing with the means by which the Court reached its conclusion, the result provides the needed flexibility "[g]iven the current popularity and growth of the worker participation technique and its potential effectiveness in alleviating critical productivity problems.").
Section 2(5) - lost its usefulness and relevancy for American workers and is now only a hindrance to the type of New Industrial Relations that will spark America's economic renewal? If it has, there would be no problem in adopting these innovative legal developments. However, if the premise is wrong, the changes contemplated have to be looked at as less acceptable.

If one merely looks at the extent of unionization in the United States over the past 30 years, a strong case could be made that collective bargaining through independent trade unions has indeed become an anachronism. The number of unionized workers now represents less than 20 per cent of the non-agricultural workforce. And estimates of the future of trade unions is not any more encouraging. By the turn of the century it is expected the level of unionization will be less than 10 per cent.

Balanced against this data is the wealth of literature and data that indicates that the proper conclusion to be drawn from the membership difficulties faced by trade unions in the United States is not so much a function of their irrelevancy, but instead the result of a legal apparatus that has made it extremely difficult for unions to survive as effective voices for American workers.\textsuperscript{76} Thus, the extent of unionization

\textsuperscript{76} See for instance: W.N. Cooke, Union Organizing and Public Policy: Failure to Secure First Contracts (Kalamazoo, Mich.: W.E. Upjohn Institute, 1985); P.C. Weiler, "Promises to Keep: Securing Workers' Rights to Self Government Under the National Labor Relations Act" (1983), 96 Harv. L. Rev. 1769;
cannot be relied upon as an accurate indication of the continued relevancy of American union.

Such questions about the continued acceptability of basic labour law doctrines and policy are well beyond the scope of this thesis. As noted in the Introduction, one of the goals of this thesis is to act as a catalyst for that broad debate. Through the preceding pages I have attempted to draw in sharp relief the tension that exists in American labour law and policy around the issue of employer domination of and interference with labour organizations. That tension has existed for a number of years. However, the current interest in the New Industrial Relations creates a sense of urgency in resolving that tension. This urgency arises from the fact that, depending on which of the previously discussed jurisprudence American Courts ultimately adopt, the New Industrial Relations could be in serious legal difficulties.

If the law prior to Chicago Rawhide and Scott & Fetzer is

given current effect, there is little doubt that many of the current industrial relations innovations will be found as classic examples of labour organizations illegally dominated by employers. That older jurisprudence exhibited little patience for any employer role in the initiation or continued existence of virtually any organization that brought the employer and employees together in discussions or bargaining. Consequently, all Quality Circles, joint labour-management committees, and semi-autonomous work group programs would likely be found to be employer dominated labour organizations, thus risking disestablishment orders.

However, if Courts embrace the developments exhibited in the Chicago Rawhide and Scott & Fetzer line of cases, the New Industrial Relations would clearly be at much less risk. Those cases illustrate an approach that would only find illegal domination in the rarest, most extreme cases.

Unfortunately, there are no clear answers to questions about the legality of the New Industrial Relations under the heading of employer domination. If anything is clear it is that the Courts have two distinct, and jurisprudentially supported approaches they could take on the issue.

(2) Managerial and Supervisory Exclusion

One theme that characterizes much of the new industrial relations literature is the idea of moving authority or decision-making power within the enterprise to lower levels
in the workplace hierarchy. Members of semi-autonomous work teams and similar bodies, for example, are often delegated responsibility to direct production, decide who shall be hired and discharged and impose discipline. It is possible that such team members could be considered to be in supervisory positions. Since employees in supervisory positions attract special rules under the National Labor Relations Act that limits their role in labour organizations, innovations that possibly provide employees with that status need particular attention.

Similarly, some innovations contemplate employees taking a more active decision-making role in managerial decisions about the direction and shape of the enterprise. An issue closely related to that concerning supervisory employees is whether such innovations raise employee participants into what could be considered managerial positions. Under the implied managerial exclusion that overlays the Act, employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" are denied coverage under the Act.78

(a) Supervisors

As noted earlier, Section 7 of the Act provides the fundamental rights protected under the Act. By its terms,

77 Infra, note 79.
such rights are only provided to "employees". Section 2(3) of the Act specifically excludes from the definition of "employee" "any individual employed as a supervisor". The term "supervisor" is defined under Section 2(11) of the Act in the following manner:

Sec. 2. When used in this Act -

... (11) The term "supervisor" means any individual having authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

Despite not being statutory employees, supervisors are nonetheless free to organize and bargain collectively with their employer, and nothing in the Act prohibits an employer from voluntarily recognizing a bargaining unit of supervisors, or voluntarily including supervisors in a bargaining unit of rank-and-file employees. However, these can prove to be very artificial rights for supervisory employees since employers are not prevented by the Act from crushing such efforts by any of the means contemplated by the Act as unfair labour practices when practised against statutory employees. And if the employer does agree to voluntarily

79 Gorman, supra, Chapter Three, note 125 at 35.

80 Gregory & Katz, infra, note 81 at 348. An exception to the absence of protection for unfair labour practices occurs when, for instance, the discriminatory discharge
recognize supervisors, it is under no duty to bargain with the supervisors. Clearly, then, there are many risks for employees who become involved in new industrial relations innovations that provide them a degree of authority hitherto only provided to foremen and other traditional supervisors.

The risks for individual employees converted by new participatory industrial relations practices into supervisors is compounded by the problems posed for trade unions when employees now considered supervisory under the Act participate in the affairs of the trade union. When participatory programs in the workplace create the possibility of a relatively wide array of employees now becoming supervisors under the Act, there is a strong likelihood that among those employees will be union activists and other leaders of the trade union at the workplace level. To the extent this is true, those now considered supervisors are prevented from participating as union representatives in any activities that will put them into contact with the employer, such as being on the union negotiating team, or dealing with the employer about employee and union grievances. And if, from all the

against a supervisor was intended by the employer to strike fear into the hearts of statutory employees and thereby interfere with their rights under Section 7 of the Act. See, for instance, N.L.R.B. v. Talladega Cotton Factory, Inc., 213 F.2d 209 (5th Cir. 1954).


82 See, for example, Nassau & Suffolk Contractors' Association, Inc., 118 N.L.R.B. 174 (1957) at 184.
circumstances of the case, it is concluded the employee is a "high-ranking" supervisor in the sense that other employees would reasonably believe that the supervisory employees were acting for and on behalf of management, they will not be permitted to participate in union elections.\(^3\)

As illustrated in the Chapter Two discussion of such innovations as semi-autonomous work teams, employees participating on such teams regularly perform functions that could be classified as supervisory. For example, team members evaluate other members, or those who have applied to become members, to determine their eligibility for membership on the team. Further, team members play an important role in determining who will be the co-ordinator of the team. Such classic indicia of supervision appears to place these team members at some risk of being excluded supervisors.

Against this argument, however, is the specific language of the Act's definition of "supervisor". Crucial to the definition is the prerequisite that the purported supervisor exercise his/her supervisory functions "in the interests of the employer". This aspect of the definition would likely be of great assistance to semi-autonomous work team members. Such teams and their members are intended to perform their job in a relatively autonomous manner. They are intended to draw upon their own skills and knowledge to arrive at decisions

which, in their view, are best for the enterprise and themselves. They are not intended to exercise their decision-making power in a manner that is consistent with what they believe is desired by the employer. That is what it means to be "semi-autonomous". Thus, it may be stretching the statutory language too far to suggest that team members exercise their "supervisory" powers "in the interests of the employer". Unfortunately, there is a dearth of authority on the issue. However, as we shall see, the United States Supreme Court in Yeshiva University appears to throw cold water on this argument.

(b) Managerial exclusion

The so-called managerial exclusion is one not found in the legislation. Instead, it has developed from a series of Board and Court decisions, and articulated with precision by the Supreme Court in Bell Aerospace.

Managerial employees have been defined by the Board as follows:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.

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84 Infra, note 88.
85 Bell Aerospace, infra, note 86.
The jurisprudence is clear that the exclusion is not limited only to those whose policy-making activities touch upon the employer's labour relations policies; all persons falling within the managerial definition are excluded from protection of the Act.

The exclusion tended over the years to be limited to a relatively small group of executive personnel without much impact on union bargaining unit members. However, a 1980 Supreme Court decision extended the exclusion further down the hierarchy in a decision that raises concerns for contemporary industrial relations practices that seek to develop policy through consensus among a relatively wide range of employees, including those traditionally protected by the Act.

In N.L.R.B. v. Yeshiva University the Board had permitted a representation election among university faculty members over the objection of the University which argued that all its faculty were excluded managers. The University argued that each of their departments were substantially autonomous and within each department the faculty members effectively determined its curriculum, grading system, admission and matriculation standards, academic calendars and course schedules. Further, the University argued, the overwhelming majority of faculty recommendations as to faculty

87 Bell Aerospace, supra, note 86 at L.C. 29,491.
89 Yeshiva, supra, note 88 at L.C. 23,340.
hiring, tenure, sabbaticals, termination, and promotion are implemented.90

The Supreme Court, in a five-four split, concluded that the faculty members were managers and thereby excluded from coverage of the Act. The majority determined that the faculty, through the collegial decision-making process of the university, exercise absolute authority over academic matters. The faculty's total authority is such that, in any other context, they unquestionably would be considered managerial.

The Court's decision raises serious concerns for a number of industrial relations innovations currently in use which provide a wide range of employees with authority in areas that have historically been considered domains of managerial prerogatives.91 Certainly if these innovations will result in employees losing their status as employees under the Act, unions and employees will be much more reticent to become involved in implementing such innovations. This is particularly so among professional employees to whom the

90 Yeshiva, supra, note 88 at L.C. 23,340.

The Yeshiva decision may be particularly applicable. It is important, therefore, to closely examine the Court's reasons.

Like most institutions and businesses with a central governing body such as a board of directors, Yeshiva University had a Board of Trustees with only one member, the President, holding a regular administrative position with the University. In his administrative role the President had four Vice-Presidents reporting to him on matters covering the range of University affairs. University-wide policies were developed by this central administration, often with non-binding recommendations from an Executive Council of Deans or School Directors and other administrators, and a Faculty Review Committee made up of elected faculty representatives. The central administration developed general guidelines concerning such matters as teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits. The thirteen schools or faculties making up the University were, however, substantially autonomous, the Court determined. Each school's Dean would meet formally and informally with faculty members, individually and in formal committee structures, to discuss and decide matters of institutional and

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93 Yeshiva, supra, note 88 at 23,341 L.C.
professional concern, including educational policy, faculty salaries and conditions of employment.

The factual determination about faculty decision-making power in this structure made earlier in these proceedings was stated by the Supreme Court:

Through these meetings and committees, the faculty at each school effectively determine it curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school make recommendations to the dean or director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the dean or director, the overwhelming majority of faculty recommendations are implemented.94

The Yeshiva University Faculty Association applied for a bargaining unit consisting of full-time faculty members, excluding deans and directors.

The N.L.R.B., in earlier cases dealing with collective bargaining in a university setting, paralleling recent commentary generally on the intersection of the N.L.R.A. and the new industrial relations, acknowledged that the power-sharing that characterizes faculty-university relations "does not square with the traditional authority structures with which the [N.L.R.A.] was designed to cope in the typical organizations of the commercial world."95

94 Yeshiva, supra, note 88 at 23,341.

95 Adelphi University, 195 N.L.R.B. 639 (1972) at 648.
The N.L.R.A. traditionally excludes from collective bargaining those who have managerial decision-making power. However, the Board reasoned that such principles developed for use in the industrial setting cannot be "imposed blindly on the academic world"\(^{96}\) where there has been a strong and vibrant institutional history of collegial decision-making. Such collegial governance has been a key distinguishing feature of academic institutions when compared with traditional business organizations.\(^{97}\) Consequently, the Board ruled that faculty members were "professional employees" under the N.L.R.A. and therefore entitled to the protection and benefits of the N.L.R.A.

The Board rejected application of traditional doctrines related to managerial exclusions on the following three grounds: "faculty participation in collegial decision-making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer' [to use the language in the Act's definition of excluded "supervisor" in Section 2(11)], and final authority rests with the board of trustees."\(^{98}\)

The Supreme Court, in reversing the Board, began their consideration by articulating the definition of managerial employees found in the Court's earlier decision in N.L.R.B. v.  

\(^{96}\) Syracuse University, 204 N.L.R.B. 641 (1973) at 643.  
\(^{97}\) Yeshiva, supra, note 88 at 23,342.  
\(^{98}\) Yeshiva University, 221 N.L.R.B. 1053 (1975) at 1054.
Bell Aerospace Co. (employees who "formulate and effectuate management policies by exercising and making operative the decisions of their employer") and extended it by adding, "normally an employee may be excluded as managerial by taking or recommending discretionary actions that effectively control or implement employer policy." The Court also mentioned that the managerial exclusion, like the supervisory exclusion found expressly in the legislation, arises from the concern that "an employer is entitled to the undivided loyalty of its representatives."

The Court rejected the only line of defence the Board put forward when the matter was argued at the Supreme Court. That defence was based on what the Court termed as the "alignment with management" criterion. The Board admitted that the faculty's decision-making power was significant enough to have them classified as management. However, the Board argued that the managerial exclusion could not be applied in a straightforward manner in this context. The status of employees exercising apparently managerial functions, the Board argued, must be determined by whether or not they

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100 Bell Aerospace, supra, note 86 at 288 (quoting Palace Laundry Dry Cleaning, 75 N.L.R.B. 320 (1947) at 323 n. 4).

101 Yeshiva, supra, note 88 at 23,343.

102 Yeshiva, supra, note 88 at 23,343.

103 Yeshiva, supra, note 88 at 23,343.
exercise their decision-making power in the interests of the employer, characterized by an express or implied requirement that such decisions conform to policies articulated by the employer. If, instead, the decision-making power is exercised in accordance with independent professional judgement, unfettered by a need to accommodate the employer's policies or institutional interests, then that decision-making power does not raise the conflict of interest concerns underlying the managerial exclusion.\textsuperscript{104}

The Court rejected this argument in the following terms:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the functions of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered and the customers who will be served.\textsuperscript{105}

Dealing specifically with the Board's argument, the Court mechanically rejected the criterion proposed by the Board on the basis of a lack of authority for the propositions

\textsuperscript{104} Yeshiva, supra, note 88 at 23,343.

\textsuperscript{105} Yeshiva, supra, note 88 at 23,343-44.
underlying it. The Court pointed to Board decisions in which professional were excluded as managers "without inquiring whether [the professionals'] decisions were based on management policy rather than professional expertise."\textsuperscript{106}

The Court then stated:

Moreover, the Board's approach would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.

The Court explained that, in its view, there is no distinction between the professional self interests of faculty members and the interests of the institution. The predominant policy objective of the institution is to operate a high-quality academic institution that will accomplish broadly defined academic goals within the limits of its financial resources. "Faculty members enhance their own standing and fulfil their professional mission by ensuring that"\textsuperscript{107} this objective is met.

There can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is "expected to conform" to one goal or another when the two are essentially the same.\textsuperscript{108}

Not only are the goals of the faculty and the

\textsuperscript{106} Yeshiva, supra, note 88 at 23,344.

\textsuperscript{107} Yeshiva, supra, note 88 at 23,344.

\textsuperscript{108} Yeshiva, supra, note 88 at 23,344.
administration the same, the Court stated, but faculty participation in the development and implementation of policy aimed at enhancing academic and institutional excellence is a crucial element in achieving that goal. The consequential independence and use of discretionary power enjoyed by faculty in achieving the institution's goals, however, requires that the faculty not be permitted to organize into an independent trade union. The Court explained this conclusion:

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgement of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The University requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy....The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.\textsuperscript{109}

The Court specifically rejected the perhaps logical conclusion that the managerial exclusion would apply to all professional employees. In doing so, the Court articulated the following test: "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management."\textsuperscript{110} The Court found that at Yeshiva University the faculty "in effect, substantially and pervasively

\textsuperscript{109} Yeshiva, supra, note 88 at 23,344-45.

\textsuperscript{110} Yeshiva, supra, note 88 at 23,345.
operat[e] the enterprise."\textsuperscript{111} This is not a role, the Court implicitly concluded, in which professional employees routinely find themselves, thus warranting the determination that the faculty were part of management and excluded from the protection afforded by the \textit{N.L.R.A.}.

In short, the Court's conclusions left the implication that employees who have a substantial influence over how their employer's business will operate will be excluded from the definition of "employee" under collective bargaining legislation and, consequently, its protection. This is so notwithstanding that the employment and institutional relationship at issue anticipates that the employees will exercise the power they have in their own interests and in the interests, as they perceive it, of the institution. And this is so notwithstanding that the institution or employer needs the employees to have that power and exercise in the manner the employees see fit in order for the institution to flourish as an esteemed academic institution.

The parallels are strong between the power relationships at work at Yeshiva University and those advocated by the New Industrial Relations literature. This literature anticipates that employees in employment relationships outside the academic environment will be characterized by an empowerment of employees to an extent approaching that of faculty at Yeshiva University. How products are to be produced, who will

\textsuperscript{111} \textit{Yeshiva, supra}, note 88 at 23,345.
be employed to produce them, solving administrative and production problems of the enterprise, as well as determining traditional personnel issues like assigning work and scheduling overtime and vacations, are all areas where significant employee involvement is prescribed. And like Yeshiva University, employers need such labour relations practices in order to flourish as a competitive enterprise.

Concern over the effect of the Yeshiva decision may be unwarranted in that its application may well be limited to academic institutions where empowerment of employees/faculty is unusually strong. Indeed, the vast majority of later decisions of the Board and the courts in which Yeshiva was considered at all were cases considering faculty unionization. However, this apparently limited application may be more a function of the limited experience

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113 See discussion, supra, Chapter 2.

114 For a listing of a large sample of such decisions to early 1987, see the Commerce Clearing House, Inc. list published in Labor Law Reports Insight, No. 2, Issue 6 (March 1987). A more comprehensive listing was obtained by the author through a Westlaw computer assisted research search conducted in January, 1990.
American industry has had with highly participative forms of management. It appears that when industries outside the academic sphere begin to adopt university-like management structures, the Yeshiva decision enters the equation. And as the Board made clear in five decisions issued in 1982, employees exercising substantially less authority than that held by faculty at Yeshiva University will nevertheless be caught by the managerial exclusion.\textsuperscript{115}

The Board's decision in \textit{PHP Inc. and Union of American Physicians and Dentists}\textsuperscript{116} exemplifies the broader application of the Yeshiva decision beyond academic institutions, as well as illustrating that employees need not be involved in the total management of the enterprise in order to be excluded under the Yeshiva doctrine.

The employer operates seven medical/dental clinics in southern California, employing approximately 70 physicians/dentists who sought unionization. The employer established a variety of permanent and ad hoc committees to deal with a variety of management and professional development issues. Among the permanent committees are the Peer Review Committee (dealing with the quality of care provided by


physicians/dentists through twice yearly individual reviews resulting usually in recommendations for either pay increments or discipline which have always been followed by management), the Advisory Committee on Provider Work Environment (dealing with physical work environment issues, as well as compensation package issues, through biweekly meetings resulting in recommendations to management that are regularly implemented), and the Advisory Committee to the Board of Directors (dealing in quarterly meetings with issues regarding the direction of the enterprise, including issues of wages, benefits and working conditions, which are then passed on to the enterprise's Board of Directors with unknown success in acceptance). From time to time committees are struck to deal with specialized objectives which have, on occasion, resulted in acted-upon recommendations concerning such matters as compensatory time-off and staffing levels.

Each of the permanent committees had rotating memberships drawn from the physicians and dentists employed at the clinics. During the five years immediately preceding the Board's decision, over half of the currently employed doctors served in the committee structure.

Management has a representative on each permanent and ad hoc committee, although there was no evidence they took a leadership role on the committees.

Against this background, the Board held that the doctors were not eligible for collective bargaining under the Act,
based on the *Yeshiva* doctrine. While acknowledging that the doctors' lacked influence over management decision-making in such crucial areas as premiums to be charged clients, salaries for doctors and hiring decisions\(^{117}\), the Board determined that "many of the decisions made...at the committee level...lie at the core of the [enterprise's] operations."\(^{118}\)

The Board emphasized participation in the following types of decisions as justifying its decision: "managing the organization's protocol system, overseeing its medical records system, setting its medicinal prescription policy, reviewing and modifying the benefits and working conditions of its staff, establishing procedures and staff training for medical emergencies, and minimizing the institution's risk of medical malpractice liability".\(^{119}\)

The confluence of participation in decision-making through these varied areas led to the Board's conclusion that "the committees perform managerial functions within the meaning of the *Yeshiva* decision."\(^{120}\) *Yeshiva*, the Board stated, required exclusion of those who formulate and effectuate management policies by expressing and making operative the decisions of their employer through taking or recommending discretionary actions that effectively control or

\(^{117}\) C.C.H. N.L.R.B. at 29,635.

\(^{118}\) *FHP*, *supra*, note 116 at 29,635 C.C.H. N.L.R.B..

\(^{119}\) *FHP*, *supra*, note 116 at 29,635.

\(^{120}\) *FHP*, *supra*, note 116 at 29,635.
implement employer policy.

Leaving aside the issue of in whose interests the doctors recommend decisions on these committees, the Board's reasoning does not address why all doctors are excluded when only a portion of them act on the committees at a given time. In the year immediately preceding the doctors' application for certification, 38 of 70 full-time doctors served on a committee. While the decision does not provide details, it is to be presumed that, with the number of doctors serving on committees, few doctors served on more than one committee at one time. It is therefore difficult to appreciate how the Board reached the conclusion implicit in its decision that each full-time\textsuperscript{121} doctor was an arm of management. Even those on a committee, assuming no overlap of membership between committees, would have no individual and independent power which could credibly classified as managerial.

Nevertheless, the Board found the doctors ineligible for collective bargaining, leaving the implication for future cases that industrial relations strategies that encompass broad employee involvement on advisory committees may jeopardize the employees' ability to partake in collective bargaining sanctioned under the \textit{National Labor Relations Act}. A gap in representation of employee interests therefore exists. When employees have no participation on advisory committees.

\textsuperscript{121} The Board concluded that the part-time doctors on staff could collectively bargain since they were not eligible to serve on any committee. \textit{FHP, supra}, note 116 at 29,635.
committee structures within their workplace, they are eligible for collective bargaining, thereby providing the employees a degree of power to assert their interests. However, when some of their numbers are involved in advisory committees, the employees as a whole lose their eligibility for collective bargaining if the advisory power has historically shown itself, in this workplace, to have a power of effective recommendation. In other words, if the advice is usually taken by the employer in governing its enterprise and developing its operational policies, the employees providing that advice, and the employees as a whole, are considered managerial. This is so, notwithstanding that the employer always retains the option in its committee structure to reject the advice provided.

It is therefore folly to describe the employees as having power in the sense of being able to place force on the employer in an effort to compel the employer to act in a manner it would otherwise reject. Any power the employees have in this advisory committee structure is based on the good will of the employer towards the employees and the advisory committee system, a good will that may not necessarily be counted on when the employer believes its interests are being undermined, as they may be when the committee deals with matters traditionally the subject of collective bargaining. Therefore, the Board's denial of collective bargaining in cases of advisory committees with the power of effective
recommendation is not entirely satisfactory if the interests of employees are to be protected.

One concern raised earlier, in the discussion of the Yeshiva decision, was whether that decision would result in all professional employees becoming ineligible for collective bargaining since many have a power of effective recommendation on issues that require drawing upon their specific expertise. The Board in FHP, consistent with the directions of the Supreme Court in Yeshiva, indicated that the use of professional discretion, by itself, would not be sufficient for employees to be classified as managerial. But the influence the doctors in FHP exercised through the committees, the Board determined, was outside the scope of decision-making routinely performed by similarly situated professionals. Thus, the Board held, the decision making power through the committee warranted the denial of collective bargaining for these individuals.

While this aspect of the decision may act as a limitation on the possible broad application of Yeshiva to professional employees, its application in this case leaves concern whether the limitation is more imaginary than real. The types of issues dealt with by the committees appear to be precisely those which doctors are routinely asked to draw upon their professional expertise to resolve.

For example, the Peer Review Committee calls upon doctors to monitor the quality of care provided to patients and to
recommend changes to procedures, or protocol, in providing medical services. The Physician and Therapeutics Committee keeps abreast of the professional literature and new medications, as well as monitors doctors' prescription practices. The Emergency Services Committee deals with planning the facility's ability to deal with medical emergencies. The Patient Services Committee investigates all reports of medical malpractice. The Advisory Committee to the Board of Directors "charts the direction of the health maintenance organization" which includes making recommendations regarding wages, benefits and working conditions of the organization's staff. The Advisory Committee on Provider Work Environment considers plans to better use the organization's medical facilities and support staff, and includes making recommendations concerning the organization's compensation package.

The pervasive theme throughout these committee functions is the necessity for the doctor-members of these committees to employ their medical expertise and judgement in order to effectively exercise these functions. Doctors must routinely exercise such professional judgement and discretion. However, the exercise of such discretion in the context of committees within a health organization is considered by the Board to be outside the routine exercise of professional discretion. Such a determination does not bode well for how the Board will

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122 FHP, supra, note 116 at 29,634.
apply its criteria in the cases of other professionals. And certainly the limitation above described will not be applicable when committee structures are used in non-professional settings where the provision of discretion to such employees has little historical antecedents.

The Yeshiva doctrine was thought, by its early usage, to apply only to initial applications for certification where the employees were not previously unionized. This limitation has also proven to be imaginary. Currently unionized employees can lose their status as "employees" under the Act if, during the course of their relationship with their employer, they become sufficiently empowered to fall within the Yeshiva definition of managers. Significantly, it appears not to matter that empowerment came as a result of the employer's unilateral provision or, instead, through the union's hard-fought collective bargaining skirmishes with the employer.

For example, in College of Osteopathic Medicine and Surgery\(^{123}\) the Board was faced with an employer's application to revoke the certification granted six years earlier to a Faculty Federation. The employer argued, relying on Yeshiva, that its employees were now managerial in that they had authority, through the College's faculty committees, very similar to that held by the faculty at Yeshiva University.

Unlike Yeshiva University, however, the authority of the

faculty committees was not freely provided by the College, but was rather gained and maintained through an adversarial process of collective bargaining over the years. Absent the certified union, it is unlikely the faculty would be permitted by the College to maintain their authority. These circumstances, the faculty argued, distinguished the case from *Yeshiva* since here it was recognized by the parties that the faculty was not exercising its authority specifically in the interests of the employer since the authority was derived through the adversarial process. Further, application of *Yeshiva* in this case would have the highly unusual effect of disqualifying employees from unionization solely because of their success in bargaining, and consequently placing them in a vulnerable position in which they would likely lose the authority that caused them to lose that eligibility to unionize. Such a result would be absurd, the faculty argued.\(^{124}\)

The Board, although clearly feeling uncomfortable doing so, applied the logic of *Yeshiva* to declare the faculty as being managerial. The source of the faculty's authority was not the Board's concern; the sole issue was whether the faculty had effective authority in the manner outlined in *Yeshiva*. There being little doubt on that issue, the Board revoked the certification. Recognizing that this decision

\(^{124}\) *College of Osteopathic Medicine*, *supra*, note 123 at 26,086.
would likely result in the faculty losing the authority that had made them managerial, the Board stated it would deal with a future certification application in a expedited manner.  

Clearly, the Board's decision in College of Osteopathic Medicine places unionized worker in a no-win situation which will discourage their involvement in employee-participation schemes whether they are initiated freely by the employer or are obtained through collective bargaining. To the extent employees gain meaningful participation in organizational decision-making, whether through collective bargaining or the generosity of the employer, they forfeit their rights under federal labour law.

Aside from these difficulties with the internal reasoning of the Yeshiva doctrine, criticism of the doctrine itself has been stinging.

The primary, and perhaps most damaging criticism of the doctrine relates to the failure to distinguish between bureaucratic authority and authority that arises from the voluntary acceptance of the expertise of those offering advice or making recommendations. This criticism has arisen in the context of professional employees so as to isolate the deleterious effects of the Yeshiva decision on the

125 College of Osteopathic Medicine, supra, note 123 at 26,087.

126 D. Rabban, "Distinguishing Excluded Managers from Covered Professionals under the NLRA" (1989), 89 Columbia L. Rev. 1775 at 1827.
unionization of professional employees. As such, the
distinction may be perceived as having limited application to
employees lacking professional credentials. After outlining
the criticism, however, it will be argued that the distinction
is also valid for employees partaking in the employee-
involvement industrial relations innovations discussed in
Chapter Two who, although lacking in professional credentials,
are nevertheless accorded authority by the operation of
innovations which value employee participation in workplace
decision-making. The broader point to be made from such
arguments is, of course, that the Yeshiva doctrine should only
apply when the employees at issue have bureaucratic authority,
as opposed to authority arising from the voluntary acceptance
of their advice and recommendations.

Professor Rabban is the leading critic of the effect
Yeshiva has had on collective bargaining by professional
employees. He reports that the decision has all but stifled
union organizing on United States college and university
campuses\textsuperscript{127} and, as a result of the FHP decision and other

\textsuperscript{127} D. Rabban, "Distinguishing Excluded Managers from
Covered Professionals Under the N.L.R.A." (1989), 89 Columbia
L. Rev. 1775 at 1824-26. See also, "Distinguishing Yeshiva:
A Troubling Task for the N.L.R.B.", Newsletter of the National
Center for the Study of Collective Bargaining in Higher
Education and the Professions (Baruch College, City University
Newsletter of the National Center for the Study of Collective
Board decisions giving broad reign to the managerial exclusion, *Yeshiva* threatens to chill the organization of professionals outside the academic environment. This is so despite the express provision in the Act allowing professional employees to organize.

Rabban distinguishes the authority held by the main body of practising professionals with what he refers to as "bureaucratic authority" held by a few professional who manage the body of professional employees working for a particular employer. It is the difference between "managerial" professionals and "practising" professionals. Managerial professionals hold positions of bureaucratic power within the formal hierarchy of an organization. Practising professionals, by contrast, do not hold positions of bureaucratic power, but, instead, in order for their employer to satisfactorily draw upon their professional skills in performing the employer's operational work, they must retain substantial autonomy or power in their day to day work. Further, their expertise within their profession is valued and thus taken strongly into account by managerial professionals.

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130 Rabban, *supra*, note 126 at 1835.

131 Rabban, *supra*, note 126 at 1835.
Consequently, strict hierarchical management and disciplinary strategies that are common among workplaces employing unskilled or semi-skilled employees becomes dysfunctional when applied in the context of practising professional employees.\textsuperscript{132} The control on the use of discretion by practising professionals comes instead from their own professional standards which have been internalized and are reinforced by their colleagues. Managerial professionals share these professional standards and, while recognizing their bureaucratic role of ensuring that the work of practising professionals meets the organization's goals, they treat the practising professionals as their professional equal, recognizing the professional values of autonomy, collegiality and organizational influence.\textsuperscript{133}

The key distinction between managerial professionals and practising professionals, in terms of influence in the organization, arises on issues of financial control over the organization, relations with outside individuals and organizations, and in monitoring the use of professional discretion of the practitioners. The bureaucratic authority of managerial professionals leaves these matters generally to them.\textsuperscript{134} Notwithstanding the narrowness of managerial authority, the relations between bureaucratic professionals

\textsuperscript{132} Rabban, \textit{supra}, note 126 at 1840.

\textsuperscript{133} Rabban, \textit{supra}, note 126 at 1841.

\textsuperscript{134} Rabban, \textit{supra}, note 126 at 1841-44.
and practising professionals are prone to conflict. First, on economic issues, practising professionals share the same difficulties as their blue-collar brethren and sisters in having their perspective on fair wages and working conditions accepted by a management that often has its own priorities for expenditures which are often at odds with the interests of the practising professionals.¹³⁵ Second, practising professionals may well have different interests than that of the organization on issues of overall organization policy direction, ranging from the operating structure of the organization to the demarcation lines between the jurisdiction of some professionals as against others.¹³⁶ Third, managerial style may serve to lessen or exacerbate the conflict felt in the previous two areas.

The existence of managerial authority in the hands of bureaucratic professionals leaves to their discretion how that authority will be exercised. While, as earlier stated, professional standards and notions of collegiality tend to encourage a management style that is consultative and consensus-oriented, the option is ultimately that of the managerial professionals as to how that authority will be exercised.¹³⁷

Rabban's analysis concludes with the proposition that the

¹³⁵ Rabban, supra, note 126 at 1847-49.
¹³⁶ Rabban, supra, note 126 at 1850-51.
¹³⁷ Rabban, supra, note 126 at 1851-52.
proper demarcation line between managerial personnel who cannot gain protection under the N.L.R.A. because of Yeshiva and professionals who should be granted the Act's protection is the line between managerial professionals and practicing professionals. Those with bureaucratic authority (i.e., managerial professionals) would be unprotected by the Act, while practicing professionals, no matter how influential they are in the decision-making processes of particular enterprises, should be granted the Act's protection. Those professionals with bureaucratic authority pose problems of divided loyalty as between the employer which relies upon them to further the goals of the enterprise and the union whose purpose is to further the goals of the union membership. Furthering the goals of the union membership may at times coincide with furthering the goals of the employer, but this will not always, or even often, be the case. Thus, there needs then to be some dividing line between those who possess bureaucratic authority and those who do not in terms of who is entitled to unionize. The line drawn by Rabban seeks to recognize this need. Yet, clearly, the intent of the line drawn by Rabban is to ensure as many professionals as possible are able to take advantage of the rights established under federal labour legislation while still remaining faithful to Yeshiva.

Despite this apparent minimizing of Yeshiva's effect, the need to exclude managerial personnel from protection under the
N.L.R.A. begs the question why managerial personnel should be denied the rights provided to employees generally under the Act. The fact that the employer relies on such managerial personnel to be its head and hands at the workplace, thus creating compelling reasons why employers seek the undivided loyalty of such personnel, does not address the fundamental question of whether such personnel are unquestionably loyal to their employer. It is apparent such personnel share many of the same conflicting interests with their employer that is recognized in less influential employees who are therefore enabled to collectively bargain under sanction of federal legislation.\(^\text{138}\) Usually individual managerial personnel possess more individual bargaining power than individual lower-level employees. But such individual managerial personnel bargaining power likely pales in comparison to the bargaining power of lower-level employees who are able, by law, to collectivise their individual bargaining power and face their employer as one. In light of their personal interests conflicting with that of their employer, and the limited nature of their individual bargaining power, should not such managerial personnel be able to collectivise their bargaining power under sanction of the law? Do they not suffer from the same type (albeit, perhaps to lesser degrees) of problems that prompted legislative protection of lower-

\(^{138}\) Rabban, supra, note 126 at 1786. See also, Packard Motor Car Co. (1945), 61 N.L.R.B. 4 at 19.
level employees in efforts to protect their interests? In principle, it would be difficult to argue they should not be entitled to the Act's protection. But we are nevertheless faced with the practical problem that employers would face if managers and rank and file employees could together bargain with their employer as one. This legitimate problem for employers, however, need not result in managerial employees being disentitled under the Act; at most, it provides an impetus for the creation of separate bargaining units, one for managerial personnel and one for rank and file personnel.

Such an issue, however, is beyond the scope of this paper. Our present concern is whether the state of the current law, which clearly recognizes exclusion of managerial personnel from the Act's protection, presents substantial roadblocks to industrial relations innovations that deeply involve rank and file employees in the decision-making processes of the enterprises for which they work. As indicated above, the Yeshiva decision and its progeny casts doubt over whether employees involved in such participatory industrial relations practices lose their protection under the Act. But can the distinction drawn by Rabban to professional employees to narrow the impact of Yeshiva be applied also to rank and file employees involved in such innovations? Such narrowing would clearly enhance the acceptability of such innovations to trade unionists.

A strong argument can be made that the distinction is
valid for more generalized use.

The heart of the distinction Rabban draws between managerial and professional employees is the qualitative difference in power each group has in the enterprise. Managerial professionals have "real" power, or bureaucratic power, in the sense that they bear ultimate responsibility to the owners for the enterprise's performance and whether the enterprise meets the broad organizational goals established by the owners. Consequently, they have the final say, as between themselves and the other employees, over crucial issues such as the enterprise's financial picture, relations with outside parties such as creditors, suppliers and customers, and overall coordination of the day to day activities of the enterprise. As professionals with an ethic of collegial decision-making, however, such managers will seek to disperse decision-making authority to the lower levels of the enterprise encompassing practising professionals. Such a process is necessary in order to effectively to tap the professional expertise of the practising professionals. This decision-making authority, however, must not be confused with "real" power, or bureaucratic authority, ultimately exercisable by the managerial professionals to control perceived excesses in discretion exercised by practising professionals.

Similarly, in workplaces practising innovative industrial relations techniques which spread power downwards and then
horizontally, a distinction can be drawn between the "real" power, or bureaucratic authority, exercised by management and the power given by management to the employees through these innovations. Like the case of practising professionals, if the enterprise is to reap the economic benefits from these innovations, including productivity increases and boosted morale, the rank and file workers must be given a fair measure of autonomy and discretion. And like the case of managerial professionals, industrial management will normally retain ultimate authority over crucial issues such as the enterprise's financial picture, relations with outside parties such as creditors, suppliers and customers, and overall coordination of the day to day activities of the enterprise. Further, industrial management will retain authority to control perceived excesses in discretion exercised by rank and file employees. Admittedly, for both managerial professionals and industrial management there will be disincentives to exercise such ultimate authority in a manner inconsistent with the autonomy and discretion of the practising professionals or rank and file workers. But such disincentives must not be confused with a notion that such professionals or workers have "real" power sufficient to create in them the type of divided loyalty problems for employers experienced with managerial professionals or industrial management.

Consequently, as with practising professionals, Yeshiva's effect can be legitimately narrowed in industrial
establishments using participative innovations so as only to include within its ambit those who are empowered to exercise "real" or bureaucratic authority. This would likely have the effect of making these innovations more palatable to trade unions members concerned about losing the protection and rights under the Act by their participation in these innovations.

The question posed by the Yeshiva University decision, however, is whether it imposes a legal barrier for unions and employees in throwing their support behind such innovations. Unions will not be interested in labour relations practices that threaten to disentitle its members from union representation. And employees may be unwilling to abandon any prospect of gaining union protection for innovative labour relations practices which, although empowering, lack the institutional security of legally enforced collective bargaining. It should not be thought, however, that this more advanced issue is of central concern to unionists at this stage in the United States when their very existence is threatened. The concern will become real, however, in the event that unions gain general strength in the United States economy.

(3) Exclusivity doctrine

The last potential legal impediment to adoption of innovative industrial relations strategies to be considered is
that created by the status of a trade union as the exclusive bargaining agent on behalf of all members of a bargaining unit.

The differing philosophical base for the exclusivity doctrine, as compared to the participative industrial relations innovations, hints strongly that the legal doctrine will be at odds with encouraging adoption of these innovations. The exclusivity doctrine looks with suspicion upon individual direct dealings between the employer and bargaining unit members, on the understanding that the imbalance in bargaining power between the two makes any resulting arrangement more advantageous to the employer than the individual employee.139 As established in Chapter Three, the exclusivity doctrine resulted from a recognition that individual dealings between employer and isolated employees generally subjected employees to oppressive terms and conditions of work.140 Such problems were to be remedied by compelling employers to deal with employees as one, through an exclusive bargaining agent. New industrial relations innovations, however, are premised on the value obtained by

139 See, for instance, J.I. Case Co. v. National Labor Relations Board (1944), 321 U.S. 332 where the Court stated as follows: "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantage...They are a fruitful way of interfering with organization and choice of representatives..."

employers and employees through direct individual employee participation in the decision-making processes of the workplace. They focus upon the individual worker in small groups or teams as the fundamental building block for management labour policy in the workplace.

Section 9(a) of the National Labor Relations Act lays the basis for the doctrine of trade union exclusivity:

Section 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...

These words are followed with a proviso which appears, on its face, to provide some scope for individual dealing between employer and employee. This proviso states as follows:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity [sic] to be present at such adjustment.

The interpretation placed on Section 9(a) as a whole, however, has provided wide berth to trade union exclusivity, with the proviso having minimal effect.

The question of particular concern at the intersection of exclusivity and the new industrial relations is whether the theme of the New Industrial Relation on individual and small
group dealing will result in such practices being rendered illegal. We have earlier considered, under the heading "Employer domination", the risk of illegality in circumstances where there is no certified trade union in place and the employer has instead implemented some form of employee-participation scheme that falls within the definition of "labor organization" under Section 2(5) of the Act. Consideration of the exclusivity doctrine, however, assumes there is a trade union in place which was designated or selected with majority support within the bargaining unit; it is only then that the trade union is accorded exclusive status under Section 9(a). Further, the exclusivity doctrine only becomes a potential impediment if the trade union at issue does not support the particular employee-participation program in place; if the exclusive bargaining agent agrees with the employer's implementation of the program or innovation, any issue related to the union's exclusive status disappears.

Thus, the following consideration of the legal implications of exclusivity on new industrial relations innovations assumes there is a trade union in place which does not approve of the implementation of a direct employee-participation program. This latter assumption is not far-fetched in that the trade union literature is replete with concern, and even disdain, about the adverse trade union organizational effects of such innovations, as well as their potentially damaging effects on the protection of employee
interests.\textsuperscript{141}

The United States Supreme Court made its first substantial comments on the doctrine of trade union exclusivity in \textit{J.I. Case Co. v. National Labor Relations Board}\textsuperscript{142} where the employer refused to bargain with the certified trade union on those matters already included in individual contracts of employment executed a few months prior to the certification petition. In the course of determining that the employer had refused to bargain, contrary to Section 8(a)(5) of the \textit{Act}, the Court articulated the implications of the exclusivity doctrine as prohibiting individual bargaining between the employer and individual employees:

The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. ... The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. ... [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought


\textsuperscript{142} (1944), 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762.
to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. ... The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivises the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.143

The message is clear. Favouring or disadvantaging individual members of the bargaining unit on any terms or conditions of employment, whether or not that matter is included in the governing collective agreement, is not permissible in light of the union's exclusive status. The employer and all employees in the bargaining unit, whether or not they were part of the majority that selected or designated the trade union as their bargaining agent, are bound to the bargain struck by the bargaining agent, and are prevented from seeking144 or agreeing145 to any other terms or conditions of employment through any process other than the bargaining agent.

The doctrine of trade union exclusivity has been provided a very wide berth in United States labour law, garnering the description by one observer as a "sacrosanct cardinal tenet of

143 J.I. Case Co., supra, note 142.

144 See, for instance, Stewart Die Casting Corp. v. National Labor Relations Board (1940), 114 F.2d 849 (7th Cir. C.A.), cert. denied (1941), 312 U.S. 680, and National Labor Relations Board v. National Motor Bearing Co. (1939), 105 F.2d 652 (9th Cir. C.A.).

the national labor policy."

Perhaps the most dramatic example of the pre-eminence attached to this trade union status is found in the 1975 United States Supreme Court decision in Emporium Capwell Co. v. Western Addition Community Organization.\(^{147}\)

Two employees of Emporium Capwell attempted to enter discussions with their employer over alleged race discrimination by the employer in its employment practices. They sought discussions with the company's president to deal with the discrimination issue. When that effort failed to achieve a meeting with the company's president, the two employees held a press conference denouncing the employer as racist, reiterated their desire to meet with "top management" and announced their intention to picket the employer and institute a boycott until the company responded. The employees were eventually terminated as a result of such activities. The issue in the case was whether the employees' activities constituted "concerted activities" protected under Section 7 of the National Labor Relations Act.\(^{148}\)


\(^{147}\) (1975), 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12.

\(^{148}\) Section 7 reads in part as follows: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the
The United States Supreme Court found the employees activities not so protected, and in the process, commented on the breadth of the union's exclusive status.

The Court emphasized the importance of the exclusive status of the trade union as a central aspect of the national labour policy. The Court stated as follows:

Central to the policy of fostering collective bargaining, where the employees choose that course, is the principle of majority rule. ... In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interests of the majority. ... As a result, []the complete satisfaction of all who are represented is hardly to be expected.  

The fact that the smaller group that sought to deal with the employer was not acting at cross-purposes to the union, in the sense that all were actively concerned about racial discrimination at this workplace, did not effect the Court's conclusion that the employees' activities undermined the union's exclusive status. The union, the Court determined, "has a legitimate interest in presenting a united front...and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests."  

The national labour purpose of collective bargaining or other mutual aid or protection,...

149 Emporium Capwell, supra, note 147.

150 Emporium Capwell, supra, note 147.
policy, the Court concluded, called for a vibrant collective bargaining process that must be able to operate unhampered; this can only occur through strong protection of the union's exclusive bargaining agent position.\textsuperscript{151} The fact that attacking racial discrimination was an equally strong national policy was not sufficient cause for the Court to undermine the union's exclusive bargaining agent status.\textsuperscript{152}

The authorities are yet to consider the application of the exclusivity doctrine to the variety of innovations which rely on direct individual and small group employee participation in decision-making. However, the wide berth provided to trade union exclusivity, as illustrated in the above references, strongly suggests that exclusivity will emerge the winner when the two meet head-on. As one industrial relations commentator has concluded, the doctrine of trade union exclusivity provides "strong grounds on which to anticipate that employee-participation structures not under union control will be illegal",\textsuperscript{153} whether these structures take the form of quality circles, QWL programs, participative management programs, or labour-management committees or councils.\textsuperscript{154} Semi-autonomous work groups would equally be at

\textsuperscript{151} \textit{Emporium Capwell, supra}, note 147.

\textsuperscript{152} \textit{Emporium Capwell, supra}, note 147.

\textsuperscript{153} D. Sockell, "The Legality of Employee-Participation Programs in Unionized Firms" (1984), 37 Industrial and Labor Relations Review 541 at 546.

\textsuperscript{154} Sockell, \textit{supra}, note 153 at 541.
risk if implemented without the support of the trade union.

The only possible means by which barriers caused by trade union exclusivity can be avoided is by limiting the matters considered by the employee-participation structure. Section 9(a) of the Act provides that a union's exclusive bargaining agent status extends to "collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The United States Supreme Court has interpreted this list as exhaustive of the matters upon which an employer is obliged to bargain with the designated or selected trade union (i.e., the so-called "mandatory" subjects of bargaining); conversely, if a matter is not captured within those subject areas, the employer is free to refuse to bargain with the union over that matter and can freely bargain with employees individually over such matters.156

Thus, so long as the employer and individuals or small groups of employee deal with matters that are not mandatory subjects of bargaining, there is no risk of impinging upon the union's exclusive status. While this sounds simple enough, in practice, given the breadth with which the United States Supreme Court has defined mandatory subjects, the parties would be left with only minor peripheral matters with which to


deal. Mandatory subjects are generally defined as those which regulate the relationship between the employer and employees, as well as those which regulate the relationship between the employer and the union. 157

This difficulty is further compounded by the necessity for employee-participation structures within the New Industrial Relations to deal with traditional collective bargaining matters if the economic benefits and personal fulfilment promised by these innovations are to be experienced by the enterprise and its employees. 158

Consequently, while in theory it is possible for industrial relations innovations to avoid impinging upon trade union exclusivity, the limits that would therefore have to be placed on the quality and quantity of employee participation would make the effort less than worthwhile. The doctrine of trade union exclusivity, therefore, poses significant roadblocks for industrial relations innovations premised on direct employee involvement in the decision-making processes of the workplace.

157 See, for instance, Gorman, supra, note 140 at 506 et seq.

158 See, for instance: Gold, supra, Chapter One, note 68; Kochan, Katz & Mower, supra, note 141; Kochan, Katz & McKersie, supra, Chapter Two, note 56; T. Kochan & M. Piore, "Will the New Industrial Relations Last? Implications for the American Labor Movement" (1984), 473 Annals of the American Academy 177.
Conclusion

Significant problems for industrial relations innovations emphasizing employee-involvement in enterprise decision-making are posed by a variety of United States labour law doctrines.

The National Labor Relations Act prohibition against employer domination or interference in labour organizations, found in Section 8(a)(2) of the Act, raises legal impediments to employers who initiate or become involved in any structure established to increase employee participation in enterprise decision-making. This will be the case whether or not a trade union represents the employees of that enterprise.

The doctrine excluding managerial personnel from protection under the Act poses difficulties for innovations which provide employees with a high degree of decision-making authority and autonomy in the enterprise, whether that authority or autonomy is provided freely by the employer or, instead, won by the employees through collective bargaining.

Finally, the doctrine which provides exclusive bargaining agent status to a trade union selected or designated by a majority of the employees inhibits the use of employee-participation programs without the approval and support of the trade union.

Together, these potential legal impediments to wide ranging industrial relations innovations may have a significant dampening effect on the desire of United States enterprises to experiment, with the consequential loss of the
increased economic benefits for the enterprise and the personal fulfilment benefits for the employees of such enterprises.

Whether similar impediments are posed by Canadian labour law will be the subject of the next Chapter.
Chapter Five
Legal Implications in Canada

Introduction

Since at least the 1940's the Canadian legal environment has been supportive and conducive to developing collective bargaining as a means of regulating the relations between employers and employees in a manner that provides employees with some voice in the government of their workplace. This support and encouragement continues to the present day, in contrast to the United States experience. Collective bargaining and the values it emphasizes appear well entrenched in the Canadian political zeitgeist.¹

This commitment to the collective bargaining model of industrial relations would consequently lead one to believe that new industrial relations innovations premised on a non-adversarial paradigm would be in danger when evaluated under Canadian labour law.

However, countervailing indicators in the history of the industrial relations practices in Canada suggest that in many ways the Canadian system of industrial relations, as distinct from industrial relations practices in the United States, would be more willing to embrace consultative, cooperative

industrial relations strategies such as those found in many of these innovations. For example, before the Wagner Act model was introduced in Canadian jurisdictions in the late 1930's and 1940's, the Canadian industrial relations legal system was characterized by its emphasis on conciliation and mediation.\(^2\)

While this emphasis placed industrial peace above dealing with the underlying issues between the parties, the system sought to encourage less adversarial means of resolving labour disputes and greater discussion and consultation among the parties before destructive work stoppages began.

The purpose of this Chapter is to determine whether the Canadian legal system of industrial relations will embrace or reject the New Industrial Relations when the two meet. I speak in future tense because, like in the United States, there is minimal jurisprudence from Canadian labour relations tribunals to predict with any degree of certainty where these innovations will land on the legal landscape. Consequently, much of this Chapter will be speculation.

This Chapter will not purport to cover all jurisdictions within Canada. The Constitution Act, 1967 provides that the Provinces have primary jurisdiction over employment and labour relations law in their respective provinces, while the federal government maintains jurisdiction over employment and labour

relations law in industries otherwise under federal jurisdiction. This split in authority over labour relations law is in contrast to the primary labour law jurisdiction of the federal government in the United States. Thus, while there is a level of labour law uniformity across the United States that enables one to provide a "national answer" to labour law issues, no such national answer is provided by one labour relations board in Canada.

This is frequently only a theoretical problem in that the legislation in each Canadian jurisdiction employs much the same concepts, and often the same statutory language. Further, decisions of some labour relations boards, such as those in British Columbia, Ontario and at the federal level (the Canada Labour Relations Board), tend to be drawn upon by most other provincial labour relations boards across the country in interpreting their respective legislation.

The bell-wether status of the Canada Labour Relations Board, Ontario Labour Relations Board and British Columbia Labour Relations Board/Industrial Relations Council explains

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4 Hereafter, the "Canada Board".

5 Hereafter, the "Ontario Board".

6 Hereafter, the "British Columbia Council". The Council was formerly known as the British Columbia Labour Relations Board until a change of name occurred in 1987, pursuant to S.B.C. 1987, c. 24. The British Columbia tribunal will be referred to as the Council throughout, regardless of whether the particular decision referred to was made by the
why this Chapter will explore the Canadian law from the perspective of their legislation and jurisprudence. While the law in the areas to be discussed is similarly legislated and applied in these three jurisdictions, sufficient differences exist in the doctrines to be examined to justify reference to the law in all three of these jurisdictions.

This Chapter does not purport to provide an exhaustive analysis of the three tribunals' interpretation of the relevant provisions and principles of their respective legislation. The Chapter will, however, highlight each tribunal's approach to three areas which raise particular concerns for industrial relations innovations. These three areas are: (1) the exclusion of managerial employees from collective bargaining; (2) the unfair labour practices of domination or interference in the formation of, administration of, or representation by trade unions; (3) the exclusive bargaining agent status of trade unions. Each section will begin with a brief review of the general approach in the three jurisdictions, with particular emphasis on principles most relevant to the New Industrial Relations. Finally, each section will end with suggestions how the law in these jurisdictions might apply to innovations such as semi-autonomous work teams. Taken together, the sections should provide a picture of the legality of such industrial relations innovations in Canada. The picture will predict a more former Board.
friendly reception in Canada for the New Industrial Relations as compared to the reception received in the United States, as discussed in Chapter Four.

(1) Managerial exclusion

Unlike the United States, the exclusion of managerial personnel from bargaining units is expressly contained in each Canadian jurisdiction's legislation.

The Canada Labour Code provides:

Section 3(1)

"employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

The Ontario Labour Relations Act provides:

Section 1 (3) Subject to Section 90, for the purposes of this Act, no person shall be deemed to be an employee,
(a)...
(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters related to labour relations.

The British Columbia Industrial Relations Act provides:

Section 1(1) In this Act "employee" means a person employed by an employer...but does not include a person who, in the council's opinion,

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7 Section 90 provides that, for the purposes of Section 80 and 89 of the Act, "person" includes any person otherwise excluded under Section 1(3)(b). Section 80 deals with protection of witnesses when they provide evidence in a proceeding under the Act. Section 89 deals with the handling of complaints made under the Act.
(a) is employed to, and does exercise the functions of, a manager or superintendent in the direction or control of employee;
(b) is employed in a confidential planning or advisory position in the development of management policy for the employer or;
(c) is employed in a confidential capacity in matters relating to labour relations or personnel.

The commonly accepted rationale or purpose for the exclusion, showing concerns similar to those expressed in the United States jurisprudence, is found in the British Columbia Council decision in Corporation of the District of Burnaby,\(^8\) which has been cited time and time again by labour relations tribunals across the country. The Council stated:

True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has directed that in the tug of these two competing forces, management must be assigned to the side of the employer.\(^9\)

The Council explained its rationale from the perspective of the employer:

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\(^9\) Ibid, at 3.
The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability." The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.10

Further, the Council explained the advantages of the exclusion from the perspective of the union:

More subtly, but equally important, the exclusion of management from bargaining units is designed for the protection of employees' organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for this effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talent and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's-length relationship between employer and union is to be preserved for the benefit of employees the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management authority over it.11

Similar sentiments have been expressed by the Ontario

10 Ibid, at 3.
11 Ibid, at 3.
Board in its leading case, *Chrysler Canada Ltd.*\(^{12}\), and by the Canada Board in *Bank of Nova Scotia*\(^{13}\), where the Board stated:

The basis of the exclusion of certain "management" persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g., the authority to dismiss or discipline fellow employees). It is for this reason that certain person are denied collective bargaining rights granted to other employees.\(^{14}\)

While these excerpts provide the policy reasoning for the exclusion of management personnel from collective bargaining - avoiding a conflict of interest for those individuals as between their union and their employer - they do not provide strong guidance as to how each jurisdiction determines who is or is not management. Defining the line between employees and management has been an extremely difficult process because, as the British Columbia Council once remarked, "[t]he term "management" is simply too amorphous and broad to admit of a


clear and definitive analysis." Notwithstanding such difficulties, some general guidelines can be briefly stated.

When faced with an individual alleged to be part of management, all three tribunals conceptually distinguish three types of managerial personnel, often applying different standards depending on the type of managerial personnel.

First, individuals may be considered managerial because of the nature of their relationship with individuals who are unquestionably "employees" under the respective legislation. This group of managerial personnel includes those individuals who, generally speaking, play a significant role in the day-to-day control and discipline of employees. Hereafter, this basis of exclusion will be referred to as the "supervisory basis".

Second, individuals may be considered managerial because of the nature of their relationship with individuals who are unquestionably part of the enterprises's management. This group of managerial personnel includes those individuals who play a significant role in formulating management's practices and policies in specific areas of the enterprise, or for the enterprise as a whole. Hereafter, this basis of exclusion will be referred to as the "policy-making basis".

Third, an individual may be considered managerial (only in the sense of being excluded from collective bargaining)

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because of the individual's significant role in the process by which management formulates in labour and industrial relations policies and practices. The basis for exclusion is not their significant role in formulating those labour relations policies (such individuals are in the second group above), but instead exclusion is based on their access to confidential information about the enterprise's labour and industrial relations policies and practices. This Chapter will not consider this basis of exclusion as it is not significant to the type of industrial relations innovations at issue.\footnote{In any event, as Vice-Chairman E.R. Peck (as he then was) said in \textit{British Columbia Ferry Corporation v. British Columbia Ferry and Marine Workers' Union}, [1979] 1 C.L.R.B.R. 116 at 127, this ground for exclusion is "sufficiently esoteric as to have a limited exclusionary effect."}

The Ontario Board and British Columbia Council agree that significantly different tests are necessary when an exclusion is alleged to be on the supervisory basis, as opposed to the policy-making basis. We will first consider their approach to the supervisory basis and then we will consider their tests for the policy-making basis.

(i) \textbf{Exclusion on the supervisory basis}

Exclusion on the supervisory basis is determined in British Columbia and Ontario by the degree of authority actually provided to and exercised by the individual over those clearly within the statutory definition of "employee". Authority in both jurisdictions includes a power to make...
"effective recommendations" or "effective determinations" that impact upon the conditions of employment of employees. Providing significance to this type of authority recognizes that in large modern enterprises the personnel function has become largely centralized, structured and bureaucratized. Such a personnel structure may include a large number of people who occupy positions at the first level of supervision of employees, but who act in these positions under detailed instructions and policies handed down from above in the hierarchy. If such individuals are merely conduits for higher levels of management in providing direction to employees and reporting back to higher management which decides what to do with that information, then that supervisor has little, if any, effective control over the conditions of employment of employees and consequently will not be excluded on the supervisory basis. However, if that individual has a power of effective recommendation or effective determination over the economic livelihood of the employees below, in the sense that his/her recommendations on matters materially affecting the conditions of employment of those supervised are usually acted upon, then that power will be sufficient to have that

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individual excluded on the supervisory basis.¹⁸

The British Columbia Council searches for this type of effective control in a number of key areas before exclusion on the supervisory basis will be warranted.¹⁹ First, the Council looks for effective control in the area of discharge and lesser discipline of employees supervised. Second, the Council examines whether the individual has effective control in hiring and promotion of employees supervised. Third, and less importantly, the Council looks for effective control in authorizing overtime. Fourth, the Council looks for the effective authority to authorize absences and schedule vacations.

Further, the Council looks for indicia of managerial status in other aspects of the individual's day-to-day work.²⁰ Continuing from the list in the immediately preceding paragraph, fifth, the Council asks whether the individual regularly engages in directing the activities of

¹⁸ British Columbia Transit, supra, note 17; British Columbia Ferry Corporation, supra, note 16; McIntyre Porcupine Mines Limited, infra, note 25.

¹⁹ The list that follows was first articulated in this form by the former Labour Relations Board in British Columbia Ferry Corporation, supra, note 16, and has been recently applied by the Council in British Columbia Transit, supra, note 17, Children's Hospital v. British Columbia Nurses Union, I.R.C. No. C58/91 (reconsideration of I.R.C. No. C159/90), and Vancouver General Hospital v. British Columbia Nurses Union, I.R.C. No. C179/91.

²⁰ These indicia are further parts of the list articulated in British Columbia Ferry Corporation, supra, note 16 and applied in the decisions mentioned in note 19.
subordinates. Sixth, does the individual exercise considerable independence and discretion in performing duties and meeting objectives established by higher authorities within the enterprise? Seventh, does the individual engage in the regular evaluation of employees supervised? Eighth, does the individual regularly attend meetings of individuals definitely part of management and has a right at such meeting to make proposals? Ninth, does the individual act as a supervisor over other supervisors (i.e., is this individual above the first level of supervision)? Finally, does the individual represent management in labour relations matters such as in the process of resolving grievances, interpreting a collective agreement, contributing to a set of bargaining proposals, or acting as management's spokesperson on a joint labour/management committee? If answers to many of these questions are positive there is a strong likelihood the individual would be excluded on the supervisory basis.

While the provision of such a list lends an air of certainty to the line-drawing process, the Council is quick to point out that the list is not exhaustive and it will not be necessary for an individual to meet all ten elements in order to be excluded as management.\textsuperscript{21} In the end, a judgement that an individual is excluded on the supervisory basis is "highly

\textsuperscript{21} \textit{British Columbia Ferry Corporation, supra}, note 16 at 133, \textit{British Columbia Transit, supra}, note 17 at 49.
subjective" but can be summarized by stating that "while the function of supervision alone will not remove an individual's employee status, supervision combined with the power of "effective determination" in key employment-related areas such as hiring, firing, and discipline does justify exclusion."  

The application of the supervisory basis exclusion operates in British Columbia to exclude more individuals than the same test applied in Ontario, and certainly more than excluded, as will be seen, on the supervisory basis by the Canada Board. The wide breadth provided to this basis of exclusion by the Council can be seen by noting the Council's articulation in recent years of the exclusion's rationale and underlying premises.

In British Columbia Transit the Council had occasion to comment specifically on the type of conflict of loyalties the supervisory exclusion is meant to address. The traditional view, and that accepted by the Ontario Board, is that the conflict to be avoided is the conflict faced by an individual who must supervise employees who are represented by the same union as would represent the supervisor. The

22 British Columbia Transit, supra, note 17 at 49.
23 British Columbia Transit, supra, note 17 at 49.
24 Supra, note 17.
Council in British Columbia Transit, however, broadened that rationale to the point where it denied that this direct conflict of interest is the key determinant. Instead, the Council determined that the exclusion is based "on the broader notion that certain individuals have or ought to have a community of interest with their employer alone, without the pressure or tension of participation in collective bargaining (as a member of any union) that strains their loyalties away." In effect, this premise for exclusion on the supervisory basis emphasizes the needs of employers to be without individuals in supervisory positions who have any element of a trade union ethic, at the expense of a greater number of employees who will be denied collective bargaining rights. Further, it appears to render less significant the ability of the Council under Section 47 of the Industrial Relations Act to create bargaining units of supervisors or to include supervisors in a bargaining unit with other employees.

Despite this relatively recent development in the Council's jurisprudence, it appears that the Ontario Board replicates the Council's approach to exclusions on a


26 British Columbia Transit, supra, note 17 at 48 (first emphasis added).
supervisory basis, as articulated in British Columbia Ferry Corporation and its progeny.

Like the British Columbia Council, the Ontario Board has found that the purpose of the managerial exclusion as a whole, including the exclusion on the supervisory basis, "is to ensure that persons who are within a bargaining unit do not find themselves with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members of the bargaining unit."27 And when faced with an individual alleged to be managerial on the supervisory basis, the Ontario Board, like the British Columbia Council, "is trying to assess ... the degree and exercise of authority over other employees which would effect [those employees'] economic position or job security, since the exercise of that authority, to any significant extent, would be incompatible with participation in the bargaining unit."28

The Ontario Board, over the years, has developed general approaches and tests to determine in as precise a way as possible the amount of authority such an individual must have, and over what issues or areas, before they would be excluded on the supervisory basis. Like the British Columbia Council,

27 Board of Education for City of Windsor, supra, note 25 at 67. The Ontario Board here quoted extensively from the British Columbia decision in Corporation of District of Burnaby, supra, note 9.

the Ontario Board has identified a number of key areas or issues to examine in determining whether an individual has sufficient authority in these areas to warrant exclusion. The Ontario Board asks whether the individual has a right to: (i) hire; (ii) fire; (iii) promote; (iv) demote; (v) grant wage increases; (vi) discipline employees; (vii) contribute to general performance evaluations of employees; (viii) participate in the grievance procedure; (ix) grant time off; and (x) authorize and assign overtime. Authority in these areas are "manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit." As mentioned earlier, exclusion by the Ontario Board on the supervisory basis will be warranted not only when the individuals at issue has direct authority to perform these acts, but also if they have a power of effective recommendation in that regard.

In the application of such test, the Ontario Board has exhibited itself to be more sensitive than the British Columbia Council to the nature of the industry at issue, the nature of the particular business within that industry, and the employer's organizational scheme in order to determine


\(^{30}\) Corporation of the City of Thunder Bay, supra, note 29 at para. 3.
whether the purpose of the exclusion would be fulfilled by making an exclusion on the supervisory basis. Such sensitivity will be important in reviewing industrial relations innovations for their consistency with the managerial exclusion which, as explored in Chapter Two, attempt to blur the line between managers and employees.

The British Columbia Council's lack of sensitivity is illustrated in their recent application of the criteria listed in *British Columbia Ferry Corporation* in a very mechanistic manner to health care professionals who were part of a collegial decision-making process in a hospital setting. In *Children's Hospital* a reconsideration panel of the Council chaired by then-Commissioner E.R. Peck overturned an earlier panel's decision finding Nurse Managers to be employees under the legislation. The original panel determined that these Managers did not have duties and responsibilities which created a significant labour relations conflict or clear potential for conflict. The reconsideration panel rejected this reasoning by stating:

> Intolerable conflict is not the standard necessary for exclusion from the bargaining unit and has no basis in law. Rather, the question is whether a person "is employed to, and does exercise the functions of a manager or superintendent in the direction or control of employees" [, quoting from

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31 *Supra*, note 16.
32 *Supra*, note 19.
33 *Children's Hospital v. British Columbia Nurses Union*, I.R.C. No. C159/90 at 23.
Section 1(1) definition of "employee" under the British Columbia Industrial Relations Act]. ... While the legislature shied away from fixed criteria to determine exclusions, the factors set out in B.C. Ferry Corp., supra, are largely determinative of status under Section 1(1)(a). 34

It appears that the Council is not prepared to apply a purposive approach to the interpretation of the managerial exclusion which would limit the exclusion to those who would likely experience the type of conflict at which the provision was originally aimed. While the Council certainly has precedent from the former British Columbia Labour Relations Board to draw upon which exhibits a less mechanistic approach, 35 the Council appears to be charting a somewhat new course.

This recent approach of the Council is to be contrasted with the approach of the Ontario Board in a similar industry. The following example from the Ontario experience illustrates a receptiveness to organizational structures that are based on collegial decision-making. Further, it illustrates an unwillingness to use exclusion on the supervisory basis as a means to deny collegial decision makers their rights to collectively bargain through unions.

The Ontario Board in Ontario Nurses' Association v. 

34 Children's Hospital, supra, note 19 at 12.

35 See, for example, Vernon Jubilee Hospital v. Health Sciences Association, [1978] 2 C.L.R.B.R. 467 (B.C.), Vancouver City College v. Faculty Association of Vancouver City College (Langara), [1974] 1 C.L.R.B.R. 298 (B.C.).
Oakwood Park Lodge\textsuperscript{36} was faced with an application for certification by nurses who supervised lesser-skilled employees such as nurses aides, and kitchen, laundry and housekeeping staff. These nurses could authorize employees to leave work early, direct employees in the performance of their work, call upon employees to correct their work, train new nurses' aides, regularly evaluate the nurses' aides' progress, and report to nursing meetings about problems with particular nurses aides which would result in monitoring of that aide. The Board found, in relation to disciplinary powers, that the nurses authority in this area was "carefully circumscribed".\textsuperscript{37} Further, the nurses attend meetings with department heads to "discuss the situation in the home, complaints, resident's care plans and so on."\textsuperscript{38} The nurses could not commit the employer to expenditure. They are not involved in the budget-creating process of the enterprise.

In the end, the Board stated it "was not persuaded that the evidence of the nurses' duties demonstrate the kind of conflict of interest which [the supervisory exclusion] was designed to avoid."\textsuperscript{39} Key to their determination was their belief that a contrary ruling would be "destructive of dozens

\footnotesize{\textsuperscript{37} Oakwood Park Lodge, supra, note 36 at 15,297.}
\footnotesize{\textsuperscript{38} Oakwood Park Lodge, supra, note 36 at 15,295.}
\footnotesize{\textsuperscript{39} Oakwood Park Lodge, supra, note 36 at 15,298.}
of successful collective bargaining relation[ships].\footnote{Oakwood Park Lodge, supra, note 36 at 15,298.}

While the actual decision reached helps show conflict of interest as the ultimate litmus-test, contrary to the recent British Columbia Council approach, the important part of the decision for our purposes is the reasoning articulated by the Board.

The Board was compelled in this decision to grapple with what has become an increasingly troublesome issue in relation to the supervisory exclusion - how to handle individuals whose job, skills and training place them in situations at work where they are provided a great deal of autonomy, discretion and input into evaluating how well the work is being performed by themselves and their peers, as well as by those with lesser skills. Are such responsibilities to result in the exclusion of broad numbers of employees on the basis of the supervisory exclusion?

Such questions arise most often in relation to professional employees. But as we saw in Chapter Two, workers under the New Industrial Relations, whether in primary industry or high-technology enterprises, are characterized by their similarity, in terms of autonomy, discretion and decision-making power, with professional employees. Thus, the approach a labour relations tribunal takes with the exclusionary rule in relation to professional employees probably provides some guidance as to how they will deal with
the exclusionary rule in relation to examples of the New Industrial Relations.

The Board in Oakwood Park Lodge acknowledged the problems of applying the traditional exclusionary rule to professional employees in the following terms. Such individuals, it indicated, performed various supervisory or coordinating functions which historically, or in other contexts, are associated with managerial status. These functions include ensuring work is done properly, permitting employees to be absent, reporting on another employee's competence, delegating work assignments, and disciplining employees who do not comply with the rules of the workplace. As the Board stated:

[Such] persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experienced.... Frequently, it is only the most senior or experienced employees who will fully understand the technical requirement of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgement are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees - but this does not mean that they exercise management functions in the sense contemplated by [the statutory exclusion] and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups. ... To hold that persons with higher levels of education or training (whether acquired on the job or otherwise) exercise
"managerial functions" ... would be tantamount to saying the Act has no application to much of the highly trained and educated work force which is characteristic of the emerging high technology industries.\textsuperscript{41}

Consequently, the Ontario Board strives to closely analyze the working relationships in enterprises characterized by such a consultative work structures, and thereby determine the true location of decision-making power. An effective recommendation test, as used by both the Ontario Board and the British Columbia Council, makes the task that much more demanding since that test does not require that the individual at issue have direct decision-making power over matters of economic concern to other employees. Speaking on this issue in broad terms, and in terms particularly relevant to the New Industrial Relations, the Ontario Board said:

Modern business organizations - especially those employing professionals - encourage the free flow of information and ideas from subordinates to superiors. Consultation and involvement in the decision-making process, improve communications in both directions, clarify the employer's problems and objectives, improve employee morale, and make optimum use of employee ingenuity or expertise. "Participatory management styles" have become a prevalent technique in large organizations for reducing employee alienation and increasing commitment to the goals of the employer. And, in small organizations, consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be realized. One should not conclude, however, that the existence of consultation, or an apparent "democratization" of decision-making, means that real managerial

\textsuperscript{41} Oakwood Park Lodge, supra, note 36 at 15,289-90.
authority has percolated downwards.  

The true test to be applied in circumstances where such consultative processes are in place, or where skill and experience have provided an individual "a special place on the team", is whether the individual regularly performs "functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment" of other employees.

It is that kind of function which raises the "collective bargaining" conflict to which [exclusion on a supervisory basis] is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under [the statutory exclusion].

As Oakwood Park Lodge shows, the Ontario Board will not apply its test in mechanistic manner; if the decision-making structure in the particular enterprise or industry is not likely to result in the type of conflict the exclusion is aimed at, the Board appears to decide such cases in a manner ensuring as many people as possible remain entitled to collectively bargain.

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42 Oakwood Park Lodge, supra, note 36 at 15,287.

43 Oakwood Park Lodge, supra, note 36 at 15,290.

44 Oakwood Park Lodge, supra, note 36 at 15,290.

45 See Board of Education for the City of Windsor, supra, note 25. See also the similar examples in the cases dealing with collegial decision-making in academic environments in, for instance, Carleton University, [1975] O.L.R.B.R. June 500 (where the Board stated the test for the managerial exclusion must vary with the context within which it was applied. Held: department chairs were not captured by the exclusion), and
In summary, while both the Ontario Board and the British Columbia Council start from the same premises and tests in relation to exclusion on the supervisory basis, the Ontario Board has shown a greater willingness not to apply a mechanistic approach and instead look for "a direct and provable" conflict of interest before excluding an individual on that basis. The British Columbia Council, on the other hand, appears to centre its attention on whether the individual at issue exhibits the classic characteristics of a manager.

The Canada Board has, in effect, struck off on its own path regarding exclusions on a supervisory basis. In the result, the Canada Board exclusion is extremely narrow. Only if the individual at issue has the direct authority personally to effect the terms and conditions of employment of others is that individual excluded on the supervisory basis.

Thus, while the Canada Board uses the same list of factors to analyze in determining whether an individual is to be excluded on the supervisory basis (power to hire, dismiss, promote, demote, discipline, planning work and appointing

\[\text{University of Windsor, [1977] O.L.R.B.R. May 300 (faculty were not managerial despite their collective, collegial decision-making as a group). The British Columbia Council had similar precedents to draw upon, such as in Faculty Association of Vancouver City College (Langara), [1974] 1 C.L.R.B.R. 298 (B.C.), where the former Board recognized the necessity of taking the context of the enterprise into account in reaching a decision regarding managerial exclusions. The British Columbia Council, however, did not refer to such decisions in the cases referred to earlier.}\]
people to do it, budgeting, representing management in the grievance procedure and collective bargaining), it requires that the exercise of those functions be in the actual hands of the individual sought to be excluded.

The fact that the individual is the immediate supervisor of employees, and thus may have a power of effective recommendation in relation to those functions, is of no moment to the Canada Board in determining the individual's status. In regard to the power of effective recommendation, the Canada Board has stated as follows:

The existence of a power to recommend instead of a power to decide is often a key indicator of the nature of the role played by a person or a group of persons in an enterprise. It is not just a question of semantics but a means of ascertaining where the real authority and responsibility lie. In such a context, the originator of a recommendation simply provides an input into the actual decision. The fact that recommendations are generally effective does not mean that the focus of the decision-making process has somehow been displaced. It is a reflection of the fact that the author of the recommendation does a good job and it might have much to do with whether or not he is likely to ever become a decision maker, but it does not change the nature of his job which is essentially that of a subordinate, however highly skilled. ... If the goals and concerns of the decision maker have been well understood and properly taken into account by the author of the report, it is likely that the recommendations will be effective. Often, this process will work so well that limited powers of decision making may be delegated subject to a right of review or veto. Thus, on the assumption that his recommendations will be sound, the subordinate will be allowed to begin implementing. However, the control is retained by requiring him to inform the superior authority which may then intervene to overrule or veto. If the subordinate is doing his job well, this power to overrule or veto will be sparingly used. ... Again, almost invariably, this will not
change the nature of the subordinate's job. The management functions are really and truly performed elsewhere.\(^{46}\)

Thus, unlike the British Columbia Council and the Ontario Board, the Canada Board will only exclude individuals on the supervisory basis if they are the actual decision maker, the person with essentially unreviewable discretion.

Clearly, the Canada Board draws the line between management and employees much higher in an enterprise's hierarchy than the other jurisdictions considered.\(^{47}\) The Canada Board's policy regarding effective recommendation helps explain how this is done. The Board's rationale for drawing the line so high in an enterprise is deeply rooted in its view of the purposes behind the Canada Code, and the relationship between supervisory functions and the conflict of interest criteria that is at the heart of exclusion on a supervisory basis.

The Board has placed great emphasis on changes to federal labour legislation in the Canada Labour Code in 1973 relative to supervisory personnel. Specifically, the Board has noted the strong commitment to collective bargaining found in the preamble of the Code, the decision by Parliament not expressly to exclude supervisors from the definition of


"employee" under the Code, and the inclusion in the Code of Section 27(4) (formerly Section 125(4)) which contemplates inclusion of supervisory personnel in bargaining units.\footnote{Cominco Ltd., supra, note 1; N.A.B.E.T. V. Canadian Broadcasting Corporation (1984), 55 di 197 at 216 et seq.} The operation of all these elements of the Canada Labour Code has caused the Board to rethink the conflict of interests basis for the managerial exclusion, and to reach the conclusion that supervision of employees is, in effect, irrelevant to the determination of whether an individual should be excluded on the supervisory basis.

As an aside, although the British Columbia Council has a similar provision authorizing the inclusion of supervisors in bargaining unit\footnote{Industrial Relations Act, R.S.B.C. 1979, c. 212, s. 47.}, the Council has not drawn the same conclusions about that provision's significance. The Canada Board, as noted, has taken the provision to signal that supervisory functions are not relevant to employee status. The British Columbia Council, on the other hand, has not seen the provision as derogating from the over-riding concern whether the individual exercises management functions.\footnote{See, for instance, Corporation of the District of Burnaby, supra, note 9 at 5.} Only if they reach a negative conclusion on that question will they consider inclusion of a supervisor in a bargaining unit.

The Canada Board's reasoning for their unique approach is
as follows:

[O]ur test is one of conflicting interests, but it is no longer as it was perceived in the 60's or even the 70's. Views about the compatibility of collective bargaining and job responsibilities have changed. ... Society accepts that citizens may exercise duties of social trust and find no conflict with their exercise and membership in trade unions or participation in collective bargaining. ...

In this context it is no longer apposite to view the conflict of interest rationale for the managerial exclusion in terms of sworn oaths of membership in unions and unswerving loyalty to the brotherhood of membership. These terms are clearly outdated. The potential conflict of interest to be considered is one between employment responsibilities and the union as an instrument for collective bargaining in a climate where there is legal protection for the individual in his relationship to the union both as bargaining agent and organization.51 To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.52

In light of these considerations, the Board articulated a non-exhaustive list of job functions which, unlike in the Ontario Board and British Columbia Council jurisprudence, will not be considered relevant to whether an individual should be

51 The Board had, earlier in its decision, catalogued the legislated rights union members have as against their union, such as the union's duty of fair representation and fair referral, the union's duty to be non-discriminatory in revoking an individual's membership, etc. See Cominco Ltd., supra, note 1 at 14,387.

52 Cominco Ltd., supra, note 1 at 14,386-87.
excluded on the supervisory basis. The Canada Board stated as follows:

The fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedule holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation. We do not subscribe to the view that says an employee will become dishonest or abuse responsibility because he is represented by a union.53

Further, the Board added that it would not consider an individual's participation on a safety committee as a representative of the employer as a management function.54 And an individual's ability to commit the employer to expenditures is equally not grounds for finding a conflict.55

In summary, the Canada Board has developed an extremely narrow rule for exclusion on a supervisory basis. Essentially, only those having direct authority to immediately decide key employment conditions of employees will be caught by the exclusion.

53 Cominco Ltd., supra, note 1 at 14,388.

54 Cominco Ltd., supra, note 1 at 14,388, and British Columbia Telephone Company, Canada Labour Relations Board Decision No. 221 (1980) at 24-26.

55 Cominco Ltd., supra, note 1 at 14,387.
(ii) Exclusion on the policy-making basis

The second group of managerial personnel excluded from collective bargaining are those excluded on the policy-making basis. Such personnel, while not directly involved in the day to day direction and control of the workforce, are nonetheless key to the employer's operation by helping determine overall policy for running the enterprise. Their impact on employees is less direct than those excluded on the supervisory basis; but their decisions often can have a deeper, more wide-spread impact on employees, such as decisions to implement technological change, thereby causing lay-offs. Consequently, their participation in the bargaining unit of employees create the same kind of conflict concerns as applied to exclusions on the supervisory basis.

All three jurisdictions exclude policy-making personnel. However, the exclusion appears to operate more broadly in British Columbia than in the other two jurisdictions.

(a) British Columbia Council

The British Columbia Council implied a policy and planning personnel exclusion from the generalized managerial exclusion found in their pre-1977 legislation. A 1977 amendment to that legislation codified that policy-making exclusion in what is now subsection (b) of the definition of


57 S.B.C. 1977, c. 72, s. 1.
"employee" set out above.

The Council made it clear in *Kootenay Savings Credit Union*\(^{58}\) that persons exercising significant administrative responsibilities as part of a "management team" or otherwise involved in duties closely associated with the functions of upper-level executive members of management would suffer the same stress of conflicting interests as those who daily direct and control the workforce. Thus, such personnel will be excluded. What distinguishes them from others, according to the British Columbia Council, is their proximity to the central decision-making structures of the employer and their consequential identity with management, particularly from the perspective of the rank and file employees.\(^{59}\) Explaining the Council's rationale for implying a "management team" exclusion, and thereby indicating the breadth of exclusion on the policy-making basis in British Columbia, the Council stated as follows in *Vernon Jubilee Hospital*\(^{60}\):

The initial wording of the Labour Code appeared to focus solely on line management -- those persons who exercise management functions over other employees in carrying out the operations of the employer [i.e., those excluded on the supervisory basis]. The Board could and did stretch that language without a great deal of effort in order to exclude executives, those persons who wielded managerial authority over the line managers themselves. But we faced a perennial difficulty in categorizing the

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\(^{58}\) *Supra*, note 56.


\(^{60}\) *Supra*, note 59 at 472.
principal assistants and advisors to these executives. In the real life of the firm, the people all function as part of a single, cohesive team developing crucial policy directions for the enterprise. For that reason, there is a compelling practical case for the exclusion of such individuals from the collective bargaining regime of the ordinary employees, if only to preserve an undivided sense of loyalty and confidentiality in the management team.

Thus, if an individual assists in the process of decision-making over the basic policy direction of the enterprise, even if only in an advisory role with no actual decision-making power, they may be excluded on the policy-making basis.

(b) Ontario Board

This British Columbia test is to be contrasted with the narrower Ontario test for dealing with persons who are engaged in management planning and policy. The Ontario test requires that a person have actual decision-making power before they will be excluded on the policy-making basis. The Ontario Board stated its test in Cottage Hospital (Uxbridge)\(^6\). There the Board stated as follows:

For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations

flowing from their expertise in a limited field.\textsuperscript{62} Thus, the key for the Ontario Board is whether the individuals in question exercise an independent power over important aspects of the employer's business. If the person has independent discretion in such areas as budgeting, buying or selling, they will generally be excluded.\textsuperscript{63} Similarly, personnel will be excluded if they control, determine or formulate policy and methods by which the employer seeks to deal with such matters as public relations, the enterprise's productivity or costs, or if they set the necessary guidelines for others to follow in such areas.\textsuperscript{64} As the Board said in Hydro-Electric Power Corporation\textsuperscript{65}:

With the rapid advance of technology and the use of more sophisticated management tools, an ever increasing number of persons are becoming actively involved, in varying degrees, in all aspects of improving public relations, efficiency, productivity and in controlling the cost of production. As more persons become involved in these matters, it becomes increasingly difficult to distinguish between [manager and employee]....The distinction [between manager and employee] can only be based on the evidence of the duties and

\textsuperscript{62} Cottage Hospital, supra, note 61.


responsibilities exercised by such persons in the particular case. Such decisions necessarily involve an empirical determination of whether the person who may perform functions which relate to or bear upon the improvement of public relations, efficiency, productivity or cost, is in fact controlling or determining the process or is merely implementing a process which has been predetermined by some person in management. It cannot be denied that these matters are properly the concern of management. However, if the person is merely implementing a decision made by another and has little latitude to use any independent discretion except in predetermined circumscribed areas, such person cannot be said to be exercising managerial functions. If, on the other hand, a person has the independent discretion to formulate policies and methods or set the necessary guidelines for others, such functions may properly described as managerial functions. These latter functions are readily distinguishable from the functions performed by persons who merely gather or collate information which will be acted upon by a member of management.

Policy-making decisions on such matters as how to improve public relations, efficiency, productivity and costs, tend only to affect employees in an indirect manner since such decisions do not immediately impact upon employment security. Consequently, exclusion will only be warranted when the person in question is an actual decision-maker; persons with only the power to make recommendations in such areas will not generally be excluded, notwithstanding that their recommendations are consistently followed by the actual decision-maker.66 This is to be contrasted with the effective recommendation rule, as described above, for personnel who have direct impact on the daily worklives and

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66 See, for instance, Cottage Hospital, supra, note 61, Corporation of City of Thunder Bay, supra, note 29.
Despite this general rule, the Ontario Board has on occasion extended exclusion on the policy-making basis to those only making effective recommendations. This occurs when, for instance, the individuals at issue possess other indicia of management, such as dealing with clearly managerial personnel on a basis of equality.\(^{67}\) Thus, in \textit{Rio Algoma Mines Limited}\(^{68}\) the Board excluded "project technicians" on the policy-making basis, despite lacking actual decision-making power. The Board described their duties and power in the following manner:

\[\text{The project technicians attend meetings of the "weekly management conference program." The main purpose of the management conference program is a management training tool. Such meetings are confined to supervisory staff. The persons attending these meetings are encouraged to participate by making suggestions and recommendations concerning various policy matters and proposals for changes in the collective agreement. In addition, the project technicians attend other management meetings. The project technicians also make effective recommendations with respect to managerial decisions which are regularly followed by the [employer]. The project technicians appear to deal with other members of supervision outside of their own department with a degree of equality one would not expect of persons included in the bargaining unit. They give instructions and make effective recommendations to supervisors in other departments. From the knowledge gained in the preparation of their reports, the project technicians must make decisions of a managerial nature in order to make effective recommendations concerning the}\]

\(^{67}\) See, for example, \textit{McIntyre Porcupine Mines}, supra, note 25 at 240-41.

\(^{68}\) \[1970\] O.L.R.B.R. 865.
discontinuance and continuance of product lines. On all the evidence, we find that the project technicians are more than collators of facts and conduits of information but effectively participate, as part of the management team, in the decision-making functions of management.\(^{69}\)

If an individual's policy-making functions are merely advisory, but they nevertheless exhibit other indicia of management, there will be created a perception amongst both the rank and file employees and management officials that the individual is aligned with management. This may in turn raise all the conflict of interest issues associated with the managerial exclusion and the provisions related to employer participation or interference in the affairs of the bargaining representative.\(^{70}\) Consequently, such individuals may be excluded from the definition of employee, notwithstanding their lack of actual decision-making power.

Thus, the British Columbia and Ontario rules appear closely aligned in dealing with personnel who exercise management functions that only indirectly affect the employment conditions of employees. Both jurisdictions will exclude people who have actual decision-making power that indirectly affects employment or employment conditions of other employees. And both jurisdictions will tend to exclude people who, although lacking actual decision-making power in such areas, nonetheless are closely aligned with management.

\(^{69}\) Rio Algoma, supra, note 68 at para. 11.

\(^{70}\) McIntyre Porcupine Mines, supra, note 25 at 247.
and perceived to be so.

(c) Canada Board

As with personnel who directly supervise the work of others, the Canada Board has narrowly interpreted the managerial exclusion in dealing with employees who only indirectly affect the employment conditions of others. The Canada Board asks whether the individual has the power to make policy decisions involving the exercise of independent judgement, either individually or as part of a "management team", which will be binding on the employer. Thus, where personnel alleged by the employer to be managerial had minimal independent authority, and only in emergency situations, to buy, spend money or order new equipment, and where they were only sporadically invited to attend management meetings, and only then to share information, they were found to be employees under the Code.

The Canada Board has made it apparent that it will require not only clear proof of substantial decision-making power, but also a strong correlation between this power and a resulting conflict of interest between the individual and the employer. The Board, more than other such tribunals, places


72 Vancouver Wharves, supra, note 71 at 16,446 C.L.L.C.
particular stress on the purpose behind collective bargaining legislation to facilitate and enhance collective bargaining for as many people as possible. The Board is therefore particularly suspicious of such concepts as the "management team". Such concepts appear designed to deny employees their rights under collective bargaining legislation.73

For the Canada Board all tests for exclusion turn on whether permitting individuals to be classed as "employees" under the Code would place them in an untenable conflict of interest between their membership in a union and their responsibilities to the employer. The Board articulated their policy in the following manner after expressing the view that much of the prior law of exclusions was based on a fallacious assumption that trade union membership automatically made an employee untrustworthy:

The fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.74

Against this background, it would appear unlikely the Canada Board would exclude personnel from the definition of


74 United Steelworkers of America and Cominco Ltd., supra, note 73 at 118.
"employee" unless they had actual decision-making power that would bind the employer and possessing that power, together with union representation, placed them in a clear conflict of interest.

(d) Potential impact of the managerial exclusion on industrial relations innovations

It will be recalled from Chapter Two that the variety of workplace innovations discussed in that Chapter culminated in a discussion of socio-technical systems and its application in semi-autonomous work groups. For the reasons stated at the end of that Chapter, we need only discuss the legal implications on this form of innovation.

Arguably, the type of authority provided to semi-autonomous work groups is such that it is likely team members would be excluded from collective bargaining by the British Columbia Council and the Ontario Board both on the supervisory basis and the policy-making basis. Whether the Canada Board would exclude on either or both of these basis is perhaps open to more debate, although there is some likelihood that team members would survive Canada Board scrutiny.

Fully developed semi-autonomous work groups have within their authority all the relevant support functions required for the team to operate on a long-term basis. Included within these powers are the personnel functions normally exercised by a human resources department of an enterprise, as well as
control over the financial resources of the team. While this is the theoretical ideal of socio-technical systems advocates, it also appears to very closely reflect reality when semi-autonomous work groups are put into practice.

As discussed in Chapter Two, the Shell Chemical manufacturing plant in Sarnia, Ontario is among the most prominent facilities to implement semi-autonomous work teams. The practice of those work groups graphically illustrates why this innovation is placed at risk by both aspects of the managerial exclusion.

Team members play an important role in the personnel function of the group.

Team members interview and select new members of the team, although the initial list is prepared by the personnel office of the enterprise.

The team's management co-ordinator is also selected in a process that involves team decision-making. When a vacancy

75 See, for instance, Mansell, supra, Chapter Two, note 60 at 13.

occurs for the position of co-ordinator, both the team and a member of management separately rank-order the candidates, who tend to be current members of the team. While the plant manager makes the ultimate decision, from the introduction of teams at Sarnia to 1990\textsuperscript{77} the candidate recommended by the teams has "almost always" been appointed.

The team plays a key role in assessing the competence of fellow team members and thus whether the member will continue with the team or be required to upgrade. Further, team members are responsible for assigning work, technical training of fellow team members in need of new skills, authorizing overtime, and scheduling vacations.

In light of these responsibilities and authority, there is a great likelihood team members would be considered managerial on the supervisory basis in both British Columbia and Ontario.

As noted earlier, the British Columbia Council examines such issues from the perspective of whether the individuals at issue exercise classically managerial functions. Clearly, semi-autonomous work group members do.

The Ontario Board is equally concerned about whether the individuals at issue exercise such classic functions. However, as indicated above, it has exhibited a sensitivity to new methods of organizing work in their application of the exclusion on the supervisory basis. However, as its reference

\textsuperscript{77} Data was not available after that year.
to semi-autonomous work groups in the Oakwood Park Lodge decision makes clear, the issue will nevertheless come down to whether the individuals in question exercise directly, or through effective recommendation, powers that intimately affect the economic security of other employees. Since the point of semi-autonomous work teams in the Sarnia plant is to provide employees with a degree of autonomy and authority hitherto not experienced by employees generally, it would appear likely that the Ontario Board would also find team members to be management.

Real authority exercised by team members would not, however, likely compel the Canada Board to find semi-autonomous work team members excluded on the supervisory basis, given that the Canada Board finds such functions irrelevant to the determination of conflict of interest. Further, it appears from the above description of semi-autonomous work teams at Sarnia that there is a plant manager who ultimately has authority, although seldom exercised, over the practices within the plant. The presence of such higher level management perhaps makes the power of semi-autonomous work teams only that of effective recommendation which, as earlier stated, is not sufficient for the Canada Board to base an exclusion.

Regarding the policy-making functions of semi-autonomous work teams, there is clearly a broad role for the teams in decisions of policy. For example, the teams maintain ongoing
planning, integrating, executing, and monitoring functions, and conduct formal evaluations of the organization's design. They are able to implement changes to the work process and equipment as required. They also have broad access to technical information about the manufacturing processes, as well as economic information so that economic implications can be taken into account when the team contemplates changes to work processes. In short, the teams are responsible for a natural, whole unit or process of work and their autonomy in this regard is a key part of the socio-technical system.

The British Columbia, Ontario and Canada tests for exclusion on the policy-making basis would all likely capture semi-autonomous work team members, although the result from the Canada Board is less certain than the other two.

The British Columbia and Ontario tests call for the exclusion of those with actual decision-making power over management policy matters. The Ontario Board has expressly included actual decision-making power in relation to efficiency, productivity and costs as within its articulated list of significant policy areas that would attract exclusion on the policy-making basis. The breadth of the British Columbia management team concept would comfortably embrace individuals with decision-making power in those areas. Clearly, semi-autonomous work teams exercise actual decision-making power in such areas. Their planning and evaluation authority, together with their authority to implement what
they determine to be necessary changes in the production processes, are manifestations of the autonomy they enjoy. Equally, they are manifestations of actual decision-making in areas of management policy that would attract the British Columbia and Ontario tests for exclusion on the policy-making basis.

While the decision-making autonomy of such work teams would also appear to attract exclusion under the Canada Board test, a degree of uncertainty remains in light of the Canada Board's stated commitment to keep the managerial exclusion narrow. It is unclear how that commitment would play itself out if the Canada Board was faced with semi-autonomous work team members. At the end of the day, however, exclusion on the policy-making basis would be likely since such broad team authority to commit the employer to change may raise the type of conflict of interest problems the Canada Board identifies as the ultimate litmus test.

(2) Employer domination

It is important at the outset of this discussion to appreciate the significant differences between the United States law and Canada's law regarding provisions in collective bargaining legislation prohibiting employer domination of bargaining agents. The difference is one that can fruitfully be discussed before examining the details of the Canadian law in this regard, since the difference centres around the
consequences in each country of a finding of employer domination. And it is a difference that has significant ramifications on the legality of industrial relations innovations and will show Canadian law as creating less impediments to such innovations under this heading.

The United States law, as will be recalled, creates an outright prohibition on employer domination of any "labor organization". Under the United States legislation, "labor organization" means "any organization of any kind ... which exists for the purpose, in whole or in part, of dealing with employers" on any terms or conditions of employment.\footnote{National Labor Relations Act, 29 U.S.C. paras. 151-69 (1989), Section 2(5).} This definition captures all organized means by which employees deal with their employer on any of the following matters: "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."\footnote{National Labor Relations Act, supra, note 78, s. 2(5).} The United States Courts have interpreted "labor organization" in such a manner that it includes "all employee-participation mechanisms, in virtually any form".\footnote{Sockell, supra, Chapter One, note 44 at 553.} Further, a finding of employer domination can result in an order requiring disestablishment of the of the labour organization. Consequently, virtually every industrial relations innovation is open to N.L.R.B. scrutiny and a possible disestablishment order. This is so
whether the labour organization is a union, employee representation plan, joint committee or semi-autonomous work team.

By contrast, Canadian labour relations tribunals are only concerned with employer domination in limited circumstances, and certainly such tribunals do not purport to have jurisdiction ordering disestablishment of a body that is dominated by an employer. The two general circumstances where employer domination becomes an issue for Canadian labour relations tribunals are:

(1) when a body alleged to be employer-dominated attempts to be certified as the exclusive bargaining agent for a group of employees. If the body is employer dominated, it will not be certified, either because the domination takes it outside the statutory definition of trade union, or because the relevant legislation prohibits certification of employer dominated trade unions. Further, any purported collective agreement between that body and the employer will be unenforceable under the legislation;

(2) when a body alleged to be employer-dominated attempts to act as a bar to a trade union's application for certification over the same employees represented by the dominated body. While voluntary recognition of a trade union can operate
as a bar to certification by another union, recognition of an organization that is employer dominated will not do so.

A finding of employer domination in these two circumstances will not result in the relevant Labour Board or Council ordering disestablishment of the body. Instead, such tribunals will simply, in the first case, refuse to certify the body as bargaining agent or permit it to enforce the collective agreement through legislative enforcement mechanisms. In the second case, the tribunal will prevent the body from acting as a bar to a certification application by a non-dominated trade union.

In summary, the fact that an employer dominates a labour organization is of no immediate legal consequence in Canada, so long as that labour organization does not attempt to be certified by a labour relations tribunal, does not attempt to have its collective agreement (if any) enforced through collective bargaining legislation, and does not attempt to act as a bar to a certification application by a trade union. In other words, Canadian collective bargaining law is not concerned with the nature of arrangements between employers and employees, so long as employees are free to pursue collective bargaining through independent trade unions if they so choose. It is only when those "arrangements" between employers and employees purport to constitute a trade union under the relevant legislation that the law becomes concerned
about employer domination or interference.

While it is not uncommon for home-grown employee associations to purport to be trade unions under collective bargaining legislation, and thereby attempt to be certified or act as a bar to certification efforts of an independent trade union, it would be highly unusual for a true semi-autonomous work group, as a discrete entity, to ever attempt to hold itself out as a trade union under the relevant legislation. This is because work groups are primarily methods of work organization rather than a means to represent employee interests to the employer. While the autonomy of such work groups enable them establish many of the matters that would traditionally appear in a collective agreement, such as hours of work, overtime entitlements, vacation rights and scheduling, skills and abilities criteria for promotion, training periods, and discipline, work groups have none of the classic characteristics of a trade union such as a constitution, funding through dues submitted by members or any overt purpose of bargaining collectively with the employer. For such reasons, semi-autonomous work groups would not likely meet the statutory definition of a "trade union" under the British Columbia, Ontario or Canadian legislation. Thus, it is extremely unlikely, and therefore not a concern that

need be addressed in this thesis, that we would ever have to consider whether work groups are themselves trade unions.

The more likely scenario would be that members of such work groups in an enterprise would create an association, separate and apart from the work groups, to deal with the employer on matters such as wage rates that are not established through the autonomous workings of the groups. This association might then purport to be a trade union with which a labour relations tribunal would have to contend if the association sought certification or to bar a certification application from an outside union.

Thus, the issue to address is whether an association of members of semi-autonomous work groups would be considered dominated by the employer so as to prevent certification of that association, or prevent that association from standing in the way of another certification applicant.

The law of the Ontario Board and British Columbia Council are very similar on issues of domination and interference. And while the Canada Board's legislation concerning domination provide for a different test than in the other jurisdictions, the practical consequences of the Canada Board's law tend to make the difference insignificant. Consequently, the law of all three jurisdictions will be considered together.

All three jurisdictions contain similar provisions regarding employer-dominated labour organizations.
The Ontario Labour Relations Act provides:

Section 13
The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it...

Section 48
An agreement between an employer...and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if the employer...participated in the formation or administration of the trade union or if an employer...contributed financial or other support to the trade union;...

The British Columbia Industrial Relations Act provides:

Section 1(1)
In this Act

"trade union" means ... but not an organization or association of employees that is dominated or influenced by an employer;

Section 50
An organization or association of employees
(a) the formation, administration, management or policy of which is, in the council's opinion, dominated or influenced by an employer or a person acting on his behalf;...
shall not be certified for the employees, and an agreement entered into between that organization or association of employees and the employer shall be deemed not to be a collective agreement.

The Canada Labour Code provides:

Section 25(1)

[W]here the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purposes of collective bargaining is impaired, the board shall
not certify the trade union as bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part.

The Ontario, British Columbia and Canada provisions are similar in that they prevent certification of employer-dominated labour organizations. The British Columbia and Canada provisions go further in that they prevent any agreement between the labour organization and the employer from being considered a collective agreement under their respective legislation.

The jurisprudence of the three jurisdictions have identified two primary purposes for preventing certification of an employer-dominated labour organization.

First, the legislation is premised on the need for employees to be represented by an organization which holds the employees' interests uppermost in its mind and strives to advance those interests in dealings with the employer. Consequently, an organization that is dominated by the employer cannot properly represent the employees. Devotion to the employees will be weakened to the extent the employer domination manifests itself by advancing the employer's interests in relations between the two parties. The jurisprudence speaks of the need to maintain an arm's length relationship between the employer and the labour organization,
so as to assist proper representation of the employees.\textsuperscript{82}

Second, the legislation is premised on the importance of employees having a free choice as to the organization that will represent their interests in relations with the employer. That freedom is compromised when employees are asked to choose a representative that is dominated by the employer. There is a strong possibility that selection of the organization will not be the product of employee free choice, but instead a desire not to act contrary to the express or implied preference of the employer to deal with the dominated organization.\textsuperscript{83}

The issue is one which primarily arises on the original certification application of an association made up of employees of one employer. Such home-grown associations will be scrutinized for employer-domination and other formation


requirements more closely than trade unions with a history of employee representation. Evidence of unlawful domination is seldom overt or express, in light of the legislative prohibition against such a practice. Consequently, like the analysis under legislated unfair labour practice provisions, inferences must be drawn from all the circumstances of the case.

The Canada Board, for example, has articulated a typical set of circumstances leading to the inference that the organization is employer-dominated. As the Board stated in its leading case in this area, CJRC Radio Capitale Limitee:

Frequently, such a union will be an independent one, created when a unionization campaign is being conducted by another union. In general, this type of union is created in great haste and recruits a majority of the employees of the enterprise very quickly. This can be explained by the more or less discreet support given the union by the employer or some of his representatives. Union meetings are held at the workplace and during the working hours of the employees, who are not penalized in any way. Recruitment is also done during working hours, often with the knowledge of the employer's representatives, if not with their assistance. The emerging union has limited financial resources but can nevertheless afford all the professional or technical assistance it needs. Documents are typed or photocopied at the workplace by persons working in close collaboration with the employer or with his authorization. Management representatives attend or participate in union meetings or openly invite employees to attend. Needless to say,

84 Transit Management Association, supra, note 17 at 27; Afton Mines Ltd., B.C.L.R.B.R. No. L185/80 at 8; Sandbar Construction Ltd., I.R.C. No. C17/89 at 15-16; Society of Ontario Hydro Professional and Administrative Employees, supra, note 83 at 14,344.

85 Supra, note 82 at 16,900.
circumstances vary with each case. The fact remains, however, that a union which is dominated or influenced by an employer, can seldom be set up without incidents of this nature occurring. Consequently, if there is evidence that such incidents have occurred, this must raise some doubt as to whether the union is genuinely independent of the employer.66

At the end of the day, the circumstances must be tested against the purposes behind the legislative provisions. As the British Columbia tribunal has stated the crucial question, "can we be satisfied that a sufficient arm's length relationship exists so that meaningful collective bargaining - the kind of collective bargaining contemplated by the [Act] - can be undertaken and sustained?" 87 The answer to this question is informed by, among other matters, the other primary value underlying the employer-domination prohibition - guarding the ability of employees to freely choose their bargaining representative. Meaningful collective bargaining cannot occur when the employees' bargaining representative is not the product of free choice.

But the importance of employee free choice discourages labour relations tribunals from being overly paternalistic in evaluating the type of bargaining agent selected by the employees. Employees may freely choose to be represented by an organization that is weak, inexperienced and therefore

66 See also, McCoy Brothers, supra, note 82, and Sandbar Construction Ltd., supra, note 84 at 14-17.

87 Sandbar Construction Ltd., supra, note 84 at 15 (quoting from McCoy Brothers Ltd., supra, note 82 at 455).
potentially open to employer domination. So long as that potential does not become actual domination so that either the choice of bargaining agents cannot credibly be said to be that of the employees or the bargaining agent cannot be shown to be outside of the control of the employer, then the union will not be considered dominated. Thus, the fact that relations between a employees' organization and the employer may be cooperative, rather than confrontational, is not sufficient, by itself, to establish unlawful domination. And neither is a collective agreement which is highly favourable to an employer sufficient, by itself, to establish employer domination.

The key will always be whether the employee organization is sufficiently separated from the employer to be able to represent the employees in an arm's-length manner with the employer, and whether the organization is the product of a free choice made by employees to have this organization represent them.

(a) Potential impact of prohibition on employer domination on industrial relations innovations

There appears to be nothing inherent in semi-autonomous work group membership that would cause employer domination

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88 Society of Ontario Hydro Professional and Administrative Employees, supra, note 82 at 14,348; Sandbar Construction Ltd., supra, note 84 at 17-18.

89 Ontario Hydro, supra, note 82 at 14,357.

90 Sandbar Construction Ltd., supra, note 84.
concerns in the event those members sought union representation. While semi-autonomous work groups themselves exhibit classic indicia of employer domination since, for example, such work groups are usually initiated by the employer, and paid work time is provided to members to establish those matters earlier identified as the usual preserve of collective bargaining, it is not the work groups that would be seeking certification. Instead, the organization seeking certification for the purposes of collective bargaining would an association or union representing individuals who happened to be semi-autonomous work group members. Except in one circumstance to be discussed below, the fact that the members of this organization are members of semi-autonomous work groups would not, by itself, be any indicia of employer domination of the organization making application for certification. In fact, the argument could be made that the autonomous work environment experienced by such members heightens the likelihood that their choice of bargaining representative is made without employer influence or compulsion.

The one circumstance when semi-autonomous work group membership could influence an employer domination inquiry is in the event semi-autonomous work group members are captured by the managerial exclusion. If, as suggested above, work group members are excluded on the supervisory or policy-making basis, they would not be eligible to join together in a union
that could be certified by the relevant labour relations tribunal since they are not "employees" as defined under the relevant legislation. That is the consequence of exclusion under the relevant legislation. Further, while this question is seldom directly addressed in the jurisprudence, a bargaining unit made up entirely of individuals excluded as managerial would likely be considered the quintessential employer-dominated labour organization.

But this assumes that the only members of the proposed bargaining unit are members of semi-autonomous work groups. The issue of employer-domination becomes more debatable if the excluded semi-autonomous work group members represent a minority of employees in the proposed bargaining unit. In such circumstances the issue becomes whether an organization that seeks certification is employer-dominated when managerial personnel are among those applying for certification and such personnel have assisted in recruiting membership.

The general rule is that if managerial personnel are involved in recruiting for the organization, it will be considered employer-dominated.91 Such managerial participation raises the inference that any resulting relationship between the organization and the employer will not be at arm's length and, consequently, will not provide the

employees with the benefits of truly independent representation. It will therefore be of no consequence that most of the employees are unaware of the management's participation in the formation or administration of the organization.⁹²

This general rule is, however, tempered by a purposive approach taken by labour relations tribunals in applying the rule. The evil at which the general rule is aimed will not be present when the managerial personnel are clearly acting on their own initiative and contrary to the interests and wishes of the employer.⁹³ There is a recognition that managerial interests are not always aligned with those of the employer and that such individuals may at times act contrary to the interests of the employer.⁹⁴ While labour relations tribunals will be suspicious when managerial personnel initiate, participate in, or otherwise support organizing efforts of employees, there is no automatic finding of employer-domination in such circumstances. The managerial employees with the benefits of truly independent representation. It will therefore be of no consequence that most of the employees are unaware of the management's participation in the formation or administration of the organization.⁹²

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status of the individuals will have to be coupled with a finding that such individuals were acting on behalf or in the interests of the employer before the purpose of the general rule is activated.95

Such a purposive approach is similarly taken when the individuals, whose participation or membership in the labour organization is said to raise the prospect of employer domination, were not found to be managerial at the time of the certification application. This usually occurs when a group of employees are first applying for certification and there is doubt whether some of the organizers or members of the proposed bargaining unit will be captured by the management exclusion. If the labour relations tribunal later determines that organizers or other members are excluded managers, is the labour organization considered employer-dominated? Taking the same purposive approach, there is no such automatic determination. Again, the finding that individuals included in the proposed bargaining unit are indeed excluded managers must be coupled with a determination that their participation in the formation of the labour organization was on behalf or in the interests of the employer before employer-domination will be established.96 In such a case, employer domination

95 Children's Aid Society of Metropolitan Toronto, supra, note 94 at para. 16, British Columbia Transit, supra, note 17 at 32.

96 See, for instance, Chrysler Canada Ltd., [1975] O.L.R.B.R. Nov. 852, British Columbia Transit, supra, note 17 at 32, Children's Aid Society of Metropolitan Toronto, supra,
will likely be established.

Of course, in each of these circumstances, individuals found to be managerial will be excluded from any resulting bargaining unit.

Applying these tests to a certification application by an organization of employees which includes members of semi-autonomous work groups, the fact such work group members are managerial would not be sufficient, by itself, to have the applicant declared employer-dominated. A determination of employer-domination would require examination of whether participation of group members in the organization was on their own behalf or, instead, on behalf and in the interests of the employer. As noted, only in the latter circumstance would employer-domination be found. It would likely be a rare occasion that group members would be found to be acting on behalf of the employer, given the relative autonomy from the employer they enjoy; their status as managers is derived from their ability to act independently from the employer in key policy-making and intra-group supervisory functions. It would seem illogical that such individuals would be said to be acting for the employer in their activities with non-excluded employees.

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(3) Employer interference

The legislation of Canada, British Columbia and Ontario all make it an unfair labour practice for an employer, or a person acting on the employer's behalf, to "interfere with the formation or administration of a trade union".97

Before considering this unfair labour practice in any detail, it is important to point out the key difference between this provision as found in Canadian jurisdictions as compared to the parallel provision in the United States National Labor Relations Act. As mentioned in the discussion of employer-domination, the United States Act prohibits certain employer actions in relation to "labor organizations". That phrase has a specific statutory meaning which encompasses virtually any form of organization within the workplace that involves regulating any aspect of the relations between employers and employees. As with domination, the Act prohibits employer interference with a "labor organization". Consequently, the United States law creates these prohibitions in relation to any body in the workplace that deals with the employer on any terms or conditions of employment, regardless of whether or not the body is a trade union.

97 British Columbia Industrial Relations Act, R.S.B.C. 1979, c. 212, s. 3(1); Ontario Labour Relations Act, R.S.O. 1980, c. 228, s. 64 (this provision also prohibits employer interference with or participation in the "selection...of a trade union or the representation of employees by a trade union"); Canada Labour Code, R.S.C. 1985, c. L-2, s. 94(1) (this provision also prohibits employer interference with or participation in "the representation of employees by a trade union").
By contrast, the Canadian legislation is only concerned with employer interference with a body that purports to be a trade union, a body formally established to collectively bargain with an employer over terms and conditions of employment.

Thus, while virtually all bodies contemplated in the New Industrial Relations will be open to scrutiny under United States law for employer domination or interference. The Canadian law is only concerned with those employer influences in relation to trade unions. Thus, as discussed earlier, bodies contemplated in the New Industrial Relations seldom meet the organizational criteria (constitution, etc.) required to be considered a "trade union". Further, such bodies will seldom seek recognition or certification as a "trade union". Thus, employers in Canada are generally free to dominate or interfere with bodies contemplated in the New Industrial Relations.

Therefore, issues of employer interference will seldom, in a Canadian context, involve direct scrutiny of such bodies. That is because Canadian law does not make it illegal for an employer to interfere with the formation or administration of employee-participation programs that do not purport to be a trade union.

This is not to suggest that New Industrial Relations innovations are totally irrelevant to issues of employer interference. They are relevant in that, as we saw in Chapter
Three, similar innovations have historically been introduced in efforts to discourage support for representation by independent trade unions. It is when New Industrial Relations innovations play such a potential role that they become relevant to issues of employer interference as an unfair labour practice. The issue becomes whether, by introducing innovations like semi-autonomous work teams, the employer can be said to be either interfering with the formation or administration of an independent trade union which is also present or vying for support, or interfering with the representation of employees by that independent trade union.

Thus, the circumstances in which this thesis will consider interference are:

(i) when an innovation like semi-autonomous work teams is introduced by an employer at the same time as an independent trade union is seeking to represent the employees;

(ii) when an innovation like semi-autonomous work teams is introduced by an employer after an independent trade union has become established as the bargaining representative of the employees.

(i) Introduced while independent union is organizing

The law related to employer interference with the formation of a trade union is shaped by the belief that, by virtue of the disparate economic power of unorganized
employees compared to that held by an employer, employees will be particularly sensitive to express or implied indications of the employer's position on issues related to the employees' employment security. Employees will tend generally to act in a manner they believe most closely comports with the views of their employer when to do otherwise may jeopardize their employment security. This is said to be particularly true when the issue is whether the employees will seek to bargain collectively with their employer through an independent trade union. If an employer indicates, expressly or implicitly, that it will not look favourably on employee attempts to unionize, this can dramatically effect whether those employees will exercise their right under collective bargaining legislation. As the Ontario Board said in Pigott Motors (1961) Ltd.:

In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and the wishes of the employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may appear to impair or destroy the free exercise of his rights under the Act.99

If an employer takes advantage of the vulnerability by actively discouraging its employees from joining an independent trade union, the employer thereby violates the

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99 Pigott, supra, note 98 at 1130.
unfair labour practice provisions of the relevant legislation.\textsuperscript{100} All such employer activity is prohibited under the generalized unfair labour practice provision prohibiting employer interference in the formation of a trade union in the workplace. However, this general prohibition is further detailed in the relevant legislation by prohibitions against particular common types of employer interference.\textsuperscript{101} Whether the employer activity constitutes a violation of the general provision against interference, or a more specific provision, will depend on the precise method by which the employer attempts to discourage its employees.

If, for instance, the employer fires those individuals who are the key organizers for the union at the workplace, the employer will have violated the provision preventing discharges of employees because of their union activity, provided that at least one aspect of the employer's motivation to fire the employee is to discourage trade union organizing.\textsuperscript{102} Such terminations send a clear message to other employees that they risk the same treatment if they actively support the union.

An equally effective method of discouraging the


\textsuperscript{101} See, for example, \textit{British Columbia Industrial Relations Act}, s. 3(3), \textit{Ontario Labour Relations Act}, s. 66, \textit{Canada Labour Code}, s. 94(3).

\textsuperscript{102} See, for instance, \textit{Forano Limited}, supra, note 83.
organization of a trade union, and one more relevant to the issue at hand, is by the employer, during a union organizing drive, putting in place, or encouraging employees to put in place, a method of employee representation in the workplace to act as a union-substitute. The message thereby imparted to the employees is that they would risk the displeasure of their employer if they chose a means of representation other than that put forward or supported by the employer. Such a method of discouraging trade union formation in the workplace is prevented by the generalized prohibition on employer activities that interfere with the formation of a trade union at the workplace.103

Thus, in Upper Canadian Furniture Limited104 the employer was held to have violated the Ontario prohibition on interference with the formation of a trade union when, during a union organizing drive, an employer representative met with a group of employees who wished to form an employee association "in order to improve communications between management and employees."105 The employer representative discussed workplace problems such as a particularly troublesome supervisor, as well as development of a grievance


105 Upper Canadian, supra, note 104 at 1017.
committee to air such problems. While the employer representative consciously avoided providing direct assistance in light of the union organizing campaign, the employer did volunteer, in front of other employees, to facilitate contact with a human resources specialist who could help them, for instance, develop committee structures. The actions of the employer representative were held by the Board to constitute employer interference with the free selection of a trade union by the employees as a whole.

Explaining its rationale, the Board stated:

If there is a simultaneous union campaign then even if the employee association is not seeking certification an employer must exhibit considerable caution in his relationship with persons known to favour an employee association over the union. Section 56 [prohibiting employer interference in the formation of a union but preserving a right in the employer to freely express his views unless they constitute, inter alia, undue influence] of the Act protects an employer's ability to freely express his views but only so long as he does not interfere with the selection of a union and so long as the expression of his opinion does not constitute coercion, intimidation, threats, promises or undue influence. For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by Section 56. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of Section 56 of the Act. Given their economic dependence on their employer, employees may readily be swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.\(^\text{106}\)

Any overt support or encouragement of a means of employee

representation as an alternative to the trade union then 
organizing would constitute unlawful interference. 

Implicit in the above discussion is an assumption that 
the employer intends, at least in part, by its introduction or 
support of an alternative means of representation, that 
employees will be discouraged from joining the union. Indeed, 
under the Ontario and British Columbia legislation, some 
degree of "anti-union animus" must generally be shown to 
sustain an unfair labour practice allegation under the 
umbrella prohibition on employer interference. Such animus 
need only be a part of the employer's motivation. Labour 
relations tribunals are seldom troubled when they are not 
presented with direct evidence of an employer motivation 
tainted, even in part, with an anti-union animus. Instead, 
such tribunals tend to employ the doctrine that people 
generally intend the natural consequences of their acts. As 
the Ontario Board stated in Skyline Hotels Limited107: 

[T]he trade union will not in every case be 
required to prove by affirmative evidence the 
existence of an anti-union motive. This is so 
because the effect of certain types of conduct is 
so clearly foreseeable that an employer may be 
presumed to have intended the consequences of his 
acts. [cites omitted] Once such conduct has been 
established, then as a practical matter...the onus 
is upon the employer to come forward with a 
credible business purpose to justify the conduct. 
It is up to the Board then, in all the 
circumstances, to decided what the motive of the 
employer really was. 

The Canada Board, by contrast, looks at the effect of the 

employer's actions on the organizing union. If an employer activity, such as initiating or supporting another form of employee representation in the face of a union organizing drive, has the effect of significantly interfering with employee free choice, the lack of anti-union animus will not prevent a finding of interference.\(^{108}\)

It is arguable, therefore, that under the Ontario and British Columbia prohibition against interference, an employer would be in violation if he initiated, or supported the initiation, of an alternative form of employee representation included within the New Industrial Relations during a union's organizing effort, provided the employer's motivation was tainted to some degree with anti-union animus.

All such innovations included within the New Industrial Relations contemplate, to a greater or lesser degree, that employee concerns and needs will be addressed in part through the mechanism established by the innovation. Consequently, employer initiation or support for such innovations will

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\(^{108}\) See, for instance, *Canadian Imperial Bank of Commerce*, [1979] 1 C.L.R.B.R. 266, 34 di 651 (regarding absence of anti-union animus), *Bank Canadian National* (1979), 35 di 39 (regarding absence of anti-union animus), and *Television Saint-François Inc.* (1981), 43 di 175 (regarding support of an alternative means of employee representation as interference in light of suspended negotiations with the union). But *contra National Bank of Canada* (1982), 51 di 60 at 66 where the Board made a passing reference which suggested the Bank was not unlawfully interfering with the organizing drive of the union when, in the absence of anti-union propaganda, it establishes a program to deal with employment-related problems. The decision provides no details, however, as to the nature of the program established by the employer.
likely be seen as support for a rival to the organizing union and thus, as interference with the selection of a trade union as bargaining representative. Applying the presumption that individuals intend the natural consequences of their acts, proof of a degree of anti-union animus will not generally be difficult to find.

Against this argument, however, is the proposition that an employer may well have legitimate business reasons for supporting or initiating New Industrial Relations innovations, in light of their proven positive effect on, for instance, productivity. The evidence of sound business reasons for supporting such innovations may challenge labour tribunals to determine whether in fact the employer's initiation or support has any degree of anti-union animus. In the end, however, it is unlikely an employer would succeed in such arguments when the employer's "business decision" happens to be made in the shadow of a union organizing campaign. Such timing would strongly suggest the employer's decision was, at least in part, motivated a desire that the employees would reject the trade union and support the new innovation.

As intimated above, such an inquiry as to anti-union animus would not be required under the Canada Board's legislation, since such animus is not a necessary prerequisite to finding unlawful interference.

There is some support in the Ontario jurisprudence for what the Ontario Board refers to as a "non-motive approach" to
unfair labour practices such as employer interference. However, this approach is rarely used by the Ontario Board. It appears to be reserved only for those cases in which, despite the good faith of the employer, the employer's business reasons for the action are not sufficiently persuasive or worthy to outweigh the significant impact the employer action has on employee activity protected under the relevant legislation. For example, the non-motive approach would apply in instances where union activists are terminated during an organizing campaign on the basis of the employer's mistaken, but good faith belief, that the employees had committed a serious employment offence.\textsuperscript{109} Applying such a test to an employer's good faith introduction of New Industrial Relations innovations during an organizing campaign, an argument could be made that the serious ramifications of this activity on the employees' freedom of choice far outweighs the employer's legitimate business reasons for introducing or supporting the innovations; consequently, the employer's actions should constitute interference despite the absence of any anti-union animus. Whether such an argument would be successful would depend, of course, on how much weight the tribunal was willing to attach to the respective interests of the parties.

In summary, employers would run significant risks of violating provisions prohibiting employer interference with

the formation or selection of a trade union as bargaining representative by introducing, or supporting the introduction, of New Industrial relations innovations in the midst of a union organizing campaign. Anti-union animus, which is generally a necessary element of the unfair labour practice in British Columbia and Ontario, would likely be presumed in light of such timing of the introduction, a presumption that would likely be difficult to rebut. The Canada Board, however, would not require a finding of any anti-union animus to find that the unfair labour practice had been committed.

(ii) Introduced after independent trade union is established in the workplace

While Canadian labour relations tribunals are particularly sensitive to the impact of employer actions during period that a trade union is attempting to organize a workplace, this sensitivity tapers off significantly after a trade union has become firmly established in a workplace. Such tribunals will not quickly brand as interference employer's actions which are doubtfully so. As the Canada Board simply put it:

[T]here can be serious effects from saying "Boo!" to a child of three, but it would take a lot more than that to scare his father - one hopes.\(^\text{110}\)

Consequently, it will be difficult for a trade union to

\(^{110}\) *Canadian Pacific Air Lines Limited* (1985), 61 di 140 at 156, 10 C.L.R.B.R. (N.S.) 62 at 78. See also for the same proposition, *C.I.CH 920/C100 FM, Division of CHUM Limited* (1989), 77 di 137 at 141.
establish that the employer's conduct constitutes unlawful interference in the administration of the union or its representation of employees. Putting aside those instances where unlawful interference is established when an employer is found to be negotiating terms or conditions of employment directly with employees rather than through the union as exclusive bargaining agent, a topic returned to in the final section of this Chapter, very few types of conduct can be cited as examples of unlawful employer interference after a trade union is established in the workplace.

Successful unfair labour practice proceedings for employer interference after establishment of a union tend to result from employer practices which can be described as those intended, at least in part, to undermine the integrity of the collective bargaining relationship. The classic examples are instances of employers closing down, or subcontracting the work of their unionized operations, so as to avoid the obligations of collective bargaining. In each of these cases, however, the employer's actions were motivated, at least in part, by an anti-union animus. This is true even of the Canada Board decisions cited, notwithstanding that Board's view in cases of union organizing efforts that anti-union

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animus need not be shown to establish unlawful employer interference. If an employer is able to establish that its actions were taken solely for legitimate business reasons, it is unlikely the employer will be found to have unlawfully interfered, notwithstanding the action having adverse effects on the union's ability to represent the employees. Labour relations tribunals tend to characterize employer activities tainted by anti-union animus as "employer conduct that actually interferes with a trade union",¹¹² as distinguished from employer conduct motivated solely by economic considerations which is said to "only incidentally affect a trade union"¹¹³ and thus not constitute unlawful interference. If an employer activity which adversely affects a union's administration or representation of employees lacks a sound business justification, a labour relations tribunal is likely to imply that the activity was motivated for anti-union motives.¹¹⁴

Thus, the fact that a trade union can establish that a particular employer practice adversely affects its administration or representation of employees will not normally be sufficient, by itself, to warrant a finding of unlawful employer interference. Some degree of anti-union

¹¹³ A.A.S. Telecommunications, supra, note 112 at para. 30.
¹¹⁴ Academy of Medicine, supra, note 111.
animus will also have to be established.

Against this background, it appears unlikely that an employer's initiation of a New Industrial Relations innovation, by itself and without a measure of anti-union animus, would successfully spark a finding of unlawful interference. The implication of an anti-union animus to be drawn from the absence of a sound business justification for employer conduct would not likely be available when the conduct at issue is implementation of a New Industrial relations innovation; as discussed in Chapter Two, the economic advantages to be gained from these innovations is their prime selling point. However, if it can be shown that the decision to implement an innovation is tainted by an anti-union animus, and an adverse effect of that implementation can be shown on protected rights, there would appear to be nothing in principle preventing a finding of unlawful interference.

This discussion of unlawful employer interference was prefaced with the decision to leave to one side, issues of direct employer dealings with employees over the head of the established bargaining agent. As we shall see, this is a form of employer interference with employee rights which may be particularly troubling for employers implementing New Industrial Relations innovations. It is this form of interference to which we now turn.
(c) **Exclusive bargaining agent status**

Labour relations legislation in British Columbia, Ontario and at the federal level each provide a trade union certified under the respective legislation with exclusive bargaining authority.\(^{115}\) Further, the same exclusive bargaining authority applies when the union is voluntarily recognized by the employer.\(^{116}\)

This exclusive bargaining authority has been stated by the Supreme Court of Canada to result in the legal incapacity of individual employees to reach enforceable bargains with their employer.\(^{117}\) Only the union can bargain, and make enforceable agreements, with the employer over terms or conditions of employment of the bargaining unit employees.\(^{118}\)

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\(^{115}\) British Columbia Industrial Relations Act, R.S.B.C. 1979, c. 212, s. 46; Ontario Labour Relations Act, R.S.O. 1980, c. 228, s. 5; Canada Labour Code, R.S.C. 1985, c. L-2, s. 36.

\(^{116}\) Simon Fraser University, I.R.C. No. C133/90, 9 C.L.R.B.R. (2d) 285 at 297 (upheld on appeal I.R.C. No. C41/91) (currently on review before the Supreme Court of British Columbia on a different point. Vancouver Registry No. A912047). Combining the effect of the Supreme Court of Canada's decision in Syndicat Catholique des Employees de Magasins de Quebec v. Compagnie Paquet Ltee, [1959] S.C.R. 206 at 212 (recognizing the above implications of exclusive bargaining authority) and Terra Nova Motor Inn (1974), 74 C.L.L.C. 14,253 (S.C.C.) (accepting voluntary recognition as an alternative to certification), it can be said that Court accepts that voluntarily recognized unions have the same exclusive bargaining authority as a certified union.

\(^{117}\) Syndicat Catholique, supra, note 116 at 212.

This prohibition on individual bargaining applies not only to matters that are the subject of bargaining between the union and the employer, or matters included within the current collective agreement; individual bargains are prohibited on all matters.\(^{119}\) A narrow exception has developed by which an employer can reach enforceable agreements with individual employees over the routine administration of the collective agreement (such as vacation scheduling, allotment of overtime, job transfers, etc.).\(^{120}\) The exception is intended only to allow collective agreements "to operate smoothly and effectively without constant intervention by the contracting parties."\(^{121}\) Thus, the British Columbia Council has indicated the application of this exception will be kept very narrow.\(^{122}\) A further exception applies when, instead of reaching an agreement with individual employees, the employer unilaterally imposes new terms or conditions of employment upon the employees. So long as those terms are not in conflict with a subsisting collective agreement, the union's

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119 Simon Fraser University, supra, note 116.


121 Simon Fraser University, supra, note 116 at 299.

122 Simon Fraser University, supra, note 116 at 299.
agreement is not required before implementation of such terms.\textsuperscript{123}

While exclusive bargaining authority requires employers to deal only through the union, the union can, of course, consent to the employer dealing over terms or conditions of employment with individual employees or groups of employees. The cases in which a union provides that consent, however, are rare and usually involve narrowly circumscribed areas within the employment relationship. For example, in some industries such as professional sports or entertainment, it is not unusual for individual employees to bargain their specific salary, with the collective agreement providing for minima below which an individual cannot bargain.\textsuperscript{124} Such cases merely illustrate that the union has the ultimate discretion whether it will permit a degree of individual bargaining with the employer.

The integrity of a union's exclusive bargaining authority is maintained not only by rendering individual bargains unenforceable, but also by making bargaining with anyone but the union an unfair labour practice. Each jurisdiction has

\textsuperscript{123} Paccar of Canada Ltd., supra, note 118; Simon Fraser University, supra, note 116.

interpreted this status as providing a general prohibition on employer's bargaining directly with employees over any terms or conditions of employment.125

A union's exclusive bargaining authority poses significant problems for employers implementing innovations such as quality circles, semi-autonomous work terms or joint employer-employee committees. As discussed in Chapter Two, one of the prerequisites for successful use of such innovations is the ability of these employee involvement programs to deal with matters that are normally the preserve of collective bargaining. Mandates and agendas for these programs limited to matters outside the terms or conditions of employment are destined to result in the early demise of the program. Employees in these programs must be able to deal the basic elements of the employment relationship, and employers must respond to these overtures in a positive manner, if these programs are to result in the kind of productivity gains employers seek to achieve.

However, unless the union supports the employee-involvement program, employers will run squarely up against the union's exclusive bargaining agent status when the program

results in the employer implementing recommendations on terms or conditions of employment emanating from the program. Such direct dealing with employees will likely result not only in the unenforceability of agreements reached in such fora, but also in findings that the employer has engaged in an unfair labour practice of employer interference. In addition to any such agreements being unenforceable, an employer can be ordered by the relevant tribunal to cease the individual bargaining.

The exception to the exclusivity doctrine noted above regarding routine administration of the collective agreement would be of little assistance for employers since employee-involvement programs would not be limited to the type of peripheral matters contemplated in that exception.

The exception to the exclusivity doctrine noted above regarding an employer's unilateral implementation of terms or conditions of employment would also have little application since employee-involvement programs contemplate the employer responding to the wishes of employees articulated in such programs. An employer could perhaps argue that since such programs seldom oblige the employer to implement recommendations, any actual implementation is the result of the employer's unilateral act rather than an agreement reached with the employees. Such a technical argument, however, would not likely be successful in light of the contemplated bilateral process of such programs.
The key for employer success in implementing such programs, therefore, appears to be in gaining the support of the employees' exclusive bargaining agent. As noted, if the union agrees to employees dealing with the employer through such programs, the obligations imposed on the employer by virtue of the union's status will have been satisfied. This explains why, for instance, the semi-autonomous work teams at the Shell Sarnia facility have not faced a legal challenge on this basis. However, the union at Shell Sarnia has proven to be the exception and in light of the general union scepticism for such employee-involvement programs, the necessary consent is not likely forthcoming.

Summary

This Chapter has considered the danger posed by Canadian labour law doctrines to examples of the New Industrial Relations aimed at increasing employee involvement in workplace decision-making. While the answers provided cannot purport to be certain, the conclusion can certainly be reached that such innovations will likely face stiff legal challenges in the Canadian environment.

The managerial exclusion of employees from collective bargaining on the supervisory or policy-making basis creates sufficient uncertainty for employees involved in employee-involvement programs that many employees may be discouraged from participating and unions will not likely support the
involvement of their members.

Issues related to employer-dominated trade unions and employer interference with employee and union rights under collective bargaining legislation in Canada may also serve to discourage development of employee-involvement programs in Canada.

Finally, a trade union's status as exclusive bargaining agent may cause an employer pause before proceeding with implementation of such programs unless the union concurs with the program, a concurrence that is unlikely in light of both the historical scepticism about such programs and the possibility that employees involved in such programs may end up excluded as managers.

Taken together, the issues raised in this Chapter raise serious doubts about the ability of the New Industrial Relations to survive in the Canadian legal system without fundamental changes to that system.
Chapter 6

Summary and Conclusions

This thesis has shown that there is a strong potential for conflict between labour law in the United States and Canada, and industrial relations innovations stressing an increased employee role in the decision-making procedures of the workplace.

The potential conflict is particularly apparent in the United States as compared to Canada.

First, the American Yeshiva University doctrine suggests employee-participants in these innovations will be considered managers, and therefore excluded from the protection of collective bargaining legislation. Recent developments in the law of British Columbia appear to provide a similar result. The law of Ontario and the Canadian federal labour law make a certain answer particularly difficult to predict. However, of any of the jurisdictions examined, these two appear to provide the most hope that the managerial exclusion may not apply to these innovations.

Second, the exclusive bargaining agent status of trade unions suggests that, if the employees of an enterprise are unionized, the consent of the union will be necessary before the employer fully implements these innovations. The same law applies in British Columbia, Ontario, and at the Canadian federal level. Trade union consent appears unlikely in light of the perceived similarity between these innovations and
employer anti-union tactics of the past.

Finally, the American legislative prohibition on employer domination of or interference with "labor organizations" opens the door to a broad examination of the relationship between employers and these innovations. Older American case authorities suggest such an examination will result in widespread findings of domination and interference. However, more recent authorities, stressing encouragement of labour-management cooperation, make such a result uncertain. In Canada, issues of domination or interference will likely only arise in few circumstances. Even then, the examination will not normally be aimed directly at the innovations themselves. Instead, the relevant labour relations tribunal will only be concerned with whether the employer's implementation of an innovation results in interference with or domination of a separate organization purporting to be a trade union representing, or seeking to represent, the employees. This narrow scope of review suggests such innovations will not suffer extensive damage under these prohibitions in Canada, unless used for the purpose of undermining a union organizing effort.

While the conclusion that the innovations may be inconsistent with labour law lends itself to the simple solution of dismantling the innovations, this may not be a wise choice. Strong evidence, reviewed in Chapter Two, suggests that these innovations are required to ensure the
economic well being of North American enterprises. Against that background, labour law that places these innovations in legal jeopardy may be seen as anachronistic and better suited to a time when a closer and more cooperative relationship between labour and management was not necessary for the continent's economic well-being. If a primary aim of labour law is to facilitate more cooperative relations between labour and management, it would seem inconsistent to permit labour law doctrines to subsist which hinder cooperative efforts between those parties.

This begs the question, however, as to the proper role of law in labour relations. Is the recent American jurisprudence correct in stating that the primary role of labour law is to facilitate cooperative labour relations?¹

Labour law should certainly not have barbed industrial relations as its aim. Labour law should, where possible, facilitate a more cooperative industrial relations environment. This recognizes the close alignment of interests between the parties on such issues as enterprise survival.

But at the same time the goals of labour law must be informed by the disparity in power as between employer and individual employee. Further, those goals must be informed by the history of industrial relations as practised in North America. As discussed in Chapters One and Three, this history

has been punctuated by a strong employer antipathy towards sustained power sharing in the workplace.

Consequently, a primary goal of labour law has been to protect and empower employees. As Kahn-Freund stated:

The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation...must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.²

Labour law's prohibition on employer-dominated labour organizations and employer interference, the law's managerial exclusion, and its protection of a union's exclusive bargaining authority, are each aimed at employee protection and empowerment.

Should these necessary purposes of labour law be undermined in an effort to facilitate industrial relations innovations required to assure the economic well-being of North American enterprises?

The aim of this thesis is to open the debate on this most fundamental question. While this thesis does not purport to fully answer the question, some recommendations can be made for the proper approach to be taken in doing so.

First, the approach must take clear account of the employee protection and empowerment purposes that underly our law. If changes to labour law are necessary to facilitate the New Industrial Relations, it must not be done in a manner that sacrifices employee protection and empowerment. Advocates of industrial relations innovations suggest that a primary aim of these innovations is the empowerment of employees. Thus, they argue, we can assume any change in labour law made to facilitate these innovations will not detract from the empowerment goal. To the extent that real power is diffused to employees by these innovations, it is difficult to argue against facilitation of the innovations. However, the innovations discussed in this thesis rely largely upon the good will of the employer for their implementation, continued existence and the power which they provide employees. For example, these innovations contemplate that employers will respond positively to the recommendations arising from employees through these innovations.

Unfortunately, as reviewed in Chapter Three, history has shown employees that they cannot rely upon the good will of employers when, as is often the case, their interests conflict with those of employees. Therefore, before these innovations can be said to provide real power to employees, the innovations must incorporate some form of institutionalized mechanism by which employees can apply economic force on employers to compel compliance with the recommendations. The
ability of employees to join independent trade unions and impose economic sanctions on employers to compel agreement has been the primary institutionalized mechanism used to date for this purpose. Thus, absent the development of an equally effective mechanism, collective bargaining through independent trade unions must be an essential ingredient in industrial relations innovations.

Second, the approach must be sensitive to the deep-seated suspicion of trade unionists regarding employee involvement programs. This suspicion, well-grounded in a history of employer attempts to undermine trade unions through similar programs, will likely only be overcome if the programs truly empower employees and recognize the institutional role of trade unions as a mechanism to ensure this empowerment occurs.

If labour law reform to facilitate the New Industrial Relations can satisfy these requirements, the advisability of such reform is enhanced. Whether and how this marriage of goals will occur is the challenge employees, trade unions, employers and governments must face as we reach the 21st century.
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