

**Contemporary Collective Bargaining:  
How Well is it Working?**

**Presented by Tim Armstrong, Q.C.**

**21<sup>st</sup> Larry Sefton Memorial Lecture  
Woodsworth College, University of Toronto**

**March 6, 2003**

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***Introduction***

I want to say how honored I am to have been invited to deliver the 2003 Sefton Lecture on this, the 21<sup>st</sup> anniversary of its dedication. I have great respect for the sponsors and organizers, having had long connections of one sort or another with all of them.

The Centre for Industrial Relations has, over the years, made a unique contribution in producing knowledgeable industrial relations practitioners and providing guidance and insight to those in the legal community and elsewhere who work in the system. Linkages between the academic world and the rest of us are all too rare.

The corporate co-sponsor, Valleydene Corporation, founded by my good friend Ralph Barford, is, in many ways, a model Canadian corporation in its progressive approach to labour-management relations.

And of course tribute is due to the Steelworkers' Union. In my early days as a lawyer I worked with the Steelworkers, initially under the guidance of David Lewis, John Osler and Ted Jolliffe. More recently, I have had the privilege of working with the Steelworkers' International President, Leo Gerard, on several pioneering projects involving corporate restructuring and employee ownership and governance. The Toronto

Area Council and District 6 of the U.S.W.A. remain in the forefront in providing enlightened leadership to its members and to the movement at large.

Woodsworth College is also to be commended. David Lewis often spoke with deep admiration of the role that James Shaver Woodsworth played in our political history and in advancing the interests of social democracy in Canada. Woodsworth College, founded in his memory, has made a valuable contribution to the U of T's federated family of institutions – and, incidentally has graduated my youngest son, for which he and I are grateful.

Although you may think I am old enough to have known J.S. Woodsworth, I am afraid I did not – but I did have the privilege of knowing Larry Sefton, whose impact on the labour scene was, in the middle years of the 20<sup>th</sup> Century, profound and enduring – and profoundly effective in advancing the well-being of Steelworkers and all others whose lives he touched and influenced in so many positive ways.

I came to know and admire Larry during the early 1960s when the Jolliffe Lewis & Osler firm represented the Steelworkers in its titanic struggle with the Mine-Mill & Smelter Workers at Inco in Sudbury. He was then, and in memory remains, an iconic figure, representing the very best qualities of selfless leadership, high intellect, sound judgment and an abiding and deep-rooted commitment to social and economic justice in the workplace.

Larry led District 6 for 20 years, a period during which the District's membership more than quadrupled. He was the driving force in achieving recognition and breakthrough agreements at Stelco in the mid-1940s and later at Inco. His impact was not limited to Canada. The same leadership qualities were evident in his international activities, through his work with the International Metalworkers Federation. For all of these reasons, and many more, it is fitting that we pay tribute to the memory and achievements of Larry Sefton at this important annual event.

I hope I can make a suitable contribution as the twenty-first speaker in this Lectureship. Thanks to the staff of the Centre's library, I have had access to the impressive, indeed intimidating, remarks of many of my predecessors – at least those who spoke from a text. [I am told that often the most memorable contributions were those delivered extemporaneously. I used to be able to do that, after a fashion, but with advancing years and the death of so many brain cells, this becomes increasingly hazardous.]

In preparing for this evening, I have been greatly assisted by the Center's librarians and by many others: Reg Pearson and Jerry Meadows of the Ministry of Labour; Brian Burkett of Heenan Blaikie; Brian Smeenk of McCarthy's; Larry Stickland of the Grievance Settlement Board; Buzz Hargrove; Leo Gerard; members and staff of the Canadian Council of Chief Executives; and not least important, Warren Smith, President of USWA Local 1005, who drew my attention to an important study by the World Bank on collective bargaining. To all of them I express my gratitude. I know that I have

learned more from them than I will ever be able to impart to you in the lecture you are about to endure.

Rather than focus on a single topic, I intend to pose five questions relating to contemporary industrial relations. I will give you my views on each of them, in the hope that I am able to provoke some lively discussion at the conclusion of my remarks.

- 1. Has the case for unionization and the nature of collective bargaining in Canada changed since Larry Sefton's days? If so, in what ways? To the extent that there has been a decline in union density, what are the reasons?***

This is an enormous topic and much has been written on it. Many contend that new forces<sup>1</sup> have transformed bargaining as we knew it 50 years ago – increased global competition, fostered by trade liberalization; new technologies, especially in electronic communications; the decline in both the primary and resource sectors as well as massive restructuring in industrial manufacturing. These changes have been accompanied by rapid growth in the service sector, in information technology, in small businesses and

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<sup>1</sup> Progress has been made through national governments and supranational institutions, with the input of unions and employers, to address globalization in labour laws and employment standards. Within NAFTA and the EU, there is a recognition that trade liberalization and worker protection are linked. The ILO has taken a leadership role in developing global labour standards through its 1998 “Declaration on Fundamental Principles and Rights at Work”. The Canadian labour movement has been active in urging the unions in developed nations to negotiate with multinational employers on behalf of non-unionized workers in developing nations. Employers have responded by adopting voluntary codes of conduct, inspired by the ILO’s 1997 “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” and the OECD’s 1976 “Guidelines for Multi-National Enterprises”.

with that growth, has come a substantial increase in casual, seasonal and part-time employment, as well as in the number of self-employed. All these trends, it is argued, pose new and daunting challenges for organized labour<sup>2</sup>.

### ***The Impact of Globalization***

The popular conception is that “globalization” and the resulting increased competition from low wage, developing economies has cast serious doubt on the viability of the collective bargaining systems in the developed OECD countries. This thesis is examined at some length in a recent World Bank study “*Unions and Collective Bargaining: Economic Effects in a Global Environment*”, 2002, The World Bank, Washington, D.C. The authors, basing their findings on a detailed literature survey covering more than 1,000 primary and secondary studies, observe that if the right to collective bargaining can be shown to have *positive* economic effects, this will dissipate some of the heat in the “North-South” debate around the notion that collective bargaining gives an “unfair” cost advantage to those nations that do not have it. While their findings are in many respects inconclusive, there are some cautiously-stated positive observations in support of collective bargaining regimes. At the outset, the study notes that there *is* a positive

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<sup>2</sup> In the automotive sector, the penetration of non-unionized Japanese assemblers and their keiretsu-related parts suppliers, has posed new challenges for the Big Three and the CAW. In the 1970s, the Japanese share of the North American market (largely imports) was in the 7 - 8% range. Now Japanese imports and domestic transplant production account for more than 35% of the North American market. For the CAW, there has been a loss of some 20,000 members over the last 15 years. The Big Three (especially GM, which was slow off the mark with bloated and inefficient facilities and unappealing styles) have reacted by instituting more flexible production methods, with co-operation from both the UAW and the CAW. However, while agreeing to follow more flexible work rules, the CAW has resisted proposals for changes in compensation – such as lump sum payments in lieu of across-the-board wage increases, weakened COLA clauses and profit sharing – changes agreed to by the UAW in the U.S.

correlation between higher GDP and the presence of freedom of association and collective bargaining. The question of the extent to which collective bargaining contributes to the superior GDP performance is, however, difficult to isolate. To attempt to do so, the study focuses on the micro-level, comparing similar firms, union and non-union, across particular sectors. In making these comparisons, the comments concerning unionization include the following:

- *firms with “high quality” industrial relations, as measured by the number of grievances, the number and duration of strikes, etc., have, on average, high productivity.*
- *Unionized workers tend to receive more training than their non-unionized counterparts, especially company-related training.*
- *Voluntary job turnover is lower and job tenure is longer in unionized firms.*
- *Hours worked is lower among unionized workers.*
- *In Canada, there is evidence that unions have reduced discrimination against indigenous people.*
- *There is evidence that unions contribute to wage compression, narrowing the differential between the lowest and highest paying jobs, and also bring about a reduction in the overall pay gender gap.*
- *Countries with coordinated collective bargaining tend to be associated with lower and less persistent unemployment, less earnings inequality and*

*wage dispersion and fewer and shorter strikes. Note, however, that to assess this finding, a detailed examination is necessary of what is entailed in “coordinated collective bargaining”, a system under the author’s definition that does not appear to pertain to Canada.*

In addition to these World Bank study observations, reference should be made to the Steelworkers’ own globalization initiatives, which may be unique in the trade union movement. Recognizing the need to match transnational corporate structures, the USWA is forming international world bargaining councils. Some of these councils are company-specific: e.g., Goodyear, Bridgestone-Firestone and Michelin-Continental General. A World Rubber Council has also been formed which includes unions from eight former eastern block European nations. In response to the acquisition by some U.S. steel companies in Europe and Asia, the Steelworkers have also formed a Steel World Council, where representatives of the relevant national trade unions will be able to sit as observers in specific sets of negotiations. A key objective of these councils is to attempt to harmonize the non-economic “social infrastructure” issues which heretofore have been bargained in national isolation.

Similar work is also proceeding in the aluminum industry. The USWA has formed an internal Aluminum Working Group, comprised of staff and representatives from the U.S. and Canada. This group, working with the International Metalworkers Federation, intends to form an Aluminum World Council to deal with the large producers, Alcoa, Alcan, Picheney, as well as Kaiser and some of the smaller companies.

So the Steelworkers are themselves proactive in globalization, and it will be interesting to see the results of their collaborative efforts with their union counterparts in other jurisdictions. A concern in these and other areas is China, which now produces more steel, aluminum and tires than any other country. As Leo Gerard puts it, China is the “800 lb. gorilla” of world production and trade. Although nominally a member of the WTO, there are concerns about China’s compliance with trade rules, and, as is well known, there is no free trade union movement in China with which a dialogue can occur. The problem is compounded by the size and growth of the Chinese domestic market, which makes countries like Canada and the U.S. reluctant to criticize either its repressive internal political and social policies or its trade practices.

Returning to the World Bank report, it should be noted that there is a clear implication that for unions to maintain their relevance – and the support of existing and potentially new members – they must move away from their traditional adversarial postures and adopt more co-operative, collaborative and flexible approaches to collective bargaining and contract administration. Some say this is already happening and that by permitting

flexibility in workplace organization, unions in return are being given a significant role in strategic business decisions.<sup>3</sup>

### ***Collaboration and Bargaining Agendas***

Some unions have gone further than others in entering into collaborative arrangements. Examples frequently cited include Norske Skog Canada Limited and the Communications, Energy, Paperworkers Union in B.C.; Inco and the U.S.W.A. in Sudbury and in Thompson, Manitoba; Weyerhaeuser Company Limited and the I.W.A.; Canada Post and The Canadian Union of Postal Workers; Canfor and the I.W.A.; Ontario Power Generation and the Power Workers Union and the Society of Energy Professionals. In the Norske Skog situation, improved labour relations are said to be reflected in their last round of “mutual gains” bargaining, where a five-year deal (negotiated in 90 days) resulted in an 11% increase over the term of the agreement; employee contributions to the pension plan in return for greater union participation in the plan’s administration; and an employee bonus payable when the price of newsprint exceeds a threshold level.

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<sup>3</sup> Views are sharply divided on the extent to which unions are exhibiting genuine flexibility in areas such as job classifications and work assignments. There is a pervasive view in the management community that as the labour market has shifted to knowledge-based work, there is need for much more variation in job descriptions and more value-added performance. This, it is said, is especially true in the service sector that has provided much of Canada’s job growth in recent years. Management asserts that this has two implications. To quote from one management group with whom I consulted: “First, old-style, rigid job classifications are hard to define and inefficient to maintain. Even in traditional unionized industries like automotive assembly, new entrants have demonstrated an ability to function without unions by offering a superior balance between the employer’s need for flexibility and the employee desires for compensation, benefits and working conditions. Second, it is contended that most workers know when their contribution is in some respects unique. They want to be rewarded accordingly for their effort and contribution rather than for their classification, and they want flexibility to tackle new challenges and grow professionally. Thus, the decline in union relevance is both employer and worker driven; neither is served by a collective bargaining process built on homogenized worker classification and compensation.”

This may be an example of greater collaboration, but it is difficult to determine its real impact without knowing much more about the way in which the trade-offs actually affected the employees, economically and operationally, in their day-to-day activities. In any event, my impression is that any new spirit of collaboration is still the exception, rather than the rule – and that there has, as yet, been no sea-change in adversarial collective bargaining. Of course, agendas change. This year for example, private sector unions are predicted to be focusing on demands for greater job security and increased retirement income protection<sup>4</sup>. Management says that it will be looking for more flexibility in pursuit of increased operational efficiency, benefit plan cost containment and wage restraint. Some employers are seeking to implement compensation systems linked to performance, such as merit pay and other variable pay plans – gain-sharing, cash bonuses, and profit sharing.

In the public sector, there is, on the union's side, the same preoccupation with job retention, as governments and other public sector bodies and agencies continue to move to leaner organizational structures. As a result, there is a greater focus on demands for restrictions on contracting out, enhancing benefits for both active and retiring employees

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<sup>4</sup> The contours of benefit packages are also changing. In response to cutbacks in statutory protection, greater union emphasis is now placed on drug coverage, supplemental health benefits and retirement and supplemental employment benefits. Weakened legislative protection for unpaid wages in the case of insolvencies has brought this issue to the fore in some bargaining situations. And there is now much more emphasis on “equality” issues: training for women and minority groups; educational programs on human rights, including anti-harassment and support for day care.

and improving early retirement incentive packages.<sup>5</sup> Some of these important agenda items for 2003 bargaining are admittedly receiving greater attention, but few are new. Agenda changes in bargaining have always reflected changes in economic cycles, but are not necessarily signs of permanent structural, strategic or tactical changes in bargaining. That is why I say that I am skeptical that there has been any radical change in the long-term objectives of the trade union movement or the way in which they are pursued.

### *Wages*

Trade unions continue to play an important and constructive role in giving workers a collective voice in determining wages. I am not aware of any persuasive contentions that wage bargaining has had any negative micro- or macro-economic effects. Indeed, as John Dunlop has said, wage determination through collective bargaining, over the long term, tends to have a distinctly positive effect and results in a greater degree of stability and distributive fairness than would otherwise exist.

In Dunlop's view, wages are set by complex series of comparisons in the marketplace – across companies and between industries. Unions give employees a collective voice as to how these comparisons are made. There are leaders and laggards in various markets and industries, and unions tend to bring the laggards up to the leaders. This is a positive

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<sup>5</sup> Management representatives express concerns about the lack of “bottom line” discipline in public sector bargaining. One management group expressed its position to me as follows: “The fact is that union representation has remained strong only in the public sector, where the combination of effective monopoly power and the lack of accountability for bottom-line results has given unions more clout than in the private sector.”

contribution – unless, of course, wage levels become the driving force leading to unsustainable inflation.

I cannot recall that happening since the infamous Longshoreman's settlement and other similar double-digit settlements in the 1970s which gave rise to wage and price controls and the federal Anti-Inflation Board. Since then, there is no convincing evidence that collective bargaining has "taken wages out of or beyond competition", to use the lingo of the economists. I am not suggesting that wage structures across the economy are free from imperfections, distortions and inequities. But these exist because of the haphazard forces of the marketplace. Overall, collective bargaining operates to smooth out the distortions.

### ***Working Conditions, Training and Leadership***

Non-wage terms and conditions of employment, especially the establishment of fair working rules, emphasizing the importance of seniority, still rank high on organized labour's agenda. The benefits of an orderly and predictable governance regime in unionized workplaces is widely recognized. Rules that are sensibly formulated, consistently interpreted and applied, *and flexible enough to meet the changing conditions to which I have referred,*<sup>6</sup> make for a more productive enterprise, to the benefit of workers, management and the enterprise at large.

Collective bargaining continues to yield other positive contributions. I refer to the union's role in training, especially in the skilled trades in important segments of the industrial sector and throughout the construction industry, and its promotion of health and safety programs, one clear area where unions and management have a common interest

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<sup>6</sup> It is important, labour leaders urge, to look behind the language of the collective agreement to determine how operations are being handled on the shop floor. Where management requests for flexibility are reasonable, where communication is open, and when there is an atmosphere of trust, unions contend that they are prepared to accommodate legitimate requirements for flexibility on a day-to-day basis. The persistence of "rigidities" in collective agreement language is said to be retained as "back-up" protection in those cases where management's case for rule relaxation is not well-founded or properly communicated. A specific example cited was the demand by Daimler-Chrysler, in last fall's bargaining with the CAW, for changes in many long-established work rules, which would have permitted staggered shift schedules, a reduction in rest times, limits on job transfers, greater flexibility in the assignment of tradespersons and in the timing of annual model changes. The CAW resisted these changes, but contends that, as a matter of practice, the union will not insist on the strict enforcement of contractual work rules where management makes a sound case for exceptions in the interests of efficiency and increased productivity.

and where considerable progress continues to be made in labour-management collaboration.<sup>7</sup>

Mention should also be made of the capacity of well-led unions to mobilize employee support where they are satisfied that management's desire to introduce new methods and techniques for improving its competitive position is sound and justified. When employees are convinced, through experience, that their union is capable of successfully protecting and enhancing their legitimate interests, they will be much more likely to accept the union's call for support for productivity-enhancing management initiatives that might otherwise be resisted.

So in this era of globalization, with intensified competitive pressures and widespread restructuring and downsizing in both the public and private sectors, I believe that the role of unions is at least as important as it was when Larry was active in the movement. Indeed, in this particular period, when less reliance can be placed on government to intervene, either by statute or through enhanced programs, to provide support for workplace standards and their enforcement, it may be argued that organized labour has an

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<sup>7</sup> More than a decade ago, Zehrs Markets and U.F.C.W. Local 1977 entered into a partnership initiative for employee education. Together, they established a training center for workers, named after a former director of the U.F.C.W., Cliff Evans. The Center offers educational opportunities to union members in such wide-ranging areas as computer training, stress management and retirement planning. Fifteen years ago the Training Center graduated 47 students. By 2001, some 3,000 students were taking more than 30,000 hours of training. Other unions have established joint training programs in their collective agreements, focussing not only on skills training, but also on the importance of quality and productivity. In some cases, the curricula include the development and role of the union, the history of the company, the state of the economy and, in some cases, the specific competitive issues facing the sector in which the company operates.

even more critical role to play in guarding against the deterioration of equity, fairness and safety in the workplace.

### ***Union Density***

The level of unionization in the non-agricultural workforce in Canada has remained relatively constant at slightly above 30%. This is in marked contrast to the U.S. where union membership has declined from 24% in 1979 to just under 14% in 1998, and continues to fall. The decline in union density in the U.S. has been attributed to several factors, including vigorous and co-ordinated employer opposition to unions and to labour laws which provide less protection than ours to employees seeking representation rights. In this connection, mention should be made of the effect of the changes to the Ontario *Labour Relations Act* in 1995 on certification, which is now exclusively a vote-based system. In the years following the change, there was a drop of about 30% in the number of certification applications and a decrease in the success rate of applications from about 75% to 60%. At the same time, under the new rules, the success rate in decertification applications increased from about 40% to over 60%. It remains to be seen what the longer term effect on union density will be as a result of these statutory changes.<sup>8</sup> Some attribute the modest decline in Canada over the last two or three years to the fact that some unions are said to have lost touch with their members. A senior official of the

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<sup>8</sup> Legislative changes were also made in British Columbia with the enactment in 1992 of a new *Labour Relations Code*, which made organization easier. This was followed by a significant increase in certifications, from an average of 235 per year to over 400. In the federal sector, there has been a slight decline in the number of certification applications, whose success rate has remained close to 70%.

United Food & Commercial Workers was quoted in a recent Conference Board Outlook publication as saying “Our language does not resonate with the youth and, as a result, they are not joining unions.” However, whatever the difficulties may be, union density in Canada is certainly not in free-fall, as it seems to be in the U.S.<sup>9</sup>

2. *Aside from providing equity for the workers and efficiency and competitiveness for the enterprise, how well is the broader community – i.e., the public interest – being served by collective bargaining?*

This question is intended to raise the secondary but important issue of how well the parties are doing in making collective bargaining work effectively and avoiding adverse effects on the community at large. Too often, we think of collective bargaining in the narrower context of its impact on the bargaining parties and, in any given set of negotiations, whether the union or management wins or loses. It is important to remember that we all have a stake in the outcome of orderly collective bargaining in the key sectors of our economy, public as well as private. From a public interest perspective, it is important that key conflicts are resolved equitably and expeditiously, without the

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<sup>9</sup> Some management representatives place greater emphasis on the decline in private sector union density in Canada. For example, I was told that private sector union density has declined primarily because the labour market has shifted from industrial to post-industrial work, but unions, by and large, “have stuck with industrial-era strategies and philosophies. At a time when most workers performed undifferentiated tasks (cogs on an assembly line), collective action added to the market power of all members of the group. With the shift to knowledge-based work, all this has changed and some unions have failed to respond to the change.”

economic loss, inconvenience and disruption that occurs when bargaining fails and strikes or lockouts ensue.<sup>10</sup>

There is no simple answer to this question of collective bargaining's effectiveness from a community standpoint, given the variegated industrial, commercial and institutional topography in which bargaining takes place across the public and private sectors of the economy. Two random examples from recent times indicate some of the strengths and weaknesses of the system as it impacts the public.

***City of Toronto/C.U.P.E. Dispute, 2002***

Last summer, the dispute between the City of Toronto – Canada's sixth largest government, serving a population of close to 3 million people with an annual operating budget of over \$7 billion – and its two CUPE local unions broke down. I was called upon to act as mediator-arbitrator under the back-to-work legislation enacted as the garbage piled up and as the Pope's visit approached.<sup>11</sup> I was astonished at the sorry state of the relationship that existed. The parties had been bargaining for over six months *after*

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<sup>10</sup> Over the last 20 years, work loss due to strikes and lockouts has declined dramatically. In 1980, in the middle of my 10-year tenure as Deputy Minister of Labour, almost 1,000 work days per 1,000 employees were lost due to labour disputes. By 1985, the figure had dropped by more than one-half, to below 400, and, since 1995, it has halved again to below 200 days per 1,000 employees. This trend may support the view that the parties are resorting to more collaborative, innovative dispute settlement techniques.

<sup>11</sup> Neither unions nor management are enthusiastic towards legislatively-imposed interest arbitration. I received the following comment about the process from the management side: "Clearly where workers are in fact essential (where disruption of services would impose unacceptable social costs or physical dangers) and where no competition is possible (fire and police services...) there has to be some system of agreeing on fair compensation without resorting to strikes. However, the arbitration process itself has flaws, because it does not always take into account such factors as the employer's ability to pay, especially when the employer's revenue is from taxes rather than customer purchases.

their agreement had expired and had gone through intensive mediation. But well over 100 issues remained unresolved when I entered the picture – and this was after a 2-1/2 week strike! The problems included the failure of both sides to seriously bargain with a view to concluding a new agreement on or before the expiry of the old one; and their failure to prioritize items in dispute so the less controversial ones could be addressed expeditiously, thereby establishing a “settlement psychology” and clearing the path for serious and intensive dialogue on the two or three key items remaining. There was as well a lack of trust that characterized the relationship and prevented pragmatic resolution of the simplest, most innocuous of issues, even with the assistance of experienced mediators.

### ***C.A.W. and The Big Three Bargaining***

I am reluctant to make invidious comparisons, but the City-C.U.P.E. negotiations stand in marked contrast to the CAW’s negotiations last fall with the Big Three. I cite this CAW example as having a “public interest” component because of the critical importance of the automotive industry, which accounts, directly or indirectly, for approximately one out of every six jobs in Ontario. The economic consequences of bargaining failure in the automotive assembly talks are therefore critical. Similar comments could be made about Steelworkers’ bargaining in the integrated steel industry, in mining, and elsewhere, but I am focusing here on the automotive industry simply because I have more familiarity with it.

The three relationships that the C.A.W. has with G.M., Ford and Daimler-Chrysler are characterized, on both sides, by high levels of professionalism, sophistication and

pragmatism. The importance of communication, from the plant floor to the head office leadership levels, is well understood and practiced with skill. The C.A.W.'s long practice of setting strike deadlines – under the rubric “no contract, no work” – operates to avoid the prolonged, unfocused bargaining that the City and C.U.P.E. experienced. On the Union's side, the C.A.W. has an admixture of democratic, grass roots input and strong national leadership that further reduces the likelihood of miscommunication.<sup>12</sup> While the membership is given full opportunity to set the general parameters for bargaining, the three negotiating teams, led by the President and his National Office staff, are given sufficient latitude to negotiate trade-offs that, given the level of trust, are virtually certain to be ratified by the membership. The analysis of the cost of proposals and the capacity of the companies to absorb them, economically and operationally, are assessed by highly-qualified professionals on both sides. In those relatively rare situations where strikes have occurred, the causes are not attributable to communications failures, analytical flaws, or the failure to make timely decisions on key issues – all avoidable failures which contributed, in varying ways, to the meltdown in the City/C.U.P.E. talks.

It should be acknowledged that in the North American automotive assembly sector, the Union's leverage is substantial. A work stoppage in Canada has potential for continental disruption, given the high degree of industry integration and the dependence of the

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<sup>12</sup> Mid-contract communication is also critical. In key industrial sectors, many if not most Canadian union leaders now meet, on a regular basis, with their CEO counterparts to anticipate and where possible resolve issues that might otherwise accumulate and become a burden on an already overloaded bargaining agenda. This pragmatic communication/problem solving procedure does not seem to be prevalent in the public sector.

assemblers on just-on-time inventory systems. That said, little is left to chance in the auto industry talks and the risks of failure are substantially minimized in a carefully planned and orchestrated system, where the costs of failure to the parties themselves and to the economy at large are well recognized on both sides of the table.

3. *Apart from the bargaining process and the effect it is having on wage levels and working conditions, both directly for the organized employees and indirectly for the unorganized, how effective are existing mid-contract dispute resolution processes working – i.e., the grievance and arbitration processes – and what scope, if any, is there for improvement?*

An enormous body of arbitral jurisprudence has developed over the years since I was first involved as a counsel in rights arbitration in the early 1960s. This development, in my view, is a mixed blessing. I agree that it is important for the parties to have a body of case law to guide them in administering collective agreements and to alert them to the contractual language required to support their bargaining objectives. And I also agree that the quality and thoughtfulness of Canadian arbitration jurisprudence is generally quite high. However, the growing volume and complexity of arbitration decisions are a source of concern.

On the one hand, there is merit, psychological and practical, for both sides to have the benefit of clearly articulated written reasons for decisions. If you lose, you want to know why. Beyond that, recent court decisions indicate that comprehensible reasons for

judicial and quasi-judicial decisions may be needed to satisfy the requirements of due process: see *R. v. Sheppard* [2002] SCC, File No. 27439, where the Supreme Court of Canada observed that “the delivery of reasoned decisions is inherent in the judge’s role”. The Court added “It is part of his or her accountability for the discharge of the responsibilities of office. In its more general sense, the obligation to provide reasons for a decision is owed to the public at large.”

On the other hand, there is a troubling tendency on the part of those of us who arbitrate to apply overly legalistic reasoning to some issues – a tendency not in keeping with either the intent of our labour legislation or the interests of the parties. When matters get to arbitration, prompt and practical resolution of disputes contribute to stability in the ongoing relationship. Long, drawn out and costly proceedings have a contrary effect. Arbitrators, and I include myself, often lose sight of these practicalities and too frequently become more interested in exhibiting their erudition and wisdom.

Time permits me to cite only one example of many. The rule in *Browne v. Dunn*, often invoked by counsel, has, in my opinion, no place in labour arbitration adjudication. The rule was formulated in a 19<sup>th</sup> Century English court decision which prohibits the calling of evidence to contradict testimony given by a witness who has not been cross-examined on the point at issue. The rationale for the rule is that it is unfair to a witness to have his or her disputed testimony impugned unless he/she has been put on notice, through cross-examination, that the testimony will be contradicted. Had the rule been applied in a recent dispute before me, the grievor would have been denied the right to give her version

of the circumstances surrounding the very incident which led to her discharge – clearly, an untenable situation.

To my surprise, the reported Canadian arbitration cases dealing with *Browne v. Dunn* made no reference to the fact that the English courts have long recognized that because of the relative informality of the proceedings and the fact that lawyers are not always presenting cases, the *Browne v. Dunn* rule has no application to proceedings in magistrates courts. And even in more formal court settings, it has been authoritatively determined that an adverse witness, whether cross-examined or not, must be taken to be aware that his or her testimony on *the central issue in dispute* will be challenged by contrary evidence.

This is but one of many examples where an excessively legalistic approach may foul up the process. A couple of years ago I listened, with some skepticism, to a speech by Winkler, J., where he made the case for simplifying and streamlining the labour arbitration process. The parties, he contended, want speedy justice and have little desire for reasons for judgment, elaborate or otherwise. My skepticism was based on my belief that if you lose, it is important, especially in an ongoing relationship, to be satisfied that one's position has been understood and to know why it did not prevail. Nonetheless, I am now much more inclined to the Winkler view. Short, snappy reasons, issued with the least possible delay, serve the best interests of both parties. I also agree with a related Winkler theme, namely the desirability of a more interventionist, facilitative role by arbitrators. More often than not, it becomes clear from the opening statements what the

contours of a fair solution are likely to be. Barring objection from counsel, arbitrators should be encouraged to engage in active mediation efforts in those cases where they have a pretty clear idea what the outcome of a fully-litigated case would likely be.

This interventionist prescription, along with a plea for simpler decisions, is not universally shared. But the need for streamlining and simplifying is clear, compelling and urgent. This is especially true in relations like those that I encountered at the City of Toronto, where the costs of arbitration are truly staggering and where the litigation culture has operated to divert attention from other pressing substantive and relationship issues. At the City, there is what I call a “fatal attraction” to arbitration. The very able personnel on both sides revel in the cut and thrust of combat. We lawyers understand this attraction, where the adversarial juices are stimulated. But with notable exceptions involving important issues of principle and first impression, we are not serving the system well by the prolongation of the proceedings that results from lengthy, repetitive evidence and unnecessarily long and complex awards.

The problem becomes particularly acute where a substantial grievance backlog accumulates. As I observed in the recent CUPE award, over 3,000 grievances were awaiting arbitration when I entered the picture and some 460 were at the arbitration stage. This is symptomatic of a dysfunctional relationship. It appears that the City/CUPE backlog problem is now being tackled. Others have developed effective systems for expedited mediation/arbitration. There is a growing body of experience and commentary on how these systems work in practice. One particularly successful model is to be found

at the Ontario Crown Employees Grievance Settlement Board, where a former colleague at the Ministry of Labour, Larry Stickland, has done a superb job in virtually eliminating a backlog of over 20,000 outstanding disputes within less than two years. Let me be clear. I am not saying that conflict, *per se*, is necessarily bad. To the contrary, conflict often compels the parties to focus on the important issues and motivate them to work out solutions. However, if, as appeared to be the case at the City, it is not serving that purpose, then the parties are in need of the kind of therapeutic interventionist assistance from third party facilitators that has been successfully employed at the GSB.

4. *What are the positions of unions and management in Canada towards areas beyond the scope of traditional collective bargaining? More specifically, how do the parties approach organizational change and the participation by employees in matters traditionally thought to be within the exclusive prerogative of management? What advantages are there to employee ownership?*

#### ***Organizational Change/Quality of Working Life***

These are contentious issues that have caused sharp divisions within both the labour and management communities. The central question can be formulated as follows: Is it better to follow Taylorism, where the command and control style of management prevails, maintaining a clear demarcation between the role of managers and workers? Or are those proponents of organizational change – whether trained in London’s Tavistock Institute, in the Wharton School in Pennsylvania, or on the shop floor of a Japanese automotive assembly plant – correct when they advocate greater employee involvement in work design and re-design, with semi-autonomous, multi-skilled work groups or

teams having responsibility for work assignment and self-assessment? Are the latter group correct when they contend that such new methods of work organization operate to improve the quality of working life? Are such new systems made more attractive when gain-sharing is made part of the package?

These issues are not new to the Ontario industrial relations landscape. In the 1970s, employers and unions in such diverse fields as retail grocery chains (Steinberg's) and the petrochemical industry (Shell Canada) were embracing this new wave of experimentation, in each case with the support of their unions. In the Ontario government, we established the Quality of Working Life Centre, headed by a renowned scholar and practitioner from the University of Leyden in the Netherlands, Hans van Beinum. The Centre and its activities were under the governance of a tripartite industry/labour/government board. The private sector participants came from the most senior leadership levels. Union representation included the OFL, the Steelworkers, the CAW, the Communications Workers and OPSEU. Board members engaged in intensive on-site study and evaluation of work organization and collective bargaining practices in the U.K., Sweden, the Netherlands, France, Austria and Germany. These studies involved assessments of various co-determination systems, including the German supervisory boards, with worker members, and enterprise works councils. The director and his staff initiated some pilot projects here in Ontario, with mixed results.

After about six years of experimentation, the initiative came to an end, not because of the withdrawal of government funding support, which was substantial, but because both

labour and management decided that the risks of greater collaboration in workplace change were greater than the potential benefits. For its part, organized labour decided not to run the risk of being co-opted to an agenda that it feared was driven primarily by a desire by management to increase productivity and reduce labour costs by breaking down or eliminating rigid job classifications. Management, on the other hand, was equally apprehensive about shared decision-making and the concomitant obligation to share knowledge and information that had traditionally been treated as confidential.

By the mid-1980s, the philosophy of the CAW, in particular, had crystallized into a hard-line position. At the CLC convention in or about 1985, the CAW's position prevailed and thereafter labour's formal stance was that it opposed becoming involved in corporate management, at any level. While some local unions continued experimenting in QWL projects, these became very much the exception and both management and labour reverted to their traditional adversarial positions.

Over the past decade, I have detected little appetite on either side for the revival of organizational change experimentation involving structured union/management collaboration. There are the examples to which I referred earlier, cited by the Conference Board of Canada, by Human Resources Development Canada, and others. But these, in my view, remain exceptions to what is still, very largely, the traditional adversarial approach. Where change has occurred, my sense is it has by and large been imposed by

management, sometimes with the union's passive acquiescence and sometimes over its objections.<sup>13</sup>

### ***Employee Ownership***

I have your International President, Leo Gerard, to thank for my involvement on the boards of directors of two companies, where employees, through their unions, held majority ownership. However, my experience and observations are unlikely to inspire much confidence in the prospects for advances on this front. From 1993 to 1995, I was a member of the board of directors of Interlink Freight Systems Inc., the employee-owned successor to CP Freight and Transport. Under the weight of intense competition, Interlink sought protection in 1995 under the *Companies' Creditors Arrangement Act*, survived for another year under the direction of a restructuring officer, and then went bankrupt. From 1995 to 2001, I served as a board member of the restructured Algoma Steel, the majority shares of which were originally owned by the Steelworker employees of Algoma. This first Algoma restructuring succeeded in large measure due to the determination and leadership of Leo Gerard. However, by 2001, the Steelworkers' employee ownership had been diluted to somewhere below 20%, the bondholders having

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<sup>13</sup> With or without union cooperation, there are signs of growing determination on the part of management to effect necessary organizational change. As one management commentator told me: "The process of organizational change being driven both by global competitive pressures and the potential of new technologies is having a profound impact on the organization of work in the private sector. This process varies between employers, but I think it is fair to say that there is a significant trend toward the delayering of hierarchies and the empowerment of individual workers and teams. Flexibility, adaptability and creativity have become vital to corporate survival and growth. Especially in the public sector, however, the thrust of union strategy has been defensive, a short-sighted effort to maintain rigidities and classifications and work rules and conformity in compensation between individuals – objectives that serve the interests neither of employers nor, increasingly, the desires and long-term interests of their members."

become the *de facto* owners and the company was again restructured. While it is no longer an employee-owned company, the employees have better and more meaningful lines of communication with management.<sup>14</sup> The real achievement at Algoma is not only survival – a quite remarkable consequence in itself – but also the fact that Algoma was in the forefront of the restructuring which has subsequently been found to be essential in many sectors of the “old” economy. The result is that there is now in Sault Ste. Marie a modernized and efficient mill capable of producing quality steel at relatively low costs per tonne. This is not to suggest that Algoma’s long-term survival is assured, given the uncertain state of the market, the debt load and the less than optimal location of the mill. But the fact that it has survived makes it, in the eyes of many, a remarkable example of what can be achieved when governments, unions and industry collaborate.

Notwithstanding these positive features, I would be less than frank if I were to say that my experiences at Interlink and Algoma have convinced me that employee ownership is the wave of the future. The Steelworkers are to be commended for their imaginative risk-taking by participating, through employee ownership, in various steel company salvage

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<sup>14</sup> The management community is by no means universally hostile to certain forms of employee ownership, as the following comment made to me indicates: “It is widely accepted in corporate governance circles that share ownership (as opposed to the granting of stock options) remains an important means of aligning the interests of directors and managers with those of shareholders. The same rationale continues to apply to ownership of equity by employees at all levels. When individuals have skin in the game (not necessarily large in absolute amount, but significant in relation to their income and assets) they will pay more attention to the viability and success of the enterprise as a whole. Where a company is in financial difficulty, employee share ownership exchanged for concessions may help, but only if it in fact leads to a real commitment on the part of the union to greater flexibility. The experience to date in the airline sector (in Canada and the United States) suggests that union share ownership and board representation has not been sufficient to rescue an otherwise doomed business. It is not enough for employees and unions to become owners; they must also be willing to think and act like owners.”

operations, at Algoma and more prominently in the U.S., and for their far-sightedness in making concessions that have kept troubled companies afloat and retained jobs that would otherwise have disappeared. The Union's success in some of these endeavors may have been more encouraging in the U.S. than in Canada. However, even in the early years following the first restructuring at Algoma in 1992, when the operation was profitable and when the stock price was rocketing upwards, I saw no radical move towards a new system of co-management, either on the shop floor or in the executive suite. There were certainly improved communications, more open information flows, greater co-operation in safety and environmental matters, but traditional collective bargaining continued, as did the grievance and arbitration process, as well as the other hallmarks of a traditional adversarial relationship. I know there have been more successful ventures such as Spruce Falls Power and Paper, Creo Products, Great Western Breweries and some others. For those who wish to read a thoughtful analysis of Canadian employee ownership initiatives, I commend a recently published book by Carol Beatty and Harvey Schacter entitled *Employee Ownership: The New Source of Competitive Advantage*. Those authors take a positive view of all of the cases they examined, except for Interlink. My view is less sanguine. I believe that whatever the future may hold, employee ownership will remain a ripple on the surface of Canadian industrial relations, at least for the foreseeable future.

5. ***What role are unions currently playing in formulating, or influencing, public policy in Canada, not only in reference to labour relations laws, but also on the broader spectrum of laws that are of principal interest to union members – e.g.,***

*health care, education, social assistance, the environment and, since Enron, corporate governance?*

I should declare my strong bias on this issue up front. I am an enthusiastic, unreconstructed and unapologetic neo-corporatist. I believe that in the long run – when, as Keynes reminded us, we will all be dead – the most satisfying, productive, efficient and equitable societies will be those where public policy is formulated in a truly collaborative manner – where governments, management and labour sit down together and work through a policy agenda where the interests of stakeholders are, to the extent possible, balanced and reconciled in a fair and workable manner. If other groups should be included, they can be added, but if the labour and management perspectives are as broad as they should be, and narrow and parochial postures are avoided, they should be able to bring to the table a broad spectrum of interests – such as those of environmentalists, minority groups, and others.<sup>15</sup>

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<sup>15</sup> Some in management remain highly skeptical about the capacity of unions to rise above what is described as “their narrow parochial interests and contribute positively and impartially to public policy dialogue.” The following comment made to me expands on this view: “Union interest in public policy remains ostensibly driven by social democratic values, but in practice has shrunk to narrow self-interest. Health care unions fight for more money for public health care, ostensibly to shorten waiting lines and improve the quality of care, and then immediately seek large wage increases that soak up the new funds. Teachers fight for public education, but seek more money without any commitment or willingness to break out of the rigidities that hamper innovation and that are clearly needed to deliver better education outcomes for our children. Taken together with the continuing institutional link with a political party that has ceased to influence policy formulation, and with the decoupling of the values of union leaders and their members, unions as a group have steadily lost credibility in broader discussions about what public policy options would be best for the country.”

With rare exceptions, the federal government has not had a convincing record of engaging in meaningful consultation. However, I understand that when the *Canada Labour Code* was being amended a couple of years ago, the consultation process was quite effective. It is to be hoped that this trend will continue. There are certainly precedents that prove its worth – most of the Scandinavian countries, Germany, Austria and, despite all the negative publicity associated with its recent economic difficulties, Japan, where I lived for four years and observed the system first-hand. In recent years, our political system has not really enfranchised the major labour interest groups in broad public policy formulation. During my years in the Ontario government – 1974 through 1992 – some genuine efforts were made to seek significant labour/management input into policymaking. Shortly after I joined the Ministry of Labour in 1974, Premier Davis established the Premier’s Council, comprised of a broadly representative group of senior leaders from various sectors of society. This initiative was continued, in a more complex and arguably less effective organizational structure, under Premier Peterson and later under Premier Rae. To my knowledge, Premier Harris disbanded the Council, presumably because of the fixed agenda of the Common Sense Revolution, which can hardly be characterized as the product of consensual consultations. I am simply not aware whether Premier Eves has revived the equivalent of the structures created by Messrs. Davis, Peterson and Rae. If, as seems to be the case, he wishes to replicate the Davis years, it may well be on the Eves’ agenda. I certainly hope so.

I can give you one small but not, I think, insignificant example of the value of balanced tripartite public policymaking. In the early 1980s, there were some troublesome

bargaining failures, accompanied by picket line violence, resulting from disputes about union security – more specifically, demands by unions for automatic dues check-off. The unions argued that in a collective bargaining system, where all members of the bargaining unit benefit from negotiated improvements, everyone should contribute to the costs associated with bargaining. And since this was not a cost item for the employer – except for the minor administrative costs of deduction and remittance – unions claimed that it should not be an issue for bargaining but should be legislated as a matter of right flowing from certification.

This matter was openly discussed with labour and management. The employer's preferred position was to resist the automatic check-off, but during discussions it became apparent that if the check-off was to be legislated, management would expect some meaningful statutory *quid pro quo*. As it happened, management at the time was concerned by the fact that some “final offers” that might well be acceptable to employees were being unjustifiably withheld from testing through membership ratification votes. The result, according to the employers, was that work stoppages were being unnecessarily and wastefully prolonged.

It became apparent that there was both theoretical and practical merit in both substantive proposals. The government was therefore able to enact a “balanced” amendment package. Neither side was ecstatic, but the trade off was accepted without rancour. It would have been impossible to achieve this trade off had it not occurred in the

collaborative, non-polarized environment that the Davis government's tripartite approach had engendered.

Critics of tripartite or multipartite consultation argued that it "panders to special interest groups".<sup>16</sup> The federal government, in particular, seems to favour town hall type forums, e-mail dialogue and other methods of so-called "grassroots" consultation. A current example, initiated by the federal government, is the Department of Foreign Affairs' strategy to formulate a new framework for Canada's international affairs strategy. This approach, to me, is a poor substitute for drawing upon the very considerable store of institutional knowledge and expertise in a systematic, structured way. Union and management organizations like the Canadian Labour Congress, the Canadian Council of Chief Executives, at the federal level and many others at the provincial level should be meeting *together* with senior politicians and public servants on a regular basis to discuss current policy issues, with a view to exploring common ground and, where possible, reaching consensus. Holding public meetings, soliciting e-mail comments and other *ad hoc* populist and staged consultation events are all essentially public relations exercises.

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<sup>16</sup> The World Bank study does not appear to share this concern. It states, in part: "A compelling argument is that workers should have a fair share of the benefits associated with economic growth and when output falls, they should not be penalized for crises for which they are not responsible. *The best way for governments and the international community to protect workers' interests and their families' welfare may be to promote economic efficiency and mechanisms that ensure a fair distribution of efficiency gains. The involvement of social partners may be a pre-requisite for designing and implementing policies that reflect the preferences of society at large.*"

I referred earlier to the Japanese consultative model involving labour and management. I have written and spoken elsewhere about how this system operates in practice. Skeptics will say that the Japanese economic system has broken down and is now largely dysfunctional. For those that know Japan, and are familiar with its resilience, this is at best a premature judgment on an economy which, in the 50 years following World War II, experienced the most rapid economic growth of any nation in history – and is still the second largest and most powerful economy in the world. And the participatory role played by both labour and management, collaborating with the Japanese government in broad policy formulation, contributed to that remarkable success story.<sup>17</sup>

### ***Conclusion***

In closing, let me address the thread which runs through all five questions, namely the evolution of collective bargaining in Ontario and its present state. Since 1945, my sense is that there have been three broad phases in industrial relations and collective bargaining in Ontario.

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<sup>17</sup> For an elaboration of the Japanese system in the labour relations field, see T.E. Armstrong, Reprint Series No. 81, Industrial Relations Center, Queen's University, October 19, 1988, *Japanese Consensus Methods and Their Relevance to Canada*.

- *From 1945 until the mid-1970s, the atmosphere was quite confrontational, as evidenced by hard-fought certification battles, frequent lengthy and acrimonious strikes, often accompanied by picket line turbulence.<sup>18</sup>*
- *By contrast, the period from the late 1970s through the 1980s was more tranquil and the parties were more accommodating. Strikes became less frequent. Conflict at the bargaining table diminished and settlements were achieved with less difficulty and rancour.*
- *In the 1990s, several forces converged to contribute to the return to a more polarized bargaining environment. Trade liberalization, accompanied by increased global competition, led to wide scale restructuring and downsizing, especially in some of the older, more sclerotic manufacturing industries. This tendency was fed, in Ontario, by pendulum-like changes in our labour laws – a marked swing to the left under the Rae government, following by an equally radical retrenchment to the right in 1995 under the Harris government. As has been argued by Kevin Burkett in an earlier Sefton Lecture, these public policy gyrations*

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<sup>18</sup> Friday afternoons came to be known at my firm in those days as “ex parte injunction days”. Employers would find a spare judge and bring injunction applications to limit picketing to one or two employees at each plant gate. Unions might get several hours advance notice, and union counsel would argue, usually unsuccessfully, that the limitation sought was unjustified. This was also a period when picket line incidents frequently occurred, where police were routinely involved, and when, on occasion, court injunctions were ignored by strikers. The cases of Oshawa Times, Fleck Manufacturing and Tilco Plastics come to mind. And the deep divisions between the parties were mirrored in the nature of the advocacy. David Lewis vs. Norman Mathews was invariably a battle of titans – and there were others, like David Lloyd George Jones and later my partner, Len MacLean, who gave no quarter and took no prisoners. Further fuel was added to the fire during this period when wage and price controls were introduced in the mid-1970s.

*sent conflicting and destabilizing signals to the bargaining parties.*

- *Now, in the third year of the new century, there seems to be more civility and sophistication – and less emotion – in the bargaining process, at least in the private sector. Bargaining based on mutual interest in achieving enterprise competitiveness, together with the unions’ focus on retention of employment, is more common. I have at least one caveat to this optimistic assessment. There is some spill-over from the U.S., where organized management has less tolerance for unionization than exists in Canada. This impacts on those Canadian-based firms that are American-owned or controlled.<sup>19</sup>*

And finally, the assumption that globalization has made collective bargaining in the developed nations anachronistic and unsustainable is not borne out by any empirical evidence of which I am aware. To the contrary, the study by the World Bank – some would say an unlikely source of support for the merits of unionization – indicates otherwise. Nevertheless, most agree that there is a need for the parties and for the system to adapt to and accommodate rapidly changing conditions – and especially to address the

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<sup>19</sup> In the Hamilton area, for example, a half dozen or more U.S.-owned companies have recently been closed by their American parents for reasons that are not entirely clear. Another has been on strike for two years, with no sign of settlement. These are all Steelworkers’ plants and there are other numerous examples, both with the Steelworkers and other unions. The Canadian advantages which I used to cite in Tokyo – well-trained and productive workers, lower employer benefit costs under our medicare system, the favourable exchange rate, and so on – have not operated to preserve these closed plants. Although I have seen no studies on the issue, my instinct is that post-9/11, there may well be a nationalistic, patriotic surge favouring industrial consolidation in the U.S. “homeland”.

need for flexibility and innovation, the imperatives dictated by the new global context in which we are all operating.

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