

COLLECTIVE BARGAINING, STRIKES AND LOCKOUTS UNDER THE LABOUR RELATIONS ACT, 1995

**Prepared for the Ontario Ministry of Labour, to support the Changing
Workplaces Review of 2015**

Statement of Work # 10

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Executive Summary

This goal of this project was to review statistical trends in Ontario work stoppages, and to summarize and assess the relevant academic literature examining the functionality of LRA provisions that are the most salient in respect of the collective bargaining process, and the operation and duration of strikes and lockouts. These provisions include the duty to bargain in good faith; the legislative requirements for a legal work stoppage; alternative responses to labour disruptions (such as subsequent interest arbitration); issues related to picketing; the reinstatement of employees following a work stoppage; mandatory and permissive provisions in collective agreements; and the grievance arbitration system.

Analysis suggests that there has been a general decline in union wage premiums in Canada in recent decades, suggesting a loss in union bargaining power and/or shift towards non-wage priorities. On the other hand, small union wage premiums continue to exist, and these relative advantages are larger in cases where youth, and/or workers in non-standard employment forms, are able to access unionization. Another indicator of the functioning of the collective bargaining regime overall, trends in work stoppages, were also examined. Analysis suggests that for the past few decades, there has been a steady decline in the occurrence of work stoppages, which is primarily a decline in strikes, especially in the private sector. An underlying trend is a lack of propensity to strike in small bargaining units, increasingly common in the modern era, and the already low propensity to strike amongst small units seems to have been exacerbated over time. On the other hand, within the increasingly small set of strikes that do occur, evidence suggests that average strike duration has been growing and that duration growth is even more pronounced in lockouts and small-unit strikes. A simple starting-point explanation for the dual pattern of declining strike incidence and duration growth, on which further explanation can be built, is that there has been a general decline in the necessity, willingness, or capacity of Ontario workers to strike, in all but cases of comparably much “larger” conflict or zones of disagreement.

The subsequent literature review probes for more specific explanations for these patterns. One body of literature is reviewed that provides potential explanations for these patterns based on notions of how the instrumentality of strikes is affected by factors shaping socio-economic context. These factors include: heightened capital mobility and globalization of production; cultural and ideological forces; shifts in managerial strategies and capacities; and organizational restructuring. There seems to be both theoretical and empirical support for the notion that various contextual factors have produced a general decline in the instrumentality of strikes, which helps explain the long run decline in strike incidence that we have observed in recent decades. Another body of literature uses quantitative methods to try to isolate the effects of specific components of the legal regime governing collective bargaining on work stoppage patterns, and in some cases also on outcomes such as wages, employment and investment. These studies have produced a large volume of estimates, many of which conflict with one another, about the correlation between the presence of specific labour policy “variables” and the various phenomena being studied. This report summarizes the results of these studies in detail for the CWR to consider. However, this report also outlines a number of grounds for the recommendation of exercising great caution in reliance upon the outcomes of these studies in making policy decisions about specific aspects of labour law. Some of these concerns pertain to specific studies, while certain concerns are somewhat common across the body of studies.

Literature examining the regulation of picketing is also examined. This literature highlights the historical roots of modern picketing regulation, often from a critical perspective emphasizing the role of judicial ideology in development of legal doctrine. Other literature examines the 2002 decision of the Supreme Court in *RWDSU, Local 558 v. Pepsi Cola Beverages (West) Ltd*, the historical events that led to this decision, and its effects on subsequent development of the common law pertaining to picketing. Other literature highlights the role of other restrictions on forms of collective action remaining within the law.

Given empirical patterns of increased strike duration, another section of this report discusses the possibility of a “subsequent interest arbitration” statutory provision that

could potentially be adopted to create an alternative policy response to (lengthy) work stoppages. This report also provides a summary of the subsequent interest arbitration mechanism that was adopted into Manitoba labour law in 2000, which gives one party the option of requesting arbitration, subject to various conditions precedent. The report discusses the minimal existing feedback on the functioning of this mechanism, and also points out that it has not been invoked very often in Manitoba since 2000, suggesting at a minimum the lack of any “floodgate” into arbitration in recent years prompted by adopting this additional mechanism.

This report then provides a review of literature pertaining to the legal Duty to Bargain in Good Faith. The literature identifies the historical connection with U.S. law, as well as deviation from U.S. doctrine. It also critically examines various limits of the Duty, and suggests that its interpretation has enabled the imposition of significant managerial prerogatives into our labour law over time. Further, heavy reliance upon subjective intention weakens enforcement of the Duty. A general principle drawn from the literature is that the Duty is not generally conceived as contributing primarily to the power-balancing effects of the regime overall, aside from guarding the transition from individual to collective bargaining *per se*, implicitly assuming that other aspects of labour law sufficiently address the balance of power.

The report also examines some of the recent literature about the functioning of the grievance arbitration system with respect to delay, costs, legalism, and arbitral jurisdiction. Studies unanimously show a pattern of continued growth, over several decades, in measures of average duration of time spent on grievances that proceed through to the end of arbitration. Studies also seek to deconstruct these patterns of delay, to understand the contributing effects of different factors, at different stages in the grievance arbitration process overall. Other literature discusses the historical disappearance of an ethic of “proportionality” in legal process within arbitration, and argues that any fix to the system must involve a resurgence of this ethic.

Lastly, it is suggested that labour policy overall cannot avoid taking into account the continued erosion in underlying worker collective bargaining power, one way or another. It is possible that policy-makers may continue to refuse to adapt the collective

bargaining regime so as to potentially counter the corrosive effects on worker collective bargaining power produced by various contextual shifts. Perhaps this may be out of a failure to *value* worker collective bargaining power. Alternatively, it could be due to a preference for other types of instruments, beyond the collective bargaining regime, as potentially targeted responses to specific forms of work/employment precarity. Leaving aside the highly contested desirability of such a choice, effective labour policy *overall* demands an honest recognition of the decline in worker collective bargaining power and its consequences, in order to either address it directly, or to assess the sufficiency and effectiveness of all other forms of labour policy responses to increased inequality and work/employment precarity, absent policy reform ameliorating the underlying decline in worker collective bargaining power.

Background

The *Labour Relations Act, 1995* (“LRA”) contains provisions pertaining to the negotiation, content and operation of collective agreements. The design features of these legislative provisions may have impacts on the establishment and subsequent security of unions, as well as on outcomes such as strike incidence, strike duration, and wages. These issues are of great concern to the parties directly involved in collective bargaining, but also to the public.

Research Findings & Analysis

1) Introduction:

This report provides an examination of certain data and literature pertaining to the functionality of the collective bargaining regime. Section 2 of the report provides an examination of certain key empirical trends. Recent trends in the size of union wage premiums are reviewed, as are trends in work stoppages. Section 3 provides a review of literature on the functionality of the legal regime governing collective bargaining and work stoppages. This section includes various subsections containing reviews of literature concerning: strikes and lockouts as instruments in socio-economic context; the effects of various components of the collective bargaining legal regime on work stoppages and related outcomes; the regulation of picketing activities; subsequent interest arbitration as an alternative response to work stoppages; the duty to bargain in good faith; and the grievance arbitration system.

2) The “big picture”: some key empirical trends

This section reviews certain key empirical indicators of the functioning of the collective bargaining regime in recent decades. This includes analysis of recent trends in the size of the union wage “premium,” and in work stoppage activity.

a) Some recent trends in measures of the union wage “premium”

Historically, evidence suggests that unionized workers in Canada have tended to have somewhat better conditions of employment than comparable non-unionized workers, and thus it has been possible to measure the union wage “premium”, or the gap in compensation levels of comparable unionized and non-unionized workers, *ceteris paribus*. Recent analysis suggests that union wage premiums have been declining in recent decades, suggesting a decline in union bargaining power, or sometimes called a decline in so-called “wage-setting” power, and/or a shift in union focus on non-wage outcomes. Fang and Verma (2002) found that the union wage gap towards the end of 1990’s declined to an overall average of approximately 7.7%, suggesting a gradual

narrowing of the wage gap over the previous two decades from earlier estimates of about 15% (Benjamin et al., 2012, at 466). The gap was comparably smaller in large firms, and also varied by a number of factors, such as industry, occupation, and region. Similar effects have been observed in the U.S. in recent decades.

Subsequent analysis suggests that the average union premium continued its steady decline into the mid-2000s in Canada. After confirming the continued decline in the Canadian union wage premiums from 2001 to 2006, Walsworth and Long (2012) also examined trends in the effect of unionization on employment, and the relationship between these trends. Their analysis suggests that there has been a significant decline in the effect of unionization on employment, and that there is evidence to suggest that this is somewhat explained by the decline in union premiums. They also found that while employment suppression from unionization continued in large manufacturing firms, in smaller firms there was an opposite effect. That is, amongst smaller firms, union premiums were somewhat negative (-1.9%), and unionization was associated with employment growth. This pattern suggesting that unions were trading wage advantages for jobs generally held for the services sector as well.

Verma, Reitz and Banerjee (2015) examine the effects of unionization on the labour market integration of newly arrived immigrants in Canada. Compared to white members of their immigrant cohort, non-white recent immigrants experience slower access to unionized jobs, and a smaller effect of unionization on their earnings. Their study provides evidence that since 1993, unionization has not contributed to closing the specific earnings gap between white and non-white immigrants.

The most recent available analysis of union wage premium dynamics is Gomez and Lamb (2015). Their analysis shows that in aggregate terms, union wage premiums underwent a slow decline during the period 2000-2012. While women overall experienced a larger premium than men during these years, women's union wage premiums declined from approximately 11% to 7.4%, while male union wage premiums declined from approximately 6.8 to 5.3% respectively. Gomez and Lamb also assessed differences in union wage premiums amongst workers with full-time permanent positions, and amongst workers who lacked full-time permanent status. The union

wage premium amongst workers lacking full-time permanent status was much larger than amongst workers that had this employment status (17-24% premiums compared to 1-2% premiums respectively). This suggests that workers in non-standard employment forms have much to gain from unionization, even if non-standard employment forms are maintained, where such workers are able to access unionization. Also, the interaction of gender in determining or mediating the size of union premiums has diminished substantially. While women had generally higher premiums in the full-time permanent category and men higher premiums in the non-standard or “precarious” category, by 2012, these premiums seem to have converged, eliminating gender differences in the size of premiums within both employment form categories. Similarly, Gomez and Lamb (2015) also found that among young workers (aged 15-29) the union premium rate is comparably much higher than the rate for all employees. Further, amongst young workers lacking full-time permanent status, union premium rates in this category were much higher than the average premium for youth. This suggests that young workers in non-standard employment forms have a large potential gain from unionization, even if non-standard employment forms are maintained, where such young workers are able to access unionization.

Overall then, there has been a general decline in the magnitude of union wage premiums in recent decades, suggesting a loss in union “wage-setting power” over time. On the other hand, some union premiums continue to exist, and appear largest in contexts involving non-standard employment forms and/or youth employment. The general decline in union premiums may be explained by a number of developments in socio-economic context in recent decades, including heightened international product market competition, heightened capital mobility, and patterns in industrial restructuring. These developments may be understood as having narrowed the space for wage gains under unionization due to increasing constraints of competition, and/or as having caused shifts in the balance of power in the collective bargaining process, eroding the union advantage.¹ The comparably higher union premiums for non-standard

¹ The comparably higher union premiums that exist for non-standard employment and youth largely reflects, on the one hand the comparably greater precarity experienced by these workers, in non-union contexts, while on the other suggesting the potentiality of unionization, where it may emerge, to counter this precarity.

employment and youth largely reflects, on the one hand the comparably greater precarity experienced by these workers, in non-union contexts, while on the other suggesting the potentiality of unionization, where it may emerge, to counter this precarity. The next section examines work stoppages patterns in the collective bargaining process.

b) Patterns in work stoppage activity

This section provides a basic overview of some of the relevant historical patterns in work stoppages within the collective bargaining system over time. It has been argued a great many times that the strike is the ultimate source of worker bargaining power in the collective bargaining system in Canada, and elsewhere.² Therefore, an understanding of strike dynamics may provide some important insights into the functioning of the collective bargaining system overall.

Data in this section was provided by ESDC. Unless otherwise stated, aggregated data is based on aggregate activity in bargaining units of all sizes,³ during the time period 1980-2014.

To begin with, a very simple observation can be made, which is that there has been a fairly clear trend of a long term decline in work stoppages in Ontario, and that this has been primarily the product, in an accounting sense, of a long term decline in strike activity. Figure 1 provides a graph of the aggregate number of work stoppages, strikes and lockouts in Ontario⁴. As can be seen in Figure 1, there remains significant fluctuation in strike activity over time, although the long term decline is also clear. Lockouts have generally been far less frequent, and there is less of an obvious pattern

² While it may be that, symmetrically, the lockout is the ultimate source of the employer's bargaining power, this seems less collectively accepted.

³ There is one small caveat to this. ESDC records data for all work stoppages totaling ten or more person days lost. This could be either one worker for ten days, or ten workers for one day, etc. So, there is a small chance that this inclusion threshold may filter out some work stoppage activity in very small units. All underlying data obtained from ESDC is available from the author upon request.

⁴ ESDC categorizes work stoppages as taking place in Ontario when Ontario is the relevant legal jurisdiction. Work stoppages physically occurring within Ontario, but which fall under the jurisdiction of federal labour laws, are not included in this data.

over time pertaining to lockout activity.⁵ This trend has held generally across Canada and beyond (Godard 2011). Figure 2 provides a graph of the aggregate number of work stoppages, strikes and lockouts in all Canadian jurisdictions, for all unit sizes. The fact that there has been a similar aggregate trend across Canada is fairly clear.

This picture of a major decline in strike activity also shows through when measures of the volume of strike activity are used other than the aggregate number of

Figure 1: Aggregate Annual Number of Work Stoppages, Strikes, and Lockouts in Ontario, 1980-2014



⁵ As can be seen from the graph, there was a small “spike” of strike activity in 2012, and subsequent graphs show a corresponding “plunge” in strike duration in that year. Both of these measures seem influenced by the occurrence of a single one-day teacher strike event that took place across Ontario in that year, which HRSDC recorded as 75 separate strike events.

Figure 2: Aggregate Annual Number of Work Stoppages, Strikes, and Lockouts in Canada, 1980-2014

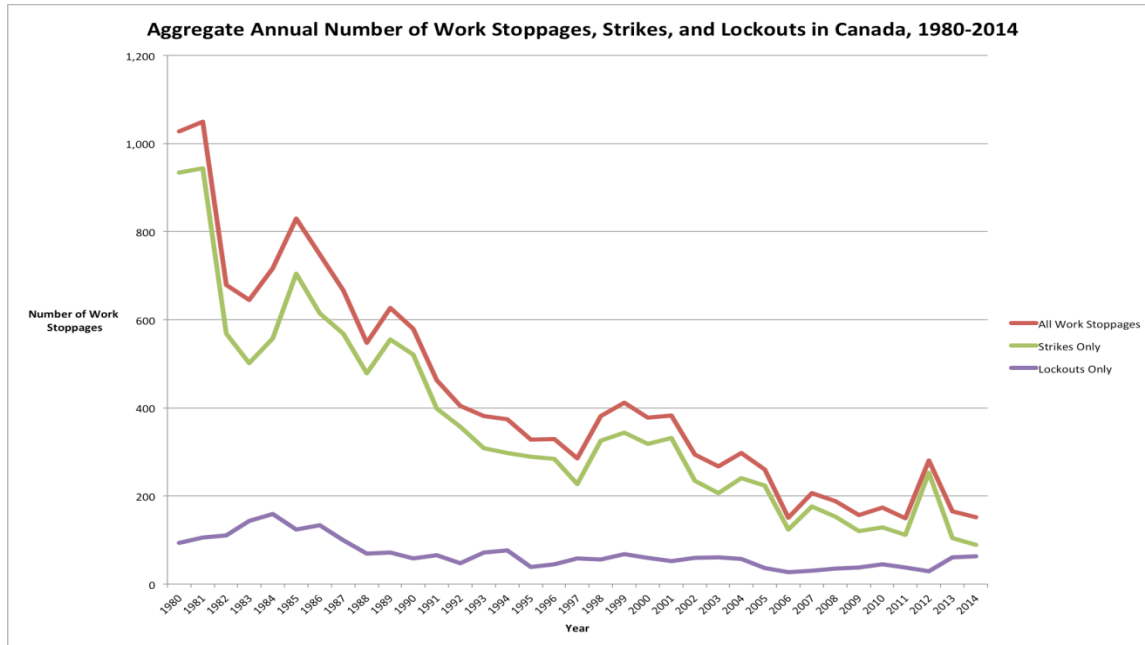


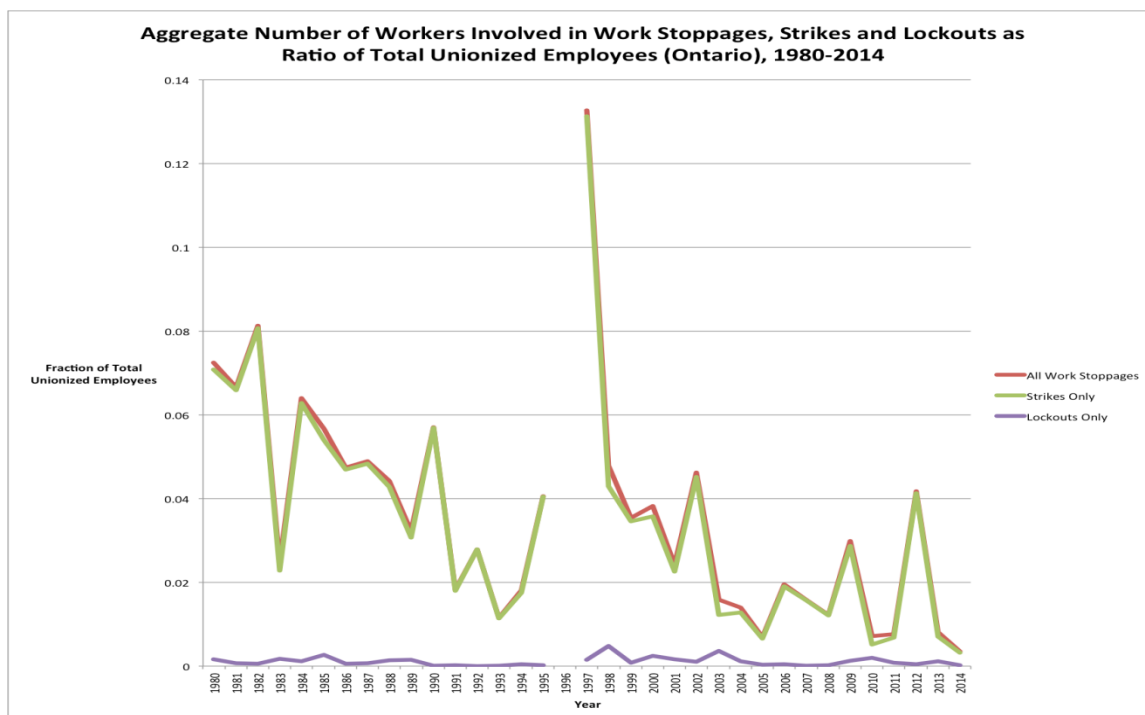
Figure 3 – Aggregate Annual Number of Workers Involved in Work Stoppages, Strikes and Lockouts in Ontario, 1980-2014



strike events. For example, Figure 3 provides a graph of the number of workers involved in stoppages, strikes and lockouts in Ontario. Although there is certain variation, and a surge in the number of workers involved in 1996-97, a long term decline trend is apparent. A comparable pattern in the numbers of workers involved in stoppages, strikes and lockouts also holds for across Canada, and a graph illustrating this is in Appendix 1.

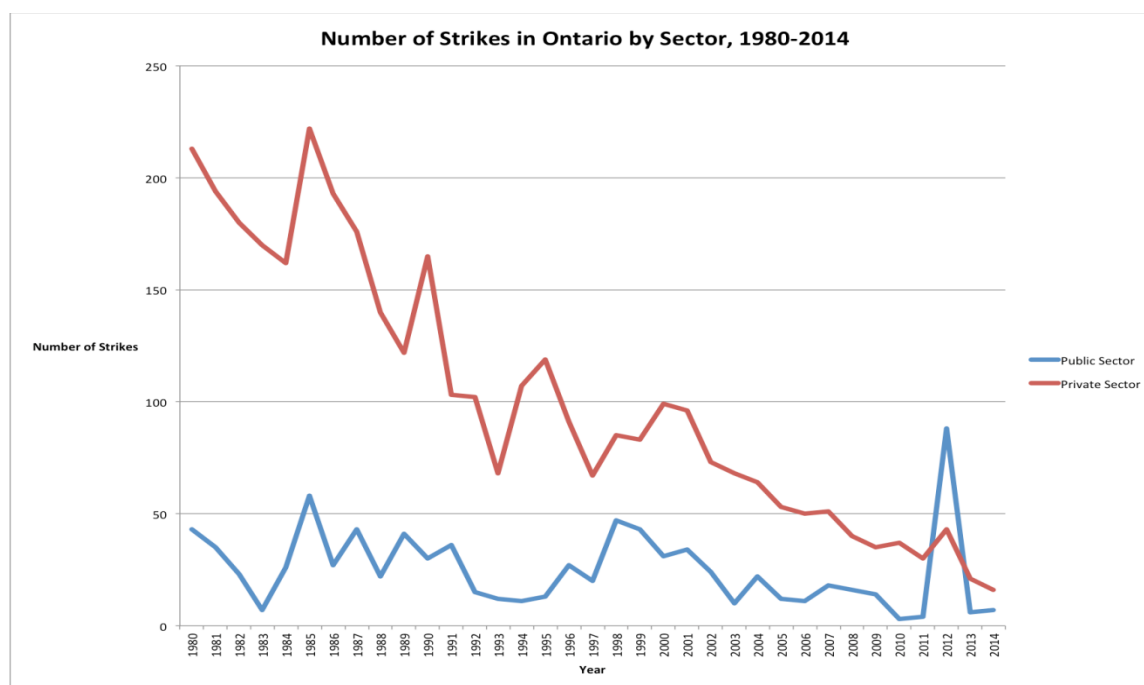
The data also show that this long term decline in strike activity is also not merely a simple product of a decline in the number of unionized workers in the province. Figure 4 provides a graph of the ratio of the number of workers involved in stoppage, strike and lockout activity to aggregate unionized employees. As can be seen in Figure 4, there is an observable long term decline in the proportion of unionized workers engaged in work stoppage events in Ontario. Again, this Ontario experience is reflected in a similar larger pattern in the data for Canada overall, and a graph of this ratio for all of Canada is provided in Appendix 1.

Figure 4: Aggregate Number of Workers Involved in Work Stoppages, Strikes and Lockouts as Ratio of Total Unionized Employees (Ontario) (1980-2014)

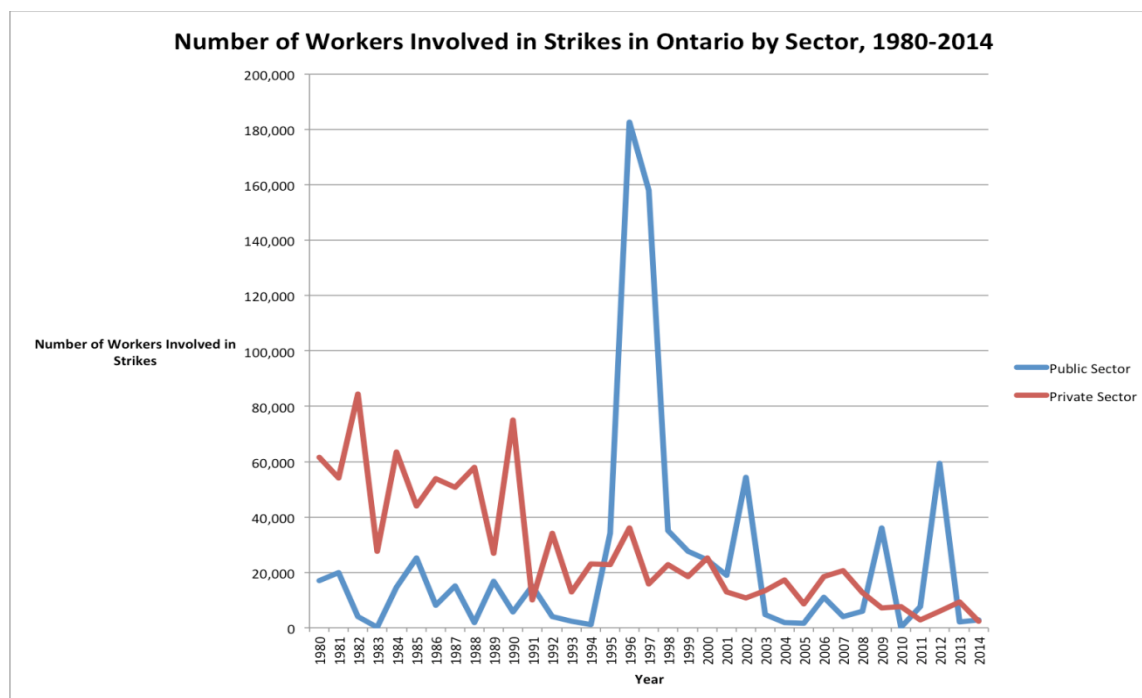
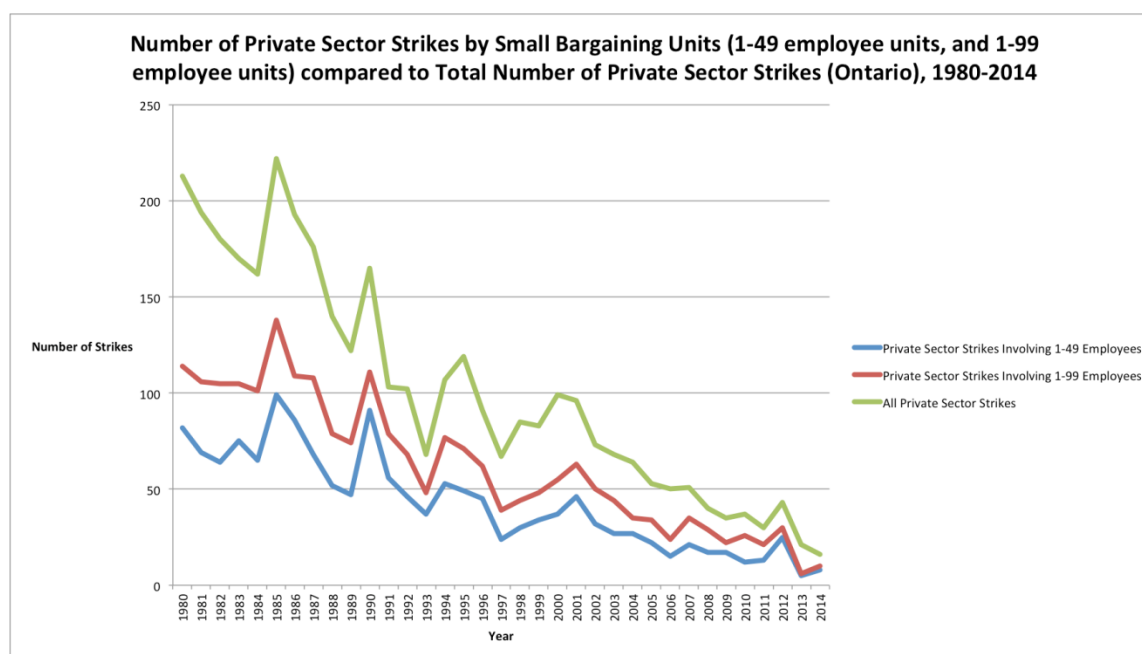


So, thus far, it appears that there has been a long term decline in stoppages activity, captured in different indicators, in both Ontario and all of Canada, and that in an accounting sense, this is the product of a long term decline in strike activity. A further important insight provided by the data relates to the existence of different trends in work stoppages across the different sectors. Figure 5 provides a graph of the number of strikes in Ontario that occurred in the public and private sectors, and Figure 6 provides a graph of the number of workers involved in strikes in Ontario, also by sector.⁶ The immediate insight from these two graphs is that while there is not a terribly clear long-term pattern in the public sector, the bulk of the decline in strikes appears to have occurred in the private sector. Further, this decline in private sector strike activity does not appear to be a mere product of a decline in private sector unionization, since the magnitude of the decline in strike activity seems fairly disproportionate to the rate of

Figure 5: Aggregate Number of Strikes in Ontario by Sector (1980-2014)



⁶ Data is allocated to the different sectors by ESDC, according to official definitions of these used for statistical purposes. The precise definitions used to assign data to the public sector is available at: http://www.labour.gc.ca/eng/resources/info/datas/wages/technical_notes.shtml

Figure 6: Number of Workers Involved in Strikes in Ontario by Sector (1980-2014)**Figure 7 – Number of Private Sector Strikes by Small Bargaining Units (1-49 Employee units, and 1-99 Employee units) Compared to the Total Number of Private Sector Strikes in Ontario (1980-2014)**

change in union density, and/or unionized employment levels, in the private sector.⁷ Thus, there seems to have occurred a significant overall decline in the necessity, willingness, or capability, of Ontario private sector workers to strike in recent decades.

Further insights pertaining to this pattern of strike decline may also be available by looking at differences in the distribution of strikes by bargaining unit size. Figure 7 provides a graph comparing the total number of private sector strikes to those in “small” bargaining units, using both 1-49 employees and or 1-99 employees as definitions for “small” units. It appears that strikes have been declining across all bargaining unit size categories. In certain research that involved econometric modelling of strike behaviour, discussed later in this report, the role of bargaining unit size was found to be statistically significant and suggested that smaller bargaining units, all other factors being equal, have a lower propensity to engage in strike action.⁸ However, more is seemingly at play here than a mere decline in average unit sizes, given that the number of strikes *within* the small units categories also declined over time, suggesting that the lack of strike propensity in small units may have been exacerbated over time.⁹

The “size” of strike activity may also be measured with respect to its time duration. Figure 8 provides a graph of the average duration of work stoppages, strikes and lockouts in Ontario, in units of all sizes, and a similar graph for all of Canada is included in Appendix 1. A few points can be gleaned from this graph. It seems that the average duration of lockouts has varied substantially over time, to a greater degree than strike duration, although this is potentially related to the fact that there are far fewer lockouts than strikes, making the average of this category more prone to wider variation. In more recent years (since 2000) there is some evidence of a trend towards longer average lockout duration, although variation remains strong. Further, the degree of variation in

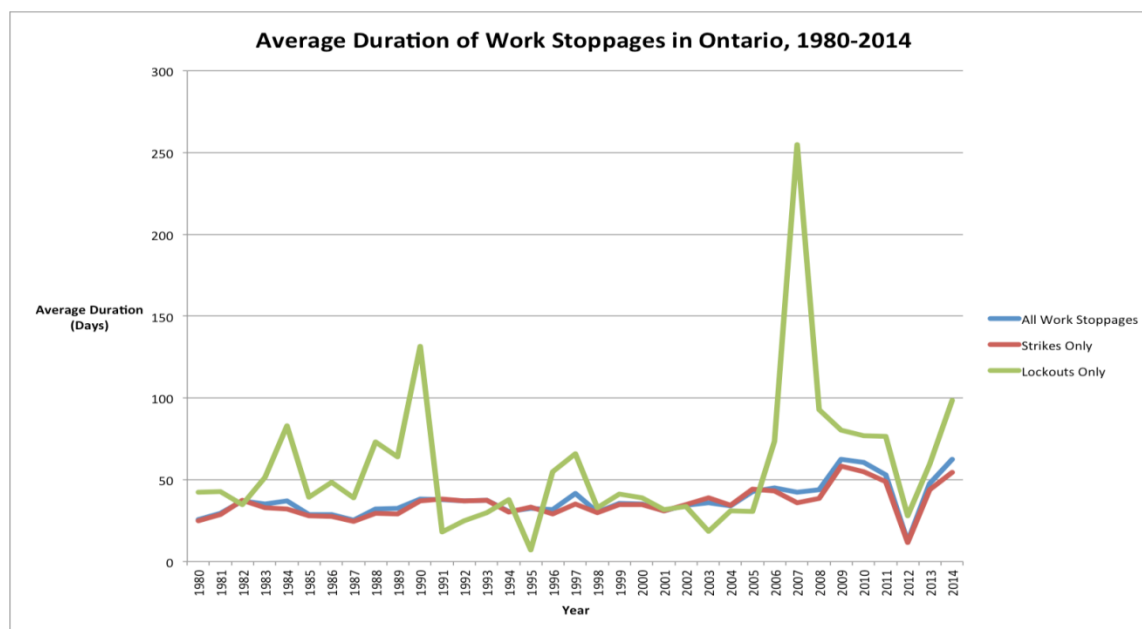
⁷ For example, Galarneau and Sohn (2013) estimate that Canadian private sector union density declined from 18.4% in 1999 to 16.4% in 2012, while private sector employment growth would also have offset some of the density decline effect on the total number of unionized workers in the private sector. The proportional decline in private sector strikes (and workers involved) appears much greater than the decline in private sector unionization.

⁸ See Hebdon, Hyatt and Mazerolle (1999); Campolieti, Hebdon and Hyatt (2005); and Campolieti, Hebdon and Dachis (2014).

⁹ Data on the underlying distribution of unionized employment by bargaining unit size, for comparison purposes, was not available.

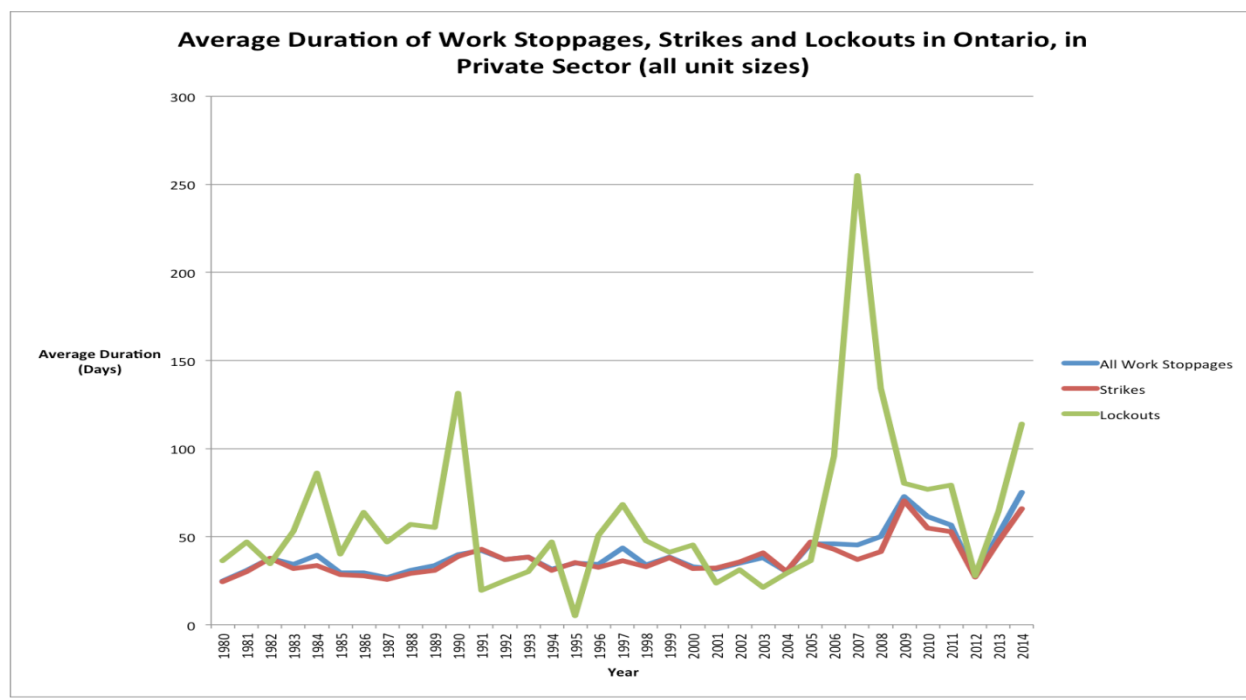
average strike duration also seems to have widened in recent years. Based on the graph alone, there appears to be some evidence of an increase in strike duration, although the variation makes this somewhat difficult to confirm. In particular, the year 2012 seems to be somewhat of an “outlier” compared to the years close to it, in that it has quite a low measure for average duration. However, this statistic seems very heavily influenced by the existence of elementary school teacher bargaining in Ontario in that year, within which there was a province-wide, one-day strike that occurred. In response to this single coordinated event, ESDC recorded 75 separate one-day strike incidences, in 75 regions. This greatly inflated the strike/stoppage incidence measurement and reduced the average duration measurement, for 2012.¹⁰ Indeed, some academic analysis of strike/stoppage duration takes the position that all such activity of a fixed, pre-planned duration ought to be excluded from analysis of duration,

Figure 8 – Average Duration of Work Stoppages, Strikes and Lockouts, Ontario (1980-2014)



¹⁰ All of these one-day teachers strikes took place in the public sector. I have confirmed with ESDC that the data for 2012 for the private sector were not affected by these teacher strikes. So, 2012 remains an outlier year for the Ontario private sector, with comparably high strike incidence and low average strike duration, coincidentally occurring in the same year as these 75 one-day teacher strikes.

Figure 9: Average Duration of Work Stoppages, Strikes and Lockouts in Ontario, in private sector (1980-2014)

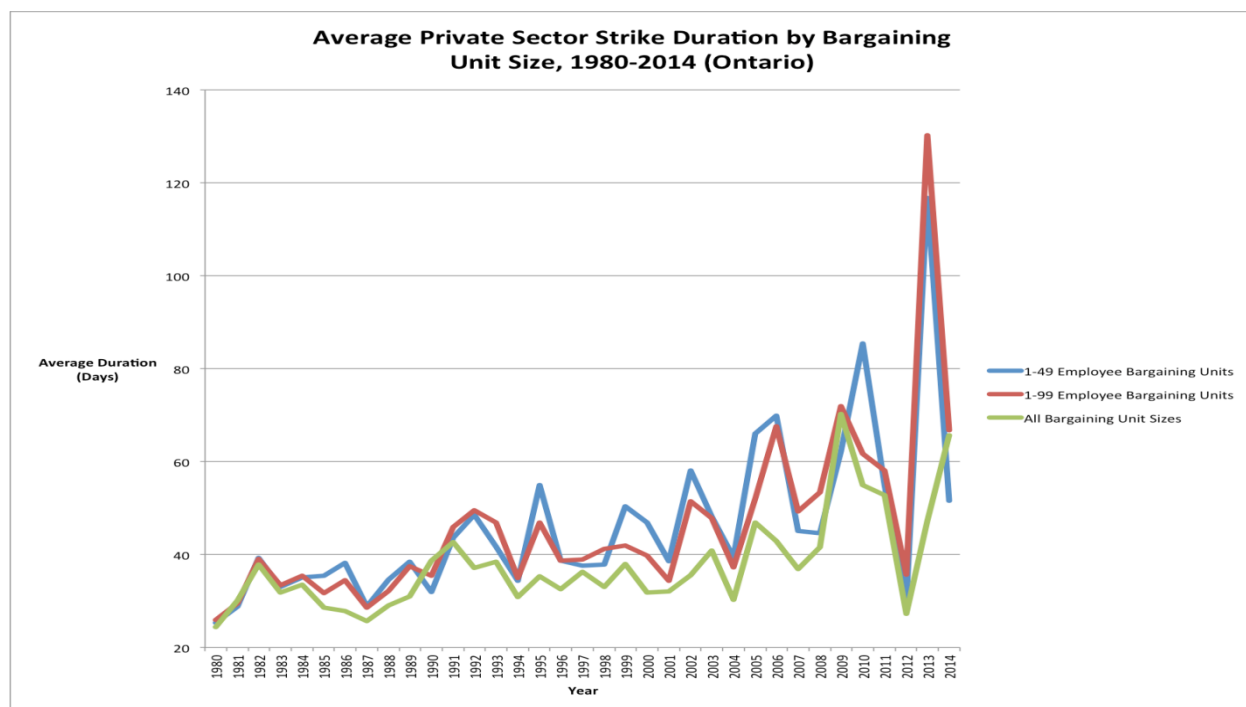


because very different phenomena are being measured (Finley, 2010). So, if we were to take into account the fact that the average duration for 2012 is somewhat “artificially” suppressed, then the trend towards longer duration becomes somewhat clearer. In terms of stoppages overall, there seems even clearer evidence of growth in average duration in recent years. These comments would appear to apply similarly to activity in Canada overall, as illustrated by another graph in Appendix 1.¹¹

Finally, Figure 10 provides a graph of average strike duration in the private sector for bargaining units of different size ranges. Interestingly, the graph seems to provide evidence of the existence of comparably longer strikes in smaller bargaining units than in larger ones. This may be related to patterns of industrial restructuring and organizational “fissuring,” and a resulting decline in the instrumentality of strikes, discussed further in the next section.

¹¹ Gunderson et al (2009, at 344) provide a similar analysis, although based on comparisons with earlier historical experience, and based on stoppages data overall.

Figure 10: Average Duration of Private Sector Strikes in Small Bargaining Units (1-49 Employee units, and 1-99 Employee units) Compared to Average Duration of All Bargaining Units (1980-2014)



Overall, the data suggests that for the past few decades, there have been fewer work stoppages overall, and in an accounting sense this is mostly because there are fewer strikes, especially in the private sector. An underlying trend is a continued decline in strikes within smaller units, and past studies had suggested that small units already had comparably lower strike propensity. In contrast, within the smaller set of existing strikes, evidence suggests that average duration has been growing, and duration growth is even more pronounced if we look at stoppages overall, including lockouts, and is also more pronounced in smaller workplaces.

There is no one single definitive explanation for these combined trends of decreased strike incidence and increased average duration. The “Annis Report” came to similar conclusions about patterns of work stoppages incidence and duration in the federal jurisdiction, but stated that research had not yet provided a conclusive interpretation for increased duration (Annis, 2008). This view seems at least partly due to the

acknowledgement of alternative theoretical approaches in examining strike dynamics, discussed more fully below. However, a fairly simple starting point interpretation, one that admittedly begs for further probing, is that there has been a *general decline in the necessity, willingness, or capacity of workers to strike, in all but cases of comparably much “larger” conflict* or zones of disagreement. Whether this in turn has been based upon an increase in the “costliness” of strikes, a decline in their efficacy, or some other exogenous factors, this simple interpretation at least provides an initial explanation for *both* patterns of declining strike incidence, *and* growth in average duration. The next section looks more closely at this question of how to interpret these work stoppage patterns, and to potentially understanding the role of the legal regime governing collective bargaining, and other contextual factors, in shaping these patterns.

Section 3 – Review of Academic Literature on the Functionality of the Legal Regime Concerning Work Stoppages and Collective Bargaining

This section of the paper will review literature pertaining to salient components of the legal regime governing collective bargaining identified by the CWR for review. This section reviews literature that attempts to analytically isolate the effects of specific, separate components of the collective bargaining legal regime identified by the CWR, but begins with a review of literature examining the strike instrument in socio-economic context.

A) Strikes and lockouts as instruments in socio-economic context

Up until the mid-late 1980's, econometric analysis of strike data suggested that there had long existed a significant positive relationship between strike incidence and the business cycle, based on the notion that strikes had greater efficacy during peaks than troughs in the business cycle (Rees, 1954; Ashenfelter and Johnson, 1969; Smith, 1972). This relationship held not only in Canada but in the U.S. as well (Ashenfelter and Johnson, 1969). Research suggested that the positive relationship between strike frequency and the business cycle was relatively stronger in North America than in many western European countries. This was likely because in these countries, the influence of corporatist systems of centralized bargaining for much of 20th century outweighed or mitigated the influence of the business cycle, unlike in North America (Brym, 2009).

However, in both Canada and the U.S., beginning in the 1980's, the influence of the business cycle on strike incidence seems to have been greatly suppressed. Strike incidence has steadily declined since then, with cyclicity largely “wrung out” of the system, displaced by a more generalized downward trend in recent decades (Brym, 2009), confirmed by the data review in the previous section of this report. This suggests that other contextual factors have had a more overwhelming effect on these dynamics, by altering the instrumentality of strikes over time.¹²

¹² On the other hand, previous econometric research suggested a different effect of the business cycle on strike *duration*. Harrison and Stewart's (1989) analysis of Canadian strike data from 1946-1983 supports the thesis that

Before the various contextual factors are reviewed, some discussion of the different theoretical models concerning strike activity is helpful at this point, since they involve different understandings about the degree to which contextual factors may “matter” in determining strike dynamics. There is no single, commonly accepted theoretical “model” of strike activity that can be turned to in order to determine the effect of contextual factors on strike dynamics (Kaufman, 1992). A number of contextual factors that we will review point to a shift in relative bargaining power from unions/workers to employers. Some theoretical approaches would see these factors therefore as being relevant in explaining strike dynamics in a fairly direct manner.¹³ Over time, however, certain theoretical approaches have taken issue with bargaining-power-based explanations, reasoning that these factors are better conceived as strictly affecting *wage outcomes*, but not strike activity itself (see Gunderson, et al., 2008). In their view, shifts in relational power, *known in advance by rational parties*, ought to be conceived as creating predictable effects on the *expected outcomes* of bargaining, which is then factored into parties’ bargaining demands and/or willingness to concede.¹⁴ Therefore, only the outcomes of bargaining shift, the propensity to strike does not. This theoretical challenge is rooted heavily in the “neoclassical” theoretical approach, which in its default form involves strict starting-point assumptions about the functioning of a conceptualized “perfect” market including, but not limited to, “perfect” (so-called) “rationality”, and perfect information. Under such assumptions, however, it turns out that there are actually extremely few, if any, explanations for strike activity whatsoever. This is because in a world in which parties are perfectly “rational” and have a “perfect” grasp of all information about their own¹⁵ (and their bargaining opponent’s) true status,

strike durations were countercyclical, with fairly strong magnitudes and robust effects across different statistical indicators of the business cycle.

¹³ See for example early bargaining power based strike models developed in Neil W. Chamberlain and James W. Kuhn (1965), *Collective Bargaining*. New York: McGraw-Hill.

¹⁴ Commenting on the difficulty of rational-choice model-building in the strike literature, Kennan (1986) referred to this overall as the “Hick’s paradox” and stated “if one has a theory which predicts when a strike will occur and what the outcome will be, the parties can agree to this outcome in advance, and so avoid the costs of a strike. If they do this, the theory ceases to hold.”

¹⁵ This of course also ignores the added complexity of the fact that we are dealing in these contexts with attempts to *aggregate* preferences across multiple workers in a bargaining unit, and further ignores differences in interests of different kinds of stakeholders on the “employer” side of bargaining. It should be noted that some

preferences, and measures of the costs/benefits of negotiated terms, and the costs of strike action on each, parties would *always* be incented, and able, to carefully contract so as to avoid strikes (assuming strikes produce costs), under given constraints. This neoclassical theoretical counterfactual sheds light on why a large literature is referred to collectively as “strikes as mistakes,” since they “theoretically” should not occur. This label discursively *privileges* the neoclassical theory as a default, contestably. Taken strictly, the argument that context-based bargaining-power shifts are only capable of effecting wage outcomes - and not strike behaviour – is a theoretical move that re-asserts neoclassical assumptions rejected in other theoretical approaches.

Forced to acknowledge *some* degree of real-world imperfections in *inter alia* information and rationality, the two main models that predominate the economics-based literature and which still seek to develop a “bounded” rational-choice approach to modelling strike dynamics are the “joint cost” model and the “asymmetric information” model. Under the former, the lower the joint costs of the strike, the more likely strikes are to occur. Thus, factors that increase the joint costs of strikes are likely to reduce strike activity, and vice versa. Under the asymmetric information model, unions are assumed to have comparably less information about the true measure of the employer’s willingness to pay, and the employer faces an incentive to withhold this information. Strikes are then an instrument for “revealing” the true status and preferences of the employer, by forcing the employer to “pay” in order to maintain its stated demands.¹⁶ Overall, these models leave comparably more “space” for the interpretation that context-based bargaining power shifts help explain strike dynamics.

Under other theoretical approaches besides these two economics-based approaches, explanations for the (non)occurrence of strike activity are based around a core assumption that strikes are the product not only of imperfections in information and rationality, but also of highly complicated processes of social and/or psychological behaviour, social interaction, preference construction, and collective mobilization (Godard, 1992, 1998). These approaches provide additional scope for interpreting

“neoclassical” analysis (if it is fair to still call it that after the acknowledgement of the violation of most of its initial postulates) has attempted to “take into account” some of these critiques of this approach.

¹⁶ See the review of these models in Gunderson et al. (2008).

context-based shifts in bargaining power and strike instrumentality as also affecting strike incidence and/or duration.¹⁷

One key contextual factor cited in literature is the significant increase in recent decades in international product market competition, trade liberalization, and capital mobility (Brym, 2009). If strikes are costly, and potential gains for labour under collective bargaining are narrowed in certain contexts by international product market competition, then net gains from strike activity are biased downwards, reducing their instrumentality.¹⁸ Further, particular employers are more direct “beneficiaries” of new modes of mobility. This can be expressed in different ways. In some cases, certain employers have an expanded option of “exit”, potentially involving the closing or relocation of an operation to a jurisdiction with lower labour costs and/or standards. This obviously affects relational bargaining power, and may correspondingly reduce the efficacy of the strike instrument. Indeed, an even more direct effect may also be operating such that, as a result of the new context, certain employers may be comparably able to avoid the effects of strikes by being able to reorganize the productive activities of the enterprise by utilizing productive capacities outside the jurisdiction in which the labour dispute is taking place (Brym, 2009; Shniad, 2010; Peters, 2010). Such reorganization of activities may take place during and in response to a strike itself, while certain reorganization efforts may also be carried out *ex ante* so as to signal an increased employer readiness to resist strike action. Strategies of reorganization of work activities outside the jurisdiction have been cited as relevant in literature examining several recent large-scale, private sector strikes. These include the 2005 Telus strike (Shniad, 2010) the 2009 Vale-Inco strike in Sudbury, Ontario (Peters, 2010); the 2012 Caterpillar strike in London, Ontario (Olive, 2012; Brym et al., 2013) and the Navistar International dispute in 2011 (Olive, 2012).

¹⁷ Brym (2009) cites this challenge to his review of socio-economic factors as really being a model of wage effects, without providing much of a defensive response, in a footnote. See Brym, 2009, at 73, note 3. Nevertheless, it is fairly clear that Brym is theorizing that these socio-economic phenomena have had effects on *both* relational power (and hence wages) as well as strike efficacy and frequency. See also John Godard (2011).

¹⁸ In interpreting the effect of liberalized trade on strike incidence, it is possible to use the “joint cost” and “asymmetric information” models to provide somewhat similar predicted effect. Such an approach would seemingly necessitate yet further assumptions including heightened power of consumers, and/or allegedly greater revelation of the employer’s “ability to pay,” under liberalized trade.

The notion of increasingly globalized production and heightened capital mobility must be understood as conceptually distinct from the concept of “foreign ownership” that has been used as an independent variable in two past econometric studies of strike data. Based primarily on theoretical models of negotiation behavior and the possibility that foreign ownership may create greater “informational” challenges and thus higher risks of “mistakes”, prior studies produced conflicting results. Cousineau et al. (1991) found that foreign ownership was negatively correlated with strike incidence, prompting them to interpret this result as suggesting that foreign-owned firms likely develop compensatory “protocols” addressing informational problems that might otherwise generate strikes. Using additional control variables omitted in previous studies, such as industry categories, and bargaining unit size, and different sub-categories of corporate ownership status, Budd (1994) also examines the effect of foreign ownership on strike dynamics using Canadian strike data from 1965-1985. Budd (1994) found that there was no statistically significant effect of foreign ownership on either strike incidence or duration. Not only is the concept of foreign ownership different from this concept, these studies were also examining the effect of “foreign ownership” within *older* data, pertaining to an earlier era *predating* the “neoliberal” era of heightened capital mobility.

Generalized welfare state restructuring has also been cited as an important contextual factor with potential influence on strike efficacy and thus strike activity. Over recent decades, welfare state shifts have included reductions to income replacement benefits, and increased restrictions on access to such benefits. Given the (perceived) potential for loss of short term income security during strike action, and/or some (perceived) potential for permanent job loss in relation to strike, this adjusts the (perceived) costs and benefits, and related uncertainty and riskiness of strike action (Brym, 2009).¹⁹

¹⁹ A recently examined Service Canada website explains that in general, workers in 2015 Canada that are affected by any “labour dispute,” including either a strike or lockout, are not eligible for Employment Insurance. More detail about this restriction on access to EI benefits is available at: <http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml>

Another factor cited in the strike literature that is associated with some other contextual factors, but may also be potentially understood as a separate independent factor, has been *cultural* or *ideological* shifts over recent decades. In general, the argument is that the shift to a more neoliberal political economy has coincided with an increasing embrace of the idea that control over labour costs is a desirable, and priority goal, making strike activity, and perhaps even unionization itself, increasingly counter to dominant cultural norms (Brym, 2009).

Another contextual factor is managerial strategies. First, it is possible that there have been shifts in managerial responses to strike action. Some historical and qualitative analysis cites shifts away from long-term stable patterns in managerial behaviour towards much more aggressive responses to strike action (Schniad, 2010, Peters, 2010, Brym et al., 2013). Increasingly aggressive responses to strike activity may include greater inclination to use replacement workers, or a more intensive use of them; the transfer and/or contracting out of work; the *ex ante* development of more sophisticated business continuity plans in anticipation of strikes; the use of professional security firms specialized in “controlling” strike/picketing activity;²⁰ and aggressive litigation strategies seeking to restrict or deter picketing activity. Given an increase in managerial capacity to undertake these strategies, this may on the one hand operate as a deterrent to strike activity. On the other hand, it may reinforce some employers’ willingness to either engage in a lockout or to “take a strike,” as a mechanism for obtaining substantial concessions. The latter view has been provided as an explanation for the observed pattern of numerous large-scale stoppages of long duration in recent years (Stanford, 2012; Brym et al., 2013; Oved, 2015). As well, qualitative studies of

²⁰ The argument has been made that picketing workers may experience these services as harassment, and thus they may undermine support for collective action (Schniad, 2010). Discussions of these services have emerged in recent policy dialogue (MacDonald, 2015) and in corporate literature on “business continuity plans” during strikes. For an example of the latter, see the report documenting the development of a sophisticated “business continuity plan” by one of these specialist firms for Telus, about a year and a half prior to the 2005 Telus strike. This is available for download at <http://www.afimacglobal.com/pmartin/wp-content/uploads/2011/01/Global-Assurance-x3.pdf>.

certain stoppages have provided evidence that the use of replacement workers tends to increase strike duration (Singh, Zinni, and Jain, 2005).²¹

Given the significance of the issue of the employer's *right* to use replacement workers in our regime, there are few studies pertaining to the actual *use* of replacement workers, as an employer strategy. One study based on Ontario data in the year 1991 suggested that replacement workers were used in only 13.8% of work stoppages, and that external replacements (from outside the bargaining unit) were used in only 12% of all stoppages.²² In a sample of strike data from the federal jurisdiction from 1991-1999, used in Jain and Singh (1999), replacement workers were used in approximately 18% of strikes. While we lack aggregate statistical evidence on employer inclination to use replacement workers duration strikes, certain case studies of large-scale conflicts suggest that some employers have begun to use them, contrary to their own past practices.²³

Of course, shifts in employer strategies that may have affected strike dynamics are not limited to *ad hoc* responses to strike action. Other *ex ante* strategies are relevant, particularly organizational “fissuring” (Weil, 2014) carried out with increased intensity over the past few decades. David Weil, Director of the Wages and Hours Division of the U.S. Department of Labor, offers the following visual analogy:

“The large corporation of days of yore came with distinctive borders around its perimeter, with most employment located inside firm walls. The large business of today looks more like a small solar system, *with a lead firm at its center* and smaller workplaces orbiting around it. Some of those orbiting bodies have their own small moons moving about them. But as they move farther away from the

²¹ Of course, the flow of causality is always a theoretical question. One theoretical interpretation of the evidence pertaining to the relationship between replacement workers and duration is that management hires replacements based on their *advanced knowledge* (which must implicitly be *assumed* in this neoclassical-economic inspired interpretation) that the strike *will be long*. The need for more sophisticated analysis of causality to aid in such theoretical interpretive conundrums is regularly cited as one of the grounds in favour of more intensive qualitative analysis, such as the research design employed by Singh, Zinni, and Jain (2005) (see Palys, 2003).

²² See Haywood (1992). The data in this paper was further reviewed in Langille (1995) prompting him to suggest that the restrictions on replacement workers in Bill 40 (passed in 1993) likely had little effect on actual behaviour, since employers used replacements so rarely before its passage.

²³ See Peters (2010) (Re Vale-Inco conflict).

lead organization, the profit margins they can achieve diminish, with consequent impacts on their workforces (Weil, 2014 at 43). (*emphasis added*)

Crucially, Weil's analysis points to the continued existence of "lead firms," which exist in a vast number of industries and are the epicentres of organizational "fissuring." To make fissuring feasible and profitable, lead firms must *retain* certain key organizational capacities, functions, and responsibilities relating to productive activities that they coordinate. Over time, developments in information and communications technology, and new legal and organizational capacities, effectively lowered the "transactions costs" (eg. monitoring costs, contractual enforcement costs, etc.) involved in having productive activities performed by workers located (at least in formal terms) "outside" the lead firm. Lead firms then increase their relative focus on the revenue side of the enterprise, maintaining responsibility for marketing, branding, and supervision of the larger contractually-linked network. These new structural arrangements have taken many forms, including franchising, subcontracting, and supply-chain arrangements.²⁴ In formal legal terms, the new separate and subordinate organizations typically also became defined as the separate, sole "employers" of "their" workers. Of course, legal tests and rules pertaining to *de jure* "employer" status *constrain* the *degree* to which lead firms can alter employer status through organizational restructuring, and lead firms also still need to balance the potential gains from this outcome against their need to maintain a *sufficient* degree of control over subordinate firms (and/or "their" workers) for fissuring to be successful, from the perspective of the lead firm. Weil's analysis suggests that employer status tests for determining the single "true" employer, weighted heavily in favour of conceptions of "control" over work activities, have provided ample scope for lead firms to strike the balance needed for successful fissuring to occur.²⁵

²⁴ While he does not define it as a separate category in its own right, Weil also cites the expansion in temporary help agency employment as an important example of fissuring and, although its categorization is not precisely specified, he seems to treat agency-supply relationships as being specific examples of subcontracting and/or supply-chain structures.

²⁵ Weil's claim about the relationship between employer-status rules and fissuring is within the U.S. context. The degree to which the functioning of Canadian employer status rules in labour law may have affected the relative degree of fissuring in Canada is not known. Although employment law in both countries has much in common in the approach to allocating employer status, some substantive differences seem to exist. See Sack, Phillips and Leal-Neri (2011).

This shift of work/workers “outward” has created various advantages for lead firms. One key advantage has been that it has enabled lead firms to avoid direct employment-related responsibility and *liabilities* while still obtaining its necessary labour supply. Arguably, this focus on liability avoidance has been the primary emphasis in literature discussing these organizational trends, and has also been the primary focus of related policy dialogue.²⁶ However, a deeper structural effect of fissuring that has been less emphasized in policy dialogue is the generalized erosion of worker *bargaining power* produced by fissuring (Bartkiw, 2015). As Weil notes, fissuring alters the underlying wage determination process itself. Fissuring enables lead firms to locate work/workers into “spaces” in which there is comparably more competition in labour supply. This is partly the result of the fact that in the new “product” market that the subordinated firm now competes, there may be other competitors (or potential competitors) with respect to the supply of this service to the lead firm. Heightened competition is also a product of comparably lower barriers to entry into the narrower scope of business activity performed by the subordinate firm. Lead firms may capture some of the benefits of this competition, leaving comparably smaller profit margins for subordinate firms, and increased competition based on labour costs.

Organizational incentives to fissure, and its consequences, are logically mediated by the nature of the legal regime governing collective bargaining and the predominant patterns in *bargaining structure* that it fosters (Bartkiw, 2015). In the Canadian private sector context, a highly decentralized bargaining structure has been imposed by the legal regime, given the default rule that workers within a defined bargaining unit must share *inter alia* the same, single “employer”.²⁷ This approach to bargaining unit determination

²⁶ In fact, policy responses aimed at this liability-avoidance consequence is the predominant concern in Weil’s book. For criticism of this limited approach to assessing the consequences of fissuring, see Bartkiw (2015). Similarly, see also the discussion of policy dialogue around the regulation of temporary agency employment and how it has focused primarily on user firm avoidance of minimum employment standards and related liabilities, in Bartkiw (2009), and fails to take into account shifts in worker bargaining power produced by triangular employment relations (on this see also Bartkiw, 2014).

²⁷ Of course, the “related employer” provision in section 1(4) of the Act “stretches” the default rule to some degree. For a discussion of the resiliency of the default assumption in law that an “employer” be a single entity, and how this is the historical residue of master and servant law, and its dependence upon a psychological conception of a unitary “master”, see Fudge (2007).

magnifies the potential gains to lead firms from organizational fissuring strategies. Fissuring produces further disaggregation in bargaining unit structure, pushing the bargaining process to comparably lower “levels” throughout the economy (Bartkiw, 2015). Returning to the relevance of this context to strike dynamics, the decentralization of bargaining structure re-maps the boundaries of permissive strike activity. Fissuring generally narrows the scope of potentially disrupted work activities by a strike of a given bargaining unit, and thus, under fissuring, lead firms (or firms “higher” up the network) may be better able to adjust production activities in response to strike disruption at a subordinate firm, by substituting an alternative supplier to the network.²⁸

Some past quantitative studies may shed some light on the consequences of industrial restructuring and fissuring on strike activity. In his econometric analysis of strike data pertaining to Canadian manufacturing firms from 1965-1985, Budd (1994) found evidence that smaller bargaining units had a lower propensity to strike than larger ones. Using data on Ontario contract settlements from 1984-1993 in bargaining units of all sizes, Hebdon et al. (1999) also found that small bargaining units had comparably lower propensities to strike. These effects held in both the public and private sectors. They also noted a trend towards smaller bargaining units in society over time, noting that the average size of a sample of newly organized units was 48 employees, while their aggregate sample bargaining unit size was 138 employees, suggesting that this would likely generate decreases in strike activity in future. In terms of measures of the probability of an impasse, their analysis suggested that the likelihood of a stoppage in the smallest size categories was 8.8 percentage points lower than in the largest size categories. Campolieti et al. (2005) also found that smaller bargaining units had a lower probability of strike incidence. Notably, they found that the odds of a strike were at least 82% smaller in bargaining units with fewer than 21 members than in those with

²⁸ This substitutability effect likely explains why there does not appear to have been any successful attempts to organize bargaining units of temporary help agency workers at the “level” of the individual temporary help agency in Canada. See Bartkiw (2009).

500 or more members (Campolieti et al., 2005, at 627). These effects of unit size were generally confirmed in Campolieti, et al. (2014).²⁹

One specific form of workplace fissuring in recent decades has been the significant expansion in temporary help agency employment (Vosko, 2000, 2010; Bartkiw, 2009). This trend has a few potentially relevant implications on work stoppages activity, aside from its effects on union growth in general.³⁰ First, the expansion of agency-supply arrangements as an increasingly normalized substitute for direct employment relations has produced a larger, stable structure for indirect labour supply. The Canadian (and Ontario) temporary help sector grew significantly in the 1990s and 2000s in terms of nominal volumes of work, and in proportion to total labour supply (Bartkiw, 2009). Although the precise question has not been examined, it suggests the possibility of an increased capacity of employers to utilize agency-supplied labour in response to work stoppages. Further, there is some evidence of an increasingly regular employer practice in recent decades of building agency-supply arrangements into their *normal* work operations, to varying degrees of intensity, with employers maintaining *both* a pool of regular “direct hire” employees and a separate pool of agency-supplied workers (Bartkiw, 2012). Assuming workers overcome the barriers to unionization that these arrangements pose, the presence of agency-supplied workers performing similar or related work to bargaining unit employees within an organization still threatens to undermine strike efficacy, since the employer already has in place a pool of non-bargaining unit workers (unless the union has been able to achieve their full inclusion in the bargaining unit) performing related/similar work as the bargaining unit, buttressing

²⁹ Certain studies suggest some possible relationship between bargaining unit size and strike duration. Hebdon et al. (1999) found a negative correlation between unit size and strike *duration*. Campolieti et al. (2005) found a similar relationship. Finley (2010) “corrected” U.S. strike data by removing all strikes of a *pre-determined* length, or strikes in which the precise length of it is established by the union before they occur. These authors do this based on the theoretical assumption that in these strikes, the role of size does not bear upon duration, or does not do so in a similar way as in cases where duration is not predetermined. Finley found that strikes tended to be shorter when the striking workers unit represented a larger proportion of the employer’s overall workforce, and that, with the inclusion of these new variables, the effect of raw bargaining unit size was no longer significant.

³⁰ These additional effects on union growth may involve multiple causal pathways. See Vosko (2000); and Bartkiw (2009, 2012, and 2014).

its ability to continue operations in the event of a strike (Bartkiw, 2012).³¹ Since these arrangements are visible to bargaining unit employees in advance, they may reasonably be expected to produce some strike deterrent effect.

Overall, there seems to be both theoretical and empirical support for the notion that various contextual factors have produced a general decline in the instrumentality of strikes, which helps explain the long run decline in strike incidence that we have observed in recent decades.

B) The effects of specific components of the collective bargaining legal regime on work stoppages and related outcomes

Another body of literature uses quantitative research methods to examine the correlation between the existence of specific components of the legal regime governing collective bargaining on various outcomes such as work stoppage incidence, duration, total work days lost, wages, employment and investment. A few general comments on this body of quantitative studies is needed, prior to reviewing the various results they offer.

Most quantitative studies of strikes are self-described as being of a purely *empirical* nature, in the sense that they are not framed as tests of any specific model of strike behaviour *per se*. This is because many strike theories only provide ambiguous predictions as to the effects of many policy variables, and there has not been significant effort in incorporating policy variables into theories of strike behaviour.³² Most of these econometric studies build upon the approach taken in a 1989 study analyzing work stoppage data by Gunderson, Kervin and Reid. This study sought to examine the *independent* effects of different components of labour policy using quantitative methods. Intuitively, the models are designed to find policy-based explanations for the differences in patterns of strike incidence (the dependant variable) across jurisdictions and time.

³¹ In their organizing activities, unions commonly need to make a strategic decision to *exclude* agency-hired workers from proposed bargaining units in their certification application, despite commonality in job functions, because of the comparable difficulty of obtaining support from amongst agency-hired workers, and the necessity of majority support amongst workers in the bargaining unit established in the certification process. See Bartkiw (2012).

³² See also the discussion above on the variety of theoretical models of strike behaviour.

The structure of this study, and all subsequent ones reviewed in this section, was “time-series cross-sectional,” since data observations occurred in all Canadian jurisdictions (10 provinces plus the federal jurisdiction), and also occurred over time (here, during the period 1967-1986). All of the data in this study was limited to Canadian data, and the same is true for all subsequent quantitative studies reviewed in this section. As part of the quantitative modelling exercise, a set of “independent variables” is constructed to represent, within the model, specific components of labor policy. At all points in time and in each jurisdiction (i.e. whenever and wherever each contract may have been settled), each of these labour policy independent variables are defined in a binary sense as either existing or not (i.e. mathematically, to be equal to 1 or 0). A crucial precondition for whether this sort of analysis is even *possible* to perform (let alone insightful), is that labour policy *must vary*. In fact, each and every separate component of labour policy must vary, in order for it to even be possible to use any such component of labour policy as a separate variable in the model. This is because all that the model is ultimately doing with respect to each dependant and independent variable is trying to measure whether the two variables are tending to *move* in some consistent manner (correlation), or not. The main reason why there is a fairly large set of Canadian studies of the relationship between strikes dynamics and labour policy (and so few U.S. ones) is that researchers take advantage of labour policy differences across Canadian provinces, treating this as variance. The amount of variation in labour policy over time is not great.

In the original Gunderson Kervin and Reid (1989) study, they defined the following set of 9 labour policy variables, and “coded” them based on their existence at precise time-periods, and within each jurisdiction: conciliation (in either a 1-stage or 2-stage form); cooling off periods (post-conciliation); mandatory strike vote requirements; employer initiated (“final-offer”) votes; mandatory dues checkoff; anti-temporary replacement worker restrictions; rights to reopen negotiations; rights to reopen negotiations due to technological change. Subsequent studies of strike dynamics, although they are largely built on the same time-series cross-sectional model structure, have altered this original set of labour policy variables somewhat, which in itself can have an impact on some of the estimates. This makes it hard to merely compare the results as representing

differences in policy effect shifting over time, and there are numerous conflicting results for several labour policy variables across the different studies, which to some extent then forces the reader to identify either technical or theoretical grounds on which to prefer the results of one study over another.

In quantitative analysis of this sort, the measures of the separate coefficients on the policy variables are estimates of the isolated independent correlation occurring between the existence of the policy in question and the dependant variable being examined, holding all other “effects” constant. In fact, although the word “effect” is sometimes used in discussing results of quantitative studies, this is problematic terminology, since quantitative models generally³³ do not confirm causality, only correlation. Causality is ultimately a matter of theoretical interpretation.

Since the particular historical period analyzed in a given study is also an important issue to consider when assessing the evidentiary value and relevance of past studies, the historical timeframes, jurisdictions, and data used in the various studies reviewed in this subsection are summarized for quick reference and comparison in Appendix 2.

Although there are specific concerns pertaining to specific studies, which are discussed below, a few concerns about the degree of reliability of this entire set of studies overall should be noted at the outset. First, since a large part of the variation in labour policy is actually cross-sectional differences, this means that capturing the effect of any such differences effectively is important. However, there are limits to the ability to do this in this approach. Models have limited ability to capture the various “province-specific” characteristics or phenomenon that could also be affecting the various strike dynamics in question. To the extent that those effects are not captured, models may produce misleading estimates of the effects of labour policy variables, as the model “does not know what it does not know”. Second, the components of labour policy do not exist in isolation from each other, and are often adopted as large bundles of different provisions simultaneously. This means that when a legislative change in a specific provision represented by an independent variable is coded into a model, the model may take no

³³ Some more advanced techniques are designed to improve causal inference, including instrumental variable estimates, difference-in-difference estimates, regression discontinuity estimates, longitudinal estimate.

account of the fact that various other legal provisions were also changed at the same time. Whether this “matters” or not depends on the specific context. When two independent variables change at the same time, this reduces the ability of the model to *separate* out the correlation between these variables and the independent variable. This is an important issue in these studies, particularly in the case of trying to determine the effects of anti-temporary replacement worker (“ATRR”) provisions. The specific concerns for different models are outlined more fully in the discussion of the specific outcomes of the studies below. A third concern pertains to the essence or true state of the law and the true differences in the law that are *represented* within the construction of the labour policy variables in these models. In quantitative modelling, some simplification of complex reality is necessary, and this is also the case in most forms of social research. However, policy analysis must be cautious and mindful of the fact that this simplification process is occurring. In this vein, there appear to be some conflicting understandings of some aspects of Canadian labour law that have been “fed” into these models by different researchers, and it is suggested that different researchers could reasonably disagree on the appropriateness of including certain variables based on the alleged degree of difference in the state of the law across Canada with respect to some labour policy provisions. More detailed examples of this issue are provided in the review of specific studies below. Overall, these concerns about model specification raise significant concerns about the ability to rely on the results of these models to justify policy choices relating to specific components of labour policy.³⁴

In what follows, a fairly detailed review of these studies is provided. Rather than proceeding through each study, one at a time, and reviewing all of the results pertaining to each policy variable in each study, the results of these studies have been organized into separate subsections for each of the labour policy variable sub-categories requested by the CWR in the Statement of Work. Specific concerns relating to specific studies are also discussed below.

³⁴ Some scholars have expressed skepticism about the ability of econometric models to incorporate the necessary complexity in real-world factors determining work stoppages and related outcomes. See for example, Savage and Butovsky (2009).

i) *Anti-temporary replacement worker restrictions (ATRR)*

In the initial study of 1967-86 unit-level contract settlement data, Gunderson, Kervin, and Reid (1989) found that the relationship between ATRR and strike incidence was statistically significant, and their model suggested that the presence of ATRR in a jurisdiction was associated with a 24.4 percentage point increase in the probability of a strike in a given round of negotiation in that jurisdiction.³⁵

Gunderson and Melino (1990) also examine the correlation between various labour policy variables, including ATRR, and strike duration, using data from 1967-85, but with data restricted to large (500+ employee) bargaining units. They found that ATRR was significantly associated with substantially longer strikes. However, the authors noted that reliance upon this result requires caution since it was not only surprising, but was also based entirely on the experience of Quebec, and thus the model might be picking up other Quebec-specific effects.

Budd (1996) found that in one of his models, the effect of ATRR on strike incidence was statistically significant and positive, increasing the likelihood of a strike by 13.3 percentage points. However, pointing out that there may be other province-specific effects in the data that are not fully captured by the model, Budd also ran separate models on the data with provincial dummy variables attempting to control for these differences. The inclusion of these controls greatly reduced the size of the estimated effect of ATRR on strike incidence, and although they remained positive, the estimates were no longer statistically significant, meaning that they were less precisely estimated, and there was insufficient evidence to reject the null hypothesis of their having no effect. Budd also tested for the effect of ATRR on strike duration. He found that ATRR was significant and associated with longer strikes. Lastly, Budd examined the relationship between ATRR and wages, using various indicators of wage growth. Here, he found conflicting results (positive and negative outcomes) using two different wage measures. Further, once province-specific effects were controlled for with dummy variables, the correlation with ATRR became much smaller in size and ceased to be statistically

³⁵ This value is from their Table 2, which provides three separate estimates based on underlying strike probability. I use the results in their column 5, estimates based on underlying *average* strike probability.

significant. Budd's study illustrates the difficulty of analyzing the relationship between ATRR and other variables, since there is a limited set of historical observations available, with studies up to 1993 relying almost entirely upon observations pertaining only to Quebec, with limited ability to analytically isolate the independent effect of this one policy from all other province-specific phenomena.

Langille (1995) discusses Ontario's ATRR provisions (in effect during 1993-95) and comments on recent studies (Budd, 1996) of the effect of this short-lived policy change. He questions whether Ontario's 1993-95 ATRR provision can be presumed to have had much of an effect, in any dimension. He argues that quantitative analysis seems to merely *assume* it is possible and appropriate to model the effect of this legal change with insufficient theoretical attention as to whether the new law intuitively threatens to alter actor behaviour to a significant degree. In minimizing the significance of the 1993 ATRR provision, he cites the low volume of historical usage of replacement workers (approximately 12% in Ontario in the year 1991 according to Haywood (1991)) and suggests that this supports the claim that the ATRR provision likely made little practical difference, perhaps contributing to the difficulties of capturing statistical significance of the ATRR variable in quantitative studies.³⁶

Crampton, Gunderson, and Tracy (1999) examine the correlation between ATRR and strike incidence, duration and wages from 1967 to 1993. Their results were similar to prior studies, but yielded more modest measures of the size of relationships. Their models estimated that the presence of ATRR increased the probability of a strike in a given case by 12.2 percentage points, although the effect was not found to be statistically significant. Further, ATRR was significantly associated with much longer strikes, with sizes varying by choice of model specification. In their preferred model, ATRR was associated with a 46% increase in average strike duration. As well, in their models of real wages, ATRR was associated with slightly more than a 4% increase in real wages.

³⁶ However, this does not address the question of the *threat* of using replacement workers, under alternative rules.

Budd (2000) examined the correlation between different labour policy variables, including ATRR, on provincial employment, using data on monthly observations from January 1966 to December 1994. This period of study allowed for observations not only during the timeframe when ATRR was in place in Quebec, but also for when it was in place briefly in Ontario and BC, although it only includes a *portion* of the period during which ATRR was in place in Ontario and BC. A fairly simplistic “difference-in-difference” exercise, which used growth in other provinces as a benchmark but did not attempt to control for other potentially relevant causal variables, suggested that ATRR was associated with a decrease in the aggregate employment-to-population ratio in each of Quebec, Ontario and B.C. Regression models were also constructed, analysing trends in the employment-to-population ratio and in unionized employment, and all suggested that ATRR was significantly associated with a reduction in employment. Different models suggested that ATRR was associated with a decline in the employment-to-population ratio (which had a mean of 57.9 percent) by .47 percentage points to 1.28 percentage points. Using a different measure of employment, other models also suggested that ATRR was significantly associated with fairly substantial declines in unionized employment. Models that attempted to control for province-specific effects to some degree resulted in smaller estimates of employment decline, and there was evidence that time-varying effects were important. Unfortunately, Budd’s overall modelling design did not allow for estimating the effect of province and year effect *interactions* – a technique subsequently performed on various policy variables (including ATRR) in Campolieti et al. (2014), and with important consequences for the results.

Budd and Wang (2004) analyzed the correlation between striker reinstatement rights and ATRR on provincial investment rates. Their data included observations of provincial net investment rates and related variables from 1967 to 1999. They found that net investment was significantly and negatively correlated with ATRR. In terms of size, their models estimated that ATRR was associated with approximately a 25% decline in net investment. In models assessing the degree of correlation between ATRR and investment across different industries, they found that the comparably strongest relationship appeared to be in building construction. In models of the time-varying effects of labour policy, only the negative effect on building construction (and no

other industrial sectors) was significant in the first three years after ATRR took effect, but an overall negative effect was also estimated for the period following three years after the adoption of ATRR.

Duffy and Johnson (2009) evaluated the effect of ATRR in a more recent dataset from 1978-2003, and used annual, province-level aggregated data rather than unit-level data used in most other studies. The design of this study on the one hand used somewhat less information, given that data was more aggregated, but on the other hand involves somewhat more historical variation in the use of ATRR, reducing somewhat the dependence on the historically specific outcomes observed only in Quebec. Further, following Budd (1996) they employed additional labour policy variables attempting to further control for the effect of the presence of striker reinstatement rights (and thus bans on permanent replacement workers), and of the presence of strike-breaker restrictions. They found that the presence of ATRR was significantly correlated with an increase in strike incidence by approximately 50%. Contrary to prior studies, they also found the presence of ATRR was significantly associated with a large decline in strike duration. With the mean strike duration of 34.14 days, two models yielded estimates of reductions of duration by 35 and 49 days. Lastly, they found that ATRR was significantly associated with an overall increase in total days lost to work stoppages, with two models yielding estimates of 880 and 1550 days lost per year. Duffy and Johnson also test to see whether the correlation between ATRR and these three different phenomena (incidence, duration and total days lost) vary over time, and specifically look for a difference in effect between the period of 1-2 years before ATR was in effect, the 2 year period after the legislation is passed, and the period more than 2 years after the legislation took effect. Their results suggest that with respect to incidence and duration, the effect of ATRR persisted for more than the 2 year period, but that there was very weak evidence that this translated into an increase in days lost to work stoppages, after the 2 year period.

Dachis and Hebdon (2010) use unit-level data from 1978-2008, and a similar set of policy variables as used in prior studies in this area. They found a significant positive effect of ATRR on strike incidence; with a mean of .72 strikes per month per province,

their models suggested that ATRR increased strike incidence by .11 strikes per month, roughly a 15% increase. They further found that ATRR was associated with a 58% increase in average duration, and that the effect on duration was significant. Dachis and Hebdon also examined the effect of ATRR on wages. Contrary to their expectations and results of some prior studies, they find that ATRR had a significant negative effect on wages, with their models yielding an estimated reduction of 3.4% in the level of private sector real wages. A concern about the results in this study is that most of the models in the study of the behaviour of numerous dependant variables, were run using a standardized set of labour policy variables, such that models of strike dynamics also included an additional independent variable representing whether a secret ballot union certification process was required in existence in each jurisdiction and time period, with arguably questionable theoretical justification.³⁷ Such a variable would be more properly included in studies of union growth, and seems out of place in these models. This specification choice may also affect reliability of other results in this study to some degree.

Campolieti, Hebdon and Dachis (2014) perform quantitative analysis on strike data from 1978-2008, using unit-level data pertaining to bargaining units of all sizes. This is the most recent econometric study of the effect of ATRR, using the most recent dataset. Also, the authors perform certain improvements in estimation technique, not included in prior papers. One key improvement involves correcting for “clustered standard errors”, which are the result of using labour policy variables that vary only at the *province* level, in an analysis of unit-level data. Employing this correction caused fairly significant changes to results from prior studies. Many estimated coefficients were found to be smaller in size, and statistically insignificant. A key difference in the results was that they could no longer reject the null hypothesis that all labour policy variables tested as a whole, had zero effect on strike incidence. Further, since the authors noted the existence of major contextual shifts in the external environment in more recent decades (discussed earlier in this report), they also examined whether there was evidence of time-varying effects of different labour policy variables, on the various outcomes. To do

³⁷ I would note that in Campolieti et al, 2014, a subsequent published study involving these same two authors as co-authors, this variable was removed.

this, they used “dummy” variables for the time period after 1992, and looked to see whether there was significant effect of various “interaction terms” measuring the combined effects of these dummy variables and labour policy variables. In other words, they looked to see if there was evidence of a statistically significant different effect of policy variables like ATRR, on different outcomes, after 1992. With respect to strike incidence, they found that ATRR also had no statistically significant effect in the post-1992 period. They also estimated that ATRR was significantly and positively correlated with strike duration, and that there also appeared to be a greater degree of correlation between ATRR and strike duration in the post-1992 era. Certain tests they performed also provided evidence that these effects were robust across bargaining unit sizes. Lastly, their models of wage dynamics for the entire 1978-2008 time period suggested that ATRR has been associated with a decline in wages of about 1.8% throughout this period. However, their models also suggested that the correlation between ATRR on wages has been highly *time-sensitive*. Using various different specifications, they found that the correlation between ATRR and wages was statistically significant and *positive* in the more recent, post-1992 era. Estimates of the size of wage growth associated with ATRR post-1992 varied across models from 2.3% to 7.3%. The authors suggested that one possible interpretation of these *reversed* effects of ATRR (and other labour policy variables) is that in more recent years, policy functionality has changed as a result of the new environment of expanded employer bargaining power.

Lastly, Legree, Schirle and Skuterud (2014) estimate the effect of various components of labour law on provincial union density rates over time. In their estimates of the isolated independent effects of various components of law, they found that ATRR was significant and associated with a positive effect on union growth, and in fact had a larger estimated effect than all of the other components of law that they examined, including the type of union certification procedure.

Comments and Assessment of these Studies:

In summary, with respect to the crucial policy question of what have been the historical effects of ATRR provisions in Canada, we have somewhat of a range of answers from the literature published over the past 36 years.

With respect to strike incidence, prior to Campolieti et al. (2014), there was near consensus that ATRR increased strike incidence, but with estimation improvements in the latter study, this older consensus now seems rebuked. With respect to strike duration, most studies suggested that ATRR was also associated with increased strike duration, although Duffy and Johnson (2009) found the opposite. Under estimation improvements in Campolieti et al (2014), ATRR was found to be positively correlated with strike duration to a comparably greater degree in the more recent (post 1993) era. With respect to wages, some early studies suggested that ATRR was associated with higher wages, suggesting that this operated through a shift in bargaining power, although Budd (1996) and Dachis and Hebdon (2010) produced conflicting results, suggesting a negative wage effect operating through investment reductions. Budd (2000) and Budd and Wang (2004) support this latter interpretation since their results suggested provincial aggregate investment was negatively correlated with ATRR. However, with their improved estimation techniques and most recent data, Campolieti et al. (2014) find that ATRR is associated with wage increases in the most recent (post-1993 era).

Overall, there appear to be various methodological grounds for preferring the results of Campolieti et al., 2014 over other studies, although there are still certain concerns about this study, along with the rest, that are reviewed below.

As admitted in most of these studies, labour policy provisions are typically not adopted in isolation, but rather as part of a legislative package, with a bundle of components. With respect to ATRR, even the most recent econometric studies reviewed above are heavily dependent, in a mathematical sense, upon measures of outcomes observed during a short-lived presence of ATRR in Ontario from 1993-1995. However, the ATRR mechanism that was in place in that short period was part of a large package (“Bill 40”) of labour law reforms, many of which also had a fairly short lifespan, since they were also revoked with the adoption of “Bill 7” in 1995.³⁸ Assuming then that it is even possible to speak of purely independent effects of ATRR alone, separate from all other aspects of law, these models are not able to isolate the “effects” caused by other

³⁸ Bartkiw (2008) includes a summary of the different shifting components of labour law in this timeframe.

components of labour law that also shifted in Ontario during this timeframe, from the effects of ATRR, because they shifted together as a bundle. This means that, assuming there were investment and employment effects experienced in Ontario that were truly due to Ontario labour law shifts in the mid-1990s, then the models ought not to be interpreted as picking up evidence of effects of ATRR alone.

Relatedly, as was discussed earlier in this paper, there is a general limitation across these studies that labour policy variables themselves do not actually *vary* (the essence of a *variable*) all that much. Much variation is cross-sectional, while variation over time is minimal, compared to the behaviour of many other commonly used variables, like GDP growth or other business cycle indicators. This affects the ability to “zero in” on the true relationship between a specific labour policy and other phenomena, and means that results produced will be increasingly affected by how models are specified.³⁹

Returning to our uncertainty over the question of employment and investment related effects of ATRR, if we look at the research design in Budd (2000) and Budd and Wang (2004), these models, out of necessity, rely on the Ontario experience of labour policy *change* in the mid-1990s to a substantial degree. That is, the estimated relationships, and their significance, are based in no small part on the fact that in the mid-1990s, while ATRR was in place in Ontario, there were observed declines in investment and employment levels. However, during much of this same time period, the Ontario economy was also being affected by a fairly widespread recession, and both investment and employment are expected to decline during a recession. Matters are further complicated by the fact that the North American Free Trade Agreement took effect on January 1, 1994, and this may have had certain additional investment and employment related effects due to industrial restructuring in the Ontario economy. To try to separate out both of these business cycle and industrial structural effects from labour policy effects, Budd (2000) and Budd and Wang (2004) *do* use various control variables

³⁹ To a degree, this difficulty was seemingly *masked* in some of the prior studies in this area that did not employ the technique of correcting for “clustered standard errors” that are generated with the combined use of unit-level data on certain variables with provincial-level data on labour policy variables, the latter of which suffer from a lack of variation. This technique which effectively “punishes” outcomes on this basis, making estimated results more conservative, was only applied in Campolieti et al. (2014). Apparently, this technique was not technically feasible at the time of most of the earlier studies, but has become feasible and reasonably expected to be done in such studies, in recent years.

representing different measures of the business cycle, and they also include controls for the proportion of employment represented by manufacturing and public administration. Ultimately however, the fact is that these employment and investment declines took place at a time in Ontario when declines of *some* size were to be expected from the recession (and possibly also from industrial restructuring). Given a general lack of variation in labour policy over time for comparison to investment/employment fluctuations over time, this raises concerns about the reliability of model estimates of *the specific proportion* of variation in employment/investment that is correctly *attributed* to labour policy as opposed to other factors. In this modelling context, the degree to which employment/investment variation is attributed to labour policy as opposed to other factors will be *sensitive* to the precise econometric model specifications chosen by the researcher.⁴⁰

ii) *The legislative requirements for a legal work stoppage:*

Many of the quantitative studies already reviewed in the above section also sought to estimate the effects of three different kinds of legislative requirements for a legal work stoppage: *mandatory conciliation, mandatory strike votes, and mandatory cooling off periods*.

Gunderson Kervin and Reid (1989) found that mandatory conciliation was associated with reduced strike incidence, with a larger and more significant reduction found in relation to two-stage conciliation. Their models also suggested that an additional cooling-off period after conciliation had little association with strike incidence, and that mandatory strike votes had a significant and large effect on reduced strike probability.

Gunderson and Melino (1990) found that the relationship between conciliation (in either one-stage or two-stage forms) and strike duration was not significant. The cooling off period variable was significant and was associated with a reduction in duration. Also, the presence of mandatory strike votes was significant and was associated with substantial reductions in strike duration.

⁴⁰ This includes choices about the set of variables to include; different data measurements or indicators pertaining to certain variables; whether certain variables should be linear, logarithmic, or lagged; and the estimation procedures chosen.

Crampton, Gunderson and Tracy (1999) estimated the effects of each of these three policy variables on strike incidence, duration and wages. With respect to strike incidence, they found evidence that conciliation reduces strike incidence, and that two-stage conciliation produces a larger effect, although their estimates were not statistically significant. Under their estimates, a 14 day cooling off period reduces strike incidence by 4.8 percentage points compared to a jurisdiction without conciliation. Similarly, mandatory strike votes were significant, and associated with a reduction of over 7 percentage points in strike incidence. In their models relating to strike duration, they found that conciliation was associated with longer strikes, suggesting that its success in reducing strike incidence may pertain to what would have been shorter strikes, shifting the composition of strikes that do occur. Both mandatory strike votes and cooling off periods were associated with shorter strikes, but only the former was statistically significant. With respect to wages, only the cooling off period variable was found to be significant, and their models suggested that it was associated with quite a large reduction (4%) in wage settlements. This seems to be a rather radical finding. Since there is no apparent *theoretical* justification for why this particular policy instrument should influence wage levels to such a great extent (in *either* direction) this outcome therefore reasonably raises concerns about accuracy in overall model specificity.

Budd (2000) includes control variables for mandatory strike votes and cooling off periods in his models of the effects of ATRR on employment, although he does not include conciliation as a variable. He finds that mandatory strike votes are significantly associated with a small increase in the employment rate. With respect to cooling off periods, the evidence is mixed, with them being significant and negatively correlated in some models, but insignificant in others. Again, there is debatable *theoretical* justification for inclusion of these bargaining process variables, and a theoretical case for their causal effect on employment levels is not even provided by the author. Rather, Budd simply notes that sometimes his main variables of interest (replacement rights and ATRR) are adopted as part of a package of other measures, and so the inclusion of these other bargaining process variables in this model of employment is done to try to isolate out their effects, but again, this begs the question of whether any effects are a

priori expected. In this situation, relying on the estimates pertaining to these control variables as accurate measures of employment effects demands great caution.

In their models of strike incidence, Duffy and Johnson (2009) found that neither compulsory conciliation nor mandatory strike votes were significant. The number of days of a cooling off period, however, was significant, and incidence declined with increases in the cooling off period. In their models of work stoppage duration, they found that conciliation was not significant, but some evidence that cooling off periods were significant and reduced strike duration, while mandatory strike votes were significant and associated with increased average strike duration of 28 days. This latter result seems particularly surprising and conflicts with results in prior studies. In their models of days lost to work stoppages, neither cooling-off periods nor mandatory strike votes are significant, but in one model, conciliation is significant and associated with very large reductions in days lost.

In their models of wage effects, Dachis and Hebdon (2010) find that conciliation was not significant, but mandatory strike votes and cooling-off periods are significant and associated with substantially higher (2.8%, and .4% per day respectively) real wage levels. These are somewhat unexpected results, there being little *a priori* theoretical justification for such substantial wage effects of these particular bargaining process variables. In their models of strike incidence, conciliation is significant and associated with fewer strikes, while mandatory strike votes are also significant but associated with more strikes. The authors omit any reference to the relationship between cooling-off periods and strike incidence. In their models of strike duration, they find that mandatory conciliation and cooling-off periods are significant and associated with substantial (41.2 days and 2.5 days/day of cooling-off respectively) increases in average strike duration. They also found that mandatory strike votes were significant and substantially reduced strike duration. All of these results concerning strike duration conflict with results in Duffy and Johnson (2009). Lastly, see the discussion above about it arguably being a model specification error in this study to include a variable relating to the presence of a secret-ballot vote in the certification process as a variable in these models, affecting the reliability of results in this study.

In contrast to most of the prior research in this area, Campolieti et al (2014) found that each of conciliation, mandatory strike votes, and cooling-off periods are not significantly correlated with strike incidence. Their models controlling for time-varying effects suggest that the effects of cooling off periods in incidence may be larger pre-1993, but the effects of conciliation and mandatory strike votes are larger post-1993. In their models of strike duration, conciliation is not significant, while cooling off periods were significant and associated with a small increase in strike duration. Mandatory strike votes are also significant and associated with shorter strikes. Their models testing for time-varying effects, suggest that the effects of mandatory strike votes were larger in the pre-1993 data, the effects of conciliation are larger in the post-1993 data, while the effects of conciliation were of roughly the same size, but in the opposite direction. In their OLS models of wage effects, the presence of conciliation was associated with a 1% decline in real wages, cooling off periods were associated with a 0.2%/day increase in wage settlements, while mandatory strike votes were not significant. In models testing for time-varying effects, the effect of mandatory strike votes was larger in the pre-1993 data, while the effects of conciliation are larger in the post-1993 data.

Comments and Assessment of these Studies:

Studies in this area seem to have produced some conflicting results, and indeed some rather surprising results with respect to the effects of these three labour policy variables.

A significant concern is that there appears to be little *a priori* theoretical grounds for the implicit assumption made in many of these studies that in models of wage determination, these three dispute-narrowing process variables should also be included as independent variables. Nevertheless, it is a fairly clear pattern that most of these studies simply opted to include the entire set of labour policy variables that were initially used to model strike incidence in Gunderson et al (1989). While these may have been initially appropriate in theoretical terms for modelling strike incidence and/or duration, the determination of wages, employment, and investment are phenomena that are comparably more *distant* from these dispute-narrowing process variables, which reduces the *theoretical* justification for their inclusion. Their inclusion seemingly also resulted in some important effects on the results, since large wage effects seem to have

been attributed to one or more of these policy variables in certain studies, which on theoretical grounds is difficult to accept as being reliable.

With respect to the effects of these variables on strike incidence and duration, as noted above, on methodological grounds, there are a number of reasons to prefer the results obtained in Campolieti, et al. (2014) over others, and their findings suggest comparably more *modest* effects of these three labour policy variables. Somewhat surprising findings even in their study included a positive correlation between cooling off periods and strike duration. Given the presence in the data of what appears to have been a positive trend in strike duration in recent years, it is possible to interpret this result, and possibly some of the other findings pertaining to duration, as suggesting that the presence of these policy variables is not *causing* longer duration, but that policy is increasingly incapable of producing settlement in cases involving larger zones of disagreement (and/or that there are proportionately more of such cases) leading to longer strikes being observed, while still being able to settle “smaller” conflicts that would have resulted in shorter strikes.

iii) Reinstatement of employees following a work stoppage

A number of studies already discussed in this review also include analysis of the effects of striker reinstatement rights, such as the provision in section 80 of the Labour Relations Act, 1995. These rights effectively create a ban on the use of so-called “permanent replacements” by employers.⁴¹

Budd (1996) finds that reinstatement rights were not significantly correlated with strike incidence, and nor were they significantly correlated with strike duration. In his models relating to wage effects, reinstatement rights were generally statistically significant, with certain models suggesting a negative but negligible effect on wages, while other models suggested a larger negative effect of around -1%.

Budd (2000) models the effects of reinstatement rights, *inter alia*, on employment, with conflicting results. Certain of his models suggest that reinstatement rights are

⁴¹ Employers in the U.S. are generally entitled to use permanent replacements, with certain provisos. See NLRB v. Mckay Radio and Telegraph Co., 304 U.S. 333, 346 (1938).

significant and associated with an increase of roughly .33 to .55 percentage points in the provincial employment-to-population ratio. Other models suggest that reinstatement rights are significantly associated with small declines in unionized employment, with insignificant effects over time.

Budd and Wang (2004) model the effects of reinstatement rights, *inter alia*, on provincial investment. Their models suggest that the presence of reinstatement rights was not sufficiently associated with aggregate net investment, although some models suggested a significant and negative relationship between these rights and investment in the building construction subsector.

Duffy and Johnson (2009) found that reinstatement rights were significant and associated with an increase in strike incidence. In their models of strike duration, reinstatement rights were also significant and associated with a very large decline (45 days) in average duration. Both of the effects on incidence and duration were found to persist for more than 2 years after legislation was enacted. In their models of days lost to work stoppages, reinstatement rights were not significant.

Dachis and Hebdon (2010) found that reinstatement rights were significant and associated with very large declines (-5.3%) in private-sector real wages; were significantly associated with higher strike incidence (.44 extra strikes per month per province) and much longer strikes (an extra 47.4 days on average). See the discussion above about it arguably being a model specification error in this study to include a variable relating to the presence of a secret-ballot vote in the certification process as a variable in these models, affecting the reliability of results in this study.

Campolieti et al (2014) found a small positive relationship between reinstatement rights and strike incidence, the effect was not significant, and the size was larger post-1992. In their models of strike duration, they found that reinstatement rights were significant and associated with substantially longer strikes, with conflicting estimates of time-varying effects. In their models of reinstatement rights, they found that these rights were significant and associated with estimated declines in wages of 1.7% to 3.8%, with larger effects post-1993.

Legree, Shirle, and Skuterud (2014) take the approach of treating the existence of reinstatement rights and bans on permanent replacement rights as being *separate* variables from each other. Previous studies treated all such rules as a single variable construct. This is the first study in this line of studies to treat these this, since *qualitative* differences in the essence of these legal provisions is highly debatable. This raises concerns about the reliability of their results.

Comments and Assessment of these Studies:

These studies produced some conflicting results with respect to these components of labour policy. As noted above, on general methodological grounds, there are a few reasons to prefer the results in Campolieti, et al. (2014) over earlier studies.

As noted above, there are additional concerns about these models. Beginning with Budd (1996), these econometric studies began adding the presence of reinstatement rights as an additional independent variable in models, on the notion that not every Canadian jurisdiction provided these rights. Prior studies of labour policy did not include the presence of these rights as separate control variables seemingly because the authors either held a different interpretation of Canadian law, or because it was not clear that the law in different provinces on this issue was actually sufficiently different in a qualitative sense to justify treating the presence of these rights as being something that really *varied* throughout Canada.⁴² Generally, provincial statutes tend to specify that workers either have a right to reinstatement, or they alternatively contain some protection to the effect that workers cannot lose their employment as a result of the strike. Although formal distinctions may make it technically possible in extraordinary cases for an employer to use replacements *indefinitely*, the law has a degree of similarity, and other instruments, like unfair labour practice rules, may further narrow the difference in practice. Nevertheless, following Budd (1996) most of the authors in this area began to insert reinstatement rights as independent causal variables in their models. Indeed, one recent study (Legree et al, 2014) in addition to a variable for ATRR, there are separate variables used for each of reinstatement rights and bans on

⁴² In addition to studies noted already, see also Martinello and Meng, 1993.

permanent replacements, despite the near identity between the two concepts. In this study, variables are also coded on the assumption that Ontario law has *never* contained any ban on permanent replacements, even though Ontario *has* had reinstatement rights since 1976, including its most recent form in section 80 of the LRA since 1995. If this is not somehow a model specification error in this study, it at least raises serious concerns about how results are to be interpreted.

Overall, if these concerns about these models based on contestable *legal* understandings are accepted as valid, this raises caution not only about relying upon the estimates of the various effects being attributed to the existence of reinstatement rights in these models, but may also raise additional caution about relying on other results produced by these models.

iv) *Mandatory and permissive provisions in collective agreements*

A number of empirical studies already discussed in this section also attempt to estimate the effects of legislative provisions that fall under this category: mandatory dues deduction and reopener rights. The latter are sometimes treated as two separate categories, since sometimes the law allows for general reopener provisions to be included in collective agreements, while in some other situations the law specifically provides some protection for reopener rights in the case of technological change.

Gunderson, Kervin, and Reid (1989) found that neither the allowance of general negotiated reopeners, nor automatic technological reopeners were significantly associated with strike incidence. They also found that mandatory dues deductions were associated with a large and statistically significant reduction in strike incidence.

In their models of strike duration, Gunderson and Melino (1990) found that while general reopeners were not significant, automatic technological reopeners were significant and associated with a reduction of about 3.4 days in average strike duration. They also found that mandatory dues deductions were significantly associated with an increase in strike duration of about 6.4 days.

Crampton, Gunderson and Tracy (1999) found that general reopener rights were significant and associated with fairly large reductions in strike incidence. On the other hand, technological reopeners were significantly associated with fairly large increases in strike incidence. In their models of duration, only general reopener rights were significant, in the model pertaining to strikes in all bargaining unit sizes. In their wages models, these provisions were not significant. With respect to mandatory dues check-off provisions, these were found to be not significantly correlated with strike incidence, but were significant and associated with large (50%) increases in strike duration. In their models of wage effects, mandatory dues check-off provisions were not significant.

In his models testing for the relationship between replacement worker restrictions and employment, Budd (2000) includes the presence of mandatory dues check-off provisions as a control variable. In each of his models, the presence of mandatory dues check-off provisions was insignificant.

Duffy and Johnson (2009) find that mandatory dues checkoff rules are significantly associated with a substantial decline (of about 50%) in strike incidence. In their models of work stoppage duration, mandatory dues checkoff provisions were not significant. In their models of days lost to work stoppages, mandatory dues provisions were found to be significant and associated with very large reductions in days lost. Duffy and Johnson only include the control variable for technological reopener rights, and find that these are not significantly correlated with work stoppage incidence or duration but that they are significantly associated with a large increase in total days lost to work stoppages.

Dachis and Hebdon (2010) found that the presence of mandatory dues checkoff provisions was not significantly correlated with wages, strike incidence, or strike duration. Also, as noted above, it is arguably a model specification error that this study included a variable relating to the presence of a secret-ballot vote in the certification process as a variable in these models, affecting the reliability of results in this study.

Campolieti et al (2014) found that the presence of mandatory dues checkoff provisions was not significantly correlated with strike incidence, strike duration, or wage levels. They also found that the neither the presence of general reopener rights or

technological reopener rights was significantly correlated with strike incidence. In their models of strike duration, they found that general reopeners were not significant, but that technological reopeners were significant and associated with substantial increases in strike duration.

Legree, Schirle and Skuterud (2014) found that neither the presence of mandatory dues checkoff provisions, nor the presence of technological reopener rights, were significantly correlated with union growth.

Comments and Assessment of these Studies:

These studies produced some conflicting results with respect to these components of labour policy. As noted above, on methodological grounds, there are a few reasons to prefer the results in Campolieti, et al. (2014) over earlier studies.

An additional concern about these studies is that different studies have seemingly used different coding practices for the labour policy variables, based apparently on conflicting understandings of the actual state of the law. For example, in Gunderson et al (1989), Gunderson and Melino (1990), Crampton et al. (1999), and Duffy and Johnson (2009), models are coded on the understanding that Ontario law has never provided reopener rights, during the entire period of each study. In contrast, in Campolieti et al. (2014), models are each structured on the *contrary* understanding that Ontario law has *always* provided for general reopener protection throughout the entire historical period, but not specific protection for technological reopeners. These conflicting legal interpretations (and resulting model specification) not only make comparisons across the different studies very difficult, but may also raise some concern about the ability to rely upon the estimated effects of these specific legal provisions produced by these models, and/or possibly raise some concerns about relying on other estimates produced by these studies due to model specificity concerns.

v) *Other bargaining process policy measures – employer initiated “final offer” votes*

Some of the econometric studies already reviewed in this report also attempt to estimate effects of the presence of employer rights to request “final offer” votes.

Gunderson Kervin and Reid (1989) found that these provisions were significantly associated with substantially higher rates of strike incidence.

Gunderson and Melino (1990) found that these provisions were not statistically correlated with strike duration.

Crampton, Gunderson and Tracy (1999) found that these provisions were not significantly associated with strike incidence, but that they were significantly associated with a large decline in strike duration. They also found that they were significantly associated with a small increase in wages.

Duffy and Johnson (2009) found that employer initiated votes were not significantly correlated with work stoppage incidence, nor total days lost to stoppages, but that they were significantly associated with longer average work stoppage duration. See the discussion above about it arguably being a model specification error in this study to include a variable relating to the presence of a secret-ballot vote in the certification process as a variable in these models, affecting the reliability of results in this study.

Dachis and Hebdon (2010) found that employer initiated votes were not significantly associated with wages, nor strike incidence, nor strike duration.

Campolieti et al (2014) found that employer-initiated votes were not significantly associated with strike incidence, nor duration, nor wages.

Legree, Schirle and Skuterud (2014) found that employer-initiated votes were not significantly associated with union density rates.

Comments and Assessment of these Studies:

These studies produced some conflicting results with respect to the effect of employer “final offer” votes. As noted above, on methodological grounds, there are some reasons to prefer the results in Campolieti, et al. (2014) over earlier studies. Overall, the evidence from these studies is that these provisions appear to be neutral in effect towards the variables of interest.

Overall, as was discussed at the beginning of this section reviewing quantitative studies of strike dynamics, and repeated throughout the summary of various studies, there are a number of concerns about these studies collectively that demand significant caution in relying upon their results as justification for policy change pertaining to specific components of labour policy.

C) The Regulation of Picketing Activities

The regulation of picketing activities has deep historical roots in the common law, and formed an important component of early regimes of labour regulation (Fudge and Tucker, 2001). A significant amount of academic research is focused on tracing out the historical roots and evolution of the law governing picketing. Much of this work seems rather critical of the historical basis of picketing regulation, based as it is on a body of nominate and economic torts, and certain provisions in the Criminal Code, developed in the late 19th and early 20th centuries (Eaton, 1992; Adell, 2003; Smith, 2014).

Much academic analysis of picketing regulation highlights the role of judicial ideology in the development of legal doctrine over time (Sangster, 2004; Tucker, 2010). Historical analysis illustrates how on the one hand, judicial ideology is to some extent a product of the larger political-economic context (Tucker, 2010). However, ideology has also played a more specific role in precise historical contexts and moments. Tucker (2010) illustrates an important example of such a juncture in his analysis of the historical background to the 1963 decision of the Ontario Court of Appeal in *Hersees of Woodstock Ltd. v. Goldstein*,⁴³ in which the court held that secondary picketing was *per*

⁴³ (1963), 38 D.L.R. (2d) 449 (Ont. C.A.).

se illegal. This decision involved some now infamous reasoning, in which the Court likened workers' picketing rights to being only for the benefit of "a particular class only", while the right to engage in unimpeded commerce was for the benefit of the "community at large", and thus of a more fundamental and important nature. Writing forty years later, Bernie Adell called these statements the "much-reviled" passages in the decision (Adell, 2003).⁴⁴ Tucker outlines how this fateful decision was the product of "the right case, at the right time, with the right people" (Tucker, 2010, at 236).

Another study that also highlights the role of judicial ideology in the historical development of picketing regulation over time is Sangster's (2004) study examining the strike of workers at the Tilco plant in Peterborough in the mid-1960s. Sangster illustrates how the highly coercive responses of the local judiciary towards picketers made this strike a cause celebre for the Ontario labour movement, and an important political precursor to the Royal Commission on Labour Disputes in 1966 that subsequently led to the adoption of the additional restrictions on injunctions in labour disputes in section 102 of the *Courts of Justice Act*.

Gerard and Phillips also highlight the role of judicial ideology and the outcome of interpretive struggles within the judiciary in the elevation of private property rights over collective labour rights that occurred in the 1976 decision of the Supreme Court in *Harrison v. Carswell*,⁴⁵ and subsequent caselaw following this as precedent. In this case, the court held that a shopping mall owner could eject union picketers from a mall-owned sidewalk in front of their struck employer's grocery store, despite the fact that mall owners had invited members of the public to enter the property. Despite certain important decisions that distinguished *Harrison v. Carswell*,⁴⁶ and some short-lived legislative reforms (in Ontario), the authors conclude that the majority judgment in this decision has stood the test of time, and remains a potent source of restriction on picketing activities that would seek to take place on property owned by third parties, given modern spatial organization of work and commerce. Gerard and Phillips are also

⁴⁴ For an early critical response to the Court's legal reasoning and labour policy effects, see Arthurs (1963).

⁴⁵ [1976] 2 S.C.R. 200.

⁴⁶ See *Cadillac Fairview Corp. v. R.W.D.S.U.* (1989), 71 O.R. (2d) 206 (C.A.); and *R. v. Layton* (1986) 33 C.C.C. (3d) 550 (Ont. Prov. Ct.).

critical of the legislative reforms adopted in 1992 by the Ontario government that provided that union members “have the right to be present” on “premises to which the public normally has access”, even if privately owned, for organizing and picketing purposes, which required that the property in question had to be “at or near but outside the entrances and exits to the employees’ workplace.” The authors argued that these restrictions on the types of property to which picketing workers would have a right of access was a narrow codification of the ruling in *Cadillac Fairview (which distinguished Harrison v. Carswell)*, and that they reduced judicial discretion to expand the scope of this ruling to enable picketer access to other types of locations.

Turning to more recent developments in picketing regulation, MacNeil (2000) similarly argues that the Supreme Court decisions in *Kmart*⁴⁷ and *Allsco*⁴⁸ reflect traditional judicial characterizations of union activity. He criticizes the pains taken to analytically separate “leafleting” as a protected form of secondary activity distinct from all other forms of secondary picketing. He argues that the Court’s “invocation of the idea that conventional picketing, even when peaceful, acts as a signal and a form of social pressure, rather than as rational and informed discourse, clearly demonstrates the impact of ideology and metaphor.”⁴⁹

More recently, the symbolic pronouncement of the Supreme Court in 2002 in *RWDSU, Local 558 v. Pepsi Cola Canada Beverages (West) Ltd*⁵⁰ that picketing is a Charter-protected form of expression, suggests somewhat of a shift in judicial ideology to some degree,⁵¹ but also arguably reinforces the desirability to examine the appropriateness of this historical foundation of modern picketing regulation (Adell, 2003).

Adell (2003) assesses the impact of the *Pepsi* case on the state of the law governing secondary picketing. He argues that a key unresolved question pertaining to the

⁴⁷ (1999), 176 D.L.R. (4th) 607.

⁴⁸ (1999), 176 D.L.R. (4th) 647.

⁴⁹ Macklem (2000) comes to very similar conclusions in his review of caselaw leading up to and including *Kmart* and *Allsco*.

⁵⁰ (2002), 208 D.L.R. (4th) 385 (S.C.C.) (hereinafter “*Pepsi*”).

⁵¹ As Tucker suggests, some recent judicial decisions provide some evidence that there has been a shift in the prevailing judicial image of labour unions from what Arthurs famously quipped as being that of a “churlish adolescent” requiring additional coercive restraint, to that of “senior citizen” losing the capacity to cope with its more hostile environment (Tucker, 2010).

“wrongful action model” established by the Court is what sorts of secondary picketing behaviour, that does not involve a nominate tort or crime, will make secondary picketing unlawful? He argues that continued reliance upon the body of “industrial torts” is undesirable, suggesting that they are broadly understood as failing to constitute a rationally coherent and principled approach to determining illegality, and suggests that employers should be more strictly required to justify requests for restrictions on picketing on criminal and/or nominate tort conduct.

Dinsdale and Awrey (2004) provide a comment on the Supreme Court’s decision in *Pepsi*. Specifically, they take issue with what they claim is the Court’s reliance upon the decision of the U.S. Supreme Court in the *Tree Fruits*⁵² decision with respect to secondary picketing. The *Tree Fruits* decision involves a distinction between two forms of picketing: general and “struck product” picketing. They suggest that subsequent U.S. caselaw shows the difficulty of applying these doctrines in the modern economy. Lastly, they argue that courts underestimate the powerful nature of the “signalling effect” of picketing, regardless of the stated, literal message.

Smith (2014) provides an in-depth history and analysis of the Pepsi strike in which the workers challenged the legality of restrictions on their secondary picketing strategies, and which ultimately led to the *Pepsi* decision. Smith argues that the history of this event illustrates that underlying collective solidarity was the most important factor in the success workers achieved in this strike, generated at least partly through a short-lived act of collective civil disobedience (plant occupation). It also shows that worker campaigning and secondary picketing throughout the city was effective in helping to forge this collective solidarity. A more specific insight is that a key potential benefit of secondary picketing from the workers’ perspective was that it enabled community-wide campaigning aimed at reducing the ability of the employer to use replacement workers, through moral suasion. Smith is also critical of the ultimate judgement in *Pepsi*, since despite adopting the wrongful action model, the Supreme Court simultaneously seems to have legitimized the continued practice of reliance upon the body of excessively

⁵² *National Labor Relations Board v. Fruit and Vegetable Packers & Warehousemen, Local 760 et al.*, 377 U.S. 58 (1964).

restrictive industrial torts as the main framework for determining whether picketing behaviour ought to be found “wrongful”.

Using qualitative empirical methods, De Lint et al. (2005) examine Court and police practices with respect to picketing contexts and injunction proceedings. Drawing from certain theoretical literature on “governance”, which emphasizes the decentralized nature of authority, they highlight how both courts and police systematically engage in practices of “deferral” of decision-making in labour dispute contexts. Their analysis also highlights how there has emerged an increasingly normal practice of bargaining in the shadow of potential intervention (by Courts and police) towards fashioning an agreed “protocol” pertaining to picketing activity, since there is systematic pressure applied on parties to do so, including explicit police recommendation and assistance with protocol formation in many jurisdictions.

Other academic literature has also discussed how, in our regime, there are rather strong restrictions on worker solidarity *beyond* individual bargaining unit boundaries (Fudge and Glasbeek, 1995). One key point of contention is that in our regime, workers’ support for strike action of other workers say, in the form of refusing to cross a picket line or refusal to carry “struck work”, are highly dangerous ethical choices for workers to make. Not only does the regime not provide *protection* for such an ethical choice, but the law is rather coercive in response to such choices. Supportive behaviour often leads to the finding, where workers are unionized and multiple individuals are involved, that this constitutes an illegal strike by the sympathetic workers. Further, sections 83(1) and 100 of the Act contain broadly worded restrictions on behaviour that might cause such illegal strikes to occur, often used to restrain secondary picketing activities at locations involving other unionized workers. Beyond this, the law also imposes severe limitations on workers ability to negotiate into their own employment conditions protections for their ability to engage in these kinds of ethical choices in favour of broader solidarity, since these are generally interpreted as being void against public policy, insofar as the behaviour often contravenes rules on the timeliness of strikes. Various legal restrictions on collective action beyond the bounds of the bargaining unit, or the precise struck location, have been cited in academic research as having a long-

run corrosive effect on worker solidarity, and aggregate bargaining power (Fudge and Glasbeek, 1995).

D) Subsequent Interest Arbitration as An Alternative Response to Work Stoppages

If the pattern of increasingly regular *long-duration* stoppages in recent years is accepted as *problematic*, a key policy response for consideration, well targeted at this precise phenomenon, would be some sort of interest arbitration mechanism that can be invoked by one party, *after* a certain length of work stoppage has already occurred. On the one hand, this is an “intrusive” measure into the collective bargaining process potentially raising theoretical concerns about the intangible costs of interest arbitration on bargaining behaviour. These include concerns about a so-called “narcotic” effect (the increased dependence on arbitration to settle disputes in future due to loss of bargaining capacities) and the “chilling” effect (the increased unwillingness to make concessions in bargaining, based on expectation of usage of interest arbitration and reluctance to narrow the zone of disagreement in advance of arbitration). On the other hand, it would seemingly only apply to a small set of disputes, of comparably larger magnitude. As well, various conditions precedent can also be imposed on the process for invoking the arbitration mechanism, further limiting its scope of application. Overall, it seems feasible to design such a process that would still allow for a significant period of uninterrupted work stoppage, with all its ensuing costs having to be absorbed by parties for maintaining their bargaining positions, preserving much of the same degree of economic pressure existing in our current system to reach a settlement. The new additional threat of a subsequent arbitration could maintain or even spur pressure to settle in such cases, given the risk of eventual arbitrated outcomes if the stoppage becomes “excessively” long.

The key issues for consideration in design of such a mechanism are the precise conditions precedent to be used. In general, the main considerations would appear to be the choice of required length of the work stoppage; whether there ought to be any inquiry into the prior bargaining behaviour of the parties up to that time (and whether the

request ought to be linked with some “good faith” requirement); and whether there ought to be any additional inquiry into how likely the parties are to reach a settlement in some measurable future time, without arbitration. A subsequent-arbitration mechanism was adopted in Manitoba in 2000,⁵³ with certain further clarifying amendments adopted in 2004.⁵⁴ To date, there does not appear to have been any academic analysis of any sort relating to these provisions, nor any other writing about such a provision in general, aside from some very brief descriptive comments about these specific Manitoba provisions in David Doorey’s online “blog” (Doorey, 2012) and a similarly brief comment about them in a newspaper editorial written by Unifor economist Jim Stanford (Stanford, 2012). What follows is therefore not a literature review about this model (as originally requested by the CWR), but a very brief outline of the Manitoba mechanism, and a summary of the limited information available about how this mechanism has functioned since 2000. The exact provisions of the Manitoba statute establishing this mechanism are contained in Appendix 3.

The basic requirements of the Manitoba mechanism are as follows. First, the work stoppage must have lasted for at least 60 days already prior to any application for arbitration being filed. As a further condition, the parties must have attempted to reach an agreement, with the assistance of a conciliation officer, for at least 30 days during the stoppage. After receiving the application, the Board must inquire into whether good faith bargaining has occurred and whether the parties are likely to reach an agreement within 30 days if they continue bargaining, and must make these determinations within 21 days, although the Board may delay making these determinations to the point where it is satisfied that the *applicant* party has bargained “sufficiently and seriously” with respect to the matters still in dispute. If the Board finds both good faith bargaining and a likelihood of settlement within 30 days, the Board will refuse to order arbitration, but may order further conciliation or mediation. If the Board finds a lack of good faith bargaining by the applicant, the applicant may still file another application for arbitration at a later date. If there is still no agreement after 30 days expire, either party may file a new application for arbitration. Once the Board decides arbitration is appropriate, there

⁵³ The Labour Relations Amendment Act (2), S.M. 2000, c.45.

⁵⁴ The Labour Relations Amendment Act, S.M. 2004, c. 31.

must be an immediate cessation of the work stoppage and a return to work, and the parties also have 10 days to agree to use interest arbitration and to submit the name of the arbitrator they have agreed upon. If the parties do not agree to arbitration and a specific arbitrator, then the new agreement will be settled by the Board itself. The new agreement is effective for a period of 1 year following the expiry date of the previous agreement, or for any longer period agreed to by the parties. If the agreement is settled more than 6 months past the expiry of the previous contract, the new agreement shall remain in effect for 6 months only.

Overall, it is apparent from a review of the provisions that a number of checks have been imposed to try to limit the recourse to the provision, and the arbitrated outcomes only last for rather short periods of time. The evidence available about the function of these provisions is very limited. What we do know is that since they were adopted in 2000, there have only been a total of seven (7) applications ever filed under these provisions, at a minimum suggesting that there is little evidence of any “floodgate” of arbitration activity that has been opened by adopting these rules. Further, three (3) of these applications were voluntarily withdrawn, perhaps related to the perceived outcome of these applications. Thus, in fifteen (15) years, the Board has only been required to make four (4) rulings on applications under this provision,⁵⁵ and the Board granted each of these four applications.

One provision in the statute requires that the Manitoba Labour Management Review Committee to report every two years on the functioning of this provision. A review of the reports of these committees since 2000 shows that the feedback on these provisions has been extremely minimal. The committee offered no feedback until 2009, apparently because it was occupied with more pressing and substantial matters. This 2009 report contained a joint recommendation that in contexts where settlement occurs more than 6 months after the expiry of the last agreement, arbitrated outcomes should be extended by *more* than the rather short 6 month extension provided by the Act. The Committee recommended that a one year extension of the arbitrated agreement would be more

⁵⁵ See 2007 Canlii81873; 2007 Canlii81878; 2010 Canlii99140; and 2011 Canlii98421. These decisions are also available from the author upon request.

appropriate. The Committee's subsequent 2011 report made no recommendations for change, merely reiterating that the various conditions precedent to invoking the provision ought to remain in the Act. Lastly, the Committee's 2013 report merely noted that additional utilization of existing mediation services would be helpful in resolving disputes. So, overall, the main feedback provided on the functioning of this rarely invoked mechanism has been a recommendation favouring slightly longer arbitrated settlements to prevent the occurrence of very short agreements in unique cases.

In its review of work stoppages in the federal sector, the Annis Report (Annis, 2008) observed similar patterns in work stoppage dynamics in the federal sector as those we have witnessed in Ontario (notably, fewer stoppages, of longer average duration). The Report included this sort of subsequent interest arbitration in its review of some alternative responses to stoppages. The Report notes that in order to further reduce any potential "chill" on bargaining that might arise from expected access to this provision, it is possible to consider adding more uncertainty as to the availability of the mechanism, such as some form of Ministerial discretion. The Report also agrees that the new threat of an unfavourable arbitrated settlement could also encourage settlement, countering concerns about the "chilling" of bargaining (Annis, 2008, at 75).

The Annis Report also identified some other potential responses to work stoppages, most of which have already been discussed in this Report. One additional alternative it cited was the possibility of a mandatory return to work "cooling off period" in stalemated work stoppages, combined with mediation assistance. The theory here is that in some cases of stalemate, a temporary return to work might somehow catalyze some existing opportunity for settlement. Interestingly, both labour and management stakeholders expressed opposition to this sort of mechanism in their feedback to the Commission.

Lastly, it should be noted that under current Ontario law, no such access to an arbitrated settlement is available in the broader private sector, without both parties' consent, except for limited access to first contract arbitration, which is beyond the scope of this report. This is true even in cases where the OLRB finds that a party has not bargained in good faith. Although 1993 amendments to the Act granted the OLRB the authority to order arbitration as a remedy as a response to bad faith bargaining, this

provision was repealed in 1995. Literature on the duty to bargain in good faith is reviewed in the next section.

E) The Duty to Bargain in Good Faith (“DBGF”) - section 17 of the LRA

Section 17 of the LRA contains the “duty to bargain in good faith” (DBGF). Somewhat of a two-pronged measure, it obliges both parties to “bargain in good faith and make every reasonable effort to make a collective agreement.” This is a longstanding provision in Ontario law. Since 1948, Ontario law has contained an explicit DBGF requirement with very similar terminology.⁵⁶ The rule was to a certain extent a transplantation of the similarly named duty enshrined in the U.S. National Labour Relations Act (“NLRA”).

In earlier years, the DBGF was enforced by quasi-criminal enforcement provisions. This approach to regulation of bargaining behaviour became subject to significant criticism, in that it seemingly placed significant limits on the scope of supervised behaviour and the range of remedies to address undesirable behaviour, resulting in limited litigation and application of the DBGF mechanism (Palmer, 1969; Adell, 1980). The 1975 amendments to the Act addressed these concerns squarely, and “breathed new life into the duty” to some extent (Bendel, 1980). In place of the previous limitation of OLRB power primarily to determining whether quasi-criminal prosecutions could proceed, the new provisions empowered and directed the OLRB to investigate alleged violations of the duty and to “determine what if anything, [the respondent] shall do or refrain from doing with respect thereto”.⁵⁷ Subsequently, there was a large volume of litigation and caselaw development fleshing out the scope, parameters, and content of the DBGF.

In a classic 1958 article, Cox (1958) outlined four key policy goals underlying the DBGF in the U.S.: 1) prevention of recognition strikes; 2) prevention of union avoidance through non-recognition, thereby supporting growth of strong labour unions; 3) support for collective (as *opposed to individual*) bargaining; and 4) the promotion of collective

⁵⁶ Ontario Labour Relations Act, 1948, s 12. The 1950 version of the statute introduced more explicit language pertaining to a “good faith” requirement in bargaining. Section 11 of this statute required parties to “bargain in good faith and make every reasonable effort to make a collective agreement”. The DBGF has continued to be expressed in these terms in Ontario since 1950. See Bendel, 1980, p.1.

⁵⁷ S.O. 1975, c. 76, s. 21(1).

bargaining as a “rational process of persuasion.” The 4th goal moves beyond merely supporting the shift from an individual to a collective bargaining regime, it involves altering the bargaining behaviour of the parties, where this is deemed objectively desirable. This is therefore an additional encroachment upon the notion of a pure “freedom of contract” than necessitated by the other goals, and may be understood as balancing the goal of freedom of contract with other goals, such as the promotion of industrial peace. Bendel (1980) found support for all four of these policy goals in early Ontario caselaw, and comparably greater support for the 4th goal than occurs in the U.S. One reason for this may be based in the wording of the NLRA itself, since the 1947 Taft-Hartly amendments to the NLRA reinforced the principle of freedom of contract, in specifying that the DBGF does *not* “compel either party to agree to a proposal or require the making of a concession”.⁵⁸ On the other hand, although Canadian tribunals like the OLRB have generally been comparably more willing to supervise undesirable bargaining behaviour than U.S. adjudicators, Bendel argues that certain adjudicative trends, such as the reluctance to impose a collective agreement as a remedy, and the reluctance to draw an inference of bad faith bargaining solely from the substantive bargaining proposals of one of the parties, suggests that Canadian adjudicators have nevertheless imported the underlying U.S. bias in favour of freedom of contract over other goals to a significant degree.⁵⁹

One of the well-known distinctions between Canadian and U.S. jurisprudence over the DBGF is the U.S. practice of categorizing all potential bargaining terms as failing within either a “mandatory” or “voluntary” category of terms. It is an unfair labour practice in the U.S. for a party to “insist” upon (bargain to impasse, engage in industrial action) its position on a “voluntary” item. Again, this practice may be related to the existence of comparably more restrictive language in the NLRA specifying that the range of terms subject to the DBGF are “wages, hours and other terms and conditions of employment”⁶⁰ and U.S. adjudicators have sought to draw a line between demands that fall within and outside this category. As Langille (1983) notes, this approach has been

⁵⁸ Labor-Management Relations (Taft-Hartley) Act, (LMRA) 29 U.S.C.S. ss. 151-67 (1975).

⁵⁹ Bendel, p 14-15.

⁶⁰ NLRA, s. 8(d).

“widely criticised on a number of functional and instrumental bases.” One key critique of this approach relates to its effect, insofar as it led to the juridical construction of a range of protected management prerogatives. Various issues relating to organizational strategy and design, including restrictions on subcontracting of work operations, were held to be “voluntary” issues (Langille, 1983). In hindsight, these legal developments likely contributed significantly to the subsequent weakness and inability of U.S. unions to resist the spread of employer reorganization strategies that expanded rapidly in the 1980’s and 1990’s, and which contributed significantly to the decline in unionization in the U.S. (Kochan, Katz and McKersie, 1986). While one may interpret these sort of legal restrictions as merely being an extension of the U.S. preference for freedom of contract (more precisely, protecting the employer’s freedom *not* to contract over certain terms) one may alternatively view the law here as actively constraining union bargaining freedom.

While Canadian tribunals did not explicitly follow the more blatant “mandatory/voluntary” approach, academic critique points to analogous forms of managerial prerogatives that were effectively imposed into our law. Langille (1983) notes that although Canadian law formally allows bargaining over subcontracting and other key organizational decisions, there has been a refusal to promote the principle of “partnership” with regard to these key decisions to any serious extent. He notes that outside the precise statutory timetable for bargaining, the law preserves unilateral managerial authority over these matters at all other times. He argues that while the law provides that significant organizational plans (which would be within the scope of the duty to bargain) and/or their contemplation may be required to be disclosed depending upon their *timing*, this regulatory approach overall simply establishes managerial incentives for manipulation of the process and timing of the contemplation and finalization of such strategic plans in order to avoid having these issues become subject to collective bargaining (Langille, 1983). This ability of employers to prevent key organizational strategic decisions from becoming subject to collective bargaining was further supported by earlier developments in arbitration caselaw concerning contracting out. While there was initially two competing views over whether employers retained an underlying prerogative to engage in contracting out of bargaining unit work (subject to restrictions in the

collective agreement) the view supporting the managerial prerogative eventually “won the day”.⁶¹ As Langille (1983) notes, this outcome in the arbitration case law had a spillover effect, in turn eroding any “partnership” based requirement that could be imposed by the DBGF.

As well, somewhat analogous to the U.S. approach, the DBGF imposes restrictions on “bargaining to impasse” various forms of demands deemed (*ex post*) “illegal”. Carter argued that Canadian tribunals have been willing “to define the concept of illegality in its broadest sense” (Carter, 1983). Restrictions in this “broadest sense” include restrictions of demands that are not overtly illegal such as a clear violation of a legislated minimum employment standard, but those that are deemed inconsistent with the overall framework of the statutory regime, such as attempts to negotiate changes to the existing scope of the bargaining unit, or insistence upon an alternative, broader-based bargaining structure (Carter, 1983). The issue of union ability to leverage its existing bargaining power to pursue broader based bargaining would seem to be an increasingly important (even if not salient) policy question, given organizational fissuring in the modern economy (Fudge and Glasbeek, 1995).

In light of the goals of the DBGF, an acutely well-known source of tension in the law is the distinction between “hard” bargaining, deemed acceptable, and so-called “surface” bargaining, based on a desire to avoid reaching a collective agreement, and/or to undermine the union as the bargaining agent. This analytical distinction has come under scrutiny. Langille and Macklem (1988) argue that DBGF jurisprudence is built on a “contractualist” philosophical foundation, with primary reliance upon a procedural, rather than substantive conception of justice. In formal terms, the law embraces the employer’s ability to use its superior bargaining power to maximize its self-interest, while guarding only against behaviour aimed at undermining collective bargaining *per se*. Langille and Macklem (1988) note that a key weakness of this approach is rooted in the reliance upon identifying *subjective* employer intention to avoid collective bargaining, and the implicit default acceptance within the jurisprudence that employer self-interest

⁶¹ See in particular the key decision in *Russelsteel Ltd.*, (1966), 17 L.A.C. 253.

maximizing behaviour is legitimate or “rational”. This leads to the consequence that the DBGF

“can capture those employers who view it in their self-interest not to recognize the trade union. If your *intent* is not to sign a collective agreement, because this is your view of how to maximize your self-interest then you are, if the evidentiary problem is overcome, caught by the duty. However, if you are willing to sign a collective agreement, then you can maximize your self-interest. The problem with this neat view of the world is that it captures only: a) the rational but less powerful and b) the irrational but more powerful, employers of the world. It does not capture the rational and powerful employer.”

Langille (1983) similarly captures the weakness in an approach that assumes the ability to distinguish and disentangle economically rational self-interested behaviour from illegitimate self-interested behaviour:

“can one say that a motive is an economic one when the economic impact referred to is the ‘axiomatic’ economic impact of unionization?...It would be an exercise in supreme sophistry if it could be alleged that the motive was not anti-union because the objection taken was not to the union itself, but to its (‘axiomatic’) effects.”

In addition, it is reasonable to conclude that the emphasis on subjective intention creates considerable difficulties of proof in the enforcement of the DBGF, and this is commonly cited as an additional weakness of the DBGF mechanism. As a solution to these weaknesses, Langille and Macklem (1988) propose that the law ought to recognize a *substantive* content to the DBGF, and that there ought to be imposed a clearer obligation to negotiate a collective agreement containing particular terms (they suggest in particular provisions dealing with seniority, just cause dismissal protection, and fair and accessible grievance procedures).

Overall then, in theoretical terms, the DBGF has not been understood as being aimed at performing a significant power-brokering function as between the parties, aside from its function of protecting the shift to collectivism and preserving the bargaining structure

established by other instruments within the regime (Cox's goals # 1, 2 and 3). Other than this protective role, the DBGF is understood as being aimed primarily at increasing the ability of the parties to otherwise freely pursue their own⁶² self-interest, given their existing degree of power. The only caveat here is where the DBGF may address behaviour that would systematically alter relative bargaining power, such as asymmetrical information pertaining to the employer enterprise. This conception of the DBGF seems based on the assumption that other aspects of the regime sufficiently carry the burden of addressing the question of the balance of power.

A final comment may be made about how the DBGF fits within the overall statutory regime. It is axiomatic that the DBGF only applies *post*-certification, and thus has no application whatsoever to employers whose workers have not yet proceeded successfully through the certification procedure⁶³ and given prevailing trends, this is the vast majority of (private sector) employers. Thus, most employer behaviour in the marketplace is free from any form of "good faith" supervision, even with respect to behaviour that may be designed to avoid collective bargaining. A key consequence in the modern labour market is that many organizations are free to adopt "fissured" structures, relying upon forms of subcontracting, franchising, and supply chains in organizing work. As one potential policy response to this new reality, Noah Zatz has argued that unfair labour practice law ought to be expanded to increasingly supervise *pre*-certification employer behaviour, particularly strategic decisions with respect to the adoption of particular organizational structures that may be driven by union avoidance (Zatz, 2010). While it is not clear whether we would conceive of such new ULP content as being an expansion of the DBGF, or rather as falling under a different content label, it is mentioned here insofar as it relates to the issue of potential regulatory supervision over organizational structures that may be either aimed at, or have the effect of, undermining collective bargaining.

⁶² This leaves aside complications in the accumulation of "preferences" of large numbers of bargaining unit employees, and in assuming a "self"-interest to employer organizations.

⁶³ Or some lawful form of voluntary recognition, where available.

F) The grievance arbitration system

The literature has cited numerous concerns about the functioning of the grievance arbitration system. Some of the most significant concerns identified, which may be inter-related, are delay, increasing legalism, cost, and the scope of arbitral jurisdiction.

It is interesting to note that various modern concerns about the grievance arbitration system are not new. As early as the 1970's various commentators and parties in labour relations were lamenting the growth in excess legalism and the ensuing delay that seemed to have already set into grievance arbitration by that time (Beatty, 1974). Thus, the long trajectory of studies overall suggest that what we appear to have experienced in recent decades with respect to delay, cost and legalism, is an increasingly worse "new normal" over time.

The Ontario government responded to early concerns about growth in delay and legalism in grievance arbitration in 1979 with a significant policy reform: "expedited arbitration". Rose (1986) reviews the extent to which the new system was adopted by parties and its effectiveness in reducing delay. Rose concludes that by several measures, the policy reform was a success. The new procedures were voluntarily adopted in large measure by parties, encouraged more settlement by mediation, and reduced the time of grievance disposition substantially. However, it is acknowledged that the new process only partially addressed the various concerns about legalism and delay, since it did not go as far as to provide for limitations on the arbitral process itself, but rather focused on some factors (i.e. arbitrator appointment) determining delay in the pre-hearing stage. Rose also found evidence that in cases involving discharge of the employee, delay seemed to be correlated with a reduced likelihood that the arbitrator would find in favour of the grievor and grant reinstatement.

Ponak and Olson (1992) examined Alberta grievance arbitration decisions from 1985-88 to determine trends in delay and some of the factors causing delay. The analysis examines delay in the pre-hearing and post-hearing stages, and suggests that in the data reviewed, most delay is in the pre-hearing stage. Statistics on average delay across aggregate caseloads however are distorted by the fact that some grievances

take an inordinate length of time, so that median delay is substantially less than mean delay. Factors that tend to be positively correlated with increased delay include the use of 3 person panels, the sector (a mild public sector effect); and the type of issue. The analysis suggested that refinements in the arbitrator selection and scheduling stages in Alberta would help reduce delay.

Thornicroft (1995) reviews Newfoundland arbitration outcomes from 1980-1992, and also examines trends and factors involved in delay, and also distinguishes delay in the pre-hearing from the post-hearing stages. Factors involved in delay included the use of 3 person panels; the use of lawyers; the choice of individual arbitrator; and a mild public-sector effect.

Ponak et al. (1996) also examined grievance delay based on a review of Alberta arbitration decisions from 1985-88, separating out 4 stages in analysis: the pre-arbitration grievance stage, the arbitrator selection stage, the hearing scheduling stage, and the preparation of the arbitration award stage (i.e., post-hearing). They argue that their findings suggest that the causes of delay are different at each stage.⁶⁴ They found that discharge cases are handled relatively faster. The presence of legal counsel increases delay during the scheduling stage, but reduces delay in the arbitrator selection and decision preparation stages. There was little evidence to support the view that arbitrator workload caused greater delay.

Senior members of the bar and judiciary have also lately commented on the plight of the grievance arbitration system. Whitaker (2010) reviews the historical development of large scale adoption of mediation-arbitration practices in Ontario. The key flashpoint was the development of huge backlogs of grievances by the late 1980s and early 1990s within various large scale bargaining structures in the province, and a growing recognition of the necessity to use mediation on a larger scale to reduce caseloads and their burden. Gradually, most arbitrators in Ontario became expected to be able to

⁶⁴ They find primarily that the length of time from the filing off a grievance to referral to arbitration is a function of the complexity and type of issue; delay in arbitrator selection is associated with the use of legal counsel and the size of the arbitration board; scheduling delay is associated with the nature of the grievance and the use of outside legal counsel; and delay in preparing the decision is linked to the complexity and type of the issue, board size, the presence of legal counsel, and the arbitrator's workload.

provide med-arb if the parties desired; it has become a normal and essential part of the toolkit.

Winkler C.J.O. (2010, 2011) contrasts modern labour arbitration practices with those of an earlier “golden age” of arbitration. The demise of the “golden age” has been driven by factors including expanded arbitral jurisdiction and a cultural shift within arbitration from pragmatism to legalism. On the point of expanded arbitral jurisdiction, he cites the outcomes in *Weber v. Ontario Hydro*⁶⁵ and in *Parry Sound v. OPSEU*⁶⁶ as crucial, since they increased the flow of disputes to arbitration rather than other processes. Winkler argues that overall the grievance arbitration system has lost “proportionality” and that solutions necessarily involve the re-insertion of a new ethic of proportionality into the system. That is, there needs to be a new ethic that various litigation practices ought to be engaged in only if they are proportionate to the importance of the matters at issue in the grievance. From the text of his two public presentations, Winkler seems to couch his suggestions as primarily being aimed at the parties themselves. However, his insights may also be interpreted as supporting policy intervention, particularly if the parties, or perhaps their legal counsel, face *systemic* incentives generating non-proportional legalism, and thus have limited ability to voluntarily opt out of this behaviour. Similarly, Pink and Wallbridge (2010) decry the excess legalism that lawyers have imposed on the process over time, stating that “lawyers have made the process so complicated and expensive that we have ‘killed the goose that has made our careers’”.

It should be noted that the expansion of arbitral jurisdiction has been driven by multiple developments, and has very important implications for any assessment of the functionality of the grievance/arbitration system. Not only has the scope of arbitration been expanded by judicial decisions in *Weber* and *Parry Sound*, but also by statutory provisions over time that directed the flow of employment standards and human rights disputes into arbitration. While this expanded jurisdiction may have produced

⁶⁵ (1995), 2 S.C.R. 929. The Court ruled that the matter in dispute arose out of the collective agreement, and that arbitrators had *exclusive* jurisdiction to determine such matters.

⁶⁶ *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union, Local 324*, [2003] 2 S.C.R. 157. Here the Court expanded the principle in *Weber* in effectively holding that arbitrators had jurisdiction to apply employment-related statutes, expanding the volume of

additional costs and/or delay within the system, there may also have been some enhancement in adjudicative rationality and/or efficiency under the consolidation of employment-related adjudicative authority in the arbitral forum. In this vein, Shilton (2013) argues that arbitration should be confirmed as the exclusive forum for human rights claims of unionized workers that are closely linked to the collective agreement, and that recourse to statutory human rights tribunals should be reserved only to unique cases, such as those where union complicity in discrimination is in issue.

Curran (2015) provides the most up-to-date analysis of grievance arbitration delay in Ontario. He provides summary statistics on various trends associated with delay in arbitration, and also estimates of the effects of separate factors on grievance delay in each of the pre-hearing, hearing and post-hearing stages. Compiling the results of previous studies with respect to arbitration delay, he shows that they collectively reveal a continuous upward trend in arbitral delay, with an estimated average annual growth of approximately 11.9 days per year, from the mid-1970s to the mid-1990s. Then, using a sample of 15% of all arbitrated grievance resolutions in each of 1994, 2004, and 2012, he compares mean values for a number of interesting variables. For example, he shows that average total disposition time grew from 419.9 days in 1994, to 444.12 days in 2004, and to 589 days in 2012. Thus, the very high growth in grievance duration in Ontario in recent decades comes after decades of substantial growth in grievance duration already occurred. It should be noted that the design of most of these studies only examines the subset of grievances that proceed to arbitration and result in an award being issued. So, comparisons are capturing differences over time within this smaller subset of grievances filed, not the average behaviour of all grievances filed.

Curran (2015) shows that most of the recent growth in overall grievance delay in this subset has been concentrated in the pre-hearing and hearing phases. Some other trends stood out in his comparisons of means, pertaining to increased legalism and/or arbitral jurisdiction. The average number of cases cited in each arbitration award grew substantially from 5 in 1994 to 7.3 in 2012. The filing of legal briefs increased substantially, occurring in 8% of grievances in 1994, and in 23% of grievance in 2012. Average decision length grew from 35 paragraphs in 1994 to 43 in 2012. As well, the

average workload of arbitrators also grew, with an average workload of 16.7 cases in 1994 to 22.5 in 2012.

Curran (2015) also performs more complicated quantitative analysis, using Cox proportional hazard models, designed to test how a number of more specific factors (variables) correlate with grievance duration, in his sample of 397 observations. These models provided little evidence for the proposition that delay was being driven by increased arbitrator workload. However, evidence did support the importance of growing legalism. The use of lawyers was associated with increased duration in both the pre-hearing and hearing phase. Preliminary objections were associated with longer pre-hearing phases. Additional witnesses seemed to lengthen the hearing phase, and total disposition time, and expert witnesses were associated with a longer hearing phase. Legal briefs were associated with lengthier decision preparation phase. Credibility challenges delayed the decision preparation phase and total disposition time. Interim awards lengthened the hearing phase. Estoppel arguments lengthened the hearing phase. On the other hand, the citing of “labour relations considerations” was associated with reduced delay in the prehearing phase. With respect to the effect of expanded arbitral jurisdiction, his study found conflicting results. For example, grievances involving the *ESA* had significantly longer pre-hearing phases, and human rights cases had longer hearing and post-hearing phases. On the other hand, after the *Parry Sound* decision, grievances involving human rights were shorter in the pre-hearing stage, and were not lengthier overall. Interestingly, he also found that the use of med-arb lengthened total disposition time, although this finding only applies with respect to grievances that ultimately require arbitration awards because they are not resolved by mediation.

In considering the overall relevance of the various academic studies of the grievance arbitration system, it is important to reiterate that the data points used in these studies are completed arbitration awards, and thus the delay being measured pertains only to the subset of grievances that actually proceed to an arbitral award. This is important given that most grievances settle prior to arbitration, or at arbitration. Thornicroft (2009) estimates that only about 2-3% of all grievances filed proceed all the way to an arbitral

award. Further, there is an anecdotal impression noted by many in the field that an extremely high percentage of grievances that proceed to arbitration actually settle at the first day of an arbitration hearing. These settlements at arbitration are not included in the data in these studies, there being no reliable aggregate dataset constructed yet that contains these events. This raises the question of whether increasing grievance delay captured in these studies is a matter of selection bias. Are the cases that proceed to arbitration of a select type or degree of complexity, increasing both the necessity to proceed to an arbitral award and greater time for disposition? We do not have a definitive answer to this question. However, there are grounds for the view that the evidence amassed in these studies suggesting increasing grievance delay over time ought not to be dismissed by this selection bias theory. For example, much of the total delay effect due to legal complexity would presumably register in the hearing and/or decision preparation phase. However, it is notable that from 1994 to 2012, average delay in the *pre-hearing* phase also grew from 273 to 397 days (Curran, 2015). While it is conceivable that there is *some* selection bias causing the observations of increasing grievance delay, many of these estimates still constitute *prima facie* evidence of significant growth in *average* grievance delay in the system.

Overall, there is fairly clear evidence that the time it takes for a grievance to progress from filing to an ultimate award has been growing steadily in Ontario for decades, with recent evidence supporting a significant growth trend up to as recent as 2012 (Curran, 2015). Certain findings support the view that excess legalism and arbitral jurisdiction are driving this trend, although evidence seems to suggest that the processes are somewhat nuanced in their effects upon different stages of the process. These findings along with increasingly common statements from senior members of the bar and/or judiciary about the system suggest that policy reforms aimed at reducing delay, if they were mindful of the different stages of the process, may be increasingly warranted. Such reforms would seemingly benefit from addressing the lack of proportionality in the system cited by C.J.O. Winkler, and from paying careful attention to the systemic legal constraints and incentives facing parties within the arbitration system altering their

ability to voluntarily opt into more proportionate practices.

Conclusions and Options

This Report has provided a review of empirical trends in union wage premiums and in work stoppages activity, and a review of various bodies of literature examining multiple aspects of the legal regime governing collective bargaining in Ontario. Throughout the report, some insights provided by these empirical trends, and by academic analysis of the collective bargaining regime, have been discussed. Rather than reiterating the various insights, a few additional concluding comments are offered.

In general, the two main sets of empirical trends reviewed, union wage effects and strike dynamics, are capable of supporting a similar *overall* interpretation. That is, they both point theoretically to a major loss of worker/union bargaining power over time in recent decades. The loss of union wage premiums is an output measurement of this erosion. The decline in strikes is an additional indicator, and arguably the most reasonable interpretation based on the evidence *overall* (including the concurring erosion of union premiums) is that various socio-economic contextual shifts (discussed in the report) have eroded the instrumentality of strikes and union bargaining power, in a simultaneous and reciprocal manner. The erosion of worker collective power is the combined product of these contextual shifts occurring, against the backdrop of a labour law regime that we have *not adjusted* towards counter-balancing these developments. Other labour law developments over time, discussed in the literature review throughout the report, have at times contributed to the general erosion of bargaining power, while certain other supportive developments may be understood rather as being insufficient to counter this core trend.

Of course, it is possible that policy choices are greatly influenced by conflicting *values* about the desirability of reinforcing worker collective action and bargaining power, or perhaps about the desirability of reinforcing worker collective action and bargaining power if this means tolerating the occurrence and/or consequences of comparably more strikes than the few that seem to occur in the modern era. Indeed, it is also possible that labour policy-makers may be, for whatever reason, somewhat more inclined to look

primarily to other policy instruments for our primary responses to developments such as growth in precarity in work and employment, which do not directly involve addressing the erosion in worker collective action and bargaining power. Conceivably, economic insecurity may be addressed via other policy domains, beyond what we have traditionally characterize as “labour and employment law” and may involve forms of expanded state provision of social welfare. Further, within the domain of labour and employment law, some may conceive of the option of expanding various forms of minimum employment standards as a form of substitute for the generally diminished “union effect” in the labour market. Assuming that it can be said that there has been a policy response aimed at ameliorating precarious employment⁶⁷ this latter approach of emphasizing certain employment standards instruments, focused at the margin of the labour market, has arguably been the dominant policy response in recent decades (Vosko, 2010). The fundamental problem with this approach is that it does extremely little, if anything, to ameliorate shifts in underlying relational power pervading the labour market broadly, resulting in minimal sustainable effects.

Labour policy overall demands at a minimum an honest recognition of the decline in collective worker bargaining power and the widespread consequences of this development, even if only for accurately assessing the nature and acceptability of all other forms of policy towards inequality and employment/work precarity in work and employment, absent labour law reform aimed at the ameliorating the decline of worker collective bargaining power. Indeed, some of the analysis of union effects that continue to remain in the labour market, outlined in the beginning of this paper (Gomez and Lamb, 2015) highlight the potential of collective bargaining power, where it can be constructed under our regime, to produce very significant improvements in employment conditions and reduced precarity, even where non-standard employment relations are maintained, suggesting that enhanced bargaining power may ultimately be a more effective sterilant against precarity than minimum standards instruments.⁶⁸

⁶⁷ Indeed, it is quite possible to view the trajectory of labour policy overall, including the abandonment of collective bargaining as an instrument, as being a direct *determinant* of increasing precarity.

⁶⁸ There is also plenty of anecdotal evidence supporting this view. Outcomes of a recently concluded round of collective bargaining in the grocery retail sector in Ontario provide an eye-opening example. By consciously

Lastly, this author was also asked to comment about potential concerns in relation to the availability of data to study the phenomena discussed in this report. The following comments are offered in this regard.

It would appear that although this was once historically the purview of the Ministry of Labour, *nobody* collects information on the actual usage of replacement workers in collective bargaining disputes in Ontario, and this may also be the case in other provinces. Since this has been cited as an important potential strategic response to work stoppages, and since it may be helpful to know how often and in what manners they are used, this seems unfortunate. It seems as though it would be helpful to know more information about this phenomenon, such as the volumes of replacement workers used, the characteristics of the users, and the different “sources” of these workers used (are they internal managers, personnel transferred from elsewhere in the organization, new short term “hires”, or agency-supplied workers).

Further, there is also limited data collection performed about aggregate picketing activity and restrictions on picketing activity, such as the various injunctions and/or picketing protocols drafted, with or without police assistance, overall.

Also, data on the distribution of unionization in general is somewhat limited. Improved measures of the union density by industry and sector, among other characteristics might be helpful in examining various questions about the functioning of the collective bargaining regime. For example, data on the underlying distribution of unionized employment by bargaining unit size, was not available.

Lastly, while studies of arbitration have shown the increased burden of this system in terms of time delay, measures of the burden of developments in the system overall in terms of costs to the parties seem comparably less available.

prioritizing those with the worst wage, hours, and scheduling conditions (many of which were defined by legislated minima) under an explicit theme of “raising the floor”, Unifor Local 414 recently obtained some extraordinary gains for marginal workers. See Mojtehedzadeh (2015). Details of this negotiation were outlined in a presentation by Angelo DiCaro at the Canada-China Labour Forum, Ryerson University, November 18, 2015.

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Appendix 1 - Additional Graphs of Work Stoppages Data

Figure A1 – Aggregate Annual Number of Workers Involved in Work Stoppages, Strikes, and Lockouts in Canada, 1980-2014.

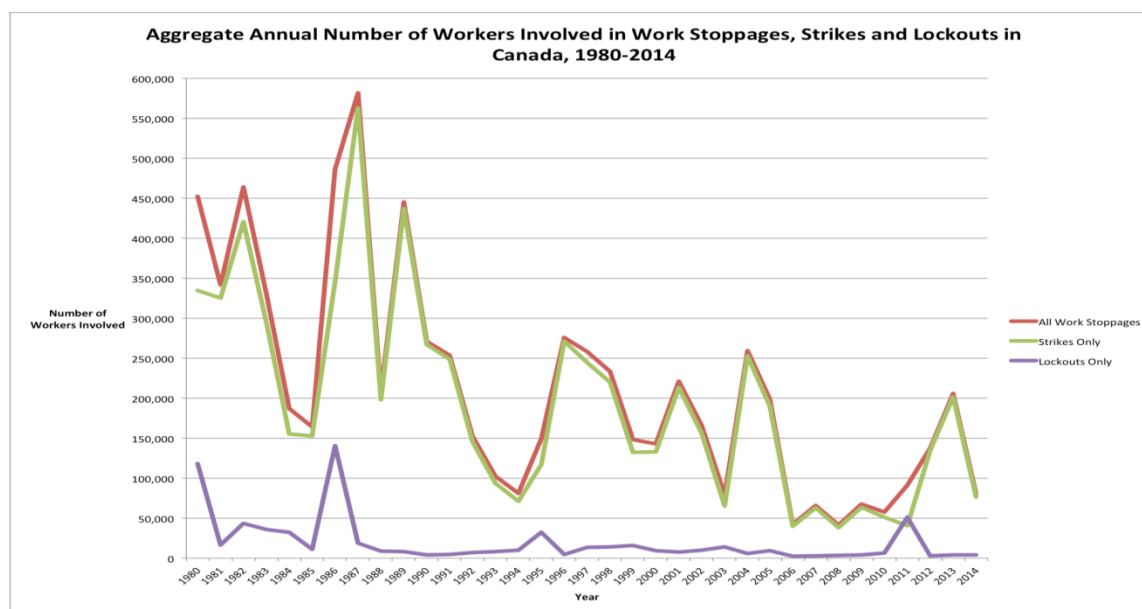
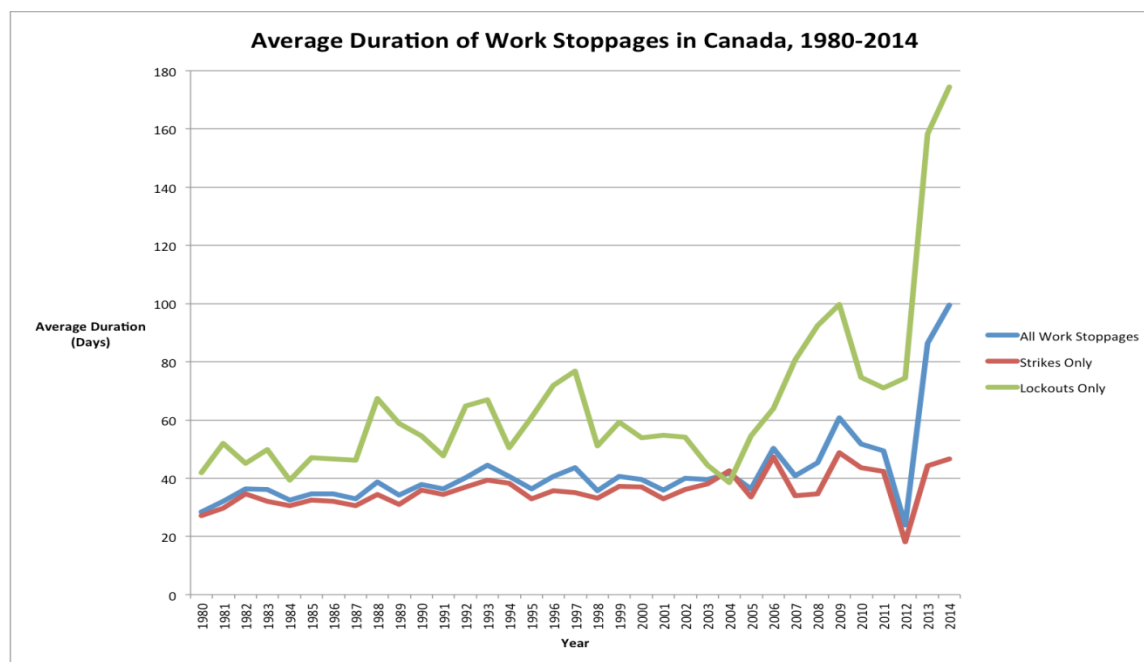


Figure A2 - Aggregate Number of Workers Involved in Work Stoppages, Strikes and Lockouts as Ratio of Total Unionized Employees (Canada) (all unit sizes)



Figure A3 – Average Duration of Work Stoppages , Strikes and Lockouts in Canada, 1980-2014 (all unit sizes)



Appendix 2 - Summary of Research Design (Jurisdiction, Timeframe, and Data) in Quantitative Studies of The Effects of Specific Components of Labour Policy on Strike Dynamics and Other Variables

Author (year)	Jurisdiction & Timeframe Studied
Gunderson, Morley, Kervin, John and Reid, Frank (1989)	Canada, all jurisdictions, bargaining units of either 200+ or 500+ employees, Unit-level data 1967-1985
Gunderson, Morley and Melino, Angelo (1990)	Canada, all jurisdictions, bargaining units of either 200+ or 500+ employees Unit-level data 1967-1985
Budd, John (1996)	Canada all jurisdictions, Unit-level data (manufacturing sector only) 1966-1985
Cramton, Peter, Gunderson, Morley and Tracy, Joseph (1999)	Canada, all jurisdictions Unit-level data, large (500+ employees) units only 1967-1993
Budd, John (2000)	Canada, all provinces Monthly, provincial aggregate data 1966 – 1994
Budd, John and Wang, Yijiang (2004)	Canada, all provinces, Monthly, provincial aggregate data 1967-1999
Campolieti, Michele, Hebdon, Robert and Hyatt, Douglas (2005)	Ontario, Unit-level data 1984-1992
Duffy, Paul and Johnson, Susan (2009)	Canada, all jurisdictions Monthly, provincial aggregate data 1978-2003

Dachis, Benjamin and Hebdon, Robert (2010)	Canada, all jurisdictions Unit-level data 1978-2008
Campolieti, Michele, Robert Hebdon, and Benjamin Dachis (2014)	Canada, all jurisdictions, Unit-level data 1978-2008
Legree, Scott, Schirle, Tammy and Skuterud, Mikal (2014)	Canada, all jurisdictions Monthly, provincial aggregate data 1981-2012

Appendix 3 – Provisions in Manitoba's *Labour Relations Act*, C.C.S.M. c. L10, Pertaining to Subsequent Interest Arbitration in Response to Protracted Work Stoppages (Initial Provisions Adopted in 2000, and Amended in 2004).

SETTLEMENT OF SUBSEQUENT AGREEMENTS

Dispute about subsequent agreements

[87.1\(1\)](#) Where a collective agreement has expired and a strike or lockout has commenced, the employer or the bargaining agent for a unit may apply in writing to the board to settle the provisions of a collective agreement if

- (a) at least 60 days have elapsed since the strike or lockout commenced;
- (b) the parties have attempted to conclude a new collective agreement with the assistance of a conciliation officer or mediator for at least 30 days during the period of the strike or lockout; and
- (c) the parties have not concluded a new collective agreement.

Notice

[87.1\(2\)](#) The board shall promptly notify the parties when it receives an application.

Board to determine if good faith bargaining

[87.1\(3\)](#) On receiving an application, the board shall inquire into negotiations between the parties and determine

- (a) whether or not they are bargaining in good faith in accordance with subsection 63(1); and
- (b) whether or not they are likely to conclude a collective agreement within 30 days if they continue bargaining.

Determination within 21 days

[87.1\(3.1\)](#) Except in the circumstance mentioned in subsection (4), the board shall make its determination under subsection (3) within 21 days after it has notified the parties of the application, even if an unfair labour practice complaint has been filed under subsection 30(1) alleging a failure to bargain in good faith under subsection 63(1).

Discretion of board

[87.1\(4\)](#) The board may delay making a determination under subsection (3) until it is satisfied that the party making the application has bargained sufficiently and seriously with respect to those provisions of the collective agreement that are in dispute between the parties.

[S.M. 2000, c. 45, s. 23; S.M. 2004, c. 31, s. 2.](#)

No settlement if good faith bargaining and agreement is likely

[87.2\(1\)](#) If the board finds under subsection 87.1(3) that the parties are bargaining in good faith and are likely to conclude a collective agreement within 30 days if they continue bargaining, it shall decline to settle the provisions of a collective agreement between them and notify them of that fact. The board may, however, appoint a board representative, or request the minister to appoint a conciliation officer, to confer with the parties to assist them in settling the provisions of a collective agreement.

New application if no agreement within further 30 days

[87.2\(2\)](#) If 30 days have elapsed since notice was given under subsection (1) and the parties have failed to conclude a collective agreement, either party may make a new application to the board under subsection 87.1(1).

[S.M. 2000, c. 45, s. 23.](#)

Settlement

[87.3\(1\)](#) If the board determines under subsection 87.1(3) that the party making an application under subsection 87.1(1) is bargaining in good faith but that a new collective agreement is unlikely to be concluded within 30 days if the parties continue to bargain,

- (a) the employees shall immediately terminate any strike;
- (a.1) the employer shall immediately terminate any lockout;
- (b) the employer shall reinstate the employees as provided for in subsection 87(5); and
- (c) the provisions of a collective agreement between the parties shall be settled
 - (i) by an arbitrator, if the parties serve a notice of their wish for arbitration under subsection (2), or
 - (ii) by the board within 90 days of its finding, in any other case.

New application

[87.3\(1.1\)](#) If the board determines under subsection 87.1(3) that the applicant party is not bargaining in good faith, that party may at any time after the determination is made make a new application under subsection 87.1(1) for the board to settle the provisions of a collective agreement.

Arbitration

[87.3\(2\)](#) Within 10 days after a determination by the board that the applicant party is bargaining in good faith but that a new collective agreement is unlikely to be concluded through further bargaining, the employer and the bargaining agent may serve a notice on the board stating that they wish to have the collective agreement settled by arbitration. The notice must name a person who has agreed to act as arbitrator.

Arbitrator to settle collective agreement

[87.3\(3\)](#) The arbitrator shall settle the provisions of the collective agreement within 60 days after notice is served on the board under subsection (2).

Arbitration provisions of this Act apply

[87.3\(4\)](#) The provisions of this Act respecting arbitration apply, with necessary modifications, to an arbitrator acting under this section.

Term of collective agreement

[87.3\(5\)](#) Subject to subsection (5.1), a collective agreement settled by an arbitrator or the board under this section is effective for a period of one year following the expiry date of the previous collective agreement, or for any longer period the parties agree to.

Extension of term of agreement

[87.3\(5.1\)](#) A collective agreement settled by an arbitrator or the board more than six months following the expiry date of the previous collective agreement shall remain in effect for six months following the date of settlement.

Collective agreement binding

[87.3\(6\)](#) A collective agreement settled under this section is binding on the parties and on the employees in the unit as though it were a collective agreement voluntarily entered into between the parties, but the parties may nevertheless amend its provisions by a subsequent written agreement.

Subsections 87(6) and (8) apply

[87.3\(7\)](#) Subsections 87(6) and (8) apply, with necessary changes, to the settlement of a collective agreement under this section.

[S.M. 2000, c. 45, s. 23; S.M. 2004, c. 31, s. 3.](#)

Review

[87.4](#) The minister shall request the Manitoba Labour Management Review Committee to review the operation of sections 87.1 to 87.3 at least once in each 24-month period after those sections come into force and provide a report to the minister setting out their findings. The minister shall table the report in the Legislative Assembly as soon as possible after receiving it.

[S.M. 2000, c. 45, s. 23.](#)