CLMR
CENTRE FOR LABOUR MANAGEMENT RELATIONS

Ted Rogers School of Management
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Room TRS-2-027, 8th Floor
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September 9, 2015

To: Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour

From: Centre for Labour Management Relations (CLMR)
Ted Rogers School of Management, Ryerson University

Re: Comments for consideration to The Changing Workplaces Review, Ministry of Labour

The Centre for Labour Management Relations (CLMR) was established at Ryerson University in May 2010. The Centre is funded by sponsors from organized labour and the corporate sector. The mission of the CLMR is to promote collaborative, ethical, entrepreneurial, proactive and sustainable best-practice labour management relations in Canada through funding ground breaking research and transferring knowledge to receptor communities. In order to achieve this mission, the Centre hosts events that bring together leaders from external organizations such as unions, private and public sector employers, and government, to explore important questions in an environment supportive of meaningful discussion and participation. Events have been held around topics such as pension reform, pay equity, and precarious employment.

CLMR also provides financial support to Ryerson University faculty for research activities in the realm of labour management relations. So far, the CLMR has funded close to 50 research projects on topics related to compensation and benefits, pension management, corporate social responsibility, disadvantaged groups, diversity and equity, labour market economics, and labour history. We would be happy to provide additional information on any of these topics (see **attachment #1** on page 7 for a listing of all funded research).

We have identified several internal and external research projects we believe relate closely to the scope of the Ministry of Labour's Changing Workplaces Review, and will provide short summaries for the identified projects, along with a linked attachment to a more in-depth document.

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1. Resisting Precarity in Toronto's Municipal Sector: The Justice and Dignity For Cleaner's Campaign (page 11)

Dr. Jenny Carson (Ryerson University)
Dr. Myer Siemiatycki (Ryerson University)

"This paper examines a relative rarity in recent Canadian labour-state relations: the successful resistance by public sector workers and their allies to government-driven employment precarity. At stake was Toronto Mayor Rob Ford's determination to contract out a thousand jobs held by city cleaners. In response, the cleaners and the city's labour movement launched a "Justice and Dignity for Cleaners" campaign to preserve these jobs as living-wage employment. Effective coalition building behind a morally compelling campaign, together with some fortuitous political alignments, forestalled city efforts to privatize a significant yet undervalued segment of the workforce. This examination of the Justice and Dignity for Cleaners campaign reveals that resistance to precarity is not futile, notwithstanding some attendant ambiguity of what constitutes a labour victory."

2. Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context, commissioned by Law Commission of Ontario (page 29)

Dr. Andrea M. Noack (Ryerson University)
Dr. Leah F. Vosko (York University)

"This study maps the prevalence of precarious jobs in Ontario's labour market over the decade long period between 1999 and 2009. At the provincial level, there is limited awareness of the different permutations and combinations of key features of labour market insecurity identified with different employment statuses (e.g., self-employment or paid employment) and forms of employment (e.g., part-time or full-time, temporary or permanent paid employment) and their prevalence among differently situated workers, both workers in different industries and occupations and in different social locations. This report aims to fill this knowledge gap, and thus is a necessary step towards correcting the disjuncture between labour market realities and the model upon which many provincial labour regulations and policies are premised. To this end, in the analysis that follows, we aim to answer four questions about precarious jobs in Ontario: i.) How has the structure of the Ontario labour market changed from 1999-2009, particularly in relation to the prevalence of part-time and temporary forms of paid employment and solo self-employment, forms of employment which are typically identified with precarious jobs?; ii.) How prevalent are the different features of labour market insecurity in the Ontario's labour market, and how has their prevalence changed from 1999-2009?; iii.) In what sectors, industries and occupations are precarious jobs most prevalent?; iv.) What are the socio-demographic characteristics (gender, ethnicity, immigration status) of people who hold precarious jobs and how has this changed from 1999-2009?"

3. An Immigrant All Over Again? Recession, Plant Closures, and Older Racialized Immigrant Workers: A case study of the workers of Progressive Moulded Products (page 89)

Dr. Winnie Ng (Ryerson University)
Dr. Aparna Sundar (Ryerson University)
Dr. Grace-Edward Galabuzi (Ryerson University)
Dr. Sedef Arat-Koc (Ryerson University)
Salmaan Khan (Ryerson University)
Sareh Serajelahi

> "This study traces the trajectory of a sample of workers over the five years since they lost their jobs at Progressive Moulded Products, an auto-parts manufacturing company in Vaughan. A large majority of PMP workers are racialized immigrants and a significant proportion were over 45 years of age when they lost their jobs. The study documents their experiences with re-training and re-employment, accessing services, working through temporary employment agencies, dealing with barriers to employment, and living with unemployment and precarious employment. While there are a growing number of studies that document the increased prevalence of precarious work, vulnerable workers, and the working poor in southern Ontario, this study is unique in providing an account of the experiences of a group of workers who transitioned from relatively secure and well-paid standard employment to precarious work and poverty wages."

4. Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee (page 181)

Dr. Patricia Sánchez Abril (University of Miami)
Dr. Avner Levin (Ryerson University)
Alissa Del Riego, J.D. (Harvard Law School)

> "Social media and mobile communication technology have blurred the boundaries between work and private life. Employees are increasingly expected to be available for work outside of traditional hours and outside of the physical workplace. Employees are also increasingly held accountable for their conduct outside of work that is captured on social media. At the same time research demonstrates that employees continue to have expectations of a private life outside of work and to have expectations that their activity on social media will have little to no implication for their work. A new declaratory standard of employment is required to re-draw and re-sharpen the boundaries between work and private life and to confirm that in Ontario employees have a right to a life separate from work. The new standard should offer reasonable protection for the online conduct and expression of employees, and establish limits on the availability of employees for work outside of the regular workplace and outside of regular work hours. The attached papers provide further discussion of the ongoing expectation of employees in regards to their private life as well as attempt to articulate a standard that would balance employee rights and employer interests."

5. Unions and Temporary Help Agency Employment (page 243)

Dr. Timothy Bartkiw (Ryerson University)

"Temporary help agency employment is a peculiar and often precarious employment form that has become increasingly salient in Canada in recent decades. This article examines the effects of the expansion of this employment form upon labour unions, as well as union responses to this phenomenon. Using a qualitative exploratory method, various effects upon union organizing and representation activities are outlined, as are a range of union responses to the phenomenon."

6. Baby Steps? Toward the Regulation of Temporary Help Agency Employment in Canada (page 267)

Dr. Tim Bartkiw (Ryerson University)

"This paper provides a critical examination of recent policy developments in Canada towards the regulation of temporary help agency employment in Canada. The contextual description provided includes analysis of recent trends in the growth of temporary help agency employment in Canada, and a review of emerging labor policy concerns. Policy "problems" are identified, under explicit normative assumptions provided in the paper. Subsequently, the paper then provides an assessment of the trajectory of Canadian policy reform through a review of four key policy process "moments" within three different regulatory jurisdictions in Canada (the provinces of Ontario and Quebec, as well as the Federal jurisdiction), which collectively reveal the nature of recent policy discourse and the trajectory of policy development. Chronologically, these four moments were the establishment by the Quebec provincial government of the "Bernier Commission" and the publication of the "Bernier Report" in 2003; the establishment of the Federal Labour Standards Review Commission by the federal government (the "Arthurs' Commission") and the publication of the "Arthurs' Report" in 2006; the sponsoring of Ontario's Bill 161 in 2007, a private member's Bill that was ultimately not passed by the Ontario legislature; and the legislative passage of Bill 139 in Ontario in May 2009. It is argued that in light of the overall context, including salient policy concerns and contrasting developments in Europe, recent Canadian developments and dialogue are comparably minimal, yet reveal aspects of a pattern in Canadian policy trajectory or, the direction of "baby steps" in this domain."

7. Response to Changing Workplace Review questions 3, 4, and 12 (page 311)

Dr. Pnina Alon-Shenker (Ryerson University)

> Dr. Alon-Shenker is an Associate Professor in the Department of Law & Business at Ryerson University, and founding Academic Director of Ryerson Law & Business Clinic. She has written a detailed and informed response to Questions 3, 4, and 12 raised in the "Guide to Consultation."

8. Ryerson University Office of Equity, Diversity and Inclusion (page 429)

This submission makes suggestions for changes to the Ontario ESA that would make it more inclusive by summarizing relevant legislation from other jurisdictions.

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References

Bartkiw, Timothy J., *Baby Steps? Toward the Regulation of Temporary Help Agency Employment in Canada*. Comparative Labor Law & Policy Journal, Vol. 31, No. 1 (October 2009): 163-206.

Bartkiw, Timothy J., *Unions and Temporary Help Agency Employment*. Relations Industrielles/Industrial Relations, Vol. 67, No. 3 (September 2012): 453-476.

Carson, Jenny and Siemiatycki, Myer., *Resisting Precarity in Toronto's Municipal Sector: The Justice and Dignity for Cleaners Campaign*. Just Labour: A Canadian Journal of Work and Society 22 (Autumn 2014): 168-185.

Ng, W., Sundar, A., Galabuzi, G.E., Arat-Koc, S., and Khan, S., *An immigrant all over again? Recession, Plant Closures, and older racialized immigrant workers*. Funded by the Centre for Labour Management Relations, Ryerson University and Unifor (2013).

Noack, Andrea M. and Vosko, Leah F., *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context*. Research Report: Law Commission of Ontario. Toronto: ON. Available at: http://www.lco-cdo.org/en/vulnerable-workers-call-for-papers-noack-vosko

Sánchez Abril, Patricia, Levin, Avner and Del Riego, Alissa., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*. American Business Law Journal, Vol. 49, No. 1 (January 2012): 63-124.

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List of Funded Research Projects

Compensation, Benefits, Incentives and Pensions Management

Kim Bates (Ryerson University)
- *High Performance Manufacturing in an Aging Canada*

Murtaza Haider (Ryerson University)
- *How Much of Work-Life Balance is Impacted by Commuting to Work?*

Ian Sakinofsky (Ryerson University and Peter Danziger (Ryerson University)
- *The Effect of Progress-Through-The-Ranks (PTR) Salary Increments on Total Salary Mass*

Corporate Social Responsibility

Shane Dixon (Ryerson University), Patrick Neumann (Ryerson University), Anna-Carin Nordvall (Umea University) and Wendy Cukier (Ryerson University)
- *Consumer Attitudes in Purchasing Decisions: A Driver for Healthy Working Conditions?*

Shane Dixon (Ryerson University), Patrick Neumann (Ryerson University) and Cory Searcy (Ryerson University)
- *Corporate Social Responsibility and Work Environment Reporting: How Are Companies Reporting on the 'Interface' Between Labour and Management?*

Shane Dixon (Ryerson University), Patrick Neumann (Ryerson University) and Cory Searcy (Ryerson University)
- *Examining Work Environment Reporting: Comparing Corporate Social Responsibility Leaders and a Sample of Randomly Selected TSX Companies*

Shane Dixon (Ryerson University), Patrick Neumann (Ryerson University) and Cory Searcy (Ryerson University)
- *Examining Managers' Conceptions of Work Environment in Corporate Social Responsibility Reporting*

Shane Dixon (Ryerson University), Patrick Neumann (Ryerson University) and Cory Searcy (Ryerson University)
- *Examining Quantitative Indicators of Work Environment in Corporate Social Responsibility Reports – Comparing Top Performers to Randomly Selected TSX Companies*

Chris MacDonald (Ryerson University)
- *Mechanisms for Achieving Value Alignment in Labour Relations*

Kernaghan Webb (Ryerson University)
- *Examining References to International Labour Instruments by Leading Socially Responsible Firms in Canada*

Disadvantaged Groups

Patrizia Albanese (Ryerson University)
- *Union - Management Collaboration in Youth Employment and Skills Development Programs*

Pnina Alon-Shenker (Ryerson University)
- *Should Cost Considerations Constitute a Legitimate Justification for Age Discrimination Against Older Workers*

Pnina Alon-Shenker (Ryerson University)
- *Re-employment Challenges Of Older Workers: Has Anti-Age Discrimination Law Been Effective?*

Rupa Banerjee (Ryerson University), Anil Verma (University of Toronto) and Jeffrey Reitz (University of Toronto)
- *Racial Minority Immigrants in Canada: A Longitudinal Study*

Rupa Banerjee (Ryerson University) and Ana Virginia Moreira Gomes (Queen's University)
- *Domestic Workers' Voice: The Guarantee of the Fundamental Right to Freedom of Association and Collective Bargaining in Canada*

Rupa Banerjee (Ryerson University) and Philip Kelly (York University)
- *Life After the Live-In Caregiver Program: The Labour Market Integration of Former Caregivers in Canada*

Rupa Banerjee (Ryerson University)
- *Transition From Non-standard To Standard Employment: Prospects for Women, Immigrants and Visible Minorities*

Murtaza Haider (Ryerson University)
- *Does Union Membership Improve the Wages of South Asian Immigrants in Canada?*

Melanie Knight (Ryerson University)
- *Diaspora Markets: Immigrant Women Entrepreneurs and the Creation of the New Markets*

Melanie Knight (Ryerson University)
- *The Making of Entrepreneurs in Post-Secondary Education Institutions*

Danielle Lamb (Ryerson University), Rupa Banerjee (Ryerson University) and Amanda Shantz (York University)
- *The Role of Volunteering in Facilitating the School-to-Work Transitions of Youth in Canada*

Winnie Ng (Ryerson University), Sedef Arat-Koc (Ryerson University), Grace-Edward Galabuzi (Ryerson University) and Aparna Sundar (Ryerson University)
- *An Immigrant All Over Again? Recession, Plant Closures and (Older) Racialized Immigrant Workers*

Ian Sakinofsky (Ryerson University)
- *Profile of Young Union Organisers in Ontario: A Preliminary Investigation*

Diversity & Equity

Asher Alkolby (Ryerson University), Avner Levin(Ryerson University) and Wendy Cukier (Ryerson University)
- *Strategies for Enhancing Diversity in the Legal Sector: The Canadian Approach*

Asher Alkoby (Ryerson University) and Avner Levin (Ryerson University)
- *Diversity in the Legal Profession: Examining the Barriers Facing Equity-Seeking Groups*

Wendy Cukier (Ryerson University)
- *Discourses of Diversity: Canadian Labour Unions*

Gerald Hunt (Ryerson University)
- *Diversity in Union Leadership: The Representation of Women, Visible Minorities and Members of the LGBT Community in Select Canadian Unions*

Gerald Hunt (Ryerson University)
- *Diversity in Union Leadership: The Representation and Experiences of Members of the LGBT Community in Select Canadian Unions*

Esther Ignani (Ryerson University), Melanie Panitch (Ryerson University) and Kathryn Church (Ryerson University)
- *Stuck on the (In)Accessible Ladder: 'Abled' and Disabled Metaphors of Career Advancement and Leadership*

Labour in Historical Contexts

Catherine Ellis (Ryerson University)
- *British Trade Unions and Postwar Youth*

Kiaras Gharabaghi (Ryerson University)
- *Changes of Great Consequence: Certification and Re-Designation As "Hospital" In The Youth Serving Private Residential Treatment Sector in Ontario*

Candace Huntley (Ryerson University)
- *Strategic Campaigns and Their Place in the Canadian Labour Movement: David vs. Goliath*

Danielle Lamb (Ryerson University) and Rafael Gomez (University of Toronto)
- *The Great Recession and Union Wage Premiums in Canada*

Allison Matthews-David (Ryerson University)
- *Fashion Victims: Clothing and Health in Historical Perspectives*

Myer Siemiatycki (Ryerson University)
- *Resisting Precarity: The Municipal Sector Experience in Toronto*

Labour Market Economics & Policy

Pnina Alon-Shenker (Ryerson University) and Guy Davidov (Hebrew University)
- *Applying the Principle of Proportionality in Employment and Labour Contexts*

Timothy Bartkiw (Ryerson University)
- *Comparing Policy Trajectories and Growth Dynamics in Temporary Help Agency Employment in Canada and the U.S.*

Timothy Bartkiw (Ryerson University) and Sara Slinn (York University)
- *Analysis of Ad Hoc Emergency Legislation as a Policy Tool in Collective Bargaining Disputes*

Bryan Evans (Ryerson University)
- *Austerity in the Provinces: The Economic Crisis and Core Public Services*

Murtaza Haider (Ryerson University)
- *The Wrong Jobs for the Right People: A Study of Mismatch between Education and Occupation Fields in Canada*

Andrea Noack (Ryerson University) and Leah Vosko (York University)
- *Job Quality and Labour Regulation in Canada, 1999-2009*

Andrea Noack (Ryerson University), Leah Vosko (York University) and Mark Thomas (York University)

- *Mapping Employment Standards Violations in Ontario*

Strategic Human Resources Management

Fei Song (Ryerson University)

- *Striving To Be The "Ideal" Employee Through Overwork: Examining The Public Policy Implications*

Bettina West (Ryerson University), Mary Foster (Ryerson University) and Avner Levin (Ryerson University)

- *Cyberbullying at Work: In Search of Effective Guidance*

RESISTING PRECARITY IN TORONTO'S MUNICIPAL SECTOR: THE JUSTICE AND DIGNITY FOR CLEANERS CAMPAIGN[1]

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ABSTRACT

This paper examines a relative rarity in recent Canadian labour-state relations: the successful resistance by public sector workers and their allies to government-driven employment precarity. At stake was Toronto mayor Rob Ford's determination to contract out a thousand jobs held by city cleaners. In response, the cleaners and the city's labour movement launched a Justice and Dignity for Cleaners campaign to preserve these jobs as living wage employment. Effective coalition building behind a morally compelling campaign, together with some fortuitous political alignments, has forestalled city efforts to privatize a significant yet undervalued segment of the workforce. Our examination of the Justice and Dignity for Cleaners campaign reveals that resistance to precarity is not futile, notwithstanding some attendant ambiguity of what constitutes a labour victory.

INTRODUCTION

On Sept. 27, 2011, a dozen City of Toronto cleaners descended on City Hall decked out in goggles and hazmat suits. The protective gear highlighted the cleaners' difficult and often dangerous working conditions, but the immediate threat prompting their appearance was neither chemical nor environmental—but rather political. The cleaners took centre stage at a rally to oppose the City of Toronto's recently announced intention to contract out a thousand municipal cleaning jobs. The 'astronaut resembling' cleaners worked at Toronto police stations, and were the first group targeted for

outsourcing by the newly elected Toronto Mayor Rob Ford. Flanked by allies and supporters from their union CUPE Local 79, the workers spoke of cleaning jail cells full of scabies and bed bugs and of being exposed to HIV blood and dangerous chemicals (Good Jobs for All Coalition 2011a; Anonymous Interview #1 2013).[3] While such conditions had long existed, as unionized workers city cleaners enjoyed access to health and safety training courses, protective gear and they earned living wages.

In 2011 all of this was about to change. Committed to reducing city spending generally and labour costs in particular, Mayor Ford identified the cleaners as an early target of privatization. Well aware of the abysmal conditions in the private cleaning sector, the city workers in turn understood the Mayor's plan as a threat to both their jobs and to the city's best interests. Police station cleaner Trish O'Brien explained to the crowd gathered outside City Hall that the elimination of decent-paying municipal cleaning jobs would add to the rapid growth in income inequality and precarious work in Canada's largest city (Good Jobs for All Coalition 2011b). The cleaners, their union and allies were signaling there would be resistance to this latest push to precarity.

In the current neoliberal moment, public sector workers and unions have faced relentless attacks from their government employers. As Stephanie Ross and Larry Savage have written, "Like their counterparts around the globe, Canada's public sector unions have been struggling against austerity, privatization, marketization, public-private partnerships, 'taxpayer' backlashes and restrictions on union rights and freedoms" (Ross and Savage 2013: 9). Nor have most of these confrontations ended well for workers and the labour movement. As Sam Gindin has observed: "limited in their vision and fragmented in their structures, unions have been no match for the offensive of employers, and above all, those of the state" (Gindin 2012: 28-29).

In the context of labour's current struggles, city cleaners looked to be an easy target for privatization while also providing Ford with an opportunity to cut down to size Canada's largest municipal workers' union: the 20,000-member CUPE Local 79 which included the cleaners in its ranks. Yet this was not to be. In what we argue is one of the few recent labour movement victories, Toronto city cleaners and their allies have thus far been able to forestall an outsourcing push from an aggressive and powerful employer. An examination of the Justice and Dignity for Cleaners campaign reveals both the challenges of launching campaigns against precarity, and the ambiguity of what constitutes 'success' in such campaigns. Most important perhaps for an embattled Canadian labour movement, it demonstrates that resistance is not futile. Effective coalition building behind a morally compelling campaign, together with some fortuitous political alignments have to date fended off a determined civic administration's intent to transform public sector jobs into precarious, low-wage private sector work. This is the terrain explored in this article.

TORONTO AS A NEOLIBERAL PROJECT

Toronto was (re)created as a neoliberal project in 1998, when Ontario's Mike Harris Conservative government imposed a municipal amalgamation of the former, smaller central City of Toronto and five surrounding suburbs. To be sure, neoliberal dynamics of privatization and contracting out had threatened and undermined municipal sector employment for some years previously (Miranda 2009). However the Harris government ranks among the most ideological governments in Canadian history, and Toronto's municipal merger was a means to purity of purpose: slashing state spending and promoting unfettered market forces. Harris won the 1995 Ontario election promising to cut taxes by 30 percent while still balancing the budget. Achieving this required $6 billion in spending cuts from a provincial budget of $56 billion (Boudreau et al. 2009). Off-loading costs to municipalities quickly emerged as a major provincial budget strategy. In Toronto's case however, only the central city had a large enough tax base to absorb the planned download. Through amalgamation, central city Toronto's tax base would be forced to cover the offload to suburban Scarborough, Etobicoke and North York. The amalgamated Toronto came into being in 2008—one of the world's few major cities created by and for neoliberal purposes.

Predictably, Toronto has perennially struggled with the fiscal dilemma of insufficient revenues to meet spending requirements. At various times over the past decade, Toronto mayors have projected annual budget shortfalls ranging from $500 million to well over $700 million. With salaries accounting for close to half of all municipal spending, since 1998 successive civic administrations have targeted reduced labour costs as a key priority to budget stability. Employer take-back demands had prompted three strikes by CUPE civic workers (2000, 2002 and 2009) under the first two post-amalgamation Mayors: Mel Lastman and David Miller. While CUPE succeeded in fending off severe concessions each time, the strike of 2009 in particular generated widespread public resentment against municipal workers and CUPE. Suspended garbage collection became the flashpoint over the 2009 39-day summer strike, widely portrayed by the media and local authorities as an irresponsible stand by labour to defend unjustified wages and benefits (Barnett and Fanelli 2009; Glassbeek 2009). When the strike's settlement did not strip civic workers of their perceived remunerative excesses, conditions were ripe for the election of a new mayor who promised to carry and wield a big stick against labour.

Rob Ford was elected Mayor of Toronto in 2010 on a single note campaign of cutting city spending and 'respecting the taxpayer', halting what he characterized as the 'gravy train' of runaway municipal spending. Leaving no ambiguity of where he would look for savings, Mayor Ford insisted Toronto had a spending—not revenue—problem, and declared: "The gravy is in the number of employees we have at City Hall" (Dale 2011).

During his first year in office, Mayor Ford built considerable momentum for his cost-cutting agenda. Assorted taxes were frozen or eliminated, service cuts (described by the mayor as 'efficiencies') were made in a host of areas, and significantly on the labour front Mayor Ford delivered on two campaign promises: eliminating transit workers' right to strike, and contracting out half the city's garbage collection (O'Toole 2011; Howlett 2011; Rider and Moloney 2011). Indeed, Mayor Ford appeared invincible through much of his first year in office, prompting Prime Minister Stephen Harper to lavish praise on Toronto's new mayor, and to associate himself with the 'Ford Nation' political brand (Wallace 2011).

Significantly, however, Mayor Ford experienced a major setback early in 2012. After widespread public opposition, city council rejected additional service cuts proposed by the Mayor (Dale and Moloney 2012). The ripples onto the labour front were significant. Unable to achieve budget cuts with further service cuts, Mayor Ford now pursued labour cost savings even more aggressively. For their part, labour and their allies had learned from their success in defeating further service cuts that a well-organized public campaign could reverse or at least stall parts of Mayor Ford's neoliberal agenda.

CLEANERS UNDER ATTACK

When Mayor Ford took office in 2010, the City of Toronto directly employed approximately 1,000 cleaners in a variety of locations, including municipal buildings, police stations, daycares, social housing and long-term care facilities (Monsebraaten 2012). To the civic administration, cleaners looked like low-hanging fruit in the push to cut costs; an obvious first "punching bag" in the words of cleaners campaign organizer Preethy Sivakumar (Sivakumar 2013). Cleaners were vulnerable because their wages as unionized civic workers were much higher than the prevailing rates in the non-union private sector. A cleaner employed by the City of Toronto earned on average $22.00 an hour with benefits; cleaners in the largely non-unionized private sector typically earned minimum wages and received few or no benefits. The industry's highly competitive nature, in which large numbers of cleaning companies bid against one another to win contracts, exerts a powerful downward pressure on wages. Nor is it uncommon for the winning bidder to then subcontract out part of their work, unleashing another round of wage-race to the bottom (Dryden and Stanford 2012; Monsebraaten 2012). John Cartwright, President of the Toronto and York Region Labour Council, describes cleaning as a "dog eat dog sector" (Cartwright 2013a).

Cleaners also were targeted because of who they are and because of the kind of work they do. As a job with heavily domestic and female-gendered connotations, cleaning has long been constructed as low-status, low-skilled work with little social value (Jones 1998). It is also largely invisible work. A cleaner who has worked in both the private and public sector aptly describes cleaners as

an "invisible army" that mobilizes at night out of sight of the public (Anonymous Interview #2 2013). As a group, cleaners are vulnerable because many of them are newcomers to Canada, including large numbers of racialized and older women who are already disadvantaged in the labour market (Dryden and Stanford 2012). For all these reasons, city cleaners were seen as a quick and easy target of Mayor Ford's cost saving plans.

However, 2011 was not the first time city cleaners had faced privatization pressure. A decade earlier the Police Services Board had proposed contracting out cleaning jobs in Toronto police stations. Significantly, a show of solidarity by police officers in 2003 saved the cleaners' jobs. After officers signed a petition opposing privatization, the city backed off its plan to outsource the work. Paramount for police officers was recognition that cleaners are privy to confidential information, and could even impact the security of officers in some circumstances. Police officers saw a stable, long-term cleaning staff as closely aligned with their own interests (Cartwright 2013a).

But 2011 was different. In that year's budget planning, Mayor Ford declared the police too would have to rein in spending. Forced to make budget cuts, Chief of Police Bill Blair recommended that the city contract out custodial and maintenance services in all police facilities. Blair estimated the outsourcing of 110 cleaning jobs would yield cost savings of $1 million annually, representing a 47 percent saving in cleaning costs as a result of lower labour costs in the private sector (City of Toronto 2011a; City of Toronto 2011b). City council accepted Chief Blair's report, and in June of 2011 informed CUPE Local 79 of the city's plan to begin contracting out custodial services in Toronto police stations (CUPE Local 79 2011a). More concerned with fending off cuts to their own budget, this time police officers did not voice support for the cleaners, reflecting the difficulties of maintaining solidarity across occupations and bargaining units, when the employer has the cutting knives out. Further, city leaders made it clear the police stations were only the first front in a larger privatization offensive. Deputy Mayor Doug Holyday described the police move as a "good first step", noting that if contracting out proved successful in the police stations there would be "no reason not to look at all city facilities" (Levy 2011).

JUSTICE AND DIGNITY FOR CLEANERS

With so much at stake, in September of 2011 the Good Jobs for All Coalition launched the Justice and Dignity for Cleaners campaign (Good Jobs for All Coalition 2011b). Founded in 2008 under the auspices of the Toronto and York Region Labour Council, Goods Jobs for All is a coalition of community, labour, social justice, youth and environmental organizations committed to improving living and working conditions in Toronto. More specifically, the Coalition defended public sector employment as a prime component of its full and equitable employment philosophy (Coulter 2012). It was fortuitous for city

cleaners that this robust network of 'Good Jobs' advocates was already in place when Mayor Ford's administration set their sights on slashing cleaning costs. Recognizing that cleaners were now on the front lines of Toronto's privatization battle, the Coalition initiated the Justice and Dignity for Cleaners campaign in their support.

The campaign had both specific immediate goals and broader long-term goals. First and most obviously, it sought to stop the outsourcing of cleaning jobs in Toronto police stations and across other city buildings. Second, and more broadly, the campaign wanted to start a dialogue about what kind of employer the City of Toronto should be; whether the city should operate by paying some of its employees poverty wages (Cartwright 2013a; Ng 2013). Third, the campaign sought to preserve a living wage scale in the municipal sector and, in the words of Labour Council President John Cartwright, "leverage the righteousness of this narrative into a strategy that would help raise the floor of wages in contract cleaning" (Cartwright 2013a). The shared interest of unionized municipal cleaners and unorganized private sector cleaners was emphasized in an interview we conducted with a former private sector cleaner now enjoying far better employment terms in the municipal sector. Much was at stake he stated in the bid to contract out municipal cleaners' jobs: "if you cannot keep them [city cleaners] with a job, a fair job, how we can bring the others up?" A win for public sector cleaners would pave the way for better private sector conditions he urged the campaign (Anonymous Interview #2). Fourth and finally, the campaign was framed as a fight for democracy. Who should make decisions regarding contracting out: elected municipal council or appointed senior management? The practice at city hall allowed senior management to make such decisions on contracts valued under $20 million. Justice and Dignity for Cleaners made the case that a decision of this significance should be made in a fully transparent and public debate by elected council, rather than by unelected staff (Sivakumar 2013).

Perhaps most effectively, Justice and Dignity mounted a campaign that was "morally compelling" (Sivakumar 2103). Police station cleaner Trish O'Brien emphasized the injustice of paying someone $10.25 an hour to clean HIV blood and feces off of walls and jail cells full of bed bugs and scabies (CUPE Local 79 2011b). Cleaner Nezrene Edwards told city councillors that "just because we pick up dirt doesn't mean we should be treated like dirt" (Justice and Dignity for Cleaners 2012). Workers' voices were crucial in gaining the moral high ground for the cleaners. Worker testimonies and deputations at city council prompted sympathetic coverage of the campaign in the media, particularly in Canada's largest circulation newspaper the *Toronto Star.* A single parent whose hopes of permanent employment with the city were dashed by contracting out told the *Star*: "I needed that job for my children and for my financial security. Now I have nothing" (Monsebraaten 2012).

By this time too, a number of studies and reports raised general concern about Toronto becoming an increasingly polarized and unequal society due to

rising precarity and the prevalence of poverty wages in the labour market (PEPSO 2013; Hulchansky 2010; Metcalf Foundation 2012). The prospect of contracted out cleaning jobs now intersected with mounting concerns over inequality in Toronto. City councillor Janet Davis for instance explained her opposition to outsourcing in terms of concern that Toronto was becoming "a segmented city of inequality." Davis insisted that "the City of Toronto should not be contributing to the problem of creating more precarious low wage work" (Davis 2013).

Critical to the success of the campaign was the support of a wide range of progressive allies. Academics produced studies and open letters against contracting out. Beyond the harm to cleaners, academics identified the negative effects on the city economy and public health, and exposed the hidden costs of outsourcing (Dryden and Stanford 2012). These academic interventions raised public awareness of the issue and challenged the logic of outsourcing. Further, the academic perspective enabled the cleaners to place their battle within the context of larger debates about the racialization of poverty, the growth of income inequality, and the decline in social cohesion that accompanies these trends. For their part, faith communities lobbied their city councillors and gave deputations framing the issue as one of ethics and social justice (Hyman 2012; Schmidt 2012). The breadth of support for the cleaners proved influential. City councillor James Pasternak, a centrist not ideologically opposed to contracting out explained his ultimate voting support for the cleaners by noting that a visit on the issue from a Rabbi and professor "had an enormous impact" (Pasternak 2013: 2).

Overall, the Justice and Dignity for Cleaners campaign was successful at forging a broad coalition with sympathetic allies, but some tensions between coalition partners emerged. Early in the campaign, the Good Jobs for All Coalition printed a flyer denouncing councillor Frances Nunziata, a member of the Toronto Police Service Board, for supporting the move to eliminate living wage jobs. Good Jobs for All did not consult with their community partners before circulating the flyer. Nunziata retaliated by threatening to cut city funding to the community groups supporting the cleaners. In response, nearly all of the ten community groups involved in the campaign withdrew. Labour rights activist and scholar Winnie Ng who was then the co-chair of the Good Jobs for All Coalition, described the incident as a "crisis" that saw the campaign deprived of critical support at a key moment (Ng 2013). For his part, Cartwright of the Labour Council described the failure to get community group sign off on the flyer as "probably one of the most stickiest mistakes" of his lengthy years of coalition-based organizing (Cartwright 2013a). In terms of potential long-term consequences, the flyer likely sowed the seeds for mistrust between the community groups and the labour movement. This conflict speaks to the importance of ensuring that all coalition members are equally involved in decision making and is a reminder of community allies' particular vulnerabilities

because of their funding structure and/or requirements of political impartiality (Blackwell and Rose 1999).

INSIDE CITY HALL

Like many battles, the Justice and Dignity campaign was fought on multiple fronts. Ultimately, however, the issue would be decided by Toronto's 45-member elected city council and would be informed by both the distinctly politicized labour relations dynamic in the municipal public sector, and by how individual council members perceived the debate. A fortuitous advantage for the campaign was that one of Toronto's councillors, Ana Bailao, had as a teenager and then-recent immigrant from Portugal worked alongside her mother as a private sector cleaner in Toronto (Rider 2012). In the 1970s and 1980s when Bailao and her mother worked in the industry, Portuguese women and their allies, launched several strikes and lobbying campaigns to improve labour conditions (Aguiar 2000, Miranda 2009). To this day Portuguese women continue to work in the industry, and were now among councillor Bailao's constituents. Further advantageously, Bailao was aligned with neither the right nor left on the highly polarized Toronto council—but was part of the centre group—and thus could have significant influence over her fellow councillors.

Councillor Bailao's advocacy role in Justice and Dignity serves as a compelling example of the potential importance of identity politics. Toronto ranks among the world's most diverse, multi-racial and multi-ethnic cities, with half its population foreign-born, and almost half non-white. Yet the composition of its municipal council has long featured under-representation of women, visible minorities and ethnic minorities—precisely the predominant profile of workers in cleaning jobs (Siemiatycki 2011). The role played by Councillor Bailao is a reminder that the gender, race, ethnic and class profile of elected officials can influence the decisions governments make.

In 2011, Bailao called for city staff to conduct a study on 'the social and economic impact of contracting out cleaning work', believing it would further exacerbate income inequality in the city and impede immigrant economic advancement out of poverty (Bailao 2011). Interestingly, Bailao's concern was not over contracting out per se. She made clear the issue at hand for her was job quality, not who the employer was (Bailao 2013). De-coupling the issue from ideology would allow her to win support from some on the right wing of council.

In December of 2011, city staff produced a report entitled "The Social Impact of Lower Wage Jobs." The report chronicled the demise of well-paying manufacturing jobs in Toronto since the 1980s, and the subsequent growth of a bifurcated service economy with those at the bottom precariously employed in poverty wage jobs. The report predicted that displaced city cleaners would be unlikely to secure similar employment with living wages and benefits and

further identified the negative impact of low income and precarious employment on workers, their communities and the broader economy (City of Toronto 2011c). A final round of public deputations on the issue in March 2012 heard cleaners, academics, community and religious leaders once again voice opposition to the erosion of stable, decent-paying cleaning jobs.

In April 2012 Toronto council voted by a large margin of 29-12 to reject immediate contracting out of cleaners' jobs. Instead, council adopted a motion establishing four important criteria before a final decision would be made. First, staff was to develop a 'Toronto self-sufficiency' standard as a benchmark to assure that any contracted out jobs would meet certain standards in terms of wages, benefits and working conditions. Second, in the event that contracting out was permitted, any further subcontracting would be prohibited (except in extenuating emergency circumstances such as a flood). This was a major victory given that many of the worst abuses in the industry took place under subcontracting schemes. Third, in the event of any multi-year contracting out, city staff would conduct annual evaluations of the impact on job conditions. And finally, any contracting out decision, regardless of amount, would be made by the elected council not staff (City of Toronto 2012a). Given Justice and Dignity's emphasis on democratic and transparent decision making, the final condition represented a major victory for the campaign. Yet even more was to come.

In July 2013, city council made two further decisions related to the outsourcing of cleaning work. By a 28-3 vote, councillors called on city staff to develop a job quality assessment tool against which contracted out jobs will be measured. As well as including wage levels, this tool will consider other criteria that determine job quality, including worker health and safety, skills and training opportunities and working conditions. Any further decisions on contracting out have been put on hold until city staff reports back to Council on the job quality assessment tool, unlikely before 2015 (City of Toronto 2013).

City council's debate over contracting out led to a second important victory for cleaners, and indeed, for all city workers. In July 2013, city council agreed to update Toronto's Fair Wage Policy. The policy, which dates back to the late 19th century, requires contractors and suppliers for the city to pay their workers at least the prevailing market wages and benefits in their field of employment or, for unionized fields, union rates. However, since the policy's wage rates had not been updated since 2003, in the case of cleaners the 'fair wage' had actually fallen below the provincial minimum wage! The updating of the policy saw cleaners' fair wage rate raised to $12.43 an hour, an amount reflecting that private sector cleaning wages are closer to Ontario's minimum wage of $11 per hour, than to the estimated Toronto living wage of $17.87 an hour (City of Toronto 2013; Brennan 2012). Finally, because the debate over fair employment for cleaners prompted an updating and raising of all occupational fair wage scales, the cleaners' campaign thus had beneficial ripple effects for other job categories. A

campaign in support of one occupational group thus also yielded what could be called a 'solidarity dividend' to workers in other occupations.

TAKING STOCK: ANALYZING THE JUSTICE AND DIGNITY FOR CLEANERS CAMPAIGN

While the fate of city cleaners has not yet been definitively determined, its leadership cadre generally regards the campaign to save their jobs as a success. Campaign Coordinator Preethy Sivakumar describes Justice and Dignity as a "real victory for collective action." Beyond the particular impact on cleaners, she believes the campaign's most significant achievement has been to challenge the logic of outsourcing, to elevate concerns over growing income inequality, to valorize service sector workers, and to "make people in power" consider what it means to be a cleaner and what constitutes a living wage (Sivakumar 2013). This impact was well articulated by centrist councillor James Pasternak who stated in an interview that the significance of the cleaners' debate, and his own vote against outsourcing, represented "one of the first opportunities where we could flex our muscle when it came to work dignity…a first opportunity to make a statement on the dignity of work" (Pasternak 2013). The campaign raised awareness of the value of cleaning work and cleaning workers.

In this regard, a significant achievement of the cleaners' campaign was the 'politicization of precarity' to modify a phrase from Linda Briskin (Briskin 2013: 91). Public sector labour struggles, Briskin notes, have a capacity to alter popular discourse and understanding of workers' issues in a progressive direction. Parallel to her assessment that recent strikes by nurses in Canada have stimulated the 'politicization of caring' to valorize nurses' work, the campaign to preserve unionized municipal employment for cleaners in Toronto re-framed fundamental questions about fair employment and the public interest.

For over two years now, the campaign has stymied a determined Mayor's bid to contract out close to a thousand more cleaning jobs, in addition to those outsourced at city police stations. CUPE Local 79 President Tim Maguire believes the campaign has "stemmed the tide of Ford's headlong rush to privatize and contract out everything that's not nailed down" (CUPE Local 79 2012). Similarly, a cleaner we interviewed believes the campaign "really helped, helped slow things down, really gave a broader view, or an honest view" (Anonymous Interview #1 2013). Additionally, CUPE has argued that the requirement to assess any proposed privatization against a job quality assessment tool is to labour's advantage. The more standards that are put in place, the union believes, "the more we can support arguments to keep it in-house".

Somewhat more reservedly, Labour Council President John Cartwright describes the campaign as "a qualified success", since it was not able to derail outsourcing of police station cleaners' jobs, and the ultimate resolution of the issue remains in the future. Yet Cartwright notes that the privatization agenda of

neoliberalism "depends on a veil of secrecy around numbers" (Cartwright 2013a). By restoring such decisions to elected council based on clear job quality criteria, the cleaners' campaign has brought greater transparency to the processes surrounding contracting out.

For their part too, city councillors who opposed privatization also regard the cleaners' campaign as a success. Councillor Ana Bailao believes the decisions made to date by council mean it will not support privatization that drives cleaners' wages below a living wage. Since cost savings in the cleaning sector rely largely on lowering wages, she expects the cleaners to remain employed by the city (Bailao 2013). Fellow centrist councillor James Pasternak believes that as a result of the cleaners' debate and lopsided votes against privatizing, "there doesn't seem to be the political appetite to go down an aggressive road of contracting out in this council term" (Pasternak 2013). The cleaners' campaign it would appear forestalled privatization not only for one job category, but deflated any appetite for seeking new targets.

At least one city councillor with considerable labour movement experience is not as optimistic about the long-term success of the campaign. Janet Davis, who was a CUPE representative before sitting on council for the past decade, worries that the updating of the Fair Wage Policy could ultimately be an enabler of privatization. Davis fears that some city councillors will be able to justify contracting out by claiming that private contractors will be required to pay their workers the city's prevailing fair wage approved by council, which she notes is barely higher than the minimum wage (Davis 2013).

Our own assessment is that the campaign has yielded significant and unexpected results for cleaners and for labour more generally. The campaign has so far stymied Mayor Rob Ford's attack on his target of choice—the labour movement. The cleaners' battle has been among Ford's more lopsided losses in council votes, and played out to considerable public sympathy for a group of city workers. Close to a thousand city cleaners continue to have stable, living wage jobs several years after they were targeted for precarity and poverty. Evidence from another jurisdiction illustrates just how severe the consequences of contracting out would have been for Toronto cleaners. As Marcy Cohen notes, when British Columbia privatized hospital housekeeping services in 2003-4, "[t]he impact on wages and working conditions was immediate and stunning: wages for privatized housekeepers were cut almost in half, benefits were eliminated or drastically reduced, and union protections abolished" (Cohen 2006: 195).

While the matter is not yet resolved, council has also undertaken several promising initiatives for the cleaners. First, any future decision will be made not by hired staff, but rather by elected council, meaning the decision-making process will be open and transparent. Second, by calling for development of a Job Quality benchmark instrument to assess any future outsourcing, council is likely to develop wage and working condition criteria incompatible with current

labour exploitation conditions in the private cleaning industry. Simply stated, private operators will not profit from the wages, benefits, and work conditions likely to be required by the city as condition for outsourcing. Nor are private contractors likely to want to pursue a 'business unfriendly two-tier wage system', whereby cleaners they assign to city sites are significantly better paid than cleaners assigned to private sector sites.

More broadly, the campaign has raised important issues regarding collective responses to precarity. Significantly, Justice and Dignity for Cleaners reveals the value of labour-community coalitions. Academic research and advocacy played a significant role in this campaign, as did the support of progressive allies from the faith community. Also critical was the workers' ability to make a strong moral claim that they deserved fair treatment and decent wages, a factor which led to the favourable media coverage and wins inside city council. And of course having an insider to champion the issue, Ana Bailao, was crucial to moving this debate forward inside City Hall. The key to the campaign's success then was its ability to fulfill the formula Marcy Cohen identifies as critical to resisting contracting out in the public sector: "action that goes well beyond the workers and the union itself" (Cohen 2006, 210).

LIMITATIONS OF THE CAMPAIGN

Justice and Dignity also reveals the challenges inherent in launching coalition-based campaigns against precarity. We explore two in closing: the issues of rank-and-file mobilization, and sustaining a coalition's momentum beyond an immediate defensive struggle.

While workers' voices were significant at various stages of the campaign, very few cleaners actually participated in the mobilization. Cartwright attributes this absence to worker fears of being victimized for speaking out (Cartwright 2013b). Conversely, an activist cleaner we interviewed attributes the non-involvement of most cleaners to

> […] a culture of complacency," especially among workers with significant job seniority. Expressing frustration with his co-workers, he declared: "It's so complacent there, 'just go do my little thing and not worry about this guy or that guy'. But I say it's gonna roll. And when it starts to roll you gotta slow that down or it will steamroll everybody" (Anonymous Interview #1 and #2 2013).

Winnie Ng, former campaign leader also noted the limited participation of cleaners in the campaign: "I don't think it got filtered down to that group of 1000 cleaners. So we end up having the same one or two spokespersons all the time" (Ng 2013). The low level of worker engagement highlights the challenges of mobilizing a rank and file that paradoxically may be too fearful of job loss to

publicly support the union or too complacent in their positions to recognize the need to guard against the erosion of workplace rights.

Additionally the very logic of coalition, lobbying style campaigning also can serve to demobilize union and worker activism. At several junctures, the Justice and Dignity campaign made the tactical calculation that union leaders and rank and file should not be the lead voices, for fear of alienating some city councillors whose support was critical to opposing outsourcing (Cartwright 2013b; Davis 2013). Instead, allied academics, community and faith leaders spoke on behalf of the cleaners. The lack—and downplaying—of worker participation is concerning for labour activists and scholars who regard rank-and-file mobilization as both the means and ends of working class struggle; as both the greatest predictor of immediate success as well as long-term class capacity building (Bronfenbrenner and Juravich 1998). Low levels of worker engagement also leave the campaign dangerously dependent on external support in the form of sympathetic politicians and allies. All of this raises issues regarding the need for a broader transformative labour movement vision and practice; all the while reflecting tensions between the labour movement's emphasis on service or mobilization (Rubin and Rubin 2001). At the same time, the cleaners' campaign illustrates that a coalition rather than class struggle orientation can achieve tangible success. For public sector workers so widely under attack, a win by any means necessarily remains a win.

However, building ongoing capacity from this win has proven problematic. The minimal rank-and-file involvement complicated the ability to develop an ongoing organizational structure for coalition building and solidarity. Following the April 2012 vote by council, the cleaners' campaign began to demobilize. Ng explains that

> […] we had the momentum, we won. And then the energy gets dissipated…This is for all organizations not just this particular campaign. We haven't been good in harnessing the energy and the mobilizing to make sure it continues…That sense of empowerment, it was there but we didn't keep building on it. (Ng 2013)

Ng believes the most important question raised by the campaign is

> […] how can we use these organizing moments to build a movement of resistance. I think threading it with a notion of building the membership was, in retrospect, absent. So we end up building a few key workers' leaders without building the base. (Ng 2013).

The challenge of this is born in part from the fact that workers and their allies are often operating in a defensive modality, moving from crisis to crisis without necessarily maintaining the momentum built from the last struggle. As Cartwright put it, as soon as the union puts out one threat, "there are ten other

alligators waiting to chew in another place" (Cartwright 2013a). Labour ally city councillor Janet Davis sees alligators in her midst, believing other councillors will again push for outsourcing in the future. "It's always just a ground war", she describes the push to cut labour costs at the city (Davis 2013).

Indeed, Mayor Rob Ford has signalled that fully contracting out garbage collection will be a centre-piece of his 2014 re-election campaign. Smarting still from public displeasure over the 2009 strike, city garbage crews enjoy little public sympathy. The divergent public responses to garbage collectors and cleaners reveals that public's estimation of labour's 'moral claim' can and does vary by occupation. In the period ahead Toronto will determine whether averting labour precarity is for all workers, or only for 'the deserving' workers.

NOTES

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[3] To protect the identities of the cleaners, we have anonymized all worker interviews.

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PRECARIOUS JOBS IN ONTARIO:

MAPPING DIMENSIONS OF LABOUR MARKET INSECURITY BY WORKERS' SOCIAL LOCATION AND CONTEXT

Vulnerable Workers and Precarious Work

November 2011

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I. INTRODUCTION

In this report, we use data from Statistics Canada's *Survey of Labour and Income Dynamics (SLID)* to map the prevalence of precarious jobs in Ontario's labour market over the decade long period between 1999 and 2009.[2] Many current labour regulations and policies are premised on the norm of a standard employment relationship (SER) defined by a full-time continuous employment relationship where the worker has one employer, works on the employer's premises and has access to extensive social benefits and statutory entitlements from that employer. Research shows, however, that this employment model, and particularly its associated securities, is waning.[3] In contrast to the SER, precarious jobs are characterized by specific features of labour market insecurity. They tend to be clustered in part-time and temporary forms of employment, although on account of the lowering of the bottom of the labour market during the post-1980 period, features of precariousness are also increasingly found in full-time permanent jobs.

To date, studies of Canada as a whole have shown that precarious jobs are most often held by workers in certain social locations, especially women, immigrants, and racialized people[4] and in certain sectors, industries and occupations, such as in the private sector and sales and services in particular.[5] Yet with the exception of studies of Quebec,[6] there is a dearth of analysis of the dynamics of precarious employment in provincial labour markets even though the provinces represent a significant site of labour regulation since the Federal Labour Code covers just ten per cent of all workers in Canada. At the provincial level, there is limited awareness of the different permutations and combinations of key features of labour market insecurity identified

with different employment statuses (e.g., self-employment or paid employment) and forms of employment (e.g., part-time or full-time, temporary or permanent paid employment) and their prevalence among differently situated workers, both workers in different industries and occupations and in different social locations. This report aims to fill this knowledge gap, and thus is a necessary step towards correcting the disjuncture between labour market realities and the model upon which many provincial labour regulations and policies are premised. To this end, in the analysis that follows, we aim to answer four questions about precarious jobs in Ontario:

i. How has the structure of the Ontario labour market changed from 1999-2009, particularly in relation to the prevalence of part-time and temporary forms of paid employment and solo self-employment, forms of employment which are typically identified with precarious jobs?
ii. How prevalent are the different features of labour market insecurity in the Ontario's labour market, and how has their prevalence changed from 1999-2009?
iii. In what sectors, industries and occupations are precarious jobs most prevalent?
iv. What are the socio-demographic characteristics (gender, ethnicity, immigration status) of people who hold precarious jobs and how has this changed from 1999-2009?

Methodological details about the objectives, data collection, sampling and coverage limitations, and analysis of the *Survey of Labour and Income Dynamics*, the principal survey upon which the report relies, are found in Appendix A.

II. UNDERSTANDING PRECARIOUS JOBS

We conceptualize precarious jobs as forms of work for remuneration which have one or more dimensions of labour market insecurity that make them substantially different from the "functions"[7] of the SER – specifically, its association with access to training, regulatory protections and social benefits, decent wages, and a social wage.[8] In particular, precarious jobs are characterized typically by high levels of uncertainty, low income, a lack of control over the labour process, and limited access to regulatory protections. The presence of one or more of these dimensions of labour market insecurity results in these jobs being of undesirable quality. There is a relationship between workers and jobs too; those workers who remain in precarious jobs may themselves be or become marginalized or perceived as precarious in relation to the larger society (e.g., on account of sex/gender divisions of labour or citizenship status); hence, the relationship between precarious jobs and so-called vulnerable workers.[9] However, this report centres on jobs, rather than workers.

One aspect of our analysis focuses on various forms of employment. Building on previous empirical findings for Canada and elsewhere, we take solo self-employment (without employees) to be more precarious than employer self-employment.[10] Without the protection of a larger and/or more diverse company, this subset of the self-employed are much more vulnerable to economic pressures; even a brief downturn in business

can lead to unemployment or poverty.[11] Further, many solo self-employed are, in practice, workers, including independent or dependent contractors who have been deemed to be self-employed in order to limit their access to equivalent levels of workplace protections and benefits as employees.[12] We also understand temporary forms of employment, which are diverse and include contract/term, seasonal, casual and on-call employment, to be more precarious than permanent forms of employment as they are uncertain by definition.[13] As employers pursue 'flexibility-enhancing' labour strategies, temporary or contract employment also affords them the opportunity to reduce their labour costs by eliminating workers, without the need to provide cause for termination or severance pay. Increasingly, employees are given multiple, recurring temporary contracts; although the positions they hold may have become a permanent part of the organization, theseworkers are required to periodically reapply for their jobs. Many temporary employees are also excluded from a full range of workplace benefits, including health benefits and pension plans.[14] We also take part-time to typically be more precarious than full-time employment since, like temporary as opposed to permanent workers, those that are part-time often have less job security (e.g., due to seniority rules), fewer social benefits and statutory entitlements (as they may fail to meet minimum hours thresholds) and less influence in their work environment. We therefore include an analysis of part-time and temporary paid employment and solo self-employment in this paper. At the same time, we recognize that precarious employment is *not* synonymous with non-standard employment. Rather, some non-standard employment is relatively secure and some full-time permanent employment is precarious. Precariousness can cut across all kinds of work for remuneration – much

depends on the nature and organization of labour market regulations.[15] For this reason, we pursue an integrated analysis that places dimensions of labour market insecurity on a par with forms of employment.

The dimensions of labour market insecurity examined in this paper include low income, a lack of control over the labour process, and limited access to regulatory protections. As in all research using secondary data, we are limited by the indicators available to us in the dataset. As indicators of low income, we use jobs which pay low wages and have little to no non-wage compensation. We define a 'low wage' job as one in which a worker makes less than 1.5 times the minimum wage. The minimum wage is designed to set a basic minimum standard of living for workers. In fact, many wage rates are tied to the minimum wage; often workers gain wage increases for seniority or supervisory duties relative to the minimum wage. Table 2.1 shows the progression of minimum wage in Ontario and how it relates to the 'low wage' cut-off used here.[16] The Low-Income Measure (LIM) is a conceptual benchmark established by Statistics Canada that adopts a more nuanced approach to measuring poverty than the Low-Income Cutoff (LICO). The LIM is an internationally comparable benchmark that represents a fixed percentage (50%) of the median adjusted household income, adjusted to account for household size and location.[17] The LIM, shown as a reference point in Table 2.1, is for a single person in Canada living in a large urban area; more than half of Ontarians live in large urban areas. Based on this reference, our cutoff of 1.5 times the minimum wage provides a reasonable, indexed measure for identifying workers in low wage jobs.

Table 2.1: Minimum Wage, Low-Wage Cutoffs and the Low Income Measure

Year	Ontario Minimum Wage	Low Wage Cutoff (1.5 times the minimum wage)	Maximum yearly gross income of full-time, workers using this low-wage cutoff*	Low-income measure for a single Canadian living in a large urban area**
1999	$6.85	$10.28	$21,372	$19,949
2000	$6.85	$10.28	$21,372	$20,929
2001	$6.85	$10.28	$21,372	$22,204
2002	$6.85	$10.28	$21,372	$23,099
2003	$6.85	$10.28	$21,372	$24,438
2004	$7.15	$10.73	$22,308	$25,302
2005	$7.45	$11.18	$23,244	$26,479
2006	$7.75	$11.63	$24,180	$27,657
2007	$8.00	$12.00	$24,960	$28,888
2008	$8.75	$13.13	$27,300	$30,064
2009	$9.50	$14.25	$29,640	$30,250

* Based on working 40 hours per week, 52 weeks a year
** Based on before tax income for those living in a CMA of 500,000 or more;[18] Adjusted from 1992 dollars using the Bank of Canada's inflation calculator

Another measure of precariousness is having little non-wage compensation. Based on the measures available, we use the presence or absence of an employer pension plan as an indicator of this dimension of labour market insecurity. Although the presence or absence of extended health, vision or dental benefits provides another indicator of non-wage compensation, these data are not available.

We also contend that jobs that lack a full range of labour protections are more likely to be precarious. This situation applies to the self-employed, and is also more likely to apply to those who work in small firms, where the scope of employment standards may be less comprehensive than in large firms (e.g., provisions for termination and severance may be better for workers who are part of a mass layoff in large firm as is the case in British Columbia) and their application and enforcement tends to be more lax,[19] and where employers are not required to abide by equal pay and employment equity legislation.[20] In this analysis, we consider those who work in firms of less than twenty people to be precarious along this dimension. Small firms are also

more likely to be subject to economic fluctuations, leading to layoffs and or termination of workers in times of economic downturn. Finally, jobs in which workers have limited control over the labour process tend to be more precarious. In this analysis, these jobs are identified as those which are not unionized and/or where workers are not covered by a collective agreement.

Ultimately, we combine these four measures (low income, no pension plan, small firm size, and no union coverage) to create a composite measure of precariousness. Although we recognize the existence of a continuum of precarious jobs,[21] this composite measure, which does not prioritize one dimension over another and thus rejects the idea of weighting dimensions, deems that workers who indicate that their job has at least three of these four features have precarious jobs.

A substantial literature indicates that people from socially disadvantaged groups are more likely to be found in precarious jobs as are workers in particular industries and occupations, leaving them vulnerable to economic uncertainty and restructuring.[22] For this reason, we elevate social relations of gender and migration and processes of racialization in the analysis through the use of the indicators of sex,[23] visible minority status, ethnic background, and immigration status as well as examining sectoral, industrial, and occupational patterns.

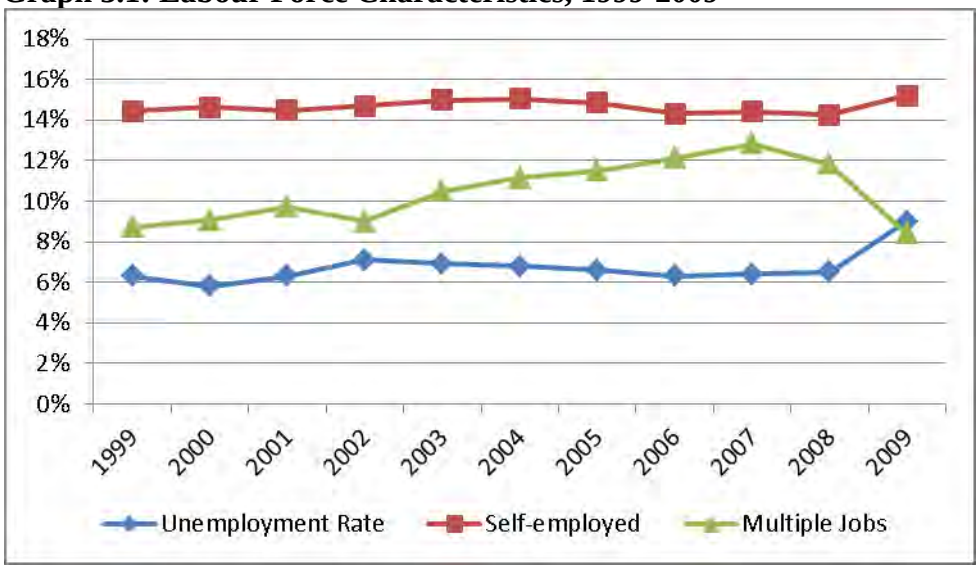
III. THE STRUCTURE OF THE LABOUR MARKET, 1999-2009

Over the past decade, a variety of forces have worked to shape Ontario's labour market. These include the development of a globalized labour force throughout the 1990s, the implementation of neoliberal employment policies during the mid-1990s, and the effects of a global recession starting in 2007. The overall proportion of Ontario's

population that is in labour force has remained constant during the past decade, though the proportion of those in the labour force who hold multiple jobs, an indicator of low wage work, has shown a steady increase to a high of 12.8% in 2007, and then dropped again to 1999 levels (see Graph 3.1). The unemployment rate in Ontario has fluctuated from a low of 5.8% (in 2000), to the most recent high of 9% in 2009 (See Graph 3.1).[24]

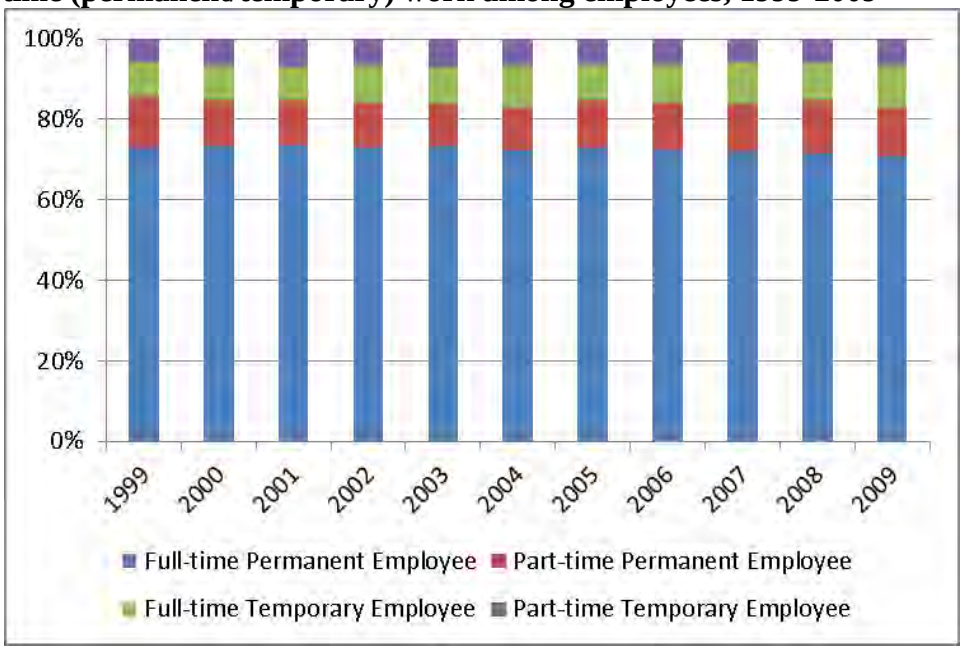
Interestingly, the proportion of both self-employed employers, and solo self-employed workers has remained relatively constant throughout the past decade, though one might expect some fluctuation in relation to changing levels of employment and unemployment. Overall, about 85% of the labour force are employees, with only about 15% who are self-employed (about 5% are self-employed employers, and 10% are solo self-employed.[25] It is possible that the quality of self-employment work has changed, as many of the self-employed are now defined by law as either independent or dependent contractors – indicating one marked change from the common perception of the self-employed worker as a small business owner-operator.[26] Changes in the quality of self-employment are not possible to assess, however, with the data that are available.

Graph 3.1: Labour Force Characteristics, 1999-2009



Trends in relation to the types of people who are self-employed are also consistent across time. Among the solo self-employed, women are less likely to be self-employed then men and, among self-employed women, solo self-employment, much of it delivering low-income, is most common.[27] Similarly, the level of education of self-employed workers has also remained relatively consistent, suggesting that the levels of socially recognized skills among the self-employed have remained relatively stable; that is, there does not appear to have been a substantial growth or decline in so-called high-skill professional self-employment, performed typically by workers with higher levels of education, nor a substantial growth or decline in forms of self-employment characterized by manual labour (e.g., cleaning, construction etc.) that are performed typically by workers with lower levels of education.

Graph 3.2: Proportions of full-time (permanent/temporary) and part time (permanent/temporary) work among employees, 1999-2009



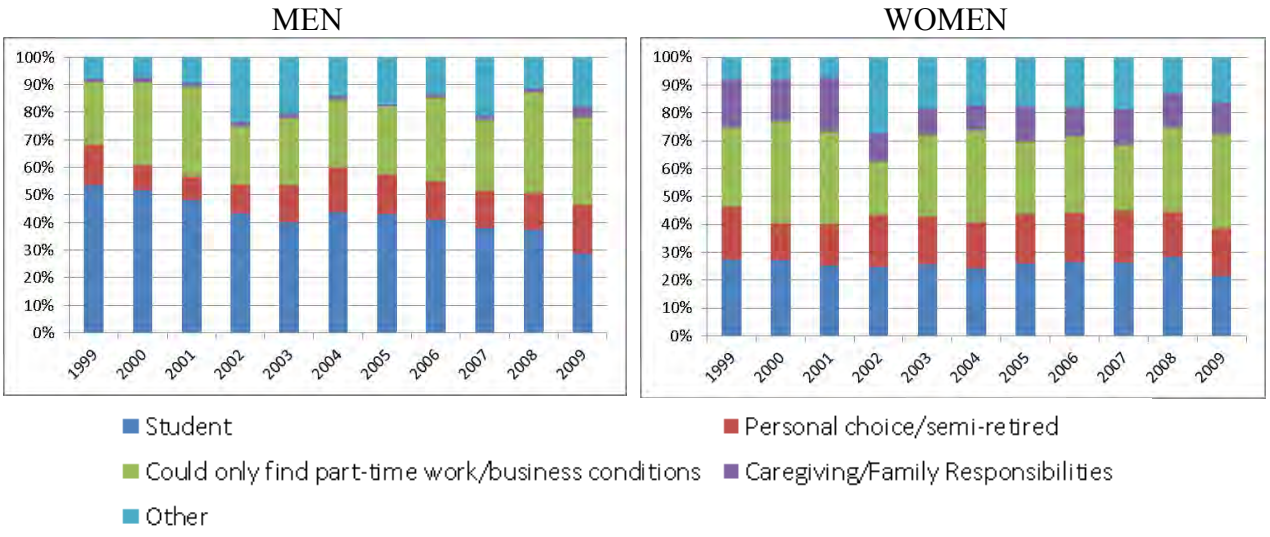
Much like self-employment, the proportion of part-time employment in Ontario's labour force has also remained relatively constant across time (see Graph 3.2),

suggesting that it has been a consistent feature of the labour market over the last decade. Again, women are more likely to hold part-time employment, and this has not changed substantially during the past decade. Similarly, workers with lower levels of education are more likely to hold part-time forms of employment, but this trend has also not varied substantially. In 2008, about a third of workers without a high school education (34.4%) worked in part time jobs, compared to only 11.7% of workers with a university degree.

Since in 2001, workers have been asked about the reasons why they were not employed full-time in the previous year. The most common reason for part-time employment reported is attending school. The next most common reason for part-time employment is the inability to find full-time employment. With some yearly variation, about a third of employees work fewer than 30 hours each week because they are unable to find more work (see Graph 3.3). Not surprisingly, women are more likely to report taking part-time employment because of the need to care for children; in 2008, 9.3% of women gave this reason for working part-time, compared to just 0.8% of men. In contrast, men are more likely to report working part time because they are students; 37.2% of men gave this as a reason for working part time in 2008, compared to only 28.5% of women. Among men, however, we see a steady decline from 1999-2009 in the proportion who work part time because they are students and a corresponding increase in the proportion who could not find full-time jobs. In part, this might reflect an increase in the barriers to accessing post-secondary education; whereas previously those who could not find work may have found it easy to return to school, they may now encounter substantial difficulties financing an education and/or gaining admission in an

increasingly competitive post-secondary environment. Interestingly, this trend does not appear for women, which provides further support for the notion that the factors that influence women's labour force decisions are different than those that influence men's.

Graph 3.3: Reasons for part-time work, by gender, 2001-2009



Overall, these results suggest a remarkable stability in the overall structure of the Ontario labour force during the period from 1999-2009. Despite the economic recession in 2007, the distribution of forms of employment has not changed substantially, though it may be too soon for its effects to be apparent. These results also suggest that the changes associated with the implementation of neo-liberal policies may have stabilized by the turn of the millennium, creating a period of relative stasis which might be identified as persistent precarity.

IV. CHARACTERISTICS OF PRECARIOUS JOBS

In the conceptualization of precarious jobs, recall that we use four key indicators of dimensions of labour market insecurity: low wages, no pension, no union coverage (i.e., either by a union or a collective agreement), and small firm size. Considering the labour force as a whole, amongst these four indicators, no union coverage is the most predominant in Ontario (see Graph 4.1). In 2008,[28] approximately three out of every four workers (73.5%) lacked union coverage. This trend has remained relatively consistent across the past decade, despite changes to legislation weakening collective bargaining overall.[29]

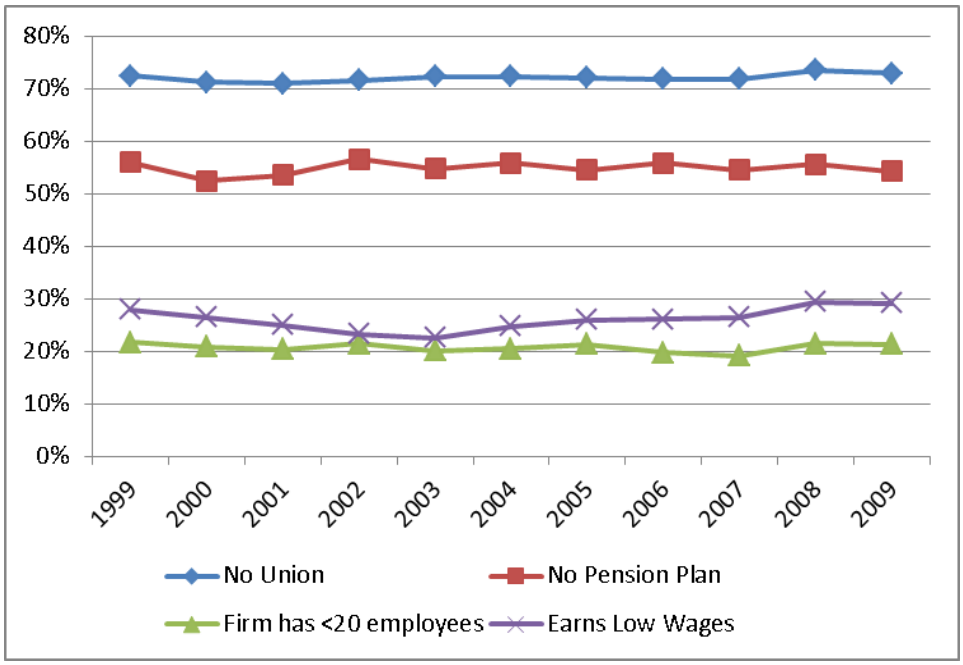
The next most prevalent indicator of precariousness is the absence of a pension plan. Just slightly less than half of workers report that they have no access to an employer sponsored pension plan, and this proportion has remained relatively consistent over time. The fact that half of all workers lack pension plan coverage makes the current concerns over the Canadian Pension Plan, also asserted by a 2008 provincial taskforce on pension reform,[30] even more pressing, as many retiring workers will not have access to additional retirement income beyond their own savings.

Following closely behind the lack of access to an employer sponsored pension plan, about a third of all workers are consistently in low-wage jobs, despite the changes in the minimum wage (and consequently a changing assessment of low-wage work) across the past decade.

The least prevalent measure of precariousness is working in a small firm – indeed, only about one in five employees work in firms of fewer than twenty people in

Ontario. Again, the proportion of Ontarians working in small firms has remained consistent across the past decade.

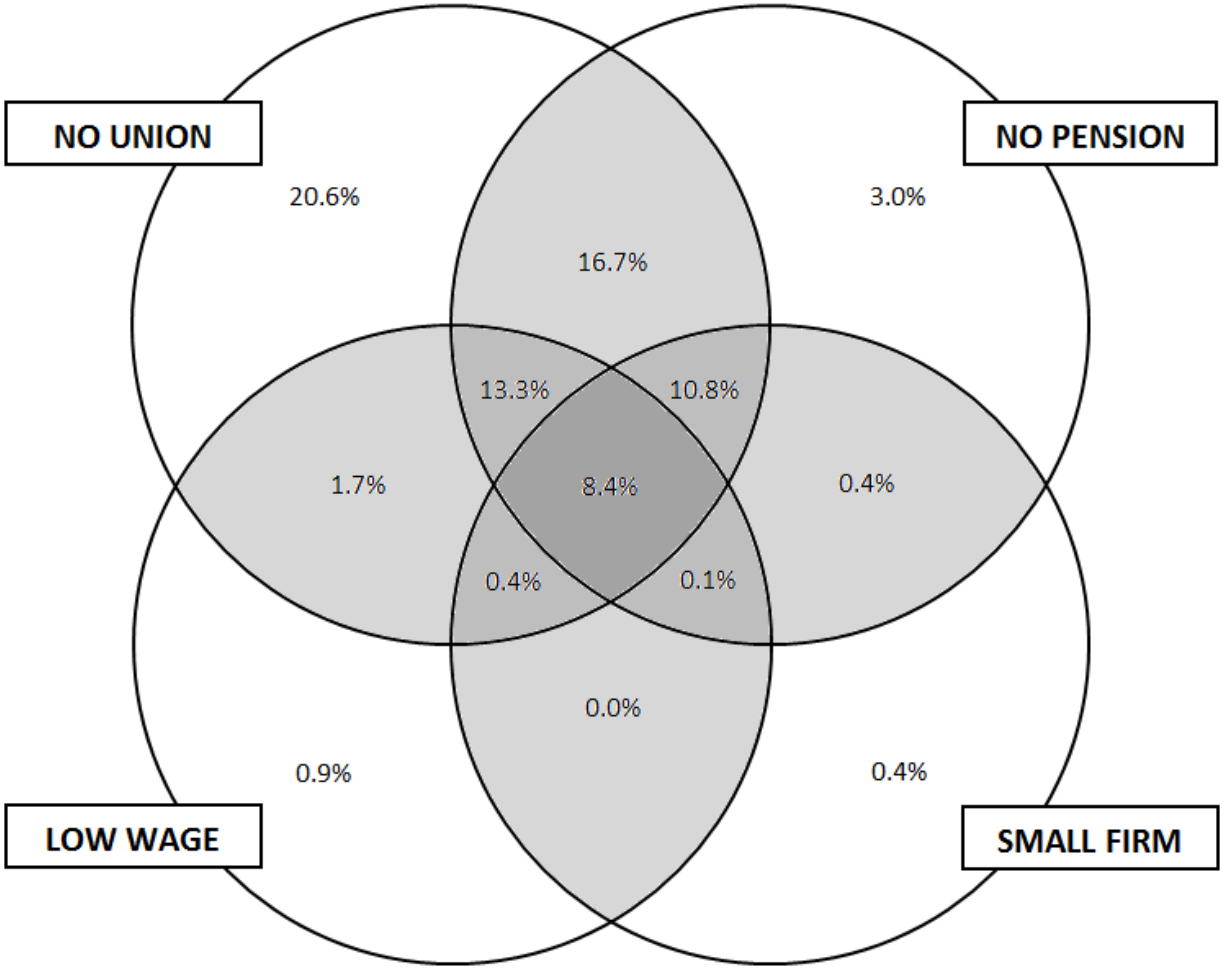
Graph 4.1: Prevalence of measures of precarious jobs, 1999-2009



One element key to understanding and mitigating precarious employment involves discerning how these different factors cluster together. In 2008, about one in five workers (20.3%) held jobs characterized by none of these indicators of precariousness. The Venn diagram shown in Figure 4.1 shows the (non-proportional) overlap between different aspects of precariousness for individual jobs/workers in 2008. The darkest area in the middle of the Venn diagram shows that 8.3% of all workers are in a job with all four indicators of precariousness; that is, their job has low wages, no pension, no union, and is in a small firm. The most common indicator of precariousness in isolation from the others is no union coverage; about 20% of workers overall have no union coverage, but have relatively high wages, a pension plan and work in a large firm (see Figure 4.1). In contrast, workers who are in a small firm are likely to also have no

pension and no union coverage. Similarly, workers who earn low wages are likely to also have no pension and no union coverage. Interestingly, it is rare for workers to *only* have no pension; this phenomenon is most common in conjunction with the absence of union coverage and/or low wages.

Figure 4.1: Overlap between indicators of precarious jobs, 2008

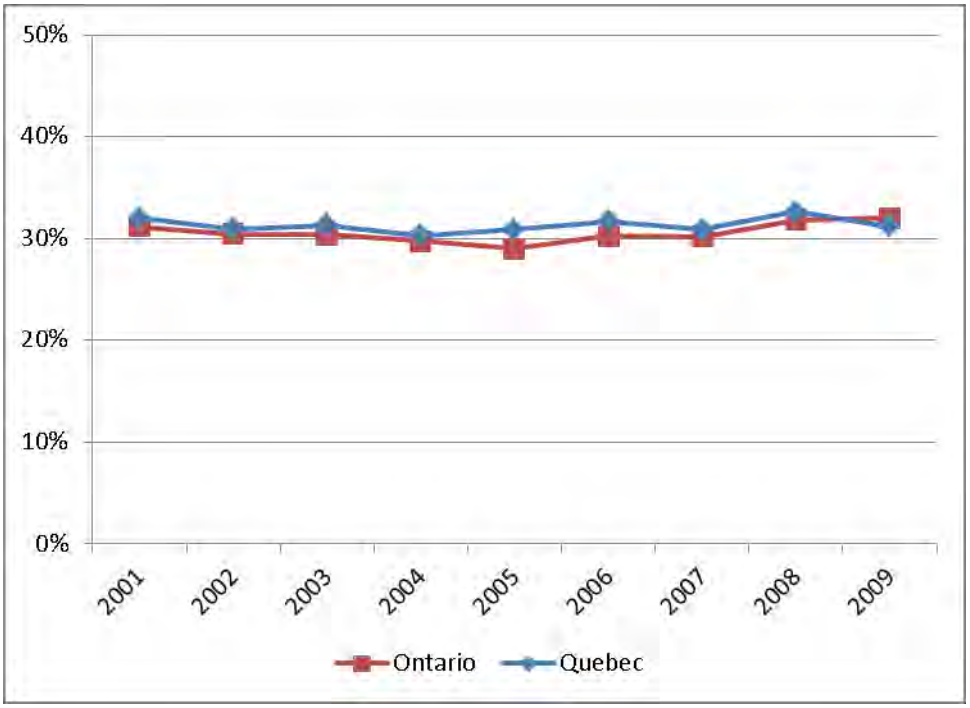


Overall, workers with three or more characteristics of precariousness are deemed here to be in precarious jobs. These overlapping areas are indicated by the two darkest shades in the Venn diagram in Figure 4.1. We can see that the most common combination leading to a designation of a 'precarious job' is having a low wage, no

union coverage, and no pension (13.3%). The next most common combination is having a no union coverage, no pension, and working in a small firm (10.8%), followed by having all four indicators (8.4%). In 2008, about a third of workers (33.1%) – more than one-third of Ontario's labour force – had a precarious job.

An inter-provincial comparison between Ontario and Quebec also shows a remarkable consistency in the proportion of workers in precarious jobs across the past decade in both contexts (see Graph 4.2).[31] The consistency of precarious jobs is not surprising for Ontario, given the erosion of collective bargaining and hence workers' greater reliance on relatively weaker employment standards regulation since the early 1990s[32] but is more surprising for Quebec given the slower decline of unionization in that context[33] and given especially improved employment standards regulations, including those pertinent to wage levels, adopted partly to compensate for growing precariousness in the early 2000s.[34] These results suggest that, in the context of a persistently structured labour force, labour regulations alone may not reduce the prevalence of precarious jobs, particularly in circumstances where workers lack control over the labour process through the limited provision of mechanisms for collective representation.[35]

Graph 4.2: Prevalence of Precarious Jobs in Ontario and Quebec, 1999-2009



Given the historical development of labour regulations in the context of the SER, it is not surprising that form of employment is strongly linked to whether or not a job is precarious. Full-time employees are less likely to be in precarious jobs than part-time employees. Similarly, permanent workers are less likely to be in precarious jobs than temporary workers. Table 4.1 shows the differing proportions of workers in each form of employment who are in precarious jobs, with full-time permanent workers the least likely to be precarious, and temporary part-time workers the most likely to be precarious. Figure 4.2 provides more context to this trend, with higher proportions of workers falling in the outer segment of the diagram depicting full-time workers as opposed to higher proportions of workers falling near the centre of the diagram depicting part-time workers.

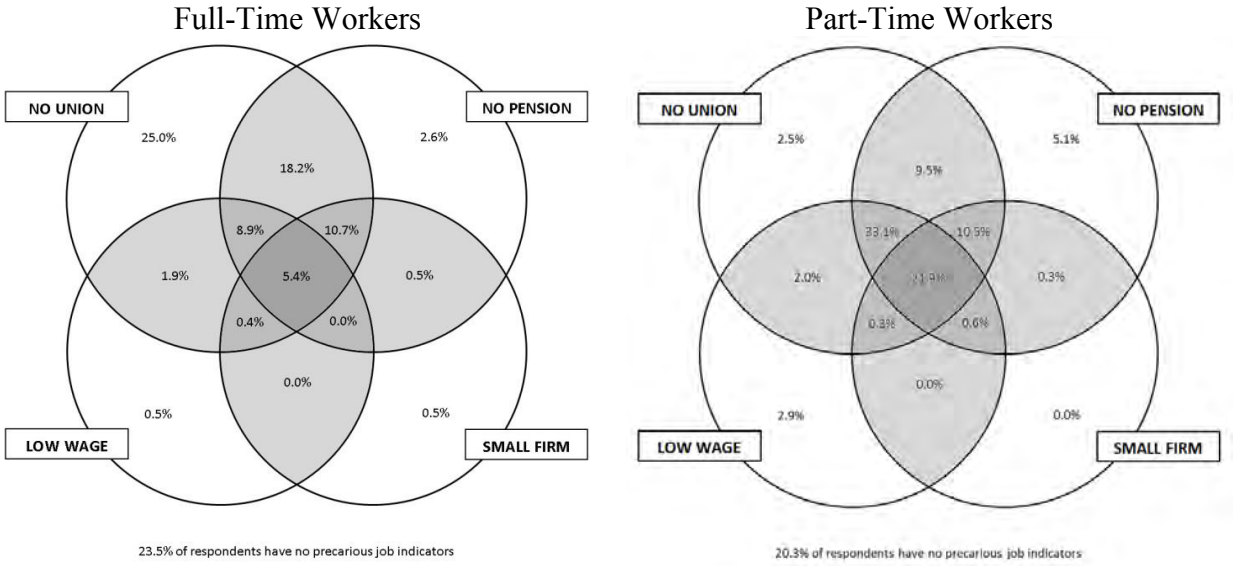
Table 4.1: Proportion of workers in precarious jobs, by form of employment, 2008

	% in Precarious Jobs
Overall	33.1
Full-time workers	25.4
Part-time workers	66.3
Permanent workers	27.6
Temporary workers	55.2
Permanent, full-time workers	21.9
Temporary, full-time workers	46.3
Permanent, part-time workers	62.4
Temporary, part-time workers	68.3

About a third of part-time workers (33.1%) are in jobs that have low wages, no union, and no pension, compared to only 8.9% of full-time workers in this situation. Full-time workers are much more likely to be in a job where the only indicator of precariousness is the absence of a union. In a stark contrast, about one in five full-time workers are in jobs without a single indicator of precariousness, whereas about the same proportion of part-time workers are found in jobs characterized by all four measures of precariousness.

The precariousness of jobs outside of the SER is even more evident when permanent and temporary forms of paid employment are also taken into account. Figure 4.3 shows the relatively low levels of precariousness for workers in full-time permanent jobs; about a quarter of such workers have no indicators of precariousness (24.8%), and a further quarter of workers (28%) lack union coverage alone. Among workers in full-time and part-time employment respectively, those in temporary jobs are more likely to experience high levels of labour market insecurity than those in permanent jobs.

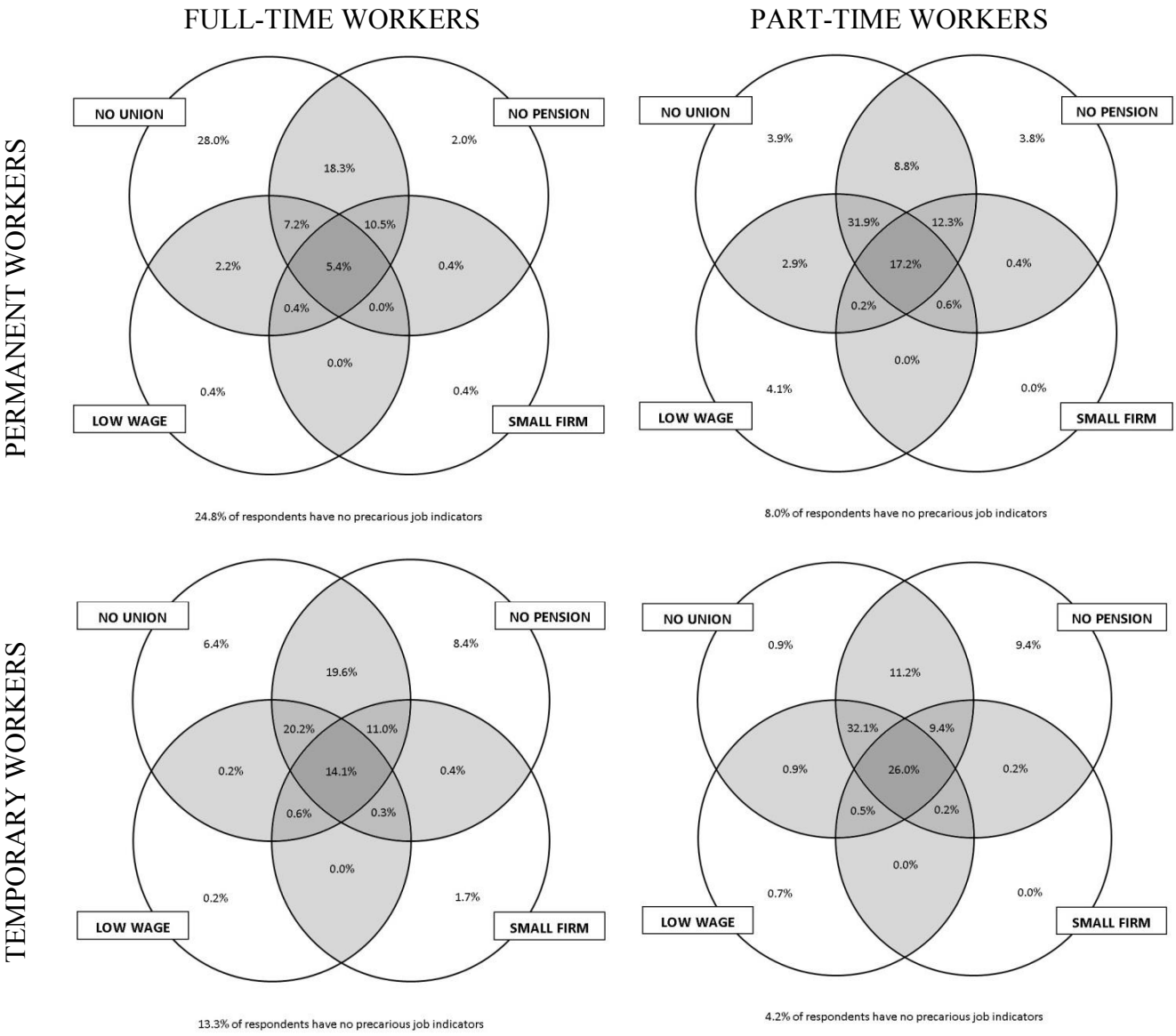
Figure 4.2: Overlap between indicators of precarious jobs, by full/part-time status, employees, 2008



Part-time temporary workers are the most likely to hold precarious jobs, with fully a quarter (26%) experiencing all four indicators of precariousness, and an additional third (32.1%) experiencing low wages, no union coverage, and no pension. Overall, it is clear that form of employment is strongly linked precariousness in a clear continuum; workers in full-time permanent jobs, in a relationship which most closely resembles the SER, are the least likely to precarious, while workers in part-time temporary jobs are the most likely to be precarious.

The relationship between dimensions of labour market insecurity and form of employment is particularly important because socio-demographic groups are unevenly distributed across all four forms of employment (see Table 4.2). For instance, women are much more likely to be engaged in part-time employment. Although women make

Figure 4.3: Overlap between indicators of precarious jobs, by employment form, employees, 2008



up only about half of employees in Ontario, they constitute 72% of permanent, part-time employees. Single parents (a group also comprised mainly of women) are also more likely to be engaged in part-time temporary employment, which has the highest likelihood of being precarious.

Table 4.2: Socio-demographic characteristics of employees, by form of employment, 2008

	Full-time employees (82.8%)		Part-time employees (17.2%)		All employees (100%)
	Permanent (70.7%)	Temporary (12.1%)	Permanent (10.4%)	Temporary (6.7%)	
Women	45.1%	45.4%	71.5%	59.9%	49.4%
Visible Minorities	23.5%	23.8%	22.0%	30.3%	23.8%
Visible minority group					
Chinese	23.9%	20.2%	8.9%	18.0%	21.3%
South Asian	20.1%	14.5%	20.1%	18.2%	19.4%
Black	16.3%	20.6%	18.0%	10.3%	16.4%
Southeast Asian	16.6%	11.3%	19.7%	19.7%	16.7%
Other visible minority	23.1%	33.4%	33.3%	33.8%	26.2%
Gender and Visible Minority Status					
Non-visible minority Men	41.1%	43.8%	20.3%	26.4%	37.7%
Non-visible minority Women	35.3%	32.4%	57.7%	43.3%	38.1%
Visible minority Men	13.3%	11.7%	6.8%	11.9%	12.5%
Visible Minority Women	10.2%	12.1%	15.2%	18.4%	11.8%
Recent Immigrant (less than 10 yrs in Can)	9.2%	10.1%	9.3%	15.9%	9.8%
Gender and Immigration Status					
Non-recent or non-immigrant Men	49.4%	51.5%	26.7%	32.0%	45.6%
Non-recent or non-immigrant Women	41.4%	38.4%	64.0%	52.1%	44.6%
Recent immigrant Men	5.2%	4.2%	1.4%	7.0%	4.7%
Recent immigrant Women	4.0%	5.9%	7.9%	8.9%	5.0%
Education					
No high school diploma	8.9%	9.6%	19.5%	23.4%	11.2%
High school diploma	26.2%	39.9%	35.3%	38.1%	29.3%
College/trade certificate or diploma	36.3%	23.2%	28.2%	18.8%	33.1%
University degree	28.6%	27.4%	17.0%	19.7%	26.5%
Family Type					
Couple without children	20.0%	15.3%	15.4%	11.9%	18.5%
Couple with children under 25	40.5%	39.3%	50.9%	49.8%	42.3%
Single parent with children under 25	5.6%	6.5%	8.8%	10.8%	6.4%
Unattached individual	13.9%	13.6%	6.9%	6.2%	12.5%
Other family type	20.0%	25.2%	17.9%	21.3%	20.3%

Overall, racialized workers are more likely to hold part-time temporary employment, which has the highest likelihood of being precarious. Among racialized workers, those of Chinese origin are most likely to be in full-time forms of employment, and those from Southeast Asia are most likely to be found in part-time forms of

employment. These findings reflect the social stratification of the labour market by race, whereby workers from some racialized background tend to be clustered in certain types of employment, both as a result of outright discrimination and the means by which group members access the labour force (e.g., via employment agencies etc.). These results also reflect how well established different cohorts of immigrants are in Canada.

Recent immigrants are more likely to be found in temporary, part-time work. Just less than one in ten employees is a recent immigrant (9.8%), and yet recent immigrants constitute 15.9% of temporary, part-time employees. The clustering of recent immigrants in temporary forms of employment might reflect the difficulty of entering the labour market in a new country, especially with foreign credentials and work experience. There is some re-assurance in finding that established immigrants have job outcomes relatively similar to their Canadian-born counterparts, but it is difficult to estimate the effects of selection bias, that is, those immigrants who are not successful in entering into the labour market are more likely to re-settle in another country or return to their countries of origin.

Workers without a high school diploma are also likely to hold part-time jobs; almost a quarter (23.4%) of part-time, temporary employees do not have a high school diploma, and another 38.1% of these employees have only a high-school diploma. In total, more than three out of every five part-time, temporary workers (61.5%) do not have a post-secondary credential. This finding suggests that part-time temporary employment is primarily held by workers who lack the formal credentials needed to access other forms of employment.

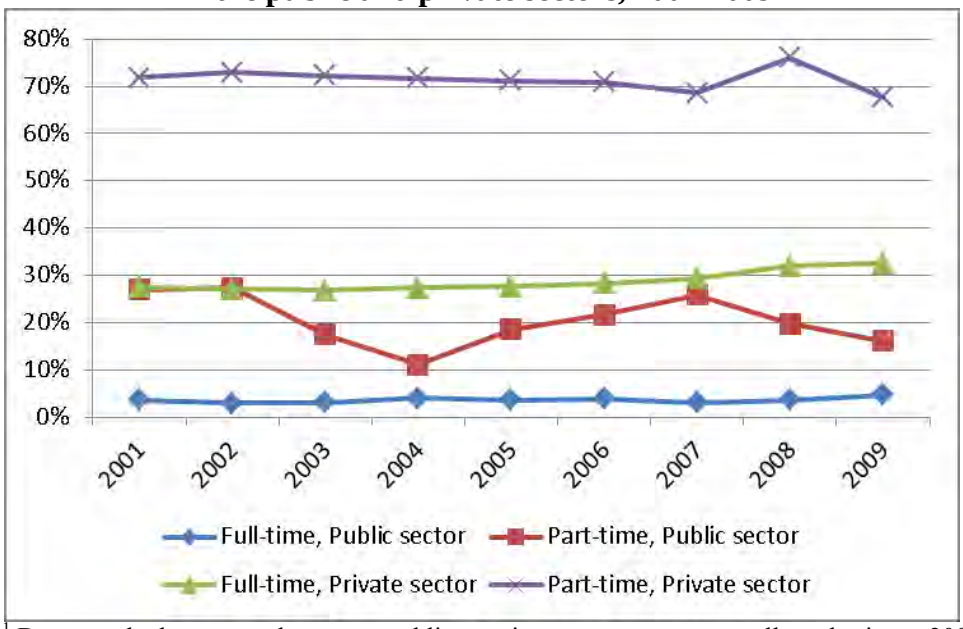
Though many of the preceding results are predictable given previous research findings, this analysis highlights clearly the continued relationship between form of employment and indicators of precariousness. It also highlights the continued need to reduce precarious jobs by advancing labour regulations that promote the principles of parity and inclusivity.[36] By labour regulations fostering parity, we mean those that address the diverse needs and situations of workers in different forms of employment rather than prorating protections to the SER. For example, regulations that take into account both working time over the lifecycle and total work, that is, paid and unpaid work,[37] rather than penalizing workers engaged in part-time employment due to, among other reasons, responsibilities for care giving. By labour regulations supporting inclusivity, we mean adopting comprehensive standards for all workers rather than permitting exceptions by form of employment; for example, instead of regulations excluding workers in temporary jobs from protections due to their limited job tenure, provide for regulatory protections and social benefits beyond a single job.

V. WHAT TYPES OF JOBS ARE PRECARIOUS?

In addition to differences in the presence and absence of labour market insecurity related to forms of employment, there are differences in the prevalence of precarious jobs across the public and private sectors as well as by industry and occupation. These differences also intersect with form of employment and socio-demographic characteristics. As expected, in Canada (as in most other industrial nations), jobs in the public sector, and especially full-time public sector jobs, are least likely to be precarious (See Graph 5.1). In part, the security associated with public sector employment flows

from the high level of unionization, which also tends to provide workers with competitive wages, good pensions, and other benefits.[38] Also, public sector employers tend to be large organizations that tend to be subject to extensive employment standards and attentive to their enforcement.[39] Even part-time workers in the public sector are less likely to be in precarious jobs. Overall, women, non-racialized workers, and workers with high levels of education tend to be working in such public sector jobs.

Graph 5.1: Proportion of Precarious workers in full and part-time jobs, in the public and private sectors, 2001-2009[1]



[1] Data on whether an employer was public or private sector were not collected prior to 2001

In contrast, part-time workers in the private sector are most likely to be in precarious jobs, often characterized by low-wages, no pension, and a lack of union coverage. Approximately seven out of every ten part-time, private sector workers are in precarious jobs. Part-time, private sector work was the 'main job' of fully 16.1% of workers in 2008 (a notable percentage since private sector employment overall was the 'main job' of 79% of workers). Given the historically higher levels of precariousness in the private sector, there may be the need for modifications to the existing labour

regulations in order to further protect workers in these jobs from less-than-ideal conditions.

Our analysis of precarious jobs by industry and occupation substantiates these claims, with industries and occupations in the public sector (such as public administration and utilities) characterized by low levels of precariousness. An analysis of precarious jobs by industry shows that employment in accommodation and food services industries is the most likely to be precarious, and that about three-quarters of workers in that industry hold jobs that are precarious (see Appendix B, Table 5.1). This finding reflects industry norms around low-wages and the lack of non-wage remuneration. The typical worker in accommodation and food services is a woman, who has schooling amounting to a high-school diploma or less. Racialized women, and workers from South Asian and Filipino backgrounds, are also overrepresented in this industry. Women who have immigrated to Canada in the past ten years are also overrepresented in the accommodation and food services industries. Of all of the industries, accommodation and food services has the highest proportion of part-time employees (44%), about a third of whom (13.5% overall) are temporary.

The industry with the next highest level of precariousness over the past decade is agriculture, though the proportion of agricultural workers in precarious jobs as a whole appears to have declined, from a high of 80.5% in 1999 to a low of 64.7% in 2008.[40] In contrast to accommodation and food services, the typical worker in agriculture is a man, with a college or trade certificate or diploma.[41] Although agricultural workers tend to be full-time, almost two in five workers (37.1%) are temporary full-time employees, and thus are likely to lack the non-wage benefits and statutory entitlements that accrue to

those that are permanent (e.g., access to employment insurance and employer pension plans where they exist). This outcome reflects the seasonal nature of agricultural work, which requires full (or more than full)-time work in peak planting and harvesting seasons.

The industries with the next highest levels of precariousness are both service industries: 'other services' (including repair and maintenance services, personal care and laundry, and civic and professional organizations) and business, building and other support services.[42] Those working in 'other services' tend to be women, with a college or trade certificate or diploma – in part reflecting the relatively low value placed on service work associated with so-called women's skills, such as personal care and caregiving.[43] Women who have recently immigrated to Canada and racialized workers, especially those from Black and Southeast Asian backgrounds, are also over-represented among workers in 'other services'. Workers in building and business support services are overwhelmingly men, with a high-school diploma. Overall, these industry-specific results demonstrate the relative precariousness of service industries assumed to be ancillary,[44] and the stability of 'core' services such as education, public administration, and utilities.

Paralleling the industry-specific findings, the occupations characterized by the highest levels of labour market insecurity are also in the service sector (see Appendix B, Table 5.2). The occupational group experiencing the highest degree of precariousness is chefs, cooks and other workers in the food and beverage industry – primarily restaurant servers.[45] The occupational group with the second highest degree of precariousness is retail sales clerks and cashiers. The profiles of workers in both of

these occupational groups are quite similar: both groups are comprised overwhelmingly of high-school educated women. Recent immigrants and racialized workers are over-represented in sales and service occupations, though underrepresented among chefs, cooks and other food and beverage workers. Both occupations are characterized by high levels of part-time employment; almost half of all workers in food services (45%) and the majority of workers in retail services (52.4%) are part-time. Retail services also has a high proportion of temporary part-time employment (15.9%) overall, reflecting the use of temporary staff in this sector as a way to deal with seasonal fluctuations in the business cycle.

The occupational areas with the next highest level of precariousness are in primary industries, including forestry and primary resource extraction, as well as some agricultural occupations (excluding labourers). This occupational group consists primarily of white men, although workers in this group have a diverse range of educational backgrounds. Similar to workers in the agricultural industry described above, these occupations are characterized by a high level of full-time temporary employment, reflecting the seasonal nature of much of this work.

An analysis of work by industry and occupation shows how the features of some forms of work – such as service and agricultural work – converge with those identified with precariousness. Furthermore, the gendered and racialized nature of work in these industries and occupations, intersect with the form of employment to result in a situation where some social groups are more likely to be situated in precarious jobs than others.

VI. WHO ARE WORKERS IN PRECARIOUS JOBS?

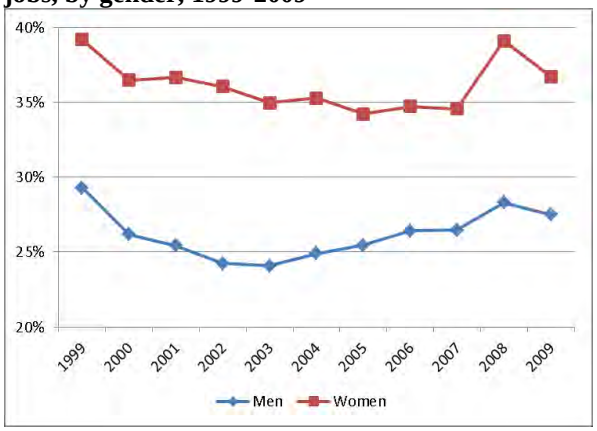
Workers' social location clearly intersects with form of work to result in an employment advantage or disadvantage for some groups of workers. In the analysis below, we provide an analysis of how precarious employment is unevenly distributed based on workers' gender, immigration status, ethnicity, education and family status. Overall, you can see that precarious jobs are not distributed evenly throughout the labour force, with women, racialized women, recent immigrants, single parents and those with less than a high-school education much more likely to be in jobs which are insecure in some way (see Table 6.1). In the discussion that follows, graphs on the left hand side show the proportion of all workers in precarious jobs whereas graphs on the right hand side show the proportion of full-time permanent workers in precarious jobs.

Overall, it is clear that women are much more likely to be in precarious jobs than men (see Graph 6.1), although this gender disparity has remained relatively stable over the decade long period covered in this study. This trend relates primarily to women's greater tendency to work in part-time and/or temporary forms of employment, which have more features of precariousness, than men's. For some, engaging in part-time or temporary employment may be a strategy responding to the increased demands of child care which often fall to women. Even among full-time permanent workers, however, women are more likely to hold precarious jobs than men (see Graph 6.2): women are more likely to earn low wages (36.7% of women compared to 22.7% of men), to lack a pension plan (58.7% of women compared to 52.6% of men), and to work in small firms (23.5% of women compared to 19.6% of men).

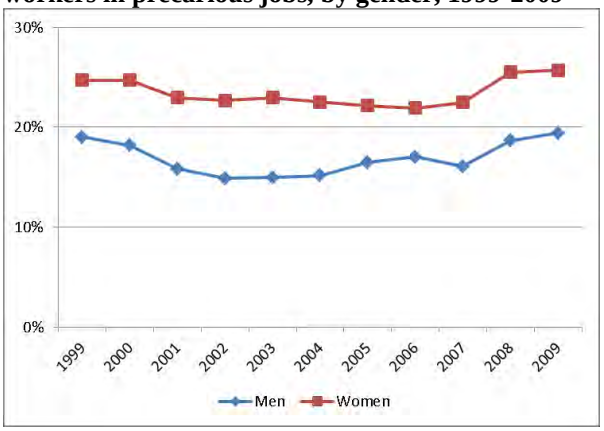
Table 6.1: Proportion of workers in precarious jobs, by sociodemographic characteristics, 2008

	% in Precarious Jobs
Overall	33.1%
Gender	
Men	28.3%
Women	39.1%
Visible Minority Status	
Non-Visible Minority	31.3%
Visible Minority	34.4%
Visible minority group	
Chinese	38.2%
South Asian	34.6%
Arab	34.6%
Southeast Asian	30.0%
Black	29.5%
Gender and Visible Minority Status	
Non-visible minority Men	26.9%
Non-visible minority Women	35.7%
Visible minority Men	26.5%
Visible Minority Women	43.1%
Immigration Status	
Non-recent immigrant or non-immigrant	31.4%
Recent Immigrant (less than 10 yrs in Can)	40.7%
Gender and Immigration Status	
Non-recent or non-immigrant Men	26.5%
Non-recent or non-immigrant Women	36.5%
Recent immigrant Men	32.7%
Recent immigrant Women	48.1%
Education	
No high school diploma	61.4%
High school diploma	42.7%
College/trade certificate or diploma	27.5%
University degree	17.1%
Family Type	
Couple without children	24.4%
Couple with children under 25	36.1%
Single parent with children under 25	51.7%
Unattached individual	27.1%
Other family type	34.7%

Graph 6.1: Proportion of all workers in precarious jobs, by gender, 1999-2009



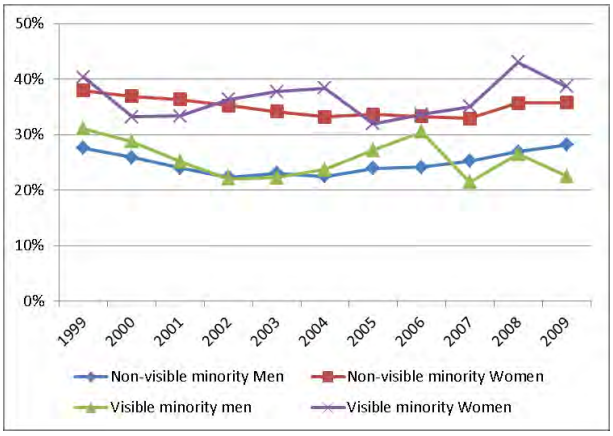
Graph 6.2: Proportion of full-time permanent workers in precarious jobs, by gender, 1999-2009



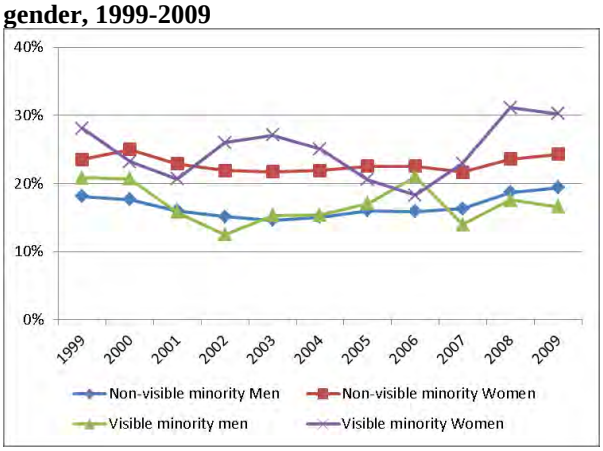
Single parents are also more likely than people in other family configurations to be in precarious jobs. This finding flows clearly from gender relations; single parents are much more likely to be women than men, and thus more likely to be in precarious jobs.

Although the effect of gender is most substantial, racialized workers tend to be slightly more likely to be in precarious jobs than their same-gender counterparts (see Graphs 6.3 & 6.4). In the period from 2002-2007 in particular, workers from Arab backgrounds were considerably more likely to hold precarious jobs. In part, this trend might reflect the overall increase in discrimination against those from Arab backgrounds as a result of the cultural discourses and practices related to race which emerged following the attacks on the World Trade Centre in September 2001. Among full-time permanent workers, members of racialized groups are more likely to earn low wages (22.9% compared to 14.0% for non-racialized workers). Racialized women are at a particular wage disadvantage, with a third of racialized women (33.2%) reporting low wages, compared to 18.7% of non-racialized women. Low wages are also notably prevalent among workers from Chinese and Filipino backgrounds, with about a third of full-time, permanent employees in each of these racialized groups earning low wages.

Graph 6.3: Proportion of all workers in precarious jobs, by racialization and gender, 1999-2009



Graph 6.4: Proportion of full-time permanent workers in precarious jobs, by racialization and gender, 1999-2009

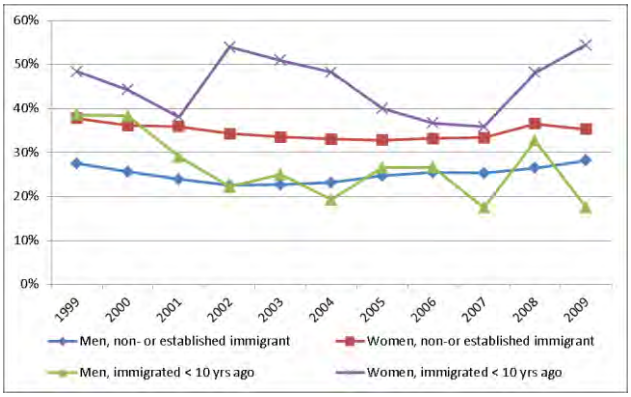


Racialized workers are also less likely to work in unionized workplaces and less likely to have a pension plan. Four out of five racialized workers (79.9%) work in non-unionized workplaces, and almost half of racialized workers (47.1%) lack a pension plan (compared to the still high 68.4% non-racialized workers who work in non-unionized workplaces, and 42.0% who lack a pension plan). Workers from Chinese backgrounds are especially likely to lack both union coverage and pension plans compared to workers from other ethnic backgrounds. Although racialized workers are less likely to be employed in small firms overall, a gender analysis shows that racialized women are more likely to work in small firms, whereas racialized men are less likely to work in small firms.

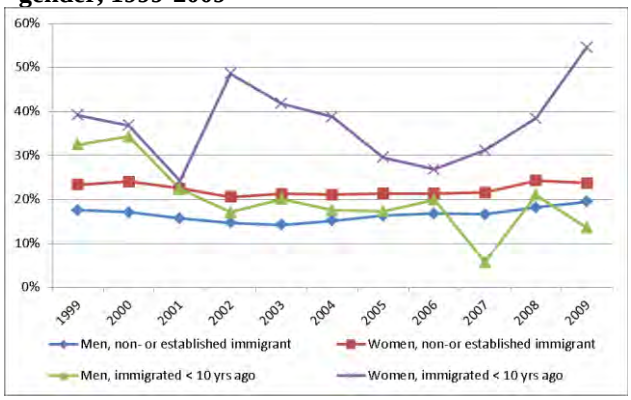
In general, recent immigrants to Canada are more likely to be in precarious jobs; in 2008, 40.7% of immigrants who had been in Canada less than 10 years were in precarious work, compared to only 31.4% of workers who were Canadian born or who had immigrated 10 or more years ago. The integration of a gender analysis shows that women who have recently immigrated are more likely to be in precarious jobs than

women who are not recent immigrants (see Graph 6.5), whereas for men the trend is less clear. A notable finding is that the proportion of workers in precarious jobs is relatively consistent for non-immigrants and non-recent immigrants. In contrast, there is much more variation in the proportion of recent immigrants with precarious jobs over time. Although some of this result can be explained by the smaller sample size of recent immigrants, it also suggests that recent immigrants are more susceptible to fluctuations in the labour market than their more established counterparts.

Graph 6.5: Proportion of all workers in precarious jobs, by immigrant status & gender, 1999-2009



Graph 6.6: Proportion of full-time permanent workers in precarious jobs, by immigrant status and gender, 1999-2009

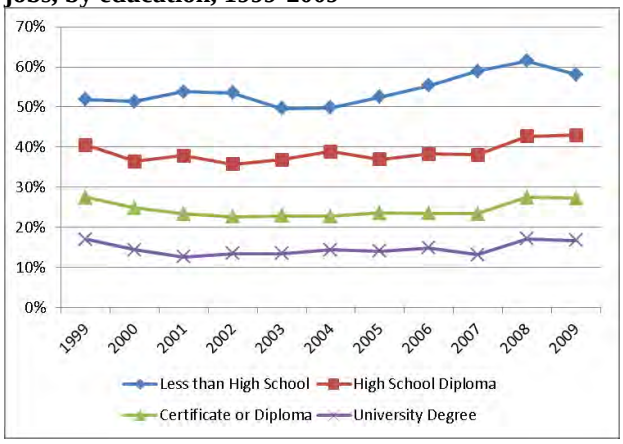


Women who have recently immigrated to Canada are especially likely to be in low wage jobs. Even among full-time permanent workers, almost half (46.6%) of women who have recently immigrated were working in low wage jobs. Women who have recently immigrated are also more likely to being working in a job with no pension; 60.9% of recent immigrant women report having no pension, compared to just over 40% of recent immigrant men, and non-recent or non-immigrant women and men.

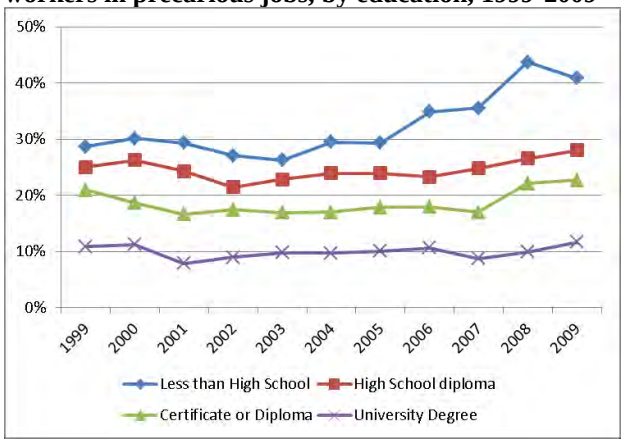
There is also a clear relationship between level of education and being precariously employed in Ontario. As expected, those with lower levels of education are more likely to be in precarious jobs. Notably, the service sector and agricultural jobs most likely to

be precarious are also those that require relatively low levels of education. Once again, however, even among those in full-time permanent jobs, those with lower levels of education are more likely to be in precarious forms of employment. Workers with less than a high school education are more likely to have each of the four indicators of precarious employment used in this analysis. For example, in 2008, 59.9% of those without a high school diploma made low wages, compared to only 13.8% of those with a university degree. Similarly, 77.5% of those without a high school diploma lack an employer pension plan, compared to 42.1% of those with a university degree.

Graph 6.7: Proportion of all workers in precarious jobs, by education, 1999-2009



Graph 6.8: Proportion of full-time permanent workers in precarious jobs, by education, 1999-2009



Overall, these analyses show clear relationship between form of employment, socio-demographic characteristics and precarious jobs. Notably, however, even among full-time permanent employees, some groups of workers are more likely to be disadvantaged. Women, visible minority women, workers from Chinese backgrounds, recent immigrants – and especially recently immigrated women, and workers with lower levels of education are more likely to hold precarious jobs than others.

VII. CONCLUSIONS AND RECOMMENDATIONS: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

The foremost conclusion of this investigation into the dynamics of precarious employment in Ontario is continuity: over the last decade, even though there were changes in the labour market, such as continued decline in manufacturing, recession, and decollectivization, measured statistically the magnitude and nature of precarious jobs persisted.

Echoing previous research findings centering on Canada as a whole, in Ontario a continuum of precarious forms of employment exists, whereby full-time permanent jobs exhibit the fewest and part-time temporary jobs exhibit the greatest dimensions of labour market insecurity. Part-time temporary jobs are characterized by the largest number of features of labour market insecurity followed by jobs that are part time and other jobs that are temporary. Furthermore, the forms of employment characterized most by precariousness are also those in which many women and single parents (part-time forms) as well as members of particular ethnic groups (full- and part-time temporary forms) participate.

Precarious jobs also tend to cluster in the private rather than the public sector, where accommodation and food services industries, agriculture, and 'other services' tend to be host to those that are most insecure. Occupational groups experiencing high levels of insecurity include chefs, cooks and other workers in the food and beverage industry, and retail sales clerks and cashiers, as well as workers in occupations in the primary industry. For these occupational groups, low levels of education are correlated with precarious jobs, except for some women in certain types of service work, where the

educational qualifications of those in service oriented careers may be undervalued. In addition to women, racialized women, and workers from particular ethnic backgrounds tend to be concentrated in industries occupational groups in which many jobs are characterized by dimensions of labour market insecurity; for example, Southeast Asian and Filipino workers in accommodation and food services industries.

Workers in precarious jobs in Ontario are also much more likely to be women than men due largely to women's concentration in part-time and temporary forms of employment. Sharp gender disparities nevertheless exist in full-time permanent jobs indicative of the 'feminization of employment norms'[46] or a gendered 'harmonizing down' in which more jobs in the labour market resemble so-called 'women's work' deviating from the SER[47]– i.e., not all jobs resembling the dominant form of the SER are characterized access to training, regulatory protections and social benefits, decent wages, and a social wage. Other findings pertinent to gender relations reinforce this conclusion, including that workers who are single parents, a majority of whom are women, are more likely than workers in other family forms to be in precarious jobs.

Racialized workers also tend to be more likely to be in precarious jobs than their same-gender counterparts. Workers of Chinese decent in particular tend to be located in jobs with low wages, no pensions, and no union representation even though many hold full-time jobs. Give that people from Chinese backgrounds are the largest ethnic group in the Ontario labour force, this is a particularly worrisome finding. These results reflect those of another recent survey conducted by the Chinese Interagency Network in Toronto, which found that many Chinese workers were not aware of their workplace rights or labour regulations.[48]

A. Reducing precarious jobs in Ontario: Recommendations

A number of recommendations for legal reform flow logically from these findings. We make four interrelated proposals below, selecting but a few that are potentially of high impact should they be taken up in combination by law- and policy-makers. We call for an integrated approach to limiting precarious employment in Ontario since our analysis underscores the multidimensional nature of problem, highlighting the necessity of multipronged solutions.

1. Improve the wage package in Ontario

Our findings suggest that in 2008, among those with no union coverage and no pension plan, a quarter of workers made $10 or less and half made $14 or less. Our profile of precarious jobs in Ontario demonstrates that more is at work than simply low wages, and yet adjustments in wages are crucial to pulling workers out of precarious jobs. To this end, raising the minimum wage such that everyone who is engaged in ongoing full-time employment (40 hours a week, 52 weeks a year), which could be drawn from multiple jobs, should earn enough to be above the LIM for a single person in an urban area is crucial.[49] This corresponds to a minimum wage of $14.55 an hour. This sum reflects a "low income" line (as opposed to a poverty line) consistent with a fair minimum wage policy to protect workers against inflation (i.e., providing for a cost-of-living increase and thus financial stability for workers in Ontario). The LIM provides a useful measure here because it is a relative measure; that is, it is based on 50% of the median adjusted family income, and recalculated annually. As a result, it fluctuates based on changes in the population economic family income, without being tied to more volatile

measures, such as the inflation rate. In addition, the LIM is calculated separately for families living in rural areas and cities of different sizes. As a result, it is more sensitive to the context of income than many other low income measures. Using this adjusted minimum wage, single workers living in an urban area would need to work approximately 27-28 hours a week to fall above Statistics Canada's Low-Income Cut-Off line, a de facto poverty line calculated on the basis of spending a higher than average proportion of income on necessities like food, shelter and clothing. This would ensure that part-time workers especially, were less likely to live in poverty. This is particularly important, given the unequal distribution of part-time work throughout the labour force, and the clustering of some disadvantaged groups (women, recent immigrants) in part-time work.

In addition, measures encouraging employers to augment the wage package are required; one indirect mechanism, which forms the basis for our second linked recommendation, involves legislative changes supporting unionization in light of the union wage premium evident in Ontario as well as unionized workers' greater access to social benefits, such as pensions. In particular, the higher proportion of racialized workers in jobs with no pension and no unionization is worrying, in that it suggests that racialized workers are less likely to be hired into jobs where workers have a modicum of control over the labour process, reflecting continued and systemic discrimination.[50] With regard to the wage package, one strategy for counteracting this systemic discrimination is by providing structural incentives for more employers to provide access to pension plans, and thus decreasing inequity for current workers, and ultimately, for retirees. Unionization provides one avenue for increasing worker control and providing access to

more social benefits, but similar effects could be achieved with other models of worker organization, government-sponsored incentives or legislation.

2. Promote greater worker control over the labour process via improved access to unionization and other workplace regulations fostering labour market security

By far, the most common dimension of labour market insecurity characterizing precarious jobs in Ontario is a lack of control over the labour process, measured in this report as the absence of union coverage or coverage under a collective agreement. This conclusion underscores the need to not only redress continued de-collectivization and/or stagnation of labour relations in Ontario[51] but to reverse this trend. As indicated above, this recommendation is linked to the need to improve pensions and wages among workers in precarious jobs since unions representing workers collectively, as opposed to individual workers negotiating singly, are more likely to secure such social benefits as well as better wages. Other vehicles for improving worker control are also, however, important to pursue. Foremost is perhaps improving workplace regulations benefiting union and non-union workers, specifically widening the scope of coverage under employment standards legislation and improving their enforcement, which brings us to our third recommendation.

Additionally, it is high time to introduce mechanisms of broader-based bargaining for self-employed and other workers in precarious paid employment who face challenges to unionizing and/or, at a minimum, to benefiting from collectively agreed standards. Meeting the former challenge necessitates, among other things, providing for regional or geographical and/or occupational unionisms through legislation and

policy (e.g., permitting multi-employer agreements applicable to a given sector); such measures would respond to problems created by majority unionism now in operation and inhibiting organizing among the precariously employed, especially in small workplaces. Overcoming the latter hurdle could involve juridical extension of labour relations and standards of the sort operating in Quebec's decree system, which allows for the extension of the terms of a collective agreement across a sector to cover both unionized and non-unionized workers although a quite significant limitation is that it does not regulate a system of representation for workers.[52]

3. Expand the scope of employment standards (ES) and enforce them

The preceding analysis by form of employment reveals a relationship between certain inclusions and exclusions from minimum employment standards in Ontario and the persistently high numbers of workers in part-time and temporary jobs. As illustrated above, although precarious employment is *not* synonymous with non-standard employment, much depends on the nature and organization of labour market regulations. In Ontario, for instance, many solo self-employed workers are excluded from protection because of their employment status, that is, they are either treated as dependent or independent contractors unlike in the province's *Occupational Health and Safety Act* which extends protection to the many self-employed workers in precarious jobs by defining a worker as "a person who I paid to perform work or supply service" and thus covers more workers dependent on their capacity to work.[53] Similarly, workers in different types of temporary employment lack full coverage under the *Employment Standards Act* (e.g., seasonal workers, especially in agriculture and workers with insufficient job tenure do not benefit fully from termination and severance provisions and

provisions for joint and several liability required by temporary agency workers are limited) yet there is no principled reason why the Act could not be modified to apply fully to these workers, nor is their justification for tying other statutory and employer social benefits to tenure in a single employee-employer relationship.[54] Finally, part-time workers do not benefit from provisions for equal treatment with workers in other forms of employment doing similar work, an omission that could be rectified by drawing on provisions contained in parallel legislation in Quebec. These are but a few ways in which the scope of ES should be reformulated that could reduce the by no means necessary correlation between so-called non-standard forms of employment and precariousness that respond to the new structure of the labour force.

At the same time, also consistent with our leading premise that *some full-time permanent jobs can be precarious* and the overarching conceptualization of precarious employment as a multidimensional phenomenon, our investigation highlights the erosion of the full-time permanent job for certain groups of workers, such as women, including racialized women, recent immigrants, as well as among workers with relatively low levels of education. These are workers who have faced labour market discrimination of various sorts historically, and are experiencing obstacles to accessing good jobs and a full range of labour protections at present. For these workers, ostensibly covered fully by ES, as well as workers in other forms of employment, their enforcement is essential. This conclusion is borne out in a parallel study on ES and OHS enforcement in Ontario included in this working paper series, which finds deterioration in both enforcement regimes through policy analysis and a review of administrative practices. Indeed, in the case of ES, this study documents a backlog in complaints, insufficient numbers of

labour inspectors, an overly narrow approach to labour inspection, and limitations in the governance of penalties for violators and collections processes as well as highlights larger problems with a complaint-based ES system, especially during an economic downturn (i.e., workers are reluctant to complain for fear of job loss, with little certainty that they will obtain sufficient representation, and/or without any guarantee they will receive the compensation they deserve).

Collectively, such findings reflect our conclusion that 'the more things change the more they stay the same.' They help explain why it is that, from a statistical vantage point, precarious jobs in Ontario can look somewhat similar (or only marginally worse) in 2009 to what they were in 1999 despite the deterioration that has occurred in labour market regulations.

4. Improve the social measurement of job quality and precariousness

Worsening conditions for many workers may not be visible statistically because of limitations in the way the data are collected (sampled) and the ways that job quality is measured. As a result, many national surveys related to job quality provide only an incomplete picture, which makes it difficult to develop comprehensive and effective policy recommendations. Politically, the limited knowledge available about job quality makes it easier to ignore or discount changes in people's working conditions, and harder for advocates to track declines and lobby for improvements.

One clear limitation of using national survey data to measure job quality is the reliance on household telephone sampling, which does not capture the most marginal workers. Research on the United States shows that young people, people living in

poverty, and renters are much more likely to have only cell phones.[55] These groups are also more likely to be in precarious jobs, but their experiences are not captured in telephone surveys. Similarly, people living in transient or communal housing arrangements (such as migrant workers) are unlikely to have a household telephone. In order to capture the experiences of these more marginal workers accurately, non-probability sampling approaches should also be used in conjunction with these probability sampling methods.

In addition, most national labour surveys, such as the SLID, ask questions about the structure of jobs, but collect little information about respondents' perceptions of job quality. The indicators used here – low wages, no pensions plan, no union coverage, and being in a small firm – are commonly used because they constitute so-called 'objective' measures of job quality. They fail to capture sufficiently the complex, and multi-faceted experience of working in a precarious or poor quality job. The addition of some 'subjective' measures of job quality would help to unearth more fully workers perceptions of their working conditions and their integration into their workplace. For instance, questions about how long workers expect to be in their current job, whether their skills are valued in their current position, and whether they feel their work could be done by others in their establishment would provide good indicators of job stability of precariousness. Another potentially useful measure of job stability could be the amount of training that an employee receives when starting their job, since this represents the amount of investment an employer makes in a new employee (and also factors into the potential cost of replacing them). More comprehensive measures of job quality in quantitative surveys– such as information about sense of control, efficacy, work

scheduling, and the enforcement of labour standards - would also help to better evaluate how the experience of working in Ontario is changing.[56] More broadly, of course, a balance between quantitative and qualitative research is required such that the latter is developed to respond to predictable limits of the former.

APPENDIX A: DATA SOURCES AND ANALYSIS

The above analysis relies on Statistics Canada's Survey of Labour and Income Dynamics (SLID; 1999-2009). The SLID was introduced in 1993 in order to improve understandings of the economic well-being of Canadians over time, and provides information on people's labour force experiences, human capital and demographic characteristics.

The SLID sample is composed of two panels of respondents (roughly 30,000 adults in 15,000 households), and each panel is surveyed annually for a six year period, with a new panel being selected every three years.[57] The SLID sample is selected from the monthly Labour Force Survey, which uses a two-stage sampling process, first selecting a sample of geographic areas, and then a sample of dwellings from each area.[58] Residents of institutions and persons living on Indian reserves or in military barracks are excluded from the SLID sample. The longitudinal nature of the SLID is particularly useful for understanding how household income changes over time, but also makes it difficult to capture the experiences of migrant workers, or people who move often. Each successive wave within a panel has declining response rates and respondents who miss responding to two subsequent years of a survey are treated as non-respondents.[59] Thus, those who move frequently are unlikely to be included in later waves of the survey. For instance, a demographic analysis shows that young people have lower response rates to the SLID than those who are middle-aged and seniors,[60] in part because this group is more difficult to trace than more established households and household members. The variation in response based on age is compensated for by Statistics Canada's weighting system, and so accurate population estimates can still

be made, but concerns remain about the SLIDs effectiveness in capturing highly mobile populations.

The SLID uses Computer-Assisted Telephone interviewing for data collection, using the basic contact information for each household established in the LFS. Access to the public-use SLID microdata from 1999-2008 for this research was obtained under a license agreement from Statistics Canada, data from 2009 was accessed using the SLIDRet remote retrieval system. Data were analyzed using SPSS 18, using the appropriate population weights.

The primary population of interest in this analysis is people residing in Ontario who were members of the labour force in the relevant year. For the majority of the analysis, the focus is on those who were employees (i.e. not self-employed). The analysis is based on respondents' 'main' job in the reference year, that is, the job in which they had the most scheduled hours (or if scheduled hours are equal in more than one job, the job with the highest earnings). Thus, this analysis provides an assessment of precariousness in workers' main jobs, and not in auxiliary or secondary jobs.

It is important to note that the variables used in this analysis of precarious work are based on employee reporting, and not employer reports. For instance, workers were asked: "In your job with [employer], did you have an employer pension plan?" and "How many persons were employed at the location where you worked for [employer]?" (or all locations, if the employer has more than one location). Respondents' hourly wages are based on the amount paid at the end of the reference year (or the end of the job) and includes tips, bonuses and commissions. For respondents who did not report an hourly wage amount, the implicit hourly wage is calculated using income, months, weeks and

hours worked. Proxy reporting is allowed in the SLID; that is, household respondents can answer for others in the household provided they are knowledgable and willing to do so.

The results presented above are based on yearly, cross-sectional estimates. That is, the trajectory of individual workers and/or households is not tracked over time, but the aggregate results from each year are compared to those of previous years, in order to show change or stability over time.

APPENDIX B: PRECARIOUS EMPLOYMENT BY INDUSTRY AND OCCUPATION, 1999-2009

Table 5.1a: Proportion of workers who have precarious jobs, by industry, 1999-2009

Year	Accomm-odation & Food Services	Agriculture	Other Services	Business, Building, & Other Support Services	Trade	Construction	Information, Culture, & Recreation	Professional, Scientific, & Technical Services
1999	78.2%	80.5%	59.2%	50.9%	54.5%	41.0%	33.4%	37.4%
2000	76.4%	84.0%	52.8%	54.0%	48.5%	37.7%	37.5%	30.7%
2001	74.0%	78.1%	49.6%	45.3%	48.9%	40.5%	37.4%	26.9%
2002	76.1%	76.9%	57.1%	44.8%	47.7%	36.0%	29.6%	24.2%
2003	74.1%	68.1%	59.3%	47.4%	45.2%	37.7%	31.7%	25.2%
2004	74.3%	68.1%	61.4%	43.8%	48.3%	43.0%	29.0%	28.9%
2005	76.0%	69.9%	58.1%	50.9%	44.7%	36.9%	37.3%	28.8%
2006	72.3%	65.1%	52.7%	44.8%	45.0%	42.9%	43.2%	29.4%
2007	73.4%	68.6%	50.7%	39.3%	47.0%	39.1%	34.7%	25.0%
2008	76.0%	64.7%	61.6%	61.5%	50.6%	42.6%	38.0%	32.4%
2009	68.3%	74.0%	55.4%	60.1%	46.6%	47.5%	38.5%	35.8%

Table 5.1b: Proportion of workers who have precarious jobs, by industry, 1999-2009

Year	Health Care & Social Assistance	Transportation & Warehousing	Forestry, Fishing, Mining, Oil & Gas	Finance, Insurance, Real Estate & Leasing	Manufacturing	Educational Services	Public Administration	Utilities
1999	24.2%	24.0%	11.9%	21.1%	18.1%	12.4%	12.0%	6.4%
2000	21.3%	20.6%	16.1%	18.2%	15.5%	9.3%	6.9%	3.1%
2001	20.4%	18.0%	14.4%	17.3%	15.9%	12.0%	7.5%	1.5%
2002	20.9%	17.2%	14.3%	14.5%	12.9%	14.4%	3.5%	0.0%
2003	20.5%	20.2%	17.6%	14.4%	14.6%	8.4%	4.3%	0.0%
2004	17.3%	18.1%	14.8%	13.9%	12.0%	9.5%	4.4%	4.3%
2005	19.2%	14.0%	16.5%	18.4%	13.1%	8.8%	5.1%	0.9%
2006	23.9%	19.8%	17.6%	12.9%	13.8%	13.4%	2.8%	3.3%
2007	20.1%	17.3%	32.6%	17.2%	16.5%	14.3%	2.2%	2.2%
2008	25.7%	18.8%	28.1%	14.6%	16.1%	13.6%	5.1%	1.7%
2009	24.6%	28.4%	21.2%	16.7%	16.7%	12.5%	3.1%	3.9%

Table 5.2a: Proportion of workers in precarious jobs, by occupation, 1999-2009

Year	Chefs, Cooks, Food & Beverage Service	Retail Sales, Clerks & Cashiers	Primary Industry	Sales & Service	Cons-truction Trades	Art, Culture, Recreation & Sport	Child Care & Home Support	Trades, Helpers, Cons-truction & Transport	Process-ing, Manu-facturing & Utilities	Transport & Equip-ment Operators	Financial, Secretarial & Admin.	Other Trades
1999	83.3%	72.9%	61.6%	63.1%	44.6%	38.4%	42.9%	39.0%	36.4%	31.9%	26.7%	25.0%
2000	80.3%	67.3%	59.6%	56.3%	37.4%	47.5%	38.9%	37.4%	29.0%	32.5%	30.5%	22.6%
2001	73.5%	67.8%	59.9%	54.5%	37.8%	39.1%	43.5%	37.9%	30.3%	28.1%	31.7%	23.7%
2002	74.7%	67.4%	66.4%	55.0%	39.7%	31.7%	49.0%	35.6%	31.6%	30.5%	27.9%	25.8%
2003	80.4%	62.0%	59.1%	53.8%	43.8%	34.8%	38.8%	32.6%	42.1%	30.5%	26.2%	23.8%
2004	73.8%	64.0%	54.9%	57.5%	41.6%	38.4%	24.0%	46.0%	36.2%	25.9%	30.0%	26.6%
2005	71.3%	60.4%	64.2%	62.4%	36.2%	42.4%	31.4%	37.2%	36.1%	24.4%	30.8%	23.8%
2006	69.2%	65.9%	63.0%	53.8%	48.4%	38.6%	41.6%	36.1%	30.7%	28.4%	31.0%	23.9%
2007	69.3%	59.5%	53.9%	59.8%	46.6%	37.6%	38.3%	37.2%	40.0%	35.4%	32.3%	25.7%
2008	80.8%	67.0%	59.4%	60.2%	46.7%	46.8%	34.1%	39.6%	32.6%	37.1%	26.8%	26.9%
2009	77.3%	64.0%	63.7%	54.9%	53.9%	46.5%	42.6%	52.0%	23.5%	34.9%	33.1%	26.1%

Table 5.2b: Proportion of workers in precarious jobs, by occupation, 1999-2009

Year	Clerical	Technical, Assist. & Related Occ. in Health	Technical, Insurance, Real Estate Sales, & Grain Buyers	Machine Operators & Assemb. in Manu-facturing	Protective Services	Other Manage-ment	Con-tractors & Super-visors in Trades & Transport	Senior Manage-ment	Prof.Occ. in Business & Finance	Natural & Applied Sciences	Teachers & Professors	Prof.Occ. in Health, Nurse Super-visors & Registered Nurses
1999	30.8%	26.2%	27.8%	18.8%	23.9%	17.7%	18.0%	25.2%	11.8%	13.1%	11.6%	10.1%
2000	27.1%	22.1%	22.7%	15.7%	18.5%	14.4%	17.1%	15.5%	11.8%	11.1%	5.7%	8.6%
2001	26.3%	22.1%	22.7%	17.2%	11.2%	17.3%	24.4%	9.6%	7.6%	7.4%	7.2%	6.6%
2002	20.5%	22.9%	19.3%	14.7%	13.9%	12.2%	15.2%	13.5%	10.4%	8.2%	8.0%	4.5%
2003	21.8%	23.2%	19.7%	14.5%	13.4%	14.9%	10.8%	4.7%	8.0%	8.6%	5.2%	6.2%
2004	17.6%	18.2%	20.4%	12.9%	9.7%	16.3%	12.9%	6.4%	13.5%	10.5%	4.7%	4.7%
2005	23.3%	22.5%	17.4%	15.2%	13.9%	15.1%	12.8%	6.5%	16.4%	9.1%	5.4%	4.7%
2006	23.3%	24.7%	17.9%	18.2%	17.7%	12.4%	12.8%	6.3%	12.7%	11.9%	7.8%	6.1%
2007	24.2%	17.4%	15.2%	17.9%	13.4%	16.7%	15.5%	2.7%	8.2%	12.5%	7.5%	5.5%
2008	31.2%	28.7%	27.2%	19.6%	15.9%	14.2%	5.1%	25.0%	11.3%	11.6%	9.0%	6.8%
2009	28.6%	26.3%	32.8%	22.2%	28.9%	15.0%	21.1%	13.3%	9.5%	12.5%	7.3%	10.2%

ENDNOTES

[1] Authorship is alphabetical to reflect equal contribution.

[2] This analysis is based on Statistics Canada Microdata files which contain anonymized data collected from 1999-2009 Survey of Labour and Income Dynamics. All computations on these microdata were prepared by Andrea Noack (Ryerson University), and the responsibility for the use and interpretation of these data is entirely that of the author(s).

[3] Ulrich Mückenberger, "Non-standard Forms of Employment in the Federal Republic of Germany: The Role and Effectiveness of the State" in Gerry Roberts & Janine Rogers, eds., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: International Institute for Labour Studies, 1989) 167; C.S. Bütchetmann & S. Quack, "How Precarious is 'Non-Standard Employment? Evidence for West Germany" (1990) 14 Cambridge Journal of Economics 315.

[4] See, for example: Cynthia J. Cranford and Leah F. Vosko, "Conceptualizing Precarious Employment: Mapping Wage Work across Social Location and Occupational Context" in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2006) 43; Tania Das Gupta, "Union Renewal and Precarious Employment: A Case Study of Hotel Workers" in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queens University Press, 2006) 318; Leah F. Vosko and Nancy Zukewich, "Precarious by Choice? Gender and Self-Employment" in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2006) 67; Grace Edward Galabuzi, "Racializing the Division of Labour: Neoliberal Restructuring and the Economic Segregation of Canada's Racialized Groups" in Jim Stanford and Leah F. Vosko, ed., *Challenging the Market: The Struggle to Regulate Work and Income* (Montreal and Kingston, McGill-Queen's University Press, 2004) 175.

[5] See, for example: Pat Armstrong & Kate Laxer, "Precarious Work, Privatization, and the Health-Care Industry" in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2006) 115.

[6] Jean Bernier, Guylaine Vallée & Carol Jobin, *"Les Besoins de Protection Sociale des Personnes en Situation de Travail Non Tradtionnelle"* Rapport final (Quebec: Ministére du Travail, 2003); Vallée,

Towards Enhancing the Employment Conditions of Vulnerable Workers: A Public Policy Perspective (Ottawa: Canadian Policy Research Networks, 2005); Stephanie Bernstein, "Mitigating Precarious Employment in Quebec: The Role of Minimum Employment Standards Legislation" in Leah F. Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006) 221; Katherine Lippel, "Precarious Employment and Occupational Health and Safety Regulation in Quebec" in Leah F. Vosko, ed*., Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2006) 241.

[7] Gerhard Bosch, "Towards a New Standard Employment Relationship in Western Europe" (2004) 42:2 British Journal of Industrial Relations 617 at 618.

[8] See, for example: Bütchetmann & Quack, note 1 at 51; Gerry Rodgers, "Precarious Work in Western Europe: The State of the Debate" in Gerry Rodgers and Janine Rodgers, eds., *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Belgium: International Institute for Labour Studies, 1989) 1; Judy Fudge, "Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario" in Abigail Bess Bakan & Daiva K. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto, Buffalo and London: University of Toronto Press, 1997) 119; Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

[9] Wallace Clement, Sophie Mathieu, Steven Prus and Emre Uckardesler, "Precarious Lives in the New Economy: Comparative Intersectional Analysis" in Leah F. Vosko, Martha MacDonald & Iain Campbell, eds., *Gender and the Contours of Precarious Employment* (London; New York, NY: Routledge, 2009) 240.

[10] See, for example: Fudge, Eric Tucker & Vosko, *The Legal Concept of Employment: Marginalizing Workers* Report (Toronto: Law Commission of Canada, 2002); Cynthia J. Cranford, Fudge, Tucker & Vosko, *Self-Employed Workers Organize: Law Policy and Unions* (Montreal and Kingston: McGill-Queen's University Press, 2005) at 208; Karen D. Hughes, *Female Enterprise in the New Economy* (Toronto: University of Toronto Press, 2005); Vosko, *Managing the Margins: Gender, Citizenship and the*

International Regulation of Precarious Employment (Politics and Business Series) (Oxford, UK: Oxford University Press, 2010).

[11] Zhengxi Lin, Janice Yates and Garnett Picot, *Rising Self-employment in the Midst of High Unemployment: An Empirical Analysis of Recent Developments in Canada* (Ottawa: Analytical Studies Branch, Statistics Canada, 1999). Online: Statistics Canada , < http://www.statcan.gc.ca/pub/11f0019m/11f0019m1999133-eng.pdf> (last accessed: 18 September 2011)

[12] See, for example: Judy Fudge, "A New Gender Contract?: Work-life Balance and Working-time Flexibility" in Joanne Conaghan & Kerry Rittich, eds., *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford; New York: Oxford University Press, 2005) 261; Eric Tucker, "*Star* Wars: Newspaper Distribution Workers and the Possibilities and Limits of Collective Bargaining" in Cynthia J. Cranford, Judy Fudge, Eric Tucker & Leah F. Vosko eds., *Self-Employed Workers Organize: Law, Policy, and Unions* (Montréal: McGill-Queens University Press, 2005) 29.

[13] Sylvia Fuller and Vosko, "Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Migration" (2008) 88:1 *Social Indicators Research* 31.

[14] See, for example: Vosko, note 6 at 52; Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004); Fuller & Vosko, note 11 at 53.

[15] Based on research examining trends in Canada, Australia, the United States and the EU 15, elsewhere Vosko (2010) also shows that when we conflate precarious employment and non-standard employment we risk obscuring and reinforcing the very problems that need to be addressed – namely, the SER-centric nature of labour regulation (Vosko, note 8 at 52).

[16] In this analysis, we rely on the reported hourly wage for the main job at the end of the reference year (or at the end of the job, if it concluded before the reference year). This is compared to the low wage cutoff of 1.5 times the minimum wage at the end of the reference year.

[17] Statistics Canada, *Low Income Lines, 2009-2010,* Income Research Paper Series, Income Statistics Division, Catalogue no. 75F0002M, no. 002 (Ottawa: Minister of Industry, 2011).

[18] *Ibid*

[19] On Ontario, see especially: J. O'Grady, "Beyond the Wagner Act, What Then?" in D. Drache, ed., *Getting on Track* (Montreal and Kingston: McGill-Queen's University Press, 1991) 153; Fudge, *Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* submitted by Ontario District Council of the International Ladies' Garment Workers' Union and Intercede. (Toronto: Intercede, Toronto Organization for Domestic Workers' Rights, 1993); Mary Gellatly, John Grundy, Kiran Mirchandani, Adam Perry, Mark Thomas & Vosko, "'Modernizing' Employment Standards? Administrative Efficiency, Market Regulation and the Production of the Illegitimate Claimant in Ontario, Canada" (2011) 22:2 Economic and Labour Relations Review 81.

[20] P. Armstrong and Hugh Armstrong, *The Double Ghetto: Canadian Women and their Segregated Work* (Toronto: Oxford University Press, 2001).

[21] Cranford, Vosko, & Zukewich, "The Gender of Precarious Employment in Canada" (2003) 58:3 Relations Industrielles/ Industrial Relations, 454.

[22] For instance, in the Canadian context and elsewhere, Vosko (2000, 2006 & 2010), Fudge & Vosko (2001a and b), Cranford & Vosko (2006), Tucker (2006), and Fuller & Vosko (2008) show that women, immigrants and people of colour are more likely to hold jobs characterized by dimensions of labour market insecurity. (Vosko, note 16 at 53; Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2006); Vosko, note 8 at 52; Fudge & Vosko "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy." (2001a) 22:2 Economic and Industrial Democracy 271; Fudge & Vosko, "By Whose Standards? Re-Regulating the Canadian Labour Market" (2001b) 22:3 Economic and Industrial Democracy, 327; Cranford & Vosko, note 3 at 51; Tucker, note 10 at 52; Fuller & Vosko, note 11 at 58).

[23] Age is another prominent dimension of labour market inequality. We do not develop an age-based analysis here, however, as this dimension is being addressed more fully in the Law Commission's series on young workers.

[24] Statistics Canada, *Labour Force Historical Review 2009* (table 86), Catalogue No. 71F0004XVB (Ottawa: Minister of Industry, 2010).

[25] Shifts in the industrial and occupational composition of the solo self-employed and the employer self-employed may accompany this apparent constancy but tracking these patterns is beyond the scope of our analysis.

[26] Fudge, Tucker & Vosko, note 8 at 52; Hughes, "Pushed or Pulled? Women's Entry into Self-Employment and Small Business Ownership" (2003) 10:4 Gender, Work and Organization, 433.

[27] Vosko, "The Challenge of Expanding EI Coverage: Charting Exclusions and Partial Exclusions on the Bases of Gender, Immigration Status, Age, and Place of Residence and Exploring Avenues for Inclusive Policy Redesign," monograph prepared for Mowat Commission on Unemployment Insurance (Toronto: Mowat Centre for Public Policy, Toronto, 2011).

[28] Throughout this analysis, we use data from 2008 as the primary reporting year. At the time of submission, there was only limited access to the 2009 data through a remote access system. Wherever possible, we have included data from 2009 in order to show changes over time.

[29] Timothy J. Bartkiw, "Manufacturing Descent?: Labour Law and Union Organizing in the Province of Ontario" (2008) 34:1 Canadian Public Policy, 111.

[30]Harry Arthurs, "A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules" (Ontario, Report of the Expert Commission on Pensions, 2007).

[31] The minimum wage cut-off has been adjusted to reflect provincial minimum wages each year.

[32] Mark P. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montréal: McGill Queen's University Press, 2009); Gellatly et al, note 17 at 53.

[33] Andrew Jackson, "Forum: Reorganizing Unions: Solidarity Forever? Trends in Canadian Union Density" (2004) 74 Studies in Political Economy, 124 at 141; Sharanjit Uppal, "Unionization, 2010", Catalogue no. 75-001-X (Ottawa: Statistics Canada, October 2010) at 18.

[34] Bernstein, note 4 at 51.

[35] See also Gellatly et al, note 17 at 53.

[36] Fudge & Vosko 2001b, note 20.

[37] Antonella Picchio, "Wages as a Reflection of Socially Embedded Production and Reproduction Processes" in Linda Clarke, Peter de Gijsel & Jorn Janssen, eds., *The Dynamics of Wage Relations in the New Europe* (London: Kluwer, 1998) 195.

[38] Ernest B. Akyeampong, "Collective Bargaining Priorities" (2005) 17:3 *Perspectives on Labour and Income*, 41 at 44.

[39] Patrice A. Dutil and Ronald Saunders, *New Approaches in Achieving Compliance with Statutory Employment Standards* (Ottawa: Canadian Policy Research Networks; Toronto: Institute of Public Administration of Canada, July 2005).

[40] This apparent decline should be interpreted with caution as it may be the result of precarious jobs in agriculture being increasingly filled by temporary foreign workers, whose experiences are unlikely to be reported in this survey. The household telephone sampling methodology used in the SLID relies on land-line telephones, which are unlikely to be used in the temporary or group living accommodations used by some foreign workers. Further, temporary foreign workers – especially those with limited English skills – may be less likely to respond to telephone survey requests.

[41] Data on the racial and ethnic composition, as well as the immigrants status, of the agricultural industry in Ontario is suppressed by Statistics Canada because of small cell sizes, which pose a threat to the confidentiality of the data.

[42] For more information on the industry classifications used in this analysis and the specific jobs which they include, please see: <http://www.statcan.gc.ca/subjects-sujets/standard-norme/naics-scian/2002/naics-scian02l-eng.htm> (last accessed: 18 September, 2011).

[43] Jane Jenson, "The Talents of Women, the Skills of Men" in Stephan Wood, ed., *The Transformation of Work? Skill Flexibility and the Labour Process* (London: Unwin Hyman, 1989) 141; Sylvia Walby, "Flexibility and the Changing Sexual Division of Labour" in Stephan Wood, ed., *The Transformation of Work? Skills, Flexibility and Labour Process* (London: Unwin Hyman, 1989) 127.

[44] P. Armstrong & Laxer, note 7 at 52.

[45] For more information on the occupational classifications used in this analysis and the specific jobs which they include, please see: <http://www.statcan.gc.ca/subjects-sujets/standard-norme/soc-cnp/2001/noc2001-cnp2001-menu-eng.htm> (last accessed, 18 September, 2011).

[46] Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

[47] P. Armstrong, "The Feminization of the Labour Force: Harmonizing Down in a Global Economy" in Isabelle Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto, Buffalo, NY: University of Toronto Press, 1996) 29.

[48] Chinese Interagency Network "Chinese Workers are not protected by ESA", (August 2010) online: Chinese Canadian Council Toronto Chapter <http://www.ccnctoronto.ca/?q=node/343> (last accessed: 13 September 2011).

[49] More than 80% of Ontario's population lives in a metropolitan area (Census Data, Statistics Canada, 2006) Online: accessed via University of Toronto SDA < http://sda.chass.utoronto.ca/sdaweb/index.html>

[50] Das Gupta, note 2 at 51.

[51] Bartkiw 2008, note 27 at 54; Uppal 2010, note 31 at 55.

[52] Vallée and Jean Charest "Globalization and the Transformation of State Regulation of Labour: the Case of Recent Amendments to the Quebec Collective Agreement Decrees Act," (2001) 17:1 International Journal of Comparative Labour Law and Industrial Relations, Kluwer Law International, 79; Michel Grant, "Deregulating Industrial Relations in the Apparel Sector: The Decree System in Quebec" in Jim Stanford & Leah F. Vosko, eds., *Challenging the Market: The Struggle to Regulate Work and Income* (Montréal: McGill-Queens University Press, 2004), 135. See also Cranford, Fudge, Tucker & Vosko, *Self-Employed Workers Organize: Law Policy and Unions* (Montreal and Kingston: McGill-Queen's University Press, 2005) at 186-192.

[53] Fudge, Tucker & Vosko 2002, note 8 at 52.

[54] Fudge & Vosko 2001a, note 20; Vosko 2010, note 8 at 52.

[55] Stephen J. Blumberg & Julian V. Luke , *Wireless Substitution: Early Release of Estimates Based on the National Health Interview Survey, July-December 2006* (Atlanta, GA: U.S. Centers for Disease Control and Prevention, 14 May 2007).

[56] Although large national surveys must necessarily strike a balance between the breadth and depth of content, the integration of better measures of job quality into one or more national surveys would signal a policy commitment to improving job quality in Canada. There are several international models for improving survey data related to job quality; for instance, the Household, Income and Labour Dynamics in Australia (HILDA) survey includes twelve items assessing subjective psychosocial characteristics of work,

which appear to reflect three general components of job quality: job demands and complexity, job control and job security (Liana Leach, Peter Butterworth, Bryan Rodgers & Lyndall Strazdins 2010). In order to better capture the situation of workers in precarious jobs, we would also recommend sponsoring research that specifically captures the experiences of workers who are likely to be underrepresented in randomly-selected telephone surveys. More diverse sampling strategies and measurements of job quality will allow policy makers to make better informed decisions. (Liana Leach, Peter Butterworth, Brayn Rodgers & Lyndall Strazdins, "Deriving an Evidence-Based Measure of Job Quality from the HILDA Survey" (July 1, 2010) No. 9 *Australian Social Policy Journal* 67.)

[57] Statistics Canada, *Survey of Labour and Income Dynamics (SLID) – 2009 Survey Overview*, Cat. No 75F0011X (Ottawa: Statistics Canada 2010b) Online: <http://www.statcan.gc.ca/pub/75f0011x/75f0011x2011001-eng.htm> (last accessed: 18 September, 2011)

[58] Statistics Canada, *Methodology of the Canadian Labour Force Survey* (Ottawa, ON: Ministry of Industry 2008) Online: <http://www.statcan.gc.ca/pub/71-526-x/71-526-x2007001-eng.pdf> (last accessed: 18 September, 2011).

[59] Bastien, Jean-François, *Data Quality for the 2009 Survey of Labour and Income Dynamics (SLID)* (Ottawa: Statistics Canada, 2009) Online: <http://www.statcan.gc.ca/imdb-bmdi/document/3889_D13_T2_V3-eng.pdf> (last accessed: 18 September, 2011).

[60] *Ibid*

An Immigrant All Over Again ?

Recession, Plant Closures, and Older Racialized Immigrant Workers:

A case study of the workers of Progressive Moulded Products

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Toronto, 25 June 2013

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Preface

The sudden closure of PMP, a non-unionized auto-parts manufacturer in the north end of Toronto, on June 30, 2008 and the subsequent protest blockade by a majority of its 2400 workers generated considerable media coverage and public support. When I first met PMP workers on the picket line as they blocked machinery from leaving the plant, I was overwhelmed by their courage, collectivity, and above all, their generosity of spirit. Later I came to know them even better when I was appointed as the Chair of the PMP Adjustment Committee and assisted in the running of the provincially-funded PMP Workers Action Centre.

It has now been almost five years since the PMP closure, and over two years since the closing of the PMP Workers Action Centre which workers referred to as their refuge or second home.

The genesis of this research project comes from a desire to find out how this group of workers has managed and whether they have landed back on their feet. The study is not meant to re-victimize this group of racialized workers; rather it is a mobilizing and excavation project to expose the systemic and structural inequalities of race, gender, age and class which further the 'invisibility' of these non-unionized immigrant workers.

This report is a tribute to the resilience and resistance of the former PMP workers who were robbed of their jobs, severance compensation, and sense of security and pride as contributing members of the community. It is also a collective narrative that reminds us of structural inequalities and our collective responsibility in a project of social transformation which will lead to good jobs and decent lives for ALL. Let us have the audacity to hope, dream and work toward such a world.

Winnie Ng

Principal Investigator

CAW-Sam Gindin Chair in Social Justice and Democracy, Ryerson University

~ *Dedication* ~

The struggle of people (man) against power
is the struggle of memory against forgetting.

Milan Kundera

To the former PMP workers, the men and women who came to this land as immigrants and refugees, and who facing all adversities, continue to walk with such courage, grace and dignity.

Executive Summary

This study traces the trajectory of a sample of workers over the five years since they lost their jobs at Progressive Moulded Products, an auto-parts manufacturing company in Vaughan. A large majority of PMP workers are racialized immigrants and a significant proportion were over 45 years of age when they lost their jobs. The study documents their experiences with re-training and re-employment, accessing services, working through temporary employment agencies, dealing with barriers to employment, and living with unemployment and precarious employment. While there are a growing number of studies that document the increased prevalence of precarious work, vulnerable workers, and the working poor in southern Ontario, this study is unique in providing an account of the experiences of a group of workers who transitioned from relatively secure and well-paid standard employment to precarious work and poverty wages.

- **P**oliticize
- **M**obilize
- **P**ower for Workers

PMP workers were in a long-term, non-precarious, standard employment relationship for years, even decades, and, as such, might have been considered successfully 'settled' and 'integrated'. However, research participants' struggles to find appropriate training and stable re-employment in the years after the closure suggest that, for many immigrant workers, their immigrant status never disappears. An economic crisis can leave them worse off than they were when they first came to Canada. After more than half a lifetime of working in Canada, these workers find themselves faring worse than when they first arrived. In addition to the challenges that all older workers face in making a second career transition, these workers must struggle with the challenge of being 'immigrants all over again', without access to even the limited settlement programs available to new immigrants. We note, therefore, that both 'settlement' and 'integration' are long-term processes that require attention to the particular needs of heterogeneous immigrant populations in situations of economic crisis and restructuring. In a

highly competitive and precarious labour market, the systemic barriers of race, gender and age further marginalize such workers.

Key Findings

1. From Stable to Precarious Forms of Employment

- Only one third (34%) of participants have secured permanent full time employment (i.e. more than 25 hours per week). Fully two thirds of the former PMP workers were either in precarious employment or unemployed.
- Of those currently working, close to 40% are either in on-call/casual work or in some form of temporary, precarious work arrangement.

The shift to new forms of employment was found to be highly gendered.

- Out of those who have not secured permanent full-time or part-time employment, only one third of the women workers reported holding temporary short term contract work lasting less than one year while 75% of the male workers reported the same. Women seem to be more concentrated in the casual or on-call employment arrangements (42%) compared to 25% of their male counterparts.
- Out of those who were not working at the time of the interview, an overwhelming majority (80%) were women (13 out of 16).

2. From Secure, Living Wages to Poverty Wages

- 77% of our participants' current wages are worse than at PMP.
- 36% of male participants and 37% of women participants reported a wage drop of $5 an hour or more.
- 52% of female participants and 42% of male participants reported that their household often found it difficult to make ends meet since the plant closure.

3. **The Adverse Impact on Health and Wellbeing**

- Over half of the participants (52%) expressed that the uncertainty over their work schedule has interfered with their personal and family life.
- Out of those who are working, 59% reported being anxious about losing their current employment.
- Almost half, 49.4 % felt that their health has worsened since the closure, with women experiencing a higher degree of worsening health (54% vs. 41%).
- Stress levels are highest for women in the 45-49 age group, with 25% of women in that age group reporting that most days since the closure had been "extremely stressful." This speaks to the impact that insecure employment and constant juggling of work and family responsibilities have on the quality of life and the health and well being of these workers.

4. **No Guarantee of Re-employment after Retraining**

- 51% of participants completed their Second Career training (40 of 78).
- Of those who completed the Second Career training, only 25% found employment in the new chosen career field while others have either returned to the manufacturing sector or are still looking for work.
- Age is a significant factor in determining success in getting employed in the new field after training. Despite the fairly even spread across the various age groups among those who completed Second Career training, the success rate in finding employment in the new career field diminishes as the age of participant progresses, from 40% in the 45-49 age group, 21% in the 50-54 age group to only 18% in the 55+ age group.

5. **The Growing Prevalence of Temporary Employment Agency Work**

- When asked about the multiple methods that they have used to look for work, 87% of the participants reported using temp agencies to look for work.
- 42% of the participants secured their current job through temporary agencies.

- Participants shared a frustration with the exploitative and discriminatory practices of temp agencies, and described how these practices impacted their access to employment and workplace experience.

6. Discrimination in Accessing Work and Staying on the Job

- Close to 70% of participants believe discrimination has been a barrier for them in getting work.
- When asked about the specific factors that have posed the major barriers, the top three barriers to getting work are age at 85%, race at 67%; and language at 40%. Gender and religion trailed at 10%.

7. The Wider Repercussions of the Closure

The plant closure and related loss of good jobs had a ripple-effect. Community networks and supports were lost. There was a domino effect with the loss of income as participants struggled to keep their homes and families intact and to continue to contribute to their communities. There was a strong sense of betrayal by the company and the state.

Recommendations

Monitoring and Regulation of Temp Agencies

- A temp agency unit should be set up within the Employment Standards Branch with adequate resources and staff dedicated to take a pro-active approach in initiating investigations, monitoring, and enforcing regulations.
- Equal hourly pay should be implemented for workers who are in part-time work or temp work and who are performing the same work duties.
- There should be a requirement for temp agencies to guarantee a minimum number of weekly hours in order to reduce the precarity of workers who are on call 24/7.
- The Ontario Human Rights Commission can play a strong and proactive role in eliminating some of the discriminatory practices of some temp agencies and

employers. Under the Ontario Human Rights Code, there is provision for the Commission to initiate systemic review and/or systemic complaint on how work is assigned and who get transferred and gain access to permanent positions. It is timely that the Commission initiate a systemic review.

- When a pattern of discriminatory practices is detected, community based agencies who are providing assistance and support for workers should also play an active advocacy role in initiating a third party complaint to both ESB and OHRC allowed under the respective legislation.

Childcare for Shift Workers

- Consultations and policy reviews are required to develop more innovative publicly funded childcare arrangements in order to provide much-needed support for the health and well-being of families.

Settlement Services

- Access to settlement and other support services should not be restricted solely for newcomers (i.e. landed immigrants who are in Canada less than 3 years). Services should be extended to all users based on needs instead of being determined by the length of their stay in Canada.

Retraining and Re-employment for Older Workers

- An expanded targeted wage subsidy program should be in place to encourage employers to hire older workers and ensure they do not fall between the cracks.
- A commission on older workers should be set up jointly by the Federal and provincial governments to conduct a systematic review of policies and programs that will ensure older workers' access to re-employment and their ability to retire with dignity and security.
- A bridging program at the latter part of Second Career training as a placement/ internship program to support workers wanting to link up with potential employers

- Since the government has already invested in the training for these workers, it will be prudent for policy makers to consider extending the wage subsidy program to encourage employers to hire older workers eager to contribute with their lived experiences and new skills. It will be a win-win situation for all parties.

Equity in Access to Employment

- It is urgent that the Ontario government re-introduce an equity hiring policy and legislation that will addresses the systemic barriers of race, gender and other forms of discrimination experienced by Indigenous workers, women, racialized workers and workers with disabilities.

Bankruptcy Protection for Workers

- Federal bankruptcy legislation needs to be revamped to ensure workers are the first in line for all payments owing including severance, termination pay and other compensation. As the most vulnerable victims of workplace closures, workers are the ones who need protection first.
- There is a need for a new policy framework that holds employers accountable and ensures full and fair compensation for laid-off workers.

Income Support and Security

- The Federal government should lower the eligibility criteria to enable more unemployed workers to qualify for EI and raise the benefit rate so workers can have decent income support when they are out of work.
- There should be a minimum EI benefit level to ensure that laid off workers can maintain some basic income support and well-being as they look for new work.

Raising the Minimum Wage

- There is a need to increase the minimum wage to $14 an hour and establish a 40 hour work week.

Creation and Retention of 'Good Jobs'

- Recognizing that decent jobs lead to decent lives, the Federal and provincial governments should make it a policy and program priority to develop and implement a long-term industrial job strategy that will stimulate the creation and retention of 'good jobs' for all.

Union Organizing Strategies

- There is a need for a policy review of the Ontario Labour Relations Act to strengthen the protection of workers' rights to organize.
- Labour unions should consider alternative and broader-based organizing strategies that go beyond the traditional workplace setting and find meaningful ways to integrate the equity agenda into their work.

Acknowledgements

The research study would not have been possible without the support and participation of former PMP workers. In particular, the research team wishes to express a deep gratitude to Fa Lim, the worker leader who served as the outreach member of the study.

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I. Introduction

- **P**oliticize
- **M**obilize
- **P**ower for Workers

Five years ago, on Canada Day in 2008, the 2,400 workers in the eleven facilities of Progressive Moulded Products (PMP) in the Vaughan region north of Toronto found themselves thrown out of work without notice or warning when the company declared bankruptcy and closed abruptly. Ninety seven percent of the workers were immigrants to Canada and many had worked at PMP for over a decade. Though non-unionized, the workers responded by mounting a sixteen-day long picket of the plant with the aim of forcing the company to pay wages and other money owed them. This spontaneous militant and organized response from such a large group of workers received a good deal of media attention as well as support from the CAW and other sectors of the labour movement. With funding from the Ontario Ministry of Training, Colleges and Universities (MCTU), the CAW helped to set up an Action Centre to assist workers with securing back wages, vacation pay, severance and termination pay; and with applying for unemployment insurance, training and job searches. The Action Centre partnered with educational institutions to enable many workers to go through academic upgrading and Second Career training. Some workers who received re-training in new fields are among those who have found decent long-term employment since the company closed. A large number, however, remain either unemployed or in various kinds of precarious employment.

This study traces the trajectory of a sample of workers over the five years since they lost their jobs at PMP, documenting their experiences with re-training and re-employment, accessing services, working through temporary employment agencies, dealing with barriers to employment, and living with unemployment and precarious employment. A large majority of PMP workers are racialized immigrants, and a significant proportion of them were over 45 years of age when they lost their jobs. A key aim of the study is to document

the particular barriers faced by older racialized immigrant workers in labour market (re) integration. We ask: What has the experience of these workers been in finding re-employment? What is the nature of the new jobs they have found? What kinds of barriers have they faced in finding good jobs, or any kind of jobs? What factors have affected their access to employment? What has been their experience with training programs such as Second Career?

In exploring these questions, the study, like a number of other recent studies on employment patterns in Southern Ontario, has focused on the prevalence and impact of precarious employment among immigrants in the Canadian economy. It also seeks to humanize and put a face on terms such as 'economic crisis,' 'jobless recovery,' and 'retraining for the knowledge economy,' that have become part of our everyday vocabulary. While the other studies document the growing prevalence of precarious work, vulnerable workers, and working poverty in the region, the unique contribution of our study in relation to the others is its attempt to provide an account of the experiences of a group of workers who transitioned from relatively secure and well-paid standard employment relationships to precarious work and poverty wages.

We also seek to go beyond questions of labour market re-integration to ask about the broader issue of immigrant settlement and integration. OCASI (2012: 11) notes that "settlement and integration have come to be viewed as a continuum, with settlement referring to the early stages of adaptation after arrival (e.g. referrals for housing, healthcare, and schools, and accessing employment, language training, recertification), and integration referring to the long-term, two-way process in which immigrants and refugees become full and equal participants in the social, political, cultural and economic dimensions of society." We ask: Under conditions of employment insecurity and precariousness, is there any point when immigrants can be considered sufficiently "settled" and "integrated"?

The PMP workers were in long-term, non-precarious, standard employment relationships for years, even decades, and, as such, might have been considered successfully "settled" and "integrated." Indeed, based on Statistics Canada data and

their own survey, the recent PEPSO report (March 2013) found that immigrants who have been in Canada for 20 or more years are more likely to be in secure employment relationships, along with white people and people born in Canada. In contrast to this, our participants' struggles to find appropriate training and stable re-employment in the years since the PMP closure suggest that, for many immigrant workers, their immigrant status never disappears: an economic crisis can leave them worse off than they were when they were new immigrants.

In addition to the challenges that all older workers face in making a second career transition, these workers must struggle with the challenge of being "immigrants all over again," without access to even the limited settlement programs that are available to new immigrants. Their health and well-being is affected by income loss and financial insecurity, and the associated stress. They are less able to support the education, leisure and well-being of their children and families, and to contribute time or money to their communities. This further hinders the stable social reproduction that is the hallmark of successful integration.

We note, therefore, that both "settlement" and "integration" are long-term processes that require attention to the particular needs of heterogeneous immigrant populations in situations of economic crisis and restructuring. Older workers, especially those who are women and racialized, require specific kinds of support to enable them to re-integrate into the labour market after losing their jobs. Re-training programs such as Second Career need to anticipate the specific needs of diverse (in terms of gender, age, and race/ ethnicity) and marginalized workers. There should also be more scrutiny and regulation of temp agencies and employers who capitalize on the structural weakness of such workers. Importantly, we need to renew our demands for more childcare, especially for those with irregular working arrangements. We need to call, not just for a living wage, but also for ways of organizing work that accommodate family responsibilities.

This study also has another goal. It documents the courage, resilience and creativity of the workers, and their continued determination to struggle on, collectively and

- Politicize
- Mobilize
- Power for Workers

individually, to make a better life for themselves and their children in the face of all odds. In the words of Salmaan Khan, one of the student researchers and co-authors of this study, “Though their dreams are modest, their spirit of resistance remained high. Through the process of interviewing the workers, it became even more evident that what we were participating in was more than just a research exercise and was developing into a project of resistance. The research project itself, it was clear, was becoming an organizing tool.”

II. The PMP Workers’ Story

Progressive Moulded Products (PMP) was a plastic moulding company that specialized, at the time of its closure, in the manufacture of interior plastic parts, such as the console between the front seats, dashboards, and air vents, for cars and light trucks in North America. Over two decades ago, it had also manufactured handsets for phones and other such products, but gradually came to specialize in vehicle parts which it supplied to companies such as Ford, GM and Chrysler. Workers who had been with the company for over a decade described how they had worked hard to help the company grow, putting in 80 hour work weeks when the demand was high (Juravich and Healy 2009; Ng 2011: 13).

Workers recalled that while the management was relatively supportive back then, health and safety conditions in the factory were always poor; and newer workers, many of whom were southeast Asian refugees with limited English skills and financial resources, were taken advantage of to get work done on overtime and without complaint.

As the company expanded and took on more business, the long-time owner and management team was replaced through two leveraged buyouts in 2004. In 2006, the company bought two new lines from another company that had gone bankrupt, with the aim of expanding further. They put further pressure on workers to produce more, faster, and with fewer people, while

cutting back on bonuses and health and safety measures. Several accidents occurred due to the terrible health and safety conditions, but despite complaints to the Ministry of Labour, nothing seemed to change, nor were injured workers given sick leave or compensation by the company (Juravich and Healy 2009).

There were several union drives at PMP, each one unsuccessful despite the issues PMP workers faced. In part, this was because for many of the new Canadians these were good jobs, particularly given their lack of English skills. Hourly wages were typically $13 to $15 per hour, significantly more than the minimum wage, which was $8.75 at the time the plant closed. The union drives were also unsuccessful because the company met any hint of a union with intimidation, emotional blackmail, and threats that unionization would raise costs and close down the company. Many workers did resist what some of them referred to as the “racist, sexist and exploitative behavior” of the management, but they did so without the backing of a union.

From 2006 to 2008 PMP launched seven new products for North American automakers. Through speeding-up of work and the use of sub-par materials and components, its sales went from $373 million in 2006 to $470 million in 2007 and hit a high of $540 million in 2008. As the company pushed its employees to the limit, it was reported to have “borrowed heavily to invest in new equipment and quickly bring on new business” (OESA 2009, cited in Juravich and Healy 2009). With its growing debt, the company’s economic position was severely weakened. On June 20, 2008 Progressive Moulded Products was placed in bankruptcy protection. It stayed in this legal limbo during the years that followed.

Profile of PMP Workers

Country of Origin

97% were born outside Canada

Mother Tongue

87% are ESL speakers

13% use English as their first language

Gender

59% are women

Age

57% are over 40 years old

22% are over 50 years old

Length of residency in Canada

11% have been here less than 5 years

71% have been here more than 10 years

28% have been here more than 20 years

Educational Background

13% attended to completed grade school

45% graduated from high school in their countries of origin

26% attended or received college diploma

22% graduated from University

Number of years worked at PMP

36% worked there less than 2 years

41% worked there for more than 5 years

22% worked there for more than 10 years

- *Based on holistic needs assessment reports prepared by the Labour Education Centre between December 2008 and May 2009, Ng 2011: 27*

At no point in the days between the bankruptcy protection filing and closure of the plants did the company care to inform the workers of its plans. Workers at the different facilities learned about it in different ways, when they found themselves locked out or told not to return the next day, or told to go on a week's leave. Those who arrived at work were not allowed to go in to collect their belongings. As workers heard the news, they gathered at the company headquarters in the hope of meeting with the management to discuss outstanding matters. Many were still owed back-pay, vacation pay, as well as termination or severance pay (depending on how long they had worked at the plant). Many workers did not even have an officially-signed letter indicating they had been let go. Nor did they have a record of employment which they would need in order to file for unemployment insurance. Some had their drug coverage cut off even while they were still paying for their benefit plan. Instead of meeting with them, the management worked behind a wall of security and silence to load transport trucks with moulds to be shipped to new suppliers for GM, Ford and Chrysler.

The workers soon realized that once the moulds left, their struggle to keep the plant open or get what was owing to them would be lost. So they decided to act, to form a blockade to stop the equipment being moved out. As Fa, one of the worker leaders, tells it, "*When we went there it was, you can say people were angry. They wanted to show their protest over there….That's how we are not taking this injustice"* (Juravich and Healy 2009: 33). Even five years later, workers still feel bitter and hurt about the dishonesty and betrayal by the company that they had worked so hard for. On the picket line their sense of betrayal grew to include the government, as they realised that the law, the police and the courts all worked against them and in favour of their employers. The police protected the management; and the courts ruled in favour of the company's right to remove the workers from its property. To add to these injustices, bankruptcy laws placed all the other creditors ahead of the estimated $35 million owed to the workers in termination and severance payments.

But the militancy of the workers did pay off. The workers turned to the CAW for help, and the CAW, along with the Toronto and York Region Labour Council, brought unions from across the city to support the workers in their picket. In the month that followed, the

CAW worked closely with the Ontario Ministry of Training, Colleges and Universities (MTCU) to create an adjustment plan for the workers, and in October 2008, a PMP Workers Action Centre was set up as result of a partnership between the CAW and the MTCU. Between October 2008 and June 2008 when the Learning Centre that was part of the Action Centre finally closed, the Committee members, four staff and 58 peer helpers of the Action Centre helped workers with employer outreach, access to training, and information and resource development.

The efforts of the Action Centre provided several gains for the workers:

- Enhanced adjustment supports, which meant that 855 workers were able to obtain new employment (full time, part time, self-employment) by the time the Centre closed, despite a very difficult job market and the multiple barriers facing this group.
- Enhanced supports also meant 497 workers had completed or were due to graduate from Second Career Training by the time the Centre closed.
- 471 had completed upgrading or were near completion when the Centre closed.
- A special Partnership with Service Providers led to a genuine One Stop Employment Services Model. Key local providers participated in an orientation meeting with the Adjustment Committee and then assigned staff to offer services on-site at the Centre, a familiar and supportive environment for these workers.
- An innovative Partnership with Educational Institutions led to the establishment of an Adult Worker Learning Centre. It provided seamless ESL, LBS and Academic Upgrading classes in a single location with wrap-around support services from the Action Centre.
- With the support of MTCU and Educational Institutions, an Innovative Bridging Project facilitated Second Career registrations and the requisite upgrading, a form of pre-Second Career training. Peer supports were available throughout the whole process, contributing significantly to the unusually high participation and completion rates.
- An Advocacy Model supported workers' efforts to win termination and severance payments owing to them. As a result of high profile cases such as the PMP one, a federal Wage Earner Protection Program was introduced in January 2009. The law provides for immediate payment of at least some of the termination and severance payments owing workers in a bankruptcy or receivership. Although the legislation did not apply to PMP workers because it was not retroactive, their campaign was instrumental to its introduction. (Ng 2011)

The experience of the Action Centre also resulted in many lessons being learned about the adjustment process, some of which are presented in the recommendations of this report. These include the need to: have supports in place to deal with sudden closures, take a holistic approach to job loss and needs assessment, provide more income support through the adjustment process, address diverse cultural and language needs in retraining, and have workers' needs drive the process.

- **P**oliticize
- **M**obilize
- **P**ower for Workers

The PMP Workers Action Centre was a gathering place, a second home for workers going through the trauma of plant closure and transition. It was also the site of extraordinary courage, creativity and collectivity. For many workers, the experience with the Centre was a journey – finding their own voices, participating in rallies to defend their rights, and asserting their presence. Even after the closure of the Centre, workers have managed to continue their support for each other and move forward.

III. Establishing the Context – the Conceptual Framework

i. Identifying and Defining Precariousness

A number of recent reports (PEPSO 2013; Stapleton et al 2012; Law Commission of Ontario 2012; Wilson et al 2011) document the worsening employment conditions for growing numbers of people in southern Ontario. The term "precarious" is used to describe the new forms of employment, characterized by increased economic insecurity, reduced entitlement to ongoing employment, limited control over work schedules, low pay, limited benefits and few opportunities for career advancement (Vosko, 2006; Lewchuk et al, 2006). A recent study carried out by the Poverty and Employment Precarity in Southern Ontario research group (PEPSO 2013)

drew on data from their own large-scale survey as well as from Statistics Canada to conclude that across southern Ontario:

- Barely half of those working today are in permanent, full-time positions that provide benefits and a degree of employment security.
- At least 20% of all those working are in precarious forms of employment.
- Another 20% are in employment relationships that share at least some of the characteristics of precarious employment.
- Precarious employment has increased by nearly 50% in the last 20 years.

The study showed that precarious forms of employment can be found across the economic spectrum, but is greatest among low income people and also has the greatest impact on that group.

Compared to those in the *secure* cluster, **people in the *precarious* cluster**:

1. Earn 46% less and report household incomes that are 34% lower.
2. Have experienced more income variability in the past and expect to experience more in the future.
3. Rarely receive employment benefits beyond a basic wage.
4. Are often paid in cash and are more likely not to be paid at all.
5. Often don't know their work schedule a week in advance and often have unexpected work schedule changes.
6. Have limited career prospects and are less likely to be satisfied with their job.
7. Have more weeks without work and are more likely to anticipate future reductions in their hours of work.
8. Are more likely to fear that raising a concern about employment rights at work might negatively affect future employment.
9. Are more likely to have their work performance monitored.
10. Are less likely to be unionized.
11. Often hold more than one job at the same time.
12. Often work on-call.
13. Rarely receive employer-provided training and often pay for their own training.

Precarity is as much a social as an economic condition. The PEPSO study found that precarious employment affects family life, ability to spend time with children and volunteer at their school or in community and even friendships and social life. It also found that employment precarity had a significant negative impact on the health of workers, a finding also reported by Wilson et al's 2011 study of employment insecurity among racialized groups in the Black Creek area of Toronto, and even earlier by Lewchuk and others (Lewchuk et al 2006; Lewchuk et al 2008). This is partly due to the stress and uncertainty associated with such work, the lack of medical benefits, including sick leave, and lower incomes. Other trends associated with precarious employment also have adverse health impacts. These include cutbacks to government monitoring of workplaces for health and safety standards (LCO 2012) and the increased use by companies of temporary workers recruited through temp agencies to carry out hazardous or back-breaking jobs as a way of protecting the health and safety of their long-term employees (Institute for Work and Health, 2013).

In this study, we understand precariousness as produced by a set of factors which, when taken together, may act to accentuate the precariousness or vulnerability of some groups of workers over others. Economic recession and the restructuring of the Ontario economy away from manufacturing has led to a reorientation of the labour market from longer-term, standard employment relationships with decent pay and benefits, to a market where a growing number of jobs may be characterized as "precarious."

This precarity has been exacerbated by the withdrawal of state regulation of the market, leading to weakened employment and health and safety standards, and the proliferation of temporary employment agencies. The state's withdrawal is also felt in the form of weakening support for adjustment and retraining after job loss.

Social identity or location are further factors that help to explain the disproportionately high presence of racialized immigrants and women among the ranks of the precariously employed. We explore these factors in greater detail below.

ii. Factors Leading to Precariousness in Employment

Recession, 'Recovery' and 'Bad' Jobs

Ontario was hit particularly hard by the recession in 2008: 59% of the nation's permanent job losses were in Ontario, and of these many were in the manufacturing and primary industries. In 2009 Ontario lost 201 000 permanent jobs, while only 15,000 new part time jobs and 20,500 temporary jobs were created (Canadian Centre for Policy Alternatives 2010). At the peak of the previous economic cycle there were 1.1 million manufacturing jobs in Ontario, yet in 2009 manufacturing jobs in total had fallen to under 800,000, more than 100 000 of which were lost in 2009 alone (Mackenzie 2010). Economists predict that the majority of jobs lost in the manufacturing and primary sector are unlikely to return (Mackenzie 2010).

While the working-age population in Ontario continues to grow, the province's labour force growth has generally been decelerating over the past two years, causing the labour market participation rate in Ontario to decrease to 66.5%, the lowest recorded number in over a decade (HRSDC 2012). In part this is due to the growing share of retirees in the population, but the 2012 Labour Market Bulletin also suggests that some of this drop is due to discouraged workers who have temporarily left the labour force after experiencing job displacement (HRSDC 2012). Long term unemployment is a growing concern for Ontario. In 2010-2011 the share of Ontario's unemployed who have been without work for 27 weeks or more was the highest in Canada at 25%, which was well above the national average of 21.3% (MTCU 2012).

A significant percent of the jobs created in 2010 were part-time (19.3% in 2010), temporary (12.9% of all jobs in 2010), or self-employed (5.3% in 2010) (MTCU 2010). This is in keeping with trends that have been emerging since the late 1990s. While in the 1970s and to some extent the 1980s, many employment relationships were long-term, regular, regulated, and had benefits (standard employment relationships), since the 1990s, employers have responded to shifts in global competitiveness, market regulation and technology, and increasing economic volatility, by seeking ways to

increase their own "flexibility" vis-à-vis labour, resulting in employment relationships that are non-standard, or “precarious” (Lowe 2007; Vosko 2006).

Employment Insurance, Adjustment, and Retraining Programs

The impact of the restructuring of the economy is compounded by the nature of state support for workers facing job loss, in the form of employment insurance, adjustment and retraining programs. A major problem the PMP workers encountered when their factory shut down was in relation to payment of their severance and other outstanding wages. This is partly due to inconsistencies between the federal and provincial laws around bankruptcy. Juravich and Healy (2009) cite Toronto and York Region Labour Council President John Cartwright explaining that PMP workers were “facing a judge who on a Saturday night was looking at two sets of laws…The provincial laws that guarantee you your severance pay and the federal law that said that bankers were first. He chose to exercise only one law and issue an injunction” according to which all the other parties (creditors, subcontracting companies, etc) with which the company had transactions were to be paid before the workers were.”

The federal government’s employment insurance provisions are inadequate to meet the needs of workers facing job loss during a recession. They require workers to wait a two-week period before the payments kick in and then support them only for six months. The payments amount to only 55% of their earnings in the best twelve weeks of their employment. The requirement to have worked a minimum number of hours in a given period in order to qualify does not reflect the nature of the new jobs, which are increasingly short-term and part-time. Inadequate EI provisions thus contribute to increasing precarity, forcing workers to take poorly-paid jobs through temp agencies in order to survive (Ng 2011).

One of the most noted labour market trends emerging in recent years is that post secondary education is becoming a general requirement for employment (MTCU 2011). Traditionally, employment growth in high skilled jobs has been stronger, especially during economic downturns. Economists note how individuals with post-secondary

education credentials are more resilient during economic downturns and gain jobs more quickly during recoveries. Research indicates that those without post-secondary education accounted for almost 90% of the job losses in 2009, while job growth has been concentrated in positions requiring post-secondary education (MTCU 2011). Moreover, those without post-secondary education face higher unemployment rates compared to those with a post-secondary education: 9.1% versus 6.2% as of 2010 (MTCU 2011). As of 2011, employment gains for those with post-secondary education were 148,700 compared to the same period last year; in contrast, employment declined by 31,400 for those without post-secondary education (MTCU 2011). These figures do not help explain the precariousness faced by the ex-PMP workers, 48% of whom had a post-secondary education, as Lisa's story in section V of this report illustrates.

While the demand for higher skill levels is greater, employers are investing less in the upgrading, training and retention of their own lower skilled workers. This puts the onus for training on the government. Thus, in response to post-recession demands for job growth and job creation, labour market development in Ontario has focused on investments in postsecondary education and training. One of the training initiatives included the launch of the Second Career program, aimed at helping thousands of laid-off workers in accessing training and finding jobs in growing sectors of the economy. Since June 2008, the program has served over 50,000 clients. An MTCU report claims that about 74% of surveyed participants reported finding employment within one year of completing their skills training (MTCU 2012), although this does not indicate the size of the sample surveyed, or specify whether the jobs were in the areas re-trained for, and whether they were secure or precarious jobs. However, despite continuing funding in 2011-2012 to support training opportunities to help Ontarians improve their knowledge and skills, including $44 million over three years for literacy and basic skills programs, the Labour Market Agreement Annual Plan predicts that there will continue to be below average labour force participation rates for specific groups including immigrants, older workers, and workers with disabilities (MTCU 2012).

The Increased Role of Temporary Employment Agencies in the Labour Market

Temporary employment agencies (hereafter referred to as "temp agencies") have come to play an important role in an economy where employers see competitiveness as deriving from lower costs and greater "flexibility" with regard to labour. Since the profits of these temp agencies derive from filling labour shortages as they arise, it is not in their interest to allow workers to gain long-term employment within their assigned workplace. In section V, we document how the strategies used by these agencies contribute to the precariousness of our participants' work, and consequently to their lack of control over their private lives and time outside of work.

A recent study by the Institute for Work and Health (2013; see also LCO 2012) highlights the serious health and safety implications of temp agency work. The temp agency industry is very difficult to regulate. Workers who are new on a job and have been sent in for a short contract rarely are given much training on the equipment and processes of the workplace, making them more likely to have accidents. The agencies do not see the working conditions of their clients, and the workers themselves are likely to hide injuries and not report problems because of their economic insecurity. The agencies are hesitant to jeopardize their relationship with their clients by raising health and safety concerns. Importantly, the Institute for Health and Work study suggests that the current legal framework in Ontario itself "ineffectively targets prevention of injury to temp agency workers and weakens employer accountability." Worse, it creates a situation where employers maintain their health and safety records by hiring temp agency workers for arduous or hazardous jobs. The report notes:

> *The Occupational Health and Safety Act allows for both clients and temp agencies to be held accountable for violations of the Act. However, in practice, this legislation is only enforced if a problem comes to the attention of a Ministry of Labour inspector. Even if a fine is applied, some small agencies run with little infrastructure and can avoid fines by closing down, declaring no assets and re-opening under another name.*
>
> *The Workplace Safety and Insurance Act recognizes temp agencies as the sole employer, and so the 'prevention incentive' in experience-rated WSIB premiums is applied only to temp agencies. This means client employers*

> *who hire temp agency staff can maintain a clean WSIB accident record, even when accidents happen regularly to temp agency workers on their premises. The cost and risk of work accidents are effectively outsourced to temp agencies.*
>
> *(Institute for Work and Health 2013)*

iii. Who are the Precariously Employed? The Role of Immigration Status, Racialization, Language, Gender and Age

The Law Commission of Ontario (LCO 2012: 11) defines vulnerable workers as "those whose work can be described as "precarious" and whose vulnerability is underlined by their "social location" (that is, by their ethnicity, sex, ability and immigration status)." Vulnerability refers "*not to the workers themselves but to the situation facing them*, both in their work environment and in other aspects of their lives such as their health, their families, their ability to participate in their community and their integration into Ontario life" (LCO 2012: 11). Groups that they identify as likely to be more vulnerable include: women and single parents; racialized persons; newcomers and long-term immigrants; temporary migrant workers; aboriginal persons; persons with disabilities; youth; and non-status workers. In the following section, we review the literature that explores how immigrant status, racialization, programs affecting English language acquisition, gender and age interact to accentuate the vulnerability of groups such as the former PMP workers.

Immigrants have been identified as particularly disadvantaged in the current labour market (Canadian Centre for Policy Alternatives 2010). Studies indicate that while employment among Canadian-born workers was down by 1.6% between June 2008 and June 2009, employment among recent immigrants was down 5.7%, and employment among long-term immigrants –immigrants in Canada for more than a decade –was down by 3%, nearly twice the rate of decline of Canadian-born workers (Mackenzie, 2010).

Racialization is a further factor that can affect the outcome of racialized immigrants, but also operates independently of immigrant status. Canadian research has shown that

racialized and immigrant workers face particular barriers to incorporation into the labour market (Hiebert 1997; Pendakur & Pendakur 1998; Picot & Hou 2003; Teelucksingh & Galabuzi 2005; Reitz & Banerjee 2005; Block and Galabuzi 2011). Precarious employment is particularly prevalent amongst recent immigrants and racialized communities (Goldring & Landolt 2009a; Teelucksingh & Galabuzi 2005; Workers Action Centre 2007). Racialized families were three times more likely to live in poverty in 2005 than non-racialized families (Block 2010). The fact that both Canadian-born and immigrant racialized individuals have similar unemployment rates and economic outcomes indicates that there operates a "colour coded labour market" (see Block and Galabuzi 2011) within which access and quality of employment is segmented along ethno-racial lines (see also Galabuzi, 2006). A recent study of employment and income security for racialized groups in the Black Creek area of Toronto (Wilson et al 2011) found that discrimination, particularly race-based discrimination (based on socially produced ethno-racial features including skin colour, accent, religious or cultural affiliation), is a pervasive factor undermining racialized people's search for stable employment. This is supported by a recent study that found that those with English sounding names were 35% more likely to receive call backs on resumes then applicants with Indian or Chinese names (Oreopoulos and Dechief 2011). Wilson et al further note that race-based discrimination also affects experiences within the workplace including the types of work that racialized people are given, wage, exposure to workplace injuries, occupational mobility, and job security. At the same time, they have little or no formal recourse to file complaints about or counter these experiences. They conclude that the Black community, the Arabic-speaking community (particularly the Muslim Arabs), and people with low English language fluency experience racism more frequently and more intensely in the labour market.

Official language acquisition can be a particular barrier faced by immigrants, and this is tied to the availability and design of language programs for different types of immigrants. Szwed (1981: 21) has suggested that the activities and practices involved in language training have consequences for and are affected by family life, work patterns, economic conditions, patters of leisure, and several other factors. The

processes of language training for immigrants, particularly if they are newcomers, are not processes that occur in a vacuum but rather one that compete with other day-to-day obligations and responsibilities such as acquiring funds to maintain adequate subsistence. For this reason Cumming (1991) suggests that it takes people from two to seven years to develop fluency in second language skills, depending on the target level they aspire to. In the case of women even more than men, immigrants may take anywhere from three to ten years to establish themselves financially, socially and otherwise prior to engaging in formal language training. However, the Language Instruction for Newcomers to Canada (LINC) programs, which are the dominant language programs for immigrants, only serve immigrants in their first three years after arrival to the country. This can pose a particular problem for groups such as the former PMP workers, most of who began to work full time soon after arrival and were not able to avail themselves of English language training. Decades later, they experience this as one of the major barriers when seeking re-employment.

Gender compounds the vulnerability of (immigrant) workers in multiple ways. Burnaby's (1996) historical analysis shows the ways in which the explicit gender bias in prior language training programs, such as those in the 1970s which targeted the 'head of household' led to many women being excluded from formal language training. Although the federal program over the years has been refined to include women, for instance the "Settlement Language Training Program" and the "Language at Work Program," these new programs have nonetheless denied women "the economic subsidy necessary for full-time study" (Burnaby, 1996 p 91).

Women across Canada continue to do the bulk of childcare: in 2010 Canadian women spent an average total of 50 hours per week caring for household children, double that spent by men (24 hours) (Milan et al, cited in LCO 2012: 20) The lack of adequate facilities or financial support for **childcare** is a particular problem for immigrant women

seeking to enter full-time language training, post-displacement re-training, as well as the labour market itself.

As with all women, immigrant women earn significantly less than immigrant men (Bucklaschuk & Wilkinson, 2011). The overall gap between women's and men's wages in Canada, which has been stuck at between 70 and 72 per cent for the last three decades, is larger for older and racialized women (Canadian Labour Congress, 2009). Moreover, immigrant women have higher rates of unemployment and less job security than both immigrant men and Canadian born women (Bucklaschuk & Wilkinson, 2011). Researchers have termed this situation a 'double jeopardy,' as immigrant women in the labour market experience a double disadvantage due to their immigrant status and gender (Bucklaschuk & Wilkinson, 2011). According to the 2006 Census data, while immigrant men experience similar unemployment rates as Canadian-born men, immigrant women experience higher unemployment rates and lower labour market participation rates than Canadian born women (Bucklaschuk & Wilkinson, 2011).

According to Mazerolle & Singh (2004), gender is used as an allocation strategy with respect to job opportunities. Evidence suggests that after experiencing a job displacement, women are less likely than men to become re-employed, and thus have higher rates of non-participation in the labour force following displacement (Abbott, 2008; Mazerolle & Singh, 2004). With regards to post-displacement wage earnings, evidence indicates that for Canadian workers who were displaced from their job due to closures or mass layoffs, both males and females experienced large and persistent mean earnings losses, and a similarly slow earnings recovery process (Abbott, 2008). Data indicates that for displaced workers on average, the drop in earnings is approximately16-22 per cent for men, and between 22-31 per cent for women (Jones, 2011). The literature further reveals that women in Canada are much more likely than men to work part-time and multiple jobs, often under precarious employment arrangements (Canadian Labour Congress, 2009).

The gap in wages for older women, and especially for older racialized women, is significant in the post-displacement context because lower wages mean less adequate

benefits (Canadian Labour Congress 2012). Fewer hours of work make it harder to qualify for Employment Insurance, and it means that even if women do quality, the average duration of benefits is less than that of men (Canadian Labour Congress, 2012). This is significantly problematic for older women in a post-displacement situation because, as previously indicated, women are less likely to return to the workforce following displacement. This means that they are more likely to be surviving solely on the benefits they are entitled to; however, in 2011 only 37% of unemployed women qualified for regular benefits as compared to 45% of men, and between 2006 and 2010 women's average weekly benefits were consistently about $60 lower than men' s (Canadian Labour Congress, 2012).

Age is another variable that compounds workers' vulnerability, as seen above. An important labour market trend that has emerged in recent years is the growth in the employment rate for both men and women over the age of 55 (Carriere & Galarneau 2011; HRSDC 2012). Specifically, from 1997 to 2010, the employment rate of men 55 and over grew from 30.5% to 39.4%, and that of women grew from 15.8% to 28.6% (Carriere & Galarneau 2011). However, the Expert Panel on Older Workers (2008) identified older workers, namely those over the age of 55, as a group who has been particularly disadvantaged in the labour market post-recession. MTCU (2011) indicates that the number of permanently laid off older workers rose 20% between 2008 and 2010. The Annual Labour Market Survey of Ontario for 2010 (MTCU 2010) shows that older workers 55 and over are disproportionately represented in long-term unemployment. While this group accounted for 12.8% of total unemployment in 2010, it made up 20.2% of the long-term unemployed. In 2010, about 40% of unemployed older workers faced long-term unemployment compared to 30% for prime-aged unemployed workers (ages 25-44) and 10% of unemployed youth. Further, older workers are more likely to be engaged in non-standard forms of work: non-standard forms of work now account for about one-third of all employment among older workers (Expert Panel on Older Workers, 2008).

The literature regarding older workers as a whole generally suggests that age discrimination plays a significant role in the allocation of jobs following displacement.

This discrimination is usually manifested in negative stereotypes held by employers about older workers, such as that they are less productive, less likely to retrain, more injury prone, and less likely to remain in the labour force for a long period of time (Mazerolle & Singh, 2004). According to Mazerolle & Singh (2004), empirical evidence supports the view that if an employer has to choose between an older worker and a younger worker, they will select the younger worker.

Older immigrant workers who have experienced involuntary job loss are also less likely to receive training that will allow them to re-enter the labour force. Evidence indicates that Canadian-born employees are more likely to receive job-related training than their immigrant counterparts, 35% versus 31% for men, and 37% versus 35% for women (Park, 2011). Furthermore, male employees who migrated as adults were 25% less likely to receive training than their Canadian born counterparts. However, one interesting trend with specific regards to older immigrant female workers, is that female immigrants, aged 45-64, were more likely to receive training than those from 18-24; this finding is consistent with research suggesting that women in general receive less training especially early in their careers (Park, 2011). Conversely, among men, older immigrant workers were less likely to receive job training than their younger counterparts ranging in age from 25-44 (Park, 2011). As well, immigrant employees were more likely to perceive the presence of barriers to training as compared to their Canadian born counterparts; among immigrant women, 35% reported barriers compared to 30% of Canadian born women, and similarly 31% of immigrant men perceived some barriers to training as compared to 25% of non-immigrant men (Park, 2011). Bucklaschuk & Wilkinson (2011) argue that as the age of immigrant workers increase, the odds of them pursuing additional education decreases, although both Abbott (2008) and Beach (2009) show that the completion of education and/or training post displacement, such as attaining a post-secondary certificate, had the potential to have positive effects on both the hourly and annual earnings of older displaced men. Similar effects were not seen for women in the same category.

- **P**oliticize
- **M**obilize
- **P**ower for Workers

IV. Introducing the Study: Methodology

The research methodology was grounded in the principles of community based action research where there is an active engagement between the researcher and participants in a process of dialogue, action and reflection. It is a collaborative research process with, and not on, the people (Reason & Bradbury 2006). For this study, the survey questionnaire, in-depth one-to-one dialogue, focus group discussion, and finally the reporting back session to the participants were all structured to share their lived experiences and encourage them to come up with alternatives. The collective inquiry became a journey of empowerment and solidarity building.

The research team took advantage of the Chinese New Year gathering organized by CAW in February 2012 to begin recruiting participants who were former PMP workers. A previous staff member of the Action Centre was employed to make the initial contacts and recruit potential participants. Potential participants were identified as any former PMP worker over 45 years of age. Care was to taken to recruit roughly equal numbers of men and women and to ensure diversity in the ethnic groups represented. A survey form was developed with the input of two workers and then pre-tested. Whenever possible, the research also tried to provide bilingual interpreters in Spanish, Punjabi; and Chinese during the interview process. The questionnaire was translated into Chinese and Punjabi to allow for more authentic discussion. A special outreach was made to the South Asian community in the Brampton area. A total of 78 participants were administered the questionnaire between the spring and autumn of 2012.

Profile of Participants

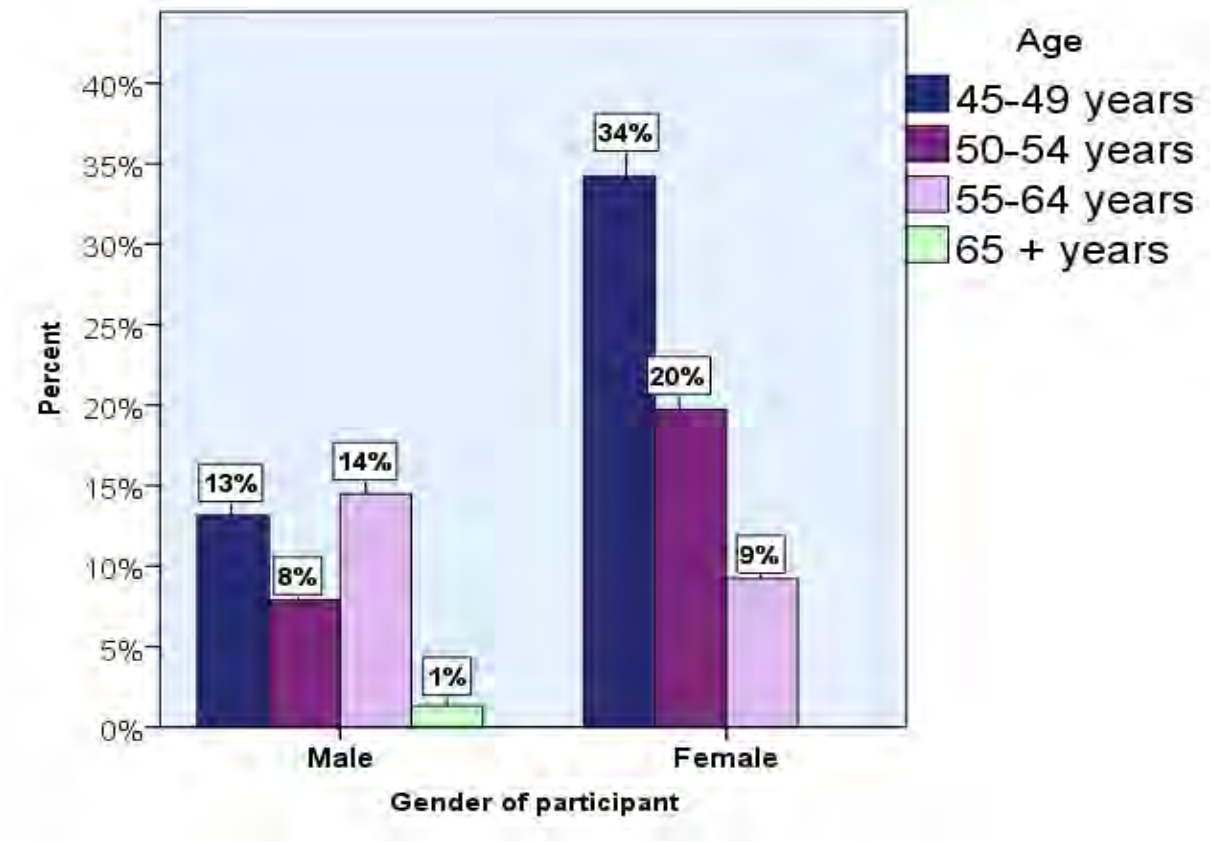

Figure 1

A further two focus groups were held in English consisting largely of participants who had expressed a willingness to talk further. A reporting back session was held in December 2012 to solicit participants' suggestions for recommendations. This event was combined with a holiday party, in the same way that the research project had been introduced to potential participants at a Chinese New Year gathering. In these ways, the research project created occasions for the former co-workers to continue to meet socially and hold on to a sense of community. These occasions also served as opportunities for the research team to interact socially with the participants and share, even if in a small way, their journey toward a more just and secure future. The ways in which we as researchers grew through this project and deepened our own sense of community, solidarity and commitment to social justice is reflected in the pieces below by the two student researchers who worked closely on the project.

Sareh's reflections

Four years after the closure of PMP, we approached former workers for interviews, limiting our sample to racialized workers--45 years and older. After calling over 200 workers, 78 workers (49 females and 29 males) agreed to participate in interviews that lasted anywhere between 45 minutes to 1.5 hours.

We were interested in seeing how demographic factors i.e. age, gender, race, and country of origin impacted whether participants sought a "Canadian" education or language training upon arrival to Canada, and after the plant closure how second career training influenced their prospects for re-employment in the labour market.

Given that we administered the questionnaires face to face, in the form of an interview, as opposed to surveys they filled out themselves, we are confident that the answers are reliable because the interviewer would clarify any uncertainty regarding the questions asked. We were careful to use simple language and refrained from using any academic jargon. When asking questions such as "How often do you feel the discrimination you experienced by supervisors/management was a factor in how you were treated at your current job? (that is, discrimination based on your race, gender, age, language etc.?)" we sensed that some participants were not familiar with the term "discrimination" in this context or were hesitant to talk about it because of the sensitive nature of the topic.

A key challenge was to explain to potential participants that their participation in this study was not going to result in any immediate or even direct personal benefit, but for a majority of people, the concern for the collective good resonated strongly and they agreed to participate based on the expectation that the final report would yield recommendations that would inform public policy intended to safeguard future immigrant workers from experiencing this kind of tragic loss.

We would also like to use this opportunity to discuss openly the limitations of our research and the challenges inherent to accessing participants who have been subjected to an injustice and later asked to recall their experience of struggle. Since nearly all of the former workers have familial responsibilities and still remain in various forms of precarious work (including on-call work) they could only give us very short notice on whether they were available for an interview, sometimes as late as the night before. We also experienced a high volume of cancellations at the last minute. Many citing work related obligations. So, we can only imagine how their precarious status in the labour market has impacted their daily lives.

In a few instances, the children of the participants translated for them, acting as 'cultural brokers'...this may have not been ideal (things could get lost in translation), and in retrospect, we should have discouraged participants to sit in on the interview with their

life partners because I sensed for a few women this may have influenced their response to personal questions like "How does stress about your employment situation interfere with your personal or family life?"

Salmaan's reflections

Even though there were limitations to the information we were able to gather quantitatively, the collective narratives of the workers gave us great insight into the intimate effects of economic and social marginalization.

As mentioned by Sarah, the data collection process, aside from the focus groups, consisted of one-on-one interviews that usually lasted a little over one hour. We had not planned for them to take this long, but as soon as we sat face to face with workers who could pass for our own parents - who too had made the journey across oceans in the hopes of a better life - the experience took on a much more personal and intimate dimension. Either before or after the interview process we would share with each other our experiences and thoughts. Sometimes our discussions would venture off into the state of the economy, or we would share our reflections on the stresses of migration. For many of the workers, these discussions were an opportunity to finally speak with someone about their personal experiences. Needless to say, there was much to be said, and much that we were eager to learn.

I will not try to convince you that the research process was carried out in an 'objective' and impartial manner with the respective 'research participants'. Not only would this be impossible, but it would be wrong. To ignore the stories, the trials, the journeys, the tears, the anger, would be to re-commit the same wrongs that a capitalist state built on racial and economic exploitation continues to mete out on workers of colour. It is in fact the erasure of their collective lived experiences that makes it easier for the system to maintain its exploitative nature.

It is not in a piece of paper, or a statistic, but through the life stories of the mother who has to balance working night shifts and raising her family during the day (getting only a couple of hours of sleep) or the pianist from the Philippines whose hands once composed music, but are now chained to the assembly line, that we begin to understand the realities of racial exploitation and marginalization.

There is a strong narrative that poverty is simply a "newcomer" phenomenon or that all it takes is time – 10 to 15 years – for one to 'settle down.' This discourse holds that we were all immigrants once, and that over time, we will 'catch up.' From what we have recorded throughout this project, many workers living here for more than 20-25 years

still find themselves living in precarity and on the margins of society. For these workers, there never was a "Canadian dream"; and if anything, life is getting even more difficult.

During the interview sessions, one of the questions we asked was: "What are some of your hopes and dreams for the future?" It is no big surprise that with modesty, most of participants answered with: wanting to have a better job; a stable job; to get more hours for work; to find a job in my field; or even simply, to find a job. Some other responses included: wanting always to be a nurse; to be able to buy a house; to have my children live a normal life and be able to find work; hoping that life in Canada would get better; to finally be able to go on holiday; to live a stress-free life; to stop working and travel around the world.

Though their dreams are modest, their spirit of resistance remains high. Through the process of interviewing the workers, it became even more evident that what we were participating in was more than just a research exercise and was developing into a project of resistance. The research project itself, it was clear, was becoming an organizing tool.

At our first get together with the workers, many of whom were in the same room for the first time in a couple of years, the atmosphere was somewhat tense and uncertain. There was a level of hesitation on the part of everyone, and no one really knew what to expect. Yet by the time we had completed the research process, at our final get together, it was clear that the workers, and the research team, were energized with a renewed sense of solidarity and ready to take on the fight.

V. Key Findings and Analysis

- Politicize
- Mobilize
- Power for Workers

In assessing the impact of closure for this group of workers, the study used a number of key indicators such as current employment status, wage and benefit level, job security; and the stress and anxiety level of juggling to make ends meet to sharpen the contrast between before and after the closure. Through statistical data analysis and participants' own narratives, the study is able to draw some conclusions about the experience of PMP workers that may be generalized to older immigrant racialized workers in precarious labour market conditions. The trends revealed include:

- From stable to precarious forms of employment
- From living wages with benefits to poverty wages
- From job security to unpredictable work assignment and schedules
- Stress and anxiety for workers and their families
- A growing reliance on temp agencies as a source of employment.

The research findings are neither pretty nor encouraging. For these former PMP workers who are racialized long-term immigrants, systemic discrimination by age, gender, and race have presented additional challenges and contributed to a downward spiral of insecurity, and growing inequities in employment and livelihood.

1. Current Employment Status: from Stable to Precarious Forms of Employment

Figure 2 presents a grim picture of the former PMP workers' current employment status four years after the closure.

- Only one third (34%) of our participants have secured permanent full time employment (i.e. more than 25 hours per week).

  Fully two thirds of the former PMP workers at the time of interview were in non-standard employment relationships or unemployed (20%).

- Out of those currently working, close to 40% have been on call/casual work, temporary/short term contract less than a year or other forms of temporary employment as agency workers.

The PEPSO study (March 2013) indicates that in 2011, only half of the employed people age 25-65 in the GTA Hamilton labour market were in a standard employment relationship (permanent full time employment with benefits). From our study of former PMP racialized workers between the age of 45 to 65, the percentage of those who have secured standard employment relationship is even lower at 34%.

The impact of the closure of the PMP plant has also been highly gendered. Women are disproportionately either unemployed or concentrated in precarious employment.

- Out of those who were not working at the time of the interview, an overwhelming majority (80%) were women (13 out of 16).

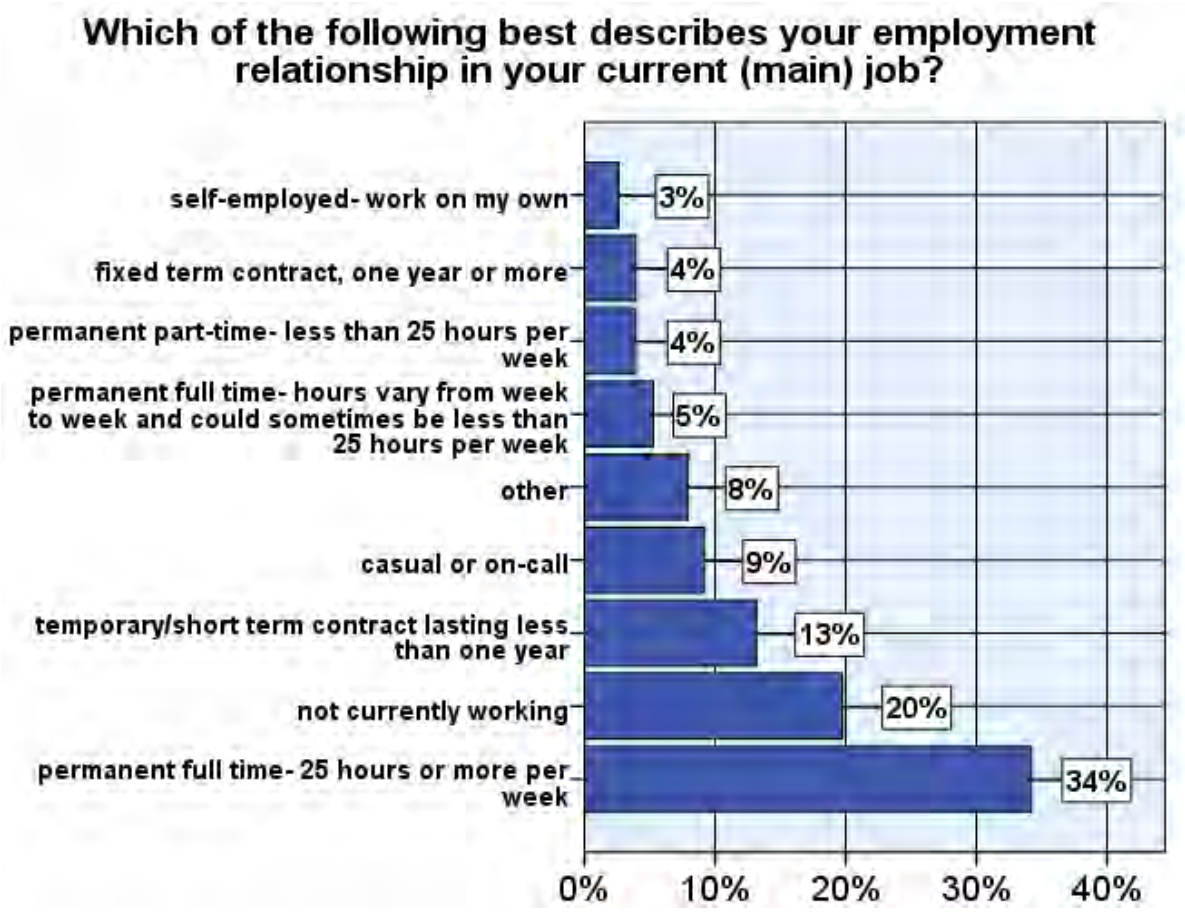

Figure 2

Figure 3 below provides a gender breakdown of those not employed in permanent work:

- 42% of these women are in casual/on-call work, as compared to 25% of men.

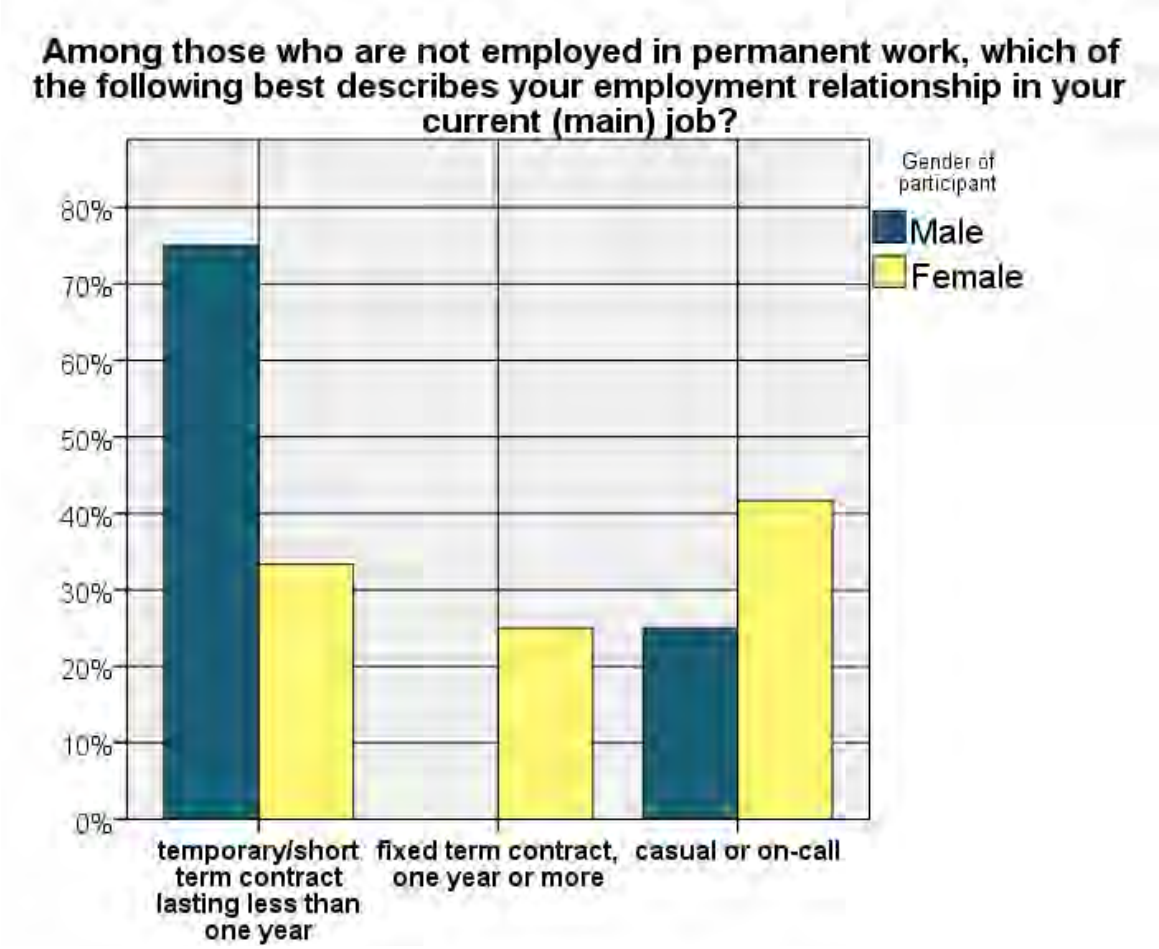

Figure 3

Figure 4 below shows the difficulty older racialized workers have with re-entry into the labour market. In particular, older male workers have had more than three jobs since the plant closure compared to younger participants who report working two or less jobs. Among males, a disproportionate number of those between 55-64 years have worked more than three jobs since the closure. In contrast, younger male participants aged 45-49 years reported working two or fewer jobs. Among female workers, older workers did better and were as likely as younger female workers to have worked one or two jobs. A much larger proportion of female participants across all age groups except those 55-64 years (as compared to males) reported that they have not found work since the closure.

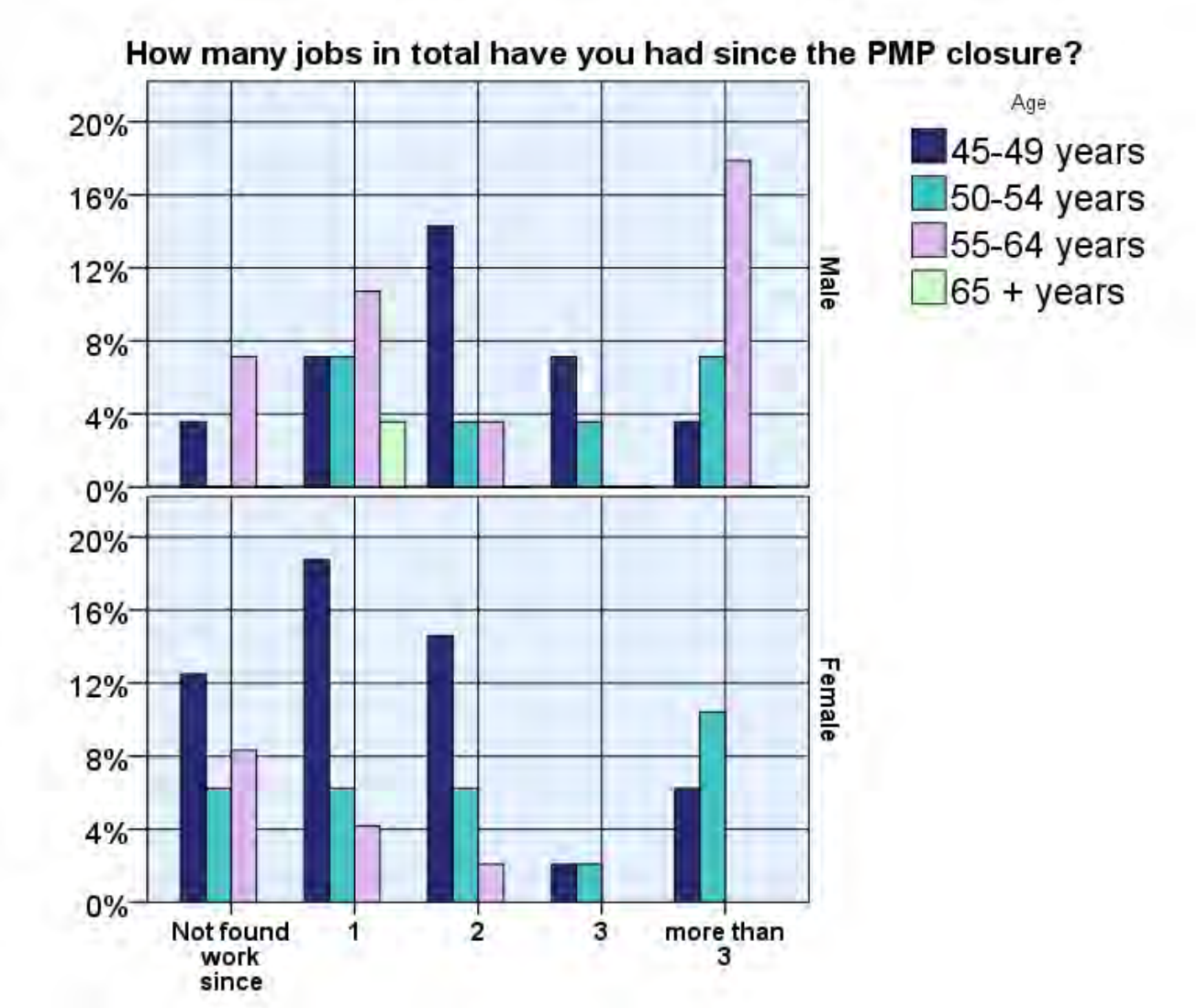

Figure 4

2. *Wages and Benefits: From Secure, Living Wages to Poverty Wages*

We were also interested in any differences in workers' income between PMP and subsequent employment. Prior to closure, the hourly rate for operators at PMP was $15 and an average of about $18 for material handlers, quality control and team leaders. This would have been considered a relatively secure and decent wage for workers in 2008 when the minimum wage in Ontario was $8.75. The findings reveal a dramatic drop in workers' wage levels after the closure.

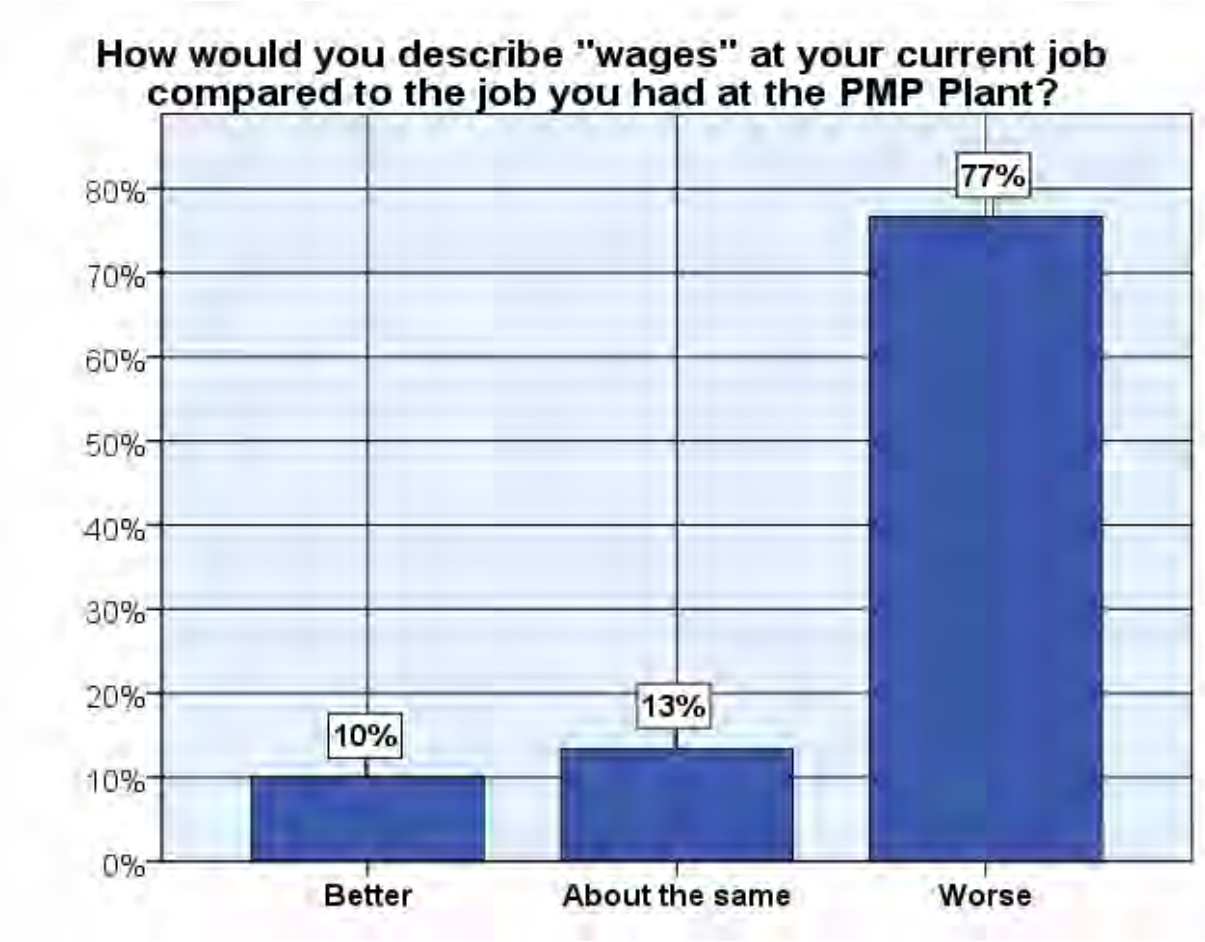

Figure 5

Current Wage Rate Compared with PMP

Figure 5 shows:

- 77% of participants' current wages are worse than at PMP
- Only 10% of participants are earning a better wage rate. 13% remain the same.

How Much Worse in Terms of the Wage Drop?

Figure 6 provides a more detailed examination of the extent to which wages dropped among those reporting their current wages are worse as compared with PMP.

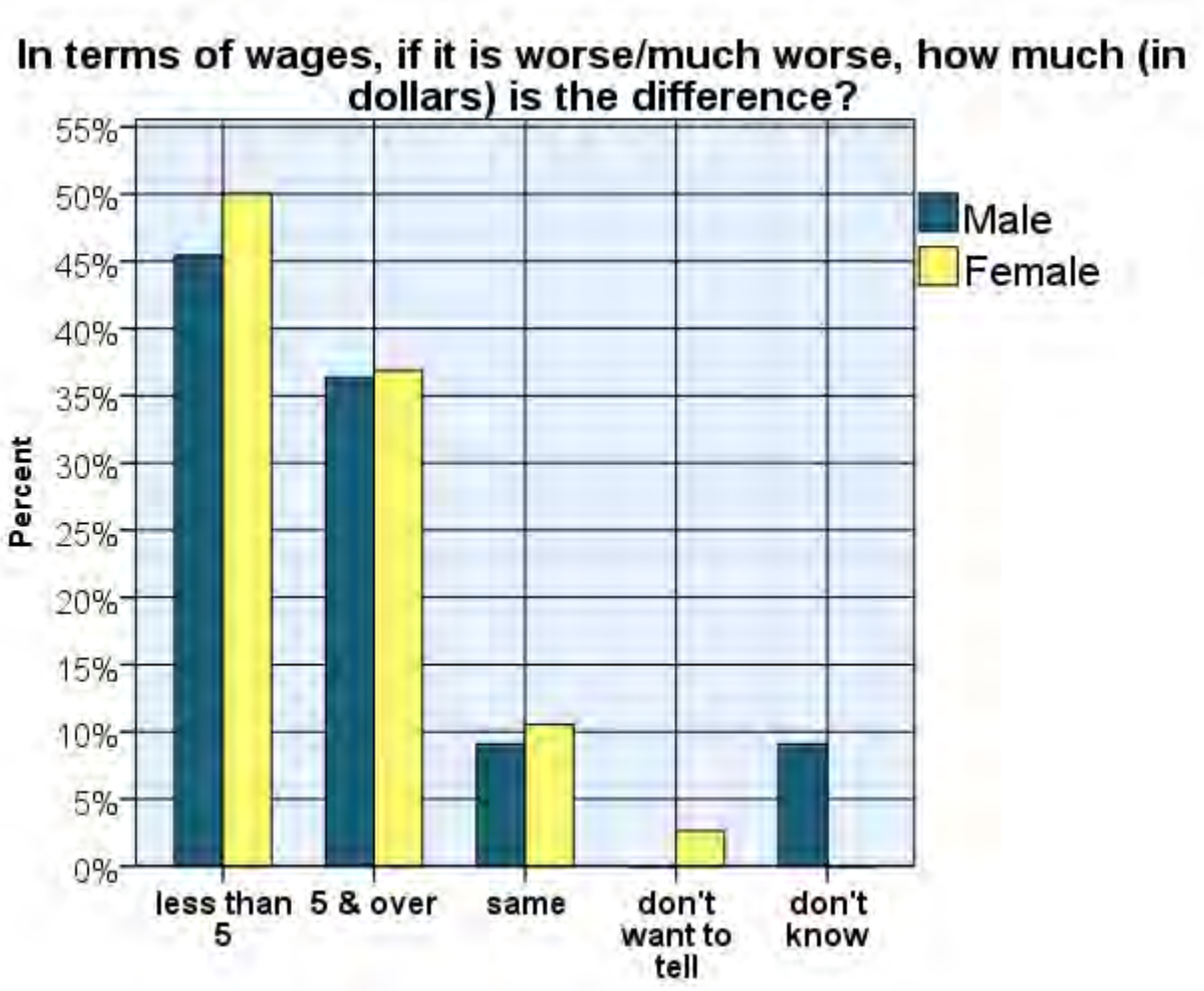

Figure 6

- 45% of male participants and 50% of women participants reported a wage drop of under $5 per hour;
- 36% of male participants and 37% of women participants reported a wage drop of $5 an hour or more.

The findings show only a minimal difference in the hourly rate drop between men and women. In retrospect, a question about monthly earnings and hours might have yielded a more accurate picture of income differences by gender. Given the significantly higher percentage of women in on-call and casual employment (42% compared with 25% of their male counterparts), the lack of stable working hours could greatly affect earnings on a weekly or monthly basis. It was not easy to delve

further into these matters as questions about earnings proved a highly sensitive topic to raise with the workers.

Benefits of Current Job Compared to PMP

In addition to the dramatic drop in wages, loss of benefits has also been a major blow to the former PMP workers and their families. Benefits such as prescription drugs, dental care, life insurance, etc. as well as pensions can represent between 30 to 35% of total employment remuneration.

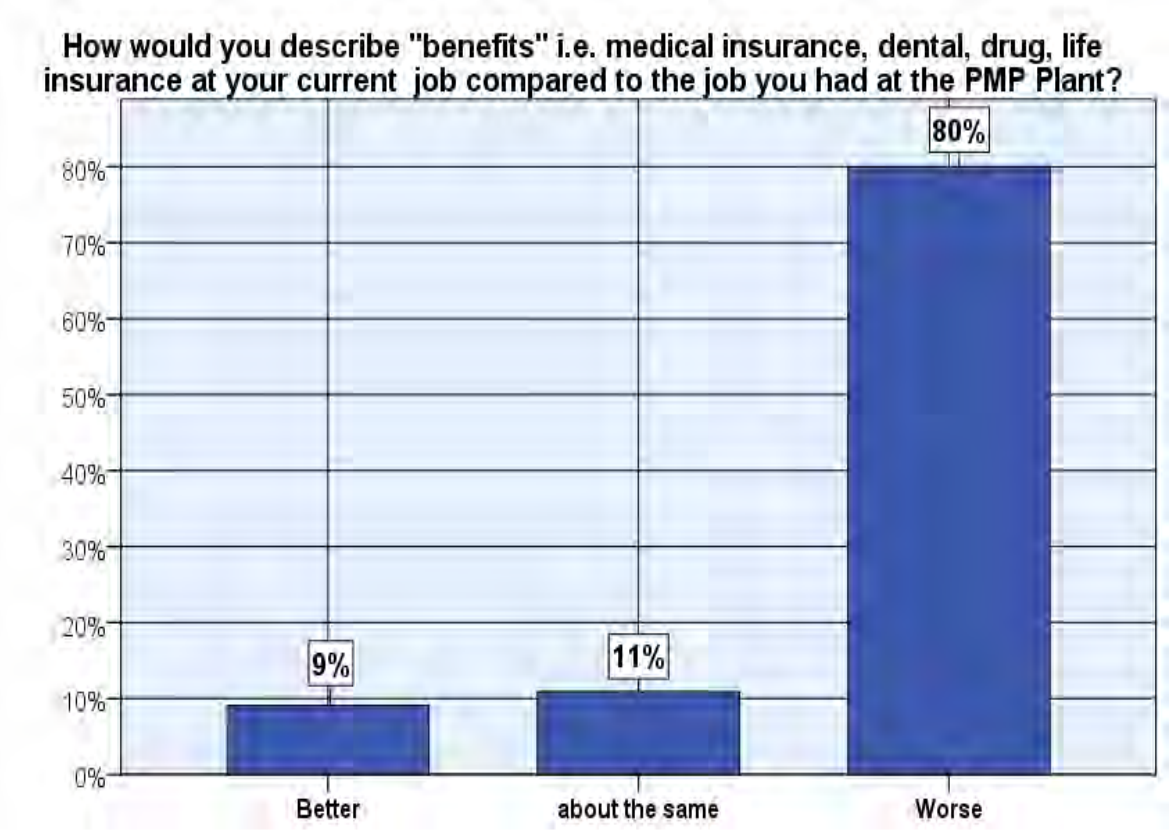

Figure 7

- Fully 80% of participants reported benefits at their current job were worse compared with PMP. Only 9% thought their current benefit package was better than at PMP.

- Participants reported that other working conditions such as health and safety and shift schedules were also worse. This is captured in a comment by a participant who now works as an assembler in another auto-parts plant:

> *For this job here it's like $15 an hour, which was almost the same as PMP, but this job does not pay for my break and lunch. They deduct it from my pay so I work for 40 hours I only get paid for 36 hours, they even deduct my break time. So I don't actually get paid $15 because they deduct my lunch and break time, so I get about $13.50 maybe.*

From Living and Participating to Struggling to Make Ends Meet

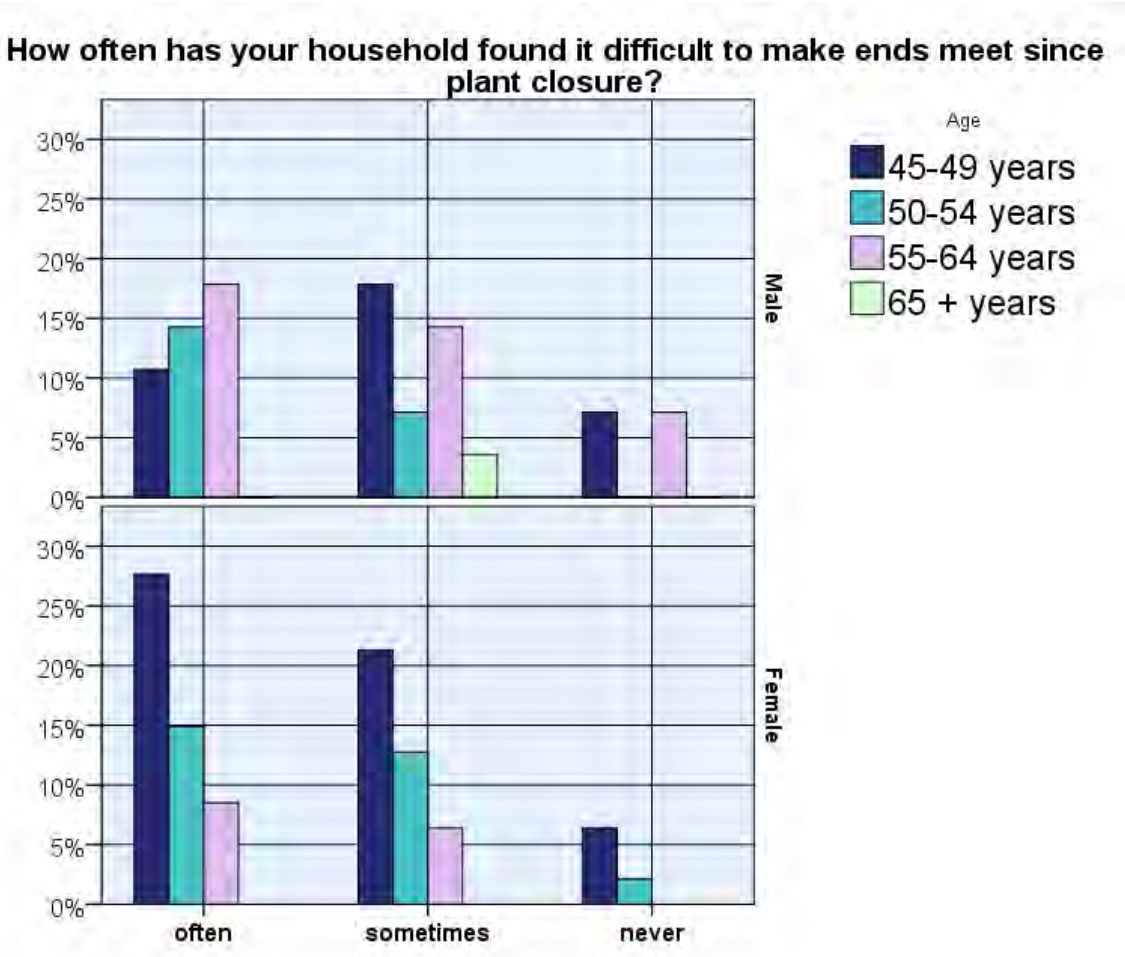

Figure 8

- 40% of women participants and 43% of male participants reported that their household sometimes found it difficult to make ends since the plant closure.

- 52% of female respondents and 42% of male respondents reported that their household often found it difficult to make ends meet since the plant closure.

- When combined, 92% of women participants and 85% of male participants sometimes or often found it difficult to make ends meet since the plant closure.

With the drop in wages and benefits and the precarious forms of employment, the relative security that these workers and their families once enjoyed also collapsed. The difference is between having a sense of stability, and surviving and struggling to make ends meet. When we further analyze the data by gender and age, a more compelling picture emerges.

Women in the 45-49 age group have found it especially difficult to juggle financially, to make ends meet. In the "often" category, when compared to their male counterparts, the ratio is almost 3 to 1 (28% vs. 10%). The household duties and the juggling between competing demands to stretch the dollar often falls on the shoulders of women in their double and triple day roles as a worker, a wife and a mother. The fact that a higher percentage of them are on-call or in temp work might also be a contributing factor to the higher proportion of women who have challenges keeping the household finances afloat.

The reduction in income is more acutely felt by those in the 50-54 age group, with competing family demands - from children's postsecondary education tuition to elder parent care. This is reflected in some of the interviews and focus groups.

> *I find it hard to pay the bills, and my parents got sick too, so it is very hard and at those times, it is very stressful.*
>
> *Often, it's very stressful when we don't have enough with two kids. The worst time was when my husband also lost his job during the same time in the year, but he was lucky because he got a call back right before the unemployment finished.*

I am worried, yes definitely because like I said I have two daughters going to college and university, I have a mortgage, daily routine expenses such as car insurance and groceries so yes, I'm worried about it. I believe in saving but I don't know how long it will last.

For other older workers who have not found work since the closure and end up on social assistance due to recurring health problems, the situation is even more dire. The sense of frustration and despair is palpable from this male older worker who is between the age of 55 and 60. He was enrolled in Second Career retraining program but ended up having to quit due to health problems aggravated by the stress of the closure.

It is the biggest one I can think of. It is a tough time when you don't even see $200 a week. It is difficult for people that cannot even find a good minimum wage job. I get $500 or $600 something a month, which is nothing, because my rent is $900 so you can imagine how I feel. And I have a car which insurance is a lot a month, so there is no food. So right now my rent is up to date, but it's going to come again because I have trouble in between, you are on your own. But tell me what's going to happen, because it is not enough to cover everything. ..My health has dropped way down and is big time worse because stress is a big factor. If you're not working you don't know where the next money is coming from!

3. The Adverse Impact on Health and Well Being

In Figure 9, the stress levels are highest for women in the 45-49 age group. Particularly alarming is the spike of 25% of women in that age group reporting most days since the closure as 'extremely stressful'. It speaks to the impact that insecure employment and the constant juggling of work and family responsibilities can have on the quality of life and the health and wellbeing of workers.

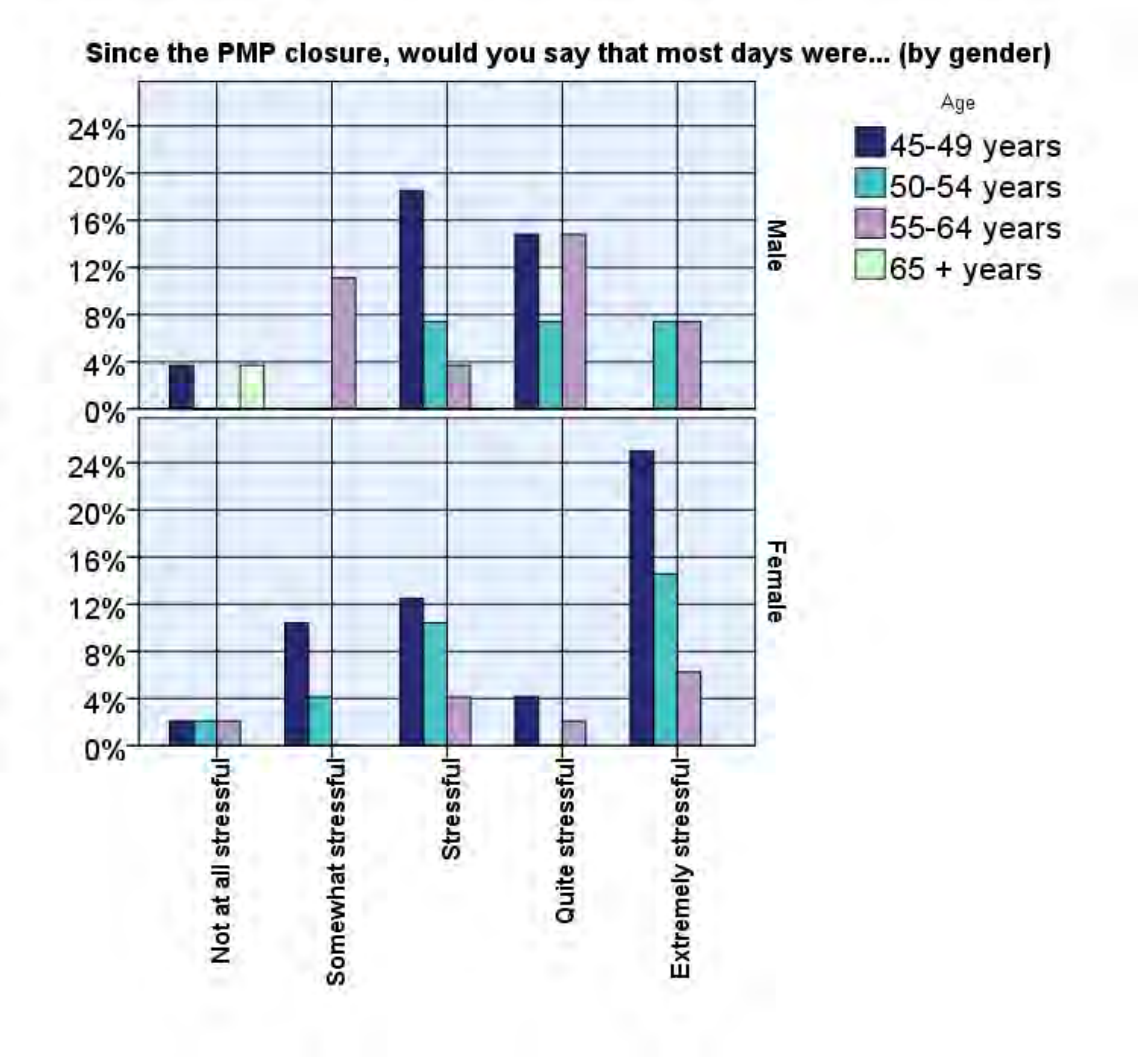

Figure 9

"I'm very worried because it is car manufacturing; the factory could shut down anytime. Like last week, you are working away and all of a sudden the horn sounds and everybody gathers around and they say that Chrysler shut us down everybody go home."

- Over half of the respondents (52%) reported that the uncertainty over their work schedule has interfered with their personal and family life.
- Out of those who are working, 59% reported being anxious about losing their current employment
- Almost half, 49.4 % felt that their health has worsened since the closure, with women experiencing a higher degree of worsening health (54% vs. 41%)

Juggling between Work and Family Responsibilities

The story of Hong (pseudonym), a midnight shift worker who sleeps at two hour intervals, is illustrative of the challenges of juggling life, family responsibilities and precarious work.

Hong is an immigrant woman who came to Canada in 1984 and worked at PMP for more than 10 years. Upon arrival, she only took ESL classes for a couple of months and then went to work. After the PMP closure, she worked at more than 3 jobs –a restaurant, car parts agency and a packing job - before landing in this position. Compared to many of her former co-workers, she considers herself lucky. She has found full time work as an assembler in a unionized plant. Due to her low seniority, she is working midnights without a shift premium. Hong has juggled her midnight shift and the responsibility of caring for three school age children for over a year. She has been denied uninterrupted sleep of more than two hours at a time.

> *It's midnight shift from 11 to 7 and there are only two breaks, They say they pay the old people (the workers with seniority) because they signed a contract a year before and the new contract is different. The new contract gives you $15 but no premium for midnight shift and you don't get paid for your break so you really only get like $12. The line is running very fast…last year they only did about 20, now they do 150. You can't stop, you have to continue and continue. And also the wax that you smell, I have to use the mask. It smells strong.*
>
> *I lost almost 20 pounds and now my knee is hard to bend. In the morning, after I come home from work, I prepare breakfast and take the kids to school. Then I sleep from 10 am to around 12 noon, I wake up to cook and prepare for my children; and then at nighttime, maybe at 7 o'clock I have to sleep again until 9.30 and go to work. So it (my sleep) does not continue and I am very tired. On the weekends sometime I work overtime, but sometime I don't work because I don't want to kill myself. But you cannot sleep that much on the weekends, my body schedule is different. So every night I ask my son to please give me a massage, only for two minutes! I just feel so sick!*

One cannot help but wonder whether she is paying too high a price for her full time midnight shift work. Hong's narrative reveals the dual and triple work day of many immigrant women who must juggle paid work, childcare and other household responsibilities. For many, there is little room to maneuver and few options.

Differential Workplace Arrangements

Some former PMP workers end up working side-by-side with others doing the same work but getting different pay and benefits. In Hong's case, she is not entitled to the midnight shift premium that workers with more seniority enjoy. In a labour market where employers are demanding tiered wage concessions this is not uncommon. Speed ups and health and safety hazards become harder to monitor and enforce with a divided workforce and weakening union presence, particularly on irregular shifts.

Hong's story also reflects the sorry state of a childcare system which is oversubscribed and underfunded. In addition, there are few innovative care arrangements that take into account the childcare needs of shift workers who are predominantly in low wage employment in both the service and manufacturing sectors. With more workers on irregular shift work and non-traditional jobs, this is an area that both policy makers and childcare advocates should further examine and address, helping to alleviate a structural barrier that impacts adversely on low wage women earners. This will contribute significantly to their overall health, well-being and the quality of life.

4. Prospect of Re-employment after Retraining

The Benefits of Second Career Training

One of the legacies of the PMP Workers Action Centre during its 30 months of operation was the development of innovative strategies and partnerships with community colleges and school boards. This was done to address the diverse training needs and supports required for these workers, many of whom had been out of school for more than 20 years. With flexibility and support from MTCU, service providers and the educational partners, an integrated and comprehensive training model and bridging

project on upgrading were implemented as part of accessing the Second Career program. Following academic upgrading, most workers were successful in completing their Second Career training program. The Second Career program was particularly effective as a response to the recession of 2008-09, providing workers like those from PMP with an opportunity to set new goals and work toward them.

From the PMP Labour Adjustment Committee Final Report (Ng 2011: 28): a total of 422 workers completed a Second Career program and 449 workers completed upgrading. These were astounding achievements considering the demographic profile of the workers. For many, the Second Career program was the first ever opportunity since their arrival in Canada to access upgrading and training that provided some tuition and income supports in the form of a training allowance. As a result, many gained new proficiencies and skills as well as a confidence that would serve them well in their future job search and interviews.

In Figure 10, a large majority (62%) of male participants enrolled in the Second Career program while less than 50% of female participants did. There is a gender differential in the enrollment.

Among those participants who did not enroll or complete the training program, many cited reasons relating to: income support while in training (most popularly reported); other costs associated with training; training program availability; and child care or other family related responsibilities.

When asked: “For those who did not enroll or complete the training program, how important was **income support** while in training in stopping you from enrolling in a training program of your choice since the plant closure?” 89% of males reported this factor as either very important or important, compared to 75% of females.

When asked: “how important was the **costs associated with the training**?” 82% of males reported this factor as either very important or important, compared to 67% of females.

Figure 10

When asked: “how important was the **training program availability**?” among males, 60% reported that it was either very important or important compared to 41% of females.

Finally, when asked: “how important was **child care or other family related responsibilities** while in training?” among males, 40% reported that it was either very important or important compared to 48% of females.

It is worth noting that among all the reasons that inhibited participants from enrolling or completing their SC training, child care or familial responsibilities were the only category where females reported the importance at a higher rate than males.

The Correlations to Success in Finding Work in the New Career Field

In our research study, 51% of the participants completed their SC training (40 out of 78). However, when asked whether they have found employment in their new chosen career field, the responses were far from promising.

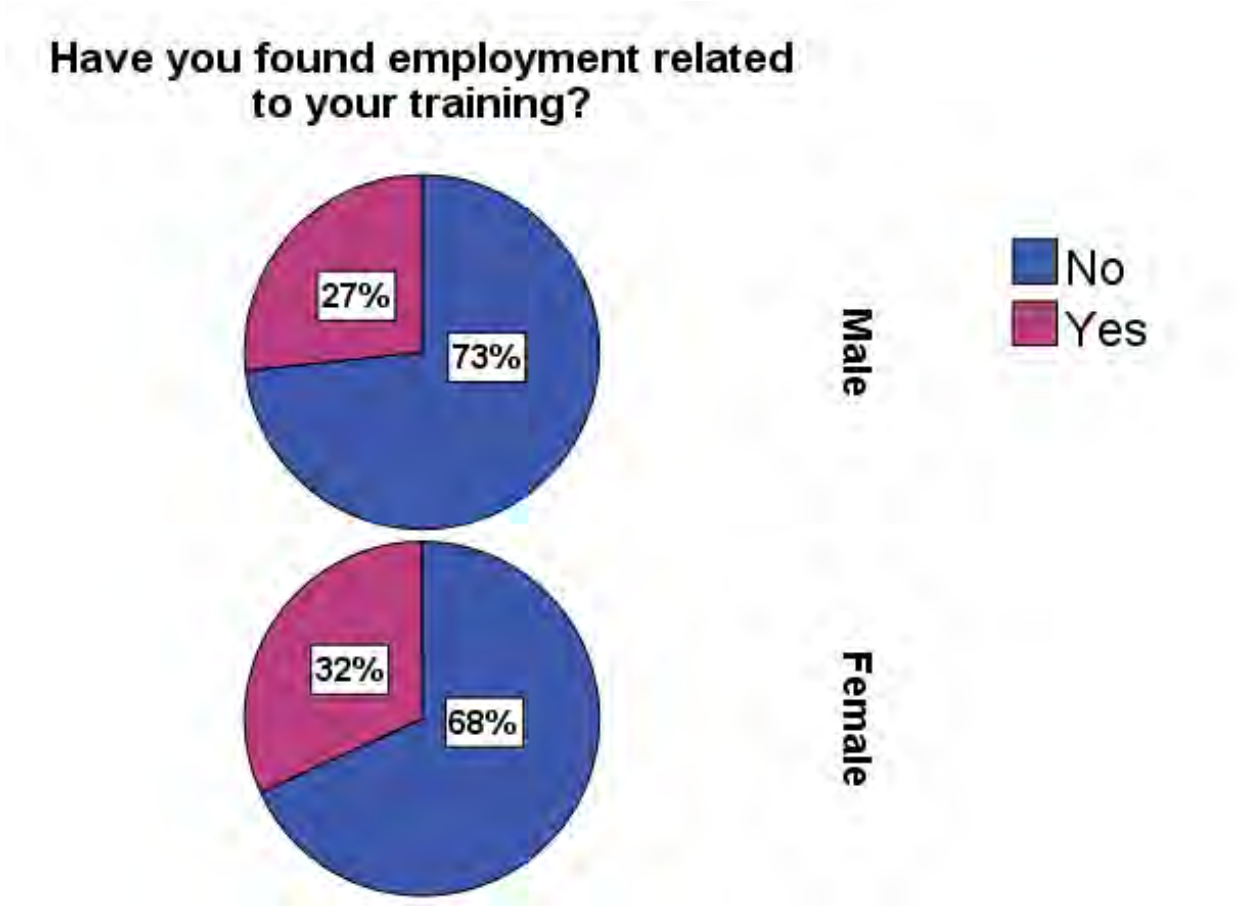

Figure 11

Figure 11 confirms that the completion of Second Career training program does not necessarily translate into re-employment in the new career field. Out of 40 workers who completed SC training, only 11 (25%) had found employment related to their training. Others either returned to the manufacturing sector or were still looking for work. For those not fortunate enough to find work in their new field yet, the frustration and disappointment is palpable, reflected in the following quote from one of the older workers who went through plumbing training.

"I want to work. I went to school and gained knowledge and have no opportunity to use it. I just want a setting where I can see and talk to people…because I'm home now and am so depressed so I don't even talk to anybody. I know that there are so many people just like me …I feel sad for myself, sometimes, I feel like I'm not good enough. It doesn't matter if you do so much or even if I send my resume out. You feel like what's wrong with you. You send your resume and nobody calls you. I don't know."

We hear a similar story from a former PMP woman worker who came to Canada as an experienced teacher. She is now unemployed after re-training.

"I used to be a certified high school teacher back in my home country. When I came here, I could not use the skills. So I went back to school here but because of discrimination, I still cannot use the new skills here. I am grateful for what Second Career has done for me. I want to contribute back to society with my work, that was going to be my thank-you to the government for helping me out, but if I cannot find a job then what do I do? I have to survive one way or another and I have to look at the best way to survive."

Finding Employment in the New Field after SC Training (by Age)

	45-49 yrs of age	50-54 yrs of age	55-64 yrs of age
Yes	6 (40%)	3 (21%)	2 (18%)
No	9 (60%)	11 (79%)	9 (82%)
Total	15 (100%)	14 (100%)	11 (100%)
(didn't do training)	19	7	7

Figure 12

Despite the fairly even spread across the various age groups among those who completed Second Career training, the success rate of getting into the new career field diminishes as the age of participant progresses, from 40% in the 45-49 age group, 21% in the 50-54 age group to only 18% in the 55+ group. These numbers indicate that age

plays a role in determining success rates in securing employment related to training. Older workers are less represented among successful candidates.

The findings demonstrate that older workers face additional challenges in a highly competitive job market despite successful completion of a retraining program and their accumulated experience and knowledge of the labour market.

5. The Growing Prevalence of Temporary Employment Agency Work

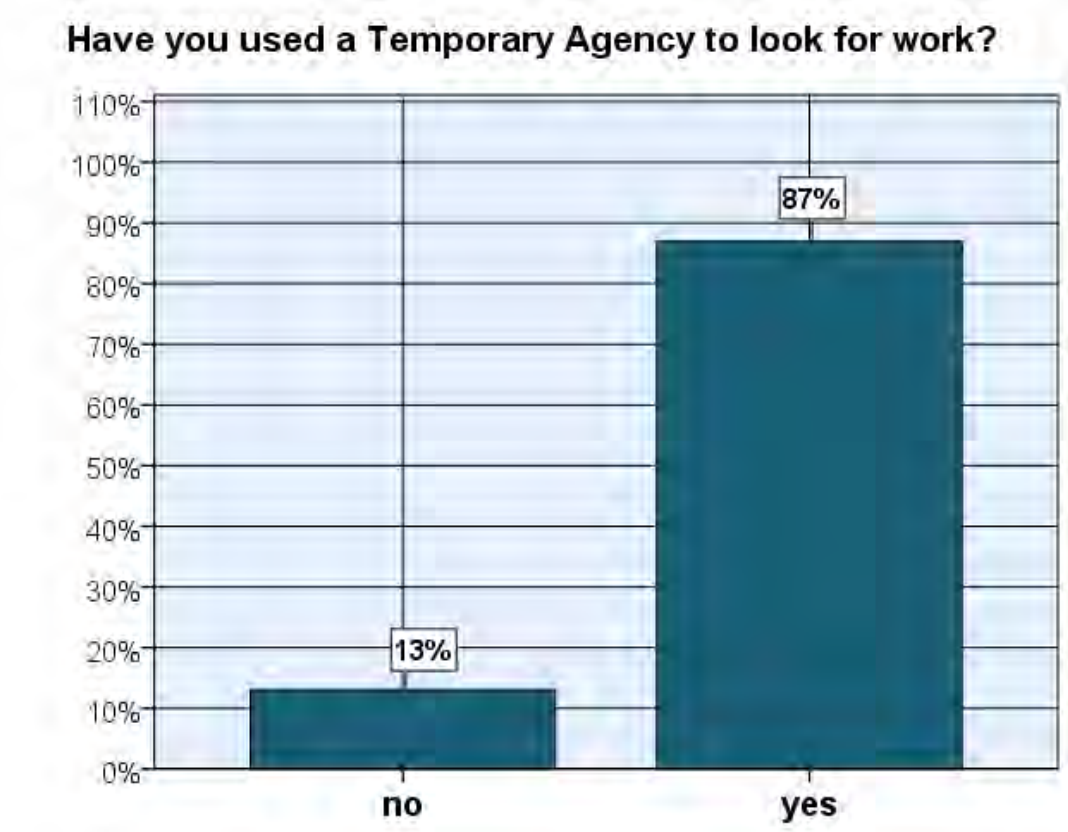

Figure 13

Former PMP workers have had to resort to a variety of means to find employment in a difficult economy. When asked about the multiple methods that they have used to look for work, 87% of the participants reported using temp agencies to look for work compared to 13% who did not. It is critical to note that 42% of the participants secured their current job through temporary agencies.

Many employers now use temp agencies to screen potential employees and to maintain a more transitory workforce, subject to lower wages and few if any benefits. The following quotes from three workers highlight the exploitative and precarious nature of temporary employment:

> *My last job is June 2010, and after that I applied with an agency working for Magna and worked there for two months, from July to September…with agency, you never know if you have job, you just wake up and they say don't come to work today because there is no work, it's unpredictable.*

> *Since the plant closed, I have worked four jobs, all through agency. The agency could send me today, and then I stay home for the whole week. And then the other agency calls at the same time and I have to go to the other one. It is really annoying when you work with agencies because they don't have jobs or two call you at the same time and you have to decide where to go, it's not stable. I get so tired when I work with the agency. You never know what's going on.*

> *Recently I was working in a car part company through an agency, and after two months, I started surveying the agency people around me as to how long they have been there. They say 'I'm working three years. 'I'm working three and a half years', some say 'I'm working for 4 years through (the agency'). This is crazy, and the pay is the same. They have yet to be made permanent. If I'm working at a company, I hate people coming from agencies because you have to train them. Well now I hate myself working through agencies but yah… I'm helpless. I have to go through it because I don't have any job and opportunities.*

In this last, candid comment, it is easy to see how workers misplace their frustration over work arrangements, taking it out on co-workers referred to as 'agency workers'.

Discriminatory Practices of Temp Agencies

One of the key themes emerging from this study is a common frustration with the exploitative and discriminatory practices of temp agencies. Our findings confirm these practices have impacted former PMP workers' access to employment .

My frustration with agencies is because they are not regulated, the immigrant's destiny is in their hands. They treat you anyhow they like because they know there is no regulation and nobody is coming in to check up on them…I know some agencies are paying people $8 because they know they (the workers) are so desperate to work that they will take any amount of money, they don't even care about the minimum wage…they pay lower than minimum wage!

The agencies know that three months from the time of hiring you are supposed to be hired full time by the employer, that's still the law. But maybe a day shy of you being three months with the employer, the agency will move you to another company so you don't have a chance to be hired full time and you need to start all over again, just so they can get their $5 or $10 dollars off you.

I don't want to work for an agency…for the future for my kids, myself, I want people to do something about agencies because they are sucking my blood and whoever's. And if you come from somewhere else you have to go to the agency to work in a company. There is no future at the agency; there is no benefit or anything. They send you home but you are on call all the time. You can't go to look for something else.

At the agency, you cannot make a complaint because no one will listen and you are not permanent and as a part time, they do not treat you good, they are not nice. When you go to work for 2 hours, then they send you home, and I said I took and paid for two buses and it took me an hour and half to get here, and after only two hours of work you sent me home. I had to wait for a call and they don't call for another one or two weeks."

I went and worked some contract at the bread factory through some agency. They had bread baking and coming out of the ovens which is very hot. They have gloves for you but when you wear the gloves you still feel the burning sensation in your hands. The regular employees do not touch the hot bread; it's the people from the agency that touch the bread. When you dump the bread upside down and touch the mold you feel the burning sensation because the heat goes right through the gloves.

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6. Discrimination in Accessing Work and Staying on the Job

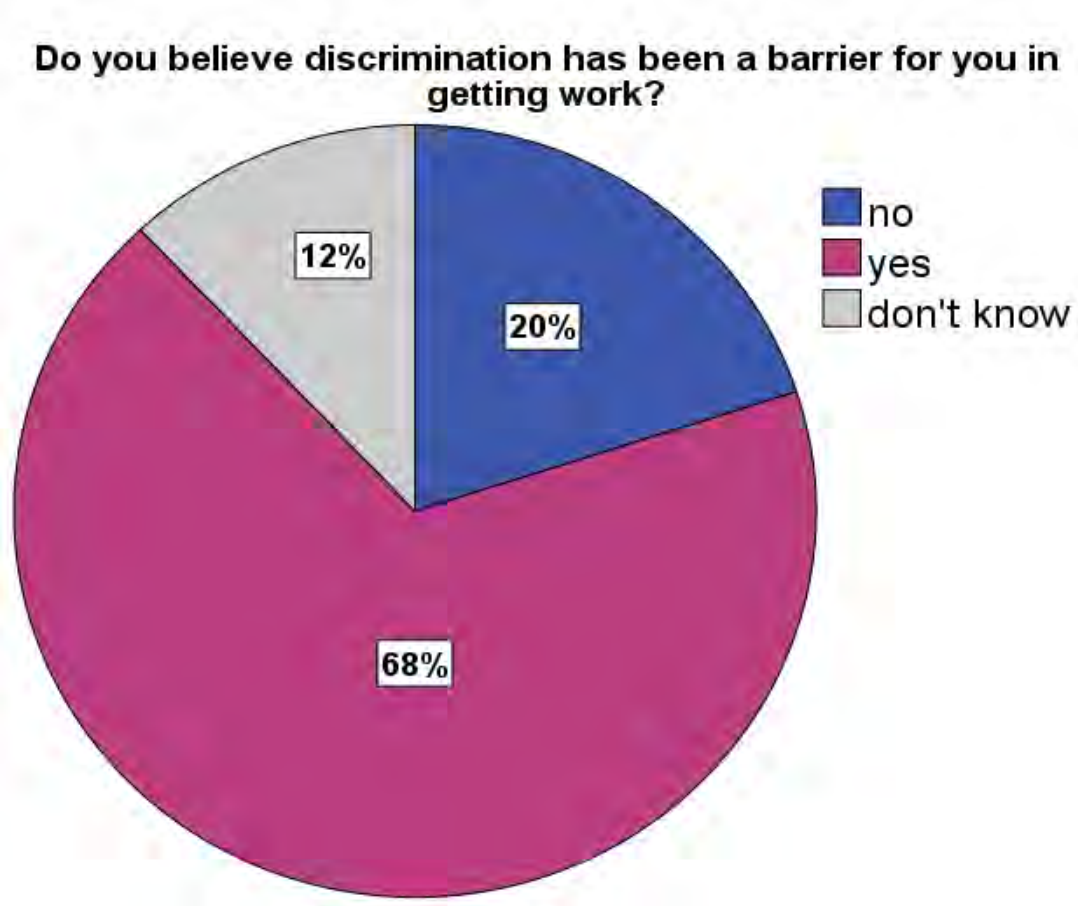

Figure 14

Close to 70% of participants believe discrimination has been a barrier in getting work. Below we discuss the particular forms of discrimination that the workers claim have impacted their opportunities. When asked about the major barriers, the top three were age at 85%, race at 67%; and language at 40%. Gender and religion trailed at 10%.

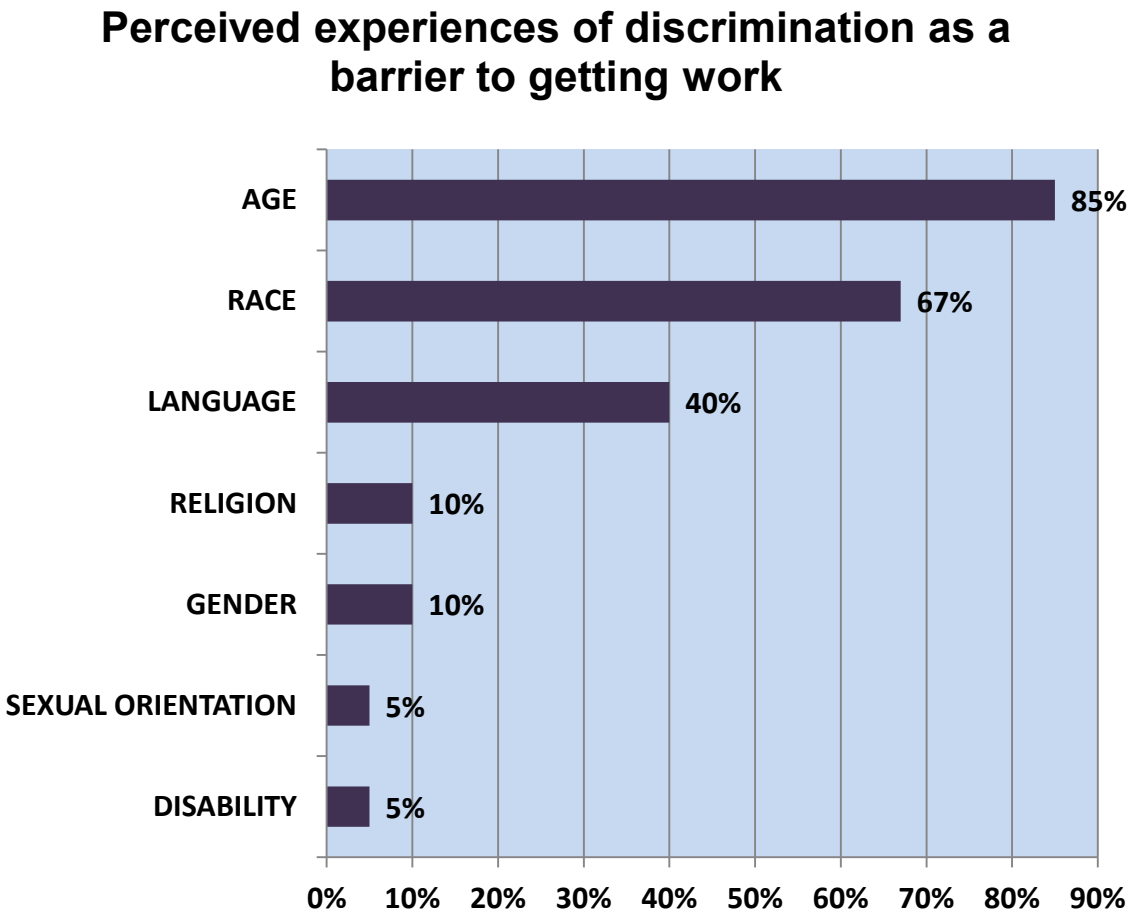

Figure 15

Oh yes, a big yes. My name sounds so good on paper. You take my resume and I get a call and then ok…you see the Canadian politics, they are nice but because my names sounds like an English name, and then you get a call and they say are you sure it's you? And then they will cancel the interview, or if I go they say that they will call you back and they never call you back.

In addition to the discrimination experienced in getting work, workers also report discrimination in workplace practices such as racial slurs, differential treatment by management in work assignments and promotion opportunities. These forms of discrimination do not occur in isolation of each other. Rather they are likely to be intersecting and compound the experience of marginalization and alienation.

This job I'm currently in, I feel discrimination based on race and age. They know I am the oldest one there, on my shift, I am the oldest. But they could not figure out what my age is, but like I said, they called me in and told me they needed to talk to me, it is not that I made mistakes they only said I am not good at my job. I applied for team leader but then they said I am not good enough for my job. But I have been there as a team leader for 8 months now.

Sometimes some people would call me "china men" but that's a racial slur. I see that it is a person from another country and probably learned it from someone else, but he does not know how hurtful it is. I know he is not from here either because he has an accent but racial comments make me go crazy.

Yes, when they (supervisors or management) see a white person or a black person they have a very different attitude. When they see black people they are scared, and I think I am very right in this observation. When they see white people they believe that they belong in the community with them, and even if they do something wrong, they never say anything against them, a lot of frustration.

Yes, definitely. One of my supervisors made fun of my English, and even sent an email to one of my customers asking to please correct. And in a high-pressure environment you don't worry about grammar and things like that… the most important is that the customer understands what is going on… but my supervisor keeps sending me emails about this. After a few times, my reaction is slower and slower because I have to concentrate on the grammar. But the customer never complains, it is just my supervisor. Race, even though I can't see it, I'm sure it exists. I have a feeling. And at work, I'm sure I am no less than everyone else, it is just appearance!

The low ranking of gender as a systemic barrier is puzzling. One explanation could be that in an already 'feminized' labour market – that is, one that produces more low-paid, part-time, insecure, typically 'women's jobs' than better-paid, full-time, secure ones—women do not necessarily feel that they fare much worse than men, who are also experiencing similar conditions. Another explanation is that gender determines

expectations about the labour market, and is therefore taken for granted as a factor. It is possible that for many immigrant women workers whose first language is not English, race and language proficiency appear as the more obvious and immediate factors limiting their opportunities and shaping their working conditions.

Interviews revealed a wide range of experiences of discrimination and harassment:

> *I think age, though the management are not showing it, the company I think discriminate older worker. They make you pick heavy parts, parts as heavy as the engines of the cars, and they old people on really parts. If you complain and say that it's too heavy, she will ask why you didn't bring your husband to help you. For us women, it is not fair. For some women she is fair, and she says ok. For other she does not recognize that they are women. We tried to talk to the union but the union is failing to recognize that she does these things. We feel the supervisor is being discriminatory based on race or colour. She has a hatred for black, she hates anything black.*

> *Once where I worked, I saw the supervisor harassing someone by touching her back. She is through the agency too. She said nothing. I asked her, I said I saw with my eyes and that was not right. One time he passed by. I looked at him and he said what are you going to do and I said I am going to do something. But too bad I have no camera or I would tape it. But only one mistake and he let me go, because I am agency I cannot say anything. If I say something I am afraid I would lose my job, if I was full time it would be a different story. If I was full time I would not be scared and would report to human resources.*

7. The Wider Repercussions of the Closure

One of the recurring themes in the research interviews and focus group discussions has been the sudden plant closure and its devastating impact. The issues of outstanding compensation, severance and termination pay and the lack of recourse and concrete redress have been a lingering reminder of the betrayal.

Loss of Community Networks and Support

For many workers, the sudden plant closure was a shock and a traumatic experience. Not only had their PMP position provided job security and a livelihood, the work also helped define their role and value as a contributing member of society. The workplace was very much their source of social network and community outside the home, built up over the years – a place where they could socialize and draw support from each other. The closure meant a dismantling of that community. For many workers, there was a grieving process over the loss of that sense of belonging. As expressed by one worker in a focus group discussion:

> *"Losing your job is like a divorce. People need counseling to ease the stress. Losing a job is like losing a loved one."*

The Betrayal by the Company and the State

These immigrant workers felt betrayed not only by the employer but also by the state. There continues to be an absence of a legislative framework and options to hold the employer accountable for the compensation owed to the workers. Instead the company hid behind federal bankruptcy protection laws that place workers who are owed severance and termination pay last on a list of so-called secured creditors.

> *"When you work for a company for 20 or 30 years, you try and save… then you realize that there is nothing there because the company goes bankrupt. So who protects you and those years of working? I want to complain about them because that's not fair. Service is service and there must be something that can be done! …For all the time I put into work, we get enough abuse where we are working, and then they just tell you ok we don't need you anymore. They just said bankruptcy and move on. They just don't want to pay. The prime minister needs to think about the people who work there because when you work there for so many years, it is difficult to throw everything away.*
>
> *The government should not allow them to file for bankruptcy and not pay their employees for what they are entitled to. Workers need to be paid first. Legislation should not allow employers to take advantage of*

the workers. That's what they are doing. They put the money in their pocket and walk away and the workers are the victims. When students take out loan under OSAP, government makes them pay back with interest. So why can't there be some legislation in place to make the employers pay? Government is smart and they should come up with some rules, not indulging employers who walk away."

In addition to the lack of government recourse regarding compensation, many participants also felt let down by the state upon their arrival in Canada. Some had come to Canada with international credentials and work experience but ended up working at PMP. The plant closure triggered a sense of bitterness and disappointment after years of under-employment, discrimination, and sacrifice. Retraining as a security guard after 15 years at PMP suggests a twist of fate to this participant who was a trained engineer:

"When I came to Canada, I came on the points system. I was not a refugee or a sponsored relative. They assessed my education and work history and after the interviews I got the immigration. And then they I came to Canada and there is nothing. Due to my qualification and work experience they say you will get a good job over here, but no. I would understand if I was not skilled but I am skilled. A couple of weeks ago I went to apply for security license. When I got there was a dental assistant and an assistant professor in Pakistan...he is only qualifying as a security guard. This country is about luck."

The Domino Effect of Income Loss

Even though PMP workers were earning a living wage, most of them lived from pay cheque to pay cheque with little room to maneuver. The following experiences shared by two workers speak to the desperation and hardship that workers were subjected to.

"When the PMP workers got laid off, the company denied us of money that we are entitled to. So then our bills cannot be paid. I was unable to meet my other obligations and pay my debt. So I filed for bankruptcy, and because I filed for bankruptcy, OSAP will not finance

my education and will not give me money to continue. It is a chain reaction."

I have to use up all my RRSP. I work and I get laid off. I got laid off three times. It is not stable. And all my savings are gone now; I don't have any.

The domino effect of sudden job loss and income was particularly drastic for families where both spouses or multiple members of the household were employed by PMP. The impact on the educational opportunities of children can be acutely felt by the next quote from a South Asian woman participant whose husband also worked at PMP:

I have never faced this situation in my life, it's so horrible. When PMP was there my daughter was studying in Vancouver, but when PMP went bankrupt I had to bring her back. She was over there studying fashion design because there was limited opportunity here but she had the opportunity there and I had to bring her back. It was a horrible situation. It is very hard for us to survive. It is really, really hard. I had to make my daughter do a job of her own and study on her own.

For some workers, the loss of job and income represents the beginning of the unraveling. Some workers ended up borrowing from credit cards to pay their mortgage and then eventually lose their homes, while others ended up losing their marriage. This is seen poignantly in Lisa's story told at the end of this section.

8. Hopes and Dreams for the Future

For most respondents, when asked about their hopes and dreams for the future, the desire for secure employment is the constant refrain. Many of them defined a good job as simply having enough hours and some sense of predictability.

I hope to take care of my daughter and have good children. I hope to have a good job. I am looking for a good job every day and wait for the call but nobody calls. I said I can do morning shift but the company needed me for afternoon and midnight but I could not, so I could not go to work.

I hope for a job with security and a steady career so I don't have to look anymore. I worked a lot of jobs for three weeks and then I'm laid off and then I get another job and I'm happy, and then I get laid off again. So a job is very important for me. I have some job offers for minimum wage but I cannot do it because I have loans and things.

I would like to pay off my mortgage, but there is still a long way to go. And I really don't like working with agency. I would like it if there was no agency and the company would just hire, it would be better for everybody. I feel like the agency is a rip-off because they pay us minimally and we actually get paid more if we get hired straight from the company, instead of getting a couple of dollars deducted from the agency.

I want to work Monday to Friday, 40 hours, and on weekends work part time for my second career. I can do it at home, my hairstyle part time on Saturday and Sunday, but I want Monday to Friday stable 40 hours. That is what I wish for my future. Just get a better job, that's my dream. Doing something like PSW (Personal Support Worker) would be good.

My hope and dream is just to take a vacation with my kids. I have not taken them anywhere after PMP.

The above quotes, in particular the last quote, speak to a collective desire for decent work and a decent future. In the grand scheme of things, being able to take a short vacation with the children has become an unattainable goal. The presence of stable employment is the difference between survival and full participation in a country they call home.

Lisa's Story

My name is Lisa and this is my emigration story. I came to Canada in 1995 from the African country of Ghana. As at the time of emigrating I had graduated from Teacher's College with a certificate and had taught for almost 8 years. Though life was not perfect, I considered myself as a professional who was climbing up both the social and professional ladder without any thought of myself as a woman or a second class citizen. Having arrived here with high hopes and dreams of continuing my education, I couldn't believe the hardships and disappointments of friends and families I met here. The stories told were many and unbelievable, but it did not take long for me to live my own experiences.

First, it was about getting my certificate evaluated by the Ontario College of Teachers so I would know how and what to do to get into the profession I much loved.

My first disappointment came when I was told I have to pay five hundred dollars and get my transcripts sent directly to them from my home country. After that, I had to wait for about a year before I could get any feedback. Mind you, I had arrived with my two young children ages seven and nine, and my husband had used his credit card to pay for our passage here. Being an immigrant himself had its own disadvantages. Why you may ask? Being an African man to us means being a provider, protector and mentor for our son especially, so not being able to spend much needed time with him meant neglecting his duties as a father and that is not acceptable. Working long hours and being discriminated against at work meant humiliation to him and so coming home also meant terror for us. As a young wife, I did not find time to understand why my once loving husband was becoming a tyrant at home towards the very people he claimed to love. It was only recently that I began to realize how much emotional pain he was suffering. With the stress of marriage pushing me down, I decided to forgo my interests and ambitions and help raise my kids to the best of my abilities so that they could become who they were meant to be. My focus totally shifted from becoming the same career woman and mother I was back home to working any job to support my husband so his stress would go down. This is how I found myself working from one employment agency to the other, until a friend told me of Progressive Moulded Products.

I vividly remember that fateful day when I was told I was hired fulltime. It was one of the best days of my life in Canada. As a new employee starting at a new plant, ex-coworkers and I became pioneers of the 21 Granitridge plant. We worked hard to please the owners and they were happy with the production we were giving. They even promised and gave us part of the huge profits they made in those days and this

prompted us to even work harder. There were lots and lots of overtime and I quite remember some of the workers sleeping in their cars for a few hours so they could start the next shift. A lot of sacrifices were made to make huge profits for the company but as time went on we noticed rapid changes in ownership and people were going and coming as new owners and partners. There were lots of rumors going on concerning the financial health of the company but through it all we were assured that all was well.

About six years into my service there, I noticed lots of changes and conditions going from bad to worse. The profit sharing was stopped and a flimsy excuse was given. Then came the stoppage of pay increases and job evaluations. No one cared anymore as senior management became hostile and started firing people left and right for complaining about issues of health and safety and non recognition of senior employees. Everybody was regarded on the same level no matter how long one had worked for the company. No salary increase or vacations were given according to service time and, by late 2007, we were told that whoever did not like the way the company was being run, could quit. It was either you take it or leave. Since most of us were immigrants and had families to feed, we kept quiet and took the abuse and bullying for the sake of the money. Just as most of us had adjusted to the bad conditions and were still working hard for this company, we were rudely surprised on the 30 of June, 2008 that the company had closed down due to bankruptcy. This unexpected behaviour and disappointment threw all of us into a state of shock, misery and anger. It was after the closure of PMP, that Fa and a few other co-workers decided not to give up and go away just like the employer had wanted us to do. They underestimated us, thinking because we were immigrants and most did not speak good English, we did not know our rights and therefore they could just vanish without any consequence.

With the help of the Action Centre, a few of us took an evaluation test and it was determined that though we had passed, most of us had been out of school for more than twenty years and so throwing us in the middle of college without prior preparation was not a good idea. For me, this was a moment of opportunity to go back to the dream I had put on the back burner for so long. As our academic level was beyond upgrading, we were admitted into the pre- community services program in George Brown College to slowly integrate us into the college system here. Though this was very challenging for me both academically and emotionally, I was determined to do what I had set out to do many years prior. The challenge of being a mature student and having difficulty understanding how the grading system works here as well as not having enough money to help my kids as I used to, threw me into a deep depression that I have never discussed. I struggled with my grades as they were not impressive, but through it all I promised not to give up and let the hard work of the kind counsellors at the Action Centre go to waste.

With George Brown behind me, I applied and gained admission to Seneca College where I trained as a social service worker with a specialization in immigrants and refugees. The decision to do this was a no-brainer to me at all because I was inspired by the counsellors at the Action Centre and I promised to pay back to society the kindness and care I had received from them. This really helped me excel in Seneca academically but personally, my life was falling apart. Without the two incomes at home, the pressure on my spouse became too much and at some point he decided to bail out on me since the kids were grown and moved out now. I never gave up on my education since that was the only dignity I had. I persevered through the depression and managed to graduate with honours.

All indications at the time showed that the prospects of finding a job in the field were there, but unfortunately things did not go according to plan. I thought I was the only one in this situation but upon meeting a few of my ex-coworkers and listening to their stories, I found out that ninety percent of those who trained in second careers did not find work in their respective fields. I did all I could to find work i.e. through volunteering in community agencies, helping out in events and applying for over a hundred jobs, but none was willing to give me a chance to even prove myself.

The stress of uncertainty and the pressure to cater for my family led me to go back to temporary employment agencies to do menial jobs just to put food on the table, and that has been the situation for most of us. We went from making a decent living as workers of PMP to living on charity from family, friends and the government. Utilizing resources in the community is not something most of us rely on since we are proud workers. Unable to find work and realizing that the Ontario works I applied for was not enough ($329.00 per month), I decided to go back to school for my degree, since most of the jobs require at least a Bachelor or Master's degree. By the grace of God, I made it to York University in the fall of 2011 and hopefully, will graduate by June 2014. As much as I am proud of this, I would not be quick to celebrate yet, because remember I have put myself into debt from the OSAP I collected. I am frustrated because this debt could have been avoided if I had found work after the second career training.

Coming out with two certificates from the Second Career program should have helped, but unfortunately the systemic racism and the need for younger workers these days have made my dream a nightmare. Though I am in school, I find myself depressed all the time and this has affected my grades again. I have kept this a secret and almost afraid to discuss this because I have been the support for most of my ex-coworkers. This is killing me but I always pretend in front of people that all is well, especially my family and friends. I am the one they look up to when they need help so I cannot afford to show weakness. My main fear now is the uncertainty of a future job. I am constantly thinking of the huge amount of debt I am incurring; about $40 – 45,000 by the time I graduate. How am I going to pay this debt, not to talk about saving for pension?

The so called Canadian dream of owning a house is out of reach for me now so all I pray for is to find work after graduating so I can begin to pay the debt in front of me. My kids joke about my collection of certificates and how they are collecting dust because none of them have helped give me the job I so desperately needed.

This same desperation led me to try out any job I can find and that is how I recently found myself in a chicken farm in Bradford, Ontario. Here, I was willing to work for both the satisfaction of self reliance and also for my self esteem but unfortunately, after going through the interview and verifying my credentials, I was told that I was overqualified. Though it was refreshing to hear the comforting words of being overqualified for a job for the first time, I also felt sad for finding myself in limbo. The future is becoming more precarious and I am afraid of how so many of us from PMP will survive. Though I am doing my part not to be a burden to society, I wonder if that is good enough.

Thank you all for listening and reading my story but one thing I need from you is to join me to tell the Minister of Education and those in charge of the Second Career program that there needs to be more done that just the training. Courses with internships should be made to accommodate students' professional assurance at the end of their school, or the wage subsidy program can be attached to all Second Career programs so students will be assured of some type of jobs in their field of training after they graduate.

Tom's Story

I was here twenty-six years ago. I came here to Canada in 1987 when I was twenty six years old. I am fifty two now. When we first came to Canada it was easy to find a job, even though I didn't speak English as good, when I came I still got a job. They needed more workers, they needed more labour, so it was very easy to find a job twenty something years ago. Then since the company I worked for closed, I worked for PMP. It was 1997. So I thought I would stay at that company [PMP] until I retired because it seemed like the job was good job for me. It was not a good job, but it was reasonable for me. Another reason is that I don't speak good English, so it's hard for me to find a job. Everywhere you go they require like a high school diploma. And that time when I applied for this job [PMP] I didn't even speak good English. PMP was easier at that time and they were willing to hire, so I was okay with that. I didn't have good English speaking skills at that moment so I thought, okay, stay here. As long as I have income.

About twelve years after, the PMP closed. They had announced that we will be shutting down for two weeks, and so we should come back after the two week shutdown. At the second week I got a call from my friend who told me: "hey, they are moving all the machines from the plant. Something is going wrong". And all these trucks had come to pick up the, whatever, from the factory. So we all ran there and we saw the people had

come but we did not know what to do. So someone said we should all go to the park. I forget the name of the park. But we went there and we met as a group and then we all went back to the PMP company and we began to rally and we started a picket line, you know, even without any knowledge. And we were treated like not a human being you know, and the police came and they kicked us out. And someone called Winnie Ng, and she came with John, and the next day all we see is all the union flags in the front of the company. And things changed from that day. We had more dignity, more respect. The people came and helped us and showed us what to do since I lost my job, I have been having my own problems too. Since I didn't have income, and there was too much stress, and my family now…. I don't say who's wrong or who's right, but because there was no income, and with all the financial problems, finally we saw that we just cannot live together. So finished my married life.

I tried to find a second job, and even went to Second Career. I went for hair stylist. But I didn't go into the field because it's not easy to find a job. You know, you have to wait for the customer, and if the customers don't come in, then no job. It's not like a salary. It works on commission.

So I applied for a job in New Market, and they hired through an agency. And they said you have to work here for four years or three years to get hired as a full time. So when we asked about the salary, they said its only basic pay- only minimum wage. So I had no choice but to work there and I worked there for five months. And when the job slows down they start cutting people. And I jumped from New Market to Concord through another agency. When I went to that company they said they were going to be hiring people. Then I applied for a job, since 2011 I've been working in the factory. Till now it's been two years. I didn't get hired full time because they say that "everything is slow". And it's not only me, it's all the people working through the agency. Some people even more than two years. More than ten or twenty people have been working there like me – for a long time – and they still don't get hired. So we're just waiting and waiting and we don't know what we're going to do. We don't know when they're going to hire. We just go. I went to ask the human resources, and they just say "I don't know, I don't know. Soon soon soon". This has been for almost two years. So this is the problem. I don't know what I'm going to do now. I need the benefits. I need a stable job.

We have to work more than the full time people. The full time people are hired; they don't care. We don't get hired; we care. We are afraid because a lot of people have been kicked out if they are not working good. They even sent me home for two months, but then they called me back because there was work.

There is a lot of stress. . You know, the boss push you too much. And plus my family problem. It all gives me a lot of stress. I think I'll go crazy. It's not easy this life. Because I lost my job, my marriage… what do they say… no money is no marriage. We started

having too much problems. I think it was because I didn't have a job. If I had a job I would have income and maybe the story would be a different story. We had too much stress you know, when I didn't have a job I had too much stress; she had too much stress. I couldn't find a job. I have very simple hopes. That all the people have full-time jobs; stable jobs. That they have some food on the table and shelter. That's it. I'm not a greedy person. I'm a very simple person. And everyone should get a job.

People working through the agency, maybe they come one day or two days, then they disappear. They don't come back again. Maybe the boss don't like them or maybe they don't have a job for them. So it's hard. It's very hard. When you go through an agency to get work, they don't have any limit. Like some people they say you work 6 months, 7 months and you get hired. But like me, I've been working more than two years and I haven't been hired. If you like their performance, you should keep them. We are working good for them. We are working even harder than the permanent workers.

The agency pays minimum wage. For two years minimum wage. After they deduct, you have nothing left. Nothing. So we want to find a better job, but the thing is, we don't know what kind of job to go to. We don't have any skills. If we have some skills maybe we can do an office job or whatever, and get a better income, but we don't… like my verbal English skill. How can I go now and get an office job? If you were the boss you would never hire me speaking broken English like this. And another thing is our age. With our age it's not easy to go back to school. I'm 52 now. The memories go down, everything goes down.

The boss could be standing right behind you so you don't know. You don't even have time to talk because they put too many things in front of you. You just try to finish, or look at the clock. In one hour they expect you to make 45 pieces. And you have no time to talk to anybody. You just work work work! You know, just go fast fast fast! No talking. Even if the boss talks to you, you have to talk and still move your hands on the machine. Even when you go on break time, you have to walk from the line to the break room. Already 3 minutes have gone. And when you walk back, another 3 minutes. When the first bell rings you have to go from here to there and when the second bell rings you have to already be back in your workplace. And when the third bell rings you have to touch the pile already. If sometimes you're behind, you don't even get to go to break. You have to finish them. If you don't finish then you get into trouble. They will come to ask you why why why. The older workers there, they can talk and give some explanation. But we.. no. Because we are through the temp agency. So you have to work to make them happy. They know you're working good, but they still don't care. They can send you home.

A lot of people have been sent home. They work one month, two month and they go home. I am one of the lucky ones. They kept me. About twenty people have been

working there for more than two years and they still don't keep us full time. They haven't even hired us yet. I don't know why they don't hire us. They need the labour. And we work for them so well. And they still don't keep us. We've been there for a long time already.

I learned a lot from the PMP action centre. I took part in all the training and I learned from them. I learned from them how to work together to help. And how the people are in solidarity together to fight for some idea. To fight for your own rights. I learned a lot. Before I didn't know what that was for, but since I came from that I learned that this world is so big. It's so big and the people they should live with dignity you know. Why should we live like chickens and be scared.

But I still can't find a permanent job. That's the problem. Even though my English is getting better. I am very very worried. It's very stressful I tell you. We need the benefits and we need the stable job. Now I have to pay for everything, even for my dental. I pay by myself. Nobody pays for me.

At Christmas they shut down the company, we don't have any work and we don't have any income. They shut down for two weeks, and we only get two days vacation pay. And for the other 8 days you have nothing. And plus I have my teeth problem and I have to pay money for that. And I have to buy gifts and all that you know…. what a wonderful life!

My physical, all my body is aching. All my shoulders are stiff. That's why I need the benefits for the massage or acupuncture. But I don't have the chance to use them. I work there for two years I should have got those benefits. Because I'm a temp worker… temp agency, nothing I have. So even the drugs, even the dental, everything you have to pay by yourself. Sometimes if I'm sick I just don't see the doctor otherwise the doctor will ask for prescription so I just don't go. I stay home until my sickness is gone.

It's hard for us as temp workers. We don't have any chance to explain. They don't want you they don't have to explain to you. They just call the temp agency and they say this person we don't want, we want someone new, so tomorrow you're gone. We have no value; we have no chance to explain. If they don't like you they call the agency then the agency calls you. Last time they laid me off for 2 months and they didn't even talk to me. The agency called me and said Tom, you're not going to work at that factory again, and when we get another job we'll call you. I was waiting four weeks, five weeks and I called them again and again, and they said we have no job for you. And then after almost three months they called me back and said go back to work. They don't explain anything to you. You have no chance. If some people make a mistake they have no chance to explain. We have no rights. No nothing. No human rights there they want you or they don't want you, you have no chance. It's happened to a lot of people. It's very very stressful. I've changed a lot these few years.

- Politicize
- Mobilize
- Power for Workers

Now twenty years after,. I speak English better, a thousand times better than when I first came to Canada but I still don't get a full time job. I tell you it's a funny thing that when I don't speak English they hired me at that time. I tell everybody and everyone laughs at me, but it's true. Now I know more English, but I have no chance. I thought if I learned English it would be easier to get a job, but I found out it's even worse. I've been working through temp agency for two years; can you believe that?

VI. Discussion: The Realities of being (Un)settled Immigrants

The key findings in numbers and in workers' own words graphically illustrate some of the unsettling realities facing these long tenure immigrant and racialized workers. Our initial hypothesis coming into this study was that, despite their years of working and settling in Canada, these workers had reverted back to the 'status' of newcomers as a result of the plant closure.

However, the research has revealed something even more unsettling about these long term immigrant workers who experienced the unmitigated circumstances of plant closure through no fault of their own. We have come to the sobering conclusion that these racialized workers are actually faring worse than when they first came to Canada. These workers are actually in a class of their own, operating like newcomers. Many are at an age where they experience age discrimination along with the types of challenges associated with new immigrants – language skill deficits, social/cultural capital, and competing in a highly precarious labour market where they are vulnerable to a range of risks, intensified by their age. They are the unsettled immigrants with precarious futures and dashed hopes.

This can be seen in their responses to a question during the focus group discussion about their current situation as compared to the days when they first came to Canada.

Almost all of them agreed that it is much worse now than when they first came.

The stress comes from knowing that they are growing older and the responsibility of raising a family, putting children through universities, etc. has also grown heavier. Then as newcomers, they were filled with hope and anticipation to work hard and buy into the Canadian dream. Now, having gone through the traumatic plant closure experience and coping with the aftermath and the new realities of precarious employment, there is a shared sense of bitterness and profound disappointment among the participants.

> *"When I came to this country in 1986, it was a pride just to see every woman and every man going to work every day and every morning. They did not have any hardship facing them. Now everyone is trying so hard in their houses, crying so hard, they wish they could turn back the clock."*

> *"It is even worse than before. It is like you are a brand new kid again, falling down and now having to learn how to walk. It takes a lot more to get back up now."*

> *"40 years ago, when I first came I didn't even have a SIN number and didn't speak English and I was hired immediately. These days you can get so many diplomas, so many references and still not get hired."*

Despite their years of working hard to gain even the semblance of a foothold in Canadian society, when the "rug was pulled underneath them" through the plant closure, this group of older racialized workers - already marginalized to begin with - never stood a chance. The foundation of a seemingly secure future that these workers built for themselves, and their families, over the years – through hard work, resilience, and many sacrifices; and in a society that has never hospitable in the first place - collapsed like a house of cards.

In the context of a genderized and colour-coded labour market (Galabuzi and Block, 2012), the foundations that took years for this group of workers to build were never strong enough to withstand the onslaught of the global recession that further excluded those who were already at the bottom rung of the labour market. The systemic barriers

of age, disability and other forms of discriminatory practices further complicated the successful outcome of landing back on their feet through securing stable employment. These workers were “used, and discarded like scrap materials” as described by Winnie Ng when she was Chair of the PMP Adjustment Committee (Dugale 2009). They are the collateral damage in this era of corporate globalization, with neither the state nor corporation being held accountable for the legalized theft and abuse.

Compared to newcomers, these workers have little access to settlement services as many community service providers are only funded to serve landed immigrants who have been here less than three years. As well, the trend in the admission of newcomers has dramatically shifted in the last six years. Newcomers are now of a more professional class, receiving their landed status on the basis of the point system, whereas the PMP workers came during a period of family reunification and granting of refugee asylum.

The status of “unsettled immigrants” implies not only a succession of temporary jobs but also precarious futures for workers and their families. The domino effects triggered by the permanent job loss is more than an issue of poverty, as poignantly demonstrated in the PEPSO study on precarious employment (2013). From these findings, there is a sense of resignation and a loss of hope and confidence in the context of such a precarious future. The initial coping strategies learned in the previous era of settlement are not working due to the changing nature of the labour market and growing presence of Temporary Agencies. For some of these workers, not only have they lost their jobs, but their marriages and their homes too; the latter are often the only representation of their years of sweat and labour.

There is a difference in terms of the expectations between newcomers and long term workers who have gone through the closure and navigated the maze of retraining. In relative terms, hope is a more accessible resource for newcomers who are still dazzled by the possibility and potential of life in Canada; while it only gets dimmer for those who have already made the sacrifices and ‘paid their dues’, only to find themselves having to compete back at the starting line with younger job applicants. It is a particularly

distressing situation for these older workers whose children are expecting more support as they enter into universities.

There is a further need to examine the impact of plant closures and job loss on the health and wellbeing of workers and their families. While the research has focused on the workers and the impact of the plant closure on their families in general, there is need for a more in-depth study of the impact of the closure on the health and wellbeing of the children of the affected workers. This is a health equity issue that requires further investigation into the effects and the exploration of possible policy options.

At the same time, there is an incredible sense of resilience that is shared by these workers who, against all odds, are fighting back on a daily basis by just not giving up. These are individual and collective acts of resistance against the emergent neoliberal agenda. In the reporting back session, when posed the question on how the PMP experience has changed them individually, some of the responses included:

- *Following the PMP closure I learned how to stand up for myself.*
- *I'm more afraid to talk now since before because I am now a temporary worker and don't have job security.*
- *It depends on the amount of job security that one has. Before I could talk, but now have to be careful to secure my job.*
- *PMP changed me in that I have learned how to fight for my rights and not let people step on me.*
- *What happened to us at PMP was a consequence of us being silent… being afraid to talk.*

The above comments reflect the resilience as well as the increased politicization of workers as they walk together through such a traumatic journey. They reflect the emergence of class consciousness, the realization, in retrospect, that had the company been unionized prior to the closure, they would have been more aware of the company's financial situation and, as well, the employer would not have been able to be so callous and dismissive in their actions.

- Politicize
- Mobilize
- Power for Workers

VII. Recommendations

For most of the former PMP workers, the impact of the sudden plant closure and the recession has been devastating. Their collective narrative is a collage of unpredictable and precarious employment and therefore, unsettled lives. Their resilience, courage and sense of communal responsibility have made this project far from a tale of woe and oppression. Through the participatory research process, workers were able to share their suggestions and ideas for social change. Many said they were doing so because, quite simply, they hoped that other groups of workers would not have to repeat the PMP experience. Collectively, workers involved in the reporting session expressed the desire to stay together to support each other in their respective journeys of 're-settlement' in Canadian society.

Monitoring and Regulation of Temp Agencies

This study found a strong consensus among workers concerning the frustrations of working as a 'temp'. Workers feel trapped in such work yet, ironically, they have no job security. The unscrupulous practices of temp employment agencies also cause workers considerable financial and emotional distress. There were persistent complaints of discriminatory practices on the basis of gender, race, colour, age and other systemic barriers, often masked as needing someone who is the 'right fit' for the job.

Equally troubling, most of these practices go unchallenged and underexposed. Former PMP workers say they are too frightened to come forward. Advocacy groups like the Toronto Workers Action Centre have found these fears to be widespread and have repeatedly called, to little avail, for stronger regulation and monitoring of temp agencies.

Workers employed in this form of precarious employment are often doing so because there are few, if any alternatives. This makes them doubly vulnerable. Stronger policies and enforcement are required to ensure they

are not further exploited and marginalized. In February 2012 the Law Commission of Ontario called for a comprehensive provincial strategy to address the growing phenomenon of precarious employment and the lack of protection for temporary agency workers. The following recommendations should be considered as part of any new strategy:

- A special **Temporary Help Agency Unit** should be established within the Employment Practices Branch and provided with dedicated resources and staff to initiate investigations and pro-active monitoring and ensure proper enforcement. When a short-term Temporary Help Agency blitz was conducted by the Ministry of Labour, ending in August, 2012, they found there were fewer violations upon re-inspection as compared to the initial inspection. Such efforts are needed on a permanent basis.
- Employment Standards should be amended to require **equal pay** on an hourly basis for workers performing comparable work duties, regardless of their full-time, part-time or temporary status.
- Employment Standards should be amended to require temp agencies to **guarantee minimum weekly hours** and reasonable job opportunities. This would help reduce the precarity of workers who are on call 24/7 and subject to highly erratic schedules and assignments.
- The **Ontario Human Rights Tribunal and Commission** can play a stronger, proactive role in curtailing the more discriminatory practices of some temp agencies and employers. The Ontario Human Rights Code has provisions that allow the Commission to initiate systemic reviews and complaints that look at work assignments, transfers and who gets access to permanent positions.
- **Community based agencies** providing assistance and support for workers employed by temp agencies can play a more effective advocacy role if they are allowed to initiate third party complaints to the ESB and OHRC when a pattern of discriminatory practices is detected.

Childcare for Shift Workers

- Given the growing number of working parents who are on non-standard shift work arrangements, it will be critical to conduct consultations and a policy review to develop **innovative publicly funded childcare** that responds to the needs of shift workers and provides support for the health and well-being of families.

Settlement Services

There is a need for holistic and comprehensive services for newcomers as well as long-term immigrant workers who are in precarious employment situations.

- Access to settlement and other support services should not be restricted solely to newcomers (i.e. landed immigrants in Canada less than 3 years). **Services should be extended to all users based on needs** rather than the length of stay in Canada.
- Funding should be provided to agencies **to provide more group support services**. The PMP Worker Action Centre model of a peer helper-based centre should be replicated in communities that need support for non-unionized workers going through plant closure and/or permanent job loss.

Retraining and Re-employment for Older Workers

The study confirms that age is a major barrier to finding work. These older PMP workers are too young to retire but not young enough to compete with new entrants in the workforce. With the pending legislative changes that will delay access to public pensions, and as benefit levels are gravely affected by diminished pension contributions during periods of unemployment, there is a great need for an overall strategy to integrate older workers back into gainful employment after job loss.

For older workers who went through Second Career retraining but who did not find jobs in their new chosen field, there is an urgent need to provide additional supports. They have already invested their time and energy in learning new skills. A strategic policy direction should be pursued to provide a special component in SC training with specific supports for older workers to transition from training to employment.

- A **joint commission on older workers** should be set up by the Federal and provincial governments to conduct a systematic review of policies and programs with the goal of ensuring older workers' access to re-employment and their ability to retire with dignity and security.
- A **bridging program at the latter part of Second Career training** as a placement/ internship program that assists workers to link up with potential employers. We are in support of the recommendation proposed in the final report of the PMP Labour

Adjustment Committee (Ng 2011) for a 10-12 week bridging program; it will make a world of difference.

- The government has already invested in the training for these workers. It will be prudent for policy makers to consider **extending a targeted wage subsidy program** to encourage employers to hire these older workers who are eager to contribute with their lived experiences and new skills. It will be a win-win for all.

Equity in Access to Employment

Our case study of PMP workers has also illustrated the systemic barriers of race and gender in accessing employment. Our study, along with numerous others, documents the enduring employment gap and poverty experienced by marginalized groups. Breaking the cycle of racialization of poverty and discrimination will require an overall shift in policy and public education - and systemic solutions.

- It is urgent that the Ontario government re-introduce **an equity hiring policy and workplace legislation** that addresses the additional systemic barriers of race, gender and other forms of discrimination experienced by Indigenous workers, women, racialized workers and workers with disabilities.

Bankruptcy Protection for Workers

- Currently federal bankruptcy legislation puts workers at the bottom of a list as "non-secured creditors" when companies file for bankruptcy or bankruptcy protection. The law needs to be revamped to **ensure workers are the first on the list for severance, termination pay and other compensation owing**. As the most vulnerable victims of workplace closures, workers are most in need of protection.
- The current legislative framework does not address and provide solutions for situations when employers file for bankruptcy protection as a convenient way to restructure the operation or move the production offshore. There is a need to devise **a new policy framework that will hold employers accountable** to the larger community and ensure fair compensation for laid-off workers.

Income Support and Security

One of the most devastating impacts of the plant closure for workers and their families has been the challenge of making ends meet with the loss of income and benefits. During the initial period, EI benefits based on 55% of their previous wages provided some minimal support for workers. However, subsequent employment with lower wages and unpredictable hours has made it almost impossible to cover even basic necessities with EI benefits during periods of unemployment. Former PMP workers previously endorsed a call by the labour movement and community for EI reforms. They also suggested a minimum EI benefit, like the minimum wage, for workers on temporary layoff. The latest EI changes and the penalty imposed on 'frequent' and 'occasional' claimants do not address these concerns but rather, further weaken EI, especially for these workers who are frequently on short-term or temporary work assignments.

- The Federal government should **lower EI eligibility criteria** to enable more unemployed workers to qualify for EI **and raise the benefit rate** so workers have basic income supports when they are out of work.
- There should be a **minimum EI benefit** to ensure that laid off workers can maintain some basic income support and well-being as they look for new work.

Raising the Minimum Wage

The dire need for more income to cover basic living expenses has prompted workers to take on multiple part-time jobs to augment their low wages. The research participants called for both a raise in the minimum wage and the need for adequate working hours.

- Support **a minimum wage increase to $14 hourly** and a **40 hour work week**.

Creation and Retention of 'Good Jobs'

While the latest job figures released by Statistics Canada for May 2013 shows an increase in employment, there continues to be a downward trend within the manufacturing sector – a loss of over 90,000 jobs (5.5%) from April 2012 to May 2013

(Statistics Canada, June 2013). For this group of former auto-parts workers who were concentrated at the bottom rung of the labour market, the recovery has yet to come.

- Recognizing that decent jobs lead to decent lives, the Federal and provincial governments should make it a **policy and program priority to develop and implement a long-term industrial job strategy** to stimulate the creation and retention of 'good jobs' for all.

Union Organizing Strategies

During the interviews and focus group discussions, participants reflected on the two failed union organizing attempts in the past decade. The company was able to exploit worker's fear and set up different facilities/plants to further divide the organizing capacity of workers. One participant jokingly reminisced that the last union organizing drive failed because the company ordered pizzas for the workers to create a 'family atmosphere' – "We were bought by pizzas!" There was a shared sense among the workers that had PMP been unionized, they would have been better informed and the employer would have had a legal obligation to follow a contractual process on closure.

With the dramatic increase in the number of workers in precarious forms of employment, there is an urgent need for collective representation and collective bargaining to improve workplace benefits and working conditions. It has been well documented that unionization is a great equalizer in reducing poverty and the wage gap, particularly among equity-seeking group members (Jackson 2006; DiCaro, Johnston and Stanford 2011).

- There is a need for a policy review of the Ontario Labour Relations Act to **strengthen the protection of workers' rights to organize**.
- Labour unions should consider **alternative and broader-based organizing strategies** that go beyond the traditional workplace setting and find **meaningful ways to integrate the equity agenda** into the work of unions.

- Politicize
- Mobilize
- Power for Workers

VIII. Implications for Future Research

The PMP case study has provided a glimpse into a group of courageous workers who struggle to pick up the pieces in the aftermath of a plant closure. It is a narrative that speaks to the persistent inequalities of a labour market that discriminates and differentiates on the basis of race, gender, age, accent and presents other forms of systemic barriers. It calls for a larger scale study that can compare the experiences between racialized and non-racialized workers in their experiences of retraining and re-employment.

Our research has shown that the impact of job loss has a domino effect on the quality of life, health and well-being of the affected workers and their families. The impact is particularly dramatic when more than one adult in the same household worked in the same place. The health impact of closure among immigrant workers should be further examined.

In addition, it will be instructive to conduct a study on the impact of closure on the children who stand as witnesses and are caught in a downward spiral of change and unpredictability. Their perspectives will add much richness to the full picture on health equity in relation to precarious employment and plant closure.

A large scale study needs to be conducted with temp workers on the recruiting and assignment processes devised by various employment agencies to examine the scope of the discriminatory practices.

Last but not the least, this initial study has detected some evidence of anti-black racism in terms of a disproportionately higher number of unemployed Black workers within the research sample and participants' own narratives. However, the sample size is too small to make any substantive claim. A larger scale research on this particular focus will be critical in deepening our collective understanding and policy solutions for systemic change.

- **P**oliticize
- **M**obilize
- **P**ower for Workers

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Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee

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Introduction

In his groundbreaking book on social psychology, Erving Goffman proposed that human beings control others' impressions of them through performances within spatially defined social establishments.[1] He described a social establishment as "any place surrounded by fixed barriers to perception in which a particular kind of activity regularly takes place."[2] Through these performances, Goffman posited, individuals create and tailor their social identities for particular audiences. He argued that each performance's audience must be segregated from the others for the performances to succeed. That is, an individual must "ensure that those before whom he plays one of his parts will not be the same individual before whom he plays a different part in another setting."[3] Individuals preserve audience segregation by following the rules of decorum of each social situation and by filtering the information about themselves available

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[1] Erving Goffman, The Presentation of Self in Everyday Life (1959).

[2] *Id.* at 238.

[3] *Id.* at 49.

to each audience. When the veil of audience segregation is pierced, according to Goffman, social disruption ensues. The disclosure of information to unintended audiences discredits the construction of roles and identities within the group and causes "difficult problems in impression management."[4]

The workplace is perhaps the quintessential social establishment where performers "cooperate to present to an audience a given definition of the situation."[5] Professionalism is the language of the traditional workplace performance. It includes conduct and appearance that demonstrate good judgment, a respectable stature, and the maintenance of "an air of competency and a general grasp of the situation."[6] To that end, traditional professionalism demands audience segregation between the employee's professional and private personas.

Goffman's seminal text was written in 1959, well before the digital revolution changed our vehicles of social interaction. Today, technology makes the boundaries between the professional and personal more porous. The social establishments bounded by physical space about which Goffman wrote are no longer barriers for social performances and perceptions. Personal blogs, social media profiles, Tweets, and other online fora allow individuals to publicly express multiple facets of themselves, including their private lives and their opinions. Employer-provided laptops and mobile devices do not discriminate between private and professional communications or locations. These "boundary-crossing" technologies blur the already elusive line between the private and the public, the home and the workplace. Private information that was previously segregated now becomes easily accessible to employers, colleagues, recruiters, and clients, among other perhaps unintended audiences. By its nature, digital information is infinitely transferable and hard to control. This openness has far-reaching effects on personal privacy, reputation, and self-expression.

Privacy law in the United States has traditionally been defined by physical and social establishments like those described by Goffman. The reasonable expectation of privacy analysis, which is endemic to privacy jurisprudence, is firmly rooted in the experience of physical space and its

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[4]*Id*. at 139.

[5]*Id*. at 238.

[6]*Id*. at 47.

surrounding normative circumstances. The evaluation of whether privacy expectations reasonably exist is present in nearly every assessment of privacy under U.S. law, from torts to statutory rights. In a recent case, *City of Ontario v. Quon*, the U.S. Supreme Court was charged with qualifying the privacy expectations of an employee in a social establishment not defined by physical boundaries: text messages.[7] Officer Quon claimed a violation of privacy when his employer searched the personal text messages he sent on his employer-provided pager.[8] The Court eschewed making what it deemed would be premature legal conclusions regarding privacy and technology, stating that "rapid changes in the dynamics of communication and information transmission [are] evident not just in the technology itself but in what society accepts as proper behavior."[9] It admitted having "difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable."[10]

Like the U.S. Supreme Court, other tribunals and lawmakers around the world are having trouble conceptualizing privacy in new technologies. In Europe, courts and legislatures alike are debating the wisdom of a proposed "right to be forgotten," an individual right that allows citizens to delete unwanted information online about them.[11] The Canadian Supreme Court has echoed the U.S. Supreme Court's reticence, opting to "leave the privacy implications of the more evolved technology to be decided when a comprehensive evidentiary record has been developed."[12]

The shared unease among lawmakers around the world suggests that they need more information to gauge privacy and behavioral norms for new technologies. Without clear instruction from the law or a crystal ball, indicators of normative views are the best way to forecast how expectations

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[7]130 S. Ct. 2619, 2625 (2010).

[8]*Id*.

[9]*Id*. at 2629.

[10]*Id*. at 2630.

[11]Matt Warman, *Online Right "To be Forgotten" Confirmed by EU*, Telegraph (Mar. 17, 2011, 12:53 PM), http://www.telegraph.co.uk/technology/Internet/8388033/Online-right-to-be-forgotten-confirmed-by-EU.html.

[12]R. v. Gomboc, [2010] 3 S.C.R. 211, para. 40 (Can.); *see also* R. v. Tessling, [2004] 3 S.C.R. 432, para. 55 (Can.) ("Whatever evolution occurs in future will have to be dealt with by the courts step by step. Concerns should be addressed as they truly arise.").

of privacy are being shaped in new contexts and technologies. In this article, we canvass existing domestic and international jurisprudence on social media and related technologies in the workplace, in tandem with the self-reported privacy expectations of the emerging workforce. We analyze the findings of a survey conducted on two university campuses that asked various questions of business students who were imminently entering the workforce to ascertain their privacy expectations regarding social media in the workplace. While legislatures and courts have waffled in characterizing privacy expectations in social media, the rising generation of workers already manifests certain beliefs about the technology as it plays out in work life. Our findings suggest that Millennials[13] are cognizant of their reputational vulnerability on digital media but are not willing to sacrifice Internet participation to segregate their multiple life performances. Lacking the technological or legal ability to shield performances, Millennials rely on others, including employers, to refrain from judging them across contexts. Their stated expectations of privacy, therefore, appear to be somewhat paradoxical: employee respondents generally want privacy from unintended employer eyes, and yet they share a significant amount of personal information online, knowing it could become available to employers and others. What is at the core of this seemingly contradictory behavior? Is it just an adolescent "have my cake and eat it too" mentality, or does it reveal something deeper about privacy and social performances? Should legal doctrines and business practices acknowledge this expectation?

Informed by our empirical findings, we address these questions and offer recommendations about the future of law and business practices in a digital world. These recommendations strike a balance between employees' dignitary interests and employers' practical realities. The ways that law and society respond to the multiple issues presented by boundary-crossing technologies will certainly affect the evolution of technology, the demands of the twenty-first-century workplace, and individual autonomy.

In Part I, we provide an overview of the extant legal landscape with an emphasis on three general areas of employer activity related to employees' online activities: (1) monitoring and surveillance of employee social media profiles, (2) evaluation of applicants' social media profiles and online speech in making hiring decisions, and (3) limiting

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[13]Neil Howe & William Strauss, Millennials Rising: The Next Great Generation 4 (2000) (defining Millennials as those "born in or after 1982").

employees' off-duty online activities. In Part II, we report the findings of an empirical project assessing young employees' expectations regarding the role of technology, particularly social media, in the workplace.[14] The survey asked respondents about a wide range of topics related to social media, such as the extent of personal information they post online, the privacy-protective measures they employ on social media sites, their level of concern regarding their privacy online, and their attitudes and expectations regarding the use of social media in the workplace. Despite granting employers access to information about their private lives by participating online, respondents expect that work life and private life should be generally segregated—and that actions in one domain should not affect the other. Guided by the survey findings and legal examples from international jurisdictions, in Part III we discuss the future of employee privacy in social media and offer workable recommendations designed to protect employees' desire to maintain some separation between personal and professional contexts.

I. The Law on Social Media in the Workplace

Whether it involves using employer computers to check personal e-mail and social network profiles or sending text messages on employer-provided communications devices, employee use of boundary-crossing technologies in the workplace for personal purposes is prevalent.[15] Social

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[14]The findings discussed in this article are part of a larger research project we conducted regarding the basic questions of online conduct and social media usage. The same survey was administered to university students at Ryerson University, Canada, and the University of Miami in Coral Gables, Florida. The Canadian portion of the project was funded by the Privacy Commissioner of Canada's Contributions Program and those data were reported to the Privacy Commissioner of Canada. For the full Canadian report, see Avner Levin et al., Privacy and Cyber Crime Inst., The Next Digital Divide: Online Social Network Privacy (2008), *available at* http://www.ryerson.ca/tedrogersschool/privacy/Ryerson_Privacy_Institute_OSN_Report.pdf. In 2009, some of the aggregate Canadian and American data relating to general expectations of privacy were published in the *Vanderbilt Journal of Entertainment and Technology Law*. Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 Vand. J. Ent. & Tech. L. 1001 (2009). This article focuses on the aggregate data particular to the employment context. We refer to and cite the 2009 article throughout for general propositions regarding the survey and its overall findings.

[15]*See, e.g.*, Corey A. Ciocchetti, *Monitoring Employee E-mail: Efficient Workplaces Vs. Employee Privacy*, 2001 Duke L. & Tech. Rev. 0026 (2001), *available at* http://www.law.duke.edu/

media, in particular, has permeated modern culture and the daily lives of the incoming workforce.[16] Both businesses and individuals view sites like Facebook and Twitter as valuable marketing and communication tools.[17] However, given these sites' relative newness and the ill-defined norms surrounding them, their use across work/life contexts raises numerous legal, ethical, and business-related questions.

Accounts of employees discrediting themselves and their employers via postings on social networking and media sites have become ubiquitous. A high school teacher was dismissed after posting on her Facebook page that she thought residents of the school district were "arrogant and snobby" and that she was "so not looking forward to another year [at the school]."[18] A flight attendant was fired for posting suggestive pictures of

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journals/dltr/articles/2001dltr0026.html (discussing employee use of personal e-mail in the workplace); Cindy Krischer Goodman, *Cellphones Raise Workplace Issues*, Miami Herald, Feb. 2, 2011, at B6, *available at* http://www.miamiherald.com/2011/02/01/2045915/cellphones-raise-workplace-issues.html (discussing employee use of personal cell phones in the workplace); Cindy Krischer Goodman, *Social Networks Test Companies' Boundaries*, MiamiHerald.com (Jan. 19, 2011), http://www.miamiherald.com/2011/01/18/2022458/social-networks-test-companies.html (discussing the use of online social networks in the workplace).

[16]Facebook, MySpace, Twitter, and LinkedIn boast a combined 1045 million worldwide users, with Facebook accounting for seventy-two percent of that figure (despite first reaching 250 million users in just 2009). *See* Statistics, Facebook.com, http://www.facebook.com/press/info.php?statistics (last visited Aug. 11, 2011); *see also* About Us, Linkedin.com, http://press.linkedin.com/about (last visited Aug. 11, 2011); Nicholas Carlson, *Chart of the Day: How Many Users Does Twitter Really Have?* Business Insider (Mar. 31, 2011, 6:20 PM), http://www.businessinsider.com/chart-of-the-day-how-many-users-does-twitter-really-have-2011-3; *Company Timeline*, Facebook.com, http://www.facebook.com/press/info.php?timeline (last visited Aug. 11, 2011).

[17]*See* Robert Ball, *Social Media Marketing: What's the Payoff for Your Business*, Huffington Post (Feb. 24, 2011, 6:00 PM), http://www.huffingtonpost.com/robert-ball/do-you-know-how-social-me_b_826802.html (reporting a survey that found seventy percent of small businesses use social media for marketing); David Bayer, *Social Media Marketing—Using Twitter and Facebook to Grow Your Business and Maintain Relationships*, Mortgage News Daily (Nov. 12, 2009, 11:18 AM), http://www.mortgagenewsdaily.com/channels/community/118706.aspx (providing a primer for marketing on Facebook and Twitter and noting that "[s]ocial media marketing has been on the rise for the past several years"); Josh Halliday, *Twitter and Facebook Under Scrutiny as ASA Polices Online Marketing*, Guardian (Mar. 1, 2011, 6:01 AM), http://www.guardian.co.uk/media/2011/mar/01/twitter-facebook-online-marketing-asa (reporting that the United Kingdom's Advertising Standards Authority extended its regulatory oversight to include companies' online marketing).

[18]*H.S. Teacher Loses Job Over Facebook Posting*, BostonChannel.com (Aug. 18, 2010, 7:06 AM), http://www.thebostonchannel.com/r/24670937/detail.html.

herself in her company uniform.[19] A study reported medical students engaged in unprofessional banter and disclosure about patients on their social networking profiles.[20] Two pizza chain employees were fired after posting a "prank" video on YouTube that showed them preparing sandwiches at work while one put cheese up his nose and mucus on the food.[21] Whether these well-documented anecdotes reflect ill-advised judgment of employees or overly aggressive responses by employers, they exemplify the tension between employer interests and employee privacy and speech rights.

Employer intrusion into an employee's personal life threatens the employee's freedom, dignity, and privacy—and may lead to discriminatory practices. A considerable body of business research indicates that employer invasiveness may lead to higher levels of employee stress, lower levels of productivity, and worse employee health and morale.[22] Despite documented adverse effects, employee monitoring and surveillance remain pervasive in the business world.[23] Employers have compelling business

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[19]Complaint, Simonetti v. Delta Airlines Inc., No. 1:05-cv-2321 (N.D. Ga. Sept. 7, 2005), 2005 WL 2897844 (stayed pending Delta bankruptcy proceedings).

[20]Katherine C. Chretien et al., *Online Posting of Unprofessional Conduct by Medical Students*, 302 J. Am. Med. Ass'n 1309 (2009).

[21]Stephanie Clifford, *Video Prank at Domino's Taints Brand*, N.Y. Times, Apr. 16, 2009, at B1.

[22]*See* Frederick S. Lane III, The Naked Employee: How Technology Is Compromising Workplace Privacy 11–16 (2003) (describing increased workplace surveillance as "inherently destructive of employee morale" and the Web as a "seductive" drain to employee productivity); Maureen L. Ambrose et al., *Electronic Performance Monitoring: A Consideration of Rights*, *in* Managerial Ethics: Moral Management of People and Process 61, 69–72 (Marshall Schminke ed., 1998) (discussing the fact that employer video surveillance, eavesdropping, and computer monitoring generally can lead to employee stress, worsening health, and declining productivity); Jeffrey M. Stanton, *Traditional and Electronic Monitoring from an Organizational Justice Perspective*, 15 J. Bus. & Psychol. 129, 130, 142–45 (2000) (discussing how employee monitoring and its particular use in the workplace can affect whether employees feel they are being treated fairly, which may affect job satisfaction).

[23]Although the terms "monitoring" and "surveillance" are used in the literature somewhat interchangeably, we use "monitoring" to refer to the automated, computerized collection of information. In contrast, we use "surveillance" to focus on the human review of activities or collected data. Monitoring of electronic communication is routine in the workplace, while surveillance is not. Surveillance is usually triggered by the employer's suspicion of employee misconduct. *See* Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 Am. Bus. L.J. 285, 301 (2011); Avner Levin, *Big and Little Brother: The Potential Erosion of Workplace Privacy in Canada*, 22 Can. J.L. & Soc. 197, 197–98 (2007). *See generally* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 487–90

reasons to surveil employees' and applicants' online activities. Aside from monitoring for productivity, security, and performance, firms have a vested interest in learning about their present and future employees' moral constitution and personality traits that may affect on-the-job duties.[24] Failure to uncover an obvious flaw in an employee's background or character could lead to negligent hiring[25] and negligent retention[26] lawsuits or malpractice claims having serious business repercussions.[27] Employers must also control employee behavior on company computers, as legal liability may result from employee wrongdoing. In one case, an employer faced liability for failing to act against an employee who used a company computer to post nude photographs of his daughter.[28] Finally, employers must protect their reputational interests, intellectual property, and trade secrets. Given the ease and low cost of widespread information

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(2006) (discussing the harm resulting from those in a position of power collecting private or personal data through the use of monitoring); Am. Mgmt. Ass'n, 2007 Electronic Monitoring & Surveillance Survey 4 (2008), http://www.plattgroupllc.com/jun08/2007ElectronicMonitoringSurveillanceSurvey.pdf (surveying employer monitoring practices in various areas such as the Internet, e-mail, and computer usage).

[24]*See* Terry Morehead Dworkin, *Protecting Private Employees from Enhanced Monitoring: Legislative Approaches*, 28 Am. Bus. L.J. 59, 75 (1990); Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 Am. Bus. L.J. 625, 626 (1991).

[25]Lex K. Larson, 1 Employment Screening § 10-2.3 (2006) (defining negligent hiring). Negligent hiring is a tort claim recognized in more than half of the states in the United States. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 St. Thomas L. Rev. 183, 184 (2008). In jurisdictions where the tort exists, an employer can be held liable for the harm its employee causes a third party if the employer knew or should have known of the employee's potential risk or if reasonable investigation would have uncovered such a risk. *Id*. at 184–85.

[26]Creed, *supra* note 25, at 187. Negligent retention theories of liability involve an employer's duty to exercise reasonable care in the continued retention of an employee. The tort was the basis of liability for employers of priests accused of pedophilia and football players accused of crimes. *See* Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behavior of Its Players*, 39 U. Tol. L. Rev. 41 (2007); Kelly H. Sheridan, Note, *Staying Neutral: How Washington State Courts Should Approach Negligent Supervision Claims Against Religious Organizations*, 85 Wash. L. Rev. 517 (2010).

[27]Employers can also be held liable for the torts of their employees under the legal doctrine of respondeat superior. *See, e.g.*, Micah Echols, *Striking a Balance Between Employer Business Interest and Employee Privacy: Using* Respondeat Superior *to Justify the Monitoring of Web-Based, Personal Electronic Mail Accounts of Employees in the Workplace,* 7 Computer L. Rev. & Tech. J. 273, 294 (2003).

[28]Doe v. XYC Corp., 887 A.2d 1156 (N.J. Super. Ct. 2005).

dissemination online, digital communication can be a powerful tool for disgruntled employees seeking to harm their employers by divulging intellectual assets or tarnishing their employers' names or products.[29]

This part identifies three pressing legal issues regarding social media within the employment context: (1) employer monitoring and surveillance of employee speech in social media profiles, (2) employer evaluation of the online speech of applicants in making hiring decisions, and (3) employer-imposed limitations on employees' off-duty social networking activities.

A. Monitoring and Surveillance of Employee Social Media Profiles

Most of the academic literature on the privacy of electronic communication in the workplace focuses on e-mail.[30] The explosive increase in participation on social media sites warrants an analysis of the applicability of the current law. The Fourth Amendment, privacy torts, and statutes such as the Electronic Communications Privacy Act of 1986 (ECPA) address workplace privacy in this context. Their applicability to the monitoring and surveillance of employee social media profiles and other online activities is discussed in turn below.

1. The Reasonable Expectations of Privacy Analysis

U.S. law emphasizes that the workplace and its resources are the property of the employer. The employer is generally free to dictate permissible use of company property as the employer sees fit. Workplace privacy is not an employee right, but a restriction placed upon the employer's property rights. This restriction may arise constitutionally, legislatively, or in tort

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[29]The American Management Association found that, of the twenty-eight percent of surveyed employers who reported terminating an employee for e-mail misuse, twenty-two percent of those violations involved a breach of confidentiality. *See* Am. Mgmt. Ass'n, *supra* note 23, at 8–9.

[30]*See, e.g.*, Bradley J. Alge, *Effects of Computer Surveillance on Perceptions of Privacy and Procedural Justice*, 86 J. Applied Psychol. 61 (2001); Ciocchetti, *supra* note 15; Barry A. Friedman & Lisa J. Reed, *Workplace Privacy: Employee Relations and Legal Implications of Monitoring Employee E-mail Use*, 19 Emp. Resp. & Rts. J. 75 (2007); Joan T. A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: Analysis of the Cyberspace Workplace*, 40 Am. Bus. L.J. 301 (2003); Jennifer L. Paschal et al., *Effects of Electronic Mail Policies on Invasiveness and Fairness*, 24 J. Managerial Psychol. 502 (2009); Janice C. Sipior & Burke T. Ward, *The Ethical and Legal Quandary of Email Privacy*, 38 Comm. ACM, Dec. 1995, at 48.

law, but in its essence it must be "reasonable" and not unduly erode the employer's property rights.[31] Accordingly, the inquiry into whether the employee had a reasonable expectation of privacy in the intruded space is at the core of the law governing workplace privacy. Because the expectations lack an independent normative basis, the evaluation of the reasonableness of privacy expectations can be a chicken-and-egg analysis in which normative behavior informs the law and the law, in turn, influences normative behavior. Furthermore, from a legal perspective, reasonable expectations of privacy are formed in a two-step process.[32] First, the claimant must have a subjective expectation of privacy. Second, there must also be an objective expectation of privacy that society accepts and legitimizes. Most employee arguments for privacy are foiled in step one by such instruments as employer communications and policies, but remain grounded in a widespread, societal norm the legal analysis hardly ever reaches.

For example, courts have generally held that employees do not have a reasonable expectation of privacy in the workplace, especially if using hardware provided by the employer[33] or if the employer has communi-

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[31]*See infra* notes 32–65 and accompanying discussion of reasonable expectations of privacy. Other jurisdictions, most notably the member states of the European Union, understand workplace privacy differently. In these jurisdictions, employees have a right to dignity and to a private life that does not stop at the boundary of the workplace. While this right is not absolute and must be balanced with the employer's property rights, it does contain an inalienable core that protects the dignity of the employee as a human being. *See generally* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (discussing these different approaches to understanding privacy).

[32]Katz v. United States, 389 U.S. 347, 360–61 (1967); *see also* Mayer, *supra* note 24, at 630–32. In the context of private employers, the analysis is the same. *See, e.g.*, Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) (finding that there is no "reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system"); Dir. of Office of Thrift Supervision v. Ernst & Young, 795 F. Supp. 7, 10 (D.D.C. 1992) (applying the *O'Connor* standard to the question of employee privacy in diaries containing personal and company data). In *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987), the Supreme Court held that an employee's reasonable expectation of privacy in the workplace should be judged under all the circumstances and must be reasonable both in inception and scope.

[33]*See, e.g.*, Bohach v. City of Reno, 932 F. Supp. 1232 (D. Nev. 1996); *Smyth*, 914 F. Supp. 97; Bourke v. Nissan Motor Corp., No. B068705 (Cal. Ct. App. July 26, 1993) (unreported decision); McLaren v. Microsoft, No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *12 (Tex. App. May 28, 1999); Jay P. Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289, 303 (2002).

cated to employees that they may be monitored (by written policy or otherwise).[34] The Supreme Court has also recognized that employers have a legitimate interest in monitoring their employees, especially for reasonable work-related reasons.[35] As a result of this legal validation, employee monitoring and surveillance has become a common practice.[36]

Despite the fact that organizations generally have a legal right to access and monitor employees' e-mail and online activities and that employees generally accept monitoring practices, employees still cling to certain expectations of privacy in the workplace.[37] Studies show that employees generally believe that it is illegal and unethical for employers to intrude into certain areas of their lives.[38] The manner in which reasonable expectations of privacy are legally constructed, both for constitutional and private law purposes, and the observable expectations of employees are thus disconnected.[39] For this reason, the debate over expectations of privacy in the workplace endures and is apparent in privacy jurisprudence, specifically relating to the Fourth Amendment and the privacy torts.

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[34]*See, e.g.*, Muick v. Glenayre Elec., 280 F.3d 741, 743 (7th Cir. 2002) (finding no reasonable expectation of privacy in workplace computer files when the employer expressly reserved the right to inspect the computer); Thygeson v. U.S. Bancorp, No. CV-03-467, 2004 WL 2066746, at *20 (D. Or. Sept. 15, 2004) (finding no reasonable expectation of privacy in computer files and e-mail when the employee handbook explicitly warned of the employer's right to monitor files and e-mail); Kelleher v. City of Reading, No. Civ. A. 01-3386, 2002 WL 1067442, at *8 (E.D. Pa. May 29, 2002) (finding no reasonable expectation of privacy in workplace e-mail when the employer's guidelines "explicitly informed employees that there was no such expectation of privacy").

[35]*O'Connor*, 480 U.S. at 712.

[36]The American Management Association has reported that sixty-six percent of the largest U.S. companies monitor Internet connections. *The Latest on Workplace Monitoring and Surveillance*, Am. Mgmt. Ass'n (Mar. 13, 2008), http://www.amanet.org/training/articles/The-Latest-on-Workplace-Monitoring-and-Surveillance.aspx.

[37]*See* Jason L. Snyder, *E-mail Privacy in the Workplace: A Boundary Regulation Perspective*, 47 J. Bus. Comm. 266, 268 (2010) (citing Gary Gumpert & Susan J. Drucker, *The Demise of Privacy in a Private World: From Front Porches to Chat Rooms*, 8 Comm. Theory 408 (1998)).

[38]*See, e.g.*, Stanton, *supra* note 22, at 130 (discussing studies addressing employees' reactions to workplace monitoring).

[39]For more on the historical connection between the constitutional test as it was first set out in *Katz v. United States*, 389 U.S. 347 (1967), and tort law, see Mayer, *supra* note 24, at 632–37; Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 McGeorge L. Rev. 1 (2009).

The Fourth Amendment—via the Fourteenth Amendment[40]—grants individuals in the United States, including federal and state government employees, the right to "be secure in their persons, houses, papers, and effects" and protects them against "unreasonable searches and seizures."[41] Although the Fourth Amendment does not govern private-sector employers, judicial interpretation of the reasonableness of privacy expectations in the constitutional context validates new kinds of privacy interests and serves as a guide to judges and employers in the private sector.[42] As such, Fourth Amendment analyses of privacy inform privacy tort law, an area equally dependent upon the reasonableness of the plaintiff's desire for privacy.

Assessments of privacy expectations have traditionally hinged upon territorial and context-driven factors. In *O'Connor v. Ortega*, the leading Fourth Amendment employee privacy case, the U.S. Supreme Court concluded that a state hospital did not violate an employee's Fourth Amendment right to privacy when it searched his office drawers and cabinets as part of an inquiry into sexual harassment allegations against him.[43] The analysis, the Court reasoned, must first take into account whether the employee had a reasonable expectation of privacy in the invaded space given the "operational realities of the workplace."[44] Courts evaluating privacy claims in light of *O'Connor* have held that employees maintain a reasonable expectation of privacy in breakrooms,[45] restrooms,[46] and other

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[40]Mapp v. Ohio, 367 U.S. 643, 654 (1961).

[41]U.S. Const. amend. IV; *see also* O'Connor v. Ortega, 480 U.S. 709, 737 (1987) (stating that "individuals do not lose Fourth Amendment rights merely because they work for the government").

[42]Kevin J. Conlon, *Privacy in the Workplace*, 72 Chi.-Kent L. Rev. 285, 289–91 (1996); Mayer, *supra* note 24, at 629.

[43]480 U.S. at 713.

[44]*Id*. at 717.

[45]State v. Bonnell, 856 P.2d 1265, 1279 (Haw. 1993) (holding that the defendants had a reasonable expectation of privacy in their break room because access to the room was limited to employees).

[46]*Cf*. Cramer v. Consol. Freightways, Inc., 209 F.3d 1122, 1131 (9th Cir. 2000) (holding that an employment contract that arguably allowed video surveillance of the employee bathroom could not supersede the mandatory provisions in state privacy laws), *rev'd en banc*, 255 F.3d 683 (9th Cir. 2001) (reversed in part on other grounds concerning the collective bargaining agreement in place). On review, the en banc Ninth Circuit found that the invasion of privacy

spaces normatively branded as private.[47] The analysis must also consider whether the purpose and scope of the employer's search was reasonable.[48] Searches conducted for "noninvestigatory, work-related purposes" and "investigations of work-related misconduct" are permissible exceptions to an employee's right to privacy so long as they are reasonable in light of the surrounding circumstances.[49]

Since *O'Connor*, the analysis into expectations of privacy in the workplace has become considerably dislodged from its spatial roots. In *City of Ontario v. Quon*, the Supreme Court revisited *O'Connor* in the context-challenged world of digital technology.[50] The case asked whether a police officer had a reasonable expectation of privacy in the personal text messages sent and received on his employer-provided pager.[51] Officer Jeff Quon claimed his Fourth Amendment right to privacy had been violated when his employer, the City of Ontario Police Department (OPD), requested an administrative review of his text messages for purposes of determining whether to upgrade its messaging plan.[52] Upon review, the OPD discovered that the preponderance of text messages sent by Quon were of a personal nature.[53] The review also revealed that Quon had sent sexually explicit text messages to a fellow OPD employee with whom he

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claims were independent of the terms of the collective bargaining agreement and not preempted by the Labor Management Relations Act, 255 F.3d at 694; that any provision in the collective bargaining agreement that purported to authorize the use of two-way mirrors was illegal under state statute, *id*. at 695; and that such provision would thus be illegal and void. *id*.

[47]*See* Leventhal v. Knapek, 266 F.3d 64, 74 (2d Cir. 2001) (finding an employee had a reasonable expectation of privacy in the contents of his computer where the employee occupied a private office with a door, had exclusive use of the computer in his office, and did not share his computer with other employees or the public, notwithstanding the employer's policy prohibiting use of work equipment for personal purposes).

[48]*O'Connor*, 480 U.S. at 722–25.

[49]*Id*. at 725–26.

[50]130 S. Ct. 2619, 2625 (2010).

[51]*Id*. at 2632–33.

[52]*Id*. at 2626.

[53]*Id*. For example, of the 456 text messages Quon sent or received in the month of August 2002, no more than fifty-seven were work related. On an average business day, Quon sent or received twenty-eight text messages, only about three of which were work related. *Id*.

was romantically involved, and his then-wife.[54] Consequently, the OPD disciplined Quon for abuse of its policies.[55]

The Supreme Court held that the OPD did not violate Quon's Fourth Amendment right to privacy because the employer had a legitimate work-related purpose for conducting the search. The Court declined to decide whether Quon had a reasonable expectation of privacy in his text messages because it determined that the search was reasonable both in scope and purpose.[56] In reference to scope, the Court gave great weight to the fact that the OPD limited its search of Quon's text messages to those sent and received while he was on duty.[57] As to purpose, the Court found that the OPD's stated purpose for the search—to determine whether the current text-messaging service plan needed to be upgraded—was a "legitimate work-related rationale."[58]

A clear analogy can be drawn from text messaging on an employer-provided pager or telephone to the practice of communicating through social media sites on company computers. Both practices make use of employer hardware and systems for the social and personal purposes of the employee. In *Quon*, the Supreme Court displayed a surprising ambivalence regarding privacy on boundary-crossing technologies. On the one hand, the Court noted that the pervasiveness of the technology was suggestive of its essential role "for self-expression, even self-identification," which it reasoned "might strengthen the case for an expectation of privacy."[59] On the other hand, the technology's ubiquity suggested that it "is generally affordable, so . . . employees who need cell phones or similar devices for personal matters can purchase and pay for their own."[60] Ultimately, the Court refused to elaborate on privacy expectations on an

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[54]*Id*. at 2626.

[55]*Id*. at 2626–27. The officers were instructed that messages sent and received from their issued devices would be treated as e-mails under the City's Computer Policy, which stated that the City "reserve[d] the right to monitor and log all network activity . . . with or without notice." *Id*. at 2625.

[56]*Id*. at 2630.

[57]*Id*. at 2631–32.

[58]*Id*. at 2632–33.

[59]*Id*. at 2630.

[60]*Id*.

"emerging technology before its role in society has become clear,"[61] claiming that "[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices."[62]

Although the Supreme Court sidestepped analyzing the reasonableness of Quon's privacy expectations, it opined in dicta that the employee's expectation of privacy should have been limited. A reasonable employee, according to the Court, "would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."[63] The Court also noted that "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."[64] This holding is consistent with previous lower court rulings.[65]

While shedding some light on employees' reasonable privacy expectations, current Fourth Amendment jurisprudence fails to define the reasonableness of those expectations as to modern technology and social media. Some foreign courts have displayed a more direct approach. For example, France's Supreme Court has long been famous for its protective stance toward employee privacy. In *Société Nikon France, S.A. v. M. Onof*, it

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[61]*Id*. at 2629.

[62]*Id*.

[63]*Id*. at 2631.

[64]*Id*. at 2630.

[65]Courts customarily look at all of the circumstances surrounding the alleged consent to company monitoring policies in assessing whether the employee has a reasonable expectation of privacy. *See* Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1078 (Cal. 2009) (holding that the plaintiffs had a reasonable expectation of not being videotaped in their offices, despite company policy indicating the employees had no reasonable expectation of privacy in their communications, because such policy never alluded to the possibility of video recording); Bourke v. Nissan Motor Corp., No. YC-003979 (Cal. Ct. App. July 26, 1993) (unreported decision), *available at* http://www.loundy.com/CASES/Bourke_v_Nissan.html (last visited Oct. 9, 2011) (holding that employees forfeit reasonable expectations of privacy on work computers by agreeing to the employer's policies providing that use of its computers was for business purposes only); Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding that, despite an employer's failure to notify its employee that his communications were being monitored, the employer's "interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweigh[ed] any privacy interest the employee may have [had]").

held that employees have a robust right to privacy in their communications on work computers.[66] In that case, an employer was prohibited from terminating an employee based on evidence obtained from e-mails written by the employee on a work computer while at work.[67] Recently, in another case, *La Société Seit Hydr'Eau v. M. J-M*, the labor chamber of France's highest court found that employees had an expectation of privacy in electronic folders that had been marked "personal" on work computers.[68] It construed the expectation narrowly to conclude that an electronic folder marked with the employee's initials was not private.[69]

In Canada, courts have been walking a middle ground between the United States and the European Union (EU).[70] In *R. v. Cole*, a high school teacher was accused of storing nude images of a sixteen-year-old student on the laptop that the school board provided to him. He argued that he had a reasonable expectation of privacy in the laptop.[71] Cole was criminally prosecuted after a board technician discovered the offending images and other pornographic images on the laptop during a routine service of the school's information network.[72] Cole argued that the board and the police searched the laptop in violation of his rights under Section 8 of the Canadian Charter of Rights and Freedoms.[73] The Canadian court concluded the teacher had a subjective expectation of privacy in the laptop,

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[66]Cour de Cassation [Cass.] [supreme court for judicial matters] soc., Oct. 2, 2001, No. 4164 (Fr.), *available at* http://www.courdecassation.fr/jurisprudena_2/chamber_sociale_576/arret_no_1159.html.

[67]*Id*.

[68]Cour de Cassation [Cass.] [supreme court for judicial matters] soc., Oct. 21, 2009, No. 2044 (Fr.), *available at* http://www.courdecassation.fr/publications_cour_26/arrets_publies_2986/chambre_sociale_3168/2009_3332/octobre_2009_3246/2044_21_13949.html.

[69]*Id*.

[70]*See* Avner Levin & Mary Jo Nicholson, *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground*, 2 U. Ottawa L. & Tech. J. 357 (2005) (describing Canada's middle-ground position on privacy matters).

[71][2011] 105 O.R. 3d 253 (Can. Ont. C.A.), *available at* http://www.ontariocourts.on.ca/decisions/2011/2011ONCA0218.htm.

[72]*Id*. at para. 12.

[73]*Id*. at para. 3. Section 8 is roughly equivalent to the Fourth Amendment, stating, "Everyone has the right to be secure against unreasonable search or seizure." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act § 8, 1982, *available at* http://laws.justice.gc.ca/eng/charter/page-1.html.

and absent a clear privacy policy or acceptable use policy or both, this expectation was reasonable. In particular, the court stated that

> based upon the totality of the circumstances in this case . . . the appellant had a reasonable expectation of privacy in the personal use of his work laptop. . . . The teachers used their computers for personal use, they employed passwords to exclude others from their laptops, and they stored personal information on their hard drives. There was no clear and unambiguous policy to monitor, search or police the teachers' use of their laptops.[74]

The Canadian court, however, found that Cole "knew that a school technician had a limited right of access to the hard drive as part of his duties to maintain the stability and security of the network system,"[75] and so concluded that Cole's reasonable expectation of privacy did not apply to the actions of the technician.[76] Accordingly, once the technician had stumbled upon the images, the technician's and school board's actions did not violate the Canadian Charter.[77]

Cole is notable for linking expectation of privacy to organizational norms and highlighting the important role that policies play in setting privacy expectations. Other Canadian cases have held that policies in collective bargaining agreements may also inform expectations of privacy in personal data.[78]

These cases indicate the Canadian and American courts' reluctance to recognize a strong workplace privacy right and their willingness to defer to employer policies and agreements as setting reasonable workplace and e-mail privacy expectations. At the same time, it is clear from these holdings that workplace policies are not entirely responsible for setting expectations of privacy. The French court's *Seit Hydr'Eau* decision demonstrates that it is possible to protect employer interests notwithstanding strong workplace privacy rights.[79] The Canadian and American courts'

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[74]*Cole*, 105 O.R. 3d 253, para. 45.

[75]*Id*. at para. 47.

[76]*Id*. at para. 48.

[77]*Id*. at paras. 63, 66.

[78]*See, e.g*., France v. Tfaily, [2009] 98 O.R. 3d 161 (Can. Ont. C.A.) (finding that a collective bargaining agreement between a university and a faculty association granted a professor an objectively reasonable expectation of privacy in relation to his personal electronic data on university computers).

[79]*See supra* notes 68–69 and accompanying text.

unwillingness to render broader holdings has left employees and employers without a clear answer about which surveillance and monitoring practices violate an employee's reasonable expectation of privacy.[80]

2. The ECPA

The ECPA protects the private transmission and storage of electronic data.[81] Title I of the ECPA, known as the Wiretap Act, prohibits the interception, use, or disclosure of any electronic communication while in transit.[82] The significant exceptions to the Wiretap Act limit its applicability to employer monitoring and surveillance of employee social networking activities. First, the Wiretap Act does not apply to communications made through an electronic communication system that is readily accessible to the general public.[83] It appears, then, that if an employee makes her digital information accessible to the general public, her employer is not prohibited from monitoring, viewing, or intercepting such communication. This is true whether or not she was at work when the communication was made. Second, the Wiretap Act provides an exception for providers of the communication service who intercept, use, or disclose the communication in the ordinary course of business and when engaged in an activity incidental to the provision of such communication service.[84] As such, organizations providing mobile telecommunications service or Internet access to their employees for work-related purposes may access all employee communication transmitted thereby. Third, the Wiretap Act permits interception of a communication when one of the parties to the communication expressly or impliedly consents to it.[85] Individuals often expressly consent by accepting a written electronic communications policy or contract clause and

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[80]It also has been argued that, with every U.S. Supreme Court case defining the reasonableness of an individual's expectation of privacy under the Fourth Amendment, the Court has become more vague and continued to narrow its holding in *Katz v. United States*, 389 U.S. 347 (1967). *See* Mayer, *supra* note 24, at 656–58.

[81]Pub. L. No. 99–508, Title I, 100 Stat. 1851, 1859 (codified at 18 U.S.C. §§ 2510–22 (2006)); Title II, 100 Stat. 1860 (codified at 18 U.S.C. §§ 2701–11 (2006)); Title III, 100 Stat. 1868 (codified at 18 U.S.C. §§ 3121–27 (2006)).

[82]18 U.S.C. § 2511(1).

[83]*Id*. § 2511(2)(g)(i).

[84]*Id*. § 2511(2)(a)(i).

[85]*Id*. § 2511(2)(c) & (d).

acknowledgment of monitoring by way of a login prompt or corporate policy are common ways of obtaining express consent. Courts infer consent from the conduct of workers who continue employment after having been notified that their communications are subject to surveillance and monitoring.[86] Finally, employees seem to have a claim under the Wiretap Act only if their communications are intercepted while in transit, rather than in storage.[87]

Title II of the ECPA, known as the Stored Communications Act (SCA), may offer more redress for the employee whose personal online information is accessed by an employer in an unsanctioned manner. The SCA forbids the intentional and unauthorized access of stored communications.[88] The SCA provides broader exceptions than the Wiretap Act because it excludes from liability those who have been authorized access by the entity providing the electronic communication service, a user of that service who is the intended recipient of the communication, or the author of the communication.[89]

Recently, courts have interpreted the meaning of "authorized access" to social media profiles in light of the employment relationship. In *Pietrylo v. Hillstone Restaurant Group*, two restaurant employees were terminated after their manager discovered their password-protected MySpace group, which contained personal information, also referenced illegal drug use, violence, and sexual remarks about the restaurant's management and customers.[90] Employee Brian Pietrylo had created the private online

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[86]*See* Matthew Finkin, *Information Technology and Workplace Privacy: The United States Law*, 23 Comp. Lab. L. & Pol'y J. 471 (2002) (discussing the ECPA and U.S. workplace privacy in general); Sylvia Kierkegaard, *Privacy in Electronic Communication Watch Your E-mail: Your Boss Is Snooping*, 21 Computer L. & Sec. Rep. 226 (2005).

[87]*See* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 114 (3d Cir. 2003) (holding that an employer accessing an employee's e-mail did not violate the Wiretap Act because the communication was in storage rather than in transit); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 878 (9th Cir. 2002) (holding that an employer that accessed its employee's personal, password-protected Web site did not violate the Wiretap Act because the electronic communication was accessed when in storage, rather than when in transmission).

[88]18 U.S.C. § 2701(a).

[89]*Id*. § 2701(c).

[90]No. 06-5754-FSH, 2008 WL 6085437, at *1-2 (D.N.J. July 25, 2008); *see also* Dionne Searcey, *Employers Watching Workers Online Spurs Privacy Debate*, Wall St. J., Apr. 23, 2009, at A13.

forum to vent about work-related topics.[91] One of the online group members, a hostess at the restaurant, showed the site to a restaurant manager.[92] Another restaurant manager later requested the hostess divulge her MySpace login information and password to management so it could access Pietrylo's private group and review the postings.[93] The hostess testified that she gave the password to the manager for fear of retaliation.[94] Based on the content of the online postings, management terminated Pietrylo and another employee.[95] The employees filed suit, claiming the employer violated the SCA, wrongfully terminated them in violation of a clear mandate of public policy, and invaded their privacy.[96] The jury found that, because the employee who provided access to the private online forum did not act voluntarily, employer Hillstone had "knowingly or intentionally or purposefully accessed the [private MySpace group] . . . without authorization,"[97] in violation of the SCA, and awarded the plaintiff employees compensatory and punitive damages.[98] Regarding the privacy claim, the jury found that, even though Pietrylo created the private MySpace group as "a place of solitude and seclusion which was designed to protect the Plaintiff's private affairs and concerns,"[99] he did not have a reasonable expectation of privacy in the postings made on the group.[100]

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[91]*Pietrylo*, 2008 WL 6085437, at *1.

[92]*Id*.

[93]*Id*.

[94]*Id*. at *4.

[95]*Id*. at *2.

[96]*Id*.

[97]Pietrylo v. Hillstone Rest. Grp., No. 06-5754 (FSH), 2009 WL 3128420, at *1 (D.N.J. Sept. 25, 2009).

[98]*Id*.

[99]Verdict and Settlement Agreement, Pietrylo v. Hillstone Rest. Grp., No. 2:06-cv-05754-FSH-PS (D.N.J. June 26, 2009) 2009 WL 2342553.

[100]*Id*. *Pietrylo* is consistent with the manner in which expectations of privacy on social networks have been analyzed in Canada. For example, in a recent labor arbitration decision on the dismissal of a unionized employee of a car dealer, the arbitrator found that the employee had no reasonable expectation of privacy in his Facebook postings because he had one hundred Facebook friends. Lougheed Imports, Ltd. v. United Food & Commercial Workers Int'l Union, Local 1518, [2010] CanLII 62482, para. 97 (Can. B.C.L.R.B.), *available at* http://www.canlii.org/en/bc/bclrb/doc/2010/2010canlii62482/2010canlii62482.html. Similar to *Pietrylo*, the

Pietrylo stands for the proposition that an employer cannot lawfully obtain access to stored information on an employee's social media profile by coercion. It remains clear that employers are free to access such information and to act upon it,[101] if granted access to the online forum voluntarily or if the online information is readily accessible to the public at large.

The court's application of the SCA in *Pietrylo* is consistent with previous cases in which employers surreptitiously accessed the personal e-mail accounts of their employees. In *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, a New York district court found that an employer's unauthorized access to a former employee's personal Internet-based e-mail accounts was a violation of the SCA, despite the existence of a company policy, which stated that "e-mail users have no right of personal privacy in any matter stored in, created on, received from, or sent through or over the system."[102] Former employee Alexander Fell admitted he accessed his personal Gmail and Hotmail accounts on his work computer, but denied drafting or receiving e-mails at work.[103] Fell's employer reportedly obtained access to Fell's personal Internet e-mail accounts because some of the usernames and passwords to those accounts were stored on the company computer. The employer gained access to another one of Fell's personal Internet e-mail accounts by correctly guessing that the password was the same as the one used in his other two e-mail accounts.[104] While the court predictably found that the Wiretap Act did not apply because communications were not in transit,[105] it determined that the employer violated the SCA because the employee's personal Internet e-mails, administered through Google and Microsoft, were not stored on the company system, per the company policy's narrow scope.[106]

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employer did not have direct access to the employee's Facebook page, but was granted access by an ex-employee. *Id*. at para. 22.

[101]*See infra* notes 152–62 and accompanying text (discussing whether employees' off-duty online speech is concerted activity under Section 7 of the National Labor Relations Act).

[102]587 F. Supp. 2d 548, 552 (S.D.N.Y. 2008).

[103]*Id*. at 553.

[104]*Id*. at 556.

[105]*Id*. at 557–58.

[106]*Id*. at 559.

The employer had also argued that the one-sentence company e-mail policy, advising employees that they had no right of personal privacy,[107] eviscerated any reasonable expectation of privacy that Fell might claim in his personal e-mail accounts and that leaving a username and password accessibly recorded on an employer-provided computer constituted implied consent to employer access to personal e-mail accounts.[108] The court concluded that this argument had "no support in the law" and proceeded to determine that the employee did indeed have a reasonable expectation of privacy in the passwords and usernames stored on company computers.[109] It analogized the situation to an employee leaving his house key on his work desk, reasoning that under no circumstance would the law interpret a mislaid house key as "consent to whoever found the key, to use it to enter his house and rummage through his belongings."[110] The court refused to accept that "carelessness equals consent" in the realm of privacy.[111] The court further found that spotty enforcement of the company e-mail policy reinforced the employee's reasonable expectation of privacy in his personal e-mail accounts while at work.[112]

With only a minor stretch of the imagination, *Pure Power Boot Camp* suggests that employees who access their Facebook profiles on the job and store their online social network (OSN) usernames and passwords on workplace computers may be protected by the SCA from unauthorized employer intrusion into their Internet profiles and accounts. The decision is also a warning for employers. Employee Internet and social media use policies must be explicit about what information is accessible to the employer and where it is located. The existence of an explicit policy is not always dispositive to a finding of a reasonable expectation of employee privacy.

While the SCA was not drafted with the intention of securing employee e-mail and Internet privacy, it seems to be in the process of

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[107]*Id*. at 553.

[108]*Id*. at 559.

[109]*Id*.

[110]*Id*. at 561.

[111]*Id*.

[112]*Id*. The policy was not enforced in a consistent manner "that would have alerted employees to the possibility that their private email accounts, such as Hotmail, could also be accessed and viewed by their employer." *Id*.

experiencing a resurgence for that purpose. This is consistent with developing approaches to employee Internet privacy internationally. As mentioned above, the French Supreme Court has held that employers cannot access employee communications that are clearly marked as "personal" without employee permission.[113]

In Israel, a recent National Labor Court decision similarly restricted employer access to employee e-mail and offered an innovative analysis based on the character of the e-mail account, not its owner, label, or location.[114] The scenario was a familiar one—the employer wished to use an employee's e-mails as evidence to support a termination decision, and the employee argued that the e-mails were private.[115] After reminding employers of the need to have clearly communicated policies as a precondition for any employer action, the Israeli Labor Court drew a distinction between private Internet-based e-mail accounts, which employees may access at work, and certain types of employer-provided e-mail accounts.[116] The court prohibited employers from accessing private Internet-based e-mail accounts without a court order, even if such accounts were accessed by the employee at work using employer-provided infrastructure.[117] It then distinguished among three types of workplace or employer-provided e-mail accounts: (1) those used exclusively for work-related purposes, (2) those used exclusively for personal purposes, and (3) those used by the employee for both work-related and personal purposes.[118] According to the court, employers may regularly monitor "exclusively-work-related" accounts, but may not access the content of personal e-mails sent from such accounts unless the employee freely consents.[119] This rule applies even if

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[113]*See supra* notes 68–69 and accompanying text.

[114]File No. 90/08 National Labor Court, Tali Isakov Inbar v. Commissioner for Women Labor (Feb. 8, 2011), *available at* http://elyon1.court.gov.il/heb/dover/3082302.doc [in Hebrew]. For a case note in English, see Dan Or-Hof, *Israel—Monitoring Employees Email Severely Restricted*, Pearl Cohen Zedek Latzer (Feb. 10, 2011), http://www.pczlaw.com/news/2011/02/10/israel—monitoring-employees-email-severely-restricted.

[115]*Tali Isakov Inbar*, at para. 3.

[116]*Id*. at para. 2.

[117]The Israeli court explicitly stated that employee consent would be insufficient. *Id*. at para. 49.

[118]*Id*. at para. 2.

[119]*Id*. at para. 39.

the employee sends personal e-mails on work accounts in violation of corporate policies. Personal workplace accounts and dual-purpose workplace accounts are subject to further restrictions: employers must have an independent valid business reason for monitoring or accessing them, they must first resort to less-invasive methods, and they must obtain the employee's freely given consent.[120] While the Israeli decision offers employees strong protection, it is a default position. Employers are not obligated to offer employees personal e-mail accounts, and employers and employees may enter into collective agreements to regulate workplace privacy and the use of technology at work, which would supplant the Israeli Labor Court's default position.[121]

B. Employer Evaluation of Online Speech and Virtual Identity of Applicants

Organizations are increasingly monitoring social media for information that may provide insight on prospective hires.[122] One study recently found that forty-five percent of surveyed employers researched job candidates using online social networking sites.[123] More than a third of employers in that survey also reported having found publicly available content on applicants' social media profiles that caused them not to hire the applicants.[124] Objectionable content included inappropriate photographs or information, evidence of alcohol or drug use, and information revealing that the

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[120]*Id*. at para. 41.

[121]*Id*. at para. 5. Employment in Israel is governed by collective agreements to a greater extent than in the United States because legislation enables the Ministry of Labor to apply such agreements to nonunionized workplaces as well. *See* Collective Agreements Law, 5717–1957 §§ 25-33G (Isr.), *available at* http://www.tamas.gov.il/NR/rdonlyres/DF31497A-297C-431A-8C63-7DB7CD653C1F/0/3.pdf.

[122]*See* Diane Coutu, *We Googled You*, Harv. Bus. Rev., June 2007, at 37, 44 (providing comments by chairman and chief executive officer of Manpower, an employment company, about the pervasiveness of the employee online screening practice); Brian Elzweig & Donna K. Peoples, *Using Social Networking Web Sites in Hiring and Retention Decisions*, SAM Advanced Mgmt. J., Autumn 2009, at 27, 28.

[123]*Career Experts Provide Advice on Dos and Don'ts for Job Seekers on Social Networking*, CareerBuilders.com (Aug. 19, 2009), http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009&siteid=cbpr&sc_cmp1=cb_pr519_&cbRecursionCnt=2&cbsid=c6bd4651f8e845f187ba45c9c3152747-316799338-RK-4.

[124]*Id*.

applicant had lied on the job application.[125] More information about candidates is desirable when that information is bona fide. The danger of "social media background checks" is that personal information presented out of context or inaccurately may lead employers to judge candidates unfairly without their knowledge or without providing an opportunity for rebuttal. Worse yet, the surreptitious quality of the information search may be a backdoor to illegal discrimination. This unregulated yet widespread practice has received some scholarly attention.[126]

There are two main legal issues surrounding social media background checks: the propriety of employer access to the candidate's online information and the permissibility of basing hiring decisions on the discovered digital information. Of course, employers are permitted to research candidates' lives and reputations as documented in their publicly available, non-password-protected social media profiles. However, accessing a candidate's password-protected social media profile in an unauthorized manner (such as surreptitiously or by coercion) violates the SCA.[127] These practices could also violate the social network site's terms of service.[128] Both Facebook's and MySpace's terms of service prohibit using their networks for commercial purposes or gains without users' consent.[129] A company's use of a social network to research its prospective hires may be characterized as a commercial use of the network.[130] Social media sites also generally prohibit accessing a member's account for the purpose of

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[125]*Id*. (revealing that fifty-three percent of the employers that reported having found content that caused them not to hire candidates said they found candidates had posted inappropriate photographs or information, forty-four percent found evidence of candidates drinking or using drugs, and twenty-four percent discovered that applicants had lied about their qualifications).

[126]*See, e.g*., Alexander Wohl, *After Forty Years of Tinkering With Teachers' First Amendment Rights, Time for a New Beginning*, 58 Am. U.L. Rev. 1285, 1316–17 (2009); Carly Brandenburg, Note, *The Newest Way to Screen Job Applicants: A Social Networker's Nightmare*, 60 Fed. Comm. L.J. 597 (2008); Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 Vand. J. Ent. & Tech. L. 445 (2008).

[127]*See supra* notes 90–101 and accompanying text.

[128]Brandenburg, *supra* note 126, at 612–13.

[129]*MySpace.com Terms of Use Agreement*, MySpace.com, http://www.myspace.com/index.cfm?fuseaction=misc.terms (last visited Aug. 14, 2011); *Statement of Rights and Responsibilities*, Facebook.com, http://www.facebook.com/terms.php?ref=pf (last visited Aug. 14, 2011).

[130]Brandenburg, *supra* note 126, at 613.

obtaining information regarding another member or circumventing privacy settings.[131] However, no regulation forces employers to disclose their information-gathering practices on social networking sites.[132] In analogous contexts, the law suggests that regulating background checks of social media by prospective employers may be warranted. For example, the Fair Credit Reporting Act allows prospective employers to obtain a candidate's consumer report from consumer reporting agencies provided they inform the candidate in writing of the request and obtain the candidate's written authorization.[133]

Employers are currently free to judge candidates on the basis of all available information, unless prohibited or restricted by law. A candidate's recklessness, bad reputation, and unsound moral character are obviously justifiable reasons for denial of employment. Employers may not, however, discriminate on other bases. Title VII of the Civil Rights Act of 1964 (Title VII) covers most private employers with fifteen or more employees and prohibits discrimination in the workplace "with respect to . . . compensation, terms, conditions, or privileges of employment, because of [an] individual's race, color, religion, sex, or national origin."[134] Various state statutes have broadened the scope of hiring and employment discrimination. New York, for example, bars employers from basing employment decisions on a candidate's legal recreational activities, political activities, union membership, and consumption of legal products provided that the candidate's behavior does not conflict with the employer's genuine business interest.[135] By covertly obtaining personal candidate information to

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[131]*MySpace.com Terms of Use Agreement*, MySpace.com, *supra* note 129; *Statement of Rights and Responsibilities*, Facebook.com, *supra* note 129.

[132]*See generally* Donald Carrington Davis, *MySpace Isn't Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services*, 16 Kan. J.L. & Pub. Pol'y 237 (2007) (discussing the general lack of regulation requiring employers to disclose the source or process by which they obtained information on job candidates, which in turn makes them more likely to engage in surreptitious practices).

[133]15 U.S.C. §§ 1681a–b (2010).

[134]42 U.S.C. § 2000e-2(a)(1) (2006). While restrictive of some speech, Title VII has been considered compatible with the First Amendment as it protects the individual's autonomy of consciousness promoted through the First Amendment. *See* O. Lee Reed, *A Free Speech Metavalue for the Next Millennium: Autonomy of Consciousness in First Amendment Theory and Practice*, 35 Am. Bus. L.J. 1, 36–38 (1997).

[135]N.Y. Lab. Law § 201-d (Consol. 2011).

which they would not otherwise be privy, employers may be more likely to discriminate illegally and less likely to get caught.

C. Employer-Imposed Limitations on Employee Private Life

Conventional wisdom dictates that an employee is a representative of his or her organization in all areas of life.[136] This is especially true when an employee uses a company logo, wears a company uniform, or purports to speak for or about the company as an insider. In extreme cases, employers have dismissed employees whose extracurricular activities could have a negative impact on their organizations' reputations.[137] Some companies have contended that employees' aberrant, off-duty behavior can even affect the bottom line.[138] For these reasons, private employers have often sought to control the risks of off-duty employee conduct by way of specific contractual clauses such as morality clauses, confidentiality agreements, and off-duty codes of conduct.[139]

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[136]Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 Hous. L. Rev. 1545, 1575–76 (2010). As some have noted, "as employees move up the organizational hierarchy, so does the expectation of conformity with organizational expectations in one's private life." Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 La. L. Rev. 1079, 1107 (2006).

[137]*See* Levin et al., *supra* note 14, at 68; Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 Am. Bus. L.J. 47, 47–49 (1997) (providing examples of companies in the past that made employment decisions based on the employee's personal life, if they found aspects of the employee's personal life to conflict with the image the company wanted to portray to the public).

[138]In one case, a low-level supermarket employee was terminated when his supervisors learned he enjoyed dressing like a woman in private. Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *4–9 (E.D. La. Sept. 16, 2002). Company representatives maintained, in their defense, that the employee's aberrant behavior would certainly drive away customers in their small town. *Id*. at *9–10.

[139]*See* Brian Van Wyk, Note, *We're Friends, Right? Client List Misappropriation and Online Social Networking in the Workplace*, 11 Vand. J. Ent. & Tech. L. 743, 754–55 (2009) (discussing the employment of a confidentiality and noncompetition agreement to prevent client misappropriation). *See generally* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 Am. Bus. L.J. 151 (1998) (discussing the use of employee secrecy agreements in various contexts); Marka B. Fleming et al., *Morals Clauses for Educators in Secondary and Post-Secondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU Educ. & L.J. 67 (2009) (discussing the inclusion of morals clauses in teachers' employment agreements); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 Seton Hall J. Sports & Ent. L. 347

The growing use of interactive social media significantly complicates this already elusive line between the private individual and the company representative. A more public digital existence can threaten the privacy of both employees and their employers. An amalgamation of all of the elements and characters in a person's life, social media profiles allow for unprecedented transparency of an employee's private dealings, which can then be associated with his organization with minimal inference. A disgruntled employee can easily divulge trade secrets, intellectual property, or confidential information—or can harm the organization's reputation with disparaging commentary. Even a well-intentioned but reckless employee can tarnish an organization by disseminating potential evidence of the organization's negligence, immorality, or incompetence.

Some organizations have restricted their employees' off-duty use of social networking sites or have prohibited using them altogether. For example, the National Football League has prohibited players' access to social media immediately before, during, and after football games.[140] College athletic programs also restrict their student athletes' online participation to avoid damaging the reputations of their host universities.[141] Employer restrictions on off-duty speech and conduct are troubling in that they squelch expression and individual autonomy and may compromise the employee's right to a private life, especially when restrictions are unilaterally imposed after employment commences.

The First Amendment offers limited protection against speech restrictions in the employment context.[142] It does not shield private

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(2009) (discussing the more traditional use of morals clauses in contractual agreements involving talent, including endorsement contracts).

[140]Mark Maske, *League Issues New Twitter Policy*, Wash. Post: The League (Aug. 31, 2009, 4:53 PM), http://views.washingtonpost.com/theleague/nflnewsfeed/2009/08/league-issues-new-twitter-policy.html.

[141]Autumn K. Leslie, Note, *Online Social Networks and Restrictions on College Athletes: Student Censorship?* 5 DePaul J. Sports L. & Contemp. Probs. 19, 20 (2008) (explaining that closer monitoring and restrictions upon student athletes has traditionally been accepted because the acts of those athletes could implicate or tarnish the moral character of the school).

[142]*See generally* Reed, *supra* note 134 (arguing for an interpretation of free speech values in the new millennium more compatible with the human individual's autonomy of consciousness).

employees,[143] and rights afforded to public employees are limited to speech regarding matters of public concern,[144] which are balanced against their employers' business interests.[145] The U.S. Supreme Court has held that, if the employee's speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[146] As such, internal office matters generally are not issues of public concern[147] and, by logical extension, neither are pictures of drunken employees or sexual remarks about coworkers. Employers in the public sector, like the private sector, are not required to "tolerate action which [they] reasonably believ[e] would disrupt the office, undermine [their] authority, and destroy close working relationships."[148] The Supreme Court also has found that an employer may lawfully base an adverse employment action on an employee's off-duty, off-premises speech.[149] In *City of San Diego v. Roe*, a police officer filed a First Amendment claim after he was fired for selling on eBay videos of himself stripping off his police uniform and masturbating.[150] The Supreme Court held that the officer's speech was not protected under the First Amendment, because it was sufficiently

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[143]Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 817 n.5 (4th Cir. 2004); Pietrylo v. Hillstone Rest. Grp., No. 06-5754-FSH, 2008 WL 6085437, at *5–6 (D.N.J. July 24, 2008); Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 Am. Bus. L.J. 51, 53–54 (1995) (discussing the difference in First Amendment and other privacy rights between private and public sector employee); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workspace*, 19 Berkeley J. Emp. & Lab. L. 1, 4–5 (1998).

[144]Connick v. Myers, 461 U.S. 138, 147 (1983).

[145]*See* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); City of San Diego v. Roe, 543 U.S. 77, 82–83 (2004); *Connick*, 461 U.S. at 142; Pickering v. Bd. of Educ., 391 U.S. 563, 568–70 (1968) (holding that a public school teacher could not be dismissed from his job for writing a letter to the newspaper criticizing the school board's treatment of revenue measures for the school because the teacher's First Amendment rights outweighed the school's business interests).

[146]*Connick*, 461 U.S. at 146.

[147]*Id*. at 143.

[148]*Id*. at 154.

[149]*City of San Diego*, 543 U.S. 77.

[150]*Id*. at 78–79.

"linked to his official status as a police officer" and "detrimental to the mission and functions of [his] employer."[151]

The National Labor Relations Board (NLRB) has attempted to bring employers' restrictions of employees' off-duty speech and conduct under the purview of the National Labor Relations Act (NLRA).[152] The NLRA guarantees both union and nonunion employees the right to self-organization and to "engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection."[153] In late 2010, the NLRB issued a complaint against an ambulance service, claiming it unlawfully terminated an employee for violating its Internet posting policy, which forbade employees from making disparaging or defamatory comments about the company or its supervisors at any time online.[154] The employee had posted remarks on Facebook angrily implying that her supervisor was mentally ill and disparaging him with expletives.[155] The case eventually settled, and in the settlement agreement, the employer agreed to alter its Internet policies and standards of conduct, which "improperly restricted" employees' rights to "discuss [their] wages, hours, and working conditions with [their] fellow employees and others."[156]

The NLRB recently filed additional complaints against employers who terminated employees based on their online speech.[157] The NLRB

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[151]*Id*. at 84–85.

[152]Congress passed the NLRA in 1935 to protect workers' right to unionize, and it created the National Labor Relations Board to enforce the rights created under the Act. 29 U.S.C. §§ 151–69 (2006). Before the passage of the NLRA, employers could freely spy on, interrogate, and fire union members. *See generally* Coppage v. Kansas, 236 U.S. 1 (1915) (upholding an employer's right to fire its employee for refusing to sign a document stating the employee would withdraw from the union.).

[153]29 U.S.C. § 157.

[154]*See* Complaint and Notice of Hearing, *In re* Am. Med. Response of Conn., Inc., No. 34-CA-12576 (N.L.R.B. Oct. 27, 2010), *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=daf37177-f935-4fe0-be1f-82c65d0f2ac3.

[155]*See id*.

[156]Settlement Agreement, *In re* Am. Med. Response of Conn., Inc., No. 34-CA-12576 (N.L.R.B. Feb. 7, 2011), *available at* www.minnesotaemploymentlawreport.com/NLRB%20Facebook%20Settlement.pdf.

[157]Melanie Trottman, *NLRB Faults Company for Firing Workers Over Facebook Posts*, Wall St. J. (May 18, 2011, 7:08 PM), http://online.wsj.com/article/SB10001424052748703509104576331861559033254.html.

filed a complaint against a car dealership that fired an employee who posted critical photos and comments on Facebook.[158] The employee complained that sales commissions were likely to drop because a promotional event sponsored by the dealership served only water and hotdogs.[159] As a result, the employee was terminated despite the fact that he had complied with his employer's request to delete his online rant.[160] The NLRB also has taken action against Hispanics United of Buffalo, a nonprofit organization in New York, after the organization fired five workers for Facebook postings that criticized working conditions.[161] It remains to be seen, however, whether the scope of "concerted activities" will eventually be broadened to include insulting rants about an employer.[162]

In addition to federal protections, a few states such as California, Colorado, Connecticut, New York, and North Dakota have passed legislation attempting to protect employees from reprisal for lawful off-duty conduct.[163] For example, the California statute prohibits demoting, suspending, or discharging an employee for lawful conduct occurring during nonworking hours away from the employer's premises.[164] Colorado and North Dakota's statutes provide an exception for conduct that has a relation to the employer's business interests.[165] Despite these protections,

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[158]Press Release, NLRB, Chicago Car Dealership Wrongfully Discharged Employee for Facebook Post, Complaint Alleges (May 24, 2011), *available at* http://www.nlrb.gov/news/chicago-car-dealership-wrongfully-discharged-employee-facebook-posts-complaint-alleges.

[159]*Id*.

[160]*Id*.; Dave Jaimeson, *Facebook Posting Led to Worker's Unfair Firing: Feds*, Huffington Post (May 24, 2011, 3:15 PM), http://www.huffingtonpost.com/2011/05/24/facebook-posting-worker-fired_n_866353.html.

[161]Trottman, *supra* note 157.

[162]Settlement Agreement, *supra* note 156; *Company Settles Case in Firing Tied to Facebook*, N.Y. Times, Feb. 7, 2011, at B7.

[163]*See* Marisa A. Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. Pa. J. Lab. & Emp. L. 625, 629 (2004). For a general discussion of free speech in America for employees both in and out of the workplace, see Bruce Barry, Speechless: The Erosion of Free Expression in the American Workplace (2007).

[164]Cal. Lab. Code § 96(k) (Deering 2011).

[165]Colo. Rev. Stat. §§ 34-402.5(1)(a)–(b) (2011); N.D. Cent. Code § 14-02.4-03 (2011).

employers who can prove a legitimate business interest in regulating their employees' off-duty conduct are generally given a free pass.[166] Case law interpreting lifestyle protection statutes reveal that courts tend to err on the side of employers when any business interest is at stake. Courts have permitted dismissals arising out of conduct such as employee extramarital affairs and criticism of an employer in the newspaper.[167]

In Canada, employers seeking to dismiss employees on the basis of unsavory off-duty conduct have often opted to terminate them with compensation to avoid litigation.[168] For example, one employer dismissed an employee with compensation after learning from a customer that the employee moonlighted as an actor in the adult film industry.[169] Labor arbitration standards for the evaluation of off-duty conduct have a long history in Canada. A 2011 decision from Nova Scotia, *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, applied labor arbitration principles dating back to 1967 to evaluate the conduct of a school caretaker who had a sexual relationship with a student and ultimately married her.[170] In the 1967 precedent, *Re Millhaven Fibres Ltd. and Ontario O.C.A.W., Local 9-670*, the court determined the following factors to be relevant when evaluating off-duty conduct: (1) whether a crime had been committed, (2) the harm to the employer's reputation or product, (3) the ability of the employee to continue to perform his duties satisfactorily, (4) the effect on other employees, and (5) whether the employer is able to continue managing and directing employees efficiently.[171] Presumably, labor arbitrators in Canada will

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[166]*See* Aaron Kirkland, Note, *You Got Fired? On Your Day Off?!: Challenging Termination of Employees for Personal Blogging Practices*, 75 UMKC L. Rev. 545, 552–57 (2006) (discussing how the presence of a legitimate business interest in regulating or monitoring employee conduct could provide employers with a defense against various different state law claims).

[167]For a discussion of these examples and others, see Robert Sprague, *From Taylorism to the Omnipticon: Expanding Employee Surveillance Beyond the Workplace*, 25 J. Marshall J. Computer & Info. L. 1, 30–31 (2007).

[168]*See* Levin et al. *supra* note 14, at 68.

[169]*Id.*

[170][2011] 298 N.S.R. 2d 258 (Can.), *available at* http://www.canlii.org/en/ns/nsca/doc/2011/2011nsca9/2011nsca9.html.

[171][1967] 18 L.A.C. 324 para. 20 (Can.).

reformulate and apply these traditional factors when evaluating online off-duty conduct and setting appropriate boundaries in employer policies.

In summary, U.S. law currently provides feeble protection to the electronic social communications of employees—whether on or off the job. Fourth Amendment case law suggests that, while expectations of privacy in digital communication may be recognized as reasonable in the future, several factors usually cut against a finding of reasonableness, including employer interests, the logistical demands of the workplace, and the general accessibility of the information. In fact, every U.S. law touching upon employee privacy grants significant deference to the legitimate business interests of employers.[172] Statutes that specifically govern the intersection of social media and workplace privacy have yet to be enacted. In their absence, it seems that U.S. employers may legally canvass social media sites for information on employees and candidates and act on the basis of the information found therein. Employers do not have an obligation to disclose their methods of gaining information, but they may not obtain access to digital profiles by coercion. Internationally, courts are similarly struggling with blurred boundaries between work and home. On the one hand, the French and Israeli courts, guided by an inalienable right to privacy in each jurisdiction, are more generous toward employees and their digital communications. Canadian courts, on the other hand, acknowledge that workplace policies play a role, but not an exclusive one, in shaping reasonable employee expectations. Against this uncertain legal backdrop, an analysis of current workplace practices and attitudes regarding social media participation is instructive. As the U.S. Supreme Court has asserted, these burgeoning norms will dictate the future of the law governing privacy in communication technologies.[173]

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[172]*See* French v. United Parcel Serv., Inc., 2 F. Supp. 2d 128, 131 (D. Mass. 1998); Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1462 (D. Colo. 1997).

[173]*See* City of Ontario v. Quon, 130 S. Ct. 2619, 2629–30 (2010).

II. The Privacy Expectations of Millennial Employees: A Survey

Whether referred to as Millennials,[174] the MySpace Generation,[175] Digital Natives,[176] or Generation Me,[177] the rising workforce is marked by its presence on the Web and its digital world view. Much has been forecast about the role this demographic will play in shaping the workplace of the twenty-first century.[178] Scholars have described the new generation of employees as ambitious—having high expectations for salary and career promotions—while perhaps incongruously placing a premium on private life, flexibility, and work/life balance.[179] They are reported to value a "fun" and relaxed workplace atmosphere[180] and tend to perplex employers with the "casualness of their e-mail and texting language" and their furtive participation on social media while on company time.[181] Regarding

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[174]Howe & Strauss, *supra* note 13. The term Millennial is typically used to describe the cohort after Generation X and extends, according to Howe and Strauss, from those born from 1982 to 2002. *Id*. at 15. These authors posit that Millennials "are redefining the purpose of information technology," which involves communicating with networks of friends and "almost uninterrupted contact with each other." *Id*. at 272–75.

[175]Jessi Hempel, *The MySpace Generation*, Bus. Wk., Dec. 12, 2005, at 86 (describing the MySpace Generation as living comfortably in both the online word and the real world simultaneously, using online social networks as a community center), *available at* http://www.businessweek.com/magazine/content/05_50/b3963001.htm.

[176]John G. Palfrey & Urs Gasser, Born Digital: Understanding the First Generation of Digital Natives 346 (2008) (defining Digital Natives as those born after 1980 and discussing their presence on the Internet).

[177]Jean M. Twenge, Generation Me: Why Today's Young Americans Are More Confident, Assertive, Entitled—And More Miserable Than Ever Before (2006) (defining Generation Me as a generation growing up in the 1980s, 1990s, and 2000s). Twenge describes this generation as a self-important generation that believes everyone should follow and accomplish their dreams. The generation also has an extremely high focus on individuality. *Id*. at 4–7.

[178]Stephanie Armour, *Generation Y: They've Arrived at Work with New Attitudes*, USA Today, Nov. 6, 2005, at 1B; *The "Millennials" Are Coming*, CBS News (Feb. 11, 2009, 3:54 PM), http://www.cbsnews.com/stories/2007/11/08/60minutes/main3475200.shtml; Steve Tobak, *Gen Y: Solve Your Own Damn Workplace Issues*, BNET (May 13, 2010), http://www.bnet.com/blog/ceo/gen-y-solve-your-own-damn-workplace-issues/4604.

[179]Twenge, *supra* note 177, at 216–21.

[180]*Id*. at 218.

[181]Palfrey & Gasser, *supra* note 176, at 235.

privacy, they have been characterized as having "few qualms about sharing information that [others] might consider sensitive or private,"[182] as evidenced by their copious digital dossiers. For them, identity seems to be a "synthesis of real-space and online expressions of self."[183] Paradoxically, as a whole this group reports being unnerved by the idea of "someone aggregating, searching through, and acting on the basis of [the] information" they share online.[184]

The empirical project discussed in this part was undertaken to define attitudes about online privacy, specifically with regard to participation in OSNs.[185] We discuss and analyze that part of the survey pertaining to the respondents' usage of OSNs and their attitudes about online privacy vis-à-vis their employment context. Approximately 2500 Canadian and American undergraduate students answered questions relating to their employment status, privacy expectations concerning employer access to their OSN profiles, and the existence of and adherence to OSN workplace policies, among other things. These questions were close ended, as respondents chose from a list of various answer choices in multiple choice and Likert-scale format.[186]

Most respondents (94%) were between the ages of eighteen and twenty-four. Females (51%) and males (49%) were equally represented. Two-thirds of respondents (67%) were employed in paid positions and worked shifts while pursuing an undergraduate degree, as presented in Figure 1. Few respondents (less than 10%) were employed full time.

Ninety-two percent of respondents indicated that Facebook was their preferred OSN,[187] while only 2% reported belonging to LinkedIn, a business-oriented OSN mainly used for professional networking. The project's general findings suggest that respondents post a significant

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[182]Twenge, *supra* note 177, at 217.

[183]Palfrey & Gasser, *supra* note 176, at 36.

[184]*Id*. at 51.

[185]*Supra* note 14 (discussing the findings); *see also* Levin et al., *supra* note 14 (providing a full report on the Canadian findings); Levin & Sánchez Abril, *supra* note 14 (offering general propositions regarding the survey and its overall findings).

[186]For a detailed discussion of the methodology as well as the complete survey instrument, see Levin et al., *supra* note 14, 80–92; Levin & Sánchez Abril, *supra* note 14, at 1048–51.

[187]*Id*. at 1023–24.

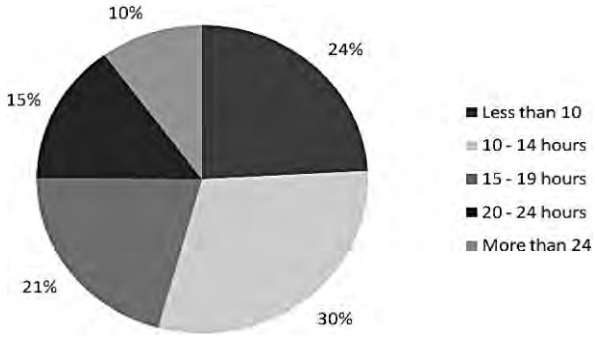

Figure 1. Hours respondents worked each week.

amount of truthful information about themselves online.[188] The most commonly shared pieces of information were pictures of themselves (77%), their hometown (76%), and their real full name (68%).[189] Respondents expressed some concern over their information reaching unintended audiences.[190] Seventy-two percent of respondents reported restricting access to their profiles by use of the privacy settings offered by the OSN Web sites.[191]

This part presents the findings related to the employment context to draw conclusions regarding the views of both current and future employees. The findings have been categorized into three thematic groups: (1) employer monitoring of OSNs, (2) work and personal life separation, and (3) workplace restrictions on OSN usage.

A. Employer Monitoring of Employee OSN Profiles

The data suggest a general ambivalence regarding employer access to employee OSN profiles. Most respondents reported being truthful about facts relating to their identities (such as full name, portrait photograph, hometown, etc.). In all likelihood, employers already enjoy access to these

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[188]*Id.* at 1024–25.

[189]*Id.*

[190]*Id.* at 1026–27.

[191]*Id.* at 1034.

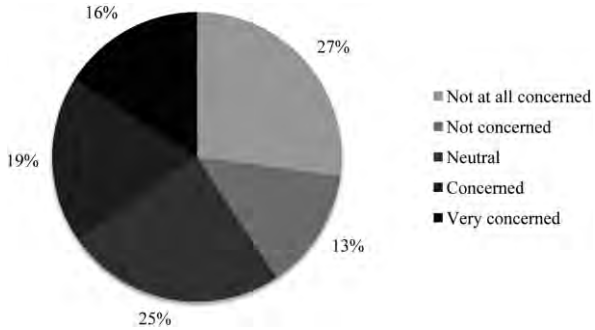

Figure 2. How concerned would you be if your employer accessed your social network profile information?

bits of identifying information without monitoring OSNs. However, some respondents reported voluntarily posting information about traditionally private or sensitive topics such as political preferences (24%) or their partner's name (25%). Interestingly, 62% posted their relationship status and 40% disclosed dating interests.[192] Perhaps Millennials consider that sharing such information, which is traditionally shared "at the water cooler," does not unduly compromise their privacy. It is unsurprising that this cohort, which has been characterized as valuing a casual and social work environment, would be inclined to share facts relating to private life with employers. This sharing reflects perhaps a population that does not construct the traditional segregation between social or home and work contexts on the basis of such facts.

Respondents generally acknowledged that posting information on social media sites makes it more accessible to many audiences. When asked how they would react to an employer accessing their social network profile information, respondents had mixed responses: 41% reported they would not be concerned if their employer accessed information on their OSN profiles, 35% indicated they were concerned or very concerned, and 25% were neutral. These findings, displayed in Figure 2, suggest that respondents were almost equally divided in their tolerance for employer access to their social media profiles. It may be that the less concerned group is not privacy wary, or it may be that they have made efforts to cleanse their profiles of private information and information that could cast them in a negative or unprofessional light in the eyes of employers.

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[192] *See id*. at 1025 (providing a chart representing this data).

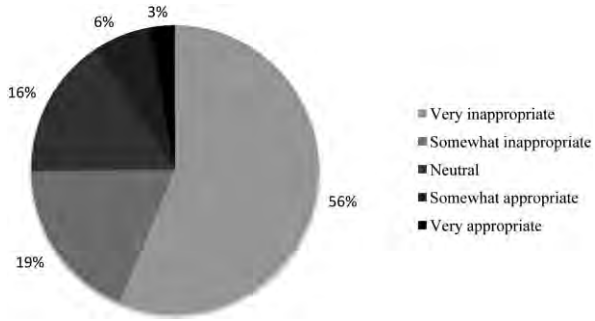

Figure 3. How appropriate would it be for you as a manager to use a social network to check up on what your employees do during personal time without them knowing?

Despite what seems like overall ambivalence toward employer intrusion into employees' social networking activities, 54% agreed with the statement, "It is not right when people can have access to information not intended for them."[193] This response suggests that respondents generally disapprove of unintended audiences learning information about them posted on social media profiles.

Overall, respondents disapproved of employer monitoring or accessing employees' OSN profiles. Seventy-five percent found this practice to be somewhat or very inappropriate (see Figure 3). This indicates that the respondents perceive an employer's monitoring of their private life as a breach of trust, especially in light of the fact that they tend to be willing to share certain private information openly with employers.

Respondents were slightly less perturbed, however, by employers checking on job applicants online without the applicant's knowledge. Fifty-six percent of respondents considered it somewhat or very inappropriate for employers to access OSNs to check the character of a job candidate (see Figure 4). The greater disapproval of intrusions in the private life of employees versus applicants may stem from a shared sentiment that judging a person based on his or her private life is more appropriate before hiring. After all, the purpose of the hiring process is to vet applicants based in part on their character and reputation.

Almost half (49%) of respondents found it somewhat or very inappropriate for employers to proactively search OSNs with the purpose of

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[193] *Id.* at 1027.

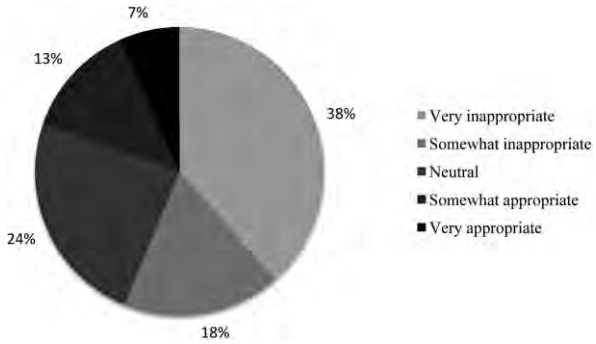

Figure 4. How appropriate would it be for you as manager to use a social network to check out the character of someone who has applied for a job?

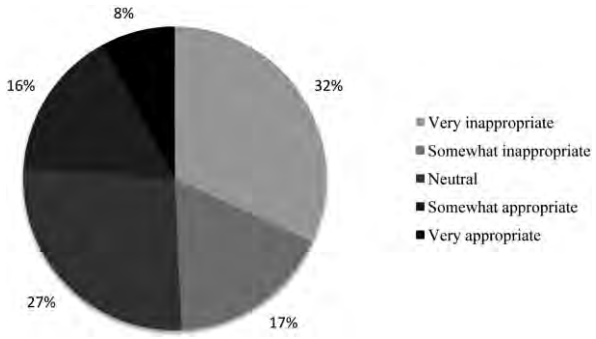

Figure 5. In your opinion, how appropriate would it be for you as a manager to proactively research social networks to identify potential high quality candidates for future positions?

identifying potential candidates for future positions (see Figure 5).[194] This figure suggests that individuals do not expect to be assessed as job candidates in their capacity as OSN members and that at least half of them are uncomfortable with the blurring of those boundaries.

Figure 5 further underlines the conclusion above: Respondents demonstrated clearly defined expectations of the uses and interpretations of their online profiles. While they are apt to share their profiles with many

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[194]For a discussion of automated processes developed for such purposes, see, for example, Saul Hansell, *Let Your Boss Find Your Facebook Friends*, N.Y. Times (Dec. 15, 2008, 3:28 PM), http://bits.blogs.nytimes.com/2008/12/15/let-your-boss-find-your-facebook-friends.

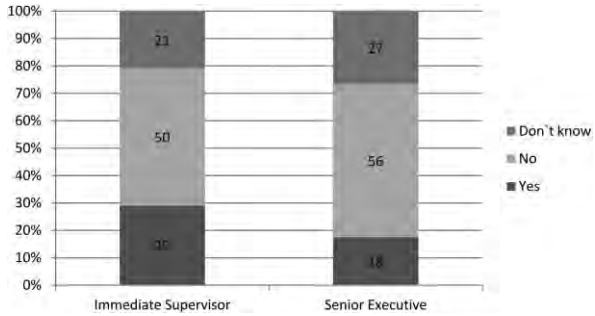

Figure 6. In your current or most recent workplace, which of the following belongs to your online social network?

and disparate audiences, they reject one audience evaluating them on the basis of information intended for another audience. Elsewhere, we have labeled this attitude "network privacy."[195] Below we elucidate network privacy in the employment context.

B. Work/Personal Life Separation

While a majority of respondents reported not inviting their employers or supervisors to be part of their OSN, many respondents considered it appropriate to blend worlds in that manner. Nearly one-third (29%) of respondents included their immediate supervisor as an online "friend." As discussed below, some welcomed their employers' participation in their social networks; others reported being required to give their employers access to their profiles. These data are consistent with the conclusion above regarding the openness and transparency of Millennial employees vis-à-vis their workplace cohorts, as well as the characterization of Millennials as valuing casual and social work environments.

In what seems like a significant departure from traditional workplace practices, 18% of respondents reported the participation of a senior company executive in their OSN (see Figure 6). The survey did not define "senior company executive," but made it clear this was a person with which offline socialization would not occur, someone senior to the immediate supervisor. The data indicate, therefore, the internal blurring of bound-

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[195]Levin & Sánchez Abril, *supra* note 14, at 1045–46.

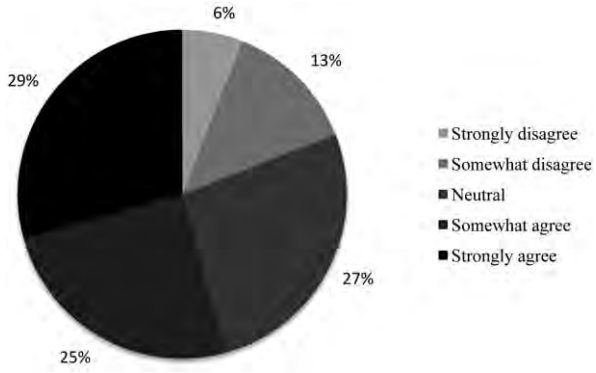

Figure 7. Work life is completely separate from personal life, and what you do in one should not affect the other.

aries, or flattening of hierarchies, that digital media facilitate. Rather than waiting for the "elevator pitch" that may never come, some young employees now have access to higher-level executives and are willing, perhaps eager, to interact with these superiors in a digital context. The data also indicate the willingness of some senior corporate executives to communicate with junior employees through OSNs.

Respondents were divided in their opinions on the propriety of supervisors socializing with employees through a social network. Thirty-six percent opined that superior-to-employee socialization is somewhat to very appropriate, 33% were neutral, and 31% found it to be somewhat to very inappropriate. The equal distribution signals that respondents' opinions may depend on other factors, such as the ages and genders of the parties, the workplace culture, the industry, and the unsettled norms that are still actively forming in this area. Despite the fact that approximately one-third of respondents included supervisors or senior company executives or both in their OSNs, respondents tended to disassociate work life from personal life. As shown in Figure 7, 54% of those surveyed strongly or somewhat agreed that "work life is completely separate from personal life, and what you do in one should not affect the other." Eighteen percent of respondents somewhat or strongly disagreed with that statement. Further, 56% disagreed that "knowing how a person behaves outside of work hours gives managers insight into whether that person is ready for a promotion." Only 16% of respondents agreed that off-duty behavior is evidence of career readiness or potential, which is highly consistent with a separatist

view of professional and personal life. The plurality of those surveyed did not believe that their participation on social media would significantly impede their professional development. Over half (52%) somewhat or strongly disagreed with the following statement: "People wanting to move up the career ladder should not be part of OSNs because [they] can't completely control what is posted about [them]." Nineteen percent agreed with the foregoing statement, despite their own admitted participation on OSNs, which indicates that the need to be connected may supersede any perceived threat to privacy or reputation. Perhaps it indicates that identity presentation and audience segregation should be facilitated by other legal and technological means.

One of our hypothetical scenarios probed the relationship between online behavior and workplace consequences. We asked respondents if they had heard of the scenario occurring or if it had occurred to them personally. Putting themselves in the place of the hypothetical actor, respondents were also asked to attribute responsibility for the consequences of the scenario to the various parties involved. Finally, they were asked whether they believed real harm could arise from the event. The hypothetical involved an employee who was caught in a lie when his employer found incriminating information about him on a social media Web site. The scenario read as follows:

> You called in sick to work because you really wanted to go to your friend's all day graduation party. The next day you see several pictures of you having a great time at the party. Because the pictures are dated you start to worry about whether you might be caught in your lie about being sick. You contact the developers of the social network and ask that the pictures be taken down because the tagging goes so far, it would take you too long to find all the pictures. There was no response from the network. You are stunned to be called in by your supervisor a week later to be advised that you were being "written up" for taking advantage of sick leave and put on notice that if it happened again you would be terminated.

When attributing responsibility to the various parties for the adverse consequences, 78% assumed personal responsibility, while the rest laid blame on the "snooping" supervisor.[196] Nearly half (47%) of respondents were concerned that material *about* them was not posted *by* them.[197] Seventy-one percent respondents agreed that "real harm"—defined as

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[196]*Id*. at 1033.

[197]*Id*. at 1037.

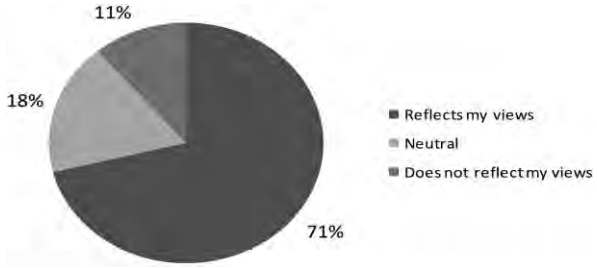

Figure 8. This scenario could result in physical, economic, or reputational injury in the offline world.

physical, economic, or reputational injury—could arise from this occurrence (see Figure 8).[198] Respondents reported experiencing an invasion of privacy when information moved, uncontrolled by participants, across networks and contexts.

These statistics suggest the same contradiction that we have seen above: the respondents were willing to give digital access to their personal lives but resists being judged on the basis of what they disclose. They expect their work and personal lives to be segregated regardless of their unified and publicly accessible digital identity.

C. Workplace Policies on Employee Participation in Social Media

The survey results show that the preponderance of the respondents' employers did not adopt clear policies regarding social media use in the workplace. Sixty-two percent of respondents indicated that their workplaces did not have formal policies on social networking (see Figure 9). Nineteen percent of respondents did not know if their employers had a policy on social media usage. Respondents' lack of clarity as to the existence of a policy and its contents has clear implications on their expectations of privacy both in and out of the workplace.

One-fifth of respondents were subject to a formal workplace policy on social media. Of respondents whose employers have a formal workplace policy, 32% reported that the policy banned employee access to social media during company time. Others only forbade any association with or mention of the company name on the employee's profile. Respondents

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[198] *Id.* at 1043.

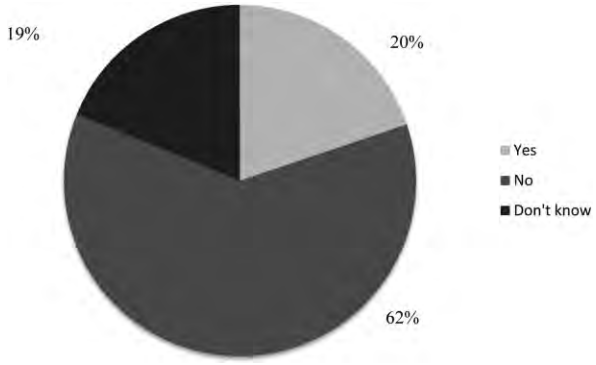

Figure 9. Does your workplace have a formal policy related to use of OSNs during company time?

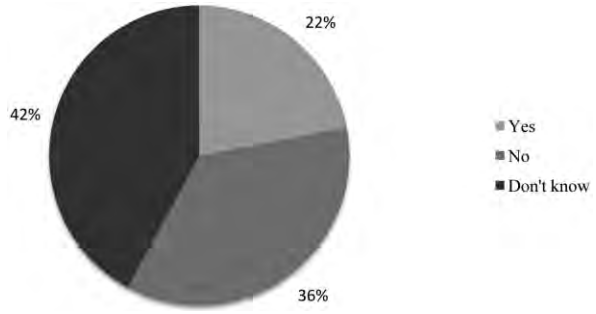

Figure 10. If there is a policy that forbids all use of OSNs during work time, do employees generally abide by the policy?

whose employers had formal policies admitted adherence to such policies was generally poor. Only 22% of respondents working for an employer with an OSN policy stated that employees abided by the policy (see Figure 10). Another recent survey found that nearly half of office employees access Facebook during work hours.[199]

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[199]Nucleus Research, Facebook: Measuring the Cost to Business of Social Networking (2009), http://nucleusresearch.com/research/notes-and-reports/facebook-measuring-the-cost-to-business-of-social-notworking/.

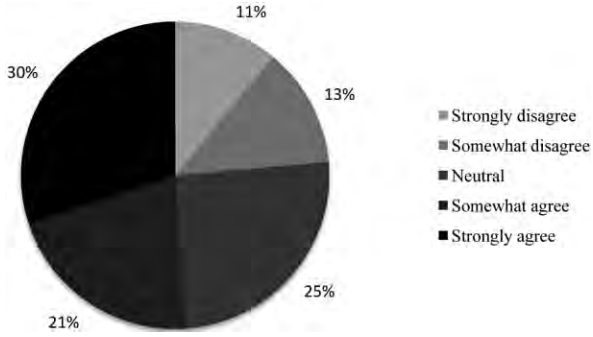

Figure 11. In my opinion, accessing OSNs should not be allowed during work hours.

At the same time, when asked to answer in the role of manager, 51% of respondents agreed that "accessing OSNs should not be allowed during work hours" (see Figure 11). This indicates that, although employees habitually access their OSNs during working hours, there is a generalized acknowledgment that such practice is counterproductive and that employer restrictions on this practice during work hours are reasonable.[200]

Some businesses have begun policing their employees' online behavior by way of requiring employees to add superiors to their OSN profiles.[201] As noted above, 18% of respondents reported a senior executive requested to (and was) added as a friend or connection to an OSN profile. If employer access is obtained by implicit or explicit coercion, this practice clearly contravenes the SCA and other laws.[202] Eighty-one percent of respondents considered it inappropriate for employees to be required to invite their supervisor to their OSN profile. Considering that only 31% of respondents believed it inappropriate for managers to socialize with employees via a social network after work hours and that 29% of respondents included their immediate supervisor, it is likely a considerable

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[200]It is possible that some respondents may have interpreted "work time" and "work hours" broadly, to include breaks and meal times.

[201]*See* Jared Sandberg, *OMG—My Boss Wants to "Friend" Me on My Online Profile*, WALL ST. J., July 10, 2007, at B1.

[202]*See supra* notes 90–101 (discussing the anti-coercion principle as applied in *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009)).

number of employers may already have access to their employees' information on an OSN and would, therefore, not violate the SCA. Given these employee practices, the current legislative framework does not offer meaningful protection for employee information online.

D. Summary

The data suggest that Millennial employees maintain an expectation of privacy regarding information disclosed on social media, especially in relation to their current and prospective employers. They acknowledge the increased accessibility and transparency of their private lives when memorialized on social networks. They also understand that they lack control over the information posted about them, the way such information is interpreted, and the unintended audiences that may access the information.

Despite these realizations, Millennial respondents displayed a clear discomfort with the idea of information flowing across contexts. Three-fourths found it inappropriate for an employer to check employee off-duty conduct via social networks. More than half (56%) objected to the practice of social media background checks. More than half also expressed that work and personal life should not be commingled and that individuals should not be judged across these contexts. When researchers posed a scenario in which an employee was caught lying via a social network posting, most respondents agreed that the employer invaded the employee's privacy—even though the employee was engaged in wrongdoing.

Millennials seem to take for granted that their work and personal lives do *not* intersect and that their actions in one should *not* affect the other, as marked by their overwhelming belief that an employee's conduct outside the office should not be used as a basis for making promotion determinations. Their objection to this increasingly common practice[203] reflects an expectation that they would not be discriminated against on the basis of their online identities. However, the practice of trawling the web

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[203]*See* Deloitte, 2009 Ethics and Workplace Survey 6 (May 21, 2009), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf (reporting that, while 53% of employee respondents said their social networking pages are none of their employer's business, 40% of business executive respondents disagreed and 30% admitted to informally monitoring social networking sites).

for information about applicants and employees—and perhaps discriminating on that basis—will no doubt continue to become the norm unless restricted by law or technology.

Although many respondents expressed unease at the lack of control they exercise over the information about them available on OSNs,[204] it is clear that respondents were not willing to forgo participation in social networks to achieve privacy or separation of work and personal life. They displayed a strong desire to socialize, to interact, and to share truthful information about themselves on social networks. The majority believed participation on social networks is worth the risk; only a small percentage agreed that participation in social media can impede professional development because individuals cannot fully control what is posted about them.

There are indeed indications in our findings that Goffman's traditional theories on audience segregation may no longer hold, because a fair number of respondents welcomed the blurring of work and personal boundaries. Roughly a third invited the participation of their bosses in their OSNs, with even more reporting that employer access to their social networking profile would not cause them concern. Somewhat surprisingly, a small percentage responded that work and personal life should not be separate. This may indicate a growing trend favoring casual work environments, it may reflect a lack of concern toward transitory "student jobs," or it may be indicative of the naiveté of a young demographic with respect to the business world.

Overall, the findings are consistent with what we have labeled network privacy,[205] which can be defined as privacy within the information's intended network and context.[206] An invasion of privacy is experienced when information moves, uncontrolled by participants, across networks and contexts.[207] The information then loses what Professor

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[204]Levin & Sánchez Abril, *supra* note 14, at 1037.

[205]*Id*. at 1045–46.

[206]*Id*.

[207]*See generally* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919 (2005) (arguing the harm and measure of privacy breaches actually occurs upon the information dissemination outside or beyond the certain social networks to which the victim of the breach reasonably expected the information to travel).

Helen Nissenbaum has called its "contextual integrity."[208] Relevant to the discussion here, employers access and interpret information meant for employees' social friends, sometimes leading to adverse consequences. Network privacy appears to carry with it a paradox: Millennial employees generally want privacy from unintended employer eyes and yet share a significant amount of personal information online, knowing it could become available to employers and others. The following part will discuss this ostensible paradox and suggest a framework for the continued discussion of network privacy in law and business.

III. The Future of Digital Privacy in the Workplace

Prior to the phenomenon of online participation, Goffman's notion of audience segregation shielded employees from employers' judgment of their private lives. Information about employee performances outside the work sphere was less readily available to employers. Our findings suggest that Millennials understand digital media and that cross-performance access (i.e., employer access to Millennials' "personal" performances) may occur, but they are not willing to sacrifice Internet participation to segregate their multiple life performances. Because it is technically and legally unfeasible to hide their multiple life performances, Millennials rely on employers to refrain from judging them across contexts.

With minimal technological, contractual, or statutory barriers, it is not reasonable for an individual to expect others to refrain from judging him or her based on publicly accessible information, especially in the business world, where organizations have legitimate and compelling legal and economic reasons to protect their reputations, trade secrets, and workplace environments. U.S. law drives employers to evaluate applicants and employees on all available, legally permissible information. While a majority of the surveyed Millennials found employer monitoring of employee online profiles inappropriate, an employee's remedy in U.S. law is contingent on whether the information obtained by the employer was

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[208] *See* Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 Wash. L. Rev. 119, 136–43 (2004) (defining the concept of "contextual integrity" and arguing that it is the "benchmark of privacy").

publicly available. The "reasonable expectations of privacy" bar is high.[209] More often than not, the large number of OSN friends with whom Millennials share information would clearly eliminate any reasonable expectation of privacy. Computer usage policies, which employers broadly adopt and employees often thoughtlessly accept, also inform the reasonable expectation analysis.[210] Though our survey respondents generally expect the information they post on their OSNs will remain private from unauthorized parties, their expectation is not currently recognized by U.S. law as reasonable and legally protectable.

Millennials' online participation appears inconsistent with their stated expectations of privacy and audience segregation. However, what seems at first glance as incongruous is readily understandable as an attempt to achieve some control in a world where individuals will inevitably amass a public digital dossier. The only way to control the dossier is to participate actively in shaping it, rather than to renounce entirely online participation.[211]

A picture emerges of a society that is, surprisingly, less free, in which tools for self-expression turn oppressive in the absence of normative, technological, and legal controls. Normative controls may come in the form of social acceptance of certain types of disclosures or skeletons in the online closet. Some have suggested that businesses and society in general will necessarily become more forgiving of unseemly personal disclosures eventually, because so many individuals will have online evidence of some purportedly inappropriate behavior.[212] Technological controls, which have not yet been widely perfected, could one day give individuals the capacity to shield unwanted audiences from their online expression and identities. As we wait for normative and technological controls to mature, the law should protect individuals from employers who are intrusive, discriminatory, or quick and unforgiving in their judgments based on unsubstantiated online information.

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[209]*See supra* notes 31–65.

[210]*See supra* Part I.A.

[211]Clive Thompson, *The See-Through CEO*, Wired (Mar. 2007), http://www.wired.com/wired/archive/15.04/wired40_ceo.html.

[212]*See* Lew McCreary, *What Was Privacy?* Harv. Bus. Rev., Oct. 2008, at 126, 129 (citing David Weinberger from the Berkman Center for Internet & Society as proposing such a "forgiveness" principle and indicating that its development may result over time as the digital-native generation ages).

As discussed above, the law does not currently offer meaningful protections. Statutory protections, such as the ECPA, were enacted long before the emergence of online social technologies.[213] Updating these and other statutes to reflect the current technological reality is essential.[214] While some initiatives have already gained some traction in Congress,[215] this messy, reactionary lawmaking is poor guidance for businesses and individuals.

A continued absence of legal protection will eventually lead to a life that Goffman called "unbearably sticky."[216] We find such a transparent future untenable and contrary to the stated wishes of network privacy expressed by our survey respondents. As such, we propose below a series of recommendations for legal and business practices. These recommendations are drawn from domestic and international case law and informed by the empirical results of our survey. They are designed to protect employees who participate online from discrimination, intrusion, harassment, and other dignitary harms, while balancing the reasonable business and reputational interests of employers.

Because social media privacy encompasses so many facets of the complex employment relationship, it is clear that there can be no one-size-fits-all solution. Instead, initiatives should be tailored to specific unwanted outcomes, take into account the nature of digital information and communication,[217] and give both employees and their employers the latitude to set

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[213]Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 878 (9th Cir. 2002) ("The ECPA was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication like Konop's secure website.").

[214]While a worthwhile and important task, making specific recommendations regarding the modernization of U.S. privacy statutes is beyond the scope of this article.

[215]In May 2011, Senator Patrick Leahy introduced the Electronic Communications Privacy Act Amendments Act of 2011, which would update the ECPA and introduce some new safeguards for consumers. Press Release, U.S. Senator Patrick Leahy, Leahy Introduces Benchmark Bill to Update Key Digital Privacy Law (May 17, 2011), http://leahy.senate.gov/press/press_releases/release/?id=b6d1f687-f2f7-48a4-80bc-29e3c5f758f2.

[216]Goffman, *supra* note 1, at 49 ("Urban life would become unbearably sticky for some if every contact between two individuals entailed a sharing of personal trials, worries, and secrets.").

[217]*See generally* Ciocchetti, *supra* note 23, 324–57 (categorizing employee surveillance and monitoring practices and prescribing analysis based on a more specific than one-size-fits-all approach).

the tone for their employment relationship in context- and firm-specific ways. The following subsections will address these recommendations in turn.

A. Clear and Communicated Employer Policies on Technology and Internet Participation

Even though social media have become pervasive in the lives of employees, their use in the workplace remains legally ungoverned and normatively unsettled. Employees bring to the shared workplace diverse and often paradoxical attitudes toward social media. Without legal or normative guidance, employers are in the best position to set parameters for behavior and expectations that reflect and honor the realities of the modern world.

What legal guidance there is points to employer responsibility. All of the international cases on workplace privacy that we canvassed stressed the importance of explicit workplace privacy policies. In Israel, where courts have been extremely protective of employee privacy, the existence of clear privacy policies is a precondition for any employer action.[218] Recent decisions from Canadian courts illustrate how the absence of understandable workplace privacy policies affects employer action.[219] In the United States, much depends on the language and communication of the corporate policies that regulate the employer–employee relationship.

Our survey shows that a striking 82% of respondents either were not subject to a workplace policy on social media or did not know if they were. Of the remaining 18% who reported being subject to a workplace OSN policy, most reported the policies were ineffectual, and compliance was poor. These statistics provide evidence that employees are unlikely to take the time to read and understand written policies or to condition their employment on the content of such policies. This is consistent with the literature and empirical reports on click-wrap agreements and form policies.[220] Employee-respondents' lack of attention to these policies may result from some combination of the incomprehensibility, legalistic style, or

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[218] *See supra* notes 114–21 and accompanying text.

[219] *See supra* note 74 and accompanying text.

[220] *See* Adam Gatt, *Electronic Commerce—Click-Wrap Agreements: The Enforceability of Click-Wrap Agreements*, 18 Comp. L. & Security Rep. 404 (2002); *see also* Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 Berkeley Tech. & L. J. 475 (2002).

overbreadth of the policies and employees' perception that the policies are inapplicable or underenforced. To achieve buy-in from employees, and thereby establish a uniform privacy culture with clear expectations, technology and Internet participation policies must be specific and clearly articulated in a manner consistent with the organization's culture, while reflecting emerging society-wide norms. Meaningful Internet participation policies should contain a high level of detail specific to the type of communication (cell phones, text messages, computer), the character of the medium (company e-mail versus Internet-based e-mail), the nature of the online forum (chat rooms, blogs, etc.), the location of the message sender (on the employer premises versus at home, on employer time or off duty), and the effect of the hardware and transmitting systems' ownership on the message's privacy. Employees also should be informed about the types of information they are prohibited from transmitting (such as harassment or libel about a coworker, confidential and proprietary information, unauthorized expressions of endorsement using the company logo or affiliation, and the like). Further, such policies should remind employees that digital information is fluid and difficult to control and that employees must comply with Web sites' terms of service.

An employer also should articulate and justify its technology and Internet participation policy in terms of the organization's purpose and mission. Compelling policies will have a nexus to a shared purpose among employees and the general nature of the business. For example, employees of a private school, who are charged with being role models to children, are much more likely to understand and abide by limitations on certain off-duty online behavior than employees whose public personas do not logically affect their workplace role.

Finally, technology and Internet participation policies should realistically reflect the stated perceptions and common expectations of employees. Employers should consider polling employees regarding their views or inviting representative employees to give input on proposed policies. Surveys detailing the privacy climate and biases of the incoming workforce, such as the one reported in this article, may be particularly instructive in the formulation of employer policies.

However, as both domestic and international courts have found, the mere existence of a policy is not sufficient to support privacy expectations among employees. For example, *Pure Power Boot Camp v. Warrior Fitness Boot Camp* admonished that a blanket e-mail policy stating that employees have no privacy in any matter flowing through the employer's system may

not be enough to eviscerate an employee's expectation of privacy.[221] Courts have reasoned that the totality of circumstances, including both implicit and explicit messages sent by employers, informs whether a reasonable expectation of privacy exists.[222] Employers should be cognizant that written policies must be carried through, enforced consistently, and incorporated into the organization's culture to form the rational foundation of employees' privacy expectations.

B. An Employee's Right to Designate Private Spaces

Throughout this examination of workplace privacy concerning social media, several recurring themes emerge. One is the individual's real or imagined construction of what Goffman termed "fixed barriers to perception."[223] Another is the complexity of creating those fixed barriers we call "privacy" within an employer's physical domain.

In the face of these challenges, courts have repeatedly remedied the employee's inequity by acknowledging the realities of the employment relationship and allowing employees to burrow holes of privacy within their employer-controlled spaces. ECPA jurisprudence has acknowledged that an employer's mere request for access to an employee's password-protected sites can constitute coercion, given the context of the employment relationship.[224] The U.S. Supreme Court has held that certain areas of the office can be deemed private, subject to the "operational realities of the workplace."[225] The French Supreme Court has gone further, giving employees a right to create certain private spaces by labeling them as such.[226] In these decisions, the French Supreme Court recognized that

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[221]587 F. Supp. 2d 548, 559 (S.D.N.Y. 2008) (finding that an employer's e-mail policy, which stated that "e-mail users have no right of personal privacy in any matter stored in, created on, received from, or sent through or over the system," was not enough to eviscerate an employee's expectation of privacy in his personal e-mail even if accessed at work).

[222]*Id*. at 561.

[223]Goffman, *supra* note 1, at 238.

[224]*See, e.g*., Pietrylo v. Hillstone Rest. Grp., No. 06-5754(FSH), 2009 WL 3128420, at *1 (D.N.J. Sept. 25, 2009).

[225]O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

[226]*See, e.g*., X v. Y-Z, Cour de Cassation [Cass.] [supreme court for judicial matters] soc., Dec. 15, 2009, No. 2561 (Fr.); La Société Seit Hydr'Eau v. M. J-M, Cour de Cassation [Cass.]

employees may legitimately store certain private information on their workplace computers and that boundary crossing is inevitable.

The French Supreme Court's approach is compatible with our survey respondents' stated expectations and behaviors. Our survey results suggest that young employees are likely to disregard traditional work–home boundaries by intermingling audiences and accounts. Defining online behavior with territorial distinctions is simply impracticable. Most people do not have separate devices for different types of digital communication. As such, we propose the creation of a right of employees to designate certain spaces as private within the workplace or employer-provided spaces. This can be in the form of a tag on a picture labeled "confidential," the subject line of an e-mail reading "private," or the label on a digital folder. Employees should, however, bear the burden of shielding what they want to keep private. This is a well-established tenet of trade secret and privacy tort law. Moreover, protecting information prospectively—that is, before a leak or a breach—by labeling it as private both reduces the potential risk of disclosure and simplifies the messy ex post facto evaluation of an employee's subjective expectations. In addition to resonating with emerging technological and social practice, such a right allows employees some reasonable and circumscribed freedom to act within their employer's policies.

C. An Applicant's Right to Transparency

Fifty-six percent of our survey respondents disapproved of employers using social networks to perform background checks on job applicants,[227] while 49% found it inappropriate for employers to trawl social network profiles for job candidates.[228] Despite these findings, reports suggest that surreptitious Internet searches of job candidates and employees have

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[supreme court for judicial matters] soc., Oct. 21, 2009, No. 2044 (Fr.), *available at* http://www.courdecassation.fr/publications_cour_26/arrets_publies_2986/chambre_sociale_3168/2009_3332/octobre_2009_3246/2044_21_13949.html; Société Nikon France SA v. M. Onof, Cour de Cassation [Cass.] [supreme court for judicial matters] soc., Oct. 2, 2001, No. 4164 (Fr.), *available at* http://www.courdecassation.fr/jurisprudena_2/chamber_sociale_576/arret_no_1159.html.

[227]*See supra* Part II.A, Fig. 4.

[228]*See supra* Part II.A, Fig. 5.

become widespread.[229] In fact, employers are often reluctant to acknowledge their use of online resources for selection processes and reluctant to disclose the manner in which they gain access to information applicants seek to disclose exclusively to their friends online.[230] The informal, clandestine quality of the practice may disadvantage applicants who participate online. The practice may also provide employers with a secret backdoor for illegal employment discrimination.

Regulations on employers' screening of social media profiles could serve to placate the concerns of social media users in the workforce. Some have called for the application of statutory standards of fairness and transparency for social media background checks and employer evaluation of employee off-duty conduct.[231] Such proposals would require employers to disclose their screening practices, including the ways they use online information in making employment decisions. This disclosure requirement would significantly deter employers with a penchant for illegal discrimination and would simultaneously alert applicants who may not know the effect of their online reputation or behavior on their employment prospects.

D. An Employee's Right to Respond and Rebut

Similarly, employees who are adversely affected by employment decisions based on online information or off-duty online conduct should have the opportunity to know the contents of the information and should have the right to respond regarding the information's integrity and veracity. Online information, by nature, is often presented in a contextual vacuum. A photograph or comment that may seem inappropriate to unintended audiences can easily belie the real circumstances under which it occurred. Our survey revealed that most students are uncomfortable with others viewing information about them out of context. Fifty-two percent of respondents agreed that "it is not right when people can have access to

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[229]*See* Alan Finder, *When a Risque Online Persona Undermines a Change for a Job*, N.Y. Times, June 11, 2006, at 1.

[230]These uses of online resources may violate an OSNs' terms of service. *See* Brandenburg, *supra* note 126, at 612–13; Byrnside, *supra* note 126, at 465–67.

[231]*See, e.g.*, Davis, *supra* note 132; Byrnside, *supra* note 126.

information not intended for them."[232] Further, individuals often cannot control what is said about them or what images of them are "tagged" in online fora. While some facts about a person may prove to be true, digital information's vulnerability to abuse cannot be overlooked.

In the event online information either suggests employee involvement in criminal or unethical activity or evidences a breach of loyalty, employers should be free to take action against the employee only after revealing the source of the discrediting information and offering the employee a meaningful opportunity to respond or to prove the information inaccurate. This type of process would be similar to what the courts have required of government employers under the Fifth Amendment's Due Process Clause. For example, in *Perry v. Sindermann*, the U.S. Supreme Court held that, when a public employee's continued employment was implied and subject only to a for-cause dismissal, such employee had the procedural due process right to contest the legitimacy of the claims brought against him when fired.[233]

E. An Individual's Right to Delete

About half of respondents in our survey (47%) were concerned that material posted about them was not posted by them, and 71% of respondents believed that online posts that cast them in a negative light could adversely affect them physically, economically, or reputationally in the offline world.[234] In response to this sentiment, the European Commission recently introduced into the European Parliament legislation that seeks to create a "right to delete" or "right to be forgotten."[235] This proposed legislation

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[232]*See* Levin et al., *supra* note 14, at 41.

[233]408 U.S. 593 (1972).

[234]*See supra* notes 197–98 and accompanying text.

[235]Press Release, European Union, European Commission Sets Out Strategy to Strengthen EU Data Protection Rules (Nov. 4, 2010), http://europa.eu/rapid/pressReleases Action.do?reference=IP/10/1462. In Spain, the country's robust laws protecting individual honor, intimacy, and privacy have already been interpreted as granting such a right, but Spanish lawmakers remain baffled regarding how to implement it. *See* Agencia Española de Protección de Datos, *Study on the Privacy of Personal Data and on the Security of Information in Social Networks*, 62–67 (2009), *available at* http://www.inteco.es/Seguridad/Observatorio/Estudios/est_red_sociales_es. Article 18.4 of the Spanish Constitution of 1978 directs the law to "regulate information technology in order to guarantee individual honor and personal and

would allow users to compel Web sites, including social networking sites and possibly even search engines, to delete users' personal information upon request, essentially giving users a right to be "forgotten" online.[236] If passed, individuals would obtain the right to request any personal information that is not in the public interest be deleted from a Web site.[237]

Armed with this right, employees would be able to request the deletion of images and information about themselves on a site-by-site basis, allowing for significant reputation cleansing or correcting. On the one hand, this proposal grants the Millennial generation nothing more than the right of forgetting that the natural frailty of the human memory gave past generations.[238] On the other hand, it is an opportunity to rewrite the past and potentially (yet figuratively) get away with murder. From an employer's perspective, employees' ability to delete negative information about themselves from the Internet provides an alternative solution to resolve instances of inappropriate online conduct, without having to resort to termination.

Although the proposed right has yet to be fleshed out from a practical perspective, a system akin to the notice and takedown procedure under the United States' Digital Millennium Copyright Act of 1998 may be applicable.[239] Among other things, that copyright statute limits the infringement liability of Internet service providers who expeditiously take

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familial intimacy and the exercise of individual rights." C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain), *available at* http://noticias.juridicas.com/base_datos/Admin/constitucion.t1.html#a18 (as translated by author); *see also* L.O.P.J. 15/1999, Dec. 13, 1999 (Spain) Protección de Datos de Carácter Personal, *available at* http://www.boe.es/boe/dias/1999/12/14/pdfs/A43088-43099.pdf.

[236]Matt Warman, *Online Right 'To be Forgotten' Confirmed by EU*, Telegraph (Mar. 17, 2011, 12:53 PM), http://www.telegraph.co.uk/technology/Internet/8388033/Online-right-to-be-forgotten-confirmed-by-EU.html. The proposal would grant national privacy bodies in EU member nations the power to investigate and prosecute offending websites. *Id*.

[237]For example, individuals would be able to request that Facebook delete an unflattering photograph of them, provided the photograph's presence online is not in the public interest. *Id*.

[238]*See* Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age 2 (2009) (discussing the effects of modern technology and the Internet specifically on humans' newfound inability to forget as content remains pervasively available online).

[239]17 U.S.C. § 512(c)(3) (2006).

down infringing material upon receipt of proper notification from the copyright owner. The statute builds in certain safeguards to protect against fraud, error, and abuse. For example, all representations in the notices are made under penalty of perjury,[240] and the process allows the initial uploader of the allegedly infringing material to file a counter notification in response to the takedown.[241] In theory, this procedure is workable in the privacy context, where individuals (like copyright owners) could petition Web sites to take down reputation-tarnishing material.

In reality, Web sites do not have the economic or legal incentives to establish this costly procedure because they are not liable for invasions of privacy as they would be for copyright violations.[242] Further, establishing copyright ownership and infringement, although difficult, is a more comfortably objective task than establishing whether a piece of information is public or the subject of legitimate public interest. For legal reasons as well, the introduction of a right to be forgotten (and an accompanying takedown system) seems highly unlikely to pass muster under U.S. law. In Europe, the archetypal advocate for this right is a Spanish woman whose drug conviction was pardoned in 1995.[243] The woman petitioned Google to remove all information about her past because she objected to the inevitable association a search of her name would produce with news of her pardon (which was published in an official national bulletin and previously accessible to a limited few by virtue of its format).[244] While this request may not seem extreme to European eyes, it is outlandish to American observers. U.S. law unequivocally holds that any information that is accessible or available to the public cannot be private. As such, there

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[240]*Id*.

[241]*Id*. § 512(g)(2).

[242]*See* Communications Decency Act, 47 U.S.C. § 230 (2006); Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. Tech. L. & Pol'y 123, 149 n.151 (2010) (collecting example cases); Molly Sachson, Note, *The Big Bad Internet: Reassessing Service Provider Immunity Under § 230 to Protect the Private Individual from Unrestrained Internet Communication*, 25 J. Civ. R. & Econ. Dev. 353, 366–67 (2011).

[243]Rosario G. Gomez, *Quiero que Internet se Olvide de Mi*, El Pais (Jan. 7, 2011), http://www.elpais.com/articulo/sociedad/Quiero/Internet/olvide/elpepisoc/20110107elpepisoc_1/Tes.

[244]*Id*.

is a meager right to privacy in public places,[245] public documents,[246] and truthful-yet-shameful histories.[247]

However, the spirit of this proposed European right should be adopted privately to safeguard individual dignitary interests. Employer policies could include grandfather clauses to forgive past reputational scars evidenced online before the date of hire, and employers could help their employees manage their individual reputations online in a mutually satisfactory and beneficial way.

F. An Employee's Right to an Off-Duty Private Life

As noted above, the EU's privacy paradigm is more in line with the reported online privacy expectations of our respondents. European employees have a right to dignity and a private life that does not stop at the employer's doorstep. This right balances the employer's property rights against the employee's dignitary protection.[248] Canadian courts have simi-

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[245]*See, e.g.*, Daly v. Viacom, Inc., 238 F. Supp. 2d 1118 (N.D. Cal. 2002) (finding no expectation of privacy with respect to kissing in a bathroom stall because the couple also kissed on a street corner in plain sight); Wilkins v. Nat'l Broad. Co., Inc., 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999) (holding that, because the plaintiff agreed to attend a meeting at a public restaurant, no invasion of privacy occurred when the plaintiff was secretly audio- and videotaped); Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problems of Privacy in Public*, 17 Law & Phil. 559, 565 (1998) (offering a philosophical justification for "privacy in public" in the face of "the inconsistencies, discontinuities and fragmentation, and incompleteness in the framework of legal protections and in public and corporate policy").

[246]Florida Star v. B.J.F, 491 U.S. 524 (1989) (reversing an award of damages to a rape victim whose name was published in a newspaper because the name had been reported in a police report and was a matter of public significance).

[247]Melvin v. Reid, 112 Cal. App. 285, 290–91 (Cal. Ct. App. 1931) ("When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private."). Despite this proclamation, the California Court of Appeals held in this famous 1931 case that a reformed prostitute could sue for invasion of privacy when producers of a film revealed she was a former prostitute who had been tried for murder. The court relied on the fact that the woman had reformed her life and that the producers revealed other private information. *Id.* at 292–93; *see also* Hall v. Post, 372 N.E.2d 711 (N.C. 1988) (holding no recovery for injury caused by a newspaper's publication of family secrets, which included the abandonment of a child at a carnival and her illicit adoption).

[248]For more on dignity as a basis for workplace privacy, see generally Avner Levin, *Dignity in the Workplace: An Enquiry into the Conceptual Foundation of Workplace Privacy Protection Worldwide*, 11 ALSB J. Emp. & Lab. L. 63 (2009). For more detailed discussions of the differences between

larly developed rubrics for drawing the elusive line between the employer's rights and the employee's private life.[249]

For practical and free speech reasons, it would be futile to focus regulatory efforts on suppressing the online information itself. Any proposal to protect individuals from the unjust consequences of an employer's privacy intrusion should focus on imposing reciprocal duties on the employer. One publicly accepted model of limiting action on the basis of publicly available information is found in the prohibited grounds model of Title VII. Under Title VII, employers are prohibited from acting against individuals based on their sex, color, race, national origin, or religion.[250] Title VII does not seek to hush the information (e.g., the fact that an employee is of a certain race or religion) but rather to regulate the permissible actions that can legally result from the information's consideration.

A more aggressive proposal would limit employer action to situations in which online information reveals evidence of criminal conduct, conduct that implicates the employee's performance, or activity that financially harms the employer. In other words, information that merely reveals aspects of an employee's private life or off-duty conduct should not alone be grounds for adverse employment decisions. While this proposal finds its format in Title VII, its substance is also well established in Canadian law, which utilizes the previously discussed five-factor analysis for evaluating off-duty conduct.[251]

Limiting the basis of employment decisions strikes an even balance. On the one hand, we do not want to protect individuals who have been involved in nefarious affairs, and we believe that society benefits from

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privacy laws and jurisprudence in the United States and the EU, see generally Nancy J. King et al., *Workplace Privacy and Discrimination Issues to Genetic Data: A Comparative Law Study of the European Union and the United States*, 43 Am. Bus. L.J. 79 (2006); Levin & Nicholson, *supra* note 70.

[249]*See* R. v. Cole, [2011] 105 O.R. 3d 253 (Can. Ont. C.A.), *available at* http://www.ontariocourts.on.ca/decisions/2011/2011ONCA0218.htm.

[250]42 U.S.C. § 2000e-2(a)(1) (2006). Similar protection exists in other countries. *See, e.g.*, Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 3.

[251]*See supra* text accompanying note 171 (listing the factors as (1) whether a crime had been committed, (2) the harm to the employer's reputation or product, (3) the ability of the employee to continue to perform his or her duties satisfactorily, (4) the effect on other employees, and (5) whether the employer is able to continue managing and directing employees efficiently).

having more information. On the other hand, we do not want to unjustly harm individuals because online media have made their information accessible across contexts and boundaries.

Ultimately, the foregoing recommendations are a first step in developing legal and normative tools to simulate territorial privacy rights online. Our survey respondents confirmed that online participation should not translate, at least in their ethos, to unlimited publicity. How we, as a society, set limits on online information—as imagined by the Millennial respondents—will define the role of privacy in the future workplace.

Conclusion

In his dissent in *O'Connor v. Ortega*, Justice Blackmun argued that defining privacy by physical space is illusory, in that "the tidy distinctions . . . between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality."[252] Indeed, this is especially the case whenever digital social fora meet the workplace—contexts collapse, intermingling relationships and information unrestricted by time and space. As with other historical breakdowns in public/private boundaries, the incursion of social media in the workplace calls for an evaluation of burgeoning societal expectations and an assessment of the compatibility of these expectations with existing law and business practices.

The Supreme Court has recently displayed reluctance in determining whether expectations of privacy can reasonably exist in modern communication technology, stating that, "[a]t the present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."[253] To clarify this uncertainty, we have analyzed data regarding these emerging norms as reported by the incoming workforce. In light of the ubiquity of social media, employers and employees need guidance on how to view social media in the workplace context and how to shape appropriate policies on their use. Recent international debates and decisions have also provided instruction on privacy expectations in the workplace. The foreign decisions discussed highlight the need for courts and lawmakers to

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[252]O'Connor v. Ortega, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting).

[253]City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010).

grasp the normative realities of communication technology in making and enforcing laws. As the United States waits for workplace privacy norms to evolve, relevant international case law provides a potential normative point of reference. Such analysis also provides the necessary insight to lawmakers and judges, especially those who are not personally immersed in the technologies.

We have shown that Millennials crave to live out in the open, offering traditionally private information online. Despite this transparency, our findings suggest that Millennial respondents maintain an expectation of network privacy, or of audience segregation. Our survey respondents displayed strong reactions against being forced to share with unintended audiences and objected to being judged across contexts. In line with Goffman's observations, it appears that Millennials share the need of all healthy individuals to engage in performances bound in social establishments and directed at distinct audiences, in order to shape their identities. Although the rising workforce desires network privacy, technology, law, and prevailing business practice do not currently support that approach. Other jurisdictions have successfully begun regulating the intersection of social media and the workplace. By shedding light on the legal vacuum and defining burgeoning societal expectations, we hope that clarity can emerge and employee dignity and autonomy can be preserved.

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Unions and Temporary Help Agency Employment

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Temporary help agency employment is a peculiar and often precarious employment form that has become increasingly salient in Canada in recent decades. This article examines the effects of the expansion of this employment form upon labour unions, as well as union responses to this phenomenon. Using a qualitative exploratory method, various effects upon union organizing and representation activities are outlined, as are a range of union responses to the phenomenon.

KEYWORDS: unions, temporary help agencies, temporary agency employment

Introduction

Temporary help agency employment (THAE) is a peculiar and often relatively precarious employment form that has become increasingly prevalent in recent decades (Vosko, 2000; Underhill, 2004). Although official data are quite limited, THAE growth is reflected in certain indicators. For example, temporary help industry revenues, a proxy for the market value of labour supplied by agency workers, grew from $1.4 billion in 1993 to $5.6 billion in 2005.[1] "Employment" in the temporary help industry has grown substantially in recent decades, despite procyclical fluctuations. The share of aggregate employment for the employment services industry, the closest proxy for the temporary help industry for which reliable time-series employment data are available,[2] grew from 0.38% in 1992 to its recent peak of 1.11% in 2006, declining slightly to 0.9% in 2009.[3]

THAE is a unique employment form in that it carries multiple concerns about precarity resulting from both its *temporary* nature on the one hand and its *triangular* structure on the other. Analysis of THAE's intersection with gendered, racialized, and immigration-based inequality suggests certain significant, albeit non-uniform effects (Fuller and Vosko, 2008). THAE generally correlates with lower wages, and with the reduction of employment advantages otherwise associated with certain industries/sectors (Fuller and Vosko, 2008). Women are significantly more likely to be agency workers, raising concerns about THAE's "gendered" nature and consequent effects (Vosko, 2000; Fuller and Vosko, 2008).

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THAE exists in many industries, and is disproportionately located in the private sector.[4] Using 2004 Survey of Labour and Income Dynamics (SLID) employment data, Fuller and Vosko (2008) estimate THAE to be distributed primarily across industry categories of manufacturing (17.7%), management, admin and other support services (48.3%), and healthcare and social assistance (7.7%).[5] Agency workers are also far less likely to be unionized than direct-hire, permanent employees, with recent estimates of union coverage rates amongst agency workers being as low as 3.4% (Fuller and Vosko, 2008).[6] Further, some argue that the effects of THAE expansion radiate beyond its immediate locational circumstances, potentially carrying a broader deregulatory effect reconstituting employment relations in general, given increased potential for employment standards avoidance through THAE and the extension of such effects via market competition (Gonos, 1997; Peck and Theodore, 2002).

In this context, this paper explores the question of the effects of THAE growth on unions in Canada, and union responses to its increased salience. Previous literature has provided limited insights into the union-agency nexus, primarily through examination of the legal system. Some quantitative studies examining the correlates of employer use of THAE included variables like unionization (Houseman, 2001), or analogous legal factors (Autor, 2003; Mitlacher, 2007). Other studies largely focused on the legal regime's lack of support for broad-based bargaining structures to facilitate agency worker organizing, or on jurisprudential trends in selecting the "true employer," as between the agency or the client end-user (Vosko, 2000; Trudeau, 2000; Notebaert, 2006; Bartkiw, 2009).

The lack of prior direct empirical inquiry into the nexus between unionization and THAE growth is also apparent in literature examining union renewal, concerned *inter alia* with understanding union behaviour in the context of emerging patterns of precarious employment (Kumar and Schenk, 2006). For example, in a recent volume devoted to understanding union renewal in Canada, the editors cite the proliferation of non-standard work as a challenge facing unions (Kumar and Schenk, 2006: 53), but the only analysis provided of union responses to THAE concern the experience of Toronto Organizing for Fair Employment (TOFFE). TOFFE subsequently merged with the Workers' Information Centre (WIC) and became the Workers' Action Centre (WAC), an organization with capacities in both worker organizing and educational servicing (Cranford, DasGupta, Ladd and Vosko, 2006), and which has been active in organizing, assisting, representing, and lobbying on behalf of agency workers in Ontario. Although it has been called a community union (Cranford, Gellatly, Ladd, and Vosko, 2006), the WAC is more commonly understood as a workers' centre, and not part of traditional inter-union or labour movement structure. Thus, despite its recognition of THAE growth as part of the new contextual reality facing unions,

literature on union renewal contains little analysis of the effects of THAE on unions and/or their responses.[7]

Overall then, there has been almost no direct empirical analysis into the core research question of this paper: the effects of THAE growth on unions in Canada, and their strategic responses. Heery (2004) performed an analogous study in the UK, although one limited to union *responses*, and developed a typology of four categories: exclusion, replacement, engagement, and regulation. Under exclusion, unions adopt strategies intended to drive agencies from the labour market. Replacement means unions accept the existence of agency workers, but seek to have agencies replaced with more acceptable labour market intermediaries. Engagement involves an embrace of both agencies and agency workers, with an attempt to represent agency workers through a negotiated accommodation with agencies. Finally, under regulation, unions don't seek to represent agency workers directly, but rather strive to regulate their terms and conditions in some manner to prevent the undercutting of their core membership. While these categories were used to inform interview questioning and interpretation of results to some extent in this study, given the different national contexts, the lack of any Canadian contextual analysis, the somewhat different research questions, and certain limitations to Heery's typology,[8] it was decided that the research design here ought not be driven by the purpose of verification, but rather should be a more open-ended inquiry.

As a result, a qualitative *exploratory* empirical approach was selected as the most appropriate method at this stage of understanding (Stebbins, 2008), with the hope of developing some insights and generalizations from this grounded theory method (Glaser and Strauss, 1967; Stebbins, 2008). The exploratory study involved twenty-four interviews with key informants from fourteen large labour unions, two union federations (the OFL and the CLC) and the Workers' Action Centre, from June 2008 to July 2010, as well as reviews of union documentation and records. The limited sample of unions was selected by the researcher based partly on an attempt to maximize coverage of potential informant knowledge across different industries/sectors. It was also based partly on convenience and resource limitations, and thus was limited to activities within Ontario. Semi-structured interviews lasting one to two hours, conducted in-person and/or by telephone with key informants sought to probe three main areas of understanding:

- the nature of THAE usage in the landscape occupied by the union, understood as industries in which they currently represent (or are seeking to organize) workers;
- the effects of THAE on the union;
- the union's strategic responses.

Informants were selected from within organizations based on their superior ability to speak to the above questions. Given diversity in organizational structure, multiple informants within a single organization were selected in some cases. Providing further global insights were informants from the OFL, CLC, and WAC, who were in each case senior/executive staff involved in strategic direction of their organization. Consistent with the constant comparative method (Glaser and Strauss, 1967), interviews were subsequently transcribed, and then coded using NVivo software. Loose numerical qualifiers were used at times in presenting the results of the analysis below. Given the non-representative sample, quantitative generalizations would be somewhat misleading; the goal was not to enumerate the phenomenon, but rather to seek to provide some insights into its nature, scope and character.

The next part of the paper provides some general observations on the use of THAE in union landscapes. The third part discusses the range of effects of THAE on unions. Revealed effects fell into two broad categories: effects relating to organizing activities, and effects on various other post-certification, representation activities, presented separately in this part. The fourth part discusses union responses, and the fifth provides some concluding comments.

Some General Observations on THAE within Union Landscapes

Not surprisingly, observations of THAE in union landscapes varied significantly across informants from unions operating in different industries. Some key informants have not observed any significant presence of THAE in their landscapes at all, suggesting it plays a very minor role in certain industries. Several key informants also suggested that they observe THAE being more concentrated in urban settings.

As well, informants cited some general trends in employer strategy around THAE. In particular, organizations that use THAE have been more commonly using it for lengthier, quasi-permanent arrangements to carry out *core* work activities. Several informants reported historically unprecedented observations of workforces where nearly 100% of workers in private sector firms were agency-supplied through either arms-length agencies, or one seemingly controlled by the end-user. Another general observation is that, with few exceptions, informants observe a wage/benefit gap between agency workers and regular employees.

Informants cited a range of explanations for these trends, including: genuine short-term flexibility needs; managerial ideology; corporate re-engineering and reduced HR capacities; and bureaucratic controls on regular employment spending and staffing processes (particularly in the public sector). There was no

across-the-board impression amongst informants that THAE growth has been driven by illegitimate purposes. Indeed, several informants felt that there are significant economic constraints limiting such strategies, including the agency markup fee, and various cost/operational constraints flowing from high turnover and inferior worker quality when using THAE on a large scale. Informants suggested that workers are generally less committed to agency work than traditional employment, and that employers report disproportionately greater problems with agency worker quality.

Effects on Unions

A few informants felt that THAE growth in their landscapes has not created any significant effect on the union, either because it is a relatively small phenomenon, or because they simply don't perceive any significant effect. Most informants, however, cited some (mostly negative) effects, to various degrees, relating to both *organizing* and *representation* activities.

Organizing Effects

The presence of agency workers within workplaces that unions target for organizing seems to have become highly regular in some industries. The organizing director for a large union active in organizing in manufacturing stated that in recent years, at least *some* portion of workforces in organizing targets are agency-supplied "approximately 9 times out of 10."

The presence of agency workers in organizing targets may create various challenges. In each campaign, a union must make a strategic decision to formally include or exclude agency workers from its proposed bargaining unit, and take a position as to whether the agency or the end-user/client is legally the "true" employer. Unions face uncertainty over whether the labour relations tribunal will approve of these positions *ex post* (Bartkiw, 2009). Both the inclusion and exclusion[9] strategies entail risks for the union, and both may be challenged by the employer in the certification process. According to one organizing director:

> the minute there is an agency involved in the organizing campaign, there's going to be a fight at the board… the minute we say "excluding temp workers," the employer jumps and says "oh no, they should be in" and deliberately attempts to screw up the numbers.

Agency worker inclusion in the bargaining unit may also increase union vulnerability to an employer challenge under section 8.1 of Ontario's *Labour Relations Act, 1995*, which enables employers to challenge the *ex ante* sufficiency of the union's membership evidence after a vote has already been held. To raise an

"8.1 challenge," employers merely "check this off" in their certification response form. The difficulty is that if agency workers are less inclined to sign membership cards than regular employees, their inclusion makes it more challenging to meet these requirements. Indeed, most informants felt that agency workers are relatively *less* likely to support unionization, sometimes due to their relative lack of connection with the client organization.

Many organizer informants believe agency workers experience relatively greater *fear* in organizing. One union organizer explained that client firms may be able to exploit agency worker vulnerability by convincing them that if the union becomes certified, there will be no more agency work allowed and they will have to seek reassignment to another workplace by their agency. Agency workers may also serve as a tool for pressuring regular employees not to unionize, particularly where agency and regular workers have established social connections. One informant explained that her union obtained evidence in a recent campaign of agency workers being told that they will no longer be used if the union wins: "the temps began putting pressure on the permanent workers saying 'if you do this, I'm going to lose my job'…that has real resonance."

Even if the end user makes no overt threat, agency workers may nevertheless feel more vulnerable due to the ease in replacing them. As one organizer noted, agency workers regularly express fear of being replaced, even if they are simply absent or go on vacation, so that a greater fear of replacement would apply were an agency worker seen as a "trouble-maker" to support unionization at the client. The informant noted that agency workers have told him that they are *not allowed* to participate in organizing and that this response is so common amongst agency workers in his union's landscape that this suggests that client firms and/or agencies are communicating this message to agency workers in advance. Among other things, responding to this problem requires attempting to explain the legal issue of the "true employer" to agency workers, and its consequences for their ability to unionize, which some unions have tried to incorporate into their organizing materials. One organizer opined that overall, getting support for unionization amongst the agency workers on assignment is a dismal task: "We can't sign the agency people because they are too afraid… it is almost impossible."

One union organizing director provided an alternative perspective that agency workers may often *help* his union's organizing drives succeed, since the underlying *potential* is there for agency workers to be even more supportive of unionization than regular workers, since he feels they have "more to gain." The challenge lies in effective union communication of this message: "we tell them 'those jobs are yours'… it all depends on communication." Some other

factors may make it possible to get support from agency workers. For example, as another informant stated, the longer the temporary placements, the better from the organizing perspective:

> you can do it…especially if they have long term relationships…if they're working there for a couple of weeks it's really hard, they don't have an axe to grind. If they've been working there for a year or so (a) they feel more stable, and (b) they have more issues with their workplace.

At times, inclusion of agency workers in organizing attempts is unsustainable, if the union is unable to obtain sufficient support amongst them, and this threatens success overall. Here, unions may seek agency worker exclusion as a defensive strategy. UFCW informants confirmed that this was its rationale for seeking exclusion in its *Nike* campaign, a strategy thwarted by the OLRB's ruling that Nike was their "true" employer.[10] Agency workers may also be excluded by an *ex post* ruling, if the employer challenges their inclusion. When seeking exclusion, unions hope that agency worker support will be unnecessary. The fear of being unable to exclude agency workers' ballots may weigh on the employees, and the employer may be able to exploit this. As one organizing director stated:

> And then the voting, you do it in a private room, the officer is there, the company and you are there, and all the members see these guys – the temps – coming in and voting even though we told them their ballots are going to be kicked out or kept in, so they are nervous. …so now when you go into the ballot box it's intimidating enough and depending on the situation with the employer [they may] get these guys in to vote first because they are under their control. They phone the agency and say "instead of sending your guys in at six tomorrow, we want them in at five-thirty" to make sure they vote…the members come in and see these guys voting and the employer is telling them in the background "once these guys vote, you don't have the numbers...they are going to vote our way because we are paying them over here through the agency…" so now there is a completely different dynamic when it comes to them casting their own ballot.

When organizing under the exclusion strategy, another concern that may arise is the anticipated effect of agency workers on the new bargaining unit's future strike power. As one organizing director put it, with agency workers already doing the same work as the proposed bargaining unit, "it intimidates some of the workers that there is someone that can take over their jobs immediately, so they're more scared of exercising their right to strike." As this same informant notes, this concern is up front in the organizing stage:

> When you go in there organizing, the first concern of the employees is "are we going to lose our jobs?" [in] any organizing campaign. But you couple that with temp guys

> who are in there [and workers ask], "well what about this guy and that guy, they don't work for us, they are doing our jobs but they don't work for us, how are you going to stop them?" You say "well, I gotta get certified in order to go in there to stop them, or attempt to stop them anyway." So it hurts you there too.

There are various challenges presented by organizing at the *agency level*, towards bargaining units comprised only of agency workers supplied with the agency identified as the employer. Some of these challenges are already identified in the literature (Vosko, 2000; Notebaert, 2006) and were confirmed by informants. With workers assigned to various locations/clients, the union is often unable to determine the whereabouts of co-workers, and their community of interest is reduced by dispersion. Further, the future strike (and bargaining) power of such a group is tenuous, since clients retain the power to switch to competitor agencies, restricting unions' ability to take wages out of competition in this market. Multi-employer, or industry-wide bargaining, which might ameliorate some of these conditions, is not supported by the legal regime. For these reasons, unionization at the agency level is almost non-existent in Canada (Notebaert, 2006).

In this context, the current research revealed two recent cases of organizing that *resembled* organizing at the agency level to varying degrees, illustrating similar constraints. In the first case, a large private sector union successfully organized a unit of approximately 50 workers at a logistics/distribution centre, all of whom were agency-supplied. In the certification process, the respondents claimed that the agency was the true employer. Rather than litigate, the union conceded this position and was certified. Representing this bargaining unit involved a litany of challenges. It was very difficult maintaining union support amongst the workers, given significant turnover. Perhaps because of this, bargaining was extensively delayed and lasted almost two years. Bargaining took place formally with the agency, but was constrained by the ultimate power of the client, which was not present in negotiations, but which the union believes was regularly consulted by the agency. After nearly two years, both parties agreed to interest arbitration. About one week prior to arbitration, the client announced that it was switching to a new agency, threatening to make the collective bargaining exercise moot. In response, the union wrote to the new agency and advised them that it would attempt to pursue successor rights that would bind it to the collective agreement, and suggested that it ought to attend the arbitration hearing. Although the union's ability to enforce this threat was unclear, the client revoked the switch in agencies. A first collective agreement was then achieved by interest arbitration.

Although achieving a collective agreement with an agency here was an unprecedented victory of sorts, it was partly a pyrrhic one. Despite a collective

agreement, maintaining an effective union presence in the workplace was very difficult, as turnover continued and worker commitment required continual reinvention. By the time a collective agreement was reached, only two of the people that had originally supported the union in organizing remained. An informant candidly admitted that union personnel have discussed whether this bargaining unit is "more trouble than it is worth." It is questionable whether this experience may constrain the union's future willingness and/or capacity to pursue similar organizing efforts.

The second example involves personal support workers in the home health care industry. Here, firms operate under a structure similar to the classic temporary help agency in that firms (the nominal employer) assign workers to various clients, and firm profits are based on a markup on the worker's wage. The structural similarity was pronounced enough that the Ontario government deemed it necessary to clarify, in its recent Bill 139 legislation aimed at improving employment standards in THAE, that this new law would *not* apply to home health care firms.[11] Similar to the classic temporary help agency model, these home care workers are dispersed to various client locations, are physically isolated from one another, lacking a central work location and common gathering place. Organizing is thus extremely difficult, particularly amongst the for-profit portion of the sector, which operates even more closely to the temporary help agency model. Although unions have been able to organize some of the non-profit firms, competition over time has shifted market share towards the for-profit (non-union) firms. Thus, the limitations to union organizing at the agency level, based on unions' ability to take wages out of competition, operate similarly in this industry.

Given these various organizing challenges, an important question is whether the presence of THAE in a given workplace might deter unions from targeting it. Informants responsible for union organizing functions said that a significant presence of agency workers in a workplace would not on its own be a deterrent, and nor would the expected costs of dealing with THAE in the organizing campaign (e.g. longer campaign, expected litigation, legal fees etc.). In fact, as noted above, one organizing director actually thought that, to the contrary, agency workers may be helpful in organizing. Union calculus thus seems to focus more generally on the overall likelihood of certification and of achieving a worthwhile collective agreement. However, as one key informant expressed it, the presence of agency workers may *affect* this calculus:

> in some cases when we look at shops, we have to actually walk away from potential organizing campaigns because the issue of temps is so complicated…sometimes the worst thing in the world to do is to have an organizing drive that fails.

Representation (Post-Certification) Effects

Three informants explained that they observe regular patterns in which firms that use agency workers pre-certification discontinue their use post-certification. Sometimes, this may be due to a legal ruling that they (the client) are the true employer and that the agency workers are included in the bargaining unit, obliging them to bargain employment conditions and apply the collective agreement to these workers, perhaps making the agency arrangement redundant. Discontinued use of agency workers may also be the product of the key union response to THAE, namely bargaining strategies aimed at restricting its use, discussed in the next part. Discontinued use of THAE after certification may even in some cases provide *prima facie* evidence of union avoidance as being the original motivation for using THAE in the first place. Whatever the reason, several informants witness this same pattern after certification: "We don't hear of the agency any more, that's it, it's a done deal." This pattern held in some cases where agency work was previously used at extremely high levels, and, at times, the agency workers subsequently remained with the now unionized firm, as regular employees.

However, employer use of THAE may sometimes continue or even *emerge* post-certification, various effects of which are discussed below.

Bargaining Power

The availability of agency workers during a strike makes it easier for a unionized employer to operate, reducing union bargaining power, and build-up of agency worker usage prior to a strike increases this threat.

THAE may also constrain union bargaining power through undercutting market pressure, depending on the cost premium associated with using agency workers. This premium depends on the size of any wage/benefit gap between regular and agency workers, the agency markup, and possibly differences in productivity. Most informants observe a wage/benefit gap in favour of regular employees to varying degrees. Often, agency workers will commonly receive a similar wage, but with fewer or no benefits.[12]

Undercutting pressure may also result from under-enforcement of labour standards of various sorts towards agency workers. For example, one informant noted that his union has repeatedly requested proof from employers that agency workers were insured properly under WSIB, to no avail.

Undercutting effects on union bargaining power may also be rooted in inter-firm competition. For example, one informant stated that for-profit home health care firms (analogous to temporary help agencies) maintain a wage/benefit cost advantage over their non-profit rivals, and take advantage of certain legal exemptions to employment standards (e.g. termination and severance pay)

which are available to them (as firms operating similar to classic temporary help agencies),[13] and which are complied with voluntarily by non-profit firms. This has likely contributed to increased market share for these non-union firms, eroding union bargaining power in this industry.

Depending on the magnitude of THAE use by the unionized employer, erosion of the actual bargaining unit itself, and/or a significant loss (or lost opportunity for expansion) of bargaining unit work, may also become a significant concern. In some cases, such as the federal public service, THAE growth has occurred alongside bargaining unit (membership) growth, muting its salience thus far.

Servicing

THAE may create additional "servicing" challenges for unions. Where an existing collective agreement provides some form of coverage for agency workers, unions need to monitor their usage. Informants explained that it is often difficult to keep track of agency workers and maintain any connection with them. Representatives from one union spend a significant amount of time and resources enforcing job/work assignment provisions, and in dealing with related complaints from members. Issues arise for example as to whether an agency worker's position was supposed to be posted first, or whether the position is actually a vacancy. There is sometimes animosity between employees and agency workers due to the work re-organization needed in order to use lesser skilled agency workers. Further, where agency workers have seniority rights, enforcement is complicated by turnover and the employer's failure to terminate agency workers at the end of their assignments:

> if they don't terminate anybody, at the end of five years they could have 500 people on the seniority list that don't work for them. It's those people who aren't getting their rights under the CA [which we are insisting upon] so the employer doesn't get sloppy with the rest of the real employees and their rights.

As well, these arrangements may affect overtime arrangements and erode overtime opportunities for regular employees.

Union Culture and Morale

Differences in compensation/treatment between employees and agency workers may affect union morale. Where agency workers are used on a larger scale, their inclusion presents a more general challenge to traditional union culture. The following quote from one informant captures this concern:

> Probably one of the most interesting parts of the conversation is …. are *we* prepared to live with this ideologically *as a union*? Do we have the culture for these new type of employments that are opening up all over the place? Because historically, we were set to deal with large units of people that stayed there for life…maybe these aspects of our own culture are not necessarily serving our own members. Then around temp

> agency the whole conversation is: is our culture – *our* culture, not even the employer – prepared to help us to deal with this situation we are describing, or [will] our culture tell us "[expletive], get it away because it is a pain in the neck, we cannot be the union."
>
> …We don't have a model, but we have a way of thinking of how things have to be done. It's not like we approve by constitution, by law, that this is the way that it has to be. No! It could be any way. But in our own heads, in the way that we are set up to serve locals and to do this and to do that…the expectation is that [on] the other side you have to have something of this particular shape. If it has *another* shape? .... We are not creative enough on tackling the new working relations that people are having.

Safety Issues

Informants reported a mix of observations regarding who tends to assume the risk of dangerous work, an issue identified in the literature (Storrie, 2002). Some informants have observed agency workers being pressured to work with insufficient training and/or safety measures, or without WSIB coverage, or are pressured not to report injury claims. At times, an opposite effect occurs, where work reorganization redirects more difficult/dangerous work to *regular* employees, in order to facilitate the use of agency workers. For example, during the SARS crisis in Toronto, it was a general pattern that regular (often unionized) nurses were required to work in the SARS restricted areas, while agency nurses worked in the non-SARS areas. Either of these effects may potentially generate internal conflict or effects upon union morale.

Economic Adjustment and "Action Centres"

Functioning at times with government[14] and/or employer support, union action centres assist workers seeking reemployment and/or retraining. Through their recent increasing control over job vacancies in the labour market, temporary help agencies have significantly affected activities of these union-operated centres. For example, the coordinator for one of the largest regional union job action centres in Ontario stated that, at any point in time, while they may have hundreds of job descriptions posted on the walls of the union's action centre, if they removed THAE postings, there would be few jobs left.

Aside from internal union "job boards," job searchers themselves are largely dependent upon websites such as "Job Bank," operated by HRSDC, and one action centre coordinator has concluded that the vast majority of advertisements on these websites are from temporary help agencies. Agencies routinely send job descriptions to action centres, requesting large volumes of resumes for review, and action centre staff have found themselves carrying out time-consuming screening tasks on behalf of agencies, which one informant suggested often neglect to communicate the results of union member job search activity.

Union Responses

Organizing and Outreach

One generalization that stands out fairly clearly is that unions do not in general, or consciously, target agency workers *per se*, as a category of workers to organize. Rather, unions select target workplaces for various reasons, some of which may contain agency workers, and then respond to agency worker presence on an *ad hoc* basis. Aside from conscious efforts to organize analogous workers discussed in the previous part (e.g. home health care workers), informants were not aware of any organizing drives aimed specifically at agency workers in their status as such. That said, many unions are becoming increasingly aware of agency workers being dispersed across workplaces in their landscapes.

As noted in the discussion of effects on organizing activities in the previous part, agency worker presence in a targeted workplace creates a strategic decision for the union: whether to seek to include or exclude these workers from their organizing efforts, with particular challenges arising under either choice. Despite the common view that agency workers are relatively more difficult to organize, most informants advised that their union would generally prefer to include them in certification attempts. Some informants stated also that in decisions about organizing, their personnel will often operate under an assumption that the union will be forced to include agency workers in the bargaining unit. This is a prudent strategy wherever an *ex post* ruling that they be included seems feasible, arguably a greater concern since the recent OLRB decision in the *Nike* case including agency workers in the bargaining unit, against the union's request, resulting in the dismissal of the certification application.[15] Several informants, aware of this decision, stated that they feel they must accordingly pursue agency worker support as much as possible, to reduce the risk of their support being watered down, once agency worker ballots are counted.

Two informants suggested that strong insiders are all the more essential in organizing scenarios involving agency workers, in order to engage with and keep track of agency workers, their contact information, and status. A few informants noted that their unions have engaged in a form of "salting" by having union representatives apply for work through agencies identified as the recruiter for specific companies, to increase their understanding of working conditions and of the agency/client relationship.

As well, three informants felt it important not to overstate the separate effects of agency worker presence, since in their view, every organizing campaign presents unique challenges, and each campaign is always tailored to the peculiarities of the target workforce, such that their practices in organizing agency workers are not "uniquely unique." For example, while organizing

campaign literature may be revised to address THAE, it may also be tailored to the specifics of every campaign.

A few unions have also undertaken some community outreach activities towards agency workers. This seems to have primarily involved offering information about workers' rights, with little development towards the creation of alternative organization models. A local president of a large public sector union noted that that union has been considering a proposal for a new organizational structure to which workers might affiliate, but that there has been insufficient support from the parent union to make this viable.

Collective Bargaining

For many unions, bargaining strategies are the main, or only, response to THAE. Bargaining responses may be limited in the public sector by legislative restrictions over staffing. Although agency worker inclusion/exclusion may have been determined during the certification process, it may also be possible to negotiate inclusion. Where agency workers are included, the union may negotiate various benefits for them, including improved job security, in the form of rights to post into permanent positions. Where excluded, unions seek restrictions on them performing bargaining unit work. For example, unions may seek to codify circumstances in which the employer is entitled to use agency workers, or seek preferential redeployment rights in favour of retired or laid-off workers.

Overall, most informants stated their union would prefer to include agency workers, but that they often lack either sufficient support in the organizing process, or lack bargaining power to successfully negotiate their inclusion. Inclusion may also sometimes be achieved through grievance arbitration (depending on the nature of the bargaining unit description, negotiated scope clause, and the degree to which the end-user has assumed *de facto* employer responsibility over the workers) where an arbitrator finds that the client is the true employer and must apply the collective agreement to agency workers.

Unions may also bargain informational entitlements concerning THAE. The existence of these sorts of disclosure obligations are not common, but exist primarily where unions have negotiated numerical restrictions on THAE,[16] since disclosure is necessary for monitoring compliance.

Another bargaining response is to negotiate alternative forms of labour flexibility. For example, one union tries to maintain a pool of retirees, available through the union for short term placements. While this arrangement has been used sporadically, employers have been reluctant to use it as a significant substitute for agency workers, possibly out of a desire to limit union involvement in staffing and/or to preserve employer control.

Despite some discussion over the idea of "hiring halls" to displace THAE, unions have apparently not been highly enthusiastic about this concept. Such arrangements create difficult co-ordination problems that the union may not be able or willing to undertake. It is challenging to keep large numbers of workers sufficiently available for immediate temporary assignments, while also keeping them sufficiently employed over time to make it worthwhile for them to remain in the arrangement. The Ontario government previously operated such a program called GO Temps, an in-house pool of workers available for temporary placements throughout the public service. This program was phased out of existence by the PC government, which dramatically increased expenditures on temporary help services. Although there was some discussion about the Ontario Public Sectors Employees Union (OPSEU) assuming responsibility for the GO Temps program, this evaporated quickly. Subsequent discussions occurred over a similar program between OPSEU and the Liberal government in 2006, to no avail. One informant explained that that the government's apparent expectation was to have OPSEU function as a sort of temporary help agency of first choice, but with little difference in the recruitment process or the extent of employer liability. The government was unwilling to assume any greater long term obligations towards temporarily assigned workers. OPSEU itself also found it difficult to conceive of a large structural alternative to THAE that would somehow increase job security of temporary workers within the context of existing (OPSEU) job security and career development schemes:

> ultimately, it's the easiest thing to call Kelly's and put the Kelly person in as the boss' secretary for six months as opposed to figuring out a "keep it in the family" solution that doesn't cause more problems than it's worth.

Information and Research

Unions commonly possess limited information about THAE within represented workplaces, although some have recently initiated information collection. One approach, referred to above, is to bargain for disclosure requirements. The Public Service Alliance of Canada (PSAC) also recently lobbied (unsuccessfully) the Public Service Commission (PSC) to revise its employee survey to help track the volume of THAE and agency worker feedback.

Unions may also gather information from their membership. The two largest unions in the federal public service have been trying this approach to some extent. PSAC created an internal "tempwatch" program, and the Professional Institute of the Public Service of Canada (PIPSC) surveyed its members about work being done by "contractors" broadly. Other unions, primarily in the public sector, have also assigned related research tasks to staff members or consultants.

Lobbying and Public Relations

Some unions have performed lobbying activities around THAE. One of the primary activities undertaken (by three unions and the Ontario Federation of Labour (OFL)) was to participate in recent legislative hearings over Bill 161 (which lapsed) and Bill 139.[17] Both Bills focused on employment standards reform, such as removing certain exemptions available to agencies as employers.[18] Bill 139 also imposed restrictions on hiring fees and other contractual barriers to the hiring of agency workers by clients. For the Canadian Union of Public Employees (CUPE) and the Service Employees International Union (SEIU), their focus was primarily on the Bill's specific exclusion of the vast majority of home health care workers from the new reforms.[19] Some informants explained that to some extent, their union's role here was to support and "follow the lead" of the non-profit Workers' Action Centre in its lobbying efforts.

Some unions have engaged in other related lobbying. Some continued lobbying activities towards card-based certification (i.e. the removal of the mandatory vote requirement regardless of the level of initial membership support), which some informants suggested would be their union's preferred legislative response to THAE's effect on organizing. Some have lobbied directly, or through OFL efforts, for union access to employee lists and contact information, which might also ameliorate THAE's effects on organizing.

A few unions also engaged in limited public relations activities around THAE. Some public sector unions have sought to align concerns about THAE growth with broader concerns around value for money and/or quality public services, subsuming this as part of a larger strategy against contracting-out, and have attended public meetings and/or legislative committee meetings. Lastly, there are isolated examples of unions raising awareness of the plight of agency workers while speaking with the media.[20]

Inter-Union and Union-Activist Relations

There has been little inter-union coordinated response to THAE growth. Neither the CLC nor the OFL has undertaken any specific campaign about THAE. References to THAE growth were included in some CLC resolutions adopted, and discussion of THAE has been included in some of its educational activities. A CLC official explained that labour movement reaction has been limited partly due to the fact that THAE growth has occurred primarily in the non-union sector, and that bargaining responses, undertaken by individual unions at already unionized workplaces, comprise the bulk of labour movement response to THAE.

OFL representatives stated that they locate the issue of THAE as merely part of a larger campaign on changing workplaces, law reform and union revitalization.

The OFL did not submit a brief to the Ministry of Labour's law reform consultation process on THAE in 2008, citing inadequate time to do so, but did make a presentation in the subsequent Bill 139 hearings. Concerns around THAE have recently entered OFL discourse primarily because of agency influence on union job action centres. One idea discussed was a protest event in which action centres would remove all THAE from their vacancy lists/boards for one day, but this never materialized. The Bill 139 hearings sparked some degree of inter-union dialogue and co-ordination of positions amongst the few interested unions, although even here there was apparently no clear common front of union priorities established.[21]

Some unions affiliate with larger international union associations (e.g. UNI, or the International Metalworkers' Federation) that perform educational and advocacy work on THAE. A few unions have also provided forms of support to the non-profit Workers' Action Centre (WAC). Although it has from the outset preserved its independence, WAC maintains a limited, evolving relationship with the OFL and certain individual unions. In practice, one member of the WAC's board of directors has been a representative from the OFL. While most of its budget (approx. $450K annually) comes from private charitable foundations, the CAW Social Justice Fund has donated $20K annually. The WAC also recently received a one-time donation of $5K from UFCW and PSAC, and small donations from the Steelworkers Humanities Fund. The OFL itself has provided no financial support to the WAC. Some unions have provided in kind assistance, such as photocopying or printing services to support a WAC campaign, on an *ad hoc* basis.

Economic Adjustment and Action Centres

One of the largest union action centres in Ontario recently adopted a policy of not dealing directly with temp agencies, and counsels its members to avoid them as much as is feasible. Its new approach is one of employer outreach, where it seeks to build direct, and exclusive recruiter relationships with employers. This centre offers its services to employers for free, and thus doesn't face the same pressure as agencies to capture profits quickly from hastily created matches. It has had some early success with some employers expressing frustration over service quality provided by agencies. The new approach may transform the action centre's mandate from being dependent upon plant closures to being a more quasi-permanent organization, and it expects support for this approach from the Ministry of Training, Colleges and Universities (MTCU).

"Engagement"

There appears to have been very little union appetite for engagement with the temporary help industry. Most informants felt that engagement made little sense in their contexts, citing a lack of mutual interests. Some felt the temporary help

industry would not be receptive to any meaningful union proposals since they felt that there is little that unions could offer the industry. Some informants were generally skeptical of the notion that unions might be able to offer improved legitimacy of sorts to the industry, suggesting that the industry would likely prefer its own public relations activities instead. As well, some informants noted that the potential for engagement is limited by the large number of agencies, and by the perception that so many of them are "fly by night" operations.

Although no large scale engagement has taken place, a few sporadic moments may be noted. In the federal public service, PIPSC observes some potential common front between itself and an organization called CABiNet, a group of agencies that united to jointly lobby against federal government plans to initiate large scale bundling of computing services projects for outsourcing. Members of CABiNet feel that the awarding of such large scale projects to single contractors reduces their opportunities to supply workers for projects and/or their bargaining power in supplying workers to successful bidders. Engagement here has been primarily communication and information exchange. One union representing home health care workers has also considered trying to build upon some shared principles/interests between itself and an employers association of predominantly non-profit employers, but sees little rationale for engagement with the for-profit sector.

Conclusion

In the context of increasing academic attention to the prospects for union renewal, this study involved an initial exploratory analysis of the effects of THAE growth upon unions and their responses to this phenomenon. Although methodology[22] here limited the ability to enumerate the phenomenon and generate quantitative generalizations, certain new insights may be developed from this study to increase our understanding of the nexus between unions and THAE growth, and assist in developing further research questions to explore this area in more detail.

Overall, the evidence clearly suggests that THAE growth carries the potential to constrain union organizing activities to varying degrees depending upon context, and in multiple ways. Mediated by the norms and rules of the labour law regime, THAE may exacerbate the complexity and cost of organizing activities, affect the likelihood of certification in a given organizing campaign, and potentially skew some organizing activities away from workplaces laden with THAE. Thus far, unions have largely maintained traditional organizing practices with *ad hoc* adjustments to the increased presence of THAE, where required. There is so far little evidence of union efforts to develop alternative organizational arrangements to address the peculiar needs of agency workers.

THAE growth may also potentially affect union representation activities through market-based effects on union bargaining power; bargaining unit erosion; additional resource and information demands in representation; and safety and morale effects. Where unionized employers seek to use THAE, some unions have responded with bargaining/arbitration strategies with mixed success. Information strategies may be somewhat of an enabling prerequisite to effective bargaining/servicing, particularly in large workforces. While bargaining strategies are somewhat consistent with Heery's exclusion strategy, the focus is less on excluding agencies from the market and more on preventing the erosion of collective bargaining. While some attention has been given to bargaining alternative forms of flexibility (akin to Heery's replacement strategy), given the burden that may fall upon unions themselves in such arrangements, there has been limited union interest in large scale arrangements.

Overall, despite the increased salience of THAE, union responses have been largely limited to incremental adjustments aimed at shoring up collective bargaining arrangements normalized by past practice, culture, and/or the legal regime. There has also been little concerted *collective* labour movement response to growth in THAE, in any of the four alternative directions cited by Heery (2004). Rather, within this relative vacuum of labour movement voice, the independent Workers' Action Centre has assumed a leadership and representational role in its lobbying activities (focused on a regulation strategy), to some extent acting on behalf of the labour movement, and with limited resources provided *ad hoc* by some unions. A potential cost in this implicit delegation here is that the effects of THAE growth upon unions may be insufficiently articulated by this non-union actor. As well, to an extent, labour may have collectively enabled THAE growth over time by acquiescing to the temporary help industry's increased control over job vacancies and placements in the labour market. It remains to be seen whether union responses – such as that of a particular union action centre seeking to substitute itself in place of agencies – will significantly alter the union-agency nexus in future.

Notes

1 See Statistics Canada Cansim tables 361-0001, 382-0001, 382-0006, and Hamdani (1997).

2 Statistics Canada publishes an annual *Service Bulletin: Employment Services* document providing certain descriptive statistics on the "Employment Services" industry, of which the temporary help (or "temporary staffing") industry is a subset. Recent bulletins reveal that proportion of total Employment Services industry revenue accounted for by temporary staffing services revenues has been declining somewhat over the last decade, but as of 2009 still accounted for 63.2% of total industry revenues. See Statistics Canada (2011).

3 Author's calculations based on Survey of Employment, Payroll and Hours ("SEPH") data in Cansim Table 281-0023.

4 In 2009, 85.9% of employment services revenues came from the "business sector." See Statistics Canada (2011).

5 Using 2002 SLID data, Fang and Gunderson (2005) found the following distribution: management and admin support (56.1%), manufacturing (17.9%), information, culture and recreation (8.7%), trade (5.8%), construction (4.4%), and health and social services (4.3%).

6 Using 2002 data, Fang and Gunderson (2005) estimate the union coverage rate to be 6.5%. Data on distribution of agency worker union coverage broken down by industry is not available.

7 A small exception, Borowy (2006) provides some statistics on THAE growth in the Ontario Public Service in the 1990s and discusses certain union responses to this.

8 Of some concern, there may be significant room for overlap between Heery's categories. For example, a regulation strategy may result in significant exclusion of agencies and their workers from the labour market (exclusion strategy), or in shifts in the character/practices of agency organizations supplying workers (replacement strategy). Further, care must be taken not to present different categorical responses as being equally available, or equally (un) constrained choices facing unions.

9 The words "inclusion" and "exclusion" from this point onwards refer to whether agency workers are included in newly organized bargaining units, or not, and thus have different meaning than when used in Heery's typologies.

10 See *Nike Canada Ltd.*, 2006 CanLII 24724 (ON LRB). Bartkiw (2009) argues that this decision reinforces the uncertainty and risk to unions in organizing workplaces that include agency workers.

11 See s. 74.2 of *An Act to Amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters*, S.O. 2009, c. 9.

12 In extraordinary occurrences, agency workers may be paid *more* than unionized employees. For example, during the SARS crisis in Toronto, many agency nurses were receiving an hourly rate of about $100, while ONA members received approximately $35. As time passed, the traditional wage/benefit gap returned.

13 See in particular sections 2(1) (12) and 9(1) (9) exempting home health care workers from entitlements to both termination and severance pay, when their arrangement allows them to "elect to work." Note also that these exemptions are scheduled to be revoked in Fall of 2012.

14 Governmental financial support for such activities is available from the Ontario Ministry of Training, Colleges and Universities and/or through the federal Employment Insurance program.

15 See *Nike Canada Ltd.*, 2006 CanLII 24724 (ON LRB) and analysis in Bartkiw (2009).

16 For example, ONA recently negotiated such terms in a number of Toronto hospital network collective agreements.

17 Bill 139 took effect in May 2009.

18 Bill 161 also included licensing scheme and a form of joint liability between agencies and clients that was not included in Bill 139.

19 *Supra*, note 11.

20 For example, the Toronto Star interviewed some union representatives, during its coverage of the hearings on Bill 139.

21 For example, while CUPE and SEIU were primarily concerned about the exclusion of home health care workers, UNITE-HERE was more concerned about the issue of joint liability.

22 These may include the non-representative sample, and the fact that (due to resource constraints) data on union behaviour were collected from union officials and representatives themselves, and not from a large number of workers.

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SUMMARY

Unions and Temporary Help Agency Employment

Temporary help agency employment (THAE) is a peculiar and often precarious employment form that has become increasingly salient in Canada in recent decades. Seeking to advance both the literatures on precarious work and union renewal, this article examines the effects of the expansion of this unique employment form upon labour unions, and union responses to this phenomenon.

The study employed a qualitative exploratory method, involving twenty-four interviews with key informants from fourteen large labour unions, two union federations, and the Toronto-based workers' centre known as the "Workers' Action Centre." Various effects of the expansion of THAE on unions were identified and categorized as relating to either union organizing or representation activities, and a range of union responses to the phenomenon are also discussed.

Overall, it is suggested that THAE growth carries the potential to constrain organizing and representation activities in multiple ways, although its effects are highly mediated by other contextual factors. Union responses have thus far been largely limited to incremental adjustments aimed at shoring up traditional organizing and collective bargaining practices.

KEYWORDS: unions, temporary help agencies, temporary agency employment

RÉSUMÉ

Les syndicats et l'emploi temporaire via les agences de placement

L'emploi temporaire via des agences de placement est une forme d'emploi singulière et souvent précaire qui est devenue de plus en plus répandue au Canada au cours des dernières décennies. Dans le but de faire progresser les écrits sur l'emploi précaire et le renouveau syndical, cet article étudie les effets de la croissance de cette forme unique d'emploi sur les syndicats et les réponses de ces derniers à ce phénomène.

L'étude a recours à une méthodologie exploratoire qualitative comprenant vingt-quatre entrevues avec des informateurs-clés en provenance de quatorze grands syndicats ainsi que deux fédérations syndicales et un centre de travailleurs basé à Toronto (Workers' Action Centre). Divers effets de la croissance du travail temporaire sur les syndicats sont identifiés et catégorisés selon qu'ils concernent les activités d'organisation syndicale ou les activités de représentation syndicale et un éventail de réponses syndicales au phénomène sont discutées.

Globalement, il est suggéré que la croissance du travail temporaire présente un potentiel réel pour contraindre les activités d'organisation et de représentation syndicales de multiples façons, bien que ses effets soient hautement médiatisés par d'autres facteurs contextuels. Aussi, à ce jour, la réponse des syndicats s'est largement limitée à des ajustements progressifs visant à renforcer les pratiques traditionnelles de représentation et de négociation collective.

MOTS-CLÉS : syndicats, agences de placement temporaire, travail intérimaire

RESUMEN

Sindicatos y empleo de agencia de ayuda temporal

El empleo de agencia de ayuda temporal (EAAT) es una forma de empleo peculiar y a menudo precario que se ha vuelto cada vez más importante en Canadá en las últimas décadas. Tratando de contribuir a los estudios sobre el trabajo precario y la renovación sindical, este artículo examina los efectos de la expansión de esta forma única de empleo sobre los sindicatos y sobre las respuestas sindicales a este fenómeno.

El estudio empleó un método cualitativo exploratorio, implicando veinticuatro entrevistas con informadores claves de catorce grandes sindicatos laborales, dos federaciones sindicales y del centro de trabajadores de Toronto conocido como el "Centro de acción de los trabajadores". Diversos efectos de la expansión del EAAT en los sindicatos fueron identificados y categorizados como vinculados a la organización sindical o a las actividades de representación; una gama de respuestas al fenómeno son también discutidas.

En general, se sugiere que el crecimiento del EAAT tiene el potencial de restringir las actividades de organización et de representación de múltiples maneras, aunque sus efectos son fuertemente mediados por otros factores contextuales. Las respuestas sindicales han estado hasta ahora limitadas a ajustes graduales orientadas a reforzar las prácticas tradicionales de organización y de negociación colectiva.

PALABRAS CLAVES: sindicatos, agencias de empleo temporal, empleo de agencia temporal

BABY STEPS? TOWARD THE REGULATION OF TEMPORARY HELP AGENCY EMPLOYMENT IN CANADA

Timothy J. Bartkiw†

I. INTRODUCTION

It is now more than a decade since the International Labour Organization (ILO) adopted Convention No. 181 Private Employment Agencies Convention 1997,[1] and its accompanying Recommendation No. 188 Private Employment Agencies Recommendation 1997,[2] significantly altering its longstanding position on the role of employment placement agencies and temporary help agencies. The Convention officially recognized the legitimacy[3] of temporary help agencies and the employment relations they construct and ostensibly set out to recommend a framework of principles to guide domestic regulation of these employment relationships. The ILO has since been criticized for its abandonment of prior policy, and for the lack of guidance the Convention provides for crafting progressive policy in this area.[4] While some policy development around temporary help agency employment has occurred in a few states since 1997, a rather stark outcome is that, after a decade, very few ILO members have even ratified this Convention.[5] Subsequent ILO deliberations over the topic of the "employment relationship" culminated in the adoption of Recommendation R198 in 2006, containing complementary

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1. *Available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181 [hereinafter the Convention].

2. *Available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?R188 [hereinafter the Recommendation].

3. For example, the Convention's preamble states "Considering the very different environment in which private employment agencies operate, when compared to the conditions prevailing when the above-mentioned Convention was adopted, and Recognizing the role which private employment agencies may play in a well-functioning labour market. . . ." The Convention, *supra* note 1.

4. *See, e.g.*, LEAH F. VOSKO, TEMPORARY WORK: THE GENDERED RISE OF A PRECARIOUS EMPLOYMENT RELATIONSHIP (2000).

5. At the time of writing, only twenty ILO member states had ratified Convention 181. An online list of countries was reviewed on September 10, 2007, *available at*: http://www.ilo.org/ilolex/english/newratframeE.htm.

suggestions for state regulation and the combating of "disguised employment."[6]

This paper seeks to provide, against the backdrop of this new international normative context, a comprehensive review of contextual aspects of temporary help agency employment, and a critical examination of recent policy developments toward the regulation of temporary help agency employment in Canada. The paper begins by analyzing recent trends in the growth of temporary help agency employment in Canada. Following this is a review of increasingly salient labor policy concerns emerging within this context. Policy "problems" are identified, under explicit normative assumptions provided in this paper, both from a review of prior literature complemented with additional analysis of the content and functioning of multiple aspects of Canadian law. Subsequently, the paper then provides an assessment of the trajectory of Canadian policy reform through a review of aspects of four key policy process "moments" within three different regulatory jurisdictions in Canada[7] (the provinces of Ontario and Quebec, as well as the federal jurisdiction), which collectively reveal the nature of recent policy discourse and the trajectory of policy development. Chronologically, these four moments were the establishment by the Quebec provincial government of the "Bernier Commission" and the publication of the "Bernier Report"[8] in 2003; the establishment of the Federal Labour Standards Review Commission by the federal government (the "Arthurs' Commission") and the publication of the "Arthurs' Report"[9] in 2006; the sponsoring of Bill 161[10] in 2007, a private member's Bill that was ultimately not passed by the Ontario legislature; and the legislative passage of Bill 139[11] in Ontario in May 2009. It is argued that in light of the overall context, including salient policy concerns and contrasting developments in Europe, recent Canadian policy developments and dialogue are comparably minimal, yet reveal aspects of a pattern in Canadian policy trajectory or, the direction of "baby steps" in this domain.

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6. *Available at* http://www.ilo.org/ilolex/english/recdisp1.htm. Note that in paragraph 23 of this Recommendation, the ILO Conference took pains to state that this Recommendation does not in any way revise the prior Recommendation 188, and that it cannot revise Convention 181.

7. The Canadian Constitution assigns primary responsibility for labor and employment regulation to the ten individual provinces, while the federal government maintains jurisdiction over labor and employment regulation concerning various types of federally regulated industries and undertakings.

8. JEAN BERNIER, GUYLAINE VALLEE & CAROL JOBIN, LES BESOINS DE PROTECTION SOCIALE DES PERSONNES DE TRAVAIL NON TRADITIONNELLE, RAPPORT FINAL (Quebec: Ministere du Travail, 2003), *available at* http://www.travail.gouv.qc.ca/publications/rapports/alphabet.html.

9. HARRY ARTHURS, FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY (Gatineau: Human Resources and Skills Development Canada, 2006).

10. An Act Respecting Temporary Help Agencies, Bill 161, 38th Legislature, 2nd Session, Ontario, 2007.

11. An Act to Amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters, S.O. 2009, c. 9.

II. RECENT GROWTH IN TEMPORARY HELP AGENCY EMPLOYMENT IN CANADA

There is evidence of a global growth in the temporary help agency industry over the past few decades. For example, a major European study found that most European Union Member States witnessed a significant growth in this sector in the 1990s, such that in almost every member of the EU, this sector grew between two- and five-fold during this decade,[12] prompting some states to increasingly regulate these arrangements, with varying intensity. In the same study it noted that in the United States, growth in temporary help agency services accounted for fully 10% of net U.S. employment growth in the 1990s, and that by the end of 2001, approximately one in thirty-five U.S. workers (2.9%) was an employee of the "Help Supply Services" industry, which category is primarily devoted to temporary help agency work.[13]

Evidence suggests that this sector has expanded rapidly in Canada as well lately, although its size remains relatively smaller than that witnessed in the United States and many EU states. The shortage of official public data tracking temporary help agency employment in Canada, perhaps an indicator in itself of policy ambivalence, deserves slight discussion. Statistics Canada has employed several different general surveys on the state of the labor market over time, some performed on an *ad hoc* basis, while others represent ongoing long term data collection efforts. Unfortunately, most of these instruments treat temporary help agency employment as one subcategory of temporary employment, and only collect data on the latter, broader category.[14] Both the Survey of Labour and Income Dynamics (SLID), and the older Survey of Work Arrangements (SWA) (performed only in 1991 and 1995) ask respondents about their jobs and whether the job being discussed is "in some way . . . not permanent." If the respondent answers "yes" to this question, then s/he is asked to indicate the way in which it is not permanent, and one possible response to this second follow-up question in both surveys is that the job is work done

12. *See* DONALD STORRIE, TEMPORARY AGENCY WORK IN THE IN THE EUROPEAN UNION (2002). Storrie finds this range of growth rates in this sector for every EU member country except Greece.

13. *Id.*

14. The Labour Force Survey (LFS) asks respondents to identify where s/he found work in a prior 4 week period, and one of the possible answers identified is "private employment agency." It also asks whether a new job held is in some way "not permanent", and the way in which it is not permanent, although the coded answer in the Guide provides the very broad "temporary, term or contract job" as a suggested response. In the "Workplace Questionnaire" of the Workplace Employee Survey (WES), respondents are asked to identify: the number of independent contractors that supplied services to the firm in a particular time (question I(h)); the manner in which vacancies were filled (question 4(a)); and whether there has been a greater reliance on "temporary workers" (questions 20 and 21(a), and 34 (h)). In none of these questions were respondents requested to provide any information specifically about the use of workers supplied through temporary help agencies.

through a temporary help agency.[15] However, measurements of the extent of temporary agency help employment based on responses to these two-part questions seem poised to *understate* the extent of this phenomenon for two reasons. First, given that temporary help agency workers may well be working on a full-time basis, and/or on a lengthy term, it is possible that workers may not identify this "non-standard" arrangement as being "not permanent." Further, such workers may not identify the fact that their employer is a temporary help agency as the reason for the impermanence, but rather may simply specify that they are on a limited term "job" (read: assignment by the agency).[16] On the basis of 2002 SLID sample data, a recent study found that approximately 0.2% of the labor force in 2002 worked through temporary help agencies.[17]

Alternative, indirect measures of temporary help agency employment in Canada also exist. One key indirect measurement is the size of the temporary help services industry, measured in total industry revenues and expenses.[18] Unfortunately though, consistent data is only available for the "employment services" industry,[19] and not for the more precisely defined "temporary help services industry,"[20] the latter being defined, under the North American Industrial Classification System (NAICS), as a subset of the former.[21] Nevertheless, there is some evidence that data on the employment services industry overall may serve as a decent proxy for the behavior of the temporary help services industry, since it is known that in 2005, industry revenues from temporary help services accounted for approximately 78% of the total revenue for the employment services industry.[22] Table 1 provides data on annual operating revenues; operating

15. *See, e.g.*, questions 40 and 45 of the SLID, 2004 and questions 31 and 32 of the SWA, 1995.

16. It should be noted that this method of data collection does not rely upon the identity of a worker's employer as the basis for "counting" the number of temporary help agency workers at a given time. Thus, concerns that have been addressed for example by the Bureau of Labor Statistics in the U.S. context about the effect of worker registration amongst multiple agencies, do not affect the data or the analysis herein.

17. *See* TONY FANG & MORLEY GUNDERSON, EMPLOYMENT PATTERNS OF NON-STANDARD WORKERS: AN ANALYSIS USING SLID (2005).

18. This data is collected by Statistics Canada through its annual Survey of Service Industries: Employment Services, and was previously gathered through its Survey of Business Services. It has been argued that because of the wide range of employment duration, industry revenues may even be a more accurate indicator of the extent of underlying employment relations than the number of people employed by the industry in a given year. *See* DAOOD HAMDANI, THE TEMPORARY HELP SERVICE INDUSTRY: ITS ROLE, STRUCTURE, AND GROWTH (Analytical Paper Series No. 10, 1997).

19. The NAICS code for this industry is 5613.

20. The NAICS code for this industry is 561320.

21. Although Statistics Canada collects this more detailed information for the temporary help industry specifically, as part of the Survey of Service Industries: Employment, it has not released any data broken down to this specific level, and refused to provide it to the author, citing confidentiality concerns arising from the smaller sample size.

22. *Employment Services Industry*, THE DAILY, May 16, 2007. This implicitly assumes that the ratio of revenues from temporary help services to other employment services is fairly constant over time.

expenses; salaries, wages, and benefits; and the number of business establishments in the "employment services industry" in Canada over selected recent years. Figures in brackets represent annual growth rates from the prior year.

Table 1
Employment Services Industry: Revenues, Expenses, and the Number of Establishments

Year	Operating Revenue (millions of $)	Operating Expenses (millions of $)	Salaries, Wages and Benefits (millions of $)	Number of Business Establishments
1998	4047.3	3882.4	3208.7	
2000	5144.1	4842.0	3824.7	3290
2001	5125.0 (-.4)	4933.9 (1.9)	3957.3 (3.5)	3616 (9.9)
2002	5420.7 (5.8)	5227.4 (5.9)	3908.8 (-1.2)	3934 (8.8)
2003	5689.1 (5.0)	5491.9 (5.1)	4118.7 (5.4)	4211 (7.0)
2004	6124.4 (7.7)	5888.8 (7.2)	4379.3 (6.3)	4255 (1.0)
2005	7182.3 (17.3)	6909.3 (17.3)	5099.5 (16.4)	4384 (3.0)

Source: Statistics Canada, Cansim, Table 361-0001.

Data in columns 2, 3, and 4 provide indicators of the monetary value of the labor supplied by this industry, or the volume of Canadian employment performed under triangular arrangements. The data clearly suggests strong growth in the monetary value of this labor over the past five years, and especially in 2005, the most recent year for which data is available, in which each indicator grew by approximately 17%.

Table 2 displays industry revenues for two specific years for which data is available for the more precise industry definition. The data reveals that between the years 1993–2005 there was not only significant growth in industry revenues, but that this growth significantly surpassed the growth rate in total labor income. If we may assume that industry revenues provide a stable proxy for the monetary value of underlying labor supplied by the industry over time, then the *share* of total labor income earned under these triangular employment arrangements grew by 128% between 1993 and 2005.

Table 2
Temporary Help Services Industry: Revenues in Proportion to Total Labor Income (billions)

Year	Temporary Help Industry Revenues	Total Labor Income	Industry Revenue/Total Labor Income
1993	$1.4[23]	$394.815	0.354 %
2005	$5.602[24]	$694.041	0.807 %

Sources: Statistics Canada, Cansim, Tables 361-0001, 382-0001, 382-0006, and Hamdani (1997).

In addition, evidence suggests that temporary help agency employment is clustered along certain industrial and occupational categories, so that in various categories, trangular employment arrangements represent a much greater relative share of total employment,[25] which occupational clustering in turn has generated specialized agencies serving narrowly defined industrial clientele niches.[26] As well, most temporary help agency employment seems clustered in four key provinces (Ontario, Quebec, Alberta, and British Columbia), given that these provinces accounted for 96.6% of total Canadian employment services industry revenue in 2005,[27] and 95.1% of the total number of temporary help workers in Canada.[28]

III. SALIENT LABOR POLICY CONCERNS

The significant expansion of temporary help agency employment in various countries has generated some debate about the consequences of this expansion. Analysis through an essentially neoclassical economic lens sees this as a natural response to market signaling and suggests three key potential benefits from this expansion. First, it responds to increased

23. This figure is provided in HAMDANI, *supra* note 18.

24. This amount is based on the statement published by Statistics Canada that in 2005, temporary help services accounted for 78% of the revenues for the "employment services industry." *See supra* note 22.

25. Using SLID data, Fang and Gunderson estimated that in 2002, the industries with the largest percentage of the total number of temporary help workers were: management and administrative support services (56.1%), manufacturing (17.9%), information, culture and recreation (8.7%), trade (5.8%), and construction (4.4%). Based on industry revenue data, Hamdani calculated that the types of labor most commonly supplied were: administrative and clerical (37.9%), general labor (18.6%), drivers and equipment operators (13.5%), professionals (excl health) (10.8%), and health caregivers (5.5%). *See* FANG & GUNDERSON, *supra* note 17; HAMDANI, *supra* note 18.

26. HAMDANI, *supra* note 18.

27. Statistics Canada, Cansim table No. 361-0001

28. FANG & GUNDERSON, *supra* note 17.

demand (and alleged need) for further labor flexibility, defined in various forms.[29] Second, labor market "matching" may be improved, assuming firms are better able to use temporary help agency employment as a form of probationary employment or on-the-job "screening." Third, employment creation is stimulated, due to the potential cost/risk spreading role played by the agency.[30] As well, this approach (among others) sees the expansion of temporary agency employment as largely driven by expansion of the regulatory burden imposed on employers.[31] The extent to which these potential benefits actually accrue is subject to ongoing debate and is the subject of empirical analysis. It should be noted, however, that both the flexibility and matching benefits ought to be carefully understood as being *relative* measurements dependent upon the extent to which the basic employment law of a country already provides such flexibility and matching potential in its approach to regulating short-term employment arrangements. Indeed, the expansion of temporary help agency employment over the past two decades in the Canadian case seems to have taken place during a period of relatively *declining* regulatory burden on employers.[32]

A growing body of research suggests a range of alternative consequences from the expansion of temporary help agency employment. While not all of it is explicitly normative, the outcomes identified by much of this work could be identified from an "institutionalist" perspective, broadly defined, as social "concerns" or "problems," toward which some form of policy reform ought to be considered. While it is beyond the scope of this paper to "weigh" the alleged benefits versus costs in a systematic manner, subsequent analysis in this paper accepts the basic institutionalist critique of the neoclassical paradigm[33] and is based essentially in the general normative foundation associated with this paradigm. Further, it is

29. Flexibility has been defined in primarily two manners (with potential sub-categories): numerical and functional. Numerical flexibility refers to the firm's ability to adjust its "count" of employees, while functional flexibility refers to the ability to adjust its human resource skills base over time.

30. For reviews of these claims related to flexibility, matching and job creation, see STORRIE, *supra* note 12; Jan Denys, *Challenges for Temporary Agency Work in the Information Society*, *in* TEMPORARY AGENCY WORK AND THE INFORMATION SOCIETY (R. Blanpain & R. Graham eds., 2004); Michael Neugart & Donald Storrie, Temporary Work Agencies and Equilibrium Unemployment (Center for European Studies Working Paper Series, Program for the Study of Germany and Europe, Harvard University, 2002); L.I. SMIRNYKH, LABOUR LEASING: ECONOMIC THEORY, EU AND RUSSIA EXPERIENCE (2005).

31. *See, e.g.*, David Autor, *Outsourcing at Will: Unjust Dismissal Doctrine and the Growth of Temporary Help Employment*, 23 J. LAB. ECON. 1 (2003).

32. Sara Slinn, *Lost Years or Charting New Territory? The Evolution of Public Policy in Industrial Relations in Canada*, *in* CLIMBING DOWNHILL: THE EVOLUTION OF PUBLIC POLICY IN INDUSTRIAL RELATIONS (Anil Verma & Serafino Negrelli eds., forthcoming).

33. *See, e.g.*, T. EGGERTSON, ECONOMIC BEHAVIOUR AND INSTITUTIONS (1990).

assumed that the remedial objectives underlying the specific content of labor and employment law ought to be, and are generally arrived at through a balancing of social objectives and competing interests of employers, workers, and other third parties in society. It is therefore a serious concern when the use of temporary help agency employment within a regime generates a *ceteris peribus* shift in bargaining power linked to the regime's failure to protect against this. Circumstances in which the use of temporary help agency employment erodes the degree of social protection for either temporary help agency workers (relative to what they would enjoy as direct-hire workers), or other indirectly affected workers, whether such erosion is intended or not, call for at least serious consideration of remedial policy action, subject to an assessment of the consequences of policy alternatives.

A central theme identified in much research, understood as a "problem," is that these types of work arrangements tend to generate a relatively greater degree of *precarity* in terms of compensation, working time (and control thereof), job security, and working conditions. Other potential policy problems include effects on training and health and safety, the rise of institutional barriers to full-time employment, and effects on worker access to unionization. Each of these areas of policy concern will now be briefly reviewed.

A. Precarity: Compensation and Job Security

Temporary help agency workers often tend to receive lower compensation than those performing comparable work, both under more "standard" employment arrangements and under alternative arrangements considered "non-standard." A recent study of Canadian workers in non-standard employment found that the average annual income for temporary help workers was well below the average for other non-standard worker categories in Canada.[34] Other studies cite evidence of differences in pay at the hourly wage level, within the same occupational categories.[35] Similarly, evidence from the 1995 Survey of Work Arrangements suggested that temporary help workers were far less likely to receive various benefits like extended health care, dental care, and paid sick leave, than both permanent workers and other types of temporary workers.[36] Temporary help agency

34. *See* FANG & GUNDERSON, *supra* note 17.

35. *See* VOSKO, supra note 4. Similarly there is a reference in the Bernier Report to a study sponsored by the Quebec government finding a typical wage discrepancy between temporary help agency workers and their standard counterparts in the range of 20–40%. *See* BERNIER, VALEE & JOBIN, *supra* note 8, at 59 n.870, citing the document entitled *Document de travail presente a des fins de discussion du Conseil d'administration de la Commission des norms du travail* (citation unavailable).

36. VOSKO, *supra* note 4.

work in Canada also seems to be relatively sensitive to business cycle fluctuations.[37] Temporary help agency work in Canada (as in many other countries) also tends to share some of the characteristics of non-standard work in general, such as low levels of working hours and relatively high incidences of multiple job-holding and collecting social assistance compared to more standard workers, including permanent part-time workers.[38] To the extent that multiple job holding is out of necessity and not based on a preference for multiple jobs, it raises concerns about increased coordination and time pressures, and related psychological stress and health effects on workers in these arrangements.[39] In addition, a significant degree of unequal treatment between temporary help agency workers and otherwise comparable workers employed under more "standard" employment arrangements raises concerns about the possibility of labor market "undercutting" dynamics, or downward pressure on *other* workers' compensation, from regime-determined bargaining power shifts accompanying the use of temporary help agency employment. This concern seemingly underlies the development of laws requiring "equal" or "comparable" compensation arrangements as between agency-supplied workers and "comparable" client employees, which are in place in several European countries,[40] and which will be required in some form by all Member States under the new EU Directive.[41] At the time of writing, there was no analogous law in any Canadian jurisdiction.

B. Institutional Barriers to Full-time Employment

Through terms commonly set out in the "employment agreement" that they sign with the agency, and/or the "service agreement" between the agency and the client, temporary help workers in Canada face institutional barriers to obtaining full-time employment. Service agreements often include service exclusivity and/or non-competition clauses restricting the worker from working elsewhere or for another agency, and/or terms requiring the client to pay some sort of a fee in order to hire the worker as a permanent employee in future.[42] This fee acts as a deterrent to the

37. HAMDANI, *supra* note 18.

38. VOSKO, *supra* note 4; FANG & GUNDERSON, *supra* note 17.

39. Some research suggests that negative health effects such as psychological stress may exist for temporary workers generally, and that the extent to which the temporary arrangement is involuntary influences the degree of the negative health effect. *See* C. E. Connolly & D.G. Gallagher, *Emerging Trends in Contingent Work Research*, 30 J. MGMT 959 (2004); K. Isaksson & K. Bellagh, *Health Problems and quitting among female 'temps'*, 11 EUR. J. WORK & ORG. PSYCHOL. 27 (2002).

40. See the discussion of European developments in the subsequent section.

41. See the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, and the subsequent discussion of the European context, below.

42. VOSKO, *supra* note 4.

permanent recruitment of the agency-supplied worker, and reinforces the attachment and dependence of the worker on the agency and this (or an alternative) triangular arrangement. Through these provisions, private contractual arrangements have the potential to generate rigidity or "stickiness" in the degree that triangular arrangements remain "chosen" by labor market actors. There is also debate over whether the economic rationale provided for these fees—the need to recapture the otherwise lost investment by the agency—is supported by theory or empirical research.[43] Apart from the limited restriction adopted in Ontario in 2009, discussed subsequently in the paper, there was at the time of writing no law in any Canadian jurisdiction designed to restrict contractual arrangements in triangular employment contexts from operating as barriers to full time employment.[44]

C. *Enforcement of Employment Standards*

There is a significant concern that temporary help agency employment erodes worker access to existing employment standards. There are three aspects to this concern. First, existing measurement devices used in standards legislation such as length of service or analogous measures limit the content of standards accessible by temporary workers in general, including those working through temporary help agencies.[45]

Second, employment standards legislation in some jurisdictions contains exemptions for "elect-to-work" employment arrangements.[46] In such scenarios, temporary help agencies may be entitled to at least take the position that such an exemption applies to their activities, either in general or on an *ad hoc* basis, and thus not apply certain minimum standards until explicitly required to do so by an administrative order. In most Canadian provinces, neither the statute nor the Regulation provides any clarification as to whether temporary help agency employment should be considered an "elect-to-work" arrangement, so this issue may only be decided by administrative investigation and/or litigation on a cumbersome and costly

43. *See* BERNIER, VALEE & JOBIN, *supra* note 8.

44. A few Canadian jurisdictions (Alberta, Saskatchewan, Manitoba, and Nova Scotia) had statutes prohibiting "fee-charging" practices by employment agencies, as compensation to the agency for job "placement" or "referral" services. It is not clear, and seems contrary to the express provisions in these statutes, that these rules would extend to cover any of these contractual barriers to full time employment in temporary help agency employment contexts. In any case, the maximum fine for violating this fee-charging prohibition in three of the four jurisdictions was a mere twenty-five dollars ($25).

45. *See* BERNIER, VALEE & JOBIN, *supra* note 8.

46. *See, e.g.*, the current "elect to work" exemptions in Ontario for the obligation to provide termination pay and severance pay. *See* §§ 2(1)(10) and 9(1)(9) of Termination and Severance of Employment, O. Reg. 288/01. Note that these provisions will no longer operate as a barrier to termination and severance pay entitlements as of November 6, 2009, when the provisions of Bill 139 come into force.

case-by-case basis,[47] an obvious barrier to rights enforcement for most temporary help employees.

Further, the triangular nature of the relationship likely creates a structural tendency toward under-enforcement of existing standards, given the potential for confusion, conflict, or outright obfuscation concerning the division of employment law responsibilities between the client user and the agency. Canadian employment statutes do not explicitly take up the challenge posed in Convention 181 to rationally allocate the different responsibilities across the agency and client. Rather, the approach is consistent with what Davies and Freedland,[48] and Fudge[49] identify, in their respective analyses of the misfit between employment law and complex and fragmented work relationships generally, as a deeply ingrained assumption of an employer being a necessarily *unitary* entity. In this vein, Canadian law tends to impose the whole of employment liabilities on *either* the agency or the client. Although Davidov's recent review of alternative models in different countries claimed that "in Canada it is usually the user firm" that is considered the employer,[50] the actual approach is more consistent with a default assumption that the agency bears employment liabilities,[51] subject to this arrangement being challenged and a contrary *ex post* determination made.[52] This approach ensures continued uncertainty and tension over the *de jure* location of liability in these arrangements, and thus has given rise to debate and litigation over which entity should be

47. Evidence of the important effect of this sort of exemption is provided in the efforts of a grass-roots organization called Toronto Organizing for Fair Employment ("TOFFE", now known as the "Workers Action Centre"), which conducted a focused campaign on this issue in Ontario, and sought to lobby the Ministry of Labour towards reform of this exemption. Ontario's policy is essentially unchanged, as the exemption remains and the Ministry continues to insist that "elect-to-work" can only be decided on a case-by-case basis. *See* Cynthia Cranford et al., *Thinking through Community Unionism*, *in* PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA (Leah F. Vosko ed., 2006).

48. Paul Davies & Mark Freedland, *The Complexities of the Employing Enterprise*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 295–316 (Guy Davidov & Brian Langille eds., 2006).

49. *See* Judy Fudge, *Fragmenting Work and Fragmenting Organizations: the Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609 (2006).

50. Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 731 (2004).

51. One caveat here is where certain provincial health and safety statutory definitions of "employer" are arguably broad enough to capture both the agency and the client. *See, e.g.*, section 1(1) of the Ontario's Occupational Health and Safety Act, R.S.O. 1990, c. O.1. See further discussion of this issue in the next section.

52. Davidov seems to base his claim about the normal approach in Canada on two such determinations, namely two cases of the Ontario Labour Relations Board in which the Board found the client to be the true employer. *See* Davidov, *supra* note 50, at 732–34. Not only is this a small sample of the volume of cases in this area, but it is also a sample drawn from the collective bargaining jurisprudence, not from employment standards jurisprudence.

identified as the "true" employer,[53] a question that has not been resolved decisively in jurisprudence or employment standards legislation, and remains dealt with primarily through cumbersome administrative or judicial application of employer "tests" on case-by-case basis.[54] Canadian employment law remains quite undeveloped and potentially problematic in this regard. Apart from very recent developments in Ontario in 2009, discussed subsequently, at the time of writing no Canadian jurisdictions' statutes provided any explicit guidance concerning the determination of the "true" employer, for employment standards purposes, in circumstances involving temporary help agency contexts, nor any attempt to allocate any particular employment law obligations across the two entities, which ILO Convention 181 encourages member states to do.[55] Instead, the practice of *ex post* determination through case-by-case administration and/or litigation was widespread.

Further, while Davidov suggests that the concept of a "related employer" provides a "defense" in this area in Canada, it is actually quite a limited one. Judy Fudge has responded to Davidov in a partial sense by noting that in Ontario, for example, employment standards adjudicators have generally required common control, in terms of common ownership, as a necessary component of the test for "related employers."[56] Perhaps as a result of this interpretive approach *inter alia*, a leading text on Ontario employment standards suggests that "generally speaking, [the workers] are regarded as employees of the temporary help agency."[57] Moreover, the concept of a "related" employer is not even provided for in the employment standards statutes in several other Canadian jurisdictions. At the time of writing, only five of the eleven jurisdictions' statutes provided any explicit power to either of an administrative tribunal, a Minister of Labour, or a Director of Employment Standards, to treat multiple entities as a "related," "single," or "common" employer for the purposes of employment standards regulation.[58] Further, certain of these statutes do explicitly require some form of common control and/or direction among the different entities as an element of "related employer" status.[59] Overall, workers have extremely

53. Gilles Trudeau, *Temporary Employees Hired Through a Personnel Agency: Who is the Real Employer*, 5 CANADIAN LAB. & EMP. L.J. 359 (2000).

54. *See* ROBERT M. PARRY, KIMBERLEY A. PARRY & DAVID A. RYAN, EMPLOYMENT STANDARDS HANDBOOK 5.31 (3d ed. 2007)

55. Of course, Convention 181 also contains further directions to states to ensure forms of "adequate protection" with respect to various concerns and Recommendation 188 makes further explicit suggestions as to restrictions on temporary help (and employment) agency behavior.

56. *See* Fudge, *supra* note 49.

57. PARRY, *supra* note 54, at 5–31.

58. These five jurisdictions were: British Columbia, Alberta, Manitoba, Ontario, Nova Scotia, and the Federal jurisdiction.

59. *See, e.g.*, section 95 of British Columbia's Employment Standards Act, RSBC 1996, c. 113.

little access to any form of joint liability mechanism for employment standards obligations in Canada.

Last, although five jurisdictions imposed statutory restrictions such as licensing or fee-charging restrictions on the activities of employment agencies,[60] none of these statutes, nor any other legislation in any other Canadian jurisdiction (aside from some recent restrictions adopted in Ontario in 2009, discussed subsequently), imposed any specific restrictions on the business activities of temporary help agencies. Thus, at the time of writing,[61] no other Canadian jurisdiction applied any sort of licensing scheme to this industry, nor had any other rules addressing employment standards enforcement in these triangular arrangements, let alone the further restrictions on agency behavior suggested in ILO Recommendation 188.[62]

D. Training, Safety, and Workplace Injuries

There is both theoretical and empirical support for the view that these employment arrangements tend to foster structural disincentives to training investments, both as a result of the temporary *and* triangular nature of the employment. In the European context, the *Third European Survey on Working Conditions, 2000*[63] reports that temporary agency workers have less access to training and less opportunity to "learn new things" than any other contractual category of worker. Additionally, there has been an accumulation of research suggesting that the use of temporary help agency workers, among other forms of precarious work, seems correlated with increased accident and injury rates.[64] These patterns raise concerns around whether industry training practices toward temporary workers are sufficient, and whether appropriate regulations are in place to facilitate safety in temporary help agency employment contexts. One issue here involves the allocation of responsibilities under general health and safety statutes. The

60. These five jurisdictions were: British Columbia, Alberta, Saskatchewan, Manitoba, and Nova Scotia.

61. This paper was accepted for publication on September 12, 2008. Post-acceptance revisions were made to this paper to include analysis of Ontario's Bill 139, which received Royal Assent in May, 2009.

62. The Recommendation, *supra* note 2, ¶¶ 4–15. *See also* discussion of this text in Leah F. Vosko, *Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective*, 19 COMP. LAB. L. & POL'Y J. 43 (1997).

63. P. PAOLII & D. MERLLIE, THIRD EUROPEAN SURVEY ON WORKING CONDITIONS, 2000 (European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the European Communities, 2001).

64. For reviews of this literature concerning occupational health and safety effects of both temporary help agency work and other forms of precarious employment, see Michael Quinlan, Claire Mayhew & Philip Bohle, *The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health: A Review of Recent Research*, 31 INT'L. J. HEALTH SERVICES 335 (2001); Katherine Lippel, *Le travail atypique et la législation en matière de santé et sécurité du travail, in* DÉVELOPPEMENTS RECENTS EN SANTÉ ET SÉCURITÉ DU TRAVAIL (Yvon Blais ed., 2004).

question has been raised in prior studies, including the Bernier Report, as to whether temporary help agency workers are effectively able to access protection afforded by these statutes. This may involve ambiguity over the allocation of responsibility between the agency and the client under the interpretation of the statute. This situation flows from the structure of these statutes, the definition of "employer"[65] or "worker" and potential uncertainty or conflict over their interpretation.[66] Further, the extent to which agency-supplied workers are able to access the participatory or "voice" mechanisms facilitated by these laws is also an important concern, because of either the temporary or triangular nature of the arrangement.[67] Further, questions have been raised around the appropriateness of incentive structures created by the rules pertaining to liability for workplace accidents and injuries, and how firm-specific accident "experience ratings" ought to be administered where an agency-supplied worker is injured. For example, a lack of effect on client user firms' accident experience ratings when an agency-supplied worker is injured was recently identified by a 2008 investigation by the Toronto Star newspaper as a serious potential flaw in the administration of this aspect of the workers compensation system in the largest Canadian province of Ontario.[68]

E. Access to Unionization

Although union certification of agency-supplied workers is conceivably possible at either the agency or client level,[69] temporary help agency workers face unique barriers in accessing unionization under the prevailing "Wagner-esque" labor law model in Canada. Essentially, the

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65. As noted earlier, in certain jurisdictions, the definition of "employer" seems broad enough to capture both the agency and client. *See, e.g.*, section 1(1) of the Ontario's Occupational Health and Safety Act, R.S.O. 1990, c. O.1. It is argued that even in these circumstances where there has been formal extension of employer liability to include client users and not merely the agency, without any further guidance or direction, confusion generally remains as to the *de facto* allocation and co-ordination of responsibilities between these parties.

66. In some jurisdictions, prevailing interpretations of the respective obligations of client and agency may be somewhat well known, yet potentially contestable over time. For example, the Manitoba Labour Board's Bulletin No. 241 provides a fairly clear statement of its position as to how the Act allocates responsibilities between these two parties. There may also be less formal communications materials, or internal Ministry policy guidelines. *See, e.g.*, the discussion of how investigators ought to approach temporary help agency employment in the "Client Sector Plan" published by the Industrial Health and Safety program of the Ontario Ministry of Labour, which is updated every two years.

67. *See* BERNIER, VALEE & JOBIN, *supra* note 8.

68. Moira Walsh, *Board shields unsafe job sites*, TORONTO STAR, Feb. 16, 2008, at http://www.thestar.com/news/Ontario/article/304163.

69. The actual term of employment, or the status of being "temporary" as opposed to "permanent" (which issue is separate from whether workers are full or part-time) is generally not relevant in determining whether or not most workers are at least formally entitled to collective bargaining rights. *See* JEFFREY SACK, C. MICHAEL MITCHELL & SANDY PRICE, ONTARIO LABOUR BOARD LAW & PRACTICE 3.166–3.167 (3d ed. 1997), and cases cited therein.

Canadian legal regime requires unions to seek to organize discrete "bargaining units" of workers, and to seek certification from the labor relations tribunal authorizing them as the sole bargaining representative for each unit. For each group the union would seek to represent, certification procedures require unions to propose to the tribunal a precise description of a bargaining unit that the union claims to be appropriate for collective bargaining.[70] The union will then be required to provide sufficient evidence of support (either through card-check[71] or mandatory vote,[72] depending upon the particular jurisdiction) among the bargaining unit of workers that the tribunal *ex post* determines to be appropriate for the purposes of the certification attempt.[73] Thus, while the Canadian system provides some discretion to unions in establishing bargaining units according to their own strategic preferences and constraints, the state arguably plays a significant role in the process of structuring the contours and boundaries of labor relations, and by extension, even the labor movement itself.[74]

The level at which organizing of temporary help agency workers may take place is driven largely by the issue of who is the "true" employer for labor law purposes, since the default rule in most jurisdictions is that employees in a bargaining unit must share the same single[75] employer and, where the issue arises, the labor relations tribunal may select the organization that is most appropriately identified as the "employer" for labor relations purposes. In cases where more than one entity exercises "employer" functions to a great extent, the tribunal may declare them to be a "single"[76] employer, based on prevailing legal tests, binding them each with employer obligations for labor relations purposes. While there has been extensive jurisprudence on the issue of the "true" employer,[77] and

70. *See, e.g.*, sub-section 7(1) of Ontario's Labour Relations Act, 1995, S.O. 1995, c.1, Sch. A.

71. Section 28 of the Canada Labour Code, R.S., 1985, c. L-2 provides for this form of "automatic certification" by tribunal card-check in the federal jurisdiction.

72. *See, e.g.*, sections 7 through 10 of Ontario's Labour Relations Act, 1995, S.O. 1995, c.1, Sch. A.

73. *See, e.g.*, section 9 of Ontario's Labour Relations Act, 1995, S.O. 1995, c.1, Sch. A.

74. For a more extensive elaboration of this argument and its consequences for the labor movement and broader Canadian political economy, see Gary Svirsky, *The Division of Labour: An Examination of Certification Requirements*, 36 OSGOODE HALL L.J. 567 (1998).

75. Most Canadian labor tribunals do not have a general power to certify multi-employer bargaining units, outside of specifically defined jurisdictions, primarily the construction industry. See the discussion of this issue in SACK, MITCHELL & PRICE, *supra* note 69, at 3.137.2. British Columbia is an exception to this norm,, where the statutory definition of an "appropriate bargaining unit" includes those in which the employees are employed by multiple employers. *See* Labour Relations Code, [RSBC 1996] c. 244.

76. In Canada, the term "single" employer is generally synonymous with and used interchangeably with the terms "related", "common", or "joint" employer. The labor relations statute for each jurisdiction specifies the chosen phrase, with a precise definition of the term. For example, see section 1(4) of Ontario's Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A. See further discussion of "single" employer status below.

77. Trudeau, *supra* note 53.

some tendency toward finding client organizations to be the "true" employer for the purposes of collective bargaining,[78] given the lack of statutory reform and the regular blurring of managerial authority between agencies and clients, this question must be continually resolved through case-by-case litigation over the application of various factors or criteria.[79] In this context, in addition to the usual challenges to organizing, unions face considerable *ex ante* uncertainty about whether its choice about the inclusion or exclusion of agency workers in an organizing attempt, and/or the level at which to organize, will be undermined by an *ex post* ruling on either the issue of the "true employer," and/or on the "appropriateness" of a bargaining unit that includes (or excludes) agency-supplied workers. Each of the potential choices over bargaining unit structure yields its own problems for the union, and will now be reviewed.

First, a union may seek to organize a bargaining unit of workers at the level of the temporary help agency, if it can persuade the labor relations tribunal that the agency is the "true" employer of the workers in question for labor relations purposes.[80] Organizing under this model is constrained by the distribution of these workers across different client workplaces, exacerbating logistical challenges and potentially increasing the range of workplace-specific concerns across such a bargaining unit. Even where a tribunal might find that *most* employer functions lay *primarily* with the agency such that it is the "true" employer, client organizations may nevertheless still hold certain managerial powers over the workers, and thus bargaining would take place in the absence of the entity exercising those powers. The lack of support for broader-based bargaining across multiple employers, such as what several provincial jurisdictions provide to support collective bargaining in the construction industry,[81] means that such organizing would proceed on an individual agency-by-agency basis, unless agencies voluntarily enter multi-employer bargaining arrangements.[82] This exacerbates the competitive disadvantage to a unionized agency, potentially reducing the flow of employment activities through that agency as clients shift their activities elsewhere, hindering the ability of unions to take wages out of competition in the industry. While the determinative effect of this

78. *See, e.g.*, Pointe-Claire (City) v. Quebec (Labour) Court, [1977] 1 S.C.R. 1015; Re UE and Sylvania Lighting Service, [1985] O.L.R.B. Rep. 1173; Re CAW and Nichirin Inc., O.L.R.B. Rep. 78 (1991); Mackie Moving Systems Corporation, 80 C.L.R.B.R. (2d) 195 (2000); Nike Canada Ltd., 2006 CanLII 24724 (ON L.R.B.).

79. For examples of such cases and the types of factors involved in determining the "true" employer, see *Pointe-Claire (City)*, *supra* note 78; York Condominium Corporation, OLRB Rep. 645 (1977); *Nike Canada Ltd.*, *supra* note 78.

80. *Id.*

81. *See, e.g.*, §§ 126–168 of Ontario's Labour Relations Act, 1995, S.O. 1995, c.1, Schedule A.

82. To date, there appear to be no such examples of centralized collective bargaining involving this industry in Canada.

legal environment has not been extensively researched, some empirical evidence confirms the very low level of unionization among temporary help agency workers, and the complete absence of certification of bargaining units at the level of the agency, even in Quebec, the province with the highest union density rate at the time.[83]

It may also be possible for agency-supplied workers to access unionization at the client level. Sometimes, where a unionized bargaining unit of client employees already exists, agency-supplied workers may access unionization through extended "coverage" of existing bargaining arrangements to them. However, such coverage is conditional upon a number of factors: the pre-existence of an established bargaining unit at the client level, the scope of this bargaining unit, the content of any collective agreement provisions concerning agency-supplied workers, and/or the voluntary acceptance by the client user firm of the extension of bargaining arrangements to include the agency-supplied workers. Where other client employees are already unionized, it is also possible for the union to seek certification for a new proposed bargaining unit comprised solely of agency-supplied workers. In this situation, labor tribunals have the discretion, as part of their general powers, to determine whether such a bargaining unit would be appropriate in the circumstances, and in doing so would consider, among other factors, whether there would be any labor relations "harm" from certifying this group separately.[84] Certification success here would also depend on the labor board accepting that the client is the "true" employer in this case, and/or that the client and agency constitute a "single" employer. Otherwise, should the tribunal rule that the temporary help agency alone is the "true" employer, this would increase the risk of it finding that a bargaining unit comprised of only a portion of the agency's employees—those assigned to the particular client in question—is not appropriate. Where client employees are not already unionized, a union may seek to organize a mixed unit of client employees and agency-supplied workers, but this would again be contingent on an *ex post* ruling that the client is the "true" employer, and that such a unit is appropriate in the circumstances. Again, even where a tribunal might find that the client is the "true" employer, the formal absence of the agency from the bargaining process may erode its efficacy, where the agency exercises *some* aspects of managerial power.

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83. Gerard Notebaert, *L'impact du cadre legislatif sur le taux de syndicalisation des interimaires au Quebec et en France*, 61 RELATIONS INDUSTRIELLES 223 (2006).

84. In determining the appropriate bargaining unit, there is some credence paid to the notion that Board's ought to defer to the union's preferences unless it can be demonstrated that labor relations harm will result. *See, e.g.*, Re Hospital for Sick Children, OLRB Rep. 266 (1985); and Niagara Parks Commission, OLRB Rep. 363 (1995).

Further, this approach, involving an *ex post* determination of the "true" employer and the appropriate bargaining unit, may lead to situations in which the *mere presence* of agency-supplied workers among the client employees in the workplace frustrates the union's ability to organize *either* group at the client level. For example, where the union is unable to obtain enough support for client-level unionization among the pool of agency-supplied workers, perhaps because of their unique circumstances, the labor tribunal may yet determine the client to be the "true" employer of the agency-supplied workers, and that a unit that excludes them is not appropriate. In this situation, the union would be required to demonstrate majority support in a larger bargaining unit that included all of the agency-supplied workers as well. Frustrated organizing of this sort was illustrated in the 2006 decision of the Ontario Labour Relations Board in the *Nike Canada*[85] case. Here, the union sought only to organize the direct-hire employees of a Nike distribution center, based on its admitted inability to organize and gain sufficient support among the workers supplied by Manpower Inc. The Board found that the relationship between Manpower and Nike was a complex arrangement designed to attempt to transfer "employer" status to Manpower Inc. One aspect of the arrangement was a strict "one-year rule" preventing any agency-supplied worker from continuing at Nike for more than a year. Conceivably, such contrived turnover could significantly constrain the union's ability to organize a group of agency-supplied workers at the client level. The OLRB's decision reveals that it understood and *agreed* that the mere presence of agency-supplied workers magnified organizing challenges concerning *both* groups of workers:

> The presence of Associates [read: agency-supplied workers] in this workplace leads to all sorts of challenges to unions, issues which are highlighted by this case. The union is between the proverbial rocks and the shoals. If the Associates are employees of Nike then the Union must organize a larger workforce, the vast majority of which is not at Nike for very long and which changes frequently. While the effects of this may be eliminated by a determination of the bargaining unit to exclude agency employees, that solution leads to an outcome of significantly reduced bargaining power for the union in any collective agreement negotiations as it will not represent the majority of the workers doing essentially the same work as its members. The union faces the same problem, if as it argues, the Associates are determined to be Manpower's employees. If Manpower is the true employer then the Union, if certified, faces the task of negotiating a collective agreement with diminished bargaining power because the employer has a ready supply

85. Nike Canada Ltd., 2006 Can LII 247 (ON L.R.B.).

> of non-bargaining unit workers who are easily able to do the work if employees go on strike.[86]

Ultimately, the Board ruled that the agency-supplied workers were Nike employees for the purposes of collective bargaining, were included in the bargaining unit, and thus the certification effort failed. In its written decision, the Board explicitly rejected the suggestion that it should apply so-called "policy" criteria: to consider what might actually "assist" unions in their organizing efforts in these problematic triangular arrangements. While further empirical evidence would be helpful, cases of this sort clearly suggest that under the current Canadian regime, an employer's use of agency-supplied workers may serve to constrain, and thus also to *deter*, union organizing efforts toward *both* the agency and permanent employees at that firm.

Last, where employer duties are highly divided between agency and client organizations, eroding the utility of certification at either level alone, unions may be able to seek an order directing that both the agency and client are a "single"[87] employer, creating a triangular bargaining structure to which both the agency and client are bound as employers. Most labor relations statutes in Canada explicitly provide the power to either a tribunal or Minister to treat multiple entities as "single" employers for labor relations purposes, although most also limit the power to do so only where it is shown that the multiple entities are under common "control" and/or "direction" and/or are carrying on "related" business activities, or even activities that effectively amount to a single enterprise.[88] At the time of writing, no Canadian labor relations statute contained any provision or guidance on either the application of the "single" employer concept, nor bargaining unit determination, in temporary help agency contexts.

In the Canadian regime, "single" employer status is a declaratory order that must be sought and achieved as an outcome of successful litigation of a multi-party legal case before a labor tribunal. In situations where client firms use services of multiple agencies, or different agencies across time, each agency-client arrangement is scrutinized separately. Thus, even if unions were successful (via litigation) in piecing together a triangular bargaining structure, subsequent alterations to the client/agency relationship could bring the very question of "single" employer status under ongoing re-examination, generating further litigation and increased *ex ante* uncertainty

86. *Id.* ¶ 63.

87. The terms "joint," "common," or "related" employer are often used interchangeably with the term "single" employer in Canadian labor relations law.

88. *See, e.g.*, § 1(4) of Ontario's Labour Relations Act, 1995, S.O. 1995, c.1, Schedule A.

as to the efficacy of the bargaining structure.[89] The true ability of Canadian unions to obtain tribunal orders crafting these triangular bargaining structures on a case-by-case basis is not well known, nor is the efficacy of these individually crafted triangular structures over time, given the potential for extraordinary conflict as the parties operate within a model designed with little expectation of, and support for, multi-employer bargaining.[90] Aside from this power to declare a single employer under limited circumstances, very few statutes facilitate multi-employer bargaining in any other way, outside of select industries such as construction. In fact, as noted above, most jurisdictions *prohibit* the certification of bargaining units containing employees of more than one employer,[91] making multi-employer bargaining arrangements essentially voluntary. Overall, the current reality, understood by many actors and even adjudicators in the Canadian system, seems to be that, relative to standard workers, the current legal regime *ceteris peribus* restricts access to unionization for temporary help agency workers, and also indirectly erodes access to unionization for *other* related workers.

Some commentators such as Fudge suggest expanding the concept of "employer" to deal with complex or fragmented work arrangements, with accompanying joint liability for employment law obligations across the expanded range of organizations involved in "activities."[92] In the more specific temporary help agency context, Davidov recommends recognizing both the agency and client entities as the employer, for both employment standards and collective bargaining.[93] However, Davidov seems to reserve this suggestion for what he calls the "true temps," and suggests that in other cases closer to what might be labeled "payrolling" arrangements, "there is no reason to consider [the agency] the employer. There is every reason to . . . consider the user to be the worker's legal employer,"[94] prompting Fudge to describe this approach as limited and "rehabilitative" (of the

89. *See, e.g.*, the case of Re Verspeeten Cartage Ltd., C.I.R.B.D. No. 11 (2004). Here, the union alleged that the employer changed agencies and revised its agency-supply arrangements as a result of a prior Board decision in which the client was declared the employer of truck drivers the board certified in that same decision. The client firm had taken the position that in its new arrangements with different temporary help agencies, none of the parties were bound by the previous rulings.

90. Such conflict is illustrated by the case of Re Verspeeten Cartage Ltd., *supra* note 88. In an earlier decision between these parties, the CIRB certified the union as representing a bargaining unit of drivers, including both direct-hires and agency-supplied drivers. The CIRB declared that the client was the legal employer of the agency-supplied drivers. This subsequent case involves an unfair labor practice allegation that following the original certification order, the client firm switched agencies and took the position that the new agencies were the true employer in question, in order to avoid unionization.

91. *Supra* note 75.

92. *Supra* note 49.

93. *Supra* note 50.

94. Davidov, *supra* note 50, at 737.

problematic *unitary* employer concept) given his continued search in all but the clearest cases for the so-called true employer. The analysis presented here of limitations on access to unionization further illuminates the limited nature of Davidov's proposals within this particular national context, since it would *inter alia* reinforce the central tendencies of *ex post* and *ad hoc* determination of the employer identity and bargaining unit structure, as the system continues its churning through complicated cases inevitably involving a distribution of employer functions, searching for clearly identifiable "true temp" situations to isolate from *less* legitimate ones.[95]

Finally, in seeking to understand the consequences of growth in triangular arrangements, this eroded access to unionization for an increasing proportion of the labor market needs to be conceived of not only as an outcome of this growth but also as a causal force with reinforcing labor market equilibria tendencies. As temporary help agency employment expands, generating negative pressure on union growth and density through this erosion of access to unionization, other evidence (reviewed above) suggests that it generates more precarious (non-union) employment that carries with it the threat of further erosion of union power and growth through labor market undercutting and the increased inability of unions to "take wages out of competition." Thus, precarious employment outcomes and restricted access to unionization become *self-reinforcing*. It follows that labor policy reforms to regulate temporary help agency employment that do not directly address the issue of frustrated access to unionization under current Canadian regimes will not likely reduce, and indeed are not at all even *aimed* at reducing, this structural tendency generating labor market precarity. Overall, there is much to suggest that the expansion of temporary help agency employment within this regime results in significant violations of the normative principles outlined earlier in this paper.

IV. TOWARD REGULATION?

Considering the increased salience of temporary help agency employment and corresponding policy concerns, there has been a significant lack of concrete policy reform aimed at addressing these developments. This lack of reform stands in contrast with European efforts at regulation, for example, at both the national and European Union level, over the past few decades. Many EU Member States have implemented

95. *Id.* Davidov argues that in "true temp" situations (as opposed to long term arrangements he deems "illegitimate"), workers should be allowed to choose *which bargaining unit* to be a part of—one at either the client or agency level—and be able to *switch* units as desired. This seems to presuppose the existence of access to collective bargaining at both of these levels, and does not problematize the question of *access* to unionization at *either* level sufficiently.

various regulatory instruments to address concerns about economic security, differential treatment, and labor market undercutting. Appendix C provides a summary of the range of different regulatory instruments employed across the EU in this area at the national (or lower) level. As well, the European Parliament adopted a Directive in November, 2008, creating certain EU-wide standards concerning temporary help agency employment.[96] Most notably, this Directive will impose the requirement that the principle of "non-discrimination" in the treatment of temporary help workers be protected by national law, subject to certain exemptions.[97] Key aspects of this Directive are summarized in Appendix D. It should be noted that this EU Directive has been adopted in a context in which much of the substantive aspects of the Directive already exist at the national level within many EU states. For example, of twenty existing EU Member States examined in a recent study by the U.K. Trades Union Congress, fourteen states already have legislation mandating a form of "equal" or "comparable" treatment between agency workers and comparable employees.[98] As well, of twenty-four EU Member States for which information was available, twenty of them already had some form of licensing scheme for temporary help agencies.[99]

The point here is not that developments in the EU are somehow an appropriate or sufficient response to policy concerns in a normative sense, which commentators such as Vosko have recently argued to the contrary,[100] but rather that EU developments reinforce the picture of a lack of comparable regulatory initiative in Canada to date. Yet, despite a lack of law reform, it is possible to identify certain recent policy "moments" revealing aspects of a trajectory in Canadian law reform in this area. Arguably, there have been four key recent moments in policy cycles in the last six years that together collectively reveal such a pattern or trajectory.[101] Each of these four moments will now be reviewed.

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96. *See* Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008.

97. *Id.* at art. 5.

98. TRADES UNION CONGRESS, THE EU TEMP TRADE: TEMPORARY AGENCY WORK ACROSS THE EUROPEAN UNION (2005).

99. *Id.*

100. *See* Leah Vosko, *Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness*, 88 SOC. INDICATORS RES. 131 (2008).

101. Identifying certain moments in policy cycles as being "key" or indicative of a development pattern is of course a matter requiring the exercise of discretion. Here, I have chosen not to engage in a review of certain governmental processes of "consultation" which have not and might never lead to any concrete report, reform proposal or statement of policy direction. Thus, for example, this paper does not also seek to review a process of receiving public input from the Quebec provincial government beginning in 2005. Indeed, the Quebec experience reveals the difficulty of attaching significance to these events. While the process seemingly ended in early 2007, the government has failed to even issue

A. The "Bernier Report"

The first moment to be discussed was the establishment of the Bernier Commission by the Quebec government and the publication of what is commonly referred to as the Bernier Report[102] in 2003. This Report, which was a study of labor policy implications of non-standard employment broadly defined, includes one of the most comprehensive analyses to date of issues around the rise of temporary help agency employment in Canada, including recognition of many of the same policy concerns discussed herein. The Report also tables various law reform recommendations, and the full set of those specifically dealing with temporary help agency employment are reproduced in Appendix A.[103] To some extent, the recommendations are informed by many of the categories of concerns discussed in this paper, in that they are aimed at reducing contractual barriers to full-time employment; improving the enforcement of certain individual employment standards (clarify "true" employer as agency, and impose joint liability for wages); and reductions in differential treatment of temporary help agency workers vis-à-vis comparable workers (enshrine the principle of equality of treatment).

Beyond this, the Report also contains some discussion of the issue of access to unionization, and accepts that a growing practice of "bargaining for manpower," in which firms increasingly contract out their *permanent* labor supply needs to temporary help agencies in order to avoid employer obligations, makes it much harder for employees to access unionization. However, in this regard, the Report seems to merely recommend that the government make more explicit certain labor tribunal certification powers that current law seems to already provide. Basically, the recommendations seek to clarify tribunal powers to certify three potential types of proposed bargaining units involving agency workers meeting clients needs on a permanent basis: 1) a distinct unit of agency-supplied workers at a client where another unit of client employees already exists;[104] 2) a combined unit of agency-supplied workers and client employees;[105] and, 3) a distinct unit of agency-supplied workers where no pre-existing unit of client employees

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a report on the process, let alone produce any sort of reform proposal, or statement of policy direction and, of course, it might never do so.

102. BERNIER, VALEE & JOBIN, *supra* note 8.

103. The Bernier Report makes also various recommendations, such as reductions in the time of continuous service required in order to access certain entitlements, which stand to assist temporary help agency workers in their status as a subcategory of "temporary workers," but do not directly address the unique concerns arising out of triangular temporary help agency employment. The recommendations in Appendix 1 herein are those aimed at the latter, unique issues.

104. BERNIER, VALEE & JOBIN, *supra* note 8, ch. 7, Recommendation 40.

105. *Id.* at Recommendation 41.

exists.[106] In the first case, the Report recommends that the tribunal should have "the power" to declare that the client and agency should be considered as a "sole" (i.e., single)[107] employer. In the second case, it should "have the power to declare, according to the usual rules" that the combined unit is an "appropriate" one, and should declare the client as the employer. In the third case, the Report recommends that the tribunal "should have the option to declare according to the powers it already has, that this group constitutes a distinct and appropriate unit . . ."[108] and that the agency and client should together be considered a "unique" (i.e., single) employer for collective bargaining.

While the Bernier Report seemingly accepts the reality of the need to improve access to unionization under temporary help agency arrangements, particularly in its discussion of the practice of "bargaining for manpower," its guidance for law reform in this area seems rather limited. Each of the three recommendations seem to amount to suggestions that that labor tribunals be given the necessary *discretionary power* to decide the questions of the "true" employer and/or the appropriate bargaining unit in the manner that would legally *allow* these workers to unionize. Yet, it is not clear that Canadian labor tribunals currently *lack* these formal powers. The "problem," as it is implied here, seems poorly defined, and it is arguably notable that the Bernier Report itself does not actually explain which of these powers is non-existent. The Recommendations do not address the problems of access to unionization fostered not by the lack of formal power to certify these groups in the ways it describes, but rather by the characteristics of prevailing law and procedure discussed above: the case-by-case approach to determining the "true" employer and appropriate bargaining units; the *ex post* timing in determining these issues; the resulting uncertainty for union strategy; the lack of deference toward union preference over "whom" it can organize; the lack of support for triangular and multi-employer bargaining; and the lack of any other tailored rules or processes informed by the uniqueness of triangular employment that the Supreme Court of Canada itself has admitted results in serious "gaps"[109] in our regime. As a result, there is limited progress here on crafting policy toward assisting unions in reducing the practice of "bargaining for manpower" in the labor market, let alone a framework of "dissuasive"

106. *Id.* at Recommendation 42.

107. *Id.* This was the word used in the English translation of the original Report, and the context clearly suggests that the concept similar to what is understood in other jurisdictions as a "single" or "common" employer was intended.

108. *Id.*

109. *See* Pointe Claire (City) v. Quebec (Labour) Court, [1977] 1 S.C.R. 1015.

measures to prohibit or deter these practices, which have been adopted in some European countries.

B. The "Arthurs Report"

The second important "moment" in recent Canadian policy cycles was the establishment of the Federal Labour Standards Review Commission chaired by Professor Harry Arthurs (the "Arthurs Commission") and the publication of the "Arthurs Report"[110] in 2006. Like the Bernier Report, its mandate was much broader than the mere examination of temporary help agency employment. Rather, the Arthurs Commission was provided with a mandate to fully review all of Part III of the Canada Labour Code,[111] ("the Code") the portion of the federal jurisdiction's key statute that deals primarily with the regulation of individual employment standards.

Like the earlier Bernier Report, the Arthurs Report, at various points, acknowledges growth in temporary help agency employment as an important labor policy concern. It cites interesting statistics concerning the federal portion of the labor market, claiming that approximately 16% of federally regulated employees work under part-time or short-term contracts, and a further 1.3% of the workers in this jurisdiction are employed through temporary help agencies,[112] with this rate being much higher (about 6%) in the trucking industry.[113] Yet, despite its acknowledgement of growth in temporary help agency employment, and the resulting concern about potential under-enforcement of existing labor standards as a result, the Report makes few recommendations towards regulatory reform in this area, each of which are reproduced in Appendix B.

The main recommendation offered concerning the plight of temporary help agency workers is that the statute be amended to make client firms "jointly and severally liable" for *non-payment* of wages and benefits owed to workers supplied to the client by an agency. The rationale provided here for this additional regulatory "risk" imposed on client firms is that not only has the client firm obtained the benefit of the work performed, but also the client firm may then exercise leverage over the agency to require it to either post a bond or provide some other "financial guarantee of compliance" with its own wage and benefit obligations. This joint liability proposal seems addressed at remedying cases of default only on certain specific financial obligations under the Code, rather than a comprehensive form of joint liability concerning all other types of employer obligations under the Code.

110. ARTHURS, *supra* note 9.
111. R.S.C. 1985, c. L-2.
112. ARTHURS, *supra* note 9, at 66.
113. *Id.* at 231.

The Report does not call for joint employer obligations concerning other kinds of rules, including, for example, the rather large category of rules related to [control over] working time.

In another chapter of the Report, prior to where it explicitly discusses agency workers, it is noted that the current process under which multiple entities may together be declared "related employers" is quite cumbersome due to the fact that only the Minister may currently exercise this discretionary power. Noting that this seems to be a more burdensome approach to dealing with the issue of "related" employers than in other jurisdictions in Canada, the Arthurs Report recommends that the requirement of involving the Minister be removed and that all decision-makers under the statute be entitled to exercise this discretionary power where appropriate.[114] This suggestion removes a very small additional constraint on declaring "related employers" apparently only present in the federal jurisdiction, but leaves this instrument essentially equivalent to what already exists in various other Canadian jurisdictions.[115] This minor recommendation is noted here since it *might* have some bearing on the ability of agency-supplied workers to seek standards enforcement. However, the Report itself does not even mention the potential relevance of the "related employer" power in the temporary help agency context, and provides no guidance on the re-fashioning of this power, either in substantive or procedural terms, toward applying it specifically in this context.[116] The salience of the Report's failure to provide any further guidance concerning the allocation of responsibility as between clients and agencies, or to address the problems in the current approach of identifying "true" or "related" employers, is reinforced in its extensive chapter on "Control Over [Working] Time." Given the expansion of precarious temporary help agency employment driven by employers' search for flexibility, it is ironic that the Report fails to address the issue of control over time in temporary help agency contexts and, more specifically how its extensive work-time-related Recommendations would apply, or be enforced, amid ongoing confusion over "employer" status in these contexts.

As apparent justification for a self-admitted lack of more concrete recommendations to government, the Arthurs Report makes a rather confusing and arguably inaccurate claim that "it appears that no

114. *Id.* at 88.

115. Employment standards statutes in five Canadian jurisdictions provide a similar provision. *See supra* note 58.

116. The Report also contains no discussion of the issue of "related employers" in connection with access to unionization, presumably since its formal mandate was to provide recommendations towards the reform of Part III of the Code only, and not toward the entire Code, although this specific mandate was arguably interpreted quite liberally in other circumstances.

comprehensive Canadian study of the placement industry has ever been undertaken."[117] What is understood as a "Canadian" or "comprehensive" study of the industry is not clear, since there have indeed been some rather extensive studies of the general phenomenon, industry practices, and the problematic nature of this employment form in Canada,[118] as well as more specific studies around various concerns generated by temporary help agency employment, both in Canada and elsewhere, many of which have been cited throughout this paper. Notably, the prior, extensive, and well-known Bernier Report itself was not even acknowledged. Similarly, although the Arthurs Report identifies certain European models of "flexicurity" as a benchmark in other areas of discussion,[119] it does not mention the significant role that regulation of temporary help agency employment has played in certain of these very arrangements, nor the efforts by the European Commission to adopt a new Directive in this policy domain at that time.

On the basis of this alleged lack of prior studies, rather than provide any further concrete law reform proposals,[120] the Arthurs Report merely recommends a "study" to assess the extent of industry employment standard *compliance* (presumably only in the federal jurisdiction) and to assess "whether *inappropriate practices* exist" requiring regulation,[121] and further recommends that the government should "encourage" an industry association to draft a voluntary "code of conduct" requiring firms to apply the law. The voluntary code should state that agencies must not "(a) deprive agency workers of access to proper pay and benefits, (b) interrupt their tenure of service after each assignment, or (c) prevent them from taking permanent jobs with client firms after a defined interval."[122] Further, the Report recommends that "The Code should also stipulate that agency workers must be made fully aware of their rights before being dispatched to

117. ARTHURS, *supra* note 9, at 235.

118. VOSKO, *supra* note 4; BERNIER, VALEE & JOBIN, *supra* note 8; HAMDANI, *supra* note 18.

119. The report uses concept of flexicurity repeatedly when discussing balancing interests, and notes its "considerable traction" in Europe, particularly in the Netherlands and Denmark, both of which have adopted considerably extensive regulation of temporary help agency work as part of these overall arrangements (discussed in STORRIE, *supra* note 12.) For examples of these references to "flexicurity," see the ARTHURS, *supra* note 9, at xvii, 34, 49, 253–58.

120. The Arthurs Report does, of course, contain various recommendations aimed at improving labor standards and their enforcement across-the-board, which might also improve labor standards or enforcement in triangular arrangements as well. However, given its apparent concern about enforcement of standards concerning agency-supplied workers, arguably little law reform is recommended.

121. ARTHURS, *supra* note 9, at 235 (emphasis added). This is qualified by the statement "so far as that is constitutionally feasible," since the Recommendations are provided to the Federal government, which does not have authority to directly regulate the temporary help agency industry in its own right, but may do so to some extent through its power to regulate employment practices in federally regulated activities.

122. *Id.*

client firms, and it should contain a mechanism for identifying and rectifying violations."[123] The Report lastly suggests that the federal government adopt a policy to require its agencies, corporations, or institutions receiving federal grants to certify compliance with this Code in dealings with temporary help agencies, and that it adopt a similar policy for itself.

The Arthurs Report also makes no mention of any need for reform around the issue of access to unionization. While this may be due primarily to its mandate being limited to a review of Part III of the Code, it is disappointing that no effort to frame this question within a more generic discussion of labor standards in relation to "voice" in general, particularly since concerns around the relationship between standards, outcomes, and "voice" played a role elsewhere in the Report.[124]

C. Ontario's "Bill 161"

Bill 161, An Act Respecting Temporary Help Agencies,[125] ("Bill 161") was a private member's Bill sponsored by MP Vic Dhillon, of the governing Liberal party, on November 22, 2006, during the 38th session of the Ontario legislature. Bill 161 was not legally enacted, since it lapsed when the Legislature was prorogued in the summer of 2007, prior to its third Reading. Bill 161 did receive Second Reading, had proceeded through the Standing Committee on the Legislative Assembly, was reported to the House as amended and, on May 14, 2007, was ordered for Third Reading. Although this was not a "government" bill sponsored by a Minister, which would have essentially guaranteed its passage into law, certain factors suggested its importance as revealing something about the trajectory of possible law reform in Ontario. Both the Liberal party and the sponsoring MP, who was associated with this Bill, were returned to power in an election held shortly after the Bill lapsed. After the second reading, the Bill received an extensive set of revisions, including a major shift in focus that originally included *employment placement* agencies, toward a strict focus on the temporary help agency industry alone, with active involvement of the Ministry of Labour in redrafting the Bill, suggesting some support for this Bill from the Minister of Labour, the Ministry

123. *Id.*

124. As well, one of the academic papers commissioned by the Arthurs Commission specifically addressed the relationship between standards and voice. *See* Anil Verma, *The Role of Employee Voice in Obtaining Better Labour Standards*, cited in ARTHURS, *supra* note 9, at 276.

125. *See supra* note 10.

bureaucracy, or both, and/or a perception of a significant possibility that the Bill would achieve majority support in the provincial Legislature.[126]

There were two key aspects to this Bill. First, it would have established a licensing scheme for temporary help agencies, administered by the Director of Employment Standards. The Bill created a potential linkage between licensing and employment standards compliance by providing that, in issuing or renewing licenses, the Director had the discretion to consider:

> (a) any current or past contraventions of this Act or the regulations on the part of the applicant;
>
> (b) any current or past contraventions of the *Employment Standards Act, 2000* or the regulations made under it on the part of the employer;
>
> (c) the health and safety of the employees;
>
> (d) any prescribed factors.[127]

The discretion allowed to the Director in renewing a license suggests that non-compliance with this Act or the Employment Standards Act, 2000 would not result in immediate non-renewal of a license.

Second, the Bill made temporary help agencies and their clients jointly and severally liable for *unpaid wages*. However, the Bill significantly limited the liability of client firms by excluding any amounts owed to the worker for termination pay, severance pay, and related benefit payments.[128] Like the similarly limited recommendation in the Arthurs Report, Bill 161 also did not impose any other form of liability for employment standards obligations generally, nor any attempt to allocate obligations across the parties. Further, the language of the Bill referred to above, as well as the definitions of "client" and "temporary help agency"[129] seemed intended to reinforce a practice of treating the agency as the legal employer for employment standards purposes, consistent with Recommendation 31 in the Bernier Report.

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126. This interpretation of the legislative process surrounding Bill 161 was explained to me in an interview with Chris Yaccato, communications director in MP Dhillon's office, in September 2007.

127. Section 6, Bill 161.

128. This includes amounts deemed unpaid wages under s. 62(2) of the Employment Standards Act, 2000, S.O. 2000, c. 41 (unpaid benefits during period of notice of termination).

129. Section 1 of Bill 161 contained the following definitions:

- "'client' means a person, a) who pays the operator of a temporary help agency, or a person related to the operator, for the labor of an employee, i) of the operator, ii) of a person related to the operator, or b) on whose behalf payment is made to the operator of a temporary help agency, or to a person related to the operator, for the labor of an employee described in subclause a) i) or ii);
- "temporary help agency" means a business of entering into contracts under which a) employees of the operator of the business or of a person related to the operator perform labor for a client, and b) the client, or another person acting on the client's behalf, pays the operator or related person for the labor of those employees.

Interestingly, the Bill also prohibited reprisals[130] by a client, or a "person acting on behalf of a client" against an "employee of the operator" seeking to enforce their rights.[131] Last, although the Bill did not contain any other significant rules about temporary help agency behavior, it did provide the Cabinet with power to make future regulations concerning fee-charging and practices that restrict the hiring of workers by clients.[132]

D. Ontario's "Bill 139"

The provisions of Bill 139 will take effect in Ontario on November 6, 2009, and include three main categories of revisions to the province's employment standards legislation:[133] clarification about the nature of the employment relationship in temporary help contexts, restrictions on certain contractual terms and fee charging by agencies, and relatively increased access to certain employment standards for agency workers.

In terms of clarifying the employment relationship, the new Bill explicitly identifies the agency as the employer.[134] The employment relationship is defined as beginning once the worker and agency agree that the agency will assign the worker to perform work for clients,[135] and employment with the agency is deemed to continue both during and after the occurrence of work assignments,[136] until one of the recognized forms of termination defined under the Employment Standards Act has taken place.[137] The concept of an assignment is also defined, and begins on the first day of work with the client, ending whenever it is brought to end by either of the employee, client, or agency.[138] Agencies are also obliged to disclose prescribed information about the agency,[139] and about each work assignment,[140] to the employee. In contrast to its predecessor, Bill 139 did not contain any provision for joint liability of client organization with respect to any employment obligations, aside from prohibitions on client reprisals against employees seeking to enforce their rights.[141]

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130. Section 14.9 states that no client shall "*intimidate or penalize* an employee of the operator or threaten to do so . . ." (emphasis added).
131. Bill 161, Section 14.9(1),(2).
132. Bill 161, section 16.
133. Employment Standards Act, 2000, S.O. 2000, c. 4.
134. *Id.* § 74.3.
135. *Id.*
136. *Id.* § 74.4(3).
137. *Id.* § 56.
138. *Id.* § 74.4 (2).
139. *Id.* § 74.5.
140. *Id.* § 74.6.
141. *Id.* § 74.12.

Bill 139 prohibits agencies from restricting employees from entering employment relations with clients,[142] and from seeking to restrict clients from providing references[143] to or entering employment relations with employees assigned to them by agencies.[144] It also prohibits agencies from charging fees to employees in relation to obtaining employment with the agency,[145] obtaining work assignments,[146] preparing resumes and job interview preparation,[147] or obtaining full-time employment with clients.[148] Fees of these sorts seem to have been more commonly associated with the less reputable or "fly-by-night" agencies. More significant is that Bill 139 also prohibits agencies from charging fees to clients "in connection with the client entering into an employment relationship with an assignment employee."[149] However, such fees are allowed for a six month period from the start of each assignment,[150] even if the assignment period is shorter than six months,[151] which is a significant limitation on the extent of the prohibition.

Last, Bill 139 also provides some improved access to certain minimum employment standards entitlements. It provides a scheme of notice requirements, or pay in lieu, for termination and severance, with extensions to the tests for calculating when a worker is terminated by way of extended layoff, and formulae for termination and severance pay entitlements. Last, by way of a separate regulation change adopted during the debate on Bill 139, the legislature also lifted the exemption from statutory "public holiday pay" for so-called "elect to work" employees.[152]

V. DISCUSSION AND CONCLUSION

"We'll support this Bill as New Democrats because even a baby step is better than no step at all."
The Honourable Cherie DiNovo, Member of Provincial Parliament.[153]

Given a new international normative context represented by the ILO's recent adoption of Convention 181; the significant expansion of the

142. *Id.* § 74.8(1)(4).
143. *Id.* § 74.8(1)(6).
144. *Id.* § 74.8(1)(7).
145. *Id.* § 74.8(1)(1).
146. *Id.* § 74.8(1)(2).
147. *Id.* § 74.8(1)(3).
148. *Id.* § 74.8(1)(5).
149. *Id.* § 74.8 (1) (8).
150. *Id.* § 74.8 (2).
151. *Id.* § 74.8 (3).
152. Ontario Regulation 443/08, § 1.
153. *Hansard*, Ontario Legislature, December 7, 2006.

temporary help industry in Canada; and the increasingly salient policy concerns arising from this expansion, Canadian policy reform activities and dialogue are rather minimal. The Bernier Report of 2003 stands out as the most extensive analysis and set of law reform recommendations to date in Canada, while the subsequent Arthurs Report and Ontario's Bill 161 represented much more limited proposals for change. Yet, collectively these moments, together with the adoption of Bill 139 in Ontario in 2009, reveal aspects of a pattern in Canadian policy direction in this area.

First, policy dialogue and reforms imply that regulatory progress in this area lies primarily, if at all, around the level of *individual* employment rights, since the issue of access to unionization, both for temporary agency workers themselves and other workers whose access may also be eroded, has been largely neglected, despite the Bernier Report's limited acknowledgement of this "problem." While there has been dialogue around possible industry licensing schemes and imposed liability on clients, these are also generally conceived as instruments for potential improvement in the enforcement of certain (limited) individual employment standards. Even the significant Bernier Report recommendation concerning the adoption of the principle of "equal treatment" may also be conceived of as operating at the level of individual rights only, and might conceivably be adopted as a principle to be enforced through employment standards regimes. While EU experience suggests that the background nature of the collective bargaining system and the extent to which temporary help agency employment becomes included under these arrangements is a crucial factor affecting outcomes for these workers,[154] the question of access to unionization, or how these workers may otherwise exercise collective voice, remains neglected in Canadian policy dialogue. Indeed, regime-derived impediments to unionization generated by temporary help agency employment, for both agency workers and laterally affected direct-hire workers, remain intact to reinforce the background phenomenon of gradual declining unionization in Canada.[155]

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154. For example, in Sweden, a country in which one of the relatively highest degrees of security are provided to temporary help agency workers, outcomes are determined primarily through direct collective bargaining processes with relatively less targeted state regulation concerning these outcomes. *See* STORRIE, *supra* note 12.

155. *See* Andrew Jackson & Sylvain Schetagne, Solidarity Forever? An Analysis of Changes in Union Density (Canadian Labour Congress Research Paper No. 25, 2003); John Godard, *Do Labor Laws Matter? The Density Decline and Convergence Thesis Revisited*, 42 INDUS. REL. 458 (2003). For an analysis of the impact of recent Canadian legislative reform on union growth, see Timothy J. Bartkiw, *Manufacturing Descent? Labour Law and Union Organizing in the Province of Ontario*, 34 CANADIAN PUB. POL'Y 111 (2008); Susan Johnson, *The impact of mandatory votes on the Canada-U.S. Union density gap: A Note*, 43 INDUS. REL. 356 (2004); Sara Slinn, *The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis*, 10 CANADIAN LAB.

Developments seem also to reveal momentum toward consolidating the status of the temporary help agency as the legal employer in Canada. This was an explicit recommendation of the Bernier Report, and with the passage of Bill 161, has been further enshrined in the law of the province of Ontario. This tendency is consistent with the approach to the question of "employer" status in the United States, where temporary help agencies generally receive more substantial statutory protection for their status as employer.[156] This amounts to a shift in favor of granting increased legitimacy to these labor market actors and to this form of employment itself, which legitimacy the temporary help industry has vigorously pursued within different national contexts.[157] Correspondingly, there has been some policy momentum toward imposing a limited form of joint liability on client firms. Although this was ultimately not adopted in Ontario, both the Arthurs Report and the prior Bill 161 placed a limited form of this concept into policy dialogue. Developments reveal little progress toward a more extensive form of joint liability for employment standards obligations broadly defined[158] and little progress toward any other kind of response to the ILO's call under Convention 181 for governments to seek to allocate potentially different types of responsibilities across the agency and client. One interesting question for future analysis is the impact of Bill 139 on the extent to which Ontario adjudicators will continue to face *ad hoc* challenges to the status of the agency as the "true" employer, and the extent to which law reform has closed the door to that *ex post* mechanism in Ontario, which remains intact in the rest of Canada.

Discussions of broader forms of restrictions on client behavior in Canada seem only to be found in the Bernier Report. Neither the Arthurs Report, nor Bill 16, nor Bill 139 dealt directly with the issue of "unequal treatment" at the client level. While Vosko cautions against "SER-Centrism,"[159] or the strict rehabilitative focus on comparing temporary help workers to those in standard employment relationships, I suggest that the

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& EMP. L.J. 399 (2003); Felice Martinello, *Mr. Harris, Mr. Rae, and Union Activity in Ontario*, 26 CANADIAN PUB. POL'Y 17 (2000).

156. *See* George Gonos, *The Contest over 'Employer' Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & SOC'Y REV. 81 (1997).

157. *See id.*; VOSKO, *supra* note 4.

158. The Bernier Report's Recommendation 39 does state that the tribunal should have the power to declare the parties "sole" (single) employers in each situation where it is necessary in order for an employee "who holds a position meeting *permanent needs on a regular basis* within the client-business to *fully exercise his rights*" (emphasis added). This is closer to general joint liability, but is much more limited in that it is restricted to full time replacements who are acting in a permanent basis, or what Guy Davidov refers to as "illegitimate" temps (which he suggests calls for case-by-case assessment of the "necessity" of imposing joint liability, and the manner and scope in which it will be imposed). *See* Davidov, *supra* note 50.

159. Vosko, *supra* note 100.

potential for temporary help agency employment to undermine other relatively "standard" employment relationships, let alone unionization, remains barely on the policy radar in Canada. Dialogue has focused squarely on increased compliance with certain limited minimum standards, and not at all on the degree of inequality persisting above the minima, nor with the extent to which outcomes for these workers rise above the minima. To a large extent, dialogue has depended upon a problem *frame* identifying the existence of select industry "*bad apples*" as the problem. This rather "low road" approach focuses on minimal outcomes, and often on remedying quite extreme or unethical behavior, such as the outright failure to pay workers at all for work performed. While some attention to this is necessary in policy reform, this frame conceals from view the increasing precarity emerging from the expansion of this form of employment unconnected to such extreme violations of basic rights. By extending certain minimum standards to agency workers, it is possible that some limited progress may have been be made via Ontario's Bill 139 toward reducing some of the structure-induced "undercutting" or "downward harmonization" effect on the labor market. However, in the rest of Canada, and even in Ontario, much of this will remain intact, while policy trajectory is toward simultaneously increasing the legitimacy of the very employment form generating these problems.

Overall, recent Canadian policy developments constitute "baby steps" toward regulation of temporary help agency employment. Of course, we do not know whether these "baby steps" will lead to further concrete law reform across Canadian jurisdictions, nor what specific reform might entail, but the trajectory itself is revealing. Whether "baby steps" are actually "better than no step at all" (as suggested in the quote at the beginning of this section) is a question that ought to remain open for debate, given the uncertain nature of tradeoffs between increased legitimization of this employment form and marginally improved outcomes from incremental changes in policy. As in many areas of public policy, policy makers must decide what social "return" they will seek in exchange for the greater legitimacy they bestow to these social arrangements and outcomes.

APPENDIX A: BERNIER REPORT RECOMMENDATIONS REGARDING TEMPORARY HELP AGENCY EMPLOYMENT

RECOMMENDATION NO. 9

That the following fundamental principle be added to the *Act Respecting Labour Standards*:

An employer may not establish working conditions for a specific employee, which are less than those granted to the other employees performing similar or equivalent work in the same establishment:

- For the only reason that this employee usually works fewer hours per week;
- For the only reason that this employee works outside the establishment; or
- For the only reason that this employee works on call on a temporary or casual basis or for a determinate period, whether or not the work is performed directly for the employer or through an employment agency.

. . . .

RECOMMENDATION NO. 25

That studies be conducted to examine the connection between occupational health and safety and non-traditional work and to assess the relevancy of having dangerous work performed by home workers or temporary workers hired directly or by an employment agency.

RECOMMENDATION NO. 26

That studies be conducted to examine whether or not there is a problem for the representation of non-traditional workers within the various participatory mechanisms created by the *Act Respecting Occupational Health and Safety* and suggest appropriate measures if necessary.

. . . .

RECOMMENDATION NO. 31

That the temporary employment agency be acknowledged in all legislation as being the real employer, subject to recommendations made below for certification purposes.

RECOMMENDATION NO. 32

That conditions for wages and holidays be those applicable in the client-business to the job for which the replacement is done or for a similar job, to the extent that such conditions are better than those offered by the agency.

RECOMMENDATION NO. 33

To the extent that these fringe benefits are not available to the referred employee, that compensation, which is equivalent to the employer's contribution to the fringe benefit plans, be added to the wages on a *pro rata temporis* basis.

RECOMMENDATION NO. 34

That the employment agency and the client-business be jointly and severally liable for any amount of salary owing to the employee as well as for the purposes of applying the legislation concerning occupational health and safety, industrial accidents and occupational diseases.

RECOMMENDATION NO. 35

That these conditions be specified in writing in the contract concluded between the employee and the agency.

. . . .

RECOMMENDATION NO. 36

That all clauses restricting an employee's freedom to obtain permanent employment with a client business or with a group or sector catered to by the agency or restricting the freedom of the client-business to hire the employee on termination of his contract be prohibited, whether or not such clauses involve a penalty to the client-business or the employee, or any other type of restriction.

RECOMMENDATION NO. 37

That this freedom to uphold permanent employment be specified in writing in the agency-client business contract and in the agency-employee contract.

RECOMMENDATION NO. 38

That in cases in which the employee is hired directly by the client business on termination of the temporary employment contract, the duration of this contract be considered for the purposes of a probationary period and for the calculation of the duration of continuous service.

. . . .

RECOMMENDATION NO. 39

That the administrative tribunal have the power to declare that the employment agency and the client-business are the sole employer every time the situation requires it to allow the agency employee who holds a position meeting permanent needs on a regular basis within the client-business to fully exercise his rights.

. . . .

RECOMMENDATION NO. 40

That the Labour Relations Board, when allowing a petition for the certification of a distinct group exclusively made up of agency employees who hold positions meeting the client businesses' permanent needs when there is already another bargaining unit within that business, have the power to declare that the client-business and the agency are to be considered as sole employer for the purposes of union certification, collective bargaining and the application of a collective agreement for that specific unit.

. . . .

RECOMMENDATION NO. 41

That the Labour Relations Board—before which a petition for certification is filed that includes all employees working for the client-business, that is to say, that businesses' own employees as well as those

supplied by the employment agency to fill positions meeting that clients' permanent needs when there is no bargaining unit liable to include these categories of employees within the client-business—have the power to declare according to the usual rules, that all these employees constitute an appropriate bargaining unit. In such a case the client-business will obviously be considered as the employer for the purposes of trade union certification, collective bargaining and the application of a collective agreement.

RECOMMENDATION NO. 42

That the Labour Relations Board before which a petition for certification is filed and which only includes the agency employees holding positions meeting the businesses' permanent needs when there is no other bargaining unit including these categories of employees within the client-business, have the option to declare according to the powers it already has, that this group constitutes a distinct and appropriate bargaining unit. In such a case, the client-business and the agency could be considered as a unique employer for the purposes of trade union certification, collective bargaining and the application of a collective agreement.[160]

160. BERNIER, *supra* note 8, at 34–70.

APPENDIX B: "ARTHURS REPORT" RECOMMENDATIONS REGARDING TEMPORARY HELP AGENCY EMPLOYMENT

RECOMMENDATION 5.9 Part III should be amended to permit any person or body exercising decision-making powers under Part III to determine that associated or related works, undertakings or businesses under common control or direction are a single employer for purposes of the statute. Such determinations should be subject to appeal in the same manner as other determinations made under Part III.

. . . .

RECOMMENDATION 10.1 The labour Program, or some other branch of the federal government, should undertake a study of employment practices in the temporary placement industry, in cooperation with the industry, if possible. The study should attempt to determine (a) the extent of compliance with existing federal and provincial labor standards, and (b) whether inappropriate practices exist within the industry that ought to be regulated under Part III, so far as that is constitutionally feasible.

The federal government, in consultation with the other interested parties, should encourage placement industry associations to draw up a code of conduct that requires agencies to comply with all relevant legislation, and prohibits practices or contractual terms that (a) deprive agency workers of access to proper pay and benefits, (b) interrupt their tenure of service after each assignment, or (c) prevent them from taking permanent jobs with client firms after a defined interval. The code should also stipulate that agency workers must be made fully aware of their rights before being dispatched to client firms, and it should contain a mechanism for identifying and rectifying violations.

The federal government should require all corporations, institutions or agencies receiving federal grants or contracts to certify that they neither do business with temporary placement agencies nor utilize agency workers in violation of the provisions of the proposed code of conduct. The government should adopt a similar policy in its own direct dealings with such agencies.

. . . .

RECOMMENDATION 10.2 Part III should make federally regulated enterprises jointly and severally liable with temporary employment agencies for non-payment of wages or benefits owing to agency employees who work in those enterprises.[161]

161. ARTHURS, *supra* note 9, at 88–236.

APPENDIX C: THE RANGE OF INSTRUMENTS REGULATING TEMPORARY HELP AGENCY EMPLOYMENT IN THE EU

(Source: Storrie, 2002 and ETUI Survey, 2000)

- General Employer obligations in labor law
  - Most EU countries name agency as Employer, normal obligations in labor law
  - Allocate (or joint) health and safety obligations, training fund contributions
  - Client user liability for unpaid wages, benefits, contributions
  - Client user obligations to comply with working time and conditions regulations
  - Client user health and safety obligations

- Regulation of Temporary Help Agency Businesses
  - Authorization or Licensing requirements, with renewal requirements
  - Financial/solvency guarantees
  - Social Partner involvement
  - Reporting Obligations (and/or monitoring schemes)
  - Limitations on Scope of activities

- Regulation of the Work Assignment
  - Specified Objective reasons for permitting agency work
  - Restricted Circumstances:
    - Assignments after dismissals for economic reasons
    - To replace striking workers
    - Dangerous work

- Regulation of the Labor Contract
  - duration and renewal rules
  - whether contract deemed open-ended or fixed term

  - requirements of writing, disclosure of specified terms in contract
  - dismissal rules

- Specific Individual Employment Standards
  - Principle of Equal Treatment, rules on wage comparisons to other employees
  - Comparable treatment in working time with client workers

- Regulation excluding temp work from certain sectors
  - E.g., Public admin, construction, others . . .

- Regulation requiring Information Disclosure
  - To "social partners" in the firm (information, consultation, or veto rights)
  - To worker (in general or in "labour contract")

- Collective Rights, Collective Bargaining
  - Supportive nature of general labor law as "background" framework
  - Support for agency sector collective bargaining
  - Requirements imposed into collective agreements
  - Rules designed to deter temp agency use for union avoidance
  - Client obligations towards client's works council—Disclosure/consultation/veto rules regarding use of agency workers

APPENDIX D: SUMMARY OF SELECTED ARTICLES FROM DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF THE EUROPEAN UNION ON TEMPORARY AGENCY WORK (NOVEMBER 19, 2008)

Art 2 – Aim—one of the purposes of the Directive is "recognising temporary-work agencies as employers."[162]

Art 4 – Review of Restrictions or prohibitions—member states to perform a review of restrictions on use of temporary agency work by December 5, 2011.[163]

Art. 5. Principle of Non-Discrimination—conditions of employment during postings at user firm should be "at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

Exemptions:

- In terms of Pay, member states may, after consulting social partners, allow an exemption where worker has contract with agency and worker continues to be paid between postings.
- Member states may, after consulting social partners, allow negotiated collective agreements to deviate.
- Where "adequate protection" provided, where there is no system for declaring collective agreements universally applicable, nor for extending their provisions to similar undertakings in a certain sector or geographical area, members states may, after consulting social partners and on the basis of an agreement concluded by them, establish arrangements that deviate from this principle, which may include a qualifying period for equal treatment.[164]

Art 6 – Access to employment, collective facilities and vocational training

- Information requirements—notice of jobs in user firms

162. Directive 2008/104/EC of the European Parliament and of the Council of the European Union on Temporary Agency Work 12 (Nov. 19, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF.

163. *Id.* at 12.

164. *Id.*

- Prohibit hiring barriers in contracts
- Prohibit fee-charging toward workers
- Equal Access to user firm amenities
- Improve temp worker access to training[165]

Art 7 – Representation

- Member states to establish conditions for workers counting in threshold calculations for representative bodies required by EU, national law, or collective agreements at Agency level.
- Member states may establish rules for these workers counting for purposes of threshold calculations for representative bodies required by EU, national law, or collective agreements, at user firm, in same was as if they were employed directly for same period of time by user firm.[166]

165. *Id.* at 13.
166. *Id.*

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Below Alon-Shenker provides her input on a few of the questions raised in the Ministry of Labour Guide to Consultation:

Q3: As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?

It is advised that the Review Commission consider the European model of works councils. Alon-Shenker studied the German model in her Master's Thesis (University of Toronto, Faculty of Law, 2005). A chapter from her dissertation is attached to this submission.

In addition to filling the current representation gap by encouraging unionization, there are other solutions outside the collective bargaining regime that may improve and increase employee voice through alternative methods of employee representation and participation. One method already exists in Ontario – mandatory joint health and safety committees under the Occupational Health and Safety Act. Works councils take employee representation and participation to the next level.

Works councils may provide a forum in which employees could discuss and formulate their concerns, and then use a representative to voice their proposals and position to management, so as to influence the priorities and policies in their workplace. They may also improve working conditions, protect against discrimination, enhance vocational training and promote collective goods such as health and safety at work. It must be clear, though, that works councils are not suggested as an *alternative* to unions but rather as a *complementary* solution to the representation gap.

Germany offers the most advanced form of works councils. The German labour law system is based on two pillars of employee representation: trade unions and works councils. Works councils are legally mandated in Germany. The law governs the establishment and operation of the works councils. It provides that "works councils are to be elected in all establishments that normally have five or more employees with voting rights". The law seeks to give works councils a say in areas such as training, employment security, and protection of the environment. Works councils have the right to specified information, the right to demand consultation on certain issues and the right to jointly decide certain workplace matters (co-determination). They have the power to conclude social compensation plans and works agreements with management at the company level, and to institute legal actions if their rights are disregarded. However, works councils are not permitted to organize strikes to resolve

disputes with the employer. An internal arbitration board (a conciliation committee) is in charge of resolving disagreements between the parties.

Despite some concerns regarding their adaptability to an era of the new economy and their impact on company performance, Alon-Shenker concludes in her Master's Thesis – based on an assessment of the theoretical and empirical literature – that the added value of works councils outweighs their disadvantages. Works councils act as an important vehicle of collective voice and improve fundamental rights at work. They promote industrial democracy and create a more cooperative, problem-solving relationship between management and workers than traditional unions. By creating collaborative work environments, they promote trust between workers and management and improve the dispute-resolution process in the workplace. Not only may they fill the representation gap but they may also help increase union density. Finally, they have been constantly modified to fit the new era of globalization and the new economy.

To conclude, works councils may help reach the masses of workers including those who are not covered by union protection by making some forms of employee representation mandatory. Yet, some modifications are required to overcome problems of low profitability and costs mainly in small- and medium-sized enterprises.

Q4: Are efficiency, equity and voice the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws?

It is advised that the Review Commission consider incorporating the open-ended standard of proportionality into labour and employment legislation. This principle will ensure that the various key objectives are balanced appropriately. Pnina Alon-Shenker and Guy Davidov published an article in *McGill Law Journal* (2013) on the application of the principle of proportionality in various employment and labour law contexts in Canada. This project was funded by the CLMR. The article is attached to this submission.

In short, the principle of proportionality, which was designed to limit abuse of power and infringement of human rights by governments, has become a fundamental and binding legal principle in the jurisprudence of many countries. Ever since the seminal R. v. Oakes decision, when the Supreme Court of Canada interpreted s. 1 of the Canadian Charter of Rights and Freedoms as entailing a three-step proportionality test, proportionality has become an important pillar of Canadian law.

Alon-Shenker and Davidov found that the principle of proportionality is already used (explicitly and implicitly) in various contexts imposing some limitations on employers and on trade unions when they exert as much control over an individual's life as governments. For example in the case of just cause dismissal, a decision to dismiss an employee infringes that employee's right or interest to have job security or receive advance notice (i.e. equity). The objective of the employer is to ensure that the workplace is composed of the most competent workers (i.e. efficiency). The balance is achieved through a proportionality analysis. Employers are required to show that the measure chosen to achieve this objective was proportional: (1) Is dismissing without notice employees who engaged in misconduct or incompetence rationally related to the objective because it creates deterrence or conclusively prevents future misconduct/incompetence; (2) Is a less severe response possible while still achieving the objective? (3) Consideration of circumstances of both employee (age, employment history, seniority, role and responsibilities) and employer (type of business, policies or practices) to

assess the severity of the harm to the employee vs. the importance of the objective to the employer.

Alon-Shenker and Davidov discuss the justifications for extending the application of proportionality to the private sphere and more specifically to the employment relationship. They conclude that a higher standard of behaviour is required in employment relationships as opposed to other contracts; that the use of proportionality is justified given its legal and analytical merits; and that the application of proportionality fits within contemporary legal doctrines and advances legal coherence. Finally, they advocate a more explicit use and structured application of the three-stage proportionality test in various employment and labour law contexts.

It should be noted that the use of proportionality is (and can) be done through development of common law (as was done in cases of just cause dismissal and restrictive covenants). Yet, it is (and can also be) done through *explicit* statutory provisions (see e.g. s. 5(3) of PIPEDA). There are many examples where the legislation refers to terms such as "reasonable" (see e.g. s. 48(17) of Ontario Labour Relations Act). Since the reasonableness test is relatively vague, a reference to terms such as "proportionate" may provide more clarity and predictability as the more structured test of proportionality would then apply. As explained in the article (on pages 409-10):

> Indeed, legislatures have established, and adjudicators have also developed, a *de facto* requirement of fairness in some employment contexts. … [E]mployers are sometimes required by common law to measure up to a reasonableness standard. Canadian courts have recognized implied contractual duties to treat employees with civility, decency, respect, and dignity, and to exercise discretion reasonably, or at least honestly and in good faith, when discretion may adversely affect employees' interests. … The advantage of these open-ended standards is their ability to address new problems in an ever-changing landscape. There is, obviously, a price in terms of indeterminacy and vagueness. To enable workers to know their rights and employers to know their obligations, we need concrete rules. To some extent, courts can develop such rules over the years by implementing the open-ended concepts, but such rules are always incomplete. We believe that the principle of proportionality offers a balance: it is open-ended and yet includes relatively concrete rules—the three-part proportionality test. Admittedly it does not offer clear-cut solutions for any given case. Yet the three-stage structure offers a principled way to analyze the problem and promises a degree of determinacy and predictability higher than what can be found in open-ended standards. Proportionality also offers a balance in terms of respecting the rights and interests of both parties. The default rule is that the employer is free to make any managerial decision, so the principle of proportionality does not generally intervene in business judgments and choices. The exception is that society insists on a degree of respect for the rights and interests of employees. Employers are not expected to completely internalize the costs of their decisions on employees. They are, however, expected to refrain from choosing means that do not advance their own goals, means that harm the employees more than necessary to achieve these goals, and means that infringe the rights of employees in a way that inflicts harms disproportionate to the expected gains. In short, the proportionality test ensures that the harms to employees are minimized, while also minimizing any intervention in business decisions.

Q12: In the context of changing workplaces, are changes required to the manner in which workers choose union representation under the LRA? Are changes needed in the way that bargaining units are defined, both at the time of certification and afterwards? Are broader bargaining structures required either generally or for certain industries? Are changes needed in regard to protecting bargaining rights?

It is advised that the Review Commission consider limiting the freedom of employers to express their opinions against unions during the initial organizing drive. Pnina Alon-Shenker and Guy Davidov wrote an article *forthcoming* in *Theoretical Inquiries in Law* on employers' speech during the organizing drive. The article is attached to this submission.

While the article starts with an examination of a recent Israeli case, it goes beyond that specific context, providing a comparative analysis of the law in Canada, the U.S. and the U.K., and laying out the theoretical framework for balancing between freedom of association and freedom of speech.

The main argument advanced in this Article is that the solution has to be purposive: to advance the goals of labour law and specifically freedom of association; and that the purposive analysis must be contextual. A rule prohibiting the employer from voicing opinions is surely an infringement of freedom of speech, and strong reasons are needed to justify it. Whether strong enough reasons exist depends on several contextual factors. Essentially, the question is whether given the current context, it is possible to secure real freedom of association without such a rule. Context refers to the real-life current experience concerning the struggles of organizing; and the existence of alternative legal mechanisms that might address this problem.

While the article concludes that the Israeli court decision to limit employers' speech during an organizing drive was justified, its findings also support the incorporation of such limitation into the legislation. Furthermore, limitation on employers' speech during an organizing drive is not unique to Israel. As described in the Article, employers' neutrality during an organizing drive was required in the early days of the National Labour Relations Act (in the U.S.) and is required to a certain extent under the Canadian federal jurisdiction.

Chapter III

The German Model of Works Councils

A. Introduction

While one might seek for a solution within the collective bargaining regime by strengthening unions' presence and powers,[1] in this thesis I focus on a different type of solution through alternative models of employee representation. In my view, although collective bargaining is a significant method for determining working conditions, it should be maintained in tandem with new, flexible models of collective representation, which might fill the representation gap more effectively. These models are thus complementary rather than alternatives to trade unions.

In this chapter, I will describe in detail the formation of the German model of works councils, its operation and powers. The German labour law system is based on two pillars of worker representation: trade unions and works councils. The relations between the two will be further discussed. Furthermore, works councils constitute an indirect form of employee participation among many other direct and indirect forms of participation that may exist at the establishment level. Direct employee participation and its relations with works councils will be also discussed at the end of this chapter.

B. General Definition and Characteristics

Rogers and Streeck broadly define works councils as "institutionalized bodies for representative communication between a single employer ('management') and the

[1] See chapter II, section H ("Other Methods of Employee Representation").

employees ('workforce') of a single plant or enterprise ('workplace')".[2] They also offer some general characteristics of works councils:

> Works councils represent all the workers at a given workplace, irrespective of their status as union members. … Works councils represent the workforce of a specific plant or enterprise, not of an industrial sector or a territorial area. … Works councils are *not* "company unions". … Being *representative* institutions, works councils also differ from management policies encouraging individual workers to express their views and ideas, as well as from new forms of work organization introduced to increase the "involvement" of workers in their work roles through decentralization and expansion of competence and responsibility in production tasks ("group work", "quality circles", and the like). … Representative communication between employers and their workforces may be of all possible kinds, and may originate from either side. … Communication … may be limited to information exchange, may entail consultation, or may end in negotiated co-decision making, or co-determination. … Works Councils may (the usual case) or may not have legal status. … Works council structures vary widely across and within countries. … Works councils are not the same as worker representation on company boards of directors.[3]

Most countries in Western Europe (such as Germany, France, Greece, Belgium and Spain) require the establishment of works councils. In Italy and Denmark, labour and management can establish such institutions voluntarily. National laws prescribe the size and structure of works councils, the rules for elections in establishments above a certain size, enforcement mechanisms for agreements, the rights of the works council to information, consultation and co-determination and its legal obligations.[4]

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[2] Joel Rogers & Wolfgang Streeck, "The Study of Works Councils: Concepts and Problems" in Joel Rogers & Wolfgang Streeck, eds., *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (Chicago: The University of Chicago Press, 1995) 3 at 6 [Rogers & Streeck, *Works Councils*] [Rogers & Streeck, "The Study"].

[3] *Ibid.* at 6-9.

[4] See Richard B. Freeman & Joel Rogers, "Who Speaks for Us?: Employee Representation in a Nonunion Labor Market" in Bruce Kaufman & Morris Kleiner, eds., *Employee Representation: Alternatives and Future Directions* (Madison, WI: Industrial Relations Research Association, 1993) 13 at 45-46. For an elaborate historical review and comparative analysis of works councils in Western European Countries see Wolfgang Streeck, "Works Councils in Western Europe: From Consultation to Participation" in Rogers & Streeck, *Works Councils*, *supra* note 2, 313. According to Streeck, the United States exceptionalism is explained by the historic struggle against company unions and the Wagner Act of 1935 (the *National Labor Relations Act*), which emphasizes adversarialism and a strong suspicion of cooperative forms of employee representation. In addition, while European countries were economically destroyed after the Second World War, America was not and thus did not require rebuilding "its productive base through class cooperation". Finally, collective bargaining was never centralized in the United States and the strong local unions in the unionized sector did not leave any room for works councils (*ibid.* at 315-16). An attempt by a coalition of Republicans and conservative Democrats to amend the NLRA and allow the establishment of joint labour-management teams (*Teamwork for*

In addition, the European Works Council Directive requires large international companies operating in Europe to set up mandatory bodies for information and consultation between employers and workers (European Works Councils). These councils have significantly less power than the German works councils.[5] In some European Union

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Employees and Managers Act – TEAM Act) was passed by both houses of Congress in 1996 but was vetoed by President Clinton.

[5] See Walther Müller-Jentsch, "German: From Collective Voice to Co-management" in Rogers & Streeck, *Works Councils*, *supra* note 2, 53 at 76. The Council Directive 94/45/EC of 22 September 1994 on the establishment of European Works Councils came into force on 22 September 1996. The directive became national law in most State members in September 1999 and now also includes the UK, Norway, Iceland and Liechtenstein. According to the directive, any company can establish a works council, but companies with at least one thousand employees in Europe, and at least 150 employees in each of at least two Member States, are obliged to do so, even if they are not European parent companies. The number of European works council members varies from three to thirty, but can be increased by agreement. These members are allowed reasonable time off during working hours to fulfill their duties, and they are entitled to pay. They also enjoy protection from unfair dismissal. The European works councils have rights to information and consultation on issues regarding the EU interests of the company as a whole, or at least two establishments in different member states. The costs of operating works councils are borne by central management. According to research conducted by independent consultants for the UK Department of Trade and Industry (DTI), the European works councils have proved to be significantly advantageous. They increase trust between management and employees, cause a greater employee involvement in the workplace, and a better understanding by employees of the factors influencing management decisions, thus helping to build a positive corporate culture. See "European Works Councils" (October 30, 2003), online: <http://www.gmb.org.uk/shared_asp_files/uploadedfiles/{770D0591-EABB-4EF9-A400-B0ABC7BE4CC5}_Europeanworkscouncils.pdf>. For a more elaborate discussion on the European Works Councils see Ruth Nielsen, *European Labour Law* (Copenhagen: DJøF Publishing, 2000) at 107-31; Roger Blanpain, *European Labour Law* (Hague: Kluwer Law International, 2003) at 605-46.

While it might be too early to assess their effects on firm performance and efficiency, there is some empirical evidence that indicates that European Works Councils are not associated with negative effects on labour productivity due to their administrative costs. However, there is also no strong indication that European Works Councils' presence positively affects labour productivity. See John T. Addison & Clive R. Belfield, "What Do We Know about the New European Works Councils? Some Preliminary Evidence from Britain", *Working Paper No. 21* (Bolzano, Italy: Free University of Bozen – Bolzano, School of Economics, March 2002). Law and economics theoretical analysis suggests that European Works Councils will only be effective if both management and works council representatives can see the advantages of these councils. See Bernhard Nagel & Roman Jaich, "Law and Economics Analysis of the European Works Council" in Gerrit De Geest, Jacques Siegers & Roger Van den Bergh, eds., *Law and Economics and the Labour Market* (Glos, UK: Edward Elgar, 1999) 157. A recent analysis of case studies, which looked at the operation of European Works Councils in France, Germany, Italy, Sweden and the UK, reveals that the advantages and benefits of European Works Councils far outweigh the disadvantages. A central assessment in many firms was that the European works councils did not slow down the decision-making process. On the contrary, some of the case studies even indicated that the European works council speeds up the decisions due to informal processes taking place in the background. The only negative outcomes found were the costs and the time required for the preparation of documents and meetings and attending the meetings. Yet, this kind of claim was usually accompanied by a description of favourable consequences. However, the report reveals that even when the information and consultation processes work well, they rarely include employees in critical corporate decision-making. See Anni Weiler, *European Works Councils in Practice* (Ireland: European Foundation for the Improvement of Living and Working Conditions, 2004), online: <http://www.eurofound.eu.int/publications/files/EF04109EN.pdf>. See also Lecher *et al.*'s categorization of symbolic, service, project-oriented and participative European works councils. The first two categories illustrate the pessimism with regard to European Works Councils. However, the last two categories emphasize that European works councils can enhance employee representation and strongly contribute to employee rights in a global economy (Wolfgang Lecher, Hans-Wolfgsng Flatzer, Stefan Rüb & Klaus-Peter Weiner, *European Works Councils: Developments, Types, and Networking* (Aldershot, England: Gower, 2001)). According to Budd, current studies imply that European works councils have the best chance when accompanied by strong

members, such as Germany, the Netherlands and France, European works councils exist alongside national works councils.[6]

On the national level, European Union Member States have been recently required to implement the EU Employee Consultation Directive establishing a general framework for national information and consultation rights in the European Community by March 2005. The Directive applies to undertakings with at least fifty employees or establishments with at least twenty employees (the choice is left to the Member States). It provides employees with the right to information and consultation yet leaves open the types of arrangements that the countries might implement.[7]

The German institution of works councils has been extensively discussed in Canadian and American literature on non-unionized employee representation, as it is the most comprehensive model of statutory and mandatory employee representation in the

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trade unions. See John W. Budd, *Employment with a Human Face: Balancing Efficiency, Equity and Voice* (Ithaca, NY: Cornell University ILR Press, 2004) at 174-75.

[6] In Germany, for example, the Act on European Works Councils came into force on November 1, 1996 and the EU Directive on European Works Councils was incorporated into German law. According to the German Federal Ministry of Labour and Social Affairs, "[t]he Act provides for cross-border information and consultations between employees and the decision-makers across national borders in companies and combines operating at Community scale. ... Adequate information and consultation will be guaranteed even if employees are affected by a decision that is taken outside the member states in which they are employed. The Act on European Works Councils is characterized by a high degree of flexibility and guarantees a practical, low-cost design of cross-border information and consultation of employees. ... The Act on European Works Councils serves to ensure a social dimension in the age of globalization ...". See "Co-determination: Quite a Good Thing" (The Federal Ministry of Economics and Labour, *Bundesministerium für Wirtschaft und Arbeit*, BMWA), online: <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/J-L/labour-and-law-codetermination-quite-a-good-thing,property=pdf.pdf>.

[7] Member States that currently have no 'general, permanent and statutory' system of information and consultation or employee representation may phase in the Directive's application to smaller firms up until 2008. While the Directive does not require any particular channel or structure through which these rights will be provided, it defines such information and consultation as taking place between the employer and the employee representatives provided for by national laws and/or practices. See "Thematic Feature: Works Councils and other Workplace Employee Representation and Participation Structures" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, October 22, 2003), online: <http://www.eiro.eurofound.eu.int/2003/09/tfeature/de0309201t.html>. The Directive (2002/14/EC) formally entered into force on 23 March 2002. For more information, see "Final Approval given to Consultation Directive" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, April 22, 2002), online: <http://www.eiro.eurofound.eu.int/2002/04/feature/eu0204207f.html>.

industrialized world.[8] I will turn now to a closer analysis of the German model of works councils.

C. Scope and Formation

Employee representation through works councils (*Betriebsrat*) in Germany is governed, formed and operated under the *Works Constitution Act*, 1972 (*Betriebsverfassungsgesetz, BetrVG*).[9] The Act was substantially modified by the 2001 Reform. The Act applies to all

[8] See *e.g.* Clyde W. Summers, "Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective" (1980) 28 Am. J. Comp. L. 367 [Summers, "Worker Participation"]; Clyde W. Summers, "The Usefulness of Unions in a Major Industrial Society" (1984) 58 Tul. L. Rev. 1409 [Summers, "The Usefulness"]; Roy J. Adams, "Should Works Councils be used as Industrial Relations Policy?" (July 1985) Monthly Lab. Rev. 25 [Adams, "Should Works Councils"]; Clyde W. Summers, "An American Perspective on the German Model of Worker Participation" (1987) 8 Comp. Lab. L.J. 333 [Summers, "An American Perspective"]; David M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987); Paul Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Mass.: Harvard University Press, 1990); Freeman & Rogers, *supra* note 4; Rogers & Streeck, *Works Councils*, *supra* note 2; Samuel Estreicher, ed., *Employee Representation in the Emerging Workplace: Alternatives* (Boston: Kluwer Law International, 1997); Bruce E. Kaufman & Daphne Gottlieb Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (Armonk, NY: M.E. Sharpe, 2000).

The American Commission on the Future of Worker-Management Relations (Dunlop Commission), established in 1993 by the Clinton Administration, examined this institution. Although it recommended the legalization of some employee involvement programs, the commission did not come to a conclusion that the U.S. needs to adopt the works council model. See *The Commission on the Future of Worker-Management Relations: Final Report* (1994), online: <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace>. According to Thomas A. Kochan, one of the commission members, some members of the commission wanted to go a step further and "recommend creating an American version of European works councils on either a voluntary or mandated basis. … The problem was that, aside from some academics, … there was no constituency in favor of this! If there is to be anything like works councils in the U.S., it is clear that they will need to emerge incrementally and experimentally in the same fashion as employee involvement programs and other workplace innovations evolved over the past two decades or so. While the Commission's recommendations do not explicitly propose formation of councils that reflect the full makeup of an establishment's workforce, they clearly allow for experimentation with such bodies on selected issues such as safety and health and other workplace regulations". He also stated that the Commission "did not recommend creation of these types of councils because of opposition from business representatives and lack of strong endorsement by labor. But clearly, there is room for experimentation that, over time, might produce an acceptable and effective American version of a workplace council". See Thomas A. Kochan, "Using the Dunlop Report to Full Advantage: A Strategy for Achieving Mutual Gains" (January 1995), online: <http://www.h-net.org/~labor/threads/thrdunkoch.html>.

According to Gollan and Patmore, "[t]he discussion of works councils as a possible reform of the industrial relations system in Australia is now on the mainstream political agenda". See Paul J. Gollan & Glenn Patmore, "The Challenge of Employee Democracy" in Paul J. Gollan & Glenn Patmore, eds., *Partnership at Work* (Australia: Pluto Press, 2002) 15 at 27.

[9] Hereinafter: the Act or the German Act. The Act was amended in 1989 and 2001. The 2001 reform will be further discussed in this chapter. Works councils in Germany first became known as workers' committees (*Arbeiterausschüsse*) in 1905, and during First World War, when some were designed to gain union support for the war effort. These committees were legally established as works councils in the Weimer Republic in 1920 under the *Works Councils Law* (*Betriebsrätegesetz*), but functioned at first under the complete authority of the trade unions. They were reestablished after Second World War in several German states and then under

establishments in the Federal Republic organized under private law (manufacturing and services).[10] The Act does not apply to religious communities and establishments that pursue, for instance, political, religious, scientific or artistic objectives.[11] The Act provides that "works councils shall be elected in all establishments[12] that normally have five or more permanent employees[13] with voting rights, including three who are eligible [to be works council members]".[14] Any employee at the age of eighteen or above has a voting right,[15]

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national legislation: the 1952 *Works Constitution Act* (*Betriebsverfassungsgesetz*). This Act formally recognized works councils' independence from the trade unions and their rights for information, consultation and co-determination. This legislation was amended under the 1972 *Works Constitution Act*. The Act broadens these rights and clarifies the relations between trade unions and works councils, while improving the access of the former to the workplace. For more historical background, see Müller-Jentsch, *supra* note 5 at 53-55; John T. Addison, Claus Schnabel & Joachim Wagner, "Nonunion Representation in Germany" in Kaufman & Taras, *supra* note 8, 365 at 366-67 [Addison *et al.*, "Nonunion Representation"]; Dr. jur. Walter Kolvenbach, *Employee Councils in European Companies* (Deventer: Kluwer, 1978) at 109-11; "Works Constitution" (European Employment and Industrial Relations Glossaries, European Foundation for the Improvement of Living and Working Conditions), online: <http://www.eurofound.eu.int/emire/GERMANY/WORKSCONSTITUTION-DE.html>.

[10] Section 130 of the Act. There is a separate system of staff councils in the public sector, which are less powerful than works councils. See Müller-Jentsch, *supra* note 5 at 55. See also the Federal Staff Representation Act and the Land Staff Representation Act, which apply to those establishments.

[11] Section 118 of the Act.

[12] An establishment is the organizational unit in which the entrepreneur alone or together with his staff pursues particular working objectives. See Liliane Jung, "National Labour Law Profile: Federal Republic of Germany" (International Observatory of Labour Law, Social Dialogue, Labour Law and Labour Administration Department, ILO, April 2001), online: <http://www.ilo.org/public/english/dialogue/ifpdial/ll/observatory/profiles/ger.htm>.

[13] "Permanent employees" include part-time employees who work regularly for the firm. See John T. Addison, Claus Schnabel & Joachim Wagner, "On the Determinants of Mandatory Works Councils in Germany" (1997) 36 Industrial Relations 419 at 421 [Addison *et al.*, "On the Determinants"].

[14] Section 1(1) of the Act. There is no official translation of the Act after the 2001 reform. The English version of the Act is from the Federal Ministry of Economics and Labour website: <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/W/works-constitution-act1,property=pdf.pdf>. Companies with more than one establishment, and thus with several works councils, are required to establish a central works council comprised of works council members from each establishment (section 47 of the Act), and a group of companies may establish a combined works council (section 54 of the Act). The central or combined works council is responsible for those duties that affect the company as a whole, several establishments, or the combined or individual subsidiaries. The central works council and the combined works council may also represent establishments or companies in which no works council has been established (sections 50 and 59 respectively).

One of the main purposes of the 2001 reform of the *Works Constitution Act* was to fit the employee representation structure to modern forms of company organization. Aside from the different arrangements mentioned above, employers and works councils may now also form different flexible kinds of employee representation structures, based on a collective agreement or a works agreement, such as works councils for special product or business department (*Spartenbetriebsräte*) (see section 3 of the Act). Another amendment to the Act that aims to achieve this purpose is section 21a, which provides works councils with a "transitional mandate" (*Übergangsmandat*), in case of the reorganization of the establishment (as a result of split up or merger) during the transitional period, for up to six months. See "Works Constitution Act Reform Adopted" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, July 28, 2001), online: <http://www.eiro.eurofound.ie/print/2001/07/feature/de0107234f.html>.

although only employees, who have been employed by the establishment for six months or more, are eligible to sit on the works council.[16] According to this Act, the term "employee" is very broad and comprises

> wage earners and salaried employees including persons employed for the purpose of their vocational training, regardless of whether they are engaged in indoor work, in field service, or in tele-work. The term includes persons engaged in home work who work principally for one and the same establishment.[17]

Since the 2001 Reform Act,[18] temporary employees, who work more than three months for the same hiring company, are also entitled to vote in works council elections.[19] Works councils do not represent employers and senior executives. Executives are excluded from the provisions of the Act but are included under the *Executives' Committee Act*, 1989 as their characteristics and interests differ from those of "regular" employees.[20]

The size of the works council increases with the number of employees entitled to vote in the establishment. It was further broadened in the 2001 reform. There must be one member in an establishment of five to twenty employees and thirty-five members in establishment of seven thousand and one to nine thousand employees. Another two members will be added for each more three thousand employees.[21]

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[15] Section 7 of the Act. Youth and trainee delegations will be elected in establishments with five employees or more under the age of eighteen or employees under the age of twenty-five who receive vocational training. This delegation will represent the special interests of those employees. See section 60 of the Act.
[16] Section 8 of the Act.
[17] Section 5(1) of the Act.
[18] The 2001 Act Reform will be discussed in the following section.
[19] Section 7 of the Act.
[20] See section 5(3) of the Act. Executive staff comprises employees who are, for instance, "entitled on their own responsibility to engage and dismiss employees … or regularly carry out other duties which are important for the existence and development of the company or an establishment and fulfillment of which requires particular experience and knowledge … or substantially influence these decisions". According to Müller-Jentsch, "neither the unions nor the employers' association were in favor of a second legal representative body at the workplace" (Müller-Jentsch, *supra* note 5 at 61).
[21] Section 9 of the Act.

D. The 2001 Reform Act

The main reasons for the 2001 Reform Act were the following. According to the Institute for Employment Research, in Western Germany only 12.5 percent of private sector establishments with at least five employees had a works council in 2000, and in Eastern Germany – only 12.6 percent.[22] Similarly, the special Co-Determination Commission, set up in 1996 by the Bertelsmann and Hans Böckler Foundations, reported in 1998 that despite the mandatory status of works councils under law, the majority of the German establishments did not have works councils.[23] Additionally, participation in works council elections dropped from 80 percent to less than 70 percent of the employees in the 1998 elections.[24]

The 2001 reform of the *Works Constitution Act* sought to achieve several purposes: to increase the number of works councils in Germany through simplified election procedures in small establishments;[25] to strengthen the works council structures by widening their functions, increasing their members' protection, and expanding their size;[26] to enable works councils to adjust to structural changes at the establishment;[27] and to improve the representation of women on works councils.[28]

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[22] See "2002 Works Council Elections Start" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, April 26, 2002), online: <http://www.eiro.eurofound.eu.int/2002/04/feature/de0204205f.html>. According to updated data from the Germany Institute for Labour Market and Employment Research (*Institut für Arbeitsmarkt- und Berufsforschung*, IAB), in 2002 only 11 percent of firms in both eastern and western Germany had a works council. Yet, works councils are mainly a feature of large firms. Around 50 percent of employees in western Germany, and 40 percent of employees in eastern German, work in a firm with a works council. See "Coverage of Collective Agreements and Works Councils Assessed" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, January 30, 2004), online: <http://www.eiro.eurofound.eu.int/2004/01/feature/de0401106f.html>.

[23] *Co-Determination and New Corporate Cultures: Survey and Perspectives* (Summary of the Report, Report of the Co-Determination Commission, *Kommission Mitbestimmung*, Bertelsmann Foundation and Hans-Böckler-Foundation, May 1998); John T. Addison, Lutz Bellmann, Claus Schnabel & Joachim Wagner, "The Reform of the German Works Constitution Act: A Critical Assessment" (2004) 43:2 Industrial Relations 392 at 393 [Addison *et al.*, "The Reform"].

[24] See Addison *et al.*, "Nonunion Representation", *supra* note 9 at 368.

[25] As will be discussed in the next section.

[26] See *supra* note 21 and *infra* note 56.

[27] See *supra* note 14.

[28] See section L below.

E. Elections

The elections for works councils in Germany, which are direct and based on a proportional representation, are held every four years[29] by secret ballot.[30] If there is a works council in the establishment, it has to elect an electoral board (*Wahlvorstand*) that will announce the election and carry it out.[31] In the absence of a works council, the electoral board will be elected by a majority vote of those present at a works meeting. Three employees with voting rights or a trade union represented in the establishment can call a works meeting to set up an electoral board. Failure to hold a meeting or elect an electoral board during a works meeting can be solved by at least three employees with voting rights or a trade union represented in the establishment applying to the labour court.[32]

Generally, employees with voting rights or trade unions represented in the establishment can submit a list of candidates.[33] The employees vote for one of the lists that contain a number of ranked candidates equal to the number of the seats in the works council. The portion of votes garnered by a particular list joined with the total number of seats available determines the number of members elected by the list.[34]

Since the pre-2001 election procedure was too complex, it provided employers with the opportunity to slow down and even prevent the election of works councils. The 2001 reform offered a simplified election procedure for establishments with between five to fifty employees. Larger companies may also use this procedure.[35] At the first election meeting,

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[29] Section 13(1) of the Act. Prior to 1989, it was three years, and prior to 1972 it was two years. See Müller-Jentsch, *supra* note 5 at 57.
[30] Sections 14(1)-14(2) of the Act.
[31] Section 16 of the Act.
[32] Sections 17(2)-17(4) of the Act.
[33] The list should be signed by at least 5 percent of employees with voting rights but by not less than three (sections 14(3)-14(4) of the Act). In an establishment that has up to twenty employees with voting rights, two signatures are sufficient. The signature of fifty employees entitled to vote will be sufficient in all cases. Alternatively, two union representatives should sign the list (sections 14(3) and 14(5) of the Act). The 2001 reform of the Act ended the separate elections of wage earners (blue-collar workers) and salaried employees (white-collar workers). Since the 2002 elections, there is, in general, a single joint election for both types of employees. See "Works Constitution Act Reform Adopted", *supra* note 14.
[34] See Addison *et al.*, "Nonunion Representation", *supra* note 9 at 368.
[35] In companies with fifty-one to one hundred employees, the parties can voluntarily agree to apply this procedure.

the employees establish an electoral board and nominate candidates for the works council. Then, after a period of one week, the works council members are elected.[36] In companies where works council already exists, the nomination and election take place during a single meeting.[37]

Since the 2001 reform, works councils will be composed "as far as possible of employees of the various organization units and the different employment categories of the workers employed in the establishment" in order to cover a large variety of interests and opinions within the works council.[38] In establishments with three or more works council members, "the gender that accounts for a minority of staff shall at least be represented according to its relative numerical strength".[39]

F. Role and Function

The works council duties include: ensuring the enforcement of the Act, other regulations, collective and works agreements; supporting the implementation of actual equality between male and female employees and the reconciliation of family and work; receiving suggestions from employees; promoting the rehabilitation of severely disabled employees; organizing the election of a youth and trainee delegation; encouraging the integration of foreign workers; and promoting occupational health and safety.[40]

Works councils and management are obligated to operate together in a non-adversarial manner "in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment".[41]

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[36] Section 14a of the Act.
[37] Section 14a(3) of the Act. The pre-2001 Act suggested a period of six weeks between nomination and election. See "Works Constitution Act Reform Adopted", *supra* note 14.
[38] Section 15(1) of the Act.
[39] Section 15(2) of the Act.
[40] Section 80(1) of the Act.
[41] Section 2(1) of the Act.

Works council meetings are called when needed. The meetings are normally held during working hours and are not open to the public.[42] Generally, the majority of the members present will make the decisions of the works council, but at least one-half of its members must take part in a vote to constitute a quorum.[43] Each employee has the right to propose issues to be discussed by the works council. If a proposal is supported by at least 5 percent of the employees in the establishment, the works council must place it on the agenda of a works council meeting within two months.[44]

Works councils with nine or more members must set up a works committee that will deal with the day-to-day business of the works council. Smaller councils can delegate day-by-day business to a chairperson or other members.[45] In establishments with more than one hundred employees, the works council may establish additional committees and assign them specific tasks.[46]

The employer and the works council have to set up joint conferences at least once a month. In these joint conferences they should discuss various issues with "an earnest desire to reach agreement and make suggestions for settling their differences".[47] Both sides will ensure that all employees are treated "in accordance with the principles of law and equity" and with no discrimination under any ground.[48] They are also obligated to protect and foster employees' development of personality and independence.[49]

An internal arbitration board (a conciliation committee) is in charge of resolving disagreements between the parties.[50] The committee is comprised of an equal number of consultants appointed by the employer and the works council and directed by a neutral

[42] Section 30 of the Act.
[43] Section 33 of the Act. Members may be replaced by substitutes.
[44] Section 86a of the Act.
[45] Section 27 of the Act.
[46] Section 28(1) of the Act.
[47] Section 74(1) of the Act.
[48] Section 75(1) of the Act.
[49] Section 75(2) of the Act.
[50] This committee will be set up based on emerging needs, while a standing committee may be established by a works agreement.

chairperson. The labour court will step in and appoint the chairperson if the parties cannot reach an agreement on this matter. The conciliation committee makes its decisions by a majority vote. The chairperson does not participate in the voting except in case of a tie.[51] The works council is not permitted to organize strikes to resolve disputes with the employer.[52]

The employer bears all the expenses of the works council establishment and operation, including election costs,[53] the costs of the conciliation committee,[54] the provision of premises, the means of information and communication, office staff and the costs of any other activities of the works council.[55] Additionally, the members of the works council are to be released from their work obligations without loss of pay "to the extent necessary for the proper performance of their functions, having regard to the size and nature of the establishment".[56] All members of the works council are protected against interference in the fulfillment of their duties,[57] and also enjoy a special protection against dismissal.[58]

G. Powers

Works councils have the right to specific information, the right to demand consultation on certain issues and the right to jointly decide certain workplace matters (co-determination). Works councils have the power to conclude social compensation plans and works agreements at the company level. These rights and powers are discussed below.

[51] Section 76 of the Act.
[52] Section 74(2) of the Act.
[53] Section 20(3) of the Act.
[54] Section 76a(1) of the Act.
[55] Sections 40(1)-40(2) of the Act.
[56] Section 37(2) of the Act. The larger the firm is, the higher the number of full-time works councils' members. See section 38 of the Act. Since the 2001 reform, there are more full-time representatives and released works council members.
[57] Section 78 of the Act.
[58] Section 103 of the Act. See also text accompanying note 74.

1. The Right to Information

The employer is obligated to provide the works council "in good time" with "comprehensive information" that will enable the works council to fulfill its duties under the Act.[59] This information includes "the employment of persons who have not entered into a contract of employment with the employer", thus enabling the works councils to be aware of the employment situation in the entire establishment.[60] The right for information also contains the right to have access at any time to any documentation the works council may require for the discharge of its duties. Works committees are entitled, for example, to review the payroll showing the gross wages and salaries of the employees.[61]

In order to facilitate works councils' being able to effectively exercise their rights of consultation and co-determination, the employer has a duty to supply the works councils in due time with information of any plans regarding "the construction, alteration or extension of works, offices and other premises belonging to the establishment; technical plants; working procedures and operations or jobs", and to provide the necessary documents concerning this information.[62] The employer is also obliged to inform the works council in full and in advance on matters relating to human resources planning.[63]

2. The Right to Make Suggestions, to be Heard and to be Consulted

The employer is obliged to consult in advance with the works council with respect to plans related to changes in jobs, operations or working environment which affect the nature of employees' work. This obligation enables the works council to make suggestions and

[59] See text accompanying note 40.
[60] Though the meaning of this clause is not interpreted in the Act, it seems that it refers to individuals such as independent contractors. According to the Federal Ministry of Economics and Labour (BMWA, *Bundesministerium für Wirtschaft und Arbeit*), this term means "external workers in the company" (persons comparable to employees, employees of other companies). See "Co-determination: Quite a Good Thing", *supra* note 6.
[61] Section 80(2) of the Act. On works committees see text accompanying notes 45-46.
[62] Section 90(1) of the Act.
[63] Section 92(1) of the Act.

objections before plans are implemented.[64] But, the final decision on these matters is that of the employer, unless these changes impose a special burden on the employees. Under these conditions, the works council is entitled to co-determine rights, which will be further discussed.[65]

In particular, the employer is obligated to consult the works council on how to avoid hardship for employees (such as staff transfers and vocational training measures), which result from workplace changes.[66] The employer also has to consult the works councils on its proposals relating to the security and promotion of employment. The works council may suggest flexible plans of working hours, part-time work, new forms of work organization, changes in working methods and working processes, the improvement of worker qualifications, and alternatives to previous operations or outsourcing. An employer, who believes that the works council's suggestions are inadequate, must give reasons for this opinion.[67]

Since the 1989 amendment, in companies of more than twenty employees with voting rights, the employer has a duty to inform the works council "in full and in good time" of any management proposed changes which may entail substantial prejudice to the staff or a large sector, and consult with the works council on these proposed changes. This information includes, *inter alia*, reduction of operations, important changes in the organization of the establishment, and introduction of new work methods and production processes.[68]

In companies of more than one hundred permanent employees, the works council may establish a finance committee and the employer has the duty to inform the committee on financial matters of the company "in full and in good time" and to provide the relevant documentation. The committee is obligated to consult with the employer on financial matters

[64] Section 90(2) of the Act.
[65] See text accompanying note 81.
[66] Section 92(1) of the Act.
[67] Section 92a of the Act.
[68] Section 111 of the Act.

and report to the works council. Financial matters include, among other things, the economic and financial situation of the company, production techniques and work methods, the company's environmental policy, reduction of operations, company transfers, mergers or break-ups, changes in the organization or objectives of establishments, and any other circumstances or projects that may materially affect the interests of the employees of the company.[69]

Finally, the works council has a right to be consulted in the case of any dismissal in the workplace.[70] The employer has to indicate the reasons for dismissal, and any notice of dismissal given without consulting the works council is void.[71] If the employer gives notice of dismissal although the works council expressed its objections, the employer has to provide the employee with a copy of the works council's opinion. The employee may then bring an action under the *Protection against Dismissal Act* and the employer is bound to keep the employee in his or her employment until the court delivers its final decision on the matter.[72] According to the Act, the parties are not obligated, but may sign an agreement that states that any notice of dismissal requires the approval of the works council and that the conciliation committee will make the decisions in events of disagreement.[73]

In the case of an exceptional dismissal of a member of the works council (including members of the youth and trainee delegation, the electoral board or candidates for election), the consent of the works council is required. If the works council refuses consent, the employer may apply to the labour court for a decision in lieu of consent on the basis that the exceptional dismissal is justified. A transfer of a member of the works council, without his

[69] Section 106 of the Act.
[70] While this is a right to consultation, it is designated in the Act as "Co-determination in the case of dismissal".
[71] The works council has to consult the employee concerned before it takes a stand. The works council may oppose a routine dismissal *inter alia* if: the employer in selecting the employee to be dismissed disregarded or did not take sufficient account of social aspects; the employee whose dismissal is being envisaged could be kept on at another job in the same establishment or in another establishment of the same company; the employee could be kept on after a reasonable amount of retraining or further training; or the employee could be kept on after a change in the terms of his contract and has indicated his agreement to such change.
[72] The employer may be released from her obligation to continue employment upon request from the labour court only if certain conditions, detailed in section 102(5), are satisfied.
[73] Section 102 of the Act.

or her consent, which would result in the loss of an office or of eligibility, requires approval of the works council. The employer may apply to the labour court for a decision in lieu of consent if the transfer is warranted by important operational reasons.[74]

3. The Right to Joint Management (Co-Determination)[75]

The most comprehensive form of employee participation through works council at the establishment level is the right to co-determination. Co-determination means the employer cannot make a decision on certain issues without the consent of the works council. If the parties cannot reach an agreement on one of the following matters subject to co-determination, the conciliation committee will make a decision.[76]

The works council has a right to co-determine various social matters, such as the rules of operation of the establishment and the conduct of employees in the establishment; working hours; wage payment procedures; leave arrangements; technical devices for monitoring employee conduct or performance; occupational health and safety; social services limited to the establishment; remuneration arrangements in the establishment; job and bonus rates and comparable performance-related payment; and rules for working group

[74] Section 103 of the Act.

[75] There are two distinct forms of co-determination. The first one is co-determination at the establishment level through the right of a works council to make joint decisions with the employer in various establishment affairs (*betriebliche Mitbestimmung*). The second is at the enterprise level where employee representatives sit on company supervisory boards (*Mitbestimmung auf Unternehmensebene*). It is regulated by three different statutes: the 1951 *Coal, Iron and Steel Industry Co-determination Act* for this industry only; the 1952 *Works Constitution Act* for companies in other industries with 501 to 1,999 employees, which share one third of seats on the supervisory board; and the 1976 *Co-Determination Act* for companies with more than two thousand employees, which have one half of the seats on the supervisory board. In this paper, I will focus on the first form of co-determination though it seems that the two are connected. According to Müller-Jentsch, works council is "the most important and most effective institution of the German co-determination system. Representation on the supervisory boards of large companies has mainly a supportive and supplementary function for the works council … Three-quarters of the elected workforce representatives on supervisory boards in firms under the jurisdiction of the 1976 *Co-determination Act* are also works councilors. Being represented on the supervisory board enables the works councils of large companies to get more reliable information about economic matters and the firm's strategic goals" (Müller-Jentsch, *supra* note 5 at 60).

[76] Sections 87(2), 91 and 97(2). See text accompanying notes 50-51.

projects;[77] except to the extent that these matters are regulated by legislation or a collective agreement.[78]

Another issue subject to co-determination rights is the promotion and initiation of vocational training. An employer is obligated to consult the works council on matters relating to staff training and vocational training facilities and programs. The works council can make relevant proposals.[79] If the employer has planned or implemented measures that would change the work of the employees and their vocational knowledge and skills are no longer sufficient to fulfill their duties, the works council has the right to participate in decisions relating to the implementation of these programs.[80] Additionally, if changes in jobs, operations or the working environment would impose a special burden on the employees, the works council may request appropriate action to remove, ease or make reward for the additional stress imposed.[81]

Finally, there are some issues that require the approval of the works council, but do not amount to joint decision-making. For example, while designing staff questionnaires and guidelines for the employees' selection for recruitment, transfer, re-grading and dismissal, the approval of the works council is required. If the parties cannot reach an agreement, the conciliation committee will decide the matter.[82] Moreover, in companies of more than twenty employees with voting rights, the employer has a duty to notify the works council in advance about any recruitment, grading, re-grading and transfer of employees, to provide recruitment documents and request the council's consent to the proposed measure. The

[77] Group work is defined as "a group of employees performing a complex task within the establishment's workflows, which has been assigned to it and is executed in a largely autonomous way". See section 87(1)(13) of the Act.
[78] Section 87(1) of the Act.
[79] Section 96(1) of the Act.
[80] Section 97 of the Act.
[81] Section 91 of the Act.
[82] Sections 94-95 of the Act.

works council may refuse to give its consent to the staff movement.[83] If the works council refuses, the employer may apply to the labour court for a decision in lieu of consent.[84]

4. Social Compensation Plans and Works Agreements

As mentioned above, in companies with more than twenty employees with voting rights, the employer has a duty to inform the works council of any proposed alterations to the organization of the establishment, work methods and production processes, and consult the works council on it.[85] The parties may reach an agreement to reconcile their interests with regard to the proposed alterations. They may also sign an agreement on full or partial compensation for any financial prejudice resulting from the proposed alterations. These agreements ("social compensation plans") have the effect of a works agreement. If the parties cannot reach an agreement on this matter, each can apply to the president of the Land labour office for mediation, or submit the case to the conciliation committee.[86]

In any other case, when the parties reach an agreement in one of the matters that are subject to co-determination, they sign a works agreement. Works agreements are binding and directly applicable to the employees under it.[87] Even after the works agreement is expired, its provisions continue to apply until a new agreement is made.[88] A works agreement might include other matters ("voluntary works agreements") such as additional measures to prevent accidents at work and health damages; measures concerning the establishment's environmental policy; the establishment of social services limited to the establishment; measures to promote capital formation and the integration of foreign employees and to

[83] In several circumstances detailed in section 99 of the Act.
[84] Section 99 of the Act.
[85] See text accompanying note 68.
[86] Section 112 of the Act.
[87] "Any rights granted to employees under a works agreement cannot be waived except with the agreement of the works council. Such rights cannot be forfeited. Any time limits for invoking these rights shall be valid only in so far as they are laid down by collective or works agreement; the same shall apply to any reduction of the periods provided for the lapsing of rights". See section 77(4) of the Act.
[88] Section 77(6) of the Act.

combat racism and xenophobia in the establishment.[89] However, the law does not require the employer to conclude works agreements on these matters.[90]

Works agreements may not deal with remuneration and other conditions of employment that are regulated or normally regulated by a collective agreement, except when the collective agreement expressly authorizes the establishment of supplementary works agreements ("opening clauses").[91] Collective agreements at the industrial level in Germany have increasingly used this method.[92] While the sectoral collective agreement is still the dominant form of agreement,[93] Germany is facing a global decentralization trend, which as described by Addison, Kraft and Wagner, is characterized by "a (partial) transfer of traditional bargaining functions to management and works councils" and a shift from collective agreements at industrial level to agreements at company level.[94]

H. Employees' Individual Rights

Although the Act was essentially designed to provide works councils, as the representative of the employees, with legal powers, it also offers individual powers to the employees

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[89] Section 88 of the Act.
[90] See "Co-determination: Quite a Good Thing", *supra* note 6.
[91] Section 77(3) of the Act.
[92] See Addison *et al.*, "On the Determinants", *supra* note 13 at 424; Müller-Jentsch, *supra* note 5 at 61. According to Müller-Jentsch, in large companies there are hundreds of works agreements, whereas in places that lack agreements, the works councils are usually less powerful (*ibid*. at 60).
[93] See section J below.
[94] This phenomenon reflects, in their view, the effect of technological changes and the emerging need for flexibility in the workplace. See John T. Addison, Kornelius Kraft & Joachim Wagner, "German Works Councils and Firm Performance" in Kaufman & Kleiner, *supra* note 8, 305 at 311. For consideration of the global trend toward decentralization and its primary causes see also *Transformation of Labour and Future of Labour in Europe: Final Report* (Belgium: European Commission, 1999), especially at 40; Roy J. Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (Columbia, S.C.: University of South Carolina Press, 1995) at 74-77.

Nevertheless, while the German government is currently considering alterations in the collective bargaining law in order to allow further decentralization of collective bargaining from sector to company level, most collective agreements already contains "opening clauses", and the majority of works council members are not interested in this kind of reform. According to the empirical survey conducted in 2002 by the Institute for Economic and Social Research, 67 percent of works council members think that collective bargaining decentralization to company-level will strengthen the employers' position to asset their interests, and 34 percent think that it will demand too much from works and staff councils. See "Works Council Members Prefer Sectoral Agreements" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, October 29, 2003), online: <http://www.eiro.eurofound.ie/2003/10/feature/de0310203f.html>.

themselves, especially, but not solely, when there is no works council in the workplace. For example, the employer has a duty to inform the employees of their tasks and responsibilities, and to give them notice "in good time" of any changes related to their areas of activities.[95] In establishments where there is no works council, the employer has to consult the employees regarding all measures that might affect the health and safety of the employees.[96] The employee has the right to be heard and request explanations in various organizational and operational matters concerning the employee personally, the calculation of his or her remuneration and his or her career possibilities in the establishment.[97]

The employees are also entitled to have access to their personal files, and have the right to make a complaint to management if they think that they have been discriminated against or treated unfairly by the employer or by any other employee in the establishment.[98] The works council will hear employees' grievances and, if they appear justified, influence the employer to remedy them.[99] Finally, as noted above, each employee has the right to propose issues to be discussed by the works council. The works council has to place on its agenda any proposal supported by at least 5 percent of the employees within two months.[100]

I. Alternative Forms of Employee Participation

Beside works councils, there are various forms of employee participation that may exist at the establishment level and assist works councils in accomplishing their purposes. Recognizing this potential, the Act has granted works councils some powers with regard to these forms of workplace participation. In this section, I will briefly introduce these forms of participation and describe their relations with works councils.

[95] Sections 81(1)-81(2) of the Act.
[96] Section 81(3) of the Act.
[97] Section 82 of the Act.
[98] Sections 83-84 of the Act.
[99] Section 85 of the Act.
[100] Section 86a of the Act.

In the last three decades new forms of employee involvement, human resources management and work organization have emerged in workplaces around the world. These forms are not based on representation, but rather on direct participation of workers. They are less institutionalized, more decentralized and firm specific. There is a large variety of participatory forms in the workplace. There are temporary groups that join together for a specific purpose and for a limited period of time (*e.g.* "project groups" and "task forces"). These forms provide workers with more discretion to organize, plan and perform work tasks.[101] There are also permanent groups that discuss various work-related topics on an ongoing basis (*e.g.* "quality circles").[102]

Employers usually design and initiate employee participation plans when they do not have sufficient information or adequate qualifications to make business decisions by themselves. The main purpose of these forms of participation is therefore maximizing the utilization of labour and improving the commitment and loyalty of employees to the objectives of the firm.[103]

Many studies have indicated that these employer-based plans result in employee satisfaction and high self-esteem. Indeed, direct participation may empower employees, increase their sense of responsibility and make them feel part of the corporation. Furthermore, it has been argued that direct participation in decision-making increases

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[101] The employer chooses the work group leader, and the members of the group choose the group spokesperson. The leader supervises work performance and attendance, monitors the time taken to perform tasks and decides when to take breaks or go on leave. See "Work Group" (European Employment and Industrial Relations Glossaries, European Foundation for the Improvement of Living and Working Condition), online: <http://www.eurofound.eu.int/emire/GERMANY/WORKGROUP-DE.html>.

[102] Quality circles are small groups of employees who voluntarily meet on a regular basis to identify, investigate, analyze and solve their own work related problems. They are designed to improve individual occupational conduct, motivation, and labour relations in the workplace. See Michael Salamon, *Industrial Relations*, 3rd ed. (London: Prentice Hall, 1998) at 355; John F. Geary, "New Forms of Work Organization: Still Limited, Still Controlled, but Still Welcome?" in Paul Edwards, ed., *Industrial Relation: Theory and Practices*, 2nd ed. (Malden, MA: Blackwell, 2003) 338; Müller-Jentsch, *supra* note 5 at 69.

[103] The emerging types of participation are viewed as a response to increasing demands for competitiveness and flexibility in an era of globalization. Employers increasingly understand the need to involve employees and grant them greater work discretion in order to increase flexibility and productivity. See Colin Gill & Hubert Krieger, "Direct and Representative Participation in Europe: Recent Survey Evidence" (1999) 10 International Journal of Human Resource Management 572 at 572.

productivity and firm performance by utilizing the experience and knowledge of workers in the work process and through increased job satisfaction and motivation.[104]

However, the main purpose of these forms of work organization is still "the extension of management control" disguised as something more.[105] They are mostly designed to improve quality of production and work processes and to decrease business costs. Their focus is on task participation, while they do not provide employees with the opportunity to influence and take part in the entire organization's decision-making.[106] Furthermore, these plans might also serve as an employer's attempt to undermine the existing representative arrangements in the workplace.[107] Unions and works councils' involvement with the establishment and operations of these programs, as in the German Act, may help avoid these undesirable outcomes.

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[104] See *e.g.* Michael H. LeRoy, "'Dealing with' Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromation" (1997) 73 Notre Dame L. Rev. 31, cited a survey that found that eight out of ten of the fastest growing firms in the U.S. have employee participation programs, and also found a correlation between those firms that most highly value these organizational structures and those firms' growth rate (Employee Participation Programs Spur Fast Growth Companies, Coopers and Lybrand L.L.P., "Trendsetter Barometer" Survey Shows). In addition, according to Kaufman, Lewin and Fossum, there is widespread evidence that employer-sponsored employee involvement and participation programs not only increase productivity and competitiveness in industry, but also enhance employee job satisfaction and quality of worklife. See Bruce E. Kaufman, David Lewin & John A. Fossum, "Nonunion Employee Involvement and Participation Programs: The Role of Employee Representation and the Impact of the NLRA" in Kaufman & Taras, *supra* note 8, 259 at 282. See also Budd, *supra* note 5 at 90; Tove Helland Hammer, "Nonunion Representational Forms: An Organizational Behaviour Perspective" in Kaufman & Taras, *supra* note 8, 176.

[105] Geary, *supra* note 102 at 339.

[106] In practice, many forms of workplace participation have insignificant influence on the working conditions of workers and they often focus on the quality of production. Sometimes, these mechanisms have been described as the employer's technique to keep "the larger framework of the traditional labor-management power relationship essentially unchanged" or to limit employee participation to the insignificant aspects of firm operation without granting any genuine power. See Orly Lobel, "Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work" (2001) 4 U. Pa. J. Lab. & Employment L. 121 at 185-86; Thomas A. Potterfield, *The Business of Employee Empowerment: Democracy and Ideology in the Workplace* (Westport, Conn.: Quorum Books, 1999) at 105; Raymond L. Hogler & Guillermo J. Grenier, *Employee Participation and Labor Law in the American Workplace* (New York : Quorum Books, 1992) at 109. According to Lobel, "[i]n the vast majority of cases, participatory programs concern operational involvement in day-to-day problems regarding issues that mainly benefit employers, such as quality of production and work processes, rather than strategic policymaking, regarding the direction of the company and the future of workers" (*ibid.* at 186). According to Gill and Krieger, studies have shown that while many different forms of direct participation exist, their scope (in terms of number of issues involved and the number of rights given to employees) is often limited, and that strong forms of employee representative involvement go together with a wide scope of direct participation. See *e.g.* a European survey conducted in ten countries, Gill & Krieger, *supra* note 103 at 589.

[107] See Salamon, *supra* note 102 at 372.

The German Act deals with the integration of various forms of employee participation in the establishment level. Works councils have the right to be consulted and even to jointly decide about the implementation of working groups. The German Act states that the employer and the works council have to "promote the independence and personal initiative of the employees and working groups".[108] Additionally, among the issues that may be determined by collective agreements is "additional bodies under the Works Constitution Act (working groups) that serve for the inter-company co-operation of workers' representations". If not covered by a collective agreement, this issue will be determined by a works agreement.[109] Furthermore, in establishments with more than one hundred employees, the works council may, by a majority vote of its members, delegate certain tasks to working groups, subject to a framework agreement with the employer. The working group may, within the scope of the tasks delegated to it, make agreements with the employer. Such an agreement is made by a majority vote of the group's members. If the employer and the working group do not reach an agreement on a certain matter, the works council exercises the right to participation.[110] Finally, the works council has a right of co-determination in principles governing the performance of group work.[111]

To conclude, the Act allows works councils to be involved in the introduction and implementation of employee participation schemes in the workplace. It encourages employee direct participation and management-labour cooperation, promotes flexibility and prevents employer's misuse of employee participation plans.

[108] Section 75 of the Act.
[109] Section 3 of the Act.
[110] Section 28a of the Act.
[111] "Group work" is defined as "a group of employees performing a complex task within the establishment's workflows, which has been assigned to it and is executed in a largely autonomous way". See section 87(1)(13) of the Act.

J. Relations with Unions

As noted above, the German employee representation traditionally operates in a two-tier system involving trade unions and works councils. Before examining the relationship between trade unions and works councils, I will briefly introduce some general characteristics of the collective bargaining regime and trade unionism in Germany.

The *Collective Bargaining Act* regulates relations between trade unions,[112] employers' federations[113] and individual employers. The right of trade unions and employers' federations to negotiate working conditions without state interference (their "collective bargaining autonomy") is guaranteed by the German Constitution.[114] Collective agreements are negotiated on a national, regional or industry-wide level[115] and, due to their centralized nature, establish industry wage patterns and national economic planning.[116]

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[112] There is no trade union law in Germany. Yet, trade unions are legally eligible to collectively bargain and to take legal action or to be taken to court (section 2 para. 1 of the *Collective Agreements Act* and section 10 of the *Labour Court Act*). Trade union members are usually obliged to pay union dues based on individual wage level. Members are entitled to support in labour disputes as well as to legal advice. See Jung, *supra* note 12.

The German union system is primarily focused on the member unions of the German Federation of Trade Unions (the DGB, formed in 1949), a federation of national unions organized along industrial lines, the German White-Collar Workers' Union (the DAG, founded in 1947) organized along occupational lines, and the German Federation of Career Public Servants (the DBB, founded in 1950). In 1957, the Christian Trade Union Federation of Germany (the CGB) was formed as a separate organization from the DGB. See "Unified Trade Union" (European Employment and Industrial Relations Glossaries, European Foundation for the Improvement of Living and Working Condition), online: <http://www.eurofound.eu.int/emire/GERMANY/UNIFIEDTRADEUNION-DE.html>.

[113] Employers' associations are generally defined as associations with legal capacity. The Federal associations of the different branches are united in two central confederations, the Confederation of German Employers' Associations (BDA) and the Federal Union of German Industry (BDI). The BDA represents companies' interest as an employer, while the BDI aims at promoting their economic and political objectives. See Jung, *supra* note 12.

[114] See "Labour Law" (Federal Ministry of Health and Social Security, January 2004), online: <http://www.bmgs.bund.de/downloads/04_Arbeitsrecht.pdf>. The German Constitution (the Basic Law) was adopted on May 23, 1949. Since 1990, the Basic Law has become the Constitution of the united West and East Germany. The Basic Law guarantees freedom of association of both workers and employers (Article 9 para. 3). This includes the right of individuals to form or join associations, to participate actively in an association, to leave an association or not to join any association. It also provides the association with protection against any influence of the state or any individual attack. According to the Basic Law, an association is a voluntary permanent organization, which must not be limited to one firm. Additionally, it must be a representative of either the employees or the employers and must explicitly pursue the conclusion of collective agreements. See Jung, *supra* note 12.

[115] In 2000, the collective bargaining coverage (according to the bargaining level in the private and public sectors) was 63 percent for multi-employer and 10 percent for single employer in Western Germany and 46 percent and 10 percent respectively in Eastern Germany. See "Collective Bargaining Coverage and Extension Procedures" (European Industrial Relations Observatory On-Line, European Foundation for the Improvement of Living and Working Conditions, December 18, 2002), online: <http://www.eiro.eurofound.eu.int/2002/12/study/tn0212102s.html>.

[116] See Summers, "An American Perspective", *supra* note 8 at 340.

Collective agreements are either between trade unions and employers' federations or between trade unions and individual employers. The parties are entitled to bargain over matters such as wage or salary levels, working hours, holiday entitlement, and periods of notice.[117] They generally do not regulate matters such as lay-offs, work rules, discipline, job classifications, promotions and work assignments, and leave these issues to the local works councils.[118] Collective agreements are legally binding as long as they keep in line with statutory minimum standards. The terms of collective agreements are incorporated into individual employment contracts. However, employees may negotiate for better terms. While a collective agreement remains in force, employees are forbidden to go on strike to enforce new demands relating to the terms and conditions the agreement covers ("industrial peace" obligation).[119]

Although only less than 30 percent of German workers are union members, around 67 percent are covered by collective agreements.[120] That is because German employers are willing to join employers associations and be bound by collective agreements even if only a

[117] See "Labour Law", *supra* note 114. Collective agreement is a contract composed of two parts (section 1 para. 1). The first part, which is governed by the law of contract, deals with rights and duties of the contractual partners (including industrial peace obligations). An arbitration agreement may also be added. The second part of the collective agreement establishes rules regarding labour contracts, operational questions and works constitution. The distinction is important because the first part ends at the same time of the termination of the agreement, whereas the second part remains in force until it is replaced by an individual contractual agreement, a works agreement or legal norms of a new collective agreement (section 4 para. 5). See Jung, *supra* note 12.

[118] See Summers, "The Usefulness", *supra* note 8 at 1413.

[119] See "Labour Law", *supra* note 114; Summers, "The Usefulness", *ibid.* at 1412-13; Jung, *supra* note 12.

[120] See "Collective Bargaining Coverage and Extension Procedures", *supra* note 115. According to Germany Institute for Labour Market and Employment Research (IAB), in western Germany in 2002, around 53 percent of companies were covered by a collective agreement of some sort (either an industry-wide agreement or a firm-level agreement) and 68 percent of employees worked in a firm covered by a collective agreement. Though there is a continuous decline in union membership in Germany, collective agreement coverage figures are still much higher than those for countries such as the USA, Japan, the UK and the new Member States joining the EU in 2004. In eastern Germany in 2002, 30 percent of companies with at least five employees were covered by a collective agreement, and 50 percent of employees were covered by a collective agreement. See "Coverage of Collective Agreements and Works Councils Assessed", *supra* note 22 (In this research, firms defined as those in the private sector with at least five employees, agricultural sector excluded).

As mentioned above, there are strong pressures of decentralization of collective bargaining in Germany. However, the sectoral agreement is still the most dominant form of collective agreement in Germany. In 2003, 43 percent of West German and 21 percent of East German firms were covered by sectoral agreements. Around 62 percent of West German and 43 percent of East German employees were covered by sectoral agreements. See Mark Carley, "Industrial Relations Developments in Europe 2004" (European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the European Communities, 2005) at 32, online: <http://www.eiro.eurofound.eu.int/other_reports/ef0572en.pdf>.

small minority (or none) of their employees are union members. Although collective agreements must be applied only to unionized workers, many employers often voluntarily apply these agreements to non-unionized workers as well. Additionally, the law allows for the extension of collective agreements or a selected range of collectively agreed provisions to the entire industry including employers who are not members of employers' associations.[121] As Summers points out, "[i]n Germany, the collective agreement structures the labor market and can serve as an instrument of national economic planning because collective agreements blanket almost the entire German labor market".[122] Consequently, unions regard themselves as representatives of the entire working class and not only of union members.[123]

Although works councils are the representative bodies at the establishment level as opposed to the industrial level, unions are also active at the establishment level. Trade unions have workplace representatives who communicate collective bargaining policy to individual employees (independent of the works council). They also keep the union informed about local employees' interests and needs. They provide information and instruction services for union members, deal with recruitment, and support unionized members of the works councils.[124] Unionized workers within an establishment or department usually elect their local union representatives. They may be granted special protection by a collective agreement.[125]

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[121] See Summers, "An American Perspective", *supra* note 8 at 337; Summers, "The Usefulness", *supra* note 8 at 1412. The influence of collective agreements in Germany is much higher than the figures presented in *supra* note 120, as about 40 percent of firms without a collective agreement in both eastern and western Germany voluntarily adopt the terms and conditions laid down in collective agreements. These firms employ about 50 percent of those employees that are not directly covered by a collective agreement. See "Coverage of Collective Agreements and Works Councils Assessed", *supra* note 22. A collective agreement may be extended by the Ministry of Labour to all employees and employers (including non-members) within certain geographical areas if at least 50 percent of the employees (who would be subject to the agreement) are hired by employers already bound by the agreement. It also requires the agreement of both industrial partners and must be of public interest. See Jung, *supra* note 12.

[122] Summers, "An American Perspective", *supra* note 8 at 340.

[123] See Summers, "The Usefulness", *supra* note 8 at 1411.

[124] See Müller-Jentsch, *supra* note 5 at 64.

[125] There are dozens of collective agreements in Germany that stipulate provisions on protection and assistance for the activity of union workplace representatives (*Vertrauensleute*). See "Union Workplace Representatives"

The presence of union representatives at the local level could result in conflict with local works council's members. Works councils are independent of unions and they represent both unionized and non-unionized workers. However, the majority of works councils' members tend to be union members, nominated by the union.[126] According to Addison, Schnabel and Wagner, 67 percent of works council members were union members in 1998, while union membership was only one-third.[127] Furthermore, there are studies that indicate that there is a strong connection between union density and works council presence in the German workplace.[128] Consequently, unions are very much involved in the daily operation of works councils.

This strong connection is, in my view, very crucial. The collective voice of employees may be obtained through different channels such as trade unions and works councils. However, it does not mean that they should operate separately, or even competitively. These methods of employee representation should work cooperatively, nourishing and enriching each other. Indeed, there are some industrial relations scholars who regard the relations between the works council and the union as essential to the success of the former in exercising its powers. They evaluate the legal rights and resources of the works councils as limited and thus expect unions to support them. Nevertheless, as a result of the

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(European Employment and Industrial Relations Glossaries, European Foundation for the Improvement of Living and Working Conditions), online: <http://www.eurofound.eu.int/emire/GERMANY/UNIONWORKPLACEREPRESENTATIVES-DE.html>.

[126] See Addison *et al.*, "On the Determinants", *supra* note 13 at 422. As opposed to the German model of independent works councils, in Italy for example, employee and union representation can be combined into one body. See Rogers & Streeck, "The Study", *supra* note 2 at 6.

[127] Addison *et al.*, "Nonunion Representation", *supra* note 9 at 369.

[128] Firms that have works councils but are not covered by an official collective agreement are rare in Germany (around 2 percent of firms in western Germany and 3 percent in eastern Germany). However, they employ a disproportionately large number of workers (about 6 percent of the workforce in western Germany and 9 percent in eastern Germany). This suggests that they are mainly large or medium-sized enterprises. See "Coverage of Collective Agreements and Works Councils Assessed", *supra* note 22. See also Addison *et al.*, "On the Determinants", *supra* note 13 at 443; and Seymour Martin Lipset & Noah M. Meltz, "Estimates of Nonunion Employee Representation in the United States and Canada: How Different are the Two Countries?" in Kaufman & Taras, *supra* note 8, 223, who found that there is a higher incidence of non-union employee representation in sectors with high union density.

growing importance of works councils, they are increasingly independent and may also offer support for unions.[129]

On the one hand, "[u]nions supply works councils with information and expertise through educational courses or furnish them direct advice through union officials".[130] Unions may provide works councils with effective bargaining power and play an important role in assuring that works councils do not become management-oriented.[131] There are studies that indicate that works councils operate more effectively in workplaces where trade unions are present.[132] Other scholars have found that productivity in works council regimes is higher only where the establishment is covered by a collective agreement.[133]

On the other hand, works councils are considered to be "the pillars of union security", as works council members usually recruit union members.[134] Due to their institutional and structural character, unions have stronger bargaining power than works councils. But, the same characteristic makes them more bureaucratic and less flexible and attentive to the needs and problems of particular employees. Works councils may assist unions in pursuing effective presence and response at the local level. Furthermore, while works councils deal with more local interests, unions are enabled to focus on common interests such as higher wages and shorter working hours.[135] Finally, not only do works councils assist unions in strengthening their position and involvement in unionized workplace, but their support may also extend to the non-unionized regime. It is possible that

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[129] See Addison *et al.*, "Nonunion Representation", *supra* note 9 at 374-75; Addison *et al.*, "On the Determinants", *supra* note 13 at 427.
[130] Müller-Jentsch, *supra* note 5 at 61.
[131] See Summers, "An American Perspective", *supra* note 8 at 353; Don Wells, *Who Gains from Worker Participation?* (Kingston: Queen's University, 1992).
[132] See Adams, "Should Works Councils", *supra* note 8 at 28.
[133] See Addison *et al.*, "The Reform", *supra* note 23 at 409, n. 25.
[134] Müller-Jentsch, *supra* note 5 at 61. It seems that trade unions in Germany fully recognize the importance of works councils. In February 2002, the German Federation of Trade Unions (DGB) even launched a two million campaign to support the works council elections. One of its main purposes was to motivate employees to elect works councils in establishments where works councils are absent. See "2002 Works Council Elections Start", *supra* note 22.
[135] See Müller-Jentsch, *supra* note 5 at 62. As noted earlier, this "separation of powers" is legally institutionalized, as works councils are not allowed to bargain over wages and to call strikes (as opposed to Italy and Spain, for instance, where they are allowed to do so and questions of control are more acute). See Rogers & Streeck, "The Study", *supra* note 2 at 7.

non-unionized employees, who work in a company with a works council, will realize that in order to achieve more power and benefits for the employees, works councils are not sufficient, and that they should therefore join unions and engage in industrial collective bargaining.[136]

The German Act stresses the importance of unions within works council regimes by clearly stating that the Act "shall not affect the functions of trade unions … and more particularly the representation of their members' interests".[137] Moreover, unions' representatives in the establishment have legal rights of access to the establishment, after notifying the employer, in order to exercise their powers and duties under this Act.[138] A delegate of a trade union represented on the works council may be invited by a request of one-fourth of the works council members to attend council meetings in an advisory capacity.[139] Finally, since 1988, unions represented in the establishment have a right to submit a list of candidates for the works council elections.[140]

To conclude, unions play a major role in works council operations. The relations between unions and works councils are for the benefit of both institutions. Thus, unions should not consider works councils as a threat or competitor. Indeed, many scholars view German works councils as "complements to, rather than substitutes for, conventional unions",[141] and urge unions to focus on how works councils can contribute to workplace democracy and regulation.[142]

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[136] See Adams, "Should Works Councils", *supra* note 8 at 28.
[137] Section 2(3) of the Act.
[138] Section 2(2) of the Act.
[139] Section 31 of the Act. See also section 46 of the Act, which states that delegates from the trade unions represented in the establishment are entitled to attend all works and department meetings in an advisory capacity.
[140] See text accompanying note 33.
[141] Addison *et al.*, "Nonunion Representation", *supra* note 9 at 382. See also Anthony Forsyth, "Giving Employees a Voice over Business Restructuring Issues: A Role for Works Councils in Australia" in Gollan & Patmore, *supra* note 8, 140.
[142] See Roger Welch, "Into the Twenty-First Century: The Continuing Indispensability of Collective Bargaining as a Regulator of the Employment Relation" in Hugh Collins, Paul Davies & Roger Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000) 615 at 627-29.

However, an inevitable question is what if the works council members do not get along with the union represented in the establishment. As Summers describes the problematic situation, "[e]ven though elected on the union slate, [works council members] may refuse to follow union policies, defy union officials, and even present in future elections a slate of candidates opposing the official union list".[143] I did not find any solution to the described problem in the literature or in the Act. My opinion is that the Act itself should be clearer and more detailed with regard to this issue. For example, the Act should clearly handle questions such as what is the forum for solving disputes, and in what way, if any, works councils may interfere with unions' policies, depart from them, and vice versa. This issue will be further discussed in chapter V.

Another question that will be discussed in chapter V is concerned with the non-unionized sector. If the presence of works councils is strongly connected to union density, how can we improve works council presence in non-unionized workplaces and thus substantially fill the representation gap?

K. Coverage of Works Councils

As mentioned above, the special Co-Determination Commission reported in 1998 that despite the mandatory status of works councils, the majority of the German establishments do not have works councils.[144] According to Addison, Bellmann, Schnabel and Wagner, there is definitive evidence that the presence of works councils in small- and medium-sized companies is relatively modest and very low among small establishments.[145]

According to the most up to-date survey by the Germany Institute for Labour Market and Employment Research (IAB) published in 2004, only 11 percent of firms in both

[143] Summers, "Worker Participation", *supra* note 8 at 373.
[144] See *supra* note 23.
[145] According to their survey, in overall terms, works councils existed in just 16.3 percent of all German establishments with five or more employees, although the proportion of employees who were covered was much higher (53 percent). See Addison *et al.*, "The Reform", *supra* note 23 at 398, 402.

Western and Eastern Germany had works councils in 2002. Yet, 50 percent of employees in Western German worked in establishments with works councils, while 40 percent in Eastern German respectively.[146]

The incidence (the proportion of establishments having works councils) and the coverage (the proportion of employees employed in firms with works councils) increase with the size of the firm.[147] The direct connection between works council coverage and establishment size can be explained by the increasing powers of works council according to its size.[148] Addison *et al.* believe that other methods of direct participation, such as teamwork,[149] serve as substitutes for formal works councils in small establishments. However, they note that due to its limited function, teamwork is not a full alternative to works councils.[150]

L. Women and Foreign Workers

Although the number of members in German works councils has increased, women and foreign workers are still underrepresented.[151] According to the German Federation of Trade

[146] This is because of the high number of small establishments existing in Germany that seldom have works councils. See "Coverage of Collective Agreements and Works Councils Assessed", *supra* note 22. According to another survey based on the same data (IAB), there were about 113,000 establishments in Germany with works councils in 2002. However, coverage increases significantly in larger establishments (95 percent of all establishments with 501 and more employees have a works council). In 2002, 90 percent of employees were covered by works councils in mining and the water supply sector, while in banking and insurance the coverage was 83 percent. Works council coverage was also very high in the consumer goods and capital goods sectors. It was low, however, in the commerce sector (35 percent), in the service sectors (between 33 and 38 percent) and in the construction sector (23 percent). See "Thematic Feature", *supra* note 7.

[147] Approximately 50 percent of workplaces with fifty-one to one hundred employees have works councils.

[148] See *e.g.* sections 106 and 111 of the Act, which are strengthening and widening the rights of works council as the size of the firm is increasing.

[149] Teamwork is defined in their survey as "groups characterized by expanded involvement in decision making and increased responsibility".

[150] Addison *et al.*, "The Reform", *supra* note 23 at 405-06. In another survey, Addison, Schnabel and Wagner similarly reported that only one-fifth of German firms in their sample have works councils. They found that structural variables affect works council coverage. They concluded that works council presence increases with firm size, firm age and in a branch plant establishment, and that the vast majority of firms with three hundred or more employees have works councils. Additionally, they found that teamwork might be connected to works councils' decreasing presence in small- and medium-sized firms. They thus suggested that teamwork and works councils are alternatives to one another at least in small firms (with twenty-one to one hundred employees). See Addison *et al.*, "On the Determinants", *supra* note 13 at 420, 435-43, 443; Addison *et al.*, "Nonunion Representation", *supra* note 9 at 373, 379. See also Müller-Jentsch, *supra* note 5 at 56.

[151] See Addison *et al.*, "On the Determinants", *supra* note 13 at 426; Müller-Jentsch, *supra* note 5 at 73.

Unions, 43 percent of employees are women, while only a quarter of all works council members are female.[152] According to Müller-Jentsch, "the traditional social profile of works council members is male … and native German, with a standard full-time employment contract as a skilled worker or as a supervisory and technical staff member".[153]

One of the purposes of the 2001 reform was to strengthen women's representation in works councils. As was mentioned earlier,[154] the gender that is the minority within the workforce must be represented by at least a corresponding proportion of works council members. The Act also addresses the special needs of female representatives who work part time and thus were forced to perform their representative tasks during their free time. The new Act states that works council members, who are part-time employees, have the right to time off in compensation for fulfilling their representative duties outside regular working hours.[155] Finally, according to the new amendments, works councils are instructed to cope with issues of reconciling family and work life and have the right to propose plans for the promotion of women in the establishment.[156]

M. Summary

In this chapter, I have introduced the German model of works councils as a complementary form of employee representation that might help fill the gap in employee representation. I have described its origins, formation and functions. I have detailed its unique powers and underlined its relations with other forms of employee representation and participation in the workplace. Finally, I have addressed the problem of works council coverage in Germany. In the next chapter, I will examine works councils' strengths and weaknesses, and draw some

[152] See "2002 Works Council Elections Start", *supra* note 22.
[153] Müller-Jentsch, *supra* note 5 at 73.
[154] Section 15(2) of the Act. See text accompanying note 39.
[155] Section 37(3) of the Act.
[156] Sections 45, 80(1)(2a)-(2b), 92(3), 96(2) of the Act. See also "Works Constitution Act Reform Adopted", *supra* note 14.

conclusions with regard to its success in providing adequate representation for workers at the enterprise level.

APPLYING THE PRINCIPLE OF PROPORTIONALITY IN EMPLOYMENT AND LABOUR LAW CONTEXTS

*Pnina Alon-Shenker and Guy Davidov**

The principle of proportionality, which is designed to limit abuse of power and infringement of human rights by governments and legislatures, has become a fundamental and binding legal principle in the jurisprudence of many countries. Ever since the seminal *R. v. Oakes* decision, when the Supreme Court of Canada interpreted section 1 of the *Canadian Charter of Rights and Freedoms* as entailing a three-step proportionality test, proportionality has become an important pillar of Canadian law. This article argues that the principle of proportionality actually extends, and *should* extend, to the private sphere—imposing limitations on employers and trade unions when using their powers. It first argues, at a descriptive level, that proportionality already plays a significant role (although often not explicitly) in various Canadian labour and employment law contexts, a role not sufficiently acknowledged thus far. It then turns to the normative level and explores the justifications for extending the application of proportionality to the private sphere and more specifically to the employment relationship. The article advocates a more explicit use and a structured application of the three-stage proportionality test in various employment and labour law contexts.

Le principe de proportionnalité, conçu pour limiter les abus de pouvoir et les violations des droits de l'homme par les gouvernements et les législatures, est devenu un principe juridique fondamental et contraignant adopté par la jurisprudence de plusieurs pays. Depuis l'arrêt de principe *R. v. Oakes*, au sein duquel la Cour suprême du Canada a estimé que l'article 1 de la *Charte canadienne des droits et libertés* entraînait un test de la proportionnalité en trois étapes, la proportionnalité est devenue un pilier important du droit canadien. Cet article soutient que le principe de proportionnalité s'étend, et *devrait* s'étendre, à la sphère privée—imposant certaines limitations aux employeurs et aux syndicats lorsqu'ils font l'usage de leurs pouvoirs. Adoptant dans un premier temps un point de vue descriptif, il avance que la proportionnalité joue déjà un rôle significatif (bien que pas toujours explicite) dans divers contextes reliés au droit du travail et de l'emploi au Canada, un rôle pas suffisamment reconnu jusqu'à présent. Il se place ensuite sur un plan normatif et explore les raisons justifiant d'étendre l'application de la proportionnalité à la sphère privée, et plus spécifiquement aux relations d'emploi. L'article préconise un usage plus explicite et une application plus structurée du test de proportionnalité en trois étapes dans divers contextes reliés aux droits du travail et de l'emploi.

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Introduction

The principle of proportionality is designed to limit abuse of power and infringement of human rights and freedoms by governments and other public officials to the minimum necessary in the circumstances. As a philosophical notion, proportionality may be traced back to the ancient Golden Rule of "that which is hateful to you, do not do to your fellow."[1] As a legal principle, it originated in the nineteenth century in Prussian administrative law, in which it imposed constraints on police powers that infringed an individual's liberty or property.[2] Throughout the years, the principle of proportionality expanded and migrated to other European countries,[3] where it is now a central and binding public law principle,[4] and to other jurisdictions, including Canada, New Zealand, Australia, South

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1 See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) at 175.

2 *Ibid* at 178–79. Courts examined whether police action was undertaken for a legitimate purpose, whether the action was suitable to reach this purpose, and whether there was a less intrusive means to achieve this purpose. In some cases, the courts also assessed whether a proper balance was struck between the adverse effects of the action and the benefits of achieving the purpose. See Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 UTLJ 383 at 384–85.

3 In 1949, the *Basic Law for the Federal Republic of Germany* (translation in Military Government Gazette—Germany (British Zone), 1949/35) was adopted, and, although it did not contain any explicit reference to proportionality, the German Federal Constitutional Court gradually applied, without explanation, the test of proportionality whenever a law infringed fundamental rights (except for the right to dignity, which is absolute). An explanation of how the principle of proportionality operates came in subsequent cases in the 1960s: see Grimm, *supra* note 2 at 385–86. See also the seminal work of Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002). Alexy argues that constitutional rights are not rules but rather principles—"optimization requirements" that are subject to a balancing and proportionality analysis.

4 See e.g. Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996); Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart, 1999). The European Court of Justice views proportionality as a general principle of European Union (EU) law, which regulates the exercise of powers and measures chosen by the EU institutions and member states affecting fundamental freedoms. See *R v Minister for Agriculture, Fisheries and Food; ex parte Fedesa*, C-331/88, [1990] ECR I-4057 at I-4062 to I-4064. The principle of proportionality is set out in EC, *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ C 325/33, art 5. The principle of proportionality is also used to assess limitations on fundamental rights and freedoms (see EC, *Charter of Fundamental Rights of the European Union*, [2007] OJ C 303/01 [*EU Charter*]). While the *European Convention for the Protection of Human Rights and Fundamental Freedoms* does not include a specific reference to proportionality, the European Court of Human Rights applies the test of proportionality when rights are infringed (see Barak, *supra* note 1 at 183–84).

Africa, Hong Kong, India, and countries in South America.[5] Furthermore, it has become part of many constitutional and international documents.[6] It is also relevant in other contexts, such as international law (e.g., the doctrine of just war, the laws of self-defence, and international human rights law)[7] and criminal law (e.g., punishment should be proportional to the offence).[8]

The principle of proportionality was first recognized in Canadian constitutional law in *R. v. Oakes*,[9] in which the Supreme Court of Canada interpreted section 1 of the *Canadian Charter of Rights and Freedoms*,[10] which allows the government to limit constitutional rights and freedoms to a reasonable extent,[11] as entailing a proportionality test. Similar to other jurisdictions,[12] the Court established a three-stage proportionality test

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5 See Barak, *supra* note 1 at 180–202, 208–10. See also David M Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004). Furthermore, the principle of proportionality has been recently advocated in the United States: see E Thomas Sullivan & Richard S Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (New York: Oxford University Press, 2009) (providing an overview of the long-standing acceptance of proportionality in Western countries and arguing that "every intrusive government measure that limits or threatens individual rights and autonomy should undergo some degree of proportionality review" at 6).

6 See e.g. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1 [*Charter*]; *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 36; *Basic Law: Human Dignity and Liberty* (ISR), 12 Adar 5752 (17 March 1992), 1391 Sefer Ha-Chukkim 150, online: <www.knesset.gov.il/main/eng/home.asp>; *Basic Law: Freedom of Occupation* (ISR), 26 Adar 5754 (9 March 1994), 1454 Sefer Ha-Chukkim 90, online: <www.knesset.gov.il/main/eng/home.asp>; *Constitution fédérale de la Confédération suisse, 1998*, art 36; *Constitution of the Republic of Turkey*, 1982, translated by Amos J Peaslee, art 13; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, arts 8–11, Eur TS 5; *New Zealand Bill of Rights Act 1990*, 1990/109, s 5; *EU Charter*, *supra* note 4, art 52.

7 See Barak, *supra* note 1 at 202–06; Sullivan & Frase, *supra* note 5 at 15–26.

8 See Barak, *supra* note 1 at 175–76.

9 [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR]. See also Sujit Choudhry, "So What Is the Real Legacy of Oakes?: Two Decades of Proportionality Analysis Under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501.

10 *Charter*, *supra* note 6.

11 "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*ibid*, s 1).

12 There is, of course, some disparity between the tests used by each jurisdiction. For example, the UK test did not originally include the third stage (see *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (1998), [1999] 1 AC 69 at 80, [1998] 3 WLR 675 (PC)). However, the third stage was later added (see *Huang v Home Secretary*, [2007] UKHL 11, [2007] 2 AC 167). In France, the test did not

that examines the relationship between the measure adopted by the government to achieve a legitimate objective and the legitimate objective itself. First, the measure adopted by the government must be *rationally connected* to the justifiable objective it aims to achieve. Second, the government must select the measure that is the least harmful to, or *minimally impairing* of, the right or freedom in question, but similarly achieves the objective. Third, there must be proportionality *stricto senso* between the harms caused by the measure and the benefits of achieving the important objective—"[t]he more severe the deleterious effects of a measure, the more important the objective must be."[13]

In a neo-liberal capitalist era, employers often exert as much control over an individual's life as governments do. Should the application of the principle of proportionality extend to the private sphere and impose limitations on employers' actions? The question is not about constitutional cases; the constitutional analysis undoubtedly involves a proportionality analysis in labour and employment contexts, as in any other context. The question here is rather about non-constitutional cases, involving private sector employers: Can (and should) we demand that such employers conform to the requirements of proportionality when making decisions affecting employees? Can (and should) we place similar constraints on labour unions making decisions that affect employers and the public at large? A number of scholars have recently explored this possibility in other jurisdictions and advocated the use of proportionality in some labour and employment contexts.[14] The three-stage test appears to offer a useful structure for discretionary decision making, ensuring that decisions are both rational and considerate, and preventing abuse of power by both employers and unions.[15]

Geoffrey England has examined the impact of the *Charter* on employment contract law, including the application of proportionality in "just cause" cases.[16] But a complete account of the role that proportionality

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originally include the minimal impairment stage, but this has been changed recently by the French Constitutional Court (see Barak, *supra* note 1 at 132, n 3).

13 *Oakes*, *supra* note 9 at 140. See *ibid* at 139 (the discussion of the proportionality test in particular).

14 In Israel, see Guy Davidov, "The Principle of Proportionality in Labor Law and Its Impact on Precarious Workers" (2012) 34:1 Comp Lab L & Pol'y J 63 at 64 [Davidov, "Proportionality"]. In the UK, see Aaron Baker, "Proportionality and Employment Discrimination in the UK" (2008) 37:4 Indus LJ 305; ACL Davies, "Judicial Self-Restraint in Labour Law" (2009) 38:3 Indus LJ 278.

15 See Davidov, "Proportionality", *supra* note 14 at 79.

16 Geoffrey England, "The Impact of the *Charter* on Individual Employment Law in Canada: Rewriting an Old Story" (2006–2007) 13 Can Lab & Emp LJ 1. In this article, England argues that the *Charter* has had significant direct and indirect impacts on em-

plays or should play in Canadian employment and labour law has not yet been offered. In this article, we wish to advance two main arguments: First, a survey of employment and labour decisions by courts and other adjudicators in Canada reveals that the principle of proportionality is already being used in certain contexts. Sometimes the application is explicit, even if incomplete (i.e., does not closely follow all three stages of the *Oakes* proportionality test). But more often, the application is implicit. That is, courts and other adjudicators analyze different situations using tests akin to the *Oakes* proportionality test without an explicit reference to proportionality. Second, we argue that this trend is normatively justified and that a more explicit and structured use of the proportionality test should be advanced in various employment and labour spheres.

The article proceeds as follows: Part I exposes the contexts in which proportionality is currently used in Canadian employment and labour law decisions. We argue at a descriptive level that proportionality already plays a major role—although often not explicitly—in Canadian labour and employment law. Part II turns to the normative level and explores the justifications for extending the application of proportionality to the private sphere, and more specifically to the employment relationship. First, we explain why a higher standard of behaviour is required in employment relationships as opposed to other contracts. Second, we defend the use of proportionality in these contexts, stressing its legal and analytical merits. Third, we demonstrate that the application of proportionality fits within contemporary legal doctrine and advances legal coherence. We therefore advocate a more explicit use and structured application of the three-stage proportionality test in the contexts mentioned above. Part III proposes additional applications of proportionality in the labour context, showing how this principle may provide a more balanced approach to the resolution of contemporary labour relations conflicts in Canada, limiting the use of excessive power by both employers and trade unions.

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ployment law in Canada. The direct impact revolves around various constitutional challenges to different statutory provisions on employment standards, pay equity, and workers' compensation. The indirect impact is demonstrated by the expansion of general *Charter* values, such as fairness, equality, and proportionality, in the law of the employment contract. England advocates protecting these new developments through explicit legislation. However, he warns against an overextension of employee rights, which may compromise the productive efficiency of employers. He therefore urges courts to carefully consider the economic effect of their decisions on employers.

I. Proportionality in Canadian Employment and Labour Contexts

A. Introduction

The principle of proportionality is used both explicitly and implicitly in various employment and labour law decisions. In some cases, the *Charter*, including section 1 and the principle of proportionality, is directly relevant in an employment setting. At times, a governmental action or piece of legislation infringes the rights and freedoms of employees, trade unions, or employers guaranteed under the *Charter*.[17] Setting aside these constitutional cases, there are also scenarios in which a private dispute arising between an employer and an employee, or an employer and a trade union, is analyzed within a proportionality framework. Sometimes the court or the relevant adjudicator will make concrete reference to proportionality, but may not follow all three stages within the *Oakes* proportionality test. Occasionally, the legal analysis will not make explicit reference to proportionality, but will significantly resemble the three-stage test. In most cases the burden of proof is dictated by the legislation or common law, but in other cases it is an open question how to devise the legal rule in this respect. This Part will canvass several representative employment and labour law decisions to demonstrate this argument.

B. Explicit Use

1. Disciplinary Procedure and Just Cause

The most obvious example of an explicit use of proportionality in the employment sphere is found in "just cause" cases. In response to its recognition of both the imbalance of bargaining power between employees and employers and the importance of work to the lives of individuals,[18] the Supreme Court of Canada developed in *McKinley v. B.C. Tel* the notion of

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[17] See e.g. *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 (considering whether provisions in human rights legislation limiting protection against age discrimination in employment to the age of sixty-five infringes section 15 of the *Charter*); *Ontario Nurses' Association v Mount Sinai Hospital*, [2005] 75 OR (3d) 245, 255 DLR (4th) 195 (considering whether a denial of severance pay to disabled employees, provided for in the Ontario *Employment Standards Act*, violates section 15 of the *Charter*); *Health Services and Support (Facilities Subsector Bargaining Assn) v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 (considering whether the British Columbia Health and Social Services Delivery Improvement legislation infringes section 2(d) of the *Charter*).

[18] See *McKinley v BC Tel*, 2001 SCC 38 at paras 53–54, [2001] 2 SCR 161 [*McKinley*].

proportionality in disciplinary procedures.[19] The Court held that employee misconduct, in and of itself, does not necessarily warrant just cause for summary dismissal. The principle of proportionality helps to assess whether, in the context and circumstances, an employee's misconduct was so serious[20] that it should give rise to just cause for dismissal. That is, employers claiming just cause for dismissal are required to show that the sanction imposed upon an employee was *proportional* to his or her misconduct. Only if the misconduct was very serious (for example, "theft, misappropriation or serious fraud") would an employer have a just cause to summarily dismiss the employee without an advance notice or pay in lieu of that notice.[21] In other cases involving less serious misconduct, an employer should use progressive discipline (i.e., "lesser sanctions for less serious types of misconduct").[22] Only when the misconduct or poor performance repeats itself or continues despite discipline and clear warnings would it amount to just cause for summary dismissal.[23]

The test for establishing just cause, developed by the Supreme Court, was named a "proportionality" test,[24] perhaps building on the well-established test for disciplinary action in labour arbitration jurisprudence.[25] The test for just cause includes two stages: "(1) whether the evidence establishe[s] the employee's [misconduct] on a balance of probabilities; and (2) if so, whether the nature and degree of the [misconduct] warranted dismissal."[26] While no reference was made to section 1 of the *Charter* or to the *Oakes* test, a closer inspection of this test reveals some similarity to the *Oakes* proportionality test. One might argue that when employers make a decision to either discipline or dismiss an employee, the decision infringes the employee's right or interest to have job security or at least to receive advance notice. Assuming that the objective of either disciplining or dismissing an employee is to ensure that the workplace is composed of the most competent and cooperative workers, employers are

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19 "An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed" (*ibid* at para 53).

20 A serious misconduct "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer" (*ibid* at para 48).

21 *Ibid* at para 51.

22 *Ibid* at para 52.

23 In this case, the employer may still dismiss the employee but would have to provide advance notice or pay in lieu of that notice.

24 "Underlying the approach I propose is the principle of proportionality" (*McKinley*, *supra* note 18 at para 53).

25 See *infra* note 34.

26 *McKinley*, *supra* note 18 at para 49.

required to show that the measure chosen to achieve this objective was proportional.

The test developed in *McKinley* resembles the first two stages of the *Oakes* proportionality test, although a more structured analysis could have been beneficial. First, the *McKinley* test requires a proof of incompetence or misconduct. This is necessary, as disciplining or dismissing without notice employees who were engaged in misconduct or incompetence appears to be rationally related to the aforementioned objective because it deters—or, in the case of dismissals, conclusively prevents—future misconduct or incompetence from the same employee. By contrast, where an employee's action was just an error in judgment, trivial or unintentional, discipline or dismissal without notice does not seem to advance the objective. Certainly, if the employee is wrongly accused or if the accusations are not substantiated—if there is no proof of the alleged misconduct—the disciplinary measure will not advance the stated objective, and therefore no rational relationship between measure and objective exists.

Second, the *McKinley* test examines whether a less severe response is possible while still achieving the aforementioned objective. Summary dismissal is a severe punishment. A less severe response, such as a warning, is usually sufficient to achieve the objective when the misconduct is not very serious.[27] However, when the employee's actions are serious, intentional, or numerous, the employer may argue that there is no less intrusive way to achieve its legitimate business objective other than to dismiss the employee without notice.[28]

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[27] *Ibid* at para 52. See also *ibid* at para 56: "[a]bsent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as 'dishonesty' might well have an overly harsh and far-reaching impact for employees."

[28] Gillian Demeyere argues that the just cause test and the bona fide occupational requirements test are similar, as they both limit the power that the employer has over its employees to control the work environment:

> Both root out attempts by the employer, under the guise of its managerial authority, to control more than the work by setting terms and conditions of employment that are neither rationally connected to nor reasonably necessary for the discharge of the employee's contractual duty to do the work. ... The common law doctrine of just cause is thus just a broader version of the bona fide occupational requirement defence under human rights legislation. That is, the just cause doctrine is best understood as imposing a duty on employers to set only occupational requirements that are reasonably necessary for the performance of the work ("Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate" (2010) 36:1 Queen's LJ 299 at 318–19).

Indeed, both tests appear to resemble the proportionality test.

The *McKinley* test was further developed in subsequent cases and now contains elements of all three stages of the *Oakes* proportionality test, including a requirement to balance the benefits gained against harms caused by the chosen sanction. In *Dowling v. Ontario*,[29] for example, the Ontario Court of Appeal held that the test requires a consideration of the particular circumstances of both the employee and the employer:

> In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.[30]

In the context of balancing harms against benefits, this contextual evidence is needed to assess the severity of the harm to the employee versus the importance of the objective to the employer in the specific circumstances—as in the third stage of the *Oakes* proportionality test.

The same analysis applies not only in dismissal cases, but also in disciplinary cases. In *Haddock v. Thrifty Foods*,[31] for example, an employee had been working for sixteen years for the same chain of grocery stores. His last position was as a seafood department manager. He had been a good employee for most of the period but, in the later years, had some personal problems that led to alcohol abuse. In response to changes in his workplace behaviour, he was warned twice in 2002 and 2003 and then, about a year later, he was demoted to a non-managerial position with a 16–20 per cent decrease in income. The Supreme Court of British Columbia held that demotion was not the proper response to his poor performance but rather amounted to constructive dismissal. The court also held that a further warning was needed before the employer could terminate without notice, due to the time that had passed since the previous warnings and also the employee's efforts to rehabilitate himself and improve his performance during that period. The additional warning requirement echoes the second stage of the *Oakes* proportionality test, in that the employer should have chosen a less severe measure (i.e., a warning) to achieve its legitimate objective of having the most competent body of employees in the organization.

In unionized settings, use of the principle of proportionality in discipline and dismissal cases is even more established. Collective agreements

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[29] *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004), 246 DLR (4th) 65, 37 CCEL (3d) 182 [cited to DLR].

[30] *Ibid* at para 52.

[31] 2011 BCSC 922 (available on CanLII).

generally require employers to establish just cause prior to the imposition of any form of discipline (i.e., oral and written warning, suspension, discharge, etc.).[32] Furthermore, legislation provides arbitrators with the power to substitute their authority for that of the employer and to reduce the penalty imposed by an employer to one that is "just and reasonable" in the circumstances.[33] Interestingly, when attempting to give concrete meaning to these vague concepts, arbitrators appear to use the proportionality test.

Arbitrators consider two main questions in just cause cases. First, they consider whether the conduct in question amounts to just cause for the imposition of some form of discipline. As noted, this part resembles the rational connection stage of the *Oakes* test: dismissing or disciplining only those employees who misbehaved or performed poorly is rationally connected to the employer's objective of having the most competent body of employees. Second, arbitrators consider whether the method of discipline selected by the employer is appropriate in the circumstances. Various mitigating factors have been identified as potentially justifying the substitution of a lesser penalty in the place of discharge, including: whether the employee was confused or mistaken as to whether an act was permitted, whether the act was impulsive (i.e., non-premeditated), whether the harm to the employer was trivial, whether the employee sincerely acknowledged the misconduct, the past record of the employee, the length of service, and whether the penalty imposes severe hardship upon the

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[32] See e.g., *Collective Agreement Between E-Z-RECT Manufacturing Ltd and Marine Workers' and Boilermakers' Industrial Union, Local No 1, Effective 1 September 2007 – 31 August 2012*, art 3.04, online: British Columbia Labour Relations Board <www.lrb.bc.ca/cas/WTD7.pdf>; *Collective Agreement Between the Elementary Teachers' Federation of Ontario (Representing the Occasional Teachers of the Elementary Teachers' Federation of Ontario) and the Lambton Kent District School Board, Effective 1 September 2008–31 August 2012*, art 502, online: Lambton Kent District School Board <www.lkdsb.net/Staff/col-agt/ETFO%20Occ%20-%202008-2012.pdf>.

[33] See for example, in Ontario, section 48(17) of the *Labour Relations Act*:

> Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances (SO 1995, c 1, s 48(17), being Schedule A to the *Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity and to Make Consequential Changes to Statutes Concerning Labour Relations*, SO 1995, c 1 [*Labour Relations Act*]).

Other provinces and the federal jurisdiction use similar clauses: see e.g. *Canada Labour Code*, RSC 1985, c L-2, s 60(2).

employee given his or her age and personal circumstances.[34] This part combines both the second and third stages of the *Oakes* proportionality test. It requires the employer to choose the least intrusive punishment while still achieving its objective. It also balances between the benefits of achieving the employer's objective and the harms imposed upon the employee.

2. Privacy in the Workplace

Another explicit use of the proportionality principle can be demonstrated in invasion of privacy cases—for example, when an employer requires his or her employees to pass a drug or alcohol test, or uses surveillance cameras, or monitors emails and computer use. The clearest examples are those that fall within the jurisdiction of the federal *Personal Information and Protection of Electronic Documents Act* (*PIPEDA*).[35] Section 5(3) of the *PIPEDA* stipulates that "[a]n organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances."[36] Section 5(3) of the *PIPEDA* was interpreted by the Privacy Commissioner, as well as arbitrators and federal courts, as including a proportionality test.

The Privacy Commissioner of Canada has set out a fourfold test for determining when personal information may be collected for purposes a reasonable person would find appropriate in the circumstances.[37] The Commissioner held that, when examining section 5(3), one has to consider the appropriateness of the organization's purpose for collecting personal information, as well as the circumstances surrounding that purpose. Once the purpose is identified, in order to determine whether the collection, use, or disclosure was reasonable in the circumstances, one has to consider the following questions: "Is the measure demonstrably necessary to meet a specific need? Is it likely to be effective in meeting that need? Is

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[34] See *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees* (1979), 23 LAC (2d) 227 at 230 (Arbitrator: HW Arthurs). See also *Re Sifto Canada Corp and Communications, Energy and Paperworkers Union, Local 16-0* (2010), 200 LAC (4th) 305 (Arbitrator: GF Luborsky). For the applicability of *McKinley* in a unionized workplace, see e.g., *Yellow Pages Group v COPE*, 2012 ONCA 448, 351 DLR (4th) 534.

[35] SC 2000, c 5 [*PIPEDA*].

[36] See also *Model Code for the Protection of Personal Information*, being Schedule 1 to the *PIPEDA*, *supra* note 35. The *Model Code* contains a number of principles, such as the requirement to explicitly identify purposes before collecting information (art 4.2).

[37] See findings under the *PIPEDA* (*supra* note 35), for example *Employee Objects to Company's Use of Digital Video Surveillance Cameras* (23 January 2003), 2003-114, online: Office of the Privacy Commissioner of Canada <www.priv.gc.ca/cf-dc/2003/cf-dc_030123_e.asp>.

the loss of privacy proportional to the benefit gained? Is there a less privacy-invasive way of achieving the same end?"[38]

This test, which has been upheld by the Federal Court[39] and is followed in many arbitration awards,[40] is very similar to the *Oakes* proportionality test. The first inquiry corresponds to the *minimal impairment* stage of the *Oakes* test because it examines whether the measure is *necessary* to meet the objective—that is, whether there are less intrusive ways of achieving the same objective. The second inquiry is akin to the first stage of the *Oakes* proportionality test because it examines whether the measure chosen for the collection of information is effective in achieving the objective—that is, whether it is *rationally connected* to it. The third inquiry resembles the third stage of the *Oakes* proportionality test because it weighs the *proportional* benefits of collecting information against the harm to the employee's privacy. Finally, the fourth inquiry, which asks whether the employer explored other less privacy-invasive ways of achieving the objective, is also similar to the *minimal impairment* stage of the *Oakes* test.

In *Eastmond v. Canadian Pacific Railway*,[41] for example, the video recording surveillance cameras installed in the work yard were held to be justified because the employer successfully demonstrated that it had used the least intrusive means available to accomplish a reasonable purpose. The Federal Court used the term "proportional", although it did not refer specifically to the *Oakes* proportionality test. In reaching its decision, the court considered the above-mentioned questions.[42] The court found that the purpose of collecting information through video cameras was appro-

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38 *Ibid.*

39 See *Eastmond v Canadian Pacific Railway*, 2004 FC 852 at paras 126–27, 33 CPR (4th) 1.

40 See e.g. *Teamsters Canada Rail Conference v Canadian Pacific Railway (2010), CROA&DR 3900 (Arbitrator: Michel G Picher),* online: CROA <www.croa.com>. Following serious collisions in the railway industry, the Canadian Pacific Railway Company adopted a policy of asking employees to provide copies of their personal wireless telephone records when a significant unexplained accident occurred. The arbitrator held that the disclosure of telephone records was demonstrably necessary for promoting public safety, given the recent history of collisions in the railway industry. *The arbitrator found that* the policy would be effective in meeting the company's need to know whether personal cell phone use was a distraction that may have contributed to an accident or incident. *The arbitrator also held that the loss of p*rivacy was limited to disclosure of the act of sending and receiving communications. Furthermore, the benefit of avoiding accidents outweighed the relatively minor loss of privacy. The arbitrator concluded that there was no equally reliable and less privacy-invasive way of achieving the purpose of promoting safety (*ibid* at 35–42).

41 *Supra* note 39.

42 *Ibid* at para 127.

priate in the circumstances. The employer had successfully established a legitimate aim—taking preventative action motivated by numerous past incidents. The court mentioned the importance of these cameras for deterrence of theft and vandalism as well as for the increased security of individuals and goods. Furthermore, the court found the loss of privacy to be minimal. Collection of information was neither surreptitious (there were warning signs) nor continuous. It was not limited to employees only, but captured every person who walked in the yard. It did not measure work performance. The recorded images were kept under lock and key and were accessed only when an incident was reported. Otherwise, they were destroyed. Moreover, the employer explored other alternatives (such as fencing and security guards), but they were too expensive or unfeasible. Finally, the court found the loss of privacy proportional to the benefit gained from the collection of information.[43]

It is worth noting that these tests had been used prior to *PIPEDA* by arbitrators adjudicating privacy cases and balancing the interests of the parties involved. Indeed, in the *CAW Canada* case,[44] which deals with drug and alcohol testing in a unionized and federally regulated workplace prior to *PIPEDA*, proportionality is not mentioned explicitly, yet the arbitrator applied tests akin to the *Oakes* proportionality test and engaged in an analysis that required balancing "the interests of the employees in the privacy and integrity of their person with the legitimate business and safety concerns of the employer."[45] In examining whether drug and alcohol testing violated the collective agreement, the arbitrator asked a series of questions. First, is there evidence of a drug or alcohol problem, or both, in the workplace and, therefore, a need for management's policy (i.e., the "test of justification or adequate cause")?[46] This parallels the first stage of the *Oakes* proportionality test. Second, has the employer considered the available alternatives and might the problem in the workplace be combatted in a less invasive way (i.e., the "test of reasonableness")?[47] This is similar to the second stage of the *Oakes* proportionality test. The arbitrator held that the employer demonstrated the need for its policy because of the safety-sensitive nature of the national railway operations[48] and provided sufficient evidence to reasonably justify its substance abuse policy, includ-

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43 *Ibid* at paras 176–82.

44 *Re Canadian National Railway Co and CAW Canada* (2000), 95 LAC (4th) 341 (Arbitrator: MG Picher) [*CAW Canada*].

45 *Ibid* at 368.

46 *Ibid* at 360.

47 *Ibid*.

48 *Ibid* at 378.

ing drug and alcohol testing.[49] Furthermore, the employer had explored other less intrusive alternatives to deal with the substance abuse problem.[50] However, the arbitrator took issue with some policy rules that did not meet these tests. For example, one rule stipulated that "a positive drug test is, of itself, grounds for discipline or discharge."[51] As such, the rule did not distinguish between "a positive drug test, standing alone, and impairment while on duty."[52] This rule was unreasonable because it made no "reference to any clearly demonstrated legitimate employer interest,"[53] and because there were less intrusive ways of achieving the goal of combating drug and alcohol use among employees in non-safety-sensitive jobs.[54] By contrast, it may be reasonable when employees in risk-sensitive positions are concerned.[55] The arbitrator held that for risk-sensitive employees, who "work in locations spread across Canada, often without supervision or with only partial supervision,"[56] the benefits of the rules for fitness assessment, discipline matters, and monitoring substance abuse in the workplace outweigh the cost of infringing the privacy rights of individuals, "whose expectations must conform to the risk-sensitive concerns of the industry in which they seek to hold employment."[57] This last part clearly reflects the third stage of the *Oakes* proportionality test.

Note that the *PIPEDA* also applies to provincially regulated organizations and businesses that collect information in the course of "commercial activities". However, it does not extend to all *employee* personal information that is collected and used by provincially regulated organizations and businesses, because this generally does not amount to "commercial activity". Some provinces have passed specific legislation on privacy which covers employment, while others have not yet done so. Consequently, different jurisdictions and adjudicators use a variety of tests when it comes to employers' potential invasion of the privacy of employees. However, there is an increasing recognition of the employee's right to privacy in the workplace, and the principle of proportionality, which is well established in *PIPEDA* cases, has gradually penetrated into non-*PIPEDA* cases. As

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49 *Ibid* at 379.

50 *Ibid*.

51 *Ibid* at 381.

52 *Ibid*.

53 *Ibid*. See also *ibid* at 390.

54 Those employees "can be adequately dealt with by the employer through traditional means of detection, treatment and, where necessary, the enforcement of discipline" (*ibid*).

55 *Ibid* at 389.

56 *Ibid*.

57 *Ibid* at 385.

we will argue later, this evolving area of law would benefit from a more explicit, structured use of the proportionality test.

Alberta, for example, has adopted comparable legislation—the *Personal Information Protection Act*—in 2003.[58] Section 11 stipulates: "(1) An organization may collect personal information only for purposes that are reasonable; (2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected."[59] In *Parkland Regional Library*,[60] an employer installed keystroke logging software to monitor the computer usage of one of its employees without his knowledge, following concerns about low productivity and suspicions of his inappropriate use for personal purposes. When the employee found out about the software, he filed a complaint with the Privacy Commissioner of Alberta. The commissioner held that the collection of personal information did not comply with the legislation. There was no legitimate reason for monitoring the employee, as there was no sufficient evidence to support the employer's suspicions.[61] This can be seen as a lack of rational connection, although the commissioner did not refer to the first stage of the *Oakes* proportionality test. Moreover, the chosen method of collection was not necessary for managing the employee. While it provided a broad range of information about the employee, other computer-based methods might have assessed productivity more specifically.[62] That is, the chosen software was not the least intrusive way of collecting this information. The employer could have, for example, simply asked the employee to explain his apparently low productivity or used performance measures and reviews, which are widely accepted management tools.[63] Again, the commissioner was using

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58 Personal Information Protection Act, SA 2003, c P-6.5 [*PIPA*]. Note that the Supreme Court of Canada has recently declared the Act invalid, though the declaration was suspended for a period of twelve months. The Court held that the Act significantly restricted the ability of a union to collect, use, and disclose personal information for legitimate labour relations purposes (such as videotaping and photographing people crossing a picket line). The Court ruled that the Act infringed a union's freedom of expression under section 2(b) of the *Charter* and was not justified under section 1 of the *Charter*. See *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 (available on CanLII).

59 *PIPA*, *supra* note 58, s 11. See also *Personal Information Protection Act*, SBC 2003, c 63, s 11: "Subject to this Act, an organization may collect personal information only for purposes that a reasonable person would consider appropriate in the circumstances."

60 *Re Parkland Regional Library* (24 June 2005), Order F2005-003, online: ABOIPC <www.oipc.ab.ca>.

61 *Ibid* at para 24.

62 *Ibid* at paras 25–26.

63 *Ibid* at para 26.

the second stage of the *Oakes* proportionality test, minimal impairment, without referring to it explicitly.

Similarly, a Nova Scotia arbitrator held that the Regional Municipality of Halifax, which recorded and stored for one year all incoming calls at a call centre, violated provincial privacy legislation (i.e., the *Municipal Government Act*, which protects privacy of information collected or used by the municipality)[64] and the collective agreement with call centre employees which included a duty to act reasonably.[65] Although the municipality's actions were for a legitimate business purpose (i.e., quality control, training, and dispute resolution), it was unnecessary in the circumstances, disproportionate to the invasion of the employees' inherent privacy rights, and therefore unreasonable. Quality deficiencies had already improved through coaching and supervision. The arbitrator concluded that the invasion of privacy was "significantly out of proportion to any benefit, potential or actual, gained or to be gained, by the employer."[66] Note that the arbitrator referred specifically to proportionality when balancing between the benefits of collecting information and the harms of invading the employees' privacy: "Proportionality is a tool to assist in the assessment of whether justification has been made out. It calibrates the intrusion to the interest protected. The operating principle is that the more serious the intrusion, the heavier the burden will be, and *vice versa*."[67]

In provinces where no such legislation exists, there is a distinction between unionized and non-unionized workplaces. In a unionized environment, employers are required to exercise their managerial rights and dis-

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64 SNS 1998, c 18, s 483(1)(c) states: "Personal information shall not be collected by, or for, a municipality unless ... that information relates directly to, and is necessary for, an operating program or activity of the municipality." Further, a municipality may use personal information only with consent (s 485(1)(b)) and may disclose personal information only to "meet the necessary requirements of municipal operation" (s 485(2)(g)).

65 See *Halifax (Regional Municipality) v Nova Scotia Union of Public and Private Employees, Local 2* (2008), 171 LAC (4th) 257 [*Nova Scotia Union*]. On judicial review, the finding regarding the violation of the provincial act was reversed by the Supreme Court of Nova Scotia, holding that voice recording did not amount to "personal information". The finding regarding the violation of the collective agreement was upheld. Although the court did not agree that the implementation of the call recording system was unreasonable, the arbitrator's finding fell within the range of the available legal outcomes (see *Halifax (Regional Municipality) v Nova Scotia Union of Public and Private Employees, Local 13*, 2009 NSSC 283, 282 NSR (2d) 180.

66 *Nova Scotia Union*, *supra* note 65 at 308.

67 *Ibid* at 301–302.

cretion reasonably.[68] In privacy cases, this reasonableness standard has evolved into a "balancing of interests" test: weighing the employer's interest in running its business effectively and safely against the privacy interests of employees. Arbitrators often assess the reasonableness of the employer's action or policy, the nature of the employer's interests in advancing this action or policy, whether there are less intrusive means available to address these interests, and the impact of the employer's action or policy on the employees.[69]

This reasonableness test embodies the first and second stages of the *Oakes* proportionality test, but some elements of the third stage may be identified too. One might argue, for example, that surveillance cameras placed in workplace washrooms are reasonably needed to prevent thefts in a workplace. That is, washroom cameras are the most effective way to prevent thefts, and there is no less intrusive way of achieving this purpose. However, most people will agree that this measure is still unreasonable, due to the severity of privacy infringement, which cannot be offset by the benefits of preventing thefts. That is, the reasonableness test some-

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[68] See *Re Lumber & Sawmill Workers' Union, Local 2537 v KVP Co Ltd* (1965), 16 LAC 73 (Arbitrators: JB Robinson, D Wren, RV Hicks); *Metropolitan Toronto (Municipality) v CUPE, Local 43* (1990), 69 DLR (4th) 268 [*Metropolitan Toronto*].

[69] See *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 27 (available on CanLII) [*Paperworkers*]. In this recent case, the Supreme Court upheld an arbitration award concluding that the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use. The majority explicitly applied a proportionality test used by "a substantial body of arbitral jurisprudence" (*ibid* at para 4), and stressed that "[t]he dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise" (*ibid*). Weighing the employer's interest in random alcohol testing as a workplace safety measure against the harm to the privacy interests of employees, the Court held that "when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse" (*ibid* at para 5). It also stated that

> a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace (*ibid* at para 6).

The dissenting opinion applied a reasonableness test (*ibid* at para 81). It held that there is an arbitral consensus that an employer has to demonstrate evidence of an alcohol problem in the workplace to justify a random alcohol testing policy (*ibid* at para 97) and that the arbitration board came to an unreasonable decision because it departed from this arbitral consensus when it required evidence of a *significant* or a *serious* problem (*ibid* at para 104) and that the evidence of alcohol use be tied to accident or injury at the plant (*ibid* at para 105).

times entails a balancing act which is the third stage of the *Oakes* proportionality test.[70] As will be argued later, it would be useful to break down the reasonableness test, which is a vague standard overall, into the three more concrete stages of the *Oakes* proportionality test.[71]

Finally, in non-unionized workplaces, employers are generally allowed to collect and use information about their employees in the absence of specific legislation or common law rules. This has led courts to seek creative ways to remedy the situation of employees whose privacy was brutally invaded by their employers in some cases,[72] and to acknowledge employees' reasonable expectation of privacy even where workplace policies allowing search and surveillance were in place.[73] Recently, a tort of invasion of privacy (called "intrusion upon seclusion") was established in On-

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70 See Harold M Smith & Joseph L Anthony, "Walking the Centre Line: Balancing an Employee's Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry" (2003) 26 Dal LJ 591. Smith and Anthony argue that reasonableness is "predicated on a proportionality between the extent to which an employer-imposed rule is necessary to protect a legitimate interest of the employer and the impact of said rule upon an employee's interests" (*ibid* at 599). That is, reasonableness requires

> a two-step inquiry[:] one must first, assess whether there is adequate cause or justification for the rule (i.e., a legitimate employer interest to be protected or objective facilitated by the operation of the rule), and second, assess the reasonableness of the rule by considering whether the employer's interest could be protected or facilitated in a less intrusive fashion (*ibid* at 599–600).

71 Indeed, in *Paperworkers*, proportionality was explicitly used, and the question was framed in line with the third stage of the *Oakes* proportionality test: "Was the benefit to the employer from the random alcohol testing policy in this dangerous workplace proportional to the harm to employee privacy?" (*supra* note 69 at para 43).

72 See for example *Colwell v Cornerstone Properties Inc* (2008 CanLII 66139 (Ont Sup Ct)), in which an employee who found out that a secret surveillance device had been installed for several months in her office suffered mental stress and left her job. She sued for breach of contract amounting to constructive dismissal. The court held that the duty of each party to treat each other in good faith was an implied term in her employment contract and that the employer's actions breached that duty. See also *Entrop v Imperial Oil Ltd* (50 OR (3d) 18, 189 DLR (4th) 14 (Ont CA)), on drug and alcohol testing in a nonunionized workplace, which was addressed through the lens of discrimination as the employers' measures infringed the rights of an employee with a history of substance abuse.

73 See *R v Cole* (2012 SCC 53, [2012] 3 SCR 34), in which a high school teacher was charged with possession of child pornography and unauthorized use of a computer. The school policy permitted the use of work-issued laptop computers for incidental personal purposes, but expressly prohibited the use or storage of inappropriate content and allowed access by the school to private emails. The Supreme Court of Canada held, among other things, that the ownership of the computer by the school board was not determinative of the teacher's expectation of privacy, and that "[w]hile workplace policies and practices may diminish an individual's expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely" (*ibid* at para 3).

tario and may be used against employers who invade the privacy of their employees.[74] However, this is merely a partial solution because it covers only extreme cases of intentional action, thus allowing most employers to continue collecting and using information about their employees. Subjecting employers' actions to the principle of proportionality, even in the absence of specific privacy legislation, may be an appropriate solution.

We have seen that proportionality is used *explicitly* in at least two labour and employment law contexts: just cause and privacy. However, while the term "proportionality" has been invoked by courts in these two contexts, this has not been consistent. In some cases the term has not been mentioned. Moreover, the three stages of the proportionality test, although they can often be found between the lines, are not usually applied separately and systematically.

C. Implicit Use

1. Introduction

In this Part, we describe restrictive covenants, workplace discrimination, picketing, and unfair labour practice cases, in which courts have developed legal tests that are very similar to the proportionality test yet lack any direct reference to proportionality.[75] The legal tests developed in some of these contexts are well-established and structured. One might then ask why using proportionality in an explicit manner will be beneficial in these contexts. Our answer is twofold: First, once it is demonstrated that the tests used in these contexts are, in fact, very similar to proportionality, our argument is that it could prove beneficial to start using all three stages of the test, a practice which, in some cases, would add additional relevant considerations into the analysis. Second, even if no change is made to the jurisprudence on this particular topic and the same tests prevail without referring to proportionality, by showing that courts are *de facto* using the proportionality tests, the argument we wish to advance is

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74 See *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241.

75 Cases on constructive dismissal (which limits managerial prerogative) can also be viewed as reminiscent of proportionality. While employers' legitimate objective is to run a productive and profitable business and they often make changes in the workplace to achieve that aim, a unilateral fundamental change, which a reasonable person in the employee's position would find unreasonable and unfair, such as major changes to the compensation package, significant changes in duties (demotion), or substantial changes to the location of employment (i.e., disproportionate change) amounts to repudiation of the employment contract. See e.g. *Farber v Royal Trust Co*, [1997] 1 SCR 846, 145 DLR (4th) 1; *Mifsud v MacMillan Bathurst Inc* (1989), 63 DLR (4th) 714, 35 OAC 356 (Ont CA).

that proportionality tests are generally useful in various contexts of labour and employment law. They are already used in some contexts, and can be used in other contexts. In other words, we are taking a broad look at several contexts in labour and employment law, within which tests have developed in ways that appear unrelated to one another, and we show that, in fact, the tests are very similar in all of those contexts, and also very similar to the *Oakes* proportionality test. This observation is, in our opinion, useful as a general jurisprudential point: demonstrating the importance and prevalence of proportionality as a general principle of law, including in private law, even when it is not mentioned explicitly. This also supports the first argument that proportionality tests *should* be used in some additional contexts.

2. Restrictive Covenants

A prominent example of an implicit use of proportionality in the employment sphere is found in restrictive covenants cases. Generally, non-competition clauses in an employment contract are viewed as a restraint of trade and are presumed to be unenforceable, unless the employer shows that the non-competition clause is necessary to protect the employer's legitimate proprietary or business interests, that the non-competition clause covers a reasonable length of time and geographic area, and that a non-solicitation clause would not suffice to protect the employer's legitimate interests in the circumstances.[76] As the Supreme Court of Canada held:

> A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. ... [C]ompeting demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable." The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case.[77]

Reasonableness is a relatively vague legal concept. Proportionality, on the other hand—which could be seen as a *concretization* of reasonableness—provides more guidance through the three different stages. And, in

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[76] See e.g. *Elsley v JG Collins Ins Agencies*, [1978] 2 SCR 916 at 924–26, 83 DLR (3d) 1 [*Elsley*]; *Friesen v McKague* (1992), 81 Man R (2d) 290 at paras 20–21, 96 DLR (4th) 341 [*Friesen*]; *Lyons v Multari*, (2000) 50 OR (3d) 526 at paras 21–23, 136 OAC 281.

[77] *Elsley*, *supra* note 76 at 923.

fact, the test used by judges to assess restrictive covenants appears to be in line with proportionality. While proportionality is not mentioned explicitly in the prevalent legal analysis, two stages of the *Oakes* proportionality test can be clearly identified. The employer is required to identify a legitimate objective (i.e., a proprietary or business interest) and to explain why a non-competition clause is necessary to protect this objective. These requirements resemble the test of rational connection. Furthermore, the employer has to draft a reasonable restrictive covenant in terms of length of time and geographic area, and must use a non-solicitation clause (i.e., rather than a non-competition clause) when it is effective in fulfilling the legitimate objective. These requirements are very similar to the test of minimal impairment. When there are less intrusive ways of achieving a goal, the employer must choose these measures. As the Manitoba Court of Appeal held:

> The onus of proving that a covenant is reasonable as between the parties falls upon the party relying on it, *i.e.*, the plaintiffs in this case. The presumption is rebuttable by evidence showing that the covenant is reasonable in that it goes no further than is necessary to protect the legitimate rights of an employer, and does not unduly restrain the employee.[78]

3. Discrimination

Another test that turns out to be very similar to proportionality is the bona fide occupational requirement (BFOR) defence in workplace discrimination cases. In *Meiorin*,[79] the Supreme Court of Canada developed a three-stage test to determine whether an employer may use the BFOR defence after an employee or a job applicant has shown a prima facie case of discrimination. Proportionality was mentioned briefly when the Court explained why direct discrimination and adverse effect discrimination should both be subject to the same analysis, despite some semantic differences across provinces:

> In both cases, whether the operative words are 'reasonable alternative' or 'proportionality' or 'accommodation', the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.[80]

By contrast, the test itself, which includes three limbs, does not refer to proportionality, but clearly includes elements of the *Oakes* proportion-

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78 *Friesen*, *supra* note 76 at para 14.

79 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin* cited to SCR].

80 *Ibid* at para 38.

ality test. To determine whether a prima facie discriminatory standard is a BFOR, an employer has to justify the impugned standard by establishing on a balance of probabilities that

> the employer adopted the standard for a purpose rationally connected to the performance of the job; that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[81]

The first limb of this test explicitly adopts a rational connection test (the first stage of the *Oakes* proportionality test). The employer's justifiable objective is to assign jobs to the most competent employees, and for this purpose the employer develops workplace standards (i.e., the measures). The second limb, requiring honesty and good faith, can be understood as an additional check on the legitimacy of the employer's purpose. If the employer acts in bad faith—in an attempt to achieve illegitimate goals—then it arguably fails the rational connection test. The third limb of the *Meiorin* test includes elements of all three stages of the *Oakes* proportionality test. It examines, first, whether the workplace standard is reasonably necessary to the accomplishment of the employer's purpose. This requires a rational connection between the workplace standard and the employer's purpose. Second, it also requires the employer to show necessity—that is, consideration of alternative and less intrusive ways of achieving the employer's goals. Alternatives may include, for example, "various ways in which individual capabilities may be accommodated."[82] As the Court explains, "there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose. ... The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible."[83] Finally, the third limb involves an act of balancing the interests and rights of the employer, and those of the employee and other workers, as part of the duty to accommodate and the undue hardship analysis. As the Court elucidates, this act of balancing includes factors such as "the financial cost of the possible method of accommodation, the relative inter-

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[81] *Ibid* at para 54.

[82] *Ibid* at para 64.

[83] *Ibid*.

changeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees."[84]

The Court then lists a number of supporting questions that again reflect a very similar analysis to the *Oakes* proportionality test.[85] These questions—"Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?"; "If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?"; "Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?"—are all akin to the second stage of the *Oakes* proportionality test. The question, "Is it necessary to have *all* employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?" reflects the first stage of the *Oakes* proportionality test (or, alternatively, could be understood as referring to minimal impairment). The question, "Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?" resembles the third stage of the *Oakes* proportionality test.

Subsequent cases have followed the same line of analysis. In *Entrop v. Imperial Oil*,[86] for example, Imperial Oil adopted an employee alcohol and drug testing policy that included an automatic termination of employment sanction for positive tests. The issue in court was whether this policy was discriminatory on the basis of disability, which includes substance abuse. The legitimate purpose of minimizing risk of impairment due to substance abuse and ensuring a safe workplace, especially in safety-sensitive positions, was clearly identified. The Ontario Court of Appeal held that while drug testing was, in general, rationally connected to work performance, it could not measure present impairment of ability to perform work safely, only past drug use. Accordingly, the court held that this testing could not be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal, which in this case appears to suggest that the policy failed the rational connection test.[87] It was also held that the sanction for a positive test was too severe—"more stringent than needed for a safe workplace

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84 *Ibid* at para 63.

85 *Ibid* at para 65.

86 *Supra* note 72.

87 *Ibid* at para 99.

and not sufficiently sensitive to individual capabilities"—which appears to suggest that the policy also failed the minimal impairment test.[88]

4. Picketing

Another context we would like to discuss regarding implicit use of proportionality involves cases concerning picketing. Proportionality may be relevant to picketing in two different contexts. The first context is constitutional and examines whether picketing should be permitted or restricted by legislation or common law rules. The second context focuses on the relationship between the union and the employer and assesses whether the use of picketing is appropriate, which involves the application of the legislation or common law rule in the specific circumstances. The relevance of proportionality in the first, constitutional context is clear. Picketing is a form of expression and, as such, is protected under section 2(b) of the *Charter*. Imposing limitations on picketing may therefore be justifiable only in accordance with section 1 and the *Oakes* test. Our focus in this article is on the second context and its less obvious relevance to proportionality. When determining, in specific circumstances, whether to issue an injunction or not, courts examine a union's action and require certain standards to be met (as sometimes imposed by an injunction order), in line with the principle of proportionality.

In the case of *Pepsi-Cola*,[89] the Supreme Court of Canada dealt with both contexts. First, it examined the constitutionality of banning or limiting secondary picketing at common law and held that secondary picketing should be allowed unless it involves a wrongful action (e.g., a crime or a tort) because picketing engages freedom of expression, which is constitutionally protected under section 2(b) of the *Charter*.[90] The Court held that the *Charter* is relevant despite the private nature of the matter because:

> The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The

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88 *Ibid* at para 100.

89 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi-Cola*].

90 The Court first delved into the relationship between common law and the *Charter* in *RWDSU v Dolphin Delivery Ltd* ([1986] 2 SCR 573, 33 DLR (4th) 174), in which it stated that when a private party sues another private party under common law, the Charter does not apply, but the principles of the common law should apply and be developed "in a manner consistent with the fundamental values enshrined in the Constitution" (*ibid* at 603).

> Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.[91]

Furthermore, since freedom of expression is not unlimited, being subject to reasonable limitation under section 1, the Court subjected the common law to section 1 values in the following: "Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society."[92]

Next, the Court moved on to assess the dispute between the private parties—Pepsi-Cola and the trade union—and asked whether the use of secondary picketing was appropriate. The Court held that the protest outside the homes of Pepsi-Cola's management personnel was tortious, and upheld the associated injunction order, but allowed the peaceful picketing outside retail outlets selling Pepsi-Cola products.[93] Although this "wrongful action approach" does not explicitly require a balancing act,[94] the Court recognized that courts and legislatures might have to provide supplementary guidelines:

> Doubtless issues will arise around the elaboration of the relevant torts and the tailoring of remedies to focus narrowly on the illegal activity at issue. Doubtless too, circumstances will present themselves where it will become difficult to separate the expressive from the tortious activity. In dealing with these issues, the courts may be expected to develop the common law sensitively, with a view to *maintaining an appropriate balance* between the need to preserve third-party interests and prevent labour strife from spreading unduly, and the need to respect the Charter rights of picketers.[95]

In our view, *maintaining an appropriate balance* requires a proportionality analysis, which may be developed at common law. The Court recognized that although picketing may cause economic harm to employers and third parties, it is usually allowed because such economic harm is "anticipated by our labour relations system as a necessary cost of resolving industrial conflict."[96] However, the "most problematic" picketing, "whose value is clearly outweighed by the harm done to the neutral third party" or which causes irreparable harm to the employer, will either not be al-

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91 *Pepsi-Cola*, *supra* note 89 at para 18.

92 *Ibid* at para 37.

93 *Ibid* at para 116–17.

94 See Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians" (2011) 34:1 Dal LJ 143 at 153.

95 *Pepsi-Cola*, *supra* note 89 at para 107 [emphasis added].

96 *Ibid* at para 45.

lowed or be subject to some restrictions.[97] Thus, these statements have opened the door for a proportionality analysis in subsequent cases.[98]

In some jurisdictions, injunction orders in labour disputes are regulated by statute. In Ontario, for example, an employer or a third party has to show that there are activities taking place that cause danger of damage to property, or danger of injury to people, or obstruction of or interference with lawful entry or exit from the property.[99] While the statute does not explicitly refer to proportionality, post-*Pepsi-Cola* cases have engaged in an analysis that closely resembles the *Oakes* proportionality test. As will be argued later, a more explicit use could better guide the reasoning by providing detailed structure, and thus, provide much more useful precedent for future cases.

In *Unilux Boiler Corp. v. Fraser*,[100] for example, when employees committed tortious acts and criminal misconduct in the course of their picketing, Unilux sought an injunction that would, among other things, limit the number of picketers. The Ontario Superior Court of Justice examined this request and held that it was "an unmerited infringement on the Union's ability to provide support for the remaining strikers and to exert pressure on their employers."[101] In other words, the union's actions met the first stage of the *Oakes* proportionality test: the picketing was rationally related to the aim of exerting pressure upon the employer. However, the court was willing to issue an order restraining the union from preventing entrance or exit for any time longer than five minutes.[102] That is, the union's actions failed to meet the second stage of the *Oakes* proportionality test. Apparently, the court felt that a five-minute delay at the entrance was sufficient to achieve the goals of picketing, including conveying information about the dispute and exerting social and economic pressure on the employer, and accordingly, a longer delay could not be justified. Alternatively, perhaps the court felt that the union's actions did not

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97 *Ibid* at para 106.

98 Here we wish to leave open the question as to who bears the burden of proof. The law already imposes (at least in theory) a heavy burden of proof on applicants who wish to obtain an injunction to restrain picketing. One might argue that they should also bear the onus of proving that the picketing was disproportionate. But there are other relevant considerations: On the one hand, it is the picketing trade union which has to exert its powers proportionately. On the other hand, an injunction to restrain picketing might be significantly detrimental to the trade union and infringes on its fundamental rights and freedoms.

99 See *Courts of Justice Act*, RSO 1990, c C.43, s 102.

100 2005 CarswellOnt 4362 (WL).

101 *Ibid* at para 40.

102 *Ibid* at paras 41–42.

meet the third stage of the *Oakes* proportionality test, because the costs to the employer outweighed the benefits of picketing when people were delayed at the entrance for more than five minutes. It is not clear from the judgment which of the two tests was applied; the court only emphasized the fact that some of the union's actions were unlawful.[103] But some form of a proportionality test is obviously required if injunctions are issued only against delays at the entrance that are longer than five minutes. Why five and not more or less? Either a minimal impairment test or the third stage of the proportionality test is necessary to justify such a conclusion.

In *Ogden Entertainment*,[104] striking workers at the Corel Centre in the City of Kanata, where NHL games were played, had set up large picket lines on nights with scheduled hockey games. They impeded the access of passenger vehicles, public transit, commercial vehicles, team buses, and more. Traffic jams resulted, causing traffic on the highway to back up for many miles. The picketers did not distribute leaflets or try to communicate with the occupants of any vehicles. The Ontario Court of Justice held that the picketing amounted to a criminal offence and nuisance, and stressed that the only thing the picketers achieved was the obstruction of vehicles.[105] It also stated that there might be a need for special rules to apply in cases that involve large numbers of people who are not party to the labour dispute.[106] The court issued an injunction restraining the picketers from interfering, blocking, or delaying any person or vehicle from entering or exiting the Centre.[107]

This is another example of how courts resort *de facto* to a proportionality analysis, and again, a more structured analysis in line with the three-stage *Oakes* proportionality test could have been beneficial. The court maintained that the picketers did not convey information to the public and achieved nothing other than the obstruction of vehicles. This appears to mean that their actions failed the first stage of the proportionality test: no rational connection to a legitimate goal. However, a better articulation of the union's goal—an articulation that recognizes the need to exert economic pressure on the employer—may have led to a different conclusion. Arguably, the analysis would have benefited from a discussion of the sec-

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103 *Ibid* at paras 20–23.

104 *Ogden Entertainment Services v USWA, Local 440* (1998), 159 DLR (4th) 340, 43 CLRBR (2d) 39 (Ont Gen Div) [*Ogden Entertainment* cited to DLR].

105 *Ibid* at 344–46.

106 *Ibid* at 347.

107 *Ibid* at 349. The Court of Appeal upheld the order except for the part where the court directed the Ontario Provincial Police to enforce the order. This part was struck because the order arose out of a civil proceeding. See *Ogden Entertainment Services v USWA, Local 440* (1998), 38 OR (3d) 448, 43 CLRBR (2d) 48 (Ont CA).

ond stage: did the union have other alternatives that were less harmful to the employer but also achieved its legitimate goals? The court did hold that the picketers committed the tort of nuisance, which is clearly harmful to the employer, but it did not consider whether other, less harmful ways to achieve its legitimate goals were actually available to the union. Moreover, as part of the "balance of convenience" examination that courts employ to consider petitions for injunctions, the court weighed the employees' interest in obstructing traffic against the employer's right to enjoy lawful entrance to and exit from its premises by its tenants, other employees, and members of the public.[108] Not surprisingly, it concluded in favour of the employer.[109] An explicit resort to the third stage of the proportionality test could have led to a better articulation of the rights and interests involved. Employees obviously do not have a right to obstruct traffic per se, but they have a right to exert pressure on the employer—or at least a legitimate interest in doing so—as a way to secure better work conditions. The court should have considered not only the damage to the employer and to the public but also the importance of the actions for the picketers themselves.

In *Ledcor*,[110] the workplace was under substantial renovations and, as a result of picketing at the entrance that included delays of vehicles, construction had to be shut down. The Ontario Superior Court of Justice allowed the picketing, but to ensure that construction workers were let in, the court limited the maximum number of picketers to twenty. The picketers were further prohibited from obstructing or blocking entrances to or exits from the site. This result resembles the minimal impairment test.[111] The court, in effect, concluded that there were less intrusive ways to achieve the objective and since the union had not chosen them, the court had to impose some limitations.

In *Industrial Hardwood*,[112] the strikers set up a picket line and blocked the entrance of vans carrying replacement workers. The delay was up to an hour and included harassment of replacement workers and damage to the vans. The Ontario Superior Court of Justice issued an order that prohibited picketers from preventing vehicular access to the workplace and also prohibited all picketing at the plant, except for the purpose of communicating information to those wishing to receive it, and

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[108] *Ogden Entertainment*, *supra* note 104 at 349.

[109] *Ibid* at 348.

[110] *Ledcor Industries Ltd v Sheet Metal Workers' International Association*, 2004 CanLII 16548 (Ont Sup Ct) [*Ledcor*].

[111] *Ibid* at para 23.

[112] *Industrial Hardwood Products (1996) Ltd v International Wood and Allied Workers of Canada, Local 2693*, 2000 CarswellOnt 383 (WL Can).

only for a maximum of five minutes. The order also limited the number of picketers to four at each plant entrance. The Court of Appeal upheld the order except for the limitation on the number of picketers.[113]

This analysis again echoes the three-stage *Oakes* proportionality test. The Court of Appeal stated the union's legitimate objective as follows:

> [Picketing] provides striking workers with the collective opportunity to seek to persuade others of the rightness of their cause. It allows them to express through collective action their solidarity in pursuit of that cause. And it provides an important outlet for collective energy in what is often a charged atmosphere.[114]

Based on this starting point, the first stage of the *Oakes* proportionality test was not met: blocking the entrance and harassing replacement workers is not effective in achieving this objective. Providing replacement workers with information, on the other hand, as the order suggests, is rationally related to the objective. The second stage of the *Oakes* proportionality test was not met: there were less intrusive means to achieve the objective. As the Court of Appeal stated, "the delays were in the range of half an hour, considerably longer than reasonably necessary for the picketers to effectively communicate their position to the occupants of the vans."[115] The order therefore limited the delay to five minutes. The third stage of the *Oakes* proportionality test was not met: the harms caused by the picketing outweighed its benefits. The case did not involve any property damage or personal injury, but the court considered the degree and duration of obstruction to entry or exit to be very substantial.[116] To be sure, the results may have been different had the court considered the goals of exerting pressure on the employer or preventing strikebreaking as well. Even if the three stages of the proportionality test are applied explicitly and separately, there is always room for discretion (and disagreement) on how to apply them. But such an analysis can help in pointing attention to all relevant considerations and in creating a more structured decision-making process.[117]

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[113] *Industrial Hardwood Products (1996) Ltd v International Wood and Allied Workers of Canada, Local 2693* (2001), 52 OR (3d) 694, 196 DLR (4th) 320 (Ont CA).

[114] *Ibid* at para 14.

[115] *Ibid* at para 25.

[116] *Ibid* at paras 23–27.

[117] For an additional example, see *Aramark Canada Ltd v Keating*, 2002 CarswellOnt 6031 (Ont Sup Ct). Note that, in this case, the court does consider the legitimate goal of exerting pressure on the employer (*ibid* at para 29).

5. Unfair Labour Practice

A final example of an implicit use of proportionality revolves around unfair labour practice cases. Although the requirement of intentional interference does not appear in certain (often central) provisions regulating employers' interference with trade unions, labour relations boards and courts have insisted on finding that employers were *intentionally* involved in unfair labour practice before holding them liable.[118] A more balanced approach might be to prohibit any sort of anti-union action by employers subject to the principle of proportionality. That is, employers often exercise their managerial prerogative to advance various actions in the workplace. These actions might interfere with trade unions. When an employer shows that: a) behind its action, there was a legitimate objective that is rationally connected to the action; b) the action was the least intrusive one to achieve the legitimate objective; and c) the harm to employees' rights and interests is not disproportionate to the benefits of achieving that objective, the action would be allowed. In contrast, anti-union actions that are not proportional would be considered unfair, and thus illegal, regardless of the employer's intention.

A few cases have followed this proportionality analysis, though implicitly. The leading example is *CBC v. Canada (Labour Relations Board)*,[119] in which the union filed an unfair labour practice complaint, claiming that CBC had interfered with its actions when it forced the union president, Goldhawk, to choose between his job as host of a radio program and his role as union president. This move by CBC followed publication of an article written by Goldhawk which the network thought was in violation of its journalistic policy. The complaint was upheld by the Canada Labour Relations Board and the Supreme Court of Canada. While CBC's actions were not intentionally anti-union, it was found liable because the unfair labour practice provision in the federal code, as well as in other Canadian jurisdictions, is not limited to intentional actions but broadly prohibits any interference.[120] As Brian Langille and Patrick Macklem describe it, it was clear that CBC had interfered with employee representation, yet

> [t]he issue, just as it is in human rights and constitutional analysis, is of possible justification. This requires ... a balancing or proportionality analysis. And this is what the board and the Court did, with

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[118] See e.g. *Labour Relations Act*, *supra* note 33, s 70 (as opposed to s 72); *International Wallcoverings v Canadian Paperworkers Union* (1983), 4 CLRBR (NS) 289 (OLRB) [*International Wallcoverings*]; Brian Langille & Patrick Macklem, "The Political Economy of Fairness: Frank Iacobucci's Labour Law Jurisprudence" (2007) 57:2 UTLJ 343 at 353.

[119] [1995] 1 SCR 157, 92 DLR (4th) 316.

[120] *Canada Labour Code*, *supra* note 33, s 94(1)(a).

> the result that the CBC was not able to justify its decision by reference to a compelling business justification of its action.[121]

In *The Society of Energy Professionals v. Hydro One*,[122] the Board explained which factors come into play when assessing an employer's conduct to determine whether it constitutes an unfair labour practice. The board employed elements of proportionality, and especially elements of the third stage of the *Oakes* proportionality test, which measures the severity of the interference for the trade union against the benefits of achieving the legitimate business goal, when it looked for "more than incidental interference with the trade union" and examined whether there was an "imbalance of interests in favour of the protected activity," "whether the conduct threaten[ed] the formation or very existence of a trade union," and "whether the employer conduct [was] classic business activity, such as a *bona fide* exercise of a managerial prerogative, such as a layoff, or subcontracting decision."[123] An explicit resort to *all* three stages of the proportionality test could be more beneficial. The test would ask whether the action that may interfere with the trade union would achieve the legitimate business goal, thus testing rational connection. It would also ask whether the action is necessary, or whether there are other, less intrusive ways to achieve the legitimate business goal.

II. Justifications for Applying Proportionality in Labour and Employment Law

A. Introduction

In the previous Part, we have shown that proportionality tests are already an important feature of Canadian labour and employment law. In the current Part, we turn from the descriptive to the normative. To justify the growing practice of resort to proportionality tests—and to suggest that this practice should be expanded and become more explicit and structured—we proceed in three steps. First, in Subsection B, below, we argue that it is justified to place a high standard of behaviour on employers vis-à-vis their employees—higher than the standard demanded in other contracts. It is similarly justified to demand a higher standard from unions when they are exercising powers that have the potential to harm employers and the public at large. Then, in Subsection C, we argue that the pro-

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[121] Langille & Macklem, *supra* note 118 at 353. See also *International Wallcoverings*, *supra* note 118.

[122] *The Society of Energy Professionals v Hydro One Inc* (2005), 123 CLRBR (2d) 42 (OLRB).

[123] *Ibid* at para 76.

portionality tests are an appropriate choice to guide such a higher standard, as they are more concrete than other (vague) standards, provide clear guidance, and generally refrain from intervening in the choice of goals, thus offering balanced solutions.[124] In this context, it will be shown that proportionality is already used by other legal systems and has proven useful to solving labour law questions. Finally, in Subsection D, we discuss the doctrinal issues. We argue that applying these proportionality tests is within the discretion of the courts in the development of the common law and, in some cases, when interpreting legislation. We also argue that applying these tests will have the added advantage of improved coherence within the legal system.

B. A Higher Standard of Behaviour is Normatively Justified

A market economy is based, to a large extent, on self-interest. People are allowed to act to advance their own interests. Indeed, they are *expected* to do so, and contract laws assume that a meeting of (self-)interests will lead to an agreement that is beneficial to both parties, and indirectly, to society at large. The law, therefore, generally supports such agreements without requiring individual actors to consider either the interests of others with whom they contract or other societal interests. There are exceptions, as we shall see shortly, but this is the default rule.

The government, on the other hand, is expected to uphold a higher standard. Government officials making a decision obviously think first and foremost about the government's interests, and so they should. But they also have to consider the implications for others; if a decision harms someone, officials have to take this into account. The leading benchmark used in recent years to examine governmental decisions is proportionality. In Canada, as in many other countries, society expects the government to act in accordance with the standard of proportionality, meaning that the decision has to pass the three stages of the test mentioned above. Why does the law demand a higher standard of behaviour from the government, as compared with the standard required in dealings between private actors? One answer could be the fact that the government acts as our "long arm", in that government officials represent us and make decisions on our behalf. It is only natural that we demand that they do so with a degree of respect for our interests—that they, at the very least, take them into consideration.

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[124] Subsection B and the first part of Subsection C are based, to some extent, on Davidov, "Proportionality", *supra* note 14; Guy Davidov, "The Principle of Proportionality in Labour Law" (in Hebrew) (2008) 31:1 Tel Aviv University Law Review 5. For additional references, see *ibid.*

There is, however, another justification that is just as valid. Governments have power, and power should be used responsibly. In various contexts, the law is designed to prevent the abuse of power by those who hold it; public law can be seen as an example of this general legal rule. But private actors hold power as well. Corporations have significant powers, which the law limits in various ways—for example, with competition or anti-trust laws, or consumer laws. In these regulated areas, private actors can no longer act freely to promote their self-interest. Rather, the law creates limitations to ensure that the interests of other parties are considered—that is, that harms to others are minimized.[125] Employment standards are, in effect, another example of this general rule. They are based on the understanding that employment relationships are characterized by a power imbalance. Employers sometimes abuse their superior powers, and employment laws are designed to prevent that—for example, by setting a minimum wage. If the interests of employees are sufficiently considered, the wage cannot fall below a certain minimum.

In collective relations, both parties have powers, and the same ideas apply. Here it is not only the employer, but also the union that is expected to use its power responsibly. The law recognizes the right to strike (or picket, etc.) and protects striking employees; in effect, unions have been given a legal power to take collective industrial actions. At the same time, it is justified to demand that decisions concerning such actions, which create significant harms to both employers and the public at large, measure up to a high standard of behaviour, to ensure that the power is not abused.

C. Proportionality is an Appropriate Choice of a Higher Standard of Behaviour

It should be fairly easy to accept the argument in the previous section. After all, labour and employment laws already create various limitations on the exercise of power by employers and by unions. And, without getting into the details of these laws, their basic existence is uncontroversial. The question is, however: why should we add an additional limitation (propor-

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[125] Accordingly, in Germany, the Constitutional Court "recognized a constitutional duty to protect fundamental rights not only *vis-à-vis* the state but also *vis-à-vis* threats stemming from private parties or societal forces. Since threats of this sort are themselves a result of the exercise of fundamental rights, this duty can be fulfilled only by limiting one group's rights in order to protect the rights of another" (Grimm, *supra* note 2 at 392). As Grimm points out, Canadian law also recognizes that "protecting a 'vulnerable' or 'not [...] powerful group in society' may justify a limitation *vis-à-vis* those who profit from this vulnerability" (*ibid*, citing *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1).

tionality) to the ones that are already detailed in legislation? Here, we offer two separate answers.

The first is that adopting the principle of proportionality does not necessarily create *additional* limitations. As we have shown in the previous Part, in many cases the current law—whether in the form of legislation or common law—already places limits on the use of power by employers or unions. Thus, for example, employers are legally entitled to dismiss employees, but this power has various limitations. Unions are legally entitled to organize picketing, but again, this power is not without limitations. Judges are left with broad room for discretion when applying these laws; thus, the three proportionality tests can be a useful aid. In other words, in many cases, proportionality would simply structure the analysis. While employee rights have been granted considerable weight in the case law, applying proportionality would strike an appropriate balance between the rights of employees and rights and interests of employers. As England argues, the use of proportionality is essential in ensuring that employee rights are not "advanced at the expense of unduly impairing employers' economic efficiency, from which everyone ultimately benefits."[126]

The second answer refers to situations in which proportionality would indeed create new limitations on employers or unions. We argue that this too is justified, at least in some contexts, and can be achieved by judicial development of the common law. We discuss the doctrinal viability of this proposal in the next Subsection. Here, we wish to justify the choice of instrument: Why proportionality and not some other standard?

The employment relationship is dynamic. Demands from an employee change over time. Mutual expectations evolve, and so do workplace norms and rules. New managers and co-workers replace old ones. Power can be used, and abused, in different and unexpected ways. Some of these ways are addressed by specific regulations, but regulations can never cover the entire range of possibilities. It is therefore useful to leave some degree of discretion for courts to prevent the abuse of power in unforeseen situations. This is accomplished through various open-ended standards. Indeed, legislatures have established, and adjudicators have also developed, a *de facto* requirement of fairness in some employment contexts.[127] And, as we have seen, employers are sometimes required by common law to measure up to a *reasonableness* standard.[128] Canadian courts have recog-

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[126] England, *supra* note 16 at 5.

[127] See discussion in Part I, above, specifically on just cause dismissal and privacy in the workplace.

[128] See discussion in Part I, above, specifically on privacy and discrimination in the workplace. Furthermore, Sullivan & Frase argue that "the common law originally embraced

nized implied contractual duties to treat employees with civility, decency, respect, and dignity,[129] and to exercise discretion reasonably, or at least honestly and in good faith, when discretion may adversely affect employees' interests.[130] In other legal systems, a requirement of good faith in employment relations is increasingly gaining ground.[131]

The advantage of these open-ended standards is their ability to address new problems in an ever-changing landscape. There is, obviously, a price in terms of indeterminacy and vagueness.[132] To enable workers to know their rights and employers to know their obligations, we need concrete rules. To some extent, courts can develop such rules over the years by implementing the open-ended concepts, but such rules are always incomplete. We believe that the principle of proportionality offers a balance: it is open-ended and yet includes relatively concrete rules—the three-part proportionality test. Admittedly it does not offer clear-cut solutions for any given case. Yet the three-stage structure offers a principled way to analyze the problem and promises a degree of determinacy and predictability higher than what can be found in open-ended standards.[133]

Proportionality also offers a balance in terms of respecting the rights and interests of both parties. The default rule is that the employer is free

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proportionality in the general sense," specifically common law limitations on compensatory damages in contract and tort (*supra* note 5 at 14, 37–49).

[129] See Kevin Banks, "Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law" (2011) 32:3 Comp Lab L & Pol'y J 547 at 574–77.

[130] See *ibid* at 578–80. See also *Metropolitan Toronto*, *supra* note 68, on the obligation of management in a unionized setting to exercise its discretion reasonably, that is, collective agreements include an implied term of "reasonable contract administration".

[131] See e.g. in Israel, Davidov, "Proportionality", *supra* note 14 at 71–72. In Canada, there is no general duty to act in good faith during the course of the employment relationship. There is, however, a duty to act in good faith in the manner of dismissal (see *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1). Furthermore, there are many cases in which courts in fact imposed an implied duty of fairness in the course of the employment relationship. These cases revolve around constructive dismissal but reveal some important duties of fairness such as obliging "employers to conduct performance appraisals in a fair and sensitive manner, and to assign work duties in a fair and reasonable way" (England, *supra* note 16 at 22 [footnote omitted]). See also Banks (*supra* note 129) who argues that the common law's implied contractual duties and constraints imposed by tort law upon employers closely resemble a general duty of good faith and fair dealing.

[132] On the imprecision of good faith doctrines, see e.g. Reuben A Hasson, "Good Faith in Contract Law: Some Lessons from Insurance Law" (1987–1988) 13 Can Bus LJ 93; Shannon Kathleen O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007) 86:2 Can Bar Rev 193.

[133] As David Beatty argues, proportionality is more impartial and neutral than many other legal principles (*supra* note 5 at 162, 166–68).

to make any managerial decision, so the principle of proportionality does not generally intervene in business judgments and choices. The exception is that society insists on a degree of respect for the rights and interests of employees. Employers are not expected to completely internalize the costs of their decisions on employees. They are, however, expected to refrain from choosing means that do not advance their own goals, means that harm the employees more than necessary to achieve these goals, and means that infringe the rights of employees in a way that inflicts harms disproportionate to the expected gains. In short, the proportionality test ensures that the harms to employees are minimized, while also minimizing any intervention in business decisions.

This does not mean that every decision by every employer and every union must be subject to a proportionality analysis. Some decisions are entirely prohibited, and should remain so—for example, dismissing an employee because of union activities. Other decisions are entirely within the employer's discretion, and should remain so—for example, choosing the managers. Our focus here is on decisions that fall somewhere in between—that is, allowed in principle, but subject to limitations. We argue that the proportionality test is a useful and appropriate way to articulate such limitations and to structure their analysis. We believe that the use of this test is warranted and justified in the various contexts discussed in the previous Part. We also believe that the same test could be useful and justified in other labour and employment contexts. We give two examples in the next Part; additional contexts could be considered in future research.

There are two possible critiques of proportionality that should be considered here. First, a relatively open-ended standard could be difficult to enforce. One could argue that such a standard would be relevant as a matter of practice only for high-level employees, those with access to legal advice and resources. This could lead to more disparity and higher inequality between workers. However, if employers change their decision-making process to consider the impact on employees—as required by proportionality tests—lower-income employees can be expected to benefit as well. Moreover, we do not propose to replace other (more concrete) standards, only to add another layer. There is no reason to believe that a requirement to avoid unnecessary or excessive harms to employees would detract in any way from the rights of other employees.

A second possible critique is that applying the principle of proportionality, especially the third part of the test, requires adjudicators to engage in an act of balancing and weighing various considerations. This might be problematic, especially in a private sector context in which the decision makers (in the current context, employers or trade unions) are in the best position to engage in such an analysis; decision makers' discretion should not be replaced by the adjudicators' discretion. Intervening in managerial

decisions infringes the autonomy of employers and could be detrimental to efficiency. Intervening in union decisions could be similarly detrimental to unions' autonomy and ability to achieve their goals.

Our response is twofold. First, as the examples in the previous Part show, courts are already required to engage in balancing when applying the law. We simply suggest replacing existing standards, such as reasonableness, with the more structured tests of proportionality. Second, proportionality analysis involves very little intervention in the choice of goals, except for very extreme situations in which certain goals will be deemed illegitimate. Employers and unions will thus continue to have very broad discretion in choosing their goals. The requirement to choose means that are rationally related to that goal, and that will minimize the negative impact on others as much as possible, is hardly a cause for concern. Rationality and minimal respect for others are not ingredients in a recipe for inefficiency—quite the contrary.[134] The situation is a bit different with regard to the third branch of the proportionality test, requiring employers and unions to internalize, to some extent, the costs to others of their decisions. To limit the harms of this demand, we suggest that the level of scrutiny vary depending on the type of decision that is in question. For example, when fundamental rights are at stake (such as equality, privacy, or freedom of association), stricter scrutiny is more appropriate compared with the protection of other interests (such as one's job, as in just cause cases). In the latter cases, the third stage of the proportionality test could be relaxed, allowing intervention only in extreme cases of disproportionality.

The many advantages of a proportionality test delineated above probably explain the ever-growing reliance on proportionality in the labour and employment laws of other countries. Most notably, proportionality is heavily used as a labour and employment law standard in Germany (*verhältnismäßigkeitsprinzip*). Interestingly, the strongest example is found in cases on the legality of strikes.[135] The principle was established in 1971, when the Federal Labour Court held that, due to their negative impact on participants as well as third parties and the general public, strikes and

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[134] Admittedly, there are litigation costs as well as the costs of possible judicial mistakes (i.e., when a court or adjudicator may decide that an employer's actions were not in line with the proportionality test based on a failure to understand the evidence). But such costs are not significantly different than in any other context of labour and employment law. In practice, employees rarely have the resources to sue, so the overall number of cases is not likely to rise substantially when a new right is created.

[135] See Manfred Weiss & Marlene Schmidt, *Labour Law and Industrial Relations in Germany*, 4th ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2008) at paras 493–97.

lockouts have to comply with the principle of proportionality.[136] To meet this requirement, industrial action must be suitable and necessary to achieve legal aims; must be proportional to those aims; must be used only after all other negotiations have failed (i.e., the last resort or *ultima ratio* principle); must not exceed what is necessary to achieve the aim; and also, both parties must contribute to restoring peace as extensively and as soon as possible after the industrial action is over.[137]

In the European Union, the principle of proportionality applies in various private spheres, including discrimination law. In October 2000, the EU adopted the *Directive establishing a general framework for equal treatment in employment and occupation* for all people, irrespective of a range of factors.[138] While direct and indirect forms of discrimination are prohibited,[139] article 2(2)(b) provides that indirect discrimination can be justified if it serves a legitimate aim and the means of achieving this aim are objectively necessary and proportionate.

Furthermore, the European Court of Justice (ECJ) subjects trade unions to the principle of proportionality. In the controversial *Laval* case,[140] it was held that the right to take collective action (i.e., the right to strike) was a fundamental one, but was subject to certain restrictions. Since it might have infringed the right to provide services, which is one of the fundamental freedoms guaranteed by the *Treaty on the Functioning of the*

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136 BAG, 21 April 1971, AP Nr 43, cited in Carl Mischke, "Industrial Action in German Law" (1992) 13:1 Indus LJ 1 at 8, n 38 (on art 9 GG Industrial Action).

137 See Mischke, *supra* note 136 at 9; Manfred Weiss, "The Settlement of Labour Disputes in Essential Services in the Federal Republic of Germany" (1997) 18 Indus LJ 1 at 6–7; Weiss & Schmidt, *supra* note 135 at para 494; Jens Kirchner & Eva Mittelhamm, "Labour Conflicts" in Jens Kirchner, Pascal R Kremp & Michael Magotsch, eds, *Key Aspects of German Employment and Labour Law* (Berlin: Springer, 2010) 199 at 201. The application of proportionality in this context raises extensive criticism. In constitutional and administrative law, proportionality sets limits on the use of power to infringe fundamental rights, whereas in this context, it sets limits on the exercise of freedoms. See Mischke, *supra* note 137 at 9, n 39.

138 EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] OJ L 303/16 [*2000/78/EC*].

139 *Ibid*, art 2.

140 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, C-341/05, [2007] ECR I-11845; [2008] 2 CMLR 9 [*Laval*]. Laval Un Partneri Ltd, a Latvian company, won a contract from the Swedish government. It posted Latvian workers to Sweden to work on site, yet they earned much less than comparable Swedish workers. A Swedish union requested Laval to sign a collective agreement to improve those workers' conditions. When Laval refused, the union called a strike to blockade Laval's premises. When Laval could not execute the contract, it claimed that the blockade infringed its right to free movement of services. The Swedish court referred the case to the European Court of Justice.

European Union, it had to be exercised proportionately.[141] This case and other similar cases[142] were criticized for their outcomes, which prioritize economic interests over social interests. Brian Bercusson, for example, argues against the use of proportionality in the context of strikes because strikes are linked to a collective bargaining process, and it is difficult to apply proportionality to unions' demands, which change and evolve through a process of negotiation. Also, applying proportionality may negatively affect the impartiality of the state in economic conflicts.[143] However, while the outcome of these cases was controversial, it does not mean that the application of proportionality should be eliminated altogether. Several commentators have proposed different ways of applying the proportionality test in this context.[144] Moreover, the justification for using this standard as a limitation of strikes becomes stronger when employers also have to conform to the same standard.

In the UK, the more structured principle of proportionality has replaced or, some have suggested, should replace the standard of reasonableness in various employment contexts.[145] The principle of proportionali-

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[141] EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2010] OJ C 83/47, art 56. In *Laval* (*supra* note 140 at para 94), the Court ruled that protecting the workers of the host state against possible social dumping generally constituted a justifiable objective. However, in this case, it was not justifiable because the collective bargaining regime in the host state of Sweden was not precise and accessible enough for an undertaking to determine its obligations in advance (*ibid* at para 110).

[142] See e.g. *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, [2007] ECR I-10806, [2008] 1 CMLR 51.

[143] See Brian Bercusson, "The Trade Union Movement and the European Union: Judgment Day" (2007) 13:3 Eur LJ 279 at 304.

[144] See Catherine Barnard, "A Proportionate Response to Proportionality in the Field of Collective Action" (2012) 37 Eur L Rev 117; Nikolett Hős, "The Principle of Proportionality in *Viking* and *Laval*: An Appropriate Standard of Judicial Review?" (2010) 1:2 European Labour Law Journal 236; ACL Davies, "One Step Forward, Two Steps Back?: The *Viking* and *Laval* Cases in the ECJ" (2008) 37:2 Indus LJ 126 at 148.

[145] See e.g. David Cabrelli, "The Hierarchy of Differing Behavioural Standards of Review in Labour Law" (2011) 40:2 Indus LJ 147. Cabrelli discusses the emergence of a "hierarchy" of standards of review of managerial prerogative. He argues that

> a by-product of the common law and statutory initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards of review in the employment relationship. The common law and statutory employment protection obligations which are imposed on employers entail that their decision making and general conduct be assessed by adjudicators in accordance with a variety of differing standards of review (*ibid* at 147).

He argues that in disability discrimination cases the "range of reasonable responses" standard was replaced by a proportionality test (*ibid* at 160).

ty is well-established in discrimination law.[146] This development was influenced by the jurisprudence of the ECJ applying EU directives concerning equal treatment.[147] These directives have led to the amendment of existing measures and to the adoption of new measures prohibiting employment discrimination on various grounds.[148] They have also required the application of a proportionality test as part of the defence in indirect cases of discrimination.[149] That is, a neutral-on-its-face provision, criterion, or practice can be justified if the employer shows that it was a proportionate means of achieving a legitimate aim.[150] While most cases deal with employers who discriminated against their employees, trade unions are also subject to the same analysis.[151] However, English courts often apply a test integrating proportionality and reasonableness; a test that requires an objective balance between the discriminatory effects of the measure and the reasonable needs of the discriminator, but avoids subjecting employers to the stricter ECJ standard, which demands that indirect discrimination be necessary to meet a real need of the business.[152]

Another application of a proportionality test is possible in cases of unfair dismissal under the *Human Rights Act 1998*, under which courts evaluate the justification for dismissing an employee relative to the in-

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146 See Baker, *supra* note 14; Davies, *supra* note 14; David Cabrelli, "Rules and Standards in the Workplace: A Perspective from the Field of Labour Law" (2011) 31:1 LS 21 [Cabrelli, "Rules"].

147 See EC, *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, [1976] OJ L 39/40 (as amended by EC, *Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC*, [2002] OJ L 269/15); EC, *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2000] OJ L 180/22; *2000/78/EC*, *supra* note 138.

148 This influence had first emerged in the area of sex discrimination. See Paul Davies & Mark Freedland, "The Impact of Public Law on Labour Law, 1972–1997" (1997) 26:4 Indus LJ 311 at 327–34. See also the new *Equality Act 2010* ((UK), c 15), which brings together the different grounds of discrimination within one piece of legislation.

149 See Baker, *supra* note 14 at 307.

150 See *Equality Act 2010*, *supra* note 149, s 19(2).

151 See Davies, *supra* note 14 at 288.

152 See Baker, *supra* note 14 at 307–08. Baker critiques the way British courts apply proportionality, "as if it means only that if the employer can point to strong enough reasons, even an 'unnecessary' rule can be justified, but never the other way around. It is nearly impossible to find a UK employment discrimination decision where the impact of the discrimination is measured or weighed at all" (*ibid* at 311). See also Davies, *supra* note 14 at 300. Davies argues against the tendency of British courts to respect the employer's decision where economic arguments are made (*ibid* at 301–03).

fringement of his or her rights guaranteed under the *Act*.[153] The *Act* incorporates the *European Convention on Human Rights* protections into UK law.[154] Although the *Act* focuses on the public sphere, applicable in the current context to public sector employees, a claim can be invoked against private employers and trade unions by various indirect means prescribed by the *Act*.[155] Baker argues that the *Act* provides a great opportunity to enhance the application of proportionality in British discrimination law cases.[156] Similarly, it has been argued that the application of proportionality in workplace privacy cases may reconcile employee privacy with employers' interests.[157]

In France, there is a general rule grounded in the *Labour Code* that prohibits any infringement of workers' rights that is not in line with the principle of proportionality.[158] In Israel, labour courts have been using proportionality tests *de facto* for many years, and more recently they have started referring to the principle explicitly.[159] It is reasonable to assume that this trend will expand into many more countries in the near future.[160]

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153 The test for unfair dismissal under section 98(4) of the *Employment Rights Act 1996* ((UK), c 18) is the "band of reasonable responses" (see *Iceland Frozen Foods Ltd v Jones*, [1982] IRLR 439 (EAT)). But in the context of the *Human Rights Act 1998* there is a potential for an application of a stricter test of proportionality. Nevertheless, in several cases (see e.g. *X v Y*, [2004] IRLR 625; *Pay v Lancashire Probation Service*, [2004] IRLR 129 (EAT); *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470) where dismissal was found within the range of reasonableness, courts have rejected the argument that the dismissal was disproportionate infringement of human rights, because they either viewed both tests as very similar or declined to apply a stricter test. These cases were criticized by various scholars who still advocate the application of proportionality in this context. See Cabrelli, "Rules", *supra* note 146 at 39; Davies, *supra* note 14 at 288, 298–300.

154 *Human Rights Act 1998* (UK), c 42, s 3.

155 See Davies, *supra* note 14 at 288.

156 Baker, *supra* note 14 at 316–17.

157 See Hazel Oliver, "Email and Internet Monitoring in the Workplace: Information Privacy and Contracting-Out" (2002) 31:4 Indus LJ 321.

158 Art L 120-2 *Code du travail* states that "[n]o[]one can limit the rights of the individual, or individual and collective freedoms, unless the limitations are justified by the task to be performed or are in proportion to the goal towards which they are aimed" (cited in Jean-Emmanuel Ray & Jacques Rojot, "Worker Privacy in France" (1995) 17:1 Comp Lab LJ 61 at 64). See also Christophe Vigneau, "Information Technology and Workers' Privacy: The French Law" (2002) 23:2 Comp Lab L & Pol'y J 351.

159 See Davidov, "Proportionality", *supra* note 14 at 66.

160 In Australia, for example, the principle of proportionality, which includes three parts (suitability, necessity, and balancing), assumes a critical role in constitutional law. It was first introduced in *Commonwealth v Tasmania* ((1983), 158 CLR 1 at 259–61, 46 ALR 625) and was influenced by the jurisprudence of the ECJ and the European Court of Human Rights. See Jeremy Kirk, "Constitutional Guarantees, Characterisation and

D. Applying the Proportionality Test is Doctrinally Possible and Will Improve Coherence

So far, we have argued that it is justified to apply the proportionality tests in the labour and employment sphere and to private sector employers as well. But some might question whether this is possible as a matter of doctrine, given the current jurisprudence of the Supreme Court of Canada concerning the inapplicability of the *Charter* in private relations. The proportionality test was developed in *Oakes* as an aid for the application of the *Charter*'s section 1. It is therefore not surprising that any mention of proportionality tends to evoke the idea that the *Charter* is being applied. Nonetheless, our argument does not rely on any change in constitutional jurisprudence. It squares perfectly well with the current jurisprudence, because we are not advocating the direct application of the *Charter* in relations between individuals. We simply use the same legal tool—proportionality—as an aid in another context. For this reason, the use of proportionality is not necessarily limited to situations in which fundamental rights have been infringed. While most of the examples considered in this article implicate fundamental rights, the same kind of analysis that we argue is useful for deciding labour and employment law cases can also be useful to analyzing the impacts on other interests deemed to be justified of protection.

There are two separate doctrinal routes in which we have argued that proportionality is used (and *should* be used): interpretation of legislative provisions and the development of common law rules. In both cases, proportionality tests can be infused into current doctrines, and to some extent, already *have* been infused. It does not mean that employees have constitutional rights vis-à-vis the employer. It simply means that limitations on employers and unions are placed into the same structure of analysis—the three-stage proportionality test—that is used in constitutional law.

The common law route is perhaps more controversial. Brian Langille has argued against any kind of "balancing" when applying the common law; he maintains that people should be able to exercise their freedoms without limitations, even when such freedoms negatively and substantially affect others and their interests, unless one has a legal *right* that limits

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the Concept of Proportionality" (1997) 21:1 Melbourne UL Rev 1. Kirk raises the question whether the application of the principle should be limited to interests and rights guaranteed by the constitution or should extend to any fundamental interest and right that any institution, not limited to governmental institutions, aims at overriding. He points out that many Australian cases refer to interests that derive from the common law. In one case, the court indicated that proportionality will protect "fundamental values traditionally protected by the common law" (*ibid* at 43).

another's freedom.[161] Such a right, he argues, arises from legislation, and can also arise from the common law. At the same time, he assumes that judges cannot develop the common law to create new rights. It is here that we respectfully disagree. Take restrictive covenants, for example. Judges developed rules to decide cases involving such covenants—and to place limits on the freedom of employers to use such covenants—by relying specifically on the concept of reasonableness. It would be odd to suggest that judges are not allowed to further develop these rules, in replacing the vague reasonableness test with the three-stage proportionality test.

As the Supreme Court held in *Pepsi-Cola*, the law should be developed in line with the values enshrined in the *Charter*.[162] The principle of proportionality has been a central part of Canadian jurisprudence, used as an aid to implement *Charter* values.[163] Applying the same tests in the labour and employment sphere has the added advantage of increasing coherence within the legal system. As David Beatty argues, "[e]xempting judge-made rules that regulate how people interact personally and privately in civil society from having to conform to the principle of proportionality is worse than incoherence."[164] It is inconsistent with the hierarchical relationship between supreme and subordinate laws. Furthermore, while some argue that applying proportionality in private law might threaten individual autonomy and freedom, the principle of proportionality is, in

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[161] Langille, *supra* note 94 at 150.

[162] See *supra* note 91 and accompanying text. See also *Pepsi-Cola*, *supra* note 89 (although the *Charter* is not directly relevant to a dispute between private parties, "the right to free expression that it enshrines is a fundamental Canadian value" and the "development of the common law must therefore reflect this value" at paras 20, 32). See also Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada" in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford: Hart, 2001) 43. See also June Ross, "The Common Law of Defamation Fails to Enter the Age of the *Charter*" (1996) 35:1 Alta L Rev 117; John DR Craig, "Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355. Both Ross and Craig argue that the torts of defamation and invasion of privacy should be developed in line with *Charter* values. Finally, see Susan B Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000) 17:2 Can J Fam L 293 (fundamental values, such as equality, as enshrined in the *Charter*, have recently been applied in different family law contexts even in the absence of government or state action, requiring their interpretation relative to common law concepts).

[163] See Beatty, *supra* note 5. See also Guy Régimbald, "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" (2005) 31:2 Man LJ 239 (arguing that a proportionality test, similar to section 1 analysis, should be used in Canadian administrative law in order to guide courts in judicial review when the standard of review is patent unreasonableness).

[164] Beatty, *supra* note 5 at 165.

fact, sensitive to these values, and without it, the threat to privacy and autonomy is greater.[165]

We have argued in Part II that applying the three proportionality tests in the labour and employment context is normatively justified. This analysis followed the detailed exposition of the various ways in which these tests are already being applied in Canadian labour and employment law, in Part I. Our conclusion is, therefore, that the development exposed in Part I is justified. However, as the examples have shown, the use of proportionality tests has so far been incomplete and inconsistent. We believe that an explicit reference to the three-stage proportionality test and a separate application of each stage will be highly beneficial. First, our recommendation will ensure that all the right questions are asked and that the examination is structured and principled. Second, this will make it easier for employers, employees, and unions to anticipate the results of litigation and understand the requirements demanded of them. Finally, an explicit resort to proportionality will add coherence to labour and employment law. As we have seen, courts invoke many different tests that are, in fact, very similar, and can be replaced with the same proportionality test.

III. Additional Applications

As described in Part I, there are many employment and labour contexts in which the principle of proportionality applies either explicitly or implicitly. This raises the question of whether there are additional labour and employment law contexts in which proportionality could be relevant and its implementation beneficial. We believe that the answer is affirmative, and offer one example in this Part: setting limits for strikes and lockouts. We hope that additional contexts will be explored in future research.

Canadian law stipulates some requirements prior to commencing a lawful strike or lockout. These are mostly technical requirements, such as a conciliation process, a "no board" report, and a strike vote.[166] Currently, there are almost no substantive restrictions on strikes or lockouts.[167] For example, a union may commence a lawful strike once it meets the technical statutory requirements even if the strike is unreasonable in the circumstances, or too destructive to the employer's business or to third parties. One might argue that a strike should not be limited once it meets the technical statutory requirements, because the right to strike is fundamen-

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[165] *Ibid.*

[166] In Ontario, see e.g. *Labour Relations Act*, *supra* note 33, s 79.

[167] See e.g. *Canada Labour Code*, *supra* note 33, s 87.4.

tal and arguably protected by the *Charter*.[168] However, there are two main justifications for the imposition of some limitations.

First, even the most fundamental and constitutional rights are not absolute. There is always a need to balance competing rights and interests. Second, when a strike is believed to be unreasonable or destructive, it is currently limited by provincial and federal governments through back-to-work legislation[169] or specific legislation denying the right to strike in some workplaces.[170] These drastic actions against unions, which have become increasingly popular, often result in major infringements of freedom of association.[171] A more balanced approach could involve subjecting the act of strike or lockout to the principle of proportionality. Importantly, such a system is already in existence in several other jurisdictions.[172] Instead of broadening the scope of what is considered to be "essential services" and consequently eliminating the right to strike altogether *ex ante*, the principle of proportionality would ensure that unions may go on strike, but use strike actions appropriately in a way that balances the interests of all parties. The Labour Relations Board, when asked to issue a back-to-work order, would have the authority to determine, on a case-by-case basis, whether the strike was proportional or not, taking into account

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168 See (2010) 15:2 CLELJ (a special issue on "Is There a Constitutional Right to Strike in Canada?"). For a discussion of recent developments, see also the collection of essays in (2012) 16:2 CLELJ.

169 See e.g. *York University Labour Disputes Resolution Act, 2009*, SO 2009, c 1 (in Ontario); *Protecting Air Service Act*, SC 2012, c 2 (at the federal level). Note that while back-to-work legislation is usually passed following a continuous strike, this federal law prevented Air Canada workers from striking in the first place. For a full list of federal back-to-work legislation, see Library of Parliament, "Federal Back to Work Legislation, 1950 to Date", online: Parliament of Canada <www.parl.gc.ca>.

170 See e.g. *Toronto Transit Commission Labour Disputes Resolution Act*, 2011, SO 2011, c 2 [*TTC Act*].

171 On the increasing tendency to use back-to-work legislation since the conservatives were elected to a majority government in May 2011, see "A Harper History of Back-to-Work Legislation" (28 May 2012), online: Global News <globalnews.ca> ["Harper History of Back-to-Work Legislation"]. For the ILO ruling in the matter of the back-to-work legislation at York University (*supra* note 169), see ILO, Governing Body, 311th Sess, *360th Report of the Committee on Freedom of Association*, GB.311/4/1 (2011) at paras 324–44, online: ILO <www.ilo.org/gb/GBSessions/WCMS_158223/lang--en/index.htm>. The union in this case argued that this was a dangerous precedent of forcing workers in non-essential services back to work while in a lawful strike position. The ILO ruled that the repeated use of back-to-work legislation might destabilize labour relations in Ontario, and that the legislative action in this matter was unjustifiable.

172 In Germany, see *supra* notes 135–137 and accompanying text. In the EU, see supra notes 140–144 and accompanying text. In Israel, see Davidov, "Proportionality", *supra* note 14 at 66–67.

all relevant factors and circumstances.[173] Obviously, such a proceeding would have to be swift, but there is no reason to think that this would not be possible. The default is that a strike is allowed, yet the Labour Relations Board may decide to issue an interim order until the final decision, if this seems justified in the circumstances.

For example, instead of preventing all Toronto Transit Commission (TTC) workers, regardless of their job position, from striking at all times (no matter if it is at rush hour or not),[174] TTC workers would generally be allowed to strike. If the strike were too destructive, the TTC would be able to file a complaint with the Ontario Labour Relations Board, which would examine the particular circumstances of the case and determine whether the union used the strike weapon proportionately. Assuming the justifiable objective of the union is to reach a collective agreement, the board would examine, first, whether a strike is effective in achieving this purpose. It would then determine whether there are other means of achieving this objective. It might be, for example, that the conciliation failed because the union did not cooperate and rushed into a lawful strike position. It might be that the union's decision to strike during rush hours for more than a day was too intrusive. In such a case, the board would be able to limit the nature and scope of the work stoppage. Finally, the board would consider whether the damages of the strike outweigh its benefits.

The same proportionality analysis should apply to lockouts. When a trade union commences a partial strike, an employer may impose a lockout for a legitimate purpose of protecting the business against inefficient operation. However, sometimes the use of a lockout might be disproportionate—for example, when an employer uses a lockout to force the government into passing back-to-work legislation. In June 2011, the Canadian Union of Postal Workers went on rotating strikes for two weeks. In response, Canada Post decided to impose a full lockout and blamed the strikers for losses of $100 million.[175] This lockout created pressure on the government, pressure that ended with the enactment of back-to-work legislation. One might argue that a more balanced approach would be to subject the right to lockout to the principle of proportionality. The employer would then have to show that it had used lockout for a legitimate purpose and that the lockout was rationally connected to this purpose, that the

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[173] Similar to the picketing discussion, the question around the burden of proof remains open for similar reasons (see *supra* note 102).

[174] As the *TTC Act* does now (*supra* note 170, s 15(1)).

[175] See "Harper History of Back-to-Work Legislation", *supra* note 171 .

lockout was the least intrusive way of obtaining this purpose, and that the benefits of a lockout outweighed its damages.[176]

We realize that these proposals assume a degree of faith in the judicial system, including courts and labour boards. Judges and adjudicators will be given a greater role and broad discretion to assess the means chosen by labour unions and by employers in light of their legitimate goals. Admittedly, in other countries where proportionality is used in this context, there are independent labour court systems, sensitive to the unique features of employment relations. We believe, however, that because of the important role played by proportionality in Canadian constitutional law, Canadian judges and adjudicators are well positioned to perform this kind of analysis, based on the default rule that the right to strike should be respected, and limitations must be justified.

Conclusion

Proportionality is seen by enthusiastic proponents as the ultimate rule of law.[177] One does not have to go very far to appreciate the usefulness of this principle as a legal tool. A demand that those holding power will use it carefully and responsibly finds a concrete legal expression in the three-stage proportionality test. An expectation that those infringing the rights of others will not do so gratuitously also materializes in the proportionality test. Ever since the seminal *Oakes* judgment, proportionality has become an important pillar of Canadian law. One cannot think about constitutional law or discuss it—in Canada as in many other countries—without referring to proportionality. We have argued that the same principle plays an important role in Canadian labour and employment law as well, a role not sufficiently acknowledged thus far. We further argued that proportionality should play an even greater and more explicit role.

It is crucial to understand that by referring to proportionality, we do not settle for an abstract, vague concept. We rather refer to the three separate stages of the proportionality test developed in the *Oakes* judgment, following other legal systems. These stages allow one to consider the means chosen to achieve a given goal. There is minimal intervention in the choice of goals: in practice, a goal simply has to be legitimate. This is appropriate for constitutional law, under which the elected branches of government should be given as much freedom as possible to pursue the

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[176] Note that in Germany a lockout will be held to be in compliance with the principle of proportionality only when the lockout was commenced in response to a strike that endangered competition and thereby solidarity among employers. Consequently, lockouts are prohibited in essential services in the public sector. See Weiss, *supra* note 137 at 6.

[177] Beatty, *supra* note 5 at 160.

goals of their choice, and it is similarly appropriate for labour and employment law, under which employers should be allowed to set their own managerial goals with as little intervention as possible. The focus of the proportionality test is on the goal-means connection: first, a rational relation must exist between them; second, the impairment of rights (or, more generally, the harm to others) should be as minimal as possible; and finally, the harm caused by the action through the chosen means should not be disproportionate to the benefits gained by it.

We began the article by canvassing the different contexts in which proportionality is already used in federal and provincial labour and employment laws. In some cases, courts have inferred from legislation a requirement that employers act according to this test (or some of its parts). In other cases, courts have developed similar tests as part of the common law when considering problems without legislative solutions. In a few instances, we found explicit reference to proportionality; in other cases, we found that seemingly unrelated tests used by courts and adjudicators, in fact, closely resemble the three-stage proportionality test. In all of these contexts, we believe that a more explicit application of all three stages of the proportionality test will prove useful to the analysis and the decision-making process.

At least in some cases, demanding that employers and unions comply with the three parts of the proportionality requirement means that a higher standard of behaviour is imposed. Is this justified? We have argued that it is. We further showed that one does not need to apply the *Charter* to private relations in order to accept this conclusion. We then explored the possibilities for further development and proposed an additional context in which proportionality tests can be used and potentially offer better solutions than current laws. Generally speaking, we believe that the incorporation of proportionality into labour and employment law could be an important and useful development. Our findings are also of great relevance to the more general discussion about the applicability of the principle of proportionality beyond the boundaries of public law.

Organizing: Should the Employer Have a Say?

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Israeli courts were recently faced with the question of whether an employer is allowed to voice objections to unionization during an organizing drive. Since the legislation fails to provide an answer for this question, it was up to the courts to come up with a solution. The National Labor Court in *Histadrut v. Pelephone* held that employers have no say and must refrain from any communications whatsoever with the workers regarding the decision of whether to join the union or not. The Supreme Court later affirmed this decision. This Article explores this legal question and examines whether this decision was justified, and whether it should be adopted in other countries as well. It first discusses the justifications for the conflicting freedoms in this scenario – the workers' freedom of association and the employer's freedom of speech – to appreciate their relative strength in the circumstances. It then examines whether some balance is possible. To this end, the Article critically reviews the legal mechanisms adopted by other legal jurisdictions (the U.S., Canada and the U.K.) in this regard, shedding light on their effectiveness and the difficulties of organizing in practice in each jurisdiction. The main argument advanced in this Article is that the solution has to be purposive: to advance the goals of labor law and specifically freedom of association; and that the purposive analysis must be contextual. A rule prohibiting the employer from voicing opinions is surely an infringement of freedom of speech, and strong reasons are needed to justify it. Whether strong enough reasons exist depends on several contextual factors. Essentially, the question is whether given the current context, it is possible to secure real freedom of association without such a rule. By context we mean two main things: First, the real-life current experience concerning the struggles of organizing; and second, the existence of alternative legal mechanisms that might address this problem.

· Ryerson University, Toronto, and the Hebrew University of Jerusalem, respectively. For full disclosure, the second author assisted the *Histadrut* in the case discussed in this article, *pro bono*. The authors would like to thank Adam Shinar, Barak Medina and the participants at the Tel-Aviv University workshop for helpful comments, and Annice Blair for excellent research assistance.

I. INTRODUCTION

Israeli courts were recently faced with the question of whether an employer is allowed to voice objections to unionization during an organizing drive. This was raised in the context of a fierce battle between the Histadrut – Israel's major labor union – and Pelephone, a major cellular company. Since the legislation fails to provide an answer for this question, it was up to the courts to come up with a solution. The National Labor Court shocked the business community by deciding that employers have no say and must refrain from any communications whatsoever with the workers regarding the decision of whether to join a union or not. The Supreme Court later affirmed this decision.

One of the arguments of employers' organizations before the courts was that a complete prohibition on employer speech during organizing is unprecedented (comparatively speaking). While this was somewhat exaggerated, given that the judgment fits the *spirit* of the law in other countries,[1] it is true that an *explicit* prohibition of this kind is without precedent. The goal of this article is to consider this judgment at a normative level, and whether it would be justified to adopt it in other legal systems as well. The question has two components: Is it the best/most justified legal arrangement? And is it within the legitimacy of courts to adopt such an arrangement? We focus for the most part on the first question, but will briefly discuss the second one as well toward the end.

The dilemma can be captured as a conflict of two fundamental freedoms: the workers' freedom of association versus the employer's freedom of speech. We realize, of course, that there is an ongoing debate about the usefulness of constitutionalizing employment and labor relations.[2] However, we are not concerned here with the strategic question of whether a union should go to court and make a constitutional claim or not.[3] The question we examine is normative: once the issue reaches the courts, what is the right solution to this conflict between the parties.[4]

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[1] As will be discussed later on in Part V.

[2] *See, e.g.*, DAVID M. BEATTY, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (1984); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); Geoffrey England, *The Impact of the Charter on Individual Employment Law in Canada: Rewriting an Old Story*, 13 CANADIAN LAB. & EMP. L.J. 1 (2006); Judy Fudge, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29 (2007); Ruth Dukes, *Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law*, 35 J.L. & SOC'Y 341 (2008); Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19 SOC. & LEGAL STUD. 403 (2010).

[3] The *Histadrut* decided to take this route, and succeeded, but we do not seek to examine this choice.

[4] At this level there is no doubt that fundamental freedoms must play a key role in the analysis. Not only because the parties themselves have argued that their freedoms have been infringed, and this must be addressed, but also because the normative discussion must be based on justifications, and advancing fundamental freedoms such as freedom of association and freedom of speech is a strong justification behind legal regulations.

Both parties in *Pelephone* indeed focused on fundamental freedoms but attempted to frame the issue somewhat differently from a conflict between these two fundamental freedoms. The union argued that because there is no public interest in protecting anti-union speech, a prohibition on employers would not amount to an infringement of a protected right. We believe that the value of the speech should be taken into account as part of the balancing, but prohibiting the employer from voicing an opinion *does* amount to a violation of freedom of speech.[5] The employer, in contrast, wanted to put emphasis on the right to property alongside the freedom of speech. True, when employees attempt to unionize a workplace, employers are mainly concerned about the possible impact on profitability and managerial flexibility. At least indirectly, then, their main concern usually revolves around property rights. However, we do not see an arrangement prohibiting anti-union speech as violating property rights. At the end of the day the employer can lose some money (or control) as a result of a collective agreement, or a strike, but this is too far removed from the speech during initial organizing. The laws allowing and supporting collective bargaining and strikes are not themselves part of the dispute here. And when one person acts legally, the fact that another person might lose some money or control indirectly as a result does not mean that the right to property has been infringed.[6] The employer has also argued that freedom of association is not infringed, because workers are free to make a decision on unionization after hearing all views. Such an analysis, however, is detached from the reality of employment relationships, in which the employer's "views" are usually determinative.

We therefore structure the analysis — as the Court in *Pelephone* did — as a conflict between freedom of association and freedom of speech. We start by briefly reviewing the case itself (Part II); we then discuss the justifications for freedom of association, and how they are applied in the current context (Part III); we then do the same with freedom of speech (Part IV). The next step is to balance the two conflicting freedoms, and we examine the legal frameworks adopted in several other jurisdictions in this regard (Part V), before suggesting

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[5] We therefore adopt the common view which defines constitutional rights and freedoms very broadly and defers discussion on appropriate limitations to the next stage of the analysis (balancing against other rights and examining whether infringements are proportional). *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 53 (1996); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 19-21, 70-71 (2012). For critiques of this approach *see* Bradley W. Miller, *Justification and Rights Limitations*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 93 (Grant Huscroft ed., 2008); GREGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTIONS: ON THE LIMITATIONS OF RIGHTS (2009). On the argument that employer speech (specifically captive audience speech) is inherently coercive and as such should not get constitutional protection see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 365, 414-17 (1995).

[6] Thus, for example, when A opens a new business that will compete with B, the latter might lose money, but can hardly claim that her right to property has been infringed.

how this balance should be struck in the Israeli context, the *Pelephone* case, and beyond (Part VI).

II. THE *PELEPHONE* CASE

Pelephone Communications Ltd. is Israel's first cellular company and still one of the largest companies in the sector, employing some 4000 workers. Until 2012 it was non-unionized, just like all other workplaces in this sector, and just like all other IT and "new economy" workplaces.[7] Union density in Israel experienced the most dramatic decline in OECD countries, from roughly eighty to eighty-five percent in the 1980s to about forty to forty-five percent in 2000, to twenty-five percent in 2012.[8] Private-sector workplaces that remained unionized were almost entirely in the "old" industrial sector. But 2013 proved to be a turning point.

To explain the shift we need to go back in time a little bit. In the last few years, the *Histadrut* (Israel's major labor union) intensified its efforts to organize workers in new sectors, with a newly-established organizing department, and has started to see results. A new union, *Ko'ach La'ovdim* ("Power to the Workers"), established in 2007, has managed to create grass-roots excitement toward unionism, to challenge the *Histadrut* to further improve its efforts, and has also seen some successes in organizing.[9] It appeared that unions were bouncing back, to some extent.

However, employers were not going to accept this without a fight. Many of them have strongly resisted organizing attempts, including by using "union-busting" methods newly imported from the United States. Although the law made it clear, at least since the 1990s, that employers cannot interfere with freedom of association,[10] in practice this proved

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[7] The term New Economy "describes aspects or sectors of an economy that are producing or intensely using innovative or new technologies" and "applies particularly to industries where people depend more and more on computers, telecommunications and the Internet to produce, sell and distribute goods and services" (OECD, Glossary of Statistical Terms, August 26, 2004, https://stats.oecd.org/glossary/detail.asp?ID=6267).

[8] Yinon Cohen, Yitshak Haberfeld, Guy Mundlak & Ishak Saporta, *Unpacking Union Density: Union Membership and Coverage in the Transformation of the Israeli Industrial Relations System*, 42 INDUS. REL. 692 (2003); Israeli Central Bureau of Statistics, Selected Data from the 2012 Social Survey on the Organization of Workers, Press Release (June 9, 2013), *available at* http://147.237.248.50/reader/newhodaot/hodaa_template_eng.html?hodaa=201319151. For comparative OECD data, see *Trade Union Density*, OECD, http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (last visited May 28, 2015).

[9] Hila Weissberg, Haim Bior & Tali Heruti-Sover, *Labor of Love: Israelis Get Organized, Flock to Union in Record Numbers*, HAARETZ, June 5, 2013, http://www.haaretz.com/business/.premium-1.528022.

[10] *See* File No. 3-209 National Labor Court, Mif'aley Tachanot Ltd. v. Israel Yaniv (Nov. 11, 1996), Nevo Legal Database (by subscription) (Isr.); File No. 4-10/98 National Labor Court, Delek v. The Histadrut (Nov. 29, 1998), Nevo Legal Database (by subscription) (Isr.); Collective Agreements Law, 5717-1957, § 33h, SH No. 221 p. 63, as amended (Isr.).

very difficult to enforce.[11] As a result, new organizing successes were very modest. While they received a lot of media coverage and created optimism among union-supporters, in practice the number of new members was relatively small, not exceeding the number of members lost due to retirement during the same period. And specifically, efforts to penetrate new industries and sectors have generally failed.

The struggles of the *Histadrut* culminated in the summer of 2012 with the organizing campaign at Pelephone. Being part of the "new economy" service sector, and employing mostly young and relatively educated workers, the cellular sector was highly coveted by the union. The time was also ripe for organizing: wide-ranging reforms introduced by the government significantly intensified competition in the sector,[12] cutting profit margins and creating an expectation for mass redundancies. Workers were thus particularly in need of protection. The company on its part was fearful of losing managerial flexibility and especially of jeopardizing its competitive stance in the non-unionized sector. This led to a bitter fight.

Israeli labor law is based on exclusive union representation but does not set any certification procedures. There is only one simple rule in legislation: to become a representative union, with the power to represent the workers in collective bargaining and strikes, a union must have at least a third of the workers in the bargaining unit as members (and more than any other union).[13] Bargaining unit rules were set by the courts; in most cases there is a single unit for the entire company. In Pelephone, the *Histadrut* and its supporters therefore had to sign up a third of the workforce, which was not an easy task given the dispersion of workers across the country. After an initial phase of signing some workers covertly, the organizing campaign became public, eliciting a prompt response from the company.

Although Pelephone enjoyed close legal advice from labor law experts, some of its actions were clearly illegal, and others highly questionable.[14] Employees were not allowed to talk to union representatives. They received messages demanding that they refuse to sign membership forms. At another site union membership forms held by employees were confiscated. Many employees were asked (even required) by direct supervisors to sign forms revoking union membership and objecting to the *Histadrut*. Other local managers were more

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[11] For examples of severe infringements of the right to organize prior to 2013, *see* File No. 24-10 National Labor Court, Hot Telecom Ltd. v. Histadrut Ha'Ovdim Ha'Leumit (Mar. 16, 2010), Nevo Legal Database (by subscription) (Isr.); File No. 33142-04-13 National Labor Court, Electra v. The Histadrut (Apr. 10, 2014), Nevo Legal Database (by subscription) (Isr.).

[12] Amitai Ziv, *Reforms Saved Cellphone Users NIS 4.5 Billion in 2011*, HAARETZ Mar. 22, 2012, http://www.haaretz.com/business/reforms-saved-cellphone-users-nis-4-5-billion-in-2011-1.420096.

[13] Collective Agreements Law, 5717-1957, § 3, SH No. 221 p.63, as amended (Isr.). There are separate rules concerning sector-wide and nation-wide bargaining, which are not relevant here.

[14] The description is based on the judgment in File No. 25476-09-12 National Labor Court, The Histadrut v. Pelephone Communications Ltd. (Jan. 2, 2013), Nevo Legal Database (by subscription).

subtle but initiated one-on-one meetings with employees to discuss the organizing drive and explain the company's objections, and sometimes also to promise personal favors. Other employees were compelled to sit as "captive audience" in roundtables which were used to disseminate anti-union propaganda. At later stages of the struggle Pelephone officials also tried to set up a "company union," and pressure was put on employees to join this union.

The *Histadrut* petitioned the labor court against these actions, and received several injunctions. Some of them were even granted with the company's agreement: Pelephone did not dispute that many of these actions were illegal, in contravention of legislation and case-law protecting freedom of association. However the company denied some of the facts, and in other cases insisted that the actions were initiated by local managers without its knowledge or direction.

There was also, however, another issue that raised a fundamental legal question. While it was clear (although as noted, difficult to enforce) that employers are not allowed to actively interfere with freedom of association, cannot threaten or otherwise pressure employees who decide to join a union, and so on — a related issue remained contentious: are employers allowed to voice their views against unionization, or more specifically against the *Histadrut*? Does the law allow an employer to deliver its stance against unions to its employees, to send information and views about the damage that will happen, in its view, as a result of organizing? Pelephone did all that, extensively. So the courts had to determine: if we put aside the illegitimate acts of pressure which are surely prohibited, and leave just the voicing of views and information, does the law allow that?

In its judgment of January 2, 2013, the National Labor Court decided in the negative: employers are prohibited from voicing their view against unionization.[15] Employers have no say on this matter; even the delivery of information which they think is relevant or missing from the discussion is not allowed. The only grounds for exception are if an employer believes that the union is making factual misrepresentations; in such a case, it can petition a labor court and ask for permission to correct this misinformation. But the employer is not allowed to do so without a specific judicial permit.

The judgment was received by employers' organizations with astonishment and even rage. They filed a petition to the Supreme Court of Israel to review the decision, which was recently denied.[16] In the meantime, the results on the ground were transformative. Pelephone quickly had to accept the *Histadrut* and has signed a first collective agreement. The other two major cellular companies in Israel (Cellcom and Partner) soon followed suit. Quickly,

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[15] Id.

[16] HJC 4179/13 Coordinating Chamber of Economic Organizations v. National Labor Court (July 7, 2014), Nevo Legal Database (by subscription) (Isr.).

successful organizing campaigns have spread to insurance companies, financial companies, fast-food chains, and even the information technology sector.[17] Admittedly, the numbers are still not dramatic, and this general trend had started even before the *Pelephone* decision. But this was nonetheless a noticeable turning point. To be sure, many employers still oppose unionization, and some still fight it fiercely, even with illegal methods. Nonetheless, it appears that many employers have internalized the fact that they are not allowed to object and have to accept and work with the union. Organizing a new workplace is still a challenge, but it is much more realistic.

III. FREEDOM OF ASSOCIATION: JUSTIFICATIONS AND CONTEXT

Why do we (as a society) allow workers to join unions, and even consider this a fundamental human freedom? At the most general level, freedom of association is protected because it answers a human need to associate with others, and because people should have the autonomy to pursue such associations. But labor unions are not like any other association. They were given significant powers by legislatures: to represent workers, including some that would not like to be represented (at least in some countries, including Israel); to sign collective agreements, which are almost as powerful as legislation; and to initiate strikes, which are harmful to employers and often to third parties and society at large. In the context of labor relations, there is little point in giving workers just a passive freedom to associate, if the union is stripped from all of these powers. Freedom of association in the labor context is usually understood to include the right of the union to bargain collectively and strike.[18] This also means that additional and more specific justifications are required.

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[17] In 2013, around 25,000 workers and above a hundred new workplaces have become unionized. This represents a 60% increase in new unionized workplaces and 90% increase in new unionized workers compared with 2012 (Hila Weissberg & Haim Bior, *How 2013 turned into the Big Unionization Year*, THE MARKER, December 25, 2013, http://www.themarker.com/career/1.2199164 (Hebrew)). See also Weissberg, Bior & Heruti-Sover, *supra* note 9; Gad Perez, *Partner Recognizes Histadrut Workers Committee*, GLOBES Sept. 8, 2014, http://www.globes.co.il/en/article-partner-recognizes-histadrut-workers-committee-1000969808; Shay Niv, *Histadrut Sets Up High Tech Union*, GLOBES June 15, 2014, http://www.globes.co.il/en/article-histadrut-sets-up-high-tech-union-1000946450.

[18] This has been the law in Israel even before the recent Pelephone decision. *See, e.g.*, File No. 57-05 National Labor Court, The Histadrut v. Ministry of Transportation and Metrodan (Mar. 3, 2005), Nevo Legal Database (by subscription) (Isr.). This is also the view adopted by the ILO Freedom of Association Committee. *See* INT'L LAB. OFFICE, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO chs. 10, 15 (5th rev. ed. 2006). The right to bargain collectively has recently been recognized as derived from freedom of association by the Supreme Court of Canada and by the European Court of Human Rights. *See* Health Serv. & Support v. British Columbia, [2007] 2 S.C.R. 391 (Can.); Demir v. Turkey, Eur. Ct. H.R. (2008) (respectively). The right to strike is broadly recognized as well, but still contested in some jurisdictions. In Canada it was recently held that the right to strike is constitutionally protected. *See* Saskatchewan Fed'n of Labour v. Saskatchewan, 2015 S.C.C. 4. At the ILO there was recently an attempt by employers' representatives to challenge this right. *See* Claire La Hovary, *Showdown at the*

Justifying freedom of association in the labor context can be done at different levels of abstraction, but all of them are based on the same basic (and well-known) background story: the employment relationship is not a regular contractual relationship; employees are in a position of vulnerability; employers generally have superior bargaining power. There are several solutions to this problem, most notably — in all advanced economies — legislation setting minimum employment standards and unionization. In other words, forming and joining labor unions is one of the main solutions to the fundamental problem of employment relations. Workers need unions because without them, they will not have countervailing power *vis-à-vis* employers, i.e. will not have sufficient power to protect their interests and prevent abuse of power by employers.

With this background story in mind, we can turn to consider several justifications for unionization. At the most general level, unionization is needed to protect the dignity of workers (or: ensure decent work); to achieve a degree of workplace democracy; to promote equality between different workers; and to advance distributive justice between capital and labor.[19] At a more concrete level, the protection and advancement of unions is justified because through collective bargaining it leads to the redistribution of resources from employers to employees; it creates a mechanism for workers to voice their views and concerns, as well as a structure of (relatively) democratic co-governance in the workplace; it prevents arbitrary decisions and ensures an internal "rule of law" in the workplace; and it can also (more controversially) promote efficiency.[20] The last justification is highly contested by employers, but empirical studies show that if they avoid an adversarial stance and agree to cooperate, employers stand to benefit from unionization through higher productivity and lower turnover.[21] Overall, unions may be beneficial for us (as employees, employers and as a

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ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike, 42 INDUS. L.J. 338 (2013).

[19] On the general goals of labor law, applicable here as well, see Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1 (2014).

[20] See Guy Davidov, *Collective Bargaining Law: Purpose and Scope*, 20 INT'L J. COMP. LAB. L. & INDUS. REL. 81 (2004), and references therein. On voice, see also Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, *in* VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD 141 (Alan Bogg & Tonia Novitz eds., 2014) (justifying freedom of association by reference to a "right to contest," which is an important aspect of freedom — following Philip Pettit's idea of freedom as non-domination — and cannot realistically be materialized in the context of employment relations without joining forces with others); Virginia Mantouvalou, *Democratic Theory and Voices at Work*, *in* VOICES AT WORK, *supra*, at 214 (discussing democratic vs. human rights justifications for voice at work).

[21] For summaries of the evidence see RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? ch. 11 (1984); Peter Kuhn, *Unions and the Economy: What We Know; What We Should Know*, 31 CAN. J. ECON. 1033 (1998); Zafiris Tzannatos & Toke S Aidt, *Unions and Microeconomic performance: A look at What Matters for Economists (and Employers)*, 145 INT'L. LAB. REV. 257 (2006). For additional recent evidence from Australia, Japan and Canada (respectively) see Stephen J. Deery & Roderick D. Iverson, *Labor-Management Cooperation: Antecedents and Impact on*

society). Admittedly, real life is not always the same as the ideal just described; unions have their own problems. But these can (and should) be solved through targeted legislation and other means, without losing the crucial benefits.[22]

Still, one might ask, isn't legislation enough for protecting workers? Why are unions needed *on top of* the many statutory employment protections? There are several possible answers. *First*, in theory, unions are not necessary; legislatures could have chosen a different structure, with a higher level of protection in legislation. In practice, however, they preferred the dual-solution system, with a *minimal* level of protection in legislation, coupled by unionization as a method giving workers the power (at least potentially) to achieve better conditions of employment. *Second*, unions are needed because of the inherent difficulties of enforcing employment legislation. Workers often lack the necessary knowledge and resources to sue. They are also fearful of the possibility of reprisals. The problem has been exacerbated in recent years, leading to a global compliance and enforcement crisis.[23] Empirical studies have shown that unions play a key role in enforcing legislated employment standards and accordingly are a crucial component of any attempt to solve this crisis.[24] *Third*, legislated solutions are limited, because they tend to be universal, and insensitive to the "local" needs and special circumstances.[25] They are not sufficiently attuned to context, because the legislature cannot tailor its solutions to every "local" situation. Employers and unions are much better situated to do so, and through collective agreements can supplement the basic-level legislation with additional protections (or other solutions) tailored to specific needs. *Fourth* and finally, unionization is crucial for voice and co-determination. In theory, these can be achieved by other means; mechanisms mandated by legislation can attempt to give voice to employees even without unions, as well as give them some degree of power to influence

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Organizational Performance, 58 INDUS. & LAB. REL. REV. 588 (2005); Masayuki Morikawa, *Labor Unions and Productivity: An Empirical Analysis using Japanese Firm-Level Data*, 17 LAB. ECON. 1030 (2010); Dionne Pohler & Andrew Luchak, *Are Unions Good or Bad for Organizations? The Moderating Role of Management's Response*, BRIT. J. INDUS. REL. (forthcoming).

[22] We do not examine critiques against unions here, as it is not the goal of this article to defend unions or the right to organize. Rather, based on the starting point that this right in enshrined, we seek to understand its rationales, to be able to interpret it and balance it against other rights.

[23] See Guy Davidov, *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, 26 INT'L. J. COMP. LAB. L. & INDUS. REL. 61 (2010).

[24] For a review of the evidence see David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13 (Richard B. Freeman, Joni Hersch & Lawrence Mishel eds., 2004).

[25] On the need to strike a balance between universalism and selectivity in labor law, see Guy Davidov, *Setting Labour Law's Coverage: Between Universalism and Selectivity*, 34 OXFORD J. LEGAL STUD. 543 (2014).

employer decisions (or even make joint decisions in some contexts).[26] However, in practice unions are the best mechanism developed so far to achieve these goals. These four explanations are independent of each other but can also co-exist. They provide strong justifications for freedom of association in the labor context. Unions are necessary on top of employment standards for all of these important reasons.

It is, however, necessary to put this theoretical discussion of the justifications for unionization into context. In recent years labor markets have gone through dramatic (and well-documented) transformations.[27] Work relations are becoming increasingly precarious: numerous workers are engaged for short terms, often indirectly, on an hourly basis with no security and no prospects. Such workers desperately need the protection of a union to improve their conditions and even just enforce the basic employment standards for them. At the same time, however, unionization is becoming ever more difficult: numerous workers work in smaller workplaces, often through outsourcing or subcontracting, some of them from home. Workers are thus spread and separated from each other, making unionization more challenging. Many are also immigrants who face language and cultural barriers. Overall, the chances of successful organizing are getting smaller.[28] How do these transformations affect the justifications for protecting workers' unionization? It appears that unions are needed even more than before. The justifications for workers' freedom of association are therefore strengthened, and the protection offered by the law should concurrently strengthen.[29]

IV. EMPLOYERS' FREEDOM OF SPEECH: JUSTIFICATIONS AND CONTEXT

Freedom of speech is one of the most fundamental human freedoms in every democracy. Dating back to ancient Greece, it appears in almost every international human rights

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[26] For example, works councils are used in Europe for these reasons; however, they work alongside unions and not instead. *See, e.g.*, WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS (Joel Rogers & Wolfgang Streeck eds., 1995); John T. Addison, Lutz Bellmann, Claus Schnabel & Joachim Wagner, *The Reform of the German Works Constitution Act: A Critical Assessment*, 43 INDUS. REL. 392 (2004); Pnina Alon-Shenker, *Works Councils in Israel: Towards a Tripartite Channel of Employee Representation and Participation*, 30 TEL AVIV U. L. REV. 319 (2007) (Isr.) (on their possible adoption in Israel).

[27] *See* notably KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); HARRY W. ARTHURS, FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY (2006); LEAH VOSKO, MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT (2010); GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (2011).

[28] Benjamin Sachs explains the difficulties of organizing by reference to the existence of "asymmetric impediments to unionization." Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 681 (2010)). Our argument here is that these asymmetric impediments have grown in recent years.

[29] See …. in this volume.

convention and states' constitutions.[30] But like other fundamental human freedoms, it is not unlimited. The relevance and strength of the various justifications for freedom of speech as well as that of competing interests are considered in context and may justify the imposition of some limits on free speech.[31] Therefore this Part considers the main justifications for freedom of speech (in general) and then more closely examines their significance and application in the specific context of employer's speech during an organizing drive.

There are three main justifications for freedom of speech. First, freedom of speech resonates with an essential human need to think freely, communicate ideas and express opinions openly in various ways and contexts. It is an instrument for self-fulfillment. It promotes individual autonomy, free choice and personality development. It is also embedded in the notion of human dignity.[32]

A second justification is that freedom of speech allows people to communicate with each other, receive information and put forward their informed opinions. It thus contributes to the creation of a "marketplace of ideas" where people can learn new things and be exposed to a diversity of opinions. This exchange of thoughts and opinions ensures that the best ideas are enhanced and that the truth is discovered.[33] The understanding is that "if voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false."[34] Furthermore, a marketplace of ideas stimulates the exposure of public wrongs which may deter excessive use of power.[35]

Finally, a third justification is that of self-governance or democracy. Freedom of speech encourages public discourse and debate and increases awareness to a variety of issues, all of which facilitate self-governance. That is, freedom of speech enables people to exercise free choice, make voluntary decisions and lead meaningful lives.

Freedom of speech is therefore perceived, first and foremost, as a political freedom, one of the building blocks of any democracy. It promotes the participation of people in the

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[30] *E.g.*, U.S. CONST. amend. I; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, s. 2(b); European Convention on Human Rights art. 10, Nov. 4, 1950, E.T.S. No. 005; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 13; African Charter on Human and Peoples' Rights art. 9, Jun. 27, 1981, 1520 U.N.T.S. 217; Universal Declaration on Human Rights art. 19, Dec. 10, 1948, U.N. Doc. A/RES/217(III); International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171.

[31] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 122 (1989).

[32] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-96 (1978); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-80 (1963).

[33] Greenawalt, *supra* note 31, at 130 (arguing that truth discovery is the most familiar justification for freedom of speech which can be traced back to John Milton, Justice Oliver Holmes and John S. Mill).

[34] *Id.* at 131.

[35] *Id.* at 142-43.

political process.[36] Furthermore, freedom of speech (and more specifically freedom of the press) is viewed as the watchdog of democracy.[37] Protection is specifically granted to dissent, i.e. opinions expressed by minorities however unpopular they may be. The purpose of this guarantee is "to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event."[38] This means that protection should be given not only against state interference but also against other powerful and resourceful actors who might dominate public debates.

Given these important values, it is not surprising that some jurisdictions have developed a robust doctrine of prior restraint. This doctrine prohibits governments from adopting regulations which limit expressions *ex ante* and instead allows for imposition of *ex post* penalties on certain deleterious expressions. The rationale for deeming *ex ante* limits on speech unconstitutional is to protect politically controversial speech and to prevent a chilling effect that prior restraint might create.[39]

What is the relevance, or strength, of these justifications in the context of an organizing drive? Starting with the self-fulfillment justification, this rationale is rather weak in the context of employer speech during a union organizing campaign. Such speech is usually a form of profit-motivated commercial speech rather than political speech.[40] Employers who speak against a union do not usually do so to promote their autonomy or personality development, but simply to advance an economic interest in avoiding unions which are perceived as a threat to business profitability and competitiveness.[41] In the large majority of cases the employer fighting against unionization is a large corporation without autonomy and personality interests. Managers or shareholders in the corporation may have strong feelings against unions and in such cases their own autonomy and self-fulfillment interests are implicated, but the importance of anti-union speech for their self-fulfillment is somewhat muted by the separation between them and the corporation they serve. The importance of this justification is stronger in the small number of cases when the organizing attempt is made within a small business or when the owner is a specific person who is

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[36] *Id.* at 145.
[37] Or the "guardian of our democracy." *See* Brown v. Hartlage, 456 U.S. 45, 60 (1982).
[38] *R. v. Zundel*, 2 S.C.R. 731, 753 (1992).
[39] See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978); Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289 (1999).
[40] *See* Story, *supra* note 5, at 395.
[41] *Id.* To be sure, there is nothing wrong with a desire to make profits. The point is that such a desire is far from the core of personal self-fulfillment which requires protection as part of freedom of speech.

attached to the business and has strong feelings against union involvement in it.[42] In such cases it could certainly be the case that the ability to express these feelings is important to the autonomy and personality development of the owner. However given the various barriers to unionization, which are stronger in small businesses, this scenario is likely to be rare.

The truth discovery and the "marketplace of ideas" justification is also relatively weak in the particular context. The notion of a "marketplace of ideas" attaches an instrumental or societal value to speech and justifies free speech for its benefits to the *listeners* rather than to the *speaker*.[43] The idea is that by allowing employers to speak against unionization, employees' free choice will be enhanced and they will be able to make informed decisions about whether or not to join a union, similar to a political campaign.[44]

However, there are significant differences between political elections and union elections.[45] Thus, the rationale for supporting the free speech of various competing political parties becomes weak. Furthermore, it would be highly misleading to view the workplace as a free and competitive market of "willing, uncoerced buyers."[46] Given the inherent imbalance of bargaining power between employers and employees, and the economic dependency of the latter on the former, it makes little sense to provide strong protection to the freedom of speech of the dominant actor who obviously has a strong influence on others. To the contrary, it might be more justifiable to limit this freedom to guarantee a meaningful "marketplace of ideas" and employee freedom of choice.

Presumably some of the workers are against unionization and will engage in discussion and debates with co-workers about whether or not to vote for a union. Also, presumably the workers are well aware of the employer's opinion about unionization. Employers and governments have been provided with ample opportunity to express their opposition to unionization in various forms and contexts. Anti-union ideas are communicated

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[42] The U.S. Supreme Court has recently ruled that the religious beliefs of a private, closely held corporation owned and operated by a family of Christians with religious objectives were protected under the law (the Religious Freedom Restoration Act), although without addressing their claim for protection under the First Amendment. *See* Burwell v. Hobby Lobby 573 U.S. (2014).

[43] Story, *supra* note 5, at 378.

[44] *Id.* at 383.

[45] Among other differences, union elections do not occur periodically on fixed dates. Unlike citizens, workers can elect not to be represented at all. Also, prior to an election, unions lack any formal representation in the workplace, and can be denied authority in and access to the workplace. Furthermore, an elected union does not gain any sovereignty in the workplace. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 500, 577- 83 (1993).

[46] Story, *supra* note 5, at 383-88; Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 806 (1991). *But see* Matthew T. Bodie, *Information and the Market for Union Representation*, 25 AM. L. & ECON. ASSOC. ANNUAL MEETINGS 2, 3 (2007) (advocating viewing the election as "a collective economic decision about whether to engage in a certain kind of activity . . . a choice [whether] to 'purchase' union representation services." This view is advanced as a new paradigm for addressing information gaps and deficiencies).

and will be communicated to workers at all times through other forums inside and outside the workplace.[47] There is therefore no reason to assume that employer speech would be instrumental (let alone necessary) to the listeners for discovering the truth and advancing a marketplace of ideas during the organizing drive.

Furthermore, one might argue that the debate on whether or not to have a union may be of interest to the employer, but since the employer is not a party to that dispute, the employer should not have a say at all.[48] In this context it is worth noting that under "speech act theory," which examines how people use language to perform acts, most employer speech during organizing drives is likely to be considered outside the scope of freedom of speech protection. This is because most expressions are usually not just "telling," "affirming" and "disagreeing," but are rather more "directive" and "coercive" in nature. They are not simply "communicative action" coordinating employee behavior, but rather more akin to "strategic action" which uses communication to manipulate and coerce and should not be constitutionally protected as a valuable expressive speech.[49]

Finally, the self-governance and democracy justification is similarly not very strong in the context of employer speech during a union organizing drive. It could be argued that corporations should not be given rights to interfere in the democratic process at all (with the exception of the press).[50] But even accepting the rights of corporations in principle, in the specific context protecting employer speech might actually impede democracy in the workplace: it may allow employers to unduly influence the true wishes of the employees, who might have voted for a union had they not been exposed to any, even implicit, resentment expressed by the employer. It would be wrong to assume that the union and the employer are equal parties competing over workers in a situation similar to political elections.[51] As noted above, this analogy does not appreciate the power relations in the workplace.[52] Furthermore,

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[47] *See* Story, *supra* note 5, at 389.
[48] *See* Becker, *supra* note 45, at 530-31.
[49] See, e.g., Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1988-1989); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005); Ashley Messenger, *The Problem with New York Times Co. v. Sullivan: An Argument for Moving from a 'Falsity Model' of Libel Law to a 'Speech Act Model*,' 11 FIRST AMENDMENT L. REV. 172 (2012).
[50] In *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310 (2010), the U.S. Supreme Court held that the First Amendment bans the government from restricting campaign financing by corporations. The judgment was widely critiqued. *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Steven J. Andre, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of* Citizens United v. FEC, 44 JOHN MARSHALL L. REV. 69 (2010).
[51] *See supra* note 45.
[52] *See* text accompanying *supra* note 46; Story, *supra* note 5, at 379-80.

unionization is viewed as promoting democracy in the workplace.[53] If employer speech is unlimited, unions are likely to lose power, and democracy in the workplace is less likely to be promoted. As Kate Andrias has argued, allowing employers to express their opinions against unions at the organizing drive stage "inhibits robust debate and collective self-governance . . . and thereby contravenes the fundamental purpose of the First Amendment," which is to facilitate democracy and collective self-governance.[54]

To be sure, freedom of speech is a cornerstone of any democracy and one of the most vital human freedoms. One might argue that at least intuitively freedom of speech is more fundamental than freedom of association. This is why generally speaking employer's freedom of speech should be protected. But as we have seen, context does matter. There are some contexts, such as the labor market and more specifically the workplace setting, where freedom of association becomes very central because it promotes important values and interests. Similarly, there are some contexts, such as employer speech in the initial stage of organizing, where the justifications for protecting freedom of speech become rather weak and partially irrelevant.

V. BALANCING: A COMPARATIVE PERSPECTIVE

This Part provides a critical comparative analysis of how various legal jurisdictions — the U.S., Canada, and the U.K. — have regulated employer speech during the initial union organizing drive. Employer's opposition to unionization in these three countries has been evident and widely documented in the literature. This comparative analysis therefore suggests that this phenomenon is widespread, shedding particular light on the difficulties of organizing in practice in each jurisdiction. Furthermore, this analysis provides insights into the various legal mechanisms developed in response to these difficulties and how these mechanisms balance between freedom of speech and freedom of association. While some jurisdictions promote (or promoted) a mechanism in which employer's neutrality during an organizing drive was a major component, other jurisdictions have strongly protected employer's free speech, sometimes at the expense of employees' freedom of association.

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[53] *See* references cited in *supra* note 20.

[54] Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2418 (2003).

A. The United States

The National Labor Relations Act of 1935, which covers the vast majority of private sector employers,[55] provides important statutory protections for workers including the right to form and join a union. It bans retaliation against workers engaged in union activity and prohibits interference and coercion in exercising the right to "self-organization."[56] During the first few years of the Act's operation, employers were generally not allowed to express their opposition to union campaigns as this was considered unlawful under the Act. The rationale was that due to the power imbalance between employers and workers, it is hard to distinguish between legitimate expression and illegal coercion. The National Labor Relations Board accordingly held that employers should "maintain complete neutrality" with respect to a union election.[57]

However, this view has gradually changed and in 1945 the Supreme Court held that employer speech during a union campaign was protected under the First Amendment.[58] In response to strong pressure from businesses, Congress codified this ruling and since 1947 the Act includes section 8(c) which explicitly allows employer speech against unions, "if such expression contains no threat of reprisal or force or promise of benefit."[59]

Ten months after this legislative change, the Board used its power under section 9 of the Act to continue regulating employer (and union) speech during elections. In *General Shoe Corporation*, the Board developed the doctrine of "laboratory conditions" under which elections should be held to determine the "uninhibited desires of the employees."[60] Based on this doctrine, the Board may invalidate election results due to an objectionable employer

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[55] Labor law is governed by both federal and state law. While many states pass legislation on various labor law issues, these laws cannot interfere with federal statutory law and cannot override the Constitution.

[56] The National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000). Specifically § 157 [s. 7] ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."); and § 158 [s. 8] (prohibiting unfair labor practices including interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 7).

[57] American Tube Bending Co., 44 N.L.R.B. 121, 129 (1942); Becker, *supra* note 45, at 535-40; Story, *supra* note 5, at 366-70.

[58] *Thomas v. Collins*, 323 U.S. 516 (1945). For the background for this decision see Story, *supra* note 5, at 370-76.

[59] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187, § 158 (2000) reads:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

[60] Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952)).

expression which interferes with an employee's ability to make a free choice, even though this expression might not amount to an unfair labor practice under the new amendment. The reasoning was that "an election can serve its true purposes only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative."[61]

The "laboratory conditions" test has not been used frequently to overturn election results, but it can still potentially limit employer speech.[62] This is important because an "objectionable conduct" which interferes with the laboratory conditions does not have to be so objectionable as to constitute an unfair labor practice, but may still lead to setting aside the result of a representation vote.[63] Some recent Board decisions have taken this approach and held for the union in a number of cases.[64]

However this remains an exception. Over the last few decades the Board has increasingly deferred to employers' freedom of speech and refused to overturn election results when, for example, the employer engaged in captive audience speech.[65] Furthermore, coercion and intimidation have often been allowed as the First Amendment began to play a pivotal role in the analysis of unfair labor practice cases.[66] In balancing the statutory protections subscribed by the Act to employees against the employer's constitutional freedom of speech, the Supreme Court has made it clear in a number of decisions that employers can say almost anything and that employee protection is very limited.[67]

The Court, at least in its rhetoric, was well aware of "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily

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[61] *Id.* at 126; *see also* Becker, *supra* note 45, at 547-52.
[62] *See* text accompanying *supra* note 60.
[63] *See* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962); Heartland Hum. Serv. v. NLRB, 746 F.3d 802, 804 (7th Cir. 2014).
[64] *See, e.g.*, Purple Commc'n, Inc. and Communications Workers of America, AFL-CIO, 361 N.L.R.B. 126 (2014) (ruling that an employer's statement prior to elections that it could improve employee working conditions only at facilities that did not have elections pending was objectionable as well as some implicit promises of benefits and implicit threats of lost bonuses); Labriola Baking Company and Juventino Silva, Petitioner and Teamsters Local 734, 361 N.L.R.B. 41 (2014) (finding an employer's statement during a captive audience meeting that if the employees vote for the union, they will be pushed to go on strike and the employer will replace them with legal workers objectionable and coercive, because of the implicit threat to take action against immigrant employees).
[65] While at first the laboratory conditions test did not require a finding of employer fault, this has changed in the late 1960s. *See* Becker, *supra* note 45, at 558, 569; Story, *supra* note 5, at 409.
[66] *See* Becker, *supra* note 45, at 548.
[67] Most notably, the Supreme Court held that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit." N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618-19 (1968); *see also* N.L.R.B. v. Vir. Elec. & Powers Co., 314 U.S. 469 (1941) (ruling that workers are protected only against coercive speech); Thomas v. Collins, 323 U.S. 516 (1945); Story, *supra* note 5, at 376-78.

dismissed by a more disinterested ear."[68] Yet, the general view of the Board and the courts is that protection of employer speech is critical to the promotion of "a marketplace of ideas." Furthermore, in their eyes, albeit controversially,[69] union representation elections are considered analogous to political elections, in the sense that employers (akin to political parties participating in a contest) are presumed equal to unions and should therefore be allowed to communicate directly with voters and to negate any undue influence by unions to ensure that voters make fully informed decisions.[70] Based on this understanding, the Board and the courts focus on explicit expressions of coercion and impose only minor limits on employer speech. For example, employers are permitted to make "predictions" of what might happen if employees vote for the union (e.g. plant closure or lay-offs). Such predictions are usually not considered a "threat."[71]

Moreover, the onus of proof in unfair labor practice cases rests on the union,[72] which struggles to provide evidence of coercive speech when threats are often made verbally and implicitly. Also, penalties for retaliation are very limited and enforcement is weak and too slow to effectively deter anti-union campaigns.[73] The Board may order a second election (which often ends with the same results) and in very limited number of cases may certify the union without an election (which rarely leads to meaningful collective bargaining). But it often takes years to reach such a resolution, rendering the Board's order ineffective.[74]

Consequently, many workers remain with no protection, intimidated and penalized for their involvement with the union.[75] Furthermore, employers are often successful in delaying elections and hire external companies to execute anti-union campaigns. The services provided by consultants and law firms on how to avoid unionization are described as "a multi-million dollar industry that has helped employers to circumvent the intent of the National Labor Relations Act (NLRA) through a vast array of union-busting tactics."[76] It is no surprise

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[68] *Gissel Packing Co.*, 395 U.S. at 617.
[69] See discussion accompanying supra note 45.
[70] *See* Story, *supra* note 5, at 376-80; Becker, *supra* note 45, at 499, 516-23, 542-47.
[71] *See Gissel Packing Co.*, 395 U.S. at 619.
[72] *See* Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187, §160 (2000).
[73] *See* Andrias, *supra* note 54, at 2437.
[74] See Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 318, 322-26 (2008).
[75] *See* Andrias, *supra* note 54, at 2418 ("[O]ver the past half-century, reprisals suffered by workers who engage in pro-union speech have increased dramatically to well over 10,000 documented cases per year."); *see also id.* at 2437.
[76] John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA since the 1970s*, 33 INDUS. REL. J. 196, 198 (2002); see also John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651 (2006).

that union density is constantly declining in the U.S.[77] While there are multiple reasons for this decline,[78] organizing new workplaces has become much harder, and employer opposition plays a significant role in this struggle.[79] An empirical study for American Rights at Work found in 2005 that the "impact of employer anti-union campaigns on the success of union organizing drives has been substantial."[80] Employers' freedom of speech has become the unfettered power to control and limit the ability of employees to unionize.[81] Attempts to amend the Act, improve enforcement mechanisms and strengthen employee choice have so far failed.[82] And it seems as though the legal analysis has been dominated by freedom of speech discourse, thus neglecting to strike an appropriate balance between this freedom and freedom of association.[83]

This legal framework and its consequences have been heavily criticized by many American scholars.[84] Alan Story argues that many expressions made by employers during an election are overlooked by the Board although they are coercive in nature, and that the Board should not examine the content of the expression outside of its context — the identity of the

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[77] In 1983, the union membership rate was 20.1%. It dropped to 11.1% in 2014. Union density in the private sector was only 6.6% in 2014. While the number of members increased from 2013 to 2014, this was not enough to keep pace with the overall growth of the American workforce. *See Economic News Release*, U.S. BUREAU OF LAB. STATISTICS (Jan. 23, 2015), http://www.bls.gov/news.release/union2.nr0.htm.

[78] See for example Jefferson Cowie, this volume.

[79] *See, e.g.,* Specter & Nguyen, *supra* note 74, at 312; Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519 (2001); *see also* Steven Mellor & Lisa M. Kath, *Fear of Reprisal for Disclosing Union Interest: Assessing the Effectiveness of Perceived Anti-Unionism*, 23 EMP. RESP. RTS. J. 117 (2011) (psychological exploration of the impact of threat of reprisal for forming a union).

[80] Chirag Mehta & Nik Theodore, A Report for American Rights at Work: Undermining the Right to Organize — Employer Behavior During Union Representation Campaigns 5 (2005) (stressing that in 2002, only thirty-one percent of the 179 petitions with the Board to represent nonunionized workers in Chicago were successful although the majority of workers supported unionization before elections took place; employers who use multiple legal and illegal anti-union tactics are more likely to be successful).

[81] *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Specter & Nguyen, *supra* note 74, at 321-22.

[82] *See* Employee Free Choice Act of 2009, H.R. 1409/S 560, 111th Congress (2009).

[83] *See, e.g.*, Harris v. Quinn, 134 S.Ct. 2618 (2014) (the Supreme Court holding that an act which allows for union security arrangements violated the freedom of speech of non-member employees without any serious discussion of freedom of association in contrast); *see also* Mitchel Lasser, *Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms*, 15 THEORETICAL INQUIRIES L. 229 (2014) (criticizing the Court of Justice of the European Union for not treating freedom of association as "truly fundamental" and establishing "a hierarchy of norms that allows fundamental market freedoms to trump fundamental rights").

[84] Note that there is also a group of scholars who argue that employer speech should be granted *broader* protection. *See, e.g.*, Peter J. Caldwell, *Campaign Promises in NLRB Elections: Advancing Employer Speech through Political Elections Law and the First Amendment*, 56 LAB. L.J. 239 (2005); Michael J. Bennett, *Excessive Restriction on Employers' Predictions during Union Representation Campaigns*, 66 MARQ. L. REV. 785 (1983); Ian M. Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board — An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. 19 (1996).

speaker and the hierarchical nature of the workplace as a forum.[85] He is specifically critical of the captive audience meetings and the distinction drawn by adjudicators between unlawful "threats" and acceptable "predictions" about the possible effects of unionization.[86] Along similar lines, Craig Becker argues that "employers should be stripped of any legally cognizable interest in their employees' election of representatives."[87] For example, he proposes that captive audience meetings would be grounds for overturning the results of an election.[88] He does not suggest that employers would be prohibited from campaigning in the workplace but rather that employers would be subject to the same rules which restrict employees and unions. Kate Andrias similarly proposes barring captive audience meetings and requiring equal time for pro-union and anti-union messages.[89] Andrias advances another proposal which would require "total employer neutrality within the workplace with respect to unionization" limited in terms of time, place and manner, where employers "could still voice opposition to unions through other forums outside the coercive setting of the workplace" and employees "could speak out against unions within the workplace."[90] Most recently, Benjamin Sachs advanced several proposals to amend the current legal regime — such as a card-check mechanism and rapid elections — that would maximize employee choice, minimize employer intervention in the organizing drive to a reasonable extent, and overall serve to correct asymmetries.[91]

Note that many scholars take issue with a particular point: that employers under the current legal regime can force employees to attend anti-union meetings during working hours prior to an election.[92] Under the First Amendment and the doctrine of employment-at-will, employers are allowed to compel employees to listen — with no ability to respond, ask questions or have the union join in and present opposing views — to their anti-union propaganda. If an employee fails to attend or if he or she leaves such a meeting, they may be subject to discipline or dismissal.[93]

Many scholars view these "captive audience" meetings as inherently coercive and violating human rights, although they usually take the free speech of employers during the

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[85] Story, *supra* note 5, at 405-14.
[86] *Id.* at 415-32.
[87] Becker, *supra* note 45, at 500.
[88] *Id.* at 592.
[89] Adrias, *supra* note 54, at 2456.
[90] *Id.* at 2456-57.
[91] Sachs, *supra* note 28.
[92] As long as it is not within twenty-four hours of a scheduled election. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953).
[93] *See, e.g.*, Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948); NLRB v. United Steelworkers of Am., 357 U.S. 357 (1958).

organizing drive as a given.[94] That is, aside from banning captive audience meetings, American scholars usually do not argue against employer anti-union speech during the organizing drive, but rather focus on alternative proposals to minimize the harsh consequences of such speech. However, one might ask, what is so uniquely problematic about coercing employees to sit in a room and listen during working hours? Employees are "coerced" into numerous other similar actions and situations during work. They do not choose what to do with their time during work. So, arguably, the problem of the different commentators is not really with the mere fact that workers have to sit in these meetings against their will; the problem is actually with the interference with the free choice regarding the decision whether to elect a union or not. Thus, it is not very different from any other employer speech on this matter — which the workers cannot really escape — perhaps just a small difference in the degree of coercion. As Becker explains:

> The realities of employer authority and employee dependence, so obvious in the captive audience meeting, exist during the entire work day and in every site at the workplace. As the Board observed about the employment relations, employers have the "ability to control [employee] actions during working hours." Any time, then, that employers campaign during work time, they necessarily use their "control" to influence the outcome of union elections. Dependent on their jobs, employees are no more free to leave the work site to avoid employer speech than they are to depart from a captive audience meeting. In either case they are subject to discharge or at least a loss of pay.[95]

The Israeli experience of the last several years, in which a system similar to card-check proved insufficient in terms of giving workers a realistic opportunity to organize, provides further support to this argument.

B. Canada

In Canada, labor relations are governed by federal and provincial laws. Each of the eleven legal jurisdictions has its own legal framework although there are many similarities. Federal and provincial statutes protect the right of workers to join or form a union and impose limits

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[94] See, e.g., Matthew W. Finkin, *Captive Audition, Human Dignity, and Federalism: Ruminations on an Oregon Law*, 15 EMP. RTS. & EMP. POL'Y J. 355 (2011); Paul M. Secunda, *Toward the Viability of State-based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008) [hereinafter Secunda, *Toward the Viability*]; Paul M. Secunda, *The Contemporary 'Fist Inside the Velvet Glove': Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L U. L. REV. 385 (2009-2010); Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 INDUS. L.J. 123 (2012); Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010); David J. Doorey, *The Medium and the "Anti-Union" Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. L. & POL'Y J. 79 (2008).

[95] Becker, *supra* note 45, at 561.

on anti-union activities during the organizing drive.[96] All jurisdictions prohibit employer's interference with the selection or formation of a union.[97] Most jurisdictions protect employers' freedom to express their views and opinions on unions, so long as it does not amount to coercion, intimidation, threats, promises or undue influence, all of which are considered unfair labor practices.[98] In most jurisdictions there is a reverse onus of proof, so that when a union files an unfair labor practice complaint, the employer has to show that its actions or statements did not amount to unfair labor practice.[99]

While the prohibition on interference can be broadly interpreted, only the (federal) Canada Labour Relations Board (CLRB) views this prohibition as a requirement for employer neutrality during the organizing drive, which for example, resulted in a ban on captive audience meetings.[100] The CLRB held that while this ban infringes employers' freedom of speech, it is justifiable under section 1 of the Canadian Charter of Rights and Freedoms.[101] The CLRB rationale goes beyond captive audience situations:

> Any involvement by the employer in the exercise by the employee of his/her basic right to join a union puts unfair pressure on the employee. . . . Either the right is recognized or it is not; if it is, it must be exercised in full light and without fear. The employer's right to communicate with its employees must be strictly limited to the conduct of the business. The employer is only permitted to respond to unequivocal and identifiable, adversarial or libelous statements; by this we do not consider as being adversarial the fact that an employee wishes or does not wish to join a union.[102]

In contrast, in most other Canadian jurisdictions captive audience meetings are considered lawful, so long as their content does not amount to unfair labor practice.[103] Moreover, labor relations boards have indicated that "when exercising its freedom of

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[96] *See, e.g.*, Ontario Labour Relations Act, S.O. 1995, c. 1, Sched. A, § 5; Canada Labour Code, R.S.C. 1985, c. L-2, § 8(1).
[97] *See, e.g.*, Ontario Labour Relations Act, § 70; Canada Labour Code, § 94(1)(a).
[98] *See, e.g.*, Ontario Labour Relations Act, § 70; Canada Labour Code, § 94(2); Alberta Labour Relations Code, R.S.A. 2000, c. L-1, § 148(2); Manitoba Labour Relations Act, 1987 C.C.S.M. c. L10.
[99] *See, e.g.*, Ontario Labour Relations Act, § 96(5). Quebec has a different arrangement where a reverse onus of proof does not apply in the context of a plant closure. *See* Plourde v. Wal-Mart Canada Corp., [2009] S.C.C. 54 (Can. S.C.).
[100] *See* Doorey, *supra* note 94, at 85.
[101] Bank of Montreal, [1985] C.L.R.B.R. (N.S.) 129. Freedom of expression and freedom of association are both guaranteed under the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, §§ 2(b),(d). Constitutional protection for freedom of expression is interpreted very broadly to include any activity that "conveys or attempts to convey a meaning," as long as it does not involve violence. Irwin Toy Limited v. Quebec, [1989] 1 S.C.R. 927, 968. While limits on expression are acceptable when they are demonstrably justified and for a reasonable extent under s. 1 of the Charter, the constitutionality of limits on employer speech in the context of organizing drives has not been fully explored.
[102] Am. Airlines Inc., [1981] 3 Can L.R.B.R. 90 (CLRB no. 301) at 133.
[103] *See* Doorey, *supra* note 94, at 87.

expression, an employer is entitled to express its opposition to a trade union" even if in a negative way.[104] In the *West Elgin* case, the Ontario Labour Relations Board even held that "the mere fact that the employer has made statements about the consequences of unionization that are false does not, by itself, bring the employer in violation of the Act."[105]

Still, there are significant differences from U.S. law. While employers are generally free to speak to employees and persuade them to vote against unions, employers must not make predictions regarding the impact of unionization in the abstract or that are speculative in nature.[106] Furthermore, in another case the Ontario Labour Relations Board held that a "no comment statement" by Wal-Mart management, in response to employee inquiry about whether Wal-Mart would close its store if the union won the certification vote, amounted to unfair labor practice because of the implicit threat to job security.[107] Finally, the general and broad "undue influence" prohibition — which some jurisdictions have introduced in their legislation — allows adjudicators to consider a great variety of actions and comments as unfair labor practice. This includes, for example, multiple one-on-one meetings with employees, even if the content of the meetings does not amount to "threat" or "intimidation."[108] That is, both the content and method of communication are under scrutiny.[109]

Generally, labor relations boards have broad discretion with regard to remedies in a case of unfair labor practice. This includes an order to an employer to pay damages, to provide the union with information about the employees and with access to the workplace, to post the board decision in the workplace and to apologize to the union.[110] The boards may also order the holding of a second representation vote. In some jurisdictions, the boards have the power to order a remedial certification (i.e., the union is certified without a vote) where, for example, other remedies would not be sufficient to ensure that a second vote reflects the true wishes of the employees or where the employer engaged in a pattern of misconduct.[111] In practice, however, this power has been used very cautiously.

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[104] Labourers' Int'l Union of N. Am. v. W. Elgin Constr. Ltd., [2005] O.N. L.R.B. ¶ 16.
[105] *Id.* ¶ 17.
[106] *Id.* ¶ 20.
[107] United Steelworkers of Am. v. Wal-Mart Can., Inc., [1997] O.L.R.D. 207 (O.L.R.B.), *aff'd* [1997] O.J. 3063 (Can. Div. Court), *perm. app. denied* [1999] O.J. No. (C.A.). The Board found this implicit threat so strong to justify an order of remedial certification. Wal-Mart appealed and argued that its freedom of expression was infringed, but the Court refused to address this issue because it was not raised before the Board.
[108] *See, e.g.*, *Wal-Mart*, O.L.R.D. No. 207; K-Mart Can. Ltd., [1981], 60 Rep. 70 (O.L.R.B.).
[109] *See, e.g.*, RMH Teleservices Int'l Inc., [2005] B.C.L.R.B. No. B188 ¶ 61.
[110] *See, e.g.*, Baron Metal Indus. Inc., [2001] O.L.R.D. 12, 10 ¶ 140.
[111] *See, e.g.*, Ontario Labour Relations Act, § 11(c); British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244 § 14(4)(f); Manitoba Labour Relations Act, 1987, § 41; New Brunswick Industrial

Furthermore, employer conduct and expression often fall off the radar and significantly impact the ability of workers to exercise their free choice. Many jurisdictions (e.g., Ontario, British Columbia, Alberta and Saskatchewan) have shifted during the last three decades from a card-check system to a mandatory certification vote system which increases employers' opportunity to impact free choice.[112] True, some jurisdictions have created an expedited mechanism where elections are to be held within five to ten days from the certification application date to reduce that impact. But there are still some delays. Employers are able, now more than before, to campaign against unions prior to the vote and this change has negatively affected union density,[113] especially as employees and unions are generally prohibited from organizing workers during working hours and on the employer's premises.[114]

C. The United Kingdom

The Trade Union and Labour Relations (Consolidation) Act 1992,[115] governs union recognition in the United Kingdom. In 1999, a new statutory procedure for securing trade union recognition, which was influenced by the North American model, was adopted.[116] Since then, unions can be recognized as bargaining agents either through a voluntary agreement with the employer or, if there are at least twenty-one workers in the workplace,[117] through an application to the Central Arbitration Committee (CAC). Under the second option, the union has to show, through a secret ballot or the number of members, that it has the support of a majority of workers in the bargaining unit. If fifty percent or fewer employees

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Relations Act, R.S.B.C. 1973, c 388 § 106(8)(e); Nova Scotia Trade Union Act, R.S.N.S. 1989, c 475 § 25(9); Canada Labour Code Canada Labour Code, § 99.1.

[112] See Sara Slinn & Richard W. Hurd, *Fairness and Opportunity for Choice: The Employee Free Choice Act & The Canadian Model*, 15 JUST LAB. 104 (2009); Chris Riddell, *Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998*, 57(4) IND LABOR RELAT REV 493 (2004).

[113] Union membership rate has declined from thirty-eight percent in 1981 to thirty percent in 2012. In the private sector only about sixteen percent were members in 2012. *See* DIANE GALARNEAU & THAO SOHN, LONG-TERM TRENDS IN UNIONIZATION, STATISTICS CANADA (2013), *available at*: http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.pdf; *see also* Slinn & Hurd, *supra* note 112; Doorey, *supra* note 94; Terry Thomason & Silvana Pozzebon, *Managerial Opposition to Union Certification in Quebec and Ontario*, 53 RELATIONS INDUSTRIELLES 750 (1998); Karen Bentham, *Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions*, 57 RELATIONS INDUSTRIELLES 159 (2002).

[114] *See* Doorey, *supra* note 94, at 114. *See, e.g.*, Ontario Labour Relations Act, § 77 [OLRA]; Canada Labour Code, § 95(d).

[115] As amended by the Employment Relations Act 1999 and the Employment Relations Act 2004) [hereinafter TULRCA].

[116] Employment Relations Act, 1999, sched. A1; see also Michael Dohery, *When You Ain't Got Nothin' to Lose . . . Union Recognition Laws, Voluntarism and the Anglo Model*, 42 INDUS. L.J. 369, 370-71 (2013).

[117] *See* Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶ 7.

(but more than ten percent) are union members, the CAC will hold a secret ballot.[118] The CAC will then award recognition only if a majority of the voters (and at least forty percent of all workers in the bargaining unit) voted in favor of the union.[119] A ballot will not be required if the union can demonstrate more than fifty percent membership when applying for recognition.[120] Unlike in the United States and Canada, once the CAC notifies the parties that a ballot will be held, the employer is required to provide the union with reasonable access to the workplace to hold meetings and seek workers support.[121]

Responding to increasing incidents of anti-union actions by employers,[122] the Employment Relations Act 2004 amended Schedule A1 to provide and extend protection against discipline, dismissal and other detrimental treatment of employees which aim at influencing ballot results.[123] The amendment also included a prohibition on offering employees financial inducement for the purpose of preventing them from joining a union.[124] Finally, an undue influence provision was added to provide broader protection against unfair practices.[125] The parties are prohibited from engaging in "unfair practices," once the CAC informed them of the arrangements for the ballot.[126] The CAC administrates the unfair practice complaints. In a case of unfair practice, the CAC may order a second ballot or in extreme cases recognize the union as the bargaining agent.[127]

The new statutory procedure and unfair practice rules have been subject to continuous criticism for various reasons. First, the burden of proof is on the union to demonstrate that such actions as inducements, dismissal or other detrimental treatments were for the purpose of altering the ballot result and were not for other work-related issues. Specifically problematic is the requirement that "the use of that practice changed or likely to change" the voting intention or behavior of a voting employee, as it is difficult to provide explicit evidence to meet this requirement.[128]

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[118] *See id.* ¶¶ 14, 23.
[119] *See id.* ¶ 29.
[120] *See id.* ¶ 22.
[121] See id. ¶ 26; see also Bob Simpson, *Trade Union Recognition and the Law, A New Approach: Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992*, 29 INDUS. L.J. 196 (2000).
[122] See Alan Bogg, *The Mouse that Never Roared: Unfair Practices and Union Recognition*, 38 INDUS. L.J. 390, 391 (2009).
[123] *See* Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶¶ 27A(2)(c)-(f).
[124] *Id.* ¶¶ 27A(2)(a)-(b).
[125] *Id.* ¶ 27A(2)(g).
[126] *Id.* ¶ 27A(1); *see also* Dohery, *supra* note 116 at 372-73.
[127] Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶¶ 27C, 27D; *see also* Bogg, *supra* note 122 at 392.
[128] Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶ 27B(4)(b); *see also* Bogg, *supra* note 122, at 392, 398.

Second, while freedom of speech is not explicitly mentioned or emphasized in this legislative arrangement, it can certainly be recognized in the background. As Alan Bogg stresses, the law and the CAC rulings are built on the assumption that the statutory recognition procedure is "inherently a partisan activity," where the parties are not expected to "put across a completely balanced message to the workforce, and some overstatement or exaggeration may well occur."[129] This assumption advances a requirement for state "neutrality towards the competing positions of unions and employers," similarly to the assumption under the U.S. law.[130] Bogg provides several examples of clear-cut complaints that were nonetheless dismissed by the CAC. In one case, an employer used captive audience meetings to convey anti-union message and told immigrant employees that union members would pressure them into strikes. In another case, an employer encouraged workers in a letter to vote against recognition and announced a generous annual bonus payment in that same letter.[131] In the first case, the CAC focused on the content of the communication (which might be incomplete but not inaccurate), while ignoring the context (manipulative tactics used by a resourceful employer on vulnerable migrant workers).[132] The latter case was dismissed because the CAC required the proof of an *explicit linkage* between the bonus and the outcome of the ballot apart from the fact that they were both mentioned in the same letter.[133] As Bogg summarizes, "Legal entrenchment of the employer's democratic right to oppose unionisation makes the legal protection of employer free speech one of the central objectives of recognition campaign regulation. This corresponds with an unfair practice jurisdiction that can be invoked only in the most extreme cases".[134]

Third, the TULRCA creates a window of opportunities for employers to enhance anti-union campaigns. Ballots are usually held within twenty working days from the date the CAC appointed a qualified independent person to run the ballot.[135] During that time, unfair practice is unlawful but employers have ample opportunity to use a variety of implicit tactics to

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[129] CODE OF PRACTICE: ACCESS AND UNFAIR PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS para. 65 (2005), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245547/05-1463-code-of-practice-recognition-derecognition-ballots.pdf, as cited by Bogg, *supra* note 122, at 400.
[130] Bogg, *supra* note 122, at 399.
[131] *Id*. at 393-94.
[132] Unite the Union v. Kettle Foods Ltd., CAC Case No. TUR1/557/(2007) (cited and critiqued in Bogg, *supra* note 122, at 397).
[133] CWU v. Cable & Wireless, CAC Case No. TUR1/570/(2007), [29] (cited and critiqued in Bogg, *supra* note 122, at 396-97).
[134] Bogg, *supra* note 122, at 400.
[135] Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶ 25.

influence employee choice. Furthermore, unfair practices which are committed *before* or *after* the ballot period are not considered unlawful.[136]

The reality is that employers have been increasingly hostile to unions and use U.S.-style anti-union consultants to avoid union recognition.[137] When employers resist unions they are usually successful in avoiding union recognition.[138] Also, it seems that very few disputes make it to the CAC, and those that do are generally dismissed.[139] Furthermore, in the vast majority of unfair practice complaints, the union lost the ballot despite having strong employee support when it applied for recognition, suggesting that unfair practice complaints are not only unsuccessful but might also be destructive.[140]

VI. A CONTEXTUAL-PURPOSIVE SOLUTION FOR PELEPHONE AND BEYOND

In this Part we wish to go back to the concrete facts of the Pelephone case and argue for the appropriate balance in that context between the competing freedoms. But we also draw some gerneral conclusions which could be applicable to other cases and other jurisdictions.

Israeli collective labor law is almost entirely judge-made. For historical reasons (especially the strong political stance of the *Histadrut* during the 1950s, when labor legislation was introduced) legislatures left much autonomy to the parties to settle their own disputes. However, this proved insufficient in recent years: quite often, the *Histadrut* no longer has the power to protect its interests through strikes (or the threat thereof), so it seeks help from the courts. Moreover, the legislature has mostly remained silent, leaving labor courts with the task of developing the law and finding solutions to the many new problems that emerged.[141] The method of interpretation advanced by Israeli courts, as in many other countries, is purposive: legislation is interpreted in light of its purpose — the goals it was designed to achieve. The same method is used for the development of solutions in case of

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[136] *See* Bogg, *supra* note 122, at 392; *see also* Gregor Gall, *Union Recognition in Britain: The End of Legally Induced Voluntarism?*, 41 INDUS. L.J. 407 (2012); Alan Bogg, *The Death of Statutory Recognition in the United Kingdom*, 54 J. INDUS. REL. 409 (2012).

[137] *See* Bogg, *supra* note 122, at 401-02; Edmund Heery & Melanie Simms, *Constraints on Union Organising in the United Kingdom*, 39 INDUS. REL. J. 24, 34 (2008).

[138] See Edmund Heery & Melanie Simms, *Employer Responses to Union Organising: Patterns and Effects*, 20 HUM. RESOURCE MGMT. J. 3 (2010); see also Gregor Gall, *The First Ten Years of the Third Statutory Union Recognition Procedure in Britain*, 39 INDUS. L.J. 444 (2010) (finding that in 2000-2010 unions have been successfully recognized (either voluntary or through the statutory procedure) in about fifty percent of the applications filed with the CAC, which means that only around 56,000 workers have been brought under union recognition in ten years through this new procedure).

[139] *See* Bogg, *supra* note 122, at 392.

[140] *Id.* at 394-95.

[141] Some of the judicial developments in the context of collective labor law are described in Guy Davidov, *Judicial Development of Collective Labour Rights — Contextually*, 15 CAN. LAB. & EMP. L.J. 235 (2010); *see also* GUY MUNDLAK, FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION (2007).

lacunas: such solutions have to be based on the purpose of related legislation and the legal system as a whole.[142]

The legal question at the center of this Article – whether an employer is allowed to voice objections to unionization during an organizing drive – has no answer in existing Israeli legislation. On the one hand, the Collective Agreements Act clearly stipulates that workers have the right to organize.[143] There are also several provisions in the Act designed to prevent specific kinds of interference, for example, an employer cannot dismiss a worker, or change employment conditions, because of organizing. However, employer speech against organizing is not mentioned in the Act. There is no reasonable way to interpret existing provisions as either prohibiting or allowing such speech. There is thus a lacuna in the law, and the parties in the *Pelephone* case needed an answer. The courts had to provide one.

Employers, of course, would argue that absent a different solution in legislation, they should enjoy freedom of speech.[144] In other words, that freedom of speech is the default position, and any limitation on this freedom has to be based in legislation. However, workers can answer in much the same way: freedom of association is a fundamental human right, and any limitation has to be based in legislation. Admittedly, if the default is that we can all do whatever we want, then the employer's position is entrenched in this default: workers can organize and employers can say what they want about this organizing. But there is no reason to suppose such a "state of nature" default within a functioning legal system. Sometimes exercising one freedom or right would have an adverse impact on the ability to exercise the other freedom or right. And when two individuals are claiming to use their freedoms or rights in ways that conflict with each other — a conflict not solved by legislation — it is for the courts to do the balancing and fill this lacuna. Israeli courts therefore had to decide the law based on what they thought is right — by asking what the law *should* be — in light of the general principles for filling lacunas.[145]

The purpose of freedom of association, and the right to organize, is to allow workers a free choice about joining a union — for all the important reasons mentioned in Part III. If this is possible to achieve without limiting the employers' freedom of speech, then we should not limit the employers' rights gratuitously. But if free choice cannot be assured without limiting the employers' speech, then it seems quite obvious — in light of the discussion in Part IV — that freedom of association should trump. For the workers, this is crucial; and

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[142] *See* Guy Davidov, *Articulating Labour Law's Goals: Why and How*, 3 EUR. LAB. L.J. 130 (2012) and references therein.
[143] *See* Collective Agreements Law, 5717-1957, § 33h, SH No. 221 p. 63, as amended (Isr.).
[144] Similar arguments were made in the Pelephone case, *supra* note 14, at ¶ 32, 35.
[145] By contrast, at least in the context of the United States and Canada, it seems as though it would have to be done through legislative amendment, as the relevant legislation explicitly allows employer speech during organizing campaigns.

society supports their organizing. The speech, in contrast, is protected but has very limited value in the particular context. A purposive and contextual analysis of the two conflicting freedoms therefore leads to this conclusion: if organizing is not truly free, because of the employer's speech, then the speech should be prohibited.[146] This is not to suggest that freedom of speech is in principle inferior to freedom of association; only that in the current context, when the speech is not so important, if it renders freedom of association meaningless the latter should trump.

The question thus becomes an empirical one: is it possible to ensure free choice by employees even when they are advised by the employer not to join a union? From a formalistic point of view, the problem can be "solved" with a legal rule preventing coercion. If the goal is to ensure free choice, on the face of it a rule preventing the employer from intervening in the free choice of employees (but allowing the mere voicing of an opinion) might seem sufficient. Such an analysis, however, entirely ignores the context: it ignores the inherent vulnerability of employees in the relationship, the inequality of power, the difficulties of enforcement, the significant (and growing) barriers to unionization, and the reality of aggressive union-busting tactics.

Assume that a worker has been intimidated not to join a union. There are several possible scenarios: (a) she will be afraid to disobey the employer and avoid joining the union; (b) she will ignore the employer and join the union or otherwise make a free choice; (c) she will notify the union about the intimidation, and the union will take this to court and ask for an injunction. In this last scenario, there are several ways in which the story can unfold: (c1) the union cannot prove the intimidation (even though it has occurred) and fails; (c2) the union gets an injunction, but the damage is already done, workers have been intimidated; (c3) the union gets an injunction and sufficient protection for individual workers to feel secure to make an entirely free choice. A rule against coercion by employers will suffice, by itself, only if scenarios (b) and (c3) are the ones expected to materialize in the large majority of cases.

Is this a realistic expectation? That depends on the additional/supporting legal mechanisms to protect organizing, including mechanisms of enforcement. Absent any other mechanisms to protect the right to organize, options (a), (c1) and (c2) are just as likely, to say the least. We do not have direct empirical evidence to support this claim, only logic, based on the understanding of the context; and there is plenty of evidence from the United States (and anecdotal evidence from Israel) showing that joining a union could be risky for employees

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[146] Compare also to employer speech directed at employees telling them who to vote for in national elections, or whether they should follow certain religious commands, etc. Even if we assume that this kind of speech is in principle constitutionally protected, we would obviously refuse to allow it when the employer uses its power to pressure employees and violates their autonomy to make their own personal choices.

and lead to reprisals.[147] A court of law cannot assume, in these circumstances, that the choice about unionization can be free in the face of anti-union speech by the employer.[148] This indeed is the situation in Israel. There are no significant tools or legislated mechanisms to ensure that scenarios (b) and (c3) will be the dominant ones in real life. The National Labor Court was therefore right to conclude that coercion is quite possible, indeed likely, even with a rule against coercion in place. The solution of the court — a sweeping ban on employer speech against unionization during an organizing campaign — does not ensure a full free choice.[149] It does, however, create a rule that is much easier to enforce. Violations are easier to catch and easier to prove; there are no gray areas. This can be expected to minimize coercion significantly.

Very recently, a regional labor court decided not to settle for an injunction against severe anti-union tactics by the employer, adding a one million Israeli Shekels damages award (approximately $255,000) in favor of the *Histadrut*.[150] Such decisions are likely to add some degree of deterrence, to ensure that employers will think twice before intimidating workers during organizing campaigns. Still, even this sum — which was several times higher than anything previously awarded by labor courts in these contexts — is very minimal, indeed negligible, for any large company determined to avoid unionization. So this additional measure cannot be a sufficient solution instead of the ban on employer speech.

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[147] In the U.S. see, for example, Sachs, *supra* note 28, at 681-87. In Israel, see, for example, File No. 3-209 National Labor Court, Mif'aley Tachanot Ltd. v. Israel Yaniv (Nov. 11, 1996), Nevo Legal Database (by subscription) (Isr.); ; and File No. 50409-11-12 National Labor Court, The Histadrut v. Pelephone Commc'n Ltd. (Jan. 2, 2013), Nevo Legal Database (by subscription) (Isr.).

[148] Another way to make this point is by reference to the difficulty of changing the default: in practice, it is much more difficult to opt-in (when the default rule is no union) than to opt-out (if the default rule would have been the existence of a union). Therefore, if we want to maximize free choice, the solution could be to change the default to opt-out, or alternatively to correct this asymmetry by other means, removing as much as possible impediments to opt-in. *See* Sachs, *supra* note 28.

[149] Even if the ban is successful in the sense that employees are free to vote for the union, one might argue that this would simply delay the problem of aggressive union opposition to a later stage. That is, if a large and resourceful employer is determined to avoid unionization, it will likely (unfortunately) be successful. Take for example the case of Wal-Mart in Canada. Although United Food of Commercial Workers (UFCW) has been certified in a number of stores across the country in the last decade, all attempts have failed to prosper. In one case Wal-Mart decided to close the store. In other cases negotiations have failed and unfair labor practice allegations were made. In some cases this led to compulsory first contract arbitration and to decertification of the union (see e.g. Plourde v. Wal-Mart Canada Corp., [2009] S.C.C. 54 (Can. S.C.); UFCW, Local 503 v. Wal-Mart Canada Corp., [2014] 2 SCR 323, 2014 SCC 45; UFCW, Local 1400 v. Wal-Mart Canada Corp., 2012 SKCA 131). We believe that while banning employer speech at the organizing drive stage is not the panacea to all forms of union opposition, it is one important step toward a better legal arrangement. Indeed, in the case of Pelephone and many other companies, once the union is certified, the employer recognizes the union as the bargaining agent of the employee and chooses to cooperate and work together toward an agreement.

[150] File No. 15478-05-14 Labor Court (TA) The Histadrut v. Hot Mobile Ltd (Sept. 23, 2014) Nevo Legal Database (by subscription) (Isr.).

Should there be exceptions? The most problematic aspect of the ban concerns factual claims made by the union that the employer believes to be false, and wishes to refute. The *Pelephone* judgment allows such speech only after getting exceptional authorization from a labor court. There is perhaps room to make this less burdensome for the employer, possibly by giving authority to some governmental agency to give this authorization. But the basic idea of creating a clear-cut rule and avoiding gray areas is justified in this context. A rule allowing an employer to refute any factual claims made by the union without prior authorization will open the door for all kinds of anti-union speech, and if the burden is on the union to prove non-coercion or that the speech involved more than a dispute about facts, we are almost entirely back to square one (of having no ban at all).

VII. CONCLUSION

The conclusion advanced here (supporting the conclusion of the Israeli courts) is based on a purposive-contextual analysis. First, it asks what legal rules are needed to advance the goals of the legislation (the Collective Agreements Act) and the goals of labor law more generally. Second, it takes into account two crucial contextual factors: the real-life current experience concerning the struggles of organizing, and the surrounding legal rules designed to make such organizing possible. It should be clear, therefore, that the conclusion is sensitive to time and place. A sweeping ban on employer speech may not have been necessary in Israel a few decades ago, when the barriers to organizing were much less daunting. Similarly, such a ban might not be necessary in other legal systems, if they have alternative legal measures designed to protect organizing that are sufficiently successful. In Canada, for example, as we have seen, other mechanisms such as reverse onus of proof and remedial certification have proved to be somewhat effective (though only to a certain extent given the increasing use of union-busting tactics by large and resourceful employers). Such detailed arrangements can be adopted in legislation, but not by courts, so the Israeli Court could not rely on their existence when considering which arrangement is necessary for an effective freedom of association.

Another way to put the dilemma is by asking whether it is possible — and realistic — to achieve "laboratory conditions" for the decision-making process of employees (whether it culminates in an election, as in some countries, or simply signing-up of new members as in Israel). Such "laboratory conditions" — free of any employer coercion — have been required by the National Labor Relations Board in the United States, at least in theory.[151] There seems to be a broad consensus among American commentators that such conditions have not been secured in practice, leading to (or at least significantly contributing to) the decline in union

[151] *See supra* note 60.

density.[152] Given the contextual factors just described, the prospects of "laboratory conditions" in organizing drives in present-day Israel are not high. Hence the ostensibly extreme measures become necessary to give organizing a chance. Again, it is important to emphasize that we are not claiming that the wholesale ban is the only possible or acceptable solution. Many other solutions have been proposed for the same problem;[153] but they all require legislative intervention. The National Labor Court in the Pelephone case, in contrast, was not in a position to create a detailed arrangement. The ban on employer speech was therefore necessary.[154]

Note that this conclusion is not only a recommended possibility of balancing between the competing freedoms, but is rather the *essential* response to the problem at stake. That is, a ban on employer speech during organizing is not only justified in the circumstances, but also constitutionally *required*, in legal systems that have no additional, meaningful measures to ensure compliance with less extreme rules. Let us explain. Assume that freedom of association and freedom of speech are both constitutionally entrenched. Any legal arrangement that involves an infringement of these constitutional rights has to be justified, usually by reference to the goal (which must be legitimate and worthy) and especially the means (which have to stand up to the principle of proportionality). In light of the discussion above, if the legislature bans employer speech this would be easy to justify. But the opposite is not so clear. If legislation and case-law *do not* ban employer speech, the infringement of freedom of association is difficult to justify. Given the contemporary contextual factors, allowing an employer to speak against the union during an organizing drive amounts to a serious infringement of freedom of association. This can be justified only by showing alternative meaningful measures that minimize this harm.

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[152] *See, e.g.*, Weiler, *supra* note 81; Andrias, *supra* note 54; Secunda, *Toward the Viability*, *supra* note 94; Sachs, *supra* note 28.

[153] See, e.g., sources cited *supra* note 152; see also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

[154] One might argue that this solution may negatively affect the rights of those who do not want to be associated with a union. These employees might be frightened to voice their opposition in a reality where unions are powerful and are allowed to speak to workers without constraints while employers are banned from doing so. While this is a possibility, it cannot serve as a justification for promoting employer speech during organizing campaigns. We do not believe that these employees need their employer to represent them and provide information that would inform their decisions. There are certainly some other ways to protect their rights either directly or through some (already existing) limits on union actions. Moreover, even if there are some costs to the solution promoted here, we believe it is the "lesser evil" and overall required and justified based on a contextualized and purposive analysis.

Changing Workplaces Review

Ryerson University Equity, Diversity and Inclusion Division Submission

This submission makes suggestions for changes to the Ontario *Employment Standards Act*, as well as some changes to the Ontario *Labour Relations Act*, so that all workers have equitable opportunities to participate in the workforce and achieve their potential. We believe that these changes will benefit society, businesses, employers and workers. The suggestions are based on research, including by Ryerson University researchers and from other sources; and some suggestions have specific references to employment standards legislation in other jurisdictions that can inform changes to Ontario legislation from an equity, diversity and inclusion perspective.

Changing Workplaces Review

Ryerson University Equity, Diversity and Inclusion Division Submission

Introduction

Thank you for the opportunity to provide input into changes to the Ontario *Employment Standards Act* (*ESA*) and the Ontario *Labour Relations Act*. The Equity, Diversity and Inclusion (EDI) division at Ryerson University, together with Dr. Winnie Ng, our CAW-Sam Gindin Chair in Social Justice and Democracy, and Jacquie Chic, a lawyer who has represented workers who have made *ESA* claims, and is currently a Lecturer in Ryerson's department of Politics and Public Administration, welcome the opportunity to provide suggestions from an equity, diversity and inclusion perspective. Our perspective and proposals are consistent with, and supportive of, the submission from Ryerson's Centre for Labour Management Relations (CLMR), and were prepared in conjunction with that submission.

The EDI division at Ryerson provides leadership to promote the integration of equity, diversity and inclusion throughout the University. By integrating EDI into our policies, programs and processes we will create a more inclusive work and learning environment, and contribute to citizenship building in Toronto, Ontario and Canada.

The Ministry of Labour acknowledges that the makeup of the workforce is much different today than when employment standards legislation was first introduced. The 21st century workforce, as the consultation document indicates, includes, and will need to be more inclusive of, historically underrepresented and marginalized groups such as women, racialized people, Aboriginal peoples, persons with disabilities, new Canadians, LGBTQ people, and people with a variety of cultural and religious beliefs and practices. Increased equity, diversity and inclusion in the workplace will provide benefits to individuals, businesses and society as a whole.

Research

The attached reference list includes Ryerson, CLMR and other research which provides evidence that,

- Workplace diversity that is fostered, valued and managed enhances innovation, productivity, quality of work and profitability.
- Individuals who belong to groups that have been historically underrepresented and marginalized have higher unemployment rates, lower wages and are more likely to be employed in precarious work. This makes them more likely to be vulnerable workers who need protection under the *ESA*.
- A workplace that supports an individual's personal circumstances and social responsibilities is more productive and efficient.

We would be happy to discuss any of our suggestions further. If you would like to contact us, please call or email Tamar Myers, Director, Strategic Planning, Assessment and Special Projects, Equity, Diversity and Inclusion, Ryerson University at 416-979-5000 ext. 7974, tsmyers@ryerson.ca .

Issues and Recommendations

Establishing Values Based and Integrated Legislation

Values, principles and references to human rights and accessibility legislation that are incorporated into the Ontario *ESA* and *OLRA*, will frame the legislation in a way that will benefit both employers and workers. Ryerson University's new Academic plan, Our Time to Lead, recognizes the benefits of equity, diversity and inclusion, and putting people first, to the university. These values are not only included in stand-alone policies and processes, such as our policies on accommodation of students and employees with disabilities and our human rights policy, but are also the foundation of our plan, and are to be reflected in all of our institutional policies and processes.

Recommendations

1. **Incorporate equity, diversity and inclusion values and principles into a Preamble or Purpose section of the legislation.** The British Columbia *Employment Standards Act* provides an example in their Purpose section (Part 1, Section 2). Another example can be found in the Alberta *Employment Standards Code* preamble. An Ontario *ESA* section should make it clear that fairness and equity include the concept of social justice, that an employer's responsibilities include assisting employees to meet both their work and personal responsibilities, that workplaces must be made as accessible as possible, and that employers and workers should respect Aboriginal perspectives.

2. While the Ontario *Human Rights Code* has primacy over other legislation including the *ESA* and the *OLRA*, it will be useful to **include reference to the *Code* in a non-discrimination section in the *ESA* and *OLRA*, as a way to reinforce the requirement for equitable treatment in employment generally**. More specifically, **Part XII of the Ontario *ESA* (equal pay provisions) should be modified with language similar to the *Saskatchewan Employment Act*, Division 2, Subdivision 4,** which includes a prohibition on different rates of pay based on any of the protected grounds under their *Human Rights* legislation.

3. **The *ESA* should include a reference to the Accessibility for Ontarians with Disabilities (AODA) Employment Standard** as a foundation for inclusion of workers with disabilities in the workforce and workplace.

4. **Equitable access to jobs should be incorporated into the principles underlying *ESA* and *OLRA* legislation**. For many disadvantaged groups, such as Aboriginal peoples, persons with disabilities and new Canadians, access to jobs is as critical an issue to a decent standard of living as protections once employed. In fact, one of the recommendations of the Truth and Reconciliation Commission of Canada: Calls to Action (number 92.ii) is to, "Ensure that Aboriginal peoples have equitable access to jobs…" The preamble and/or principles of the former Ontario *Employment Equity Act* could help to inform the language to be included in the ESA and OLRA.

Increasing Diversity and Inclusion in the Workplace

The diversity of Ontario's workforce makes us more competitive in a global economy. Research suggests that diversity is associated with business success when it is managed in a way that promotes

respect and inclusion. A growing body of research has linked diversity and inclusion to increased innovation, effectiveness and productivity. Following are some ideas for changes.

Recommendations

1. **Include a provision in the *ESA* requiring businesses to prepare and implement a plan to increase the diversity of workers in all occupations in their workforce, so that it reflects the diversity of the community in which their workplace(s) is (are) located.** The legislative provisions do not need to be overly prescriptive, so as to allow flexibility for employers (i.e. small family owned business) to tailor their plans to specific circumstances. Direction can be provided through education and guidelines and, if necessary, regulation.

2. Just as there are requirements for worker education to promote workplace safety, accessibility, etc. **there should be requirements for education to promote respect for differences and to create positive working environments, where people with different experiences and knowledges can work together effectively. In line with the Truth and Reconciliation Commission of Canada: Calls to Action (number 92.iii), include a requirement in the *ESA* for businesses to provide skills based training to their management and staff** in, "intercultural competency, conflict resolution, human rights and anti-racism," and more specifically in, "the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples..." If Ontario is to realize the potential benefits of the diversity of the workforce, businesses must create inclusive workplaces. Businesses should be able to customize training based on the nature of the work.

3. **We recommend a review of exceptions to equal pay for equal work provisions in the *ESA*** to identify modifications which will address the fact that seniority and merit systems can create barriers for workers from equity seeking groups, either because of their history of exclusion from the workforce, or specific fields, or due to well documented unconscious/implicit biases that often affect assessment of the work of employees from these groups.

4. **Incorporate provisions for appointments to the Ontario Labour Relations Board so that Board members reflect the diversity of the province.**

Addressing Precarious Work

Work that is paid minimum wage or below; is temporary or part time; is non-unionized; is with small employers; and/or is exempted from *ESA* protections, is more likely to be precarious. As noted above, there is substantial evidence in research to indicate that marginalized groups (such as women, Aboriginal peoples, persons with disabilities, new Canadians, etc.) are more likely to be employed in precarious work. Therefore, the following recommendations are submitted for your consideration.

Recommendations

1. **Reduce the categories of workers not covered under the *ESA* and remove all or most of the exceptions to specific standards, especially those provisions that relate to termination of employment, minimum wage and hours of work**. Generally, if there are minimum standards for employment, they should be minimum for all workers, unless workers are protected by alternative standards, e.g. federal workers. For example, many other jurisdictions in Canada, including Alberta,

have the same minimum wage for paid student workers as for other workers, whereas Ontario has a separate lower minimum wage for paid student workers. In fact, Ontario has so many exceptions and special rules that it doesn't seem as though we have minimum standards for employment.

Exceptions may also create unintended barriers for some groups. For example, exceptions in the Ontario *ESA* to maximum hours of work, for many professionals, helps to perpetuate work environments where excessive hours are considered appropriate. This, in turn, may inhibit some women and people from other equity seeking groups from pursuing careers in those professions.

2. **Minimum standards should be prescriptive even when they vary for specific types of work.** For example, the British Columbia *ESA Regulations* provide specific minimum wage provisions for farm workers who are employed on a piece work basis, whereas the Ontario *ESA* has a "special rule" that can result in payment to these workers that is below minimum wage.

3. The recent report of the Ontario Minimum Wage Advisory Panel focused on how to set the minimum wage and did not address the structure for determination of minimum wages. We recommend **establishing a committee of diverse stakeholders to review the structure of the minimum wage standard, to consider incorporating factors such as geographic location in establishing minimum wages** (e.g. workers in the GTA could have a different minimum wage given the cost of living in the area compared with other areas of the province).

4. We support the concerns expressed in the research, including Ryerson CLMR research, about precarious work and support any changes to the ESA to increase job stability, such as:
    a. Work schedules –provisions to require a minimum amount of stability in work schedules, such as exist in the *Saskatchewan Employment Act* Division 2, Subdivision 2.
    b. Part time work - benefits for part time workers, such as provided for in the *Saskatchewan Employment Act* , Division 2, Subdivision 9, for businesses with 10 or more employees (excludes students); equal pay provisions for part time work that is the same as full time work; and establishing minimum hours of work.
    c. Temporary work - enhanced protection for temporary workers, such as by removing exceptions to provisions of the Ontario *ESA* that apply to temporary workers, as well as by adding provisions that create a path to regular, ongoing employment for temporary workers after a number of years of employment in the same capacity with the same employer.

Expanding Flexibility in the Workplace

In a diverse society, employers must be increasingly flexible, to integrate workers with different worldviews that inform how they work, how work fits into their lives and how their lives fit into their work. Women continue to be the primary caregivers for their family members. Persons with disabilities face barriers outside of the workplace that impact their jobs. For example, workers with disabilities may not be able to get to work some days, or work rigid schedules, because of issues related to transportation.

Work and personal lives are not seen as separate and distinct in many cultures. In addition, social obligations may extend beyond the nuclear family, and beyond family to the broader community. The

narrow view of some leave provisions that focus on the immediate family and specific reasons for leaves do not work for everyone and can create barriers for workers from equity seeking groups.

1. **Establish a panel or committee with diverse representation to review Ontario *ESA* leave provisions and recommend changes to make them more inclusive.** Considerations would include new leave provisions (e.g. community service leave) as well as changes to existing leave provisions (e.g. changes to personal emergency leave to include care of dependents who are not relatives).

2. **Establish standards, consistent with the Ontario Human Rights Commission policy and human rights case law, that provide two or three paid flexible "holidays" for workers, to the same extent as Christian paid holidays are provided for** (i.e. 2 days if workers are entitled to Good Friday and Christmas as paid holidays and 3 days if workers are also entitled to Easter Monday as a paid holiday).

3. **Reframe Part VIII, Section 22(2), of the *ESA* as a modified or flexible work standard,** similar to Manitoba's *Employment Standards Code* (Sec.14.1). The provisions should indicate that modified work arrangements that involve a variance to the standards, such as hours of work and overtime, must be initiated by the worker(s) and agreed to by the employer. This will help to support workers' requests for modified work to help them meet work and personal responsibilities and circumstances, while limiting the potential for employers to pressure workers to agree to alternative work arrangements that are not in their best interests.

4. **Establish standards that provide 3-7 paid days off in a year for short term illness**. Paid time off to recover from an illness or injury benefits the employer and the employee. Research suggests that productivity and quality of work are negatively impacted for extended periods of time by "presenteeism" (when employees come to work when sick). Employees are less likely to take the necessary time off if the absence is unpaid. There is an opportunity for Ontario to show leadership in this area in Canada.

5. **Extend vacation pay and time off to 3 weeks per year** such as is provided in Saskatchewan's *ESA* (after 10 years the entitlement increases to 4 weeks)**, or 3 weeks per year after 5 years working with the same employer**, which is what British Columbia, Alberta and Manitoba's *ESAs* provide. Federal Labour Standards provide for an increase in vacation to 3 weeks after six years. In Nova Scotia and New Brunswick, vacation increases to 3 weeks after 8 years. There is a growing amount of research that points to evidence of the benefits of vacations to employee productivity, health and wellbeing.

Improving Enforcement

While all workers fear reprisal when challenging their employers, equity seeking groups are all the more apprehensive given their higher unemployment rates and the possibility that another job won't be found. Despite protections in the *ESA* for those who make a claim, there have been many instances of workers, including women, racialized employees, etc., who not only lost their job in the immediate aftermath of lodging a claim but who were unable to find work for lengthy periods thereafter.

In order to address the differential impact of the existing complaints process, we join others in recommending changes to the *ESA* to:

1. **Establish provisions for anonymous and/or third party claims to the Ministry of Labour**. Regarding the latter, the Ministry might look to section 34(5) of the *Ontario Human Rights Code* which permits third parties to file an application with the Tribunal.

2. **Expand proactive enforcement measures**, such as audits, to relieve precarious workers of the burden of enforcing the law, e.g. increasing employer audits.

Conclusion

Ryerson University is Canada's leader in innovative, career-focused education. Our motto is, "With Mind and Skill," indicating our focus on education that incorporates both theory and practice, and on building strong relationships with external communities.

Our campus has one of the most diverse student populations in Ontario and, therefore, we have and will continue to produce many of the diverse skilled, creative and critical thinkers who contribute to the province's social and economic development, participating in the current and future workforce. It is with our students and alumni in mind, along with our focus on innovation, excellence, people first values, city building and our commitment to equity, diversity and inclusion, that we present this submission.

Thank you for considering our thoughts and suggestions as part of this review that will lead to making our workforce more inclusive in the future.

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