

CHAPTER 2

THE FORMS AND LIMITS OF REPRESENTATION

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First, as to the immodesty of my title: I do not attempt an analysis of representation—and I am speaking, of course, of union representation, of the representation of units of workers by a bargaining agent—after the manner of Lon Fuller. Many of you will have recognized in my title an echo of one of the best known of the works of that most thoughtful and trenchant of teachers, his posthumously published “The Forms and Limits of Adjudication.”¹ I hope you will have heard, too, a reverberation of “Mediation—Its Forms and Functions,”² and that when I am through you may think that the morality³ of the exercise—the exercise of union rights of representation—is worth exploring.

My title, then, is meant only as an homage to that marvelous teacher. What I have to say under that title is this: that there are indeed identifiable and sometimes distinct forms through which the representation of workers’ interests may be exerted. These forms have their own potentials and their own limits, and while I direct your attention to that obvious truth, I do so not to emphasize the fact of limitation, nor to announce that my remarks are to be a harangue of the “thus far and no further” type, but rather to suggest that we have not thought sufficiently about what is achievable within the limits of any given form of representation, or about what forms may be available to enable effective representation to take place in the coming years, and that it is time we did think with some particularity about those things.

We have not given enough thought to the range of possible forms. By “we” I mean the industrial relations community in its

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¹Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

²Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971).

³See Fuller, *The Morality of Law* (New Haven: Yale Univ. Press, 1954).

entirety, because while what I will say may appear to be directed primarily at the union movement—I think it can still be called that—if modern democratic postindustrial society thinks it can get along without some form of independent worker organization, it is making a sad, arrogant, and pathetic mistake. Paternalism, however enlightened, can never be the paradigm of true industrial relations.

The concept of form is itself so broad as to be virtually formless, so I shall try to avoid the verbal quagmire of which I am on the edge, and to come to particulars. This is a luncheon address, not a scholarly article: I shall not attempt a taxonomy of possible representational structures, and having been like me victims of decade-turning, century-turning, even millennium-turning analyses which are only now really getting up a head of steam or at least hot air, you will be relieved to know that I shall say nothing about the New Europe, 1992, or Japan. The problems of postindustrial unionism are worldwide, but we should perhaps start first with the particular ones which are right before our eyes.

My predecessor in this role, Douglas Fraser, told you last year that unions, or at least his union, were on “the right track.”⁴ But there I think he was referring mainly to current or at least recent bargaining stances taken by his union. Mr. Fraser himself, it is interesting to note, echoed Lon Fuller, and it was surely no coincidence, in an earlier address where he answered the question whether labour and management would always be adversaries with an article entitled, “Bake a Larger Pie.”⁵ That such should be the approach of a labour leader of the stature of Douglas Fraser is indeed encouraging.

Encouragement of a sort is heard from an observer on the other side of the Atlantic, too. An article entitled “America’s Trade Unions” in *The Economist* in February 1990 had the heartwarming subtitle, “Return From the Dead.”⁶ It said in the article that while unions had seemed to be heading for extinction, recent victories, wiser public relations, and a backlash against corporate cost cutters had helped make them respectable again.

⁴Fraser, *Is the Labor Movement on the Right Course?*, in *Arbitration 1989: The Arbitrator’s Discretion During and After the Hearing*, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1990), 12.

⁵Fraser, *Bake a Larger Pie* (Memphis: Seidman Memorial Lecture, Southwestern Univ., 1982). The title is surely a reference to Fuller’s “Fallacy of the Static Pie.”

⁶*The Economist*, Feb. 10, 1990, at 56.

While the victories, some of which were only nonlosses, may be real, if union revivification depends on public relations and a reaction against the ravages of leveraged buy-outs, then we have every reason to think it will be a merely transitory phenomenon. Perhaps unions are still on the right track, but they give many appearances of being at the end of the line.

That is not to say they have nowhere to go. But it is time to lay some new track, and to do that there must be some careful surveying, because we are in new territory. About 17 percent of the United States' work force is unionized. Only 12 percent of the female work force is unionized. Evil, union-busting management cannot be blamed for figures like that, although they may take some shortsighted pleasure in them.

In Canada, the picture appears different, with more than one third of the work force being organized. To a considerable extent, the higher level of union organization in Canada is due to a much greater degree of organization among public servants. Outside of the public service, work force organization stands at about 19 percent. The three largest unions in Canada are unions comprised essentially of public service employees. As well, the difference may be attributable to a more congenial legislative and administrative atmosphere (a vote is not the norm in certification cases). To some extent, the fact that the degree of union organization has not fallen as much in Canada as it has in the United States may be due simply to cultural lag. What is of special significance to my remarks today is the fact that in both the United States and Canada, the degree of union organization in the growing sectors of the economy is pathetic.

The principles and assumptions upon which industrial relations have been based—since the development of modern unionism, but more particularly since the 1930s—are about to be tested as never before. The environment in which those assumptions have been valid is changing both rapidly and in some respects fundamentally. Environmental forces involve constraints which constantly limit the choices open to unions, and which the very forms of unionism must be able to accommodate.⁷ Let me say a bit about these environmental forces—economic, social, and political. They are forces to which, in Canada at least, the union movement has not sought to accom-

⁷Kumar and Slobodin, eds., *Changing Unionism in Canada* (Kingston: Queen's Univ., Industrial Relations Centre, Reprint Series No. 78).

modate itself in any very significant way. To the extent that it has reacted to them at all, it has reacted negatively, in the apparent hope that propaganda would alter their course.

First, economic factors,⁸ and here I shall refer particularly to the Canadian scene. It is not irrelevant to that of the United States, involving as it does half of the continent you share, and your largest trading partner, with whom you share it. Econometric models, on which large-scale forecasts must be based, rest on technical coefficients generally held constant over time, but subjected to a range of assumptions as to the quality or quantity of various inputs, such as labour skills, the quality and ingenuity of management, the capacities of machines and equipment, and the relative costs and substitutability of each of these in the production mix.⁹ Two particular sets of assumptions are at issue in collective bargaining: those involving the possible substitution of capital for labour under various cost scenarios, and those involving the shares of product revenues that will go to workers, shareholders, and consumers. "In the last analysis, [what] is the principal subject-matter of traditional collective bargaining [but]—how the fruits of production are to be shared?"¹⁰

The validity of these sets of assumptions is at issue because the economic environment in which they have been held has shifted and will shift more. Let me mention three major sources of uncertainty in this area for Canadians.

The first of these is free trade. Through the reduction of trade barriers, free trade is having and will have an impact on job creation and economic growth. Jobs will be created in some sectors of the economy and in some regions of the country, and jobs will be lost in others. Industry patterns, and the relative importance to our economy of whole industries as well as individual enterprises will change dramatically. Subsidies, incentive payments, and development grants will go, and the economic viability of some enterprises will vanish. Minimum wages, high security and benefit costs, union certifications themselves will come under pressure.¹¹ These pressures will not be deflected by

⁸Dion and Hébert, *L'avenir du syndicalisme au Canada*, 44 *Relations Industrielles* 2, 12–13 (1989).

⁹Adams, *Some Reflections on the Canadian Industrial Relations System* (Kingston: Queen's Univ., Industrial Relations Centre, Reprint Series No. 56), 3.

¹⁰*Id.*

¹¹*Id.*

the simple iteration, at whatever volume, of that much abused epithet, “unacceptable.”

A second source of uncertainty, well known in the United States too, is deregulation. Here again, the rules of the game are changing, most notably in the areas of transportation and communications, but also in financial services, a large industry with a large employment force, rarely spoken of at meetings such as this. In the United States the rush to deregulate has resulted generally in massive assaults on collective agreements and on unions in deregulated industries. It cannot be said that the labour relations policy for dealing with these necessary implications of a fundamental economic change has been any more imaginative in Canada than in the United States.

One of our distinguished students of industrial relations has said that it is employees who have the most to lose from deregulation “because they have been major beneficiaries of a system that has permitted [employers] to pass along higher costs to consumers. When this ability becomes constrained by competitive market forces, where else” he asks, “will employers look for relief if not to the employment of lower paid part-time workers, removal of restrictive rules or practices on job assignments and programs to boost productivity through technical innovations?”¹²

There is a third source of insecurity: technological change. Some people say that technological change will become one of the most important causes of unemployment, while others claim that the process in all likelihood will create more jobs than ever, just as rising agricultural productivity led to the move to cities and to factory jobs, and just as high productivity in manufacturing permitted the rise of the service sector. Certainly new and transforming technologies mean the decline and disappearance of some jobs but the rise of new ones. The pace of change is accelerating, and the occupational structure—also the social structure—of the work force is changing in consequence.

The sorts of representation this work force will need, and the methods by which its needs can be expressed and accommodated have not yet been adequately addressed by the present representatives, to the extent they are that, of working people. “We have barely begun to grapple with the impact of technology on seniority rights, job classifications, supervisory structures, the

¹²*Id.* at 5.

organization of work, training [and the role of] part-time workers [most of whom are women and the young],”¹³ to name just a few of the major areas where bargaining that is not done with an eye to the future is merely temporizing.

There is a real need in industrial relations to adjust to the profound changes that are coming from these three areas, from trade policy initiatives, from deregulation, and from the continuing thrust of technological advance. If our present forms of employee representation are not such as to facilitate the hammering out of collective agreements that permit positive adjustment to change, if these forms are those through which only a fraction of the work force is represented, where will people look for the new mechanisms of change that we all will need and that some will demand? What about the great mass of workers who are not organized and in many cases prefer not to be?¹⁴

Those questions have in part been getting some answers: those adversely affected by change, and with little protection from it, turn more and more to governments for solutions. Indeed, it is especially in those rapidly changing areas of the economy that unions are in decline or retrenchment and where pressure for government intervention is felt. As Charles Heckscher has written, “These changes pose a serious challenge to management as well as to organized labor, because the cost of a decline in worker representation through unionism is all too often a loss of worker commitment and a consequent decrease in productivity.”¹⁵ As well, the regulatory burden imposed on employers by some social policy initiatives has not always resulted in corresponding benefits accruing to employees.¹⁶ It is important to note that nowadays, where governments do intervene in workplace matters, it is to advance general substantive social policies, and not to advance the empowerment of representational agencies; that is, not to improve the legislative and administrative climate in which employee organization may take place.

Here I think there is a contradiction in the policies of contemporary western governments. Deregulation and privatization

¹³*Id.* at 6.

¹⁴The question is particularly urgent in the cases of white-collar workers and professional employees. See, among others, Heckscher, *The New Unionism: Involvement in the Changing Corporation* (New York: Basic Books, 1988), 5.

¹⁵*Id.* at ix.

¹⁶Weiler, *The Representation Gap in the North American Workplace*, Larry Sefton Memorial Lecture (Toronto: Univ. of Toronto, 1989), 20.

are intended (whatever other motivation such legislation may have), to allow natural, open-market, consumer-driven forces to determine, over the long run, availability of goods and services and their market values. That may be, but at the same time imposed social policies—regulation on another level—are not, as on the liberal theory they should be, the expression of the needs and concerns of workers, at least, not as formulated and advanced through appropriate and valid forms of representation. As a believer in the virtues of negotiated arrangements, I think it is to be regretted that the dedicated union rep has become the dedicated lobbyist and political activist, and that negotiation is no longer so much on behalf of those one validly represents, as on behalf of the cause one has espoused.

Another answer to the representation vacuum may be the development by employers of employee involvement schemes. These have been developed both by union employers and by nonunion employers. Where union employers have developed them, they may or may not have done so following consultations with the union. The tacit assumption of this whole movement, as Paul Weiler has written, is that it is the job of the personnel department—now sporting the fancy title of the human resources division—to represent the interests of the work force within the enterprise, and thereby to function as a substitute for the traditional outside, and supposedly too adversarial, trade union.¹⁷ The form is friendly enough, but its limits are seen in its misplaced accountability and its dubious durability when the scene changes. That form of representation is one whose limits are quickly reached.

The second group of major environmental factors bearing on the validity of the current forms of representation are social factors. Despite the 30-year decline in organized labour's share of the private sector work force, polls are showing a common perception of unions as having too much power. Unions are distrusted, although some cold comfort may be taken in their not being quite as distrusted as management. Thirty years ago, organized labour was widely seen not as a minor interest group—and whatever may be the popular view, that is how most North American governments now regard unions—but was considered one of the central institutions of our way of life. Unions had come to be seen as essential to provide a balance against

¹⁷*Id.* at 22.

corporate power and to prevent employer abuses. The New Deal established unions as a pillar of its social policy. Indeed, throughout the industrialized world, organized labour was considered as a bulwark against despotism. Totalitarian regimes always sought to undermine unions.¹⁸ One of the most exciting events in recent times has been the struggle first for survival and then for the triumphant breakthrough to freedom—with all the consequences we know—of Solidarity, in Poland. In North America, the marginalisation of the labour movement has gone largely unnoticed.

Organization of the female employment force is at a significantly lower level than that of the male employment force; organization of young workers is, I would guess, even lower; organization among visible minorities—where the problems are indeed often those of the old days—is uneven. Perhaps most significant for the future, and for my thesis, is that outside of the public service sector, white-collar workers are not organized and, above all, do not want to be organized, or at least, do not appear to be very attracted by what unions are offering them today. The forms of representation provided by the union movement as it has developed to this point simply do not appeal to, and may not be appropriate for the increasing numbers of people who work in service or high-tech industries. They work in new ways, in new surroundings. They may constitute highly dispersed groups. They need a different form of organization because their working life is organized differently. But they need and will need to be collectively represented, and forms congenial to them and appropriate for them must be devised.

Well, you may say, the trade union movement has been told before that it's obsolete, and yet it continued to grow. Let me give you the argument as presented by George Meany:

There is a common tendency to draw comparisons between the modern labor movement and that of some mythical past period of crusading fervor and dynamic forward motion. Much depends, of course, on how you view the picture. If you are looking for flaws and blemishes, there are always plenty to be found. Take any segment of labor at any given point in time and something can be found to criticize or vilify—if that is the purpose. But suppose we were to apply the same dim view consistently—disregarding the favorable aspects—to any past period of labor history.

¹⁸Heckscher, *supra* note 14, at 4.

For example, take the Federation of the 1880s and 1890s. It represented a microscopic proportion of the labor force. In addition to the Carpenters, the Cigarmakers and a small handful of other unions that still exist, its roster of affiliates consisted for the most part of such thriving organizations—vibrant with dynamic forward thrust—as the Organ Makers Union, the Umbrella and Walking Stick Workers, the Hair Spinners Union, the Box Sawyers and Nailers, the Architectural Cornice Makers, the Lantern Workers and the Horse Collar Makers National Union.

The Federation's total income in a typical month was about \$300 or \$400 and its expenses a few dollars less. It had no paid organizers in the field, and its "headquarters staff" consisted of one office boy. It had no friends in the liberal intellectual community. It was, in fact, quite obvious to any well-informed journalist, economist or student that no organization so constituted and so narrowly based and guided could possibly survive the rapid social and technological changes of the time.¹⁹

But Mr. Meany spoke those words in 1967, and the decline of which I have spoken has been continuous ever since. Let me be clear on this, if there is any doubt: I do not think unions are obsolete, and I think they can survive the rapid social and technological changes of the time. I have been saying throughout as I said at the outset: workers of all sorts must organize to protect their interests, and neither the well-meaning state nor the well-meaning employer can properly be considered a valid representative of employee interests.

The third group of environmental factors are political and legal. As I have said, workers who are adversely affected by change and who have little protection from it are turning more and more to governments for solutions. As well, innocent third parties affected by industrial disputes turn to governments to protect their interests, which they identify with the public interest. What happens in the workplace is beginning to be affected more by what is done in legislatures than by what occurs at the bargaining table, or in the day-to-day relationship of an employer and a bargaining agent.²⁰

In the last two decades employee rights have been extended far more by law than by collective bargaining. Labour standards, occupational health and safety, amended workers' compensa-

¹⁹Cited in Robinson, George Meany and His Times (New York: Simon & Schuster, 1981), 264–265 (address delivered to the AFL-CIO Convention on December 7, 1967).

²⁰See Sack and Lee, *The Role of the State in Canadian Labour Relations*, 44 *Relations Industrielles* 195 (1989), *passim*.

tion, human rights, and pay equity legislation have extended to all categories of workers' protection (in Canada in the federal jurisdiction, this even includes certain rights to arbitration) that could once have been obtained only through collective bargaining. What is more, in Canada at least, judicial interpretation of the Charter of Rights and Freedoms—a new document having constitutional force—is weighing in in favour of the protection more of individual than of collective rights.

It is to the challenge of these economic, social, and political changes that new responses must come. New responses did come, with respect to quite different problems, of course, during the transformational period of the 1920s and 1930s, when industrial unionism substantially displaced craft unionism, although the latter still constitutes a valid, and occasionally flourishing form of union organization. The 1920s were a period of crisis in the labour movement not entirely unlike the present one. To quote again from Charles Heckscher's book:

There was declining membership, hesitant organizing, parochial leadership, unimpressive results at the bargaining table and the rise of dual unions. The causes were the indifference or hostility of workers to unions, economic concentration, craft and jurisdictional restrictions of the organizations themselves and the antiunion practices of management. Behind this paralysis of the labor movement was a conjunction of social forces analogous to those that are undermining unions today. The economy was shifting to mass production; workers were being brought into large bureaucratic firms; and new movements were arising on a basis quite different from the communities that created craft unionism. The old structures could not cope. Today a similar transformation is under way, involving the decline of the very mass-production organization that originally favored industrial unionism.²¹

The structure of management is changing to postbureaucratic forms. Much study is devoted to potential forms of management—how much to potential forms of collective representation?

All these thoughts have been expressed before, and all these questions asked. Let me close by giving you abbreviated summaries of two recent attempts to foretell the future of unionism. For the future of unionism in the United States, Richard Freeman envisaged four scenarios, with varying degrees of probability. The most probable for the short term—continuation of present

²¹Heckscher, *supra* note 14, at 8.

trends—is the most discouraging. The indefinite continuation of present trends, however, is something not to be expected, and Freeman's fourth scenario, which involves the most change and the most challenge—but which has the additional driving force of being necessary—is what he describes as a new spurt in unionism. The published summary, which I ask you to hear in the language of just under two percent of Academy members, is as follows:

Une telle poussée serait plus susceptible de se produire chez les cols blancs et chez les femmes. De plus, elle nécessiterait des changements dans la signification de l'adhésion syndicale et s'accompagnerait probablement de la création d'une nouvelle centrale syndicale regroupant des syndicats de cols blancs et d'employés du secteur public avec des associations d'employés et de professionnels qui se sont traditionnellement tenus à l'écart du mouvement syndical.²²

Similarly, in recognition of the site of this meeting, and in honour of the other major linguistic group with whom we share this continent and its future, let me attempt this brief summary of a recent article in the same publication, *Relations Industrielles*, on the future of unionism in Canada:

En el año 2000, existirán todavía sindicatos, pero es difícil afirmar que forma tomarán. Los sindicatos tendrán que definirse de manera más clara. La diferencia entre el discurso y la realidad de los actos sindicales es considerable—si no se reorientan, los sindicatos canadienses podrían decaer de manera comparable en lo que pasa en los Estados Unidos. Su progreso depende de su cuestionamiento e de la aceptación del “libre intercambio,” de la libre empresa; son ellos por otra parte, una empresa en la industria del sindicalismo. El producto que venden es la seguridad para buenas condiciones de trabajo.²³

None of this is to say that some trade unions are not vibrant organizations today, or that the present forms of organization

²²“Such a new spurt would be more likely to occur among white-collar workers. It would mean changes in the meaning of union membership and would likely involve the creation of a new central union of white-collar and public sector workers as well as professionals and others who have traditionally kept away from the union movement.” Freeman, *What Does the Future Hold for U.S. Unionism?* 44 *Relations Industrielles* 25, 45 (1989).

²³“In the year 2000, unions will still be around, but it is hard to say what their characteristics will be. Unions must define their objectives more clearly. Now, there is a considerable gap between union rhetoric and union activity. Failing a major reorientation, unions in Canada may decline as they have in the United States. They must accept free trade and free enterprise. They are themselves in the business of selling security and good working conditions.” Dion and Hébert, *supra* note 8, at 24.

and representation are all outdated and should be scrapped. Those forms, however, are certainly not adequate to meet all the organizational and representational challenges that lie not ahead, but face us right now.
