

# THE DIVISION OF LABOUR: AN EXAMINATION OF CERTIFICATION REQUIREMENTS<sup>©</sup>

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Under Canadian and American labour law, organized workers must be divided into bargaining units. In order to negotiate with employers on behalf of workers, these bargaining units must be certified. This entails receiving the approval of the appropriate labour relations board. The author argues that this requirement informs the outcomes of collective bargaining. This article takes the position that certification is a subtle method for maintaining the existing social order and the consequent distribution of power, without actually appearing to do so. Certification can be understood as a tool for fragmenting the potential power of labour's unity. The present analysis draws on and consolidates some of the major themes in the critical legal, sociological, and political literature on labour/industrial relations.

Selon le droit du travail canadien et américain, les travailleurs sont divisés en unités de négociation. Afin de négocier avec leurs employeurs au nom des employés, ces unités doivent être certifiées. Conséquemment, cela implique l'approbation des conseils de relations de travail respectifs. L'auteur opine que cette exigence dévoile l'issue de la négociation collective. Cet article soutient que ce certificat représente une méthode subtile pour maintenir l'ordre social et donc, la distribution du pouvoir, sans que cela apparaisse au premier abord. La certification peut être entendue comme un outil pour fragmenter le pouvoir potentiel d'une unité de travail. La présente analyse regroupe quelques uns des thèmes majeurs dans une analyse critique, juridique, sociologique, et politique sur les relations de travail.

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## I. INTRODUCTION

This article is about the structure of relations between workers and their employers. More precisely, this article is concerned with the legal requirements for the organization of workers by unions. According to Canadian and American law, organized workers must be divided into bargaining units. These units require approval or certification from the appropriate labour relations board. This requirement impacts on the structure of relations between employers and employees. It informs the outcomes of collective bargaining and thus the shape, format, and texture of work relations.

The legal requirement of obtaining certification for a bargaining unit from the relevant labour relations board presents itself as a neutral aspect of the prevailing labour relations regime in Canada. This article takes the position that, like many other elements of our legal system, certification is a subtle method for maintaining the existing social order and the consequent distribution of power, without actually appearing to do so. In developing this thesis the present analysis draws on some of the major themes in the critical legal, sociological, and political literature on labour/industrial relations.

This article has two substantive sections. Part II sets out the theoretical context for what follows. This section seeks to establish that industrial relations are about power; that the balance of power currently belongs to those who control the means of production; and that labour law is concerned with preserving this social order.

Part III addresses the process of union certification. The overarching theme here is that labour law ensures that associations amongst workers remain fragmented. Two issues are discussed in analyzing the specific way in which certification facilitates fragmentation. First, certification ensures that the structure of organized labour, that is of bargaining units, conforms to the way in which capital itself is organized. By adhering to the imperatives of capitalism, union organization is structured in a way that is more advantageous for employers than for workers. This arrangement is critical in eviscerating union power because it permits the owners of capital to retain the advantages that attend ownership. Consequently, this places great pressure on unions to accommodate employers in a way that is not fully consistent with the broad interests of workers. Some of the problems caused by this situation are most apparent in the case of small bargaining units.

Second, conformity to capitalist forms of organization encourages unions to pursue a narrow gamut of issues. Rather than focusing on widespread political issues, unions primarily concern themselves with wage demands and other issues affecting the immediate work environment. In this way fragmentation facilitates the maintenance of one of liberalism's favourite ideological weapons: the separation of the political from the economic. Unions thus function as bureaucratic structures, partly incapable and partly unwilling to pursue changes to the variety of social institutions that are responsible for the disadvantaged position of workers. This, in turn, alienates unions from their constituencies. Instead of championing justice for workers, unions conveniently serve as managers of workers' discontent.

## II. THEORETICAL UNDERSTANDING OF LABOUR RELATIONS

The dominant and common view of labour relations is often referred to as *liberal pluralism*. It is a view firmly rooted in traditional liberal thought, the principles of which are individuality, rationality, and self-interest.

### A. *Liberal Pluralism*

According to the axioms of liberal thought, each owner of capital<sup>1</sup> (either directly or through managers) pursues a profitable return on his or her investment while each member of the non-capital class (worker) sells his or her labour. Because these two activities are motivated by self-interest they are seen as equivalent or parallel. This arrangement might be considered unobjectionable, except for the fact that the relationship between these two groups is not always balanced. "[C]apital dominates over labour."<sup>2</sup> As a result of this imbalance, labour relations are inherently volatile.

For the owners of capital the need to address this volatility is founded on practical considerations. Because there are more workers

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<sup>1</sup> Throughout this article, the terms capital-owning class, capitalist, or employer refer to both owners and managers. It is the control of capital that is significant for this article. In a large public company, it is clearly the managers and directors, rather than the shareholders, who control the corporate assets.

<sup>2</sup> R. Hyman, *Industrial Relations: A Marxist Introduction* (London: MacMillan Press, 1975) at 86.

than owners, it is imprudent for capitalists to be perceived as the agents of injustice.<sup>3</sup> Real and perceived stability helps preserve the efficiency of the market. To facilitate stability it is permissible for liberalism's sacred principle of individuality to be violated, and for individual workers to unite and bargain collectively. It is important to understand, however, that collective bargaining does not change the basic liberal premise that "[r]elations between employers and workers are governed by a contract of employment which is, in theory, freely agreed between the two parties."<sup>4</sup>

Collectively, workers are assumed to possess the economic leverage that individual capitalists possess. The right to unite "suggests that a balance of power prevails between capital and labour, that they face each other as equals, otherwise any bargain struck could scarcely be viewed as one which was 'freely' achieved."<sup>5</sup> In the liberal pluralist system, the contract remains the predominant tool for ensuring obligation. "The scheme provides for the enforceability of promises and obligations after voluntarily-entered-into agreements between the employer and the employees have been reached. The major difference between this and the common law contract regime is that the bargaining position of the individuals has been improved."<sup>6</sup>

In a traditional collective bargaining regime differences between workers and owners are considered to be reconcilable.

The general picture of industrial relations that could be drawn from this pluralistic approach is one which, though hardly free of conflict, contains mechanisms enabling the contending parties, not too unevenly matched, to negotiate their mutual accommodation. ... Within this framework, employees would be assumed to see management as simply discharging its necessary functions and receiving its rewards.<sup>7</sup>

So long as these basic tenets are accepted, the control and containment of the divergent and possibly excessive aspirations of the workers who make up the firm is a legitimate exercise of the managerial function.

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<sup>3</sup> See H.J. Glasbeek, "Law; Real and Ideological Constraints on the Working Class" in D. Gibson & J.K. Baldwin, eds., *Law in a Cynical Society? Opinion and Law in the 1980's* (Calgary: Carswell, 1985) 282 at 284 [hereinafter "Constraints on the Working Class"]; and H.J. Glasbeek, "TIP: Another Weapon in the Class War Waged Against Workers" (1981) 3 *Can. Tax'n: J. Tax Pol'y* 94 at 104 [hereinafter "TIP"].

<sup>4</sup> Hyman, *supra* note 2 at 23.

<sup>5</sup> L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract*, 2d ed. (Toronto: Garamond Press, 1993) at 11.

<sup>6</sup> "Constraints on the Working Class," *supra* note 3 at 287.

<sup>7</sup> A. Fox, *Man Mismanagement* 2d ed. (London: Hutchinson Education, 1985) at 30.

In addition to providing a mechanism for remedying the reconcilable conflicts of the labour market, collective bargaining is believed to facilitate a democratic approach to industrial relations conflict resolution. It does so in two ways. First, collective bargaining allows for the resolution of conflicts through reason and negotiation. The self-interested motivation of the parties, without the imposition of higher authority, is believed to lead to optimal results. Collective bargaining legislation simply sets out a process without establishing any substantive requirements for the agreements reached.<sup>8</sup> “[C]ollective bargaining legislation is not unlike minimum standards’ legislation: it ensures that working conditions will not drop below certain levels, but does so not by specifying those levels but rather by creating more bargaining equivalence than would otherwise have existed.”<sup>9</sup> The Ontario Labour Relations Board (OLRB) has stated that as long as the parties bargain in good faith, “the collective agreement which they ultimately reach, or whether they conclude any collective agreement at all, must ultimately depend upon the ability and the economic power which they can bring to bear in bargaining.”<sup>10</sup>

The second way in which collective bargaining is seen to facilitate a democratic approach to industrial relations conflict resolution is in protecting the right of free association.<sup>11</sup> “[T]he distinction between a democratic or authoritarian capitalist regime is never only one of voting rights. It is equally ... a distinction which rests on the absence or presence of freedom of association.”<sup>12</sup>

### B. *Power and Control*

What is wrong with the liberal pluralist conception of industrial relations and with collective bargaining as the method for regulating these relations? The answer is that liberal pluralism and the ensuing mechanism of collective bargaining fails to recognize adequately the relevance of power and control to the labour dynamic. Yet these concepts are critical to understanding labour relations and the law that

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<sup>8</sup> See A. Forrest, “Bargaining Units and Bargaining Power” (1986) 41 *Relations industrielles* 840 at 842 [hereinafter “Bargaining Units”].

<sup>9</sup> “Constraints on the Working Class,” *supra* note 3 at 287.

<sup>10</sup> *Fashion Craft Kitchens Inc.v. UBCJA, Local 3054* [1979] OLRB Rep. 967 at 970.

<sup>11</sup> See S. Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (New Haven: Yale University Press, 1992) at 182.

<sup>12</sup> Panitch & Swartz, *supra* note 5 at 8.

governs them. The following section defines the meaning of power as it applies to labour relations. It is this concept that underlies the discussion of industrial relations in the rest of the article.

Power, in the context of industrial relations, is “the ability of an individual or group to control his (their) physical and social environment; and as part of this process, the ability to influence decisions which are and are not taken by others.”<sup>13</sup> Control can be effected by means of both material and ideological resources. Disproportionate ownership of physical resources amounts to material control. Ideological control refers to the capacity to influence general beliefs and values to effect a desired result. Combined, the two aspects of power are “the ability to overcome opposition ... [and a] perhaps even more significant form of power, ... the ability to preclude opposition from even arising—simply because those subject to a particular type of control do not question its legitimacy or can see no alternative.”<sup>14</sup> More needs to be said about both aspects of power.

In a capitalist society work is organized in accordance with the exigencies of the marketplace. It is thus the owners or managers of capital who determine the conditions under which workers satisfy their material needs. As a practical matter, in order to meet their material needs, workers must sell their labour to the owners of capital. Labour is thus only one of a variety of expenses that the capitalist must incur and manage to generate a profit. The overriding authority in day-to-day work relations therefore belongs to employers and managers. “The concentrated economic power of capital ... lies at the root of the right of managerial initiative through which the employer commands while the workers are expected to obey. Hence there exists a ‘natural’ structure of one way control over production and thus over the work activities of ordinary employees.”<sup>15</sup> Because the capitalist has the prerogative to manage the business enterprise in pursuit of profit, the contract of employment in effect requires that “[t]he worker surrenders control over his labour.”<sup>16</sup> It follows from this that material constraints on the freedom of workers to negotiate a beneficial contract inhere in the capitalist, or market, society.

It is important to recognize the extent to which employers can exercise control over employees by virtue of their monopolistic

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<sup>13</sup> Hyman, *supra* note 2 at 26.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 64.

<sup>16</sup> *Ibid.* at 96.

ownership (as a class) of material resources. Direct material control, however, is merely an aspect of the power that capital exercises over workers. Physical control operates in conjunction with ideological control. The concept of ideology, as used here, refers to the way perceptions of reality are generated and perpetuated.

If physical/material domination was the only kind of power at the disposal of the capitalist class, then it would not be long before the existing social order collapsed. To effect obedience to a social order in which the vast majority of people are at a disadvantage, capitalists would ultimately have to employ force and violence. But no order can rely on physical coercion alone to maintain stability. No physical power is omnipotent or omnipresent; circumstances can always be found when it can be evaded with impunity.

To preserve the existing social order people need to obey something greater than physical power. People need to obey a personal and internalized morality from which they cannot escape. Obedience must be made possible without force; force should only be used to support obedience. The relationship between personal obedience and external force is explained by Alan Fox:

We are ... threatened with detection and punishment if we rob banks. But if authority relied on this expediency argument alone the numbers of those who fancied their chances of evading detection would probably rise. We are taught, therefore, that it is also morally wrong to rob banks. With a combination of these two arguments authority hopes to keep us under control.<sup>17</sup>

The ideology, or personal morality, that supports existing labour relations relies on separating or fragmenting the relationships and interconnections of various social phenomena that affect the workplace. Specifically, the prevailing ideology rejects the interconnectedness of social, political, and economic phenomena. "The separation of form from substance, process from policy, role from theory and practice, echoes and reechoes at each level of the regime ..."<sup>18</sup> This is at the root of fragmentation.

It is important to understand the concept of fragmentation because "[t]here is perhaps no greater obstacle to socialist practice than the separation of economic and political struggles which has typified modern working class movements. ... This 'structural' separation may,

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<sup>17</sup> Fox, *supra* note 7 at 39.

<sup>18</sup> C.A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635 at 656.

indeed, be the most effective defense mechanism available to capital.”<sup>19</sup> Fragmentation binds the working class to capitalism’s perception of reality and makes the separation of economics from politics appear objective and natural. “The tenacity of working class ‘economism’ ... derives precisely from its correspondence to the realities of capitalism and the ways in which capitalist appropriation and exploitation actually do divide the arenas of economic and political action.”<sup>20</sup>

Separating industrial relations from their economic and political context makes them appear apolitical. For liberalism, the “powers of surplus appropriation and exploitation do not rest directly on relations of juridical or political dependence but are based on a contractual relation between ‘free’ producers ... . The struggle over appropriation appears not as a political struggle but as a battle over the terms and conditions of work.”<sup>21</sup> Thus, industrial conflicts are regarded not as political or social struggles but as differences belonging to the workplace alone.

In contrast, a more holistic theory sees “relations of domination, as rights of property, as the power to organize and govern production and appropriation.”<sup>22</sup> To grasp the dynamic of power and domination the interrelation of politics and economics must be acknowledged. As discussed fully in Part III, below, the greatest problem with bargaining unit certification is that it is a manifestation of fragmentation; it separates the industrial structure from the political, the discourse of justice from the practice necessary to achieve it, and the individual worker from the entirety of workers.

### *C. The Role of the State in Labour Relations*

According to classical liberal thought, the state should be as unintrusive as possible, serving merely to facilitate the orderly operation of the market. State activity should be confined to the public sphere, which is fragmented from the private one. The argument advanced in this section is that the state, in practice, has not adhered to the classical liberal image. It has actually intervened to preserve the operation of the

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<sup>19</sup> E.M. Wood, “The Separation of the Economic and the Political in Capitalism” (1981) 127 *New Left Rev.* 66 at 67.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* at 81, 92.

<sup>22</sup> *Ibid.* at 77.

market. This intervention, however, has remained largely unseen. This is because state involvement, in both the public and the private spheres, that facilitates the profitability of capital, is seen as neutral and objective. In contrast, state intervention that actively engages in wealth redistribution and restructuring of industrial relations would not be seen as neutral and objective. Among other things, such activity would seem to involve the state in the private realm of the market where, according to liberal thought, the state's participation should be limited to overseeing orderly behaviour.

To claim that the power of government is usually utilized to preserve and promote the interests of the capital-controlling class is not to suggest that our elected representatives or members of the judiciary collude in a mendacious sham. There is, however, an amazing harmony between the broad social objectives pursued by mainstream politicians and the goals that capitalists advocate. There are two reasons for this. First, as has already been suggested, perceptions of what is socially desirable are subtly dictated by the market. "‘Economic stability’ is the precondition of all other goals which government pursues, whatever their political complexion. ... this inevitably entails the stability of a capitalist economy. Hence private profit ... [is] the barometer of economic ‘health.’"<sup>23</sup> Second, business interests have more resources at their disposal for influencing government action. The ways in which the owners of capital influence state intervention include "expensive lobbying activities of major companies, the close relationship of industrialists with politicians and civil servants, [and] the accepted role of businessmen within many of the decision-making institutions of the state."<sup>24</sup>

What are the traditional labour policy goals pursued by the state? Historically, the state has attempted to regulate labour relations in such a way as to "moderate and contain class conflict."<sup>25</sup> Labour law has aimed at stabilizing the volatility latent in industrial relations. "[A] lessening of industrial conflict is often cited as a benefit, ... a benefit which government officials are likely to view as a positive influence on

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<sup>23</sup> Hyman, *supra* note 2 at 125.

<sup>24</sup> *Ibid.* at 124-25.

<sup>25</sup> Panitch & Swartz, *supra* note 5 at 8.

productivity, the economy generally, and the labour-relations climate of the jurisdiction.”<sup>26</sup>

On one level, labour law has sought to moderate and contain class conflict by granting workers the right to exercise the strength of their collective numbers, and then subtly eviscerating the strength of this unity. On another level, governments have taken an approach that more directly evidences the intimacy between state and capital.

Many contradictions that are difficult to eradicate have revealed themselves in capitalist society. Consequently, there have been “ongoing efforts of capital to restructure itself, in the face of the enduring economic crisis and the heightened international competition integral to it.”<sup>27</sup> John O’Grady observed that “an entirely competitive or unregulated labour market generates inequality. It thereby imposes additional burdens on the state’s redistributive programs.”<sup>28</sup> An implication of this is that in the present era there is great potential for the volatility latent in industrial relations to erupt and rupture the precarious *imbalance* between owners of capital and workers. The state deals with this by subsidizing private capital.<sup>29</sup> This involves supporting the activities of capital and providing palliatives for workers. The relationship between capital and the state is thus quite intimate. Rather than accommodating the needs of workers, the state has selected the option of catering to the needs of capital.

Canadian labour law has succeeded in lessening industrial conflict by providing workers with some tangible gains, and then circumscribing those gains. Canadian labour codes are modeled on the American *Wagner Act*<sup>30</sup> Privy Council Order 1003<sup>31</sup>—the Rand Formula—for the first time legally recognized unions and guaranteed collective bargaining. At the time, this was truly a victory for labour. In 1946 Justice Rand wrote the following:

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<sup>26</sup> J.C. Anderson, “The Structure of Collective Bargaining” in J.C. Anderson & M. Gunderson, eds., *Union-Management Relations in Canada* (Toronto: Addison Wesley, 1982) 173 at 183.

<sup>27</sup> Panitch & Swartz, *supra* note 5 at 4.

<sup>28</sup> J. O’Grady, “Beyond the Wagner Act, What Then?” in D. Drache, ed., *Getting on Track: Social Democratic Strategies for Ontario* (Montreal: McGill-Queen’s University Press, 1992) 153 at 161.

<sup>29</sup> See Hyman, *supra* note 2 at 132.

<sup>30</sup> *National Labor Relations Act of 1935* 29 U.S.C. § 151 (1994) [hereinafter *Wagner Act*].

<sup>31</sup> P.C. 1003, Canada Wartime Orders and Regulations, *Wartime Labour Relations Regulations* 1944, I. 849.

Certainly the predominance of capital against individual labour is unquestionable; and in mass relations, hunger is more imperious than passed dividends. ... [T]he power of organised labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice; the just protection of all interests in an activity which the social order approves and encourages.<sup>32</sup>

In the 1940s workers secured an apparent gain by winning the right to bargain collectively. The prevailing legal regime has, however, given this right a narrow meaning. Professor Harry Glasbeek observed that “[t]he legal system ... has created a scheme which stays as close to the individual contract-making model as is consonant with the grant of some collective rights. Hence the ‘one employer—one unit of employees’ context.”<sup>33</sup> As in all contractual negotiation, this scheme ensures that the strong prevail. Thus, while the scheme purports to give workers an advantage, it simultaneously limits this advantage by ensuring that employers maintain many of the privileges they have in ordinary contract law.

In the Rand Formula the granting of rights is apparent; the limitation of these rights is more covert. It is this combination of what is visible and what is not that serves to legitimate the system. The determination of bargaining units for the purpose of certification evidences this situation. Professor Judy Fudge described the relationship between bargaining unit determination and certification:

The bargaining unit defines the constituency of employees from which a union must obtain majority support in order to be certified as the exclusive bargaining agent of those employees for collective bargaining purposes. It also defines the group of employees which can engage in collective action for the purposes of collective bargaining.<sup>34</sup>

On their face, bargaining-unit requirements appear to be neutral. Like rules of the road, they seem to be requirements for the orderly operation of collective bargaining.

In what way is the determination of the appropriate bargaining unit not a neutral and benign form of state intervention? How does it impair the voluntariness of the actors, a feature that is so cherished by liberal pluralism? The response is that “government policies exert a tremendous influence on the shape of bargaining structures. This happens ... through the criteria established for determining the scope

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<sup>32</sup> Quoted in Panitch & Swartz, *supra* note 5 at 11.

<sup>33</sup> “Constraints on the Working Class,” *supra* note 3 at 293.

<sup>34</sup> J. Fudge, “The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-based Bargaining” in L. Briskin & P. McDermott, eds., *Women Challenging Unions: Feminism, Democracy, and Militancy* (Toronto: University of Toronto Press, 1993) 231 at 233.

and composition of appropriate bargaining units ... .”<sup>35</sup> Because the bargaining unit is the basic structural element in the Canadian collective bargaining system, the way that it is formed is determinative of how much power it can exert. In *Kidd Creek Mines Ltd.*, the OLRB stated that bargaining units are “obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole;” how a unit is determined dictates its success in certification and “affects the bargaining power of the union and the point of balance it creates with that of the employer.”<sup>36</sup>

The fact that bargaining units affect the balance of power between employers and employees does not necessarily have negative implications for organized labour. Unions have been affected adversely because of the particular way in which the bargaining unit has been determined. It has been determined in a way that fragments the organization of labour. The way that fragmentation in certification influences the power of the bargaining unit, and the consequent effects that this has on the ability of organized labour to influence the owners of capital is the subject of the next part of the article.

### III. CERTIFICATION: A STUDY OF FRAGMENTATION

In reviewing specific methods employed by the state in securing its labour relations objectives, the previous section concluded by suggesting that fragmentation of organized labour is an important feature of collective bargaining law. This part of the article attempts to explain why this is so and what the role of certification is in this process.

#### A. *Conformity to Capitalist Forms of Organization*

The proposition advanced here is that the structure of organized labour is shaped by the employer, and the existing labour law regime supports the employer’s power in this regard. Before discussing the way in which certification permits the employer to have the upper hand in collective bargaining, it is useful to address the stated legal criteria for determining the bargaining unit. It is argued above that the determination of the bargaining unit is presented as nothing more than a

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<sup>35</sup> Anderson, *supra* note 26 at 186.

<sup>36</sup> *IBEW, Local 1687v. Kidd Creek Mines Ltd.*, [1984] OLRB Rep. 481 at 494.

set of administrative procedures for determining whether the majority of workers in a given constituency wish to become members of a trade union. In addition, a certified bargaining unit acquires a number of important rights. It is, for example, protected as the exclusive bargaining agent of the designated employees with whom the employer must bargain fairly and in good faith.

The Ontario *Labour Relations Act, 1995*<sup>37</sup> (*OLRA*) defines “bargaining unit” as “a unit of employees appropriate for collective bargaining ... .”<sup>38</sup> To be recognized as an “appropriate” bargaining unit the unit must be certified by the OLRB upon application by the union.<sup>39</sup> The *OLRA* specifically provides that the OLRB “shall determine the unit of employees appropriate for collective bargaining.”<sup>40</sup> The *OLRA* prohibits a number of activities by both parties to ensure that the entire process is conducted fairly. The OLRB must ascertain a number of facts before deciding on the appropriateness of the unit. Several implications flow from the criteria used in this process.

First, the OLRB must determine whether a sufficient number of the unit's possible members favour certification. An implication of this is that the union must collect the requisite number of signatures from a constituency whose size will be determined only when the OLRB establishes what the appropriate unit is.

Second, because only “employees” as defined by the OLRB can be members of a bargaining unit, it is important to distinguish them from managers or other excluded categories. This has important consequences during a strike. For example, in certain circumstances personnel designated as “managers” may be used as replacement workers. In determining who can become a member of a union, the OLRB thus makes a number of important decisions on a highly discretionary basis. There are no necessary or natural distinctions between “manager” and “employee” in this context.

Third, the bargaining unit must be formed for the purpose of negotiating with the employer. Under the *OLRA*, the authority of the bargaining unit—or the entire union—to engage in political activity is very limited. It is important to examine closely this particular restriction because the relevant case law demonstrates the separation of economics from politics under the existing regime.

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<sup>37</sup> S.O. 1995, c. 1, sched. A.

<sup>38</sup> *Ibid.* s. 1(1).

<sup>39</sup> *Ibid.* s. 7(1).

<sup>40</sup> *Ibid.* s. 9(1).

Political activity refers here to strikes that are not directly about immediate economic concerns such as terms and conditions of employment or questions about output. It is true that unions may support political candidates financially or by direct lobbying. They are, however, highly circumscribed in the way that they may employ the strike in support of more strictly political objectives. This is significant because the strike is labour's true weapon. To the extent that unions possess any leverage, it does not emanate from collected dues. Rather, the only measure of substance at the disposal of organized labour is the strike.

The basic rule in Canada is that "the legal right to strike only exists to negotiate a first or a new agreement with one employer at a time."<sup>41</sup> The *OLRA* "contains a comprehensive code that prohibits unlawful strikes, threats of unlawful strikes and behaviour intended to encourage unlawful work stoppages."<sup>42</sup> Under the *OLRA* a "strike remains an essential part of the process, providing a potent incentive for the parties to settle their differences. However, it is a weapon of last resort, and ... its use is carefully circumscribed."<sup>43</sup> This statutory rule has been in effect for about half a century, replacing the previous common law regime. The essence of the position on strikes articulated by the OLRB is that when there is a collective agreement in place a union may not strike.

This means that unions cannot strike to support or oppose political candidates, parliamentary initiatives, or simply to voice a political opinion. The statutory restriction on voicing political opinions was demonstrated in the Days of Action cases, when organized labour in Ontario attempted to orchestrate strikes in opposition to the policies of Premier Mike Harris.<sup>44</sup>

The statutory scheme that both governs and circumscribes strikes is as follows. The statutory definition of a strike according to section 1(1) of the *OLRA* "includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down, or other concerted activity on the part of the employees designed to restrict or

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<sup>41</sup> D. Drache & H.J. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: James Lorimer & Co., 1992) at 104.

<sup>42</sup> *Livent Inc. v. IATSE, Local 58*, [1996] OLRB Rep. 870 at 873 [hereinafter *Livent*].

<sup>43</sup> *General Motors of Canada Ltdv. CAW-Canada*, [1996] OLRB Rep. 409 at 435 [hereinafter *General Motor*].

<sup>44</sup> See *ibid.*; *Livent*, *supra* note 42; and *Toronto Transit Commissionv. Wilson*, [1996] OLRB Rep. 889 [hereinafter *TTC*].

limit output.”<sup>45</sup> This has been the statutory definition since the first labour relations act was passed in 1950. It is a very broad definition, covering any refusal to work, regardless of the motivation for this refusal. The definition encompasses a wide range of activity, including sympathy strikes or refusing to cross a picket line, where those activities have the effect of limiting production.<sup>46</sup>

The *OLRA* expressly prohibits striking while a collective agreement is in effect. Section 79(1) of the *OLRA* states: “Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.”<sup>47</sup> In addition to a prohibition on strikes, the *OLRA* is internally consistent by prohibiting employees from threatening to strike in section 79(6): “No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.”<sup>48</sup> Pursuant to section 46, the limitation on striking is implied into every collective agreement, regardless of the actual negotiated arrangement reached by the parties. Section 46 of the *OLRA* states that “[e]very collective agreement shall be deemed to provide that there will be no strikes or lock-outs so long as the agreement continues to operate.”<sup>49</sup> A limitation on the ability of labour leaders to organize and motivate workers to take action is included in the prohibitions, as set out in section 83: “No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.”<sup>50</sup>

In addition to these prohibitions, the *OLRA* sets limitations on the spontaneity of strikes during the period prior to or between collective agreements. Even where a collective agreement has expired and a strike is permissible under the *OLRA*, it must be delayed until the statutory conciliation process has been completed and the employees have authorized the strike by secret ballot. It is said that these restrictions on the right to strike (and the supposedly parallel restrictions on the employer’s use of the lock-out) turn the collective agreement into a

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<sup>45</sup> *OLRA*, *supra* note 37.

<sup>46</sup> See *General Motors*, *supra* note 43 at 428.

<sup>47</sup> *OLRA*, *supra* note 37.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* See also s. 100. The limits on the power and responsibility of labour leaders to avoid strikes under the *OLRA* were tested in *Livent*, *supra* note 42.

mandatory peace treaty. The collective agreement is both an undertaking and a guarantee that during its term of operation there will be no work stoppages, occasioned either by the employer or the employee.<sup>51</sup>

These statutory restrictions on strikes—which are thought to be critical elements of maintaining labour harmony—were addressed in the cases arising from the Days of Action protests. As the OLRB pointed out in *General Motors*,<sup>52</sup> these were political protests. They involved an attempt by a number of unions to voice a political opinion by staging massive one-day strikes. The strikes were akin to demonstrations in that they were not intended to change the terms and conditions of employment, or to restrict or limit output at the facilities of the affected employer. Indeed, the actual production losses occasioned by the work stoppages were minimal. The stated intent of labour leaders was to organize workers in order to manifest popular opposition to the policies of Ontario's Conservative government.<sup>53</sup> According to the union, the protests were a “moderate and relatively confined collective expression of political concern.”<sup>54</sup> In a series of cases that emerged from these protests the OLRB unequivocally declared that “the ‘no strike prohibition’ [under the *OLRA*] applies with equal force to so-called ‘political protest strikes’ of this kind.”<sup>55</sup>

The OLRB reached this conclusion by interpreting the term “strike” in the *OLRA* very broadly. Any work stoppage, even if not directly related to collective bargaining concerns such as changes in work conditions, is a strike. This broad interpretation has the effect of subjecting to the restrictive rules of the *OLRA* all organized discontent and protest by workers. As is discussed below, the *OLRA* went even so far as to hold that because strikes—including political ones—are governed by the *OLRA*, any constitutional violation of expressive freedom is justifiable.

It is interesting to examine how the OLRB reasoned that all collective action by workers, including voicing discontent, falls under the *OLRA* definition of strike. In *Domglas Ltd. v. UGCW*, the OLRB held that “[t]he Act treats the work stoppage as being, in essence, an economic weapon, and restricts its use to a certain collective bargaining situation

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<sup>51</sup> See *General Motors* *supra* note 43 at 435.

<sup>52</sup> *Supra* note 43.

<sup>53</sup> See *ibid.* at 412.

<sup>54</sup> *Ibid.* at 413.

<sup>55</sup> *TTC*, *supra* note 44 at 890.

... . To avoid disruptions in production and to promote industrial relations harmony, all work stoppages occurring outside this limited period, whatever their underlying motive, are prohibited.”<sup>56</sup> This passage indicates that it is for the sake of industrial harmony that the *OLRA* sets out precise rules for engaging in a strike. According to the OLRB, any collective action by workers that threatens industrial harmony should be subject to the rules set out in the *OLRA*. It is workers, therefore, who must sacrifice important freedoms for the sake of industrial harmony.

*Domglas* is a predecessor to the Days of Action cases. It arose out of labour’s opposition to the federal government’s passage of wage and price controls in 1975. This legislation also placed restrictions on the scope of collective bargaining. The nature of the protest in *Domglas* was, therefore, very similar to the circumstances giving rise to the Days of Action cases. In the Days of Action cases, beginning with the *General Motors* case, the OLRB adopted its reasoning in *Domglas*.<sup>57</sup> In addition to interpreting strike in the broadest way possible so as to ensure an expansive reach for the statute, the OLRB determined the status of political protest strikes under the *Canadian Charter of Rights and Freedoms*.<sup>58</sup> The OLRB held that while the impugned protests were protected expression under section 2(b) of the *Charter*, prohibiting political strikes was justifiable under section 1 of the *Charter*.

To support this holding the OLRB relied on the Supreme Court labour trilogy.<sup>59</sup> In these three cases the Supreme Court determined that the right to strike was not constitutionally protected as section 2(d) “freedom of association.” Relying on the labour trilogy, the OLRB in *General Motors* held that “if the underlying law does not involve any breach of the *Charter*, it is difficult to accept that the *Charter* gives special protection to a strike that contravenes that law as a form of political protest or civil disobedience.”<sup>60</sup>

This reasoning confounds two unrelated constitutional rights. If the right to strike is not constitutionally protected, then, according to the OLRB, neither is the political expression of strikers protected. The

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<sup>56</sup> [1976] OLRB Rep. 569 at 573-74; aff’d (1978), 19 O.R. (2d) 353 (H.C.J.) [hereinafter *Domglas*].

<sup>57</sup> See *General Motors* supra note 43 at 434.

<sup>58</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>59</sup> *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *Saskatchewan v. RWDSU* [1987] 1 S.C.R. 460.

<sup>60</sup> *General Motors* supra note 43 at 443.

suggestion that because one constitutional right is not triggered another independent constitutional right is therefore not triggered is untenable.

It is true that the labour trilogy determined that there is no constitutionally protected right to strike. This, however, should have no bearing on whether expression by means of a strike is constitutionally protected. As mentioned above, the *OLRA* prohibits strikes with a view to securing industrial harmony; and it does so by restricting strikes in situations where they are used as a “weapon.” Weapon refers to the imposition of economic sanctions on the employer. The *OLRA*, however, does not purport to restrict strikes when they are used as an expressive activity. Nor could the *OLRA* do so: if the *OLRA* had a provision prohibiting strikes for the reason that they amount to expression, then that provision of the *OLRA* would be invalid under section 2(b) of the *Charter*. This is effectively what was at issue in *General Motors*. But the OLRB simply failed to address the principal constitutional question at issue: can a strike be protected by section 2(b)? The question that the OLRB should have answered was whether the *OLRA* impermissibly restricted the right to expression. And the expression here is the most sacred under the *Charter*: political opinion. The OLRB’s difficulty in accepting that the *Charter* gives special protection to a strike that contravenes that law as a form of political protest or civil disobedience is contrary to the *Charter*. This is precisely what the *Charter* aims to do: invalidate state action that impermissibly restricts a protected constitutional right.

Beyond the restrictions just described, there are few statutory provisions for the determination of a bargaining unit. It is the discretion of the OLRB that is determinative. The most important single criterion is the “community of interest.”<sup>61</sup> The OLRB considers six factors in deciding whether the requisite community of interest exists:

1. nature of the work performed;
2. conditions of employment;
3. skills of employees;
4. administration;
5. geographical circumstances;
6. functional coherence and interdependence.<sup>62</sup>

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<sup>61</sup> Fudge, *supra* note 34 at 234.

<sup>62</sup> J. Sack, C.M. Mitchell & S. Price, *Ontario Labour Relations Board Law and Practice* vol. 1, 3d ed. (Toronto: Butterworths, 1997) at § 3.235.

All are within the control of the employer. While these criteria are not prescribed by statute, they have been applied as though they were, thereby injecting an element of certainty into the certification process and ensuring some uniformity.<sup>63</sup>

The first way in which certification ensures that union structure conforms to the demands of capital is by making it possible for managerial decisions about the allocation of resources to become the basis of bargaining unit determination. "The factory, mine, yard or office is the framework of the relationship with the employer: *his* property, *his* concentrated power, *his* underlying authority exists behind every negotiation."<sup>64</sup> If industrial relations are to be seen as a war, then it is a war that takes place on the employer's chosen battleground.<sup>65</sup> Unions have accepted this situation. "For the most part, [unions] acknowledge management's right to organize and control the work process."<sup>66</sup> The decisions which are most crucial to the determination of the bargaining unit concern the size, shape, location, and structure of the place where the business enterprise will be carried out. These decisions are controlled exclusively by the employer.

The individual firm is therefore the essential basis of the bargaining unit. "A common employer creates a community of interest."<sup>67</sup> Canadian collective bargaining legislation "requires that the collective agreement be struck on behalf of a bargaining unit of employees, comprising a number of the employees of *one common employer*."<sup>68</sup> In fact, even smaller production structures, organized within the firm, may constitute the basis of the bargaining unit. Because such smaller units fragment union structure to an even greater extent, this only strengthens the arguments developed below. Thus, for the sake of simplicity, the firm will be discussed as the essential organizational unit.

It is perhaps stating the obvious to say that any organized effort to effect specific results is contingent on the ability of the involved parties to structure how they will proceed. Preventing organized labour from being master of its own structure has served to undermine the

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<sup>63</sup> See "Bargaining Units," *supra* note 8 at 848.

<sup>64</sup> Hyman, *supra* note 2 at 170.

<sup>65</sup> See *ibid.*

<sup>66</sup> A. Forrest, "The Rise and Fall of National Bargaining in the Canadian Meat-Packing Industry" (1989) 44 *Relations industrielles* 393 at 400 [hereinafter "Meat Packing"].

<sup>67</sup> "Bargaining Units," *supra* note 8 at 846.

<sup>68</sup> "Constraints on the Working Class," *supra* note 3 at 289 [emphasis added].

bargaining power that collective bargaining legislation apparently guaranteed to unions:

Bargaining power is often discussed as though it were a naturally occurring, fixed entity, unaffected by public policy. In fact, however, the law does much to shape the power of the parties. The OLRB's small units fragment the work force and make sanctions less effective. Lawful sympathetic action is almost impossible; attempts by other groups to act in support are quickly met by a finding of a illegal strike.<sup>69</sup>

An important implication flows from employing the firm as the basis of bargaining unit determination. By making the demarcations of the firm the criteria of bargaining unit size and structure, certification ensures that negotiation occurs at the workplace level as determined by the employer. Consequently, collective bargaining is decentralized. Bargaining occurs between each individual employer and the employees organized at that workplace. There is no special reason for bargaining to occur at this level. The choice is arbitrary. Bargaining could be more broadly based. For example, it could be conducted at an industry or regional level. Such broader based bargaining is practiced in various market economies outside North America. John O'Grady posited that there is a specific reason for decentralized bargaining in North America:

The definition of "appropriate bargaining units" is fundamental to the way in which the Wagner Act model allocates economic power in the labour market. The model presumes that bargaining will *not* occur at the sectoral or regional level. ... Collective bargaining in the Wagner Act model was to be decentralized to the smallest practical unit, namely, a single workplace.<sup>70</sup>

The suggestion here is that conducting bargaining at the workplace level is once again meant to fragment and thus undermine union power.

How does decentralized bargaining undermine union power? Negotiation at the level of the workplace is the primary reason that workers cannot take advantage of their numerical superiority over the owners and managers of capital and their managerial functionaries. This incapacity operates on two levels. First, workers in one bargaining unit cannot exercise economic sanctions against their employer in support of action taken by another unit.<sup>71</sup> Such supportive behaviour by workers is prohibited even if the different bargaining units belong to the same union. This is so unless there is such a close link between the different bargaining units "that they are in fact, if not in law, interrelated

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<sup>69</sup> "Bargaining Units," *supra* note 8 at 848.

<sup>70</sup> O'Grady, *supra* note 28 at 157-58 [emphasis in original].

<sup>71</sup> See "Constraints on the Working Class," *supra* note 3 at 293.

enterprises.”<sup>72</sup> Thus, segmenting union structure to parallel the division amongst capitalist enterprises is an ostensible barrier to solidarity amongst workers in the whole society.

The second impediment to the mobilization of workers caused by workplace bargaining is that some workplaces are small and poorly organized in comparison to bargaining units at large resource-based manufacturing plants. In the former situation the bargaining unit is not sufficiently strong to exert any meaningful pressure on the employer. “Units of this size, powerless almost by definition, are the product of the Ontario Board’s preference for a highly fragmented structure of recognition. Each establishment is considered a natural bargaining constituency: the ‘single-employer, single-location, single-plant unit’ is the cornerstone of OLRB policy.”<sup>73</sup>

The weakness of small bargaining units is exacerbated by three factors. First, the cost to unions of representing small workplaces is an obstacle.<sup>74</sup> The dues base is too small to cover bargaining costs for the central union organization. Second, “[t]he cumulative impact of collective bargaining is nullified by the high attrition rate of small employers.”<sup>75</sup> Union success is felt over time, but 50 per cent of firms employing less than twenty workers in the period 1978-86 ceased operation. Third, because small firms exist in more competitive industries than larger ones, profits are lower, and consequently unions have less to gain.<sup>76</sup> These factors pose particular problems for the current union movement because there has been a trend towards small firms in recent decades.<sup>77</sup>

The power of workers in small firms is further constrained by the fact that they are very difficult to organize.<sup>78</sup> Despite the *OLRA*’s unfair labour practice provisions, employers’ resistance to certification is more effective in small workplaces. O’Grady provided two reasons for this.<sup>79</sup> First, while the dismissal of union organizers is illegal, it can be effectively used in small workplaces to impede an organizing drive at a

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<sup>72</sup> *Ibid.*

<sup>73</sup> “Bargaining Units,” *supra* note 8 at 844-45.

<sup>74</sup> See O’Grady, *supra* note 28 at 160.

<sup>75</sup> *Ibid.* at 160-61.

<sup>76</sup> See *ibid.* at 161.

<sup>77</sup> See “Bargaining Units,” *supra* note 8 at 844-45.

<sup>78</sup> See O’Grady, *supra* note 28 at 164-65.

<sup>79</sup> *Ibid.* at 159-60.

crucial moment, when it is most vulnerable. Second, employers can strategically exercise their right to freedom of expression, guaranteed by section 70 of the *OLRA*, in small workplaces to dissuade employees from signing union cards. “Managers always have the ability to influence a handful of workers.”<sup>80</sup> The advantages of influencing small groups of employees were apparent to management in *K-Mart Canada Ltd. v. SEIU, Local 183*,<sup>81</sup> where the employer intentionally communicated with employees in small groups in order to weaken union support.

In concluding the discussion of how certification ensures that union structure conforms to the production decisions of employers, it is relevant to highlight the flexibility of the system. The bargaining unit need not be determined on the basis of the firm, nor does collective bargaining need to be decentralized. When excessive fragmentation or decentralization are considered damaging to the interests of employers, they are not pursued. Two examples illustrate this argument. First, it must be remembered that the ultimate objective of labour relations regulation is to stabilize and order the market. Excessively small units may on occasion severely inconvenience some firms. Thus, “while wanting to ensure that units do not get so large that they could cause serious disruptions, [labour relations boards] do not want them so small ... that an employer will have to deal with a multiplicity of unions.”<sup>82</sup> This was the view expressed in *CUPE v. Toronto (City) Board of Education*:

[A]n employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship ... . [I]n those circumstances the board will find the unit proposed inappropriate ... .<sup>83</sup>

The message is unambiguous: fragmentation is flexible. When it is beneficial to employers’ concerns, fragmentation can be reduced.

The second example of employers’ ability to manipulate the extent of fragmentation to suit their needs concerns the decentralization of bargaining. Despite the benefit that capital derives from decentralized bargaining, centralized bargaining may sometimes be beneficial to firms. The specific circumstances in which this may occur

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<sup>80</sup> *Ibid.* at 160.

<sup>81</sup> [1981] OLRB Rep. 60.

<sup>82</sup> “TIP,” *supra* note 3 at 106.

<sup>83</sup> [1970] OLRB Rep. 430 at 436.

are not directly related to the present discussion. The importance of this observation is that the extent of centralization is not fixed:

The variety and generality of factors [considered by the OLRB in bargaining unit determination] means that a good deal of flexibility is built into standard-unit determination, even though this is hidden from view because so many cases seem unproblematic. The boards make their determinations on a case-by-case basis and the criteria used to give the “community-of-interest” concept life permit them to tailor bargaining units.<sup>84</sup>

In short, centralization may vary within the Canadian collective bargaining scheme. And the power to do so rests in the hands of employers and is enforced by the relevant labour relations board. In other words, the fact that collective bargaining is generally decentralized is the intended consequence of the owners of capital. “[B]oth unions and employers will push towards the centralization of the bargaining structures [but] only to the point that the structure matches the market structure in which the *firm* operates.”<sup>85</sup> In her study of the Canadian meat-packing industry, Anne Forrest explained that so long as the industry was organized as an oligopoly, the participating firms benefited from industry-wide bargaining. However, when the owners’ situation changed, they had the power to decentralize the bargaining process.<sup>86</sup> In the meat-packing industry it was the owners rather than the workers who had a decisive impact on the extent of centralization in that industry.

#### B. *Narrowness*

Conformity to the imperatives of capital influences the strategies that unions employ in seeking improvements for workers. Divided into small hierarchically structured units like business enterprises, unions accept that gains are best achieved through cooperation, conciliation, and accommodation. It is not suggested that cooperation, conciliation, and accommodation are to be avoided. Rather, the proposition advanced here is that unions come to see the collective agreement in the same light as any other contract struck between entrepreneurs. Thus, organized labour accepts the structure of capitalism and thereby legitimates it. Only those demands are sought that can be accommodated without doing serious violence to the profit motive of

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<sup>84</sup> Drache & Glasbeek, *supra* note 41 at 73-74.

<sup>85</sup> Anderson, *supra* note 26 at 186 [emphasis added].

<sup>86</sup> See generally “Meat Packing,” *supra* note 66.

employers. The implication of this is that certification facilitates the predominance of the capital-controlling class in industrial relations by influencing the strategies that unions deploy in seeking improvements for workers.

There is no necessary or natural limitation on the strategies that unions may employ to advance the interests of workers. Since workers constitute the vast majority of the population, unions could conceivably employ at least two methods. First, in a democracy it should be open to organized labour to engage in non-violent techniques for effecting desired results. This route has secured certain tangible gains for workers. It has not, however, resulted in reshaping industrial relations to give workers greater democratic participation in the workplace. Another option is violent opposition to the existing order. This method has generally not been used. The reason that neither of these methods have been instrumental in reshaping industrial relations is the lack of class consciousness among workers. Workers lack a sufficient appreciation of their social condition, of their commonality, and of the power of their unity. In view of this absence of consciousness and the structural constraints on unions occasioned by fragmentation, organized labour has sought gains through cooperation, conciliation, and accommodation.

The conciliatory option means that unions regard collective agreements as part of the classic contract model. This is precisely the view of collective agreements that capital advocates. In a market economy, labour must *pay* for any gains that it secures. This is a basic precept of contract law. Consideration must be given in exchange for the benefit of a contract. “[I]n a private enterprise economy labour as a class ... has to pay for whatever gains a specific labour organization may enjoy, ‘responsible’ leadership in a union, ‘business-like’ behaviour, and collusion and oligarchic distribution of decisive power come up to the same [thing].”<sup>87</sup> In order to purchase gains, unions abide by the rules of the system and limit the scope of their demands. The union and management become partners in a market transaction. This, however, is not an equal partnership. Underlying relations between unions and employers is the reality such that unions are tolerated so long as they stay within the law, which, as previously discussed, is a product of the intimate relationship between the state and capital.<sup>88</sup>

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<sup>87</sup> R. Herding, “Job Control and Union Structure” in T. Clarke & L. Clements, eds., *Trade Unions Under Capitalism* (Atlantic Highlands, N.J.: Humanities Press, 1978) 260 at 260 [footnotes omitted].

<sup>88</sup> See “TIP,” *supra* note 3 at 104, n. 41.

Two consequences flow from the above characterization of organized labour's understanding of its position in industrial relations and the consequent use of the conciliatory approach. First, unions narrow their expectations and demands to the realm of what can be achieved within the existing social and industrial order. Ultimately, this means wages are virtually the exclusive area of union concern. The second consequence of the conciliatory approach is that unions become partners in the capitalist regime. By so doing, unions assist in perpetuating the existing distribution of power in industrial relations. Unions thus serve as a mechanism in the capitalist industrial relations framework. This function can be described as the management of workers' discontent.<sup>89</sup>

What are the implications of the fact that wage increases constitute the dominant concern of union activity? The response is that when unions occupy themselves strictly with wage improvements they tacitly accept the separation of economics from politics. This means that unions seek improvements in rates of remuneration and apply no real pressure to effect structural changes. Ultimately, it becomes difficult to raise wider control issues in any meaningful way if the framework of a capitalist market is implicitly accepted by the very activity of compromise economic bargaining.

What exactly is it that the union accepts and ignores when it bargains about wage increases? The following passage contains a helpful response:

Trade unions strive to effect marginal improvements in the lot of their members and to defend them against arbitrary management action. They do *not* ... attack management on such basic principles of the social and industrial framework as private property, the hierarchical nature of the organization, the extreme division of labour, and the massive inequalities of financial reward, status, control and autonomy in work.<sup>90</sup>

Confining demands to that which management can accommodate within the scope of profit-motivated activity allows unions to score victories on these narrow issues. In other words, unions are rewarded by management for being cooperative. In turn, the extent to which union policies can be accommodated within capitalism encourages continued moderation.

Inside the constricted parameters of the accepted framework, demands for wages and particular immediate grievances constitute the short list of issues that can be accommodated. Any broader demands

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<sup>89</sup> See discussion accompanying footnotes 100-109, *infra*.

<sup>90</sup> Fox, *supra* note 7 at 6 [emphasis added].

would challenge the existing structure of industrial relations. There tends to be a fixed amount of work-control available for distribution, and for one party to increase control the other must necessarily lose some of *its* control. Leaving all issues with the exception of immediate concerns and wages to management means that rather than initiate changes, unions react to the behaviour of capital. Unions do not try “to secure a foothold in the majority of decisions made within the organization on such issues as management objectives, markets, capital investment, and rate of expansion. Very rarely do they seriously challenge such principles as the treatment of labour as a commodity to be hired or discarded at management’s convenience.”<sup>91</sup> Thus, Forrest observed that “[m]anagerial control was never seriously in jeopardy in Canada. By the time mass-production industries were unionized in the 1940s, the work process had been reorganized. Industrial unions sought to modify, but did not challenge, innovations like time and motion study, job ladders, and incentive pay.”<sup>92</sup>

Another consequence of limiting bargaining objectives to raising wages and aspects of the immediate job environment is the growth of legalism in labour relations. The narrow concerns of unions direct their efforts “away from mobilizing and organizing, and toward the juridical arena of the labour boards.”<sup>93</sup> Instead of regarding collective bargaining as a temporary compromise until the balance of forces shifts, “union officials [come] to see it as a more or less permanent, normal and desirable state of affairs.”<sup>94</sup> Union leaders thus become experts in rights, procedures, and precedents. With the growth of collective bargaining “the trade union negotiator increasingly became a specialist in quasi-legal documents and contracts, and in commercial calculations about wages, production costs, profits and the like.”<sup>95</sup> Because the existing state of the law does not favour unions, however, operating within the legal sphere virtually precludes substantive change.

Legalism is also reinforced by a collective bargaining structure that is concerned with procedure rather than substance. The fragmentation in thought that separates procedure from substance is instrumental in diverting attention from substantive change to procedural tinkering. In this context, “union rights appear as privileges

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<sup>91</sup> *Ibid.* at 33.

<sup>92</sup> “Meat Packing,” *supra* note 66 at 400.

<sup>93</sup> Panitch & Swartz, *supra* note 5 at 19.

<sup>94</sup> J. Kelly, *Trade Unions and Socialist Politics* (New York: Verso, 1988) at 57.

<sup>95</sup> *Ibid.* at 56.

bestowed by the state, rather than democratic freedoms won, and to be defended by, collective struggle.”<sup>96</sup>

In addition to influencing the tactics which unions employ in their relations with employers, legalism shapes the internal structure of unions. Thus, “[t]he trade unionism which developed in Canada during the post-war years bore all the signs of the web of legal restrictions which enveloped it. Its practice and consciousness were highly legalistic and bureaucratic, and therefore, its collective strength limited.”<sup>97</sup> The result of both aspects of legalism is that any potential “rank and file militancy ... [is] channeled to a legalistic process completely controlled by the union staff, elected union officials, and the entire repressive and ideological state apparatuses.”<sup>98</sup>

Like the narrowing of bargaining objectives to improvements in wages, the argument that unions serve as a mechanism in the prevailing regime also flows from unions’ understanding of themselves as partners with management in the industrial relationship between employers and employees. In certain circumstances, the extent to which unions regard themselves as partners with management in a common enterprise is very apparent. “On occasion, individual unions will ally with the employers of their ... members to seek further governmental protection for their continued existence.”<sup>99</sup> Parties to a contract with capital, unions come to be concerned about the subject of their bargain: broadly, this means the existing state of industrial relations. In order for unions to operate within the collective bargaining system, they must develop a commitment to the existing regime.

This tendency of unions to develop a partnership with the power of state and capital is a result of the way that unionism developed in accord with the structure of capital. It is also a result of fragmentation. As has already been argued, “unions did not develop their organizational forms independently of capitalism: they developed under the formidable pressure of events and compulsions dependent upon capitalist competition.”<sup>100</sup>

An aspect of this development has been the alienation of union members from leaders. This has been termed the problem of oligarchy. This refers to a situation where union leaders, operating under capitalist

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<sup>96</sup> *Ibid.*

<sup>97</sup> Panitch & Swartz, *supra* note 5 at 20.

<sup>98</sup> F.R. Annunziato, “Commodity Unionism” (1990) 3:2 *Rethinking Marxism* 8 at 27.

<sup>99</sup> *Ibid.* at 28.

<sup>100</sup> Kelly, *supra* note 94 at 54.

conditions, come to behave like managers of corporations. Rather than serving as leaders of a revolutionary movement, union leaders function as efficient administrators and bureaucratic organizers. Trade unions are now an expression of, rather than a challenge to, class society.<sup>101</sup> To bargain effectively union leaders have needed to ensure that their members abide by the provisions of collective agreements. To this end, union leaders must exercise “internal discipline ... so that members would respect agreements signed with employers.”<sup>102</sup> The implication is that within a collective bargaining regime union structure is characterized by an internal tension: it is the tension caused by having to exercise control *over* workers in order to exercise control *for* workers.<sup>103</sup>

The partnership between unions and management assists in binding labour to the prevailing industrial, economic, and social structure. Unions aid in “the integration of working-class institutions into the existing power structure. In fact it is plausible to argue that formal unionism helps to mediate the dominant ideology to the working class in a way that renders it acceptable.”<sup>104</sup> Courts have been unambiguous in their expectation that unions are to assist in binding workers to the imperatives of capital.<sup>105</sup> Specifically, it is a union’s responsibility to secure stability and peace in industrial relations. Consequently, unions are expected to take every reasonable effort to prevent an illegal strike. As discussed above, legal strikes are defined very narrowly. The obligation is thus on the union to ensure that narrow economic demands are not transformed into broader political and social conflict:

Unions in a capitalist system which they accept, serve as tools of “capitalist integration” to channel and administrate labour protest in forms tolerable for the system ... . Imaginative reorganization of working conditions falls prey to the combined pressure of

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<sup>101</sup> P. Anderson, “The Limits and Possibilities of Trade Union Action,” in Clarke & Clements, eds., *supra* note 87, 333 at 334.

<sup>102</sup> *Ibid.* at 56.

<sup>103</sup> See Hyman, *supra* note 2 at 26.

<sup>104</sup> L. Clements, “Reference Groups and Trade Union Consciousness” in Clarke & Clements, eds., *supra* note 87, 309 at 323.

<sup>105</sup> See, for example, *OCAW, Local 16-14 v. Polymer Corp. Ltd.* (1958), 10 L.A.C. 31; (1959), 10 L.A.C. 51, aff’d [1961] O.R. 438 (C.A.), aff’d [1962] S.C.R. 338; *Dominion Bridge Co. Ltd. v. BSOIW, Local 786*, [1983] OLRB Rep. 1801; *Belmont Plastering Cox. DALI, Local 675, CJA*, [1987] OLRB Rep. 1347; *North Central Plywoods v. PPW-Canada, Local 25* (1985), 21 L.A.C. (3d) 180; and *Nfld. (A.G.) v. Nfld. Association of Public Employees* (1976), 12 Nfld. & P.E.I.R. 495 (Nfld. S.C.).

the centralized unions' adjustment to management's drive for individual productivity and stable employment.<sup>106</sup>

The state penalizes *irresponsible* action and creates incentives for voluntary *responsible* behaviour. As has been discussed, material and ideological power are interconnected. In this context, this means that the stick and the carrot can be used simultaneously. "[C]oercion and consent are not mutually exclusive state strategies."<sup>107</sup> An important aspect of responsible union leadership within the existing framework is suppressing radical and militant rank and file action. Such action is clearly dangerous. If not contained at an early stage it can spread and undermine existing relations. The regime creates incentives for union leaders "to suppress any sign of spontaneous militancy ... [and] to act as agents of social control over their members, rather than their spokespersons and organizers."<sup>108</sup> Legalizing unions has created an incentive for unions to operate within the collective bargaining regime and to develop a commitment to its maintenance.<sup>109</sup>

#### IV. CONCLUSION

It has been argued that the liberal pluralist interpretation of industrial relations offers an inadequate understanding of this subject. Because liberal pluralism is an expression of liberal thought, many of the assumptions that underlie its view of employee-employer interaction are common-sensical. We therefore do not recognize them.

It has also been argued that industrial relations should be spoken about in the language of power. Relations between worker and manager manifest a conflict of social classes. Their relations and their conflict extend beyond the sphere of the workplace or even the sphere of economics. The material advantage that those who control capital enjoy underlies their ability to influence dominant thought. An important way in which the state serves the interests of capital is by ordering and stabilizing the volatility that inheres in industrial relations. Collective bargaining simultaneously gives to workers while taking away.

Certification can be understood as a tool for fragmenting the potential power of labour's unity. It physically fragments the ability of

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<sup>106</sup> Herding, *supra* note 87 at 260, 263.

<sup>107</sup> Panitch & Swartz, *supra* note 5 at 43.

<sup>108</sup> *Ibid.* 19-20.

<sup>109</sup> *Ibid.*

workers to unite, and it perpetuates the fragmentation in thought that separates form from substance, economics from politics, and consciousness from action. Certification ensures that the structure of labour conforms to the organizational choices of capital.