Saskatchewan's Bill 85: A Rebellion Without a Cause

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Executive Summary

Introduction

A government undertaking substantial labour law reforms should clearly set out its policy objectives in concrete terms, engage in meaningful consultation to ensure balance and address the concerns of stakeholders, and support reform proposals with careful research. By this standard, the contents of Bill 85 and the process by which they were arrived at leave much to be desired. There was no rigorous or independent study of the possible impacts of the reforms on workers, employers, unions, and the broader industrial relations system. There was no attempt by the government to develop a package of reforms that would be considered fair and balanced.

The contempt for collective bargaining embodied in Bill 85 is strangely at odds with the major challenge facing Saskatchewan: creating stable, well-paying jobs with benefits that can attract and retain the large number of workers required to meet the province's labour needs. In this context, weakening employees' individual and collective rights by undermining collective bargaining and eroding statutory protections is counter-productive. Unfortunately, this appears to be the primary aim, and likely effect, of the majority of the reforms contained in the new legal regime.

This review of Bill 85 examines the stated aims and likely outcomes of the new *Saskatchewan Employment Act* in light of current employment law and industrial relations scholarship, and the available empirical evidence. It finds a confusing and ill-considered overhaul of the legal regime governing work in Saskatchewan that promises greater conflict, instability, and costs, and that delivers few benefits from either a legal or a public policy perspective.

One-Sided Labour Law Reform: What Does Bill 85 Seek to Accomplish?

Laws governing work and employment should help to produce decent, safe jobs and a fair distribution of a society's wealth among its citizens as an important condition for a vibrant and healthy democratic community. This has historically been accomplished in two ways. First, through the establishment and enforcement of a basic legal floor of minimum conditions of work; and secondly, through laws and regulations that facilitate and regulate collective bargaining between employers and employees, and govern the conflicts that arise between them so as to minimize their disruptive and destructive potential.

Both history and employment law scholarship teach us that one-sided and haphazard labour law reform driven by ideology rather than evidence is disruptive and unsustainable. It is easy, and tempting, for a majority government to impose an entirely new vision of work law on citizens and industrial relations actors – one that will reward its most ardent supporters. But making such a model function, and sustaining it over the longer term, is considerably more difficult. If the *process* and *substance* of the law are obviously one-sided, the goodwill and legitimacy that are such important components of the industrial relations and employment law systems are endangered: conflict escalates,

the willingness to compromise fades, and short-term resistance overwhelms the potential for actors to work towards longer term, cooperative solutions.

Rather than a balanced and evidence-based public policy initiative to modernize and simplify the laws of work, Bill 85 is quite clearly an ideologically-driven legislative move to accomplish the following:

- *Limit access to collective bargaining* by making it more difficult for workers to organize unions and obtain certification;

- *Weaken or undermine existing collective bargaining relationships* by: encouraging smaller and more fragmented bargaining units; lengthening or removing 'open periods' so that unions are under constant threat of decertification and raiding; imposing greater administrative burdens on unions; imposing new limitations on the right to legally withdraw labour services; introducing new mechanisms for employers and factions of workers to challenge union bargaining committees with "final offer" votes.

- *Give employers greater discretion* to control the workplace and their employees by making employment standards more malleable and reducing the oversight role of the state.

The government has described its intent as one of "modernizing" and "simplifying" Saskatchewan's labour legislation. This review finds little evidence that it accomplishes either of these goals in any meaningful sense. In key respects, for example by eroding fixed labour standards and by encouraging greater fragmentation, conflict, and instability in the industrial relations environment, Bill 85 looks to bygone eras rather than to the future. The vagueness of the Bill means that rather than simplifying the laws of work in Saskatchewan, Bill 85 will introduce a much greater degree of legal uncertainty into labour relations, with the conflict, distrust, instability, and increased costs for all concerned that this breeds. The nature of the Bill guarantees years of expensive and disruptive litigation, at both the labour board and in constitutional cases.

1. Labour Relations

"Confidential Employee" Exemption

Bill 85 introduces a peculiar new definition of "confidential employees" whose implications remain unclear. It seems likely that the law is intended to extend the number of jobs and employees that may be excluded from the scope of collective bargaining by legal definition. Depending on how regulations clarify the law's intent, and on the interpretation given to its provisions, a good number of Saskatchewan employees may be stripped of their right to collective bargaining and find that their collective agreement entitlements have been torn up overnight. In addition to the costly litigation that will be required to get clarity on the its implications, this measure will raise important charter issues for employees whose effective exercise of their rights will have been made impossible by legislative fiat.

Fragmentation: "Supervisory Employees" and "Partial Raiding"

Bill 85 defines a new category of "supervisory employee" that may have far-reaching implications for some employees' access to collective bargaining, for the structure of bargaining units, and for the stability of labour relations. Section 6-11 orders the labour

board to carve out “supervisory employees” from all others unless the union and employer agree to maintain the status quo. One purpose of this change may be to effectively exclude the new category of employees from collective bargaining altogether by making it much more difficult for them to maintain or re-acquire union representation.

The Bill encourages the fragmentation of bargaining units by making provisions under Section 6-10 encouraging unions to apply to carve out portions of existing units consistent with the new class of “supervisory” employees. New unions or units representing these employees may proliferate, leading to more collective agreements, more complicated and costly bargaining and agreement administration, and a greater likelihood of disruptive industrial conflict. Indeed, by intentionally promoting bargaining unit fragmentation, the legislation moves in a direction opposite to that which most experts agree reduces the costs and conflicts involved in collective bargaining.

Instability and Mistrust: Open Periods and Final Offer Votes

Bill 85 changes the rules surrounding the “open periods” during which applications to displace (raid) or decertify a union can be entertained. Section 6-10 doubles the time period during which applications to raid can be made, and Section 6-17 all but eliminates the “open period” restriction on decertification applications. The result may well be a near-constant campaigning mode on the part of unions, workers, and employers, with added distraction and conflict, and a corrosion of relationships that promote long-term cooperation and productivity.

A higher frequency of representation ballots can be expected, and without substantial new funding to administer the *Act*, greater delays in conducting votes will result. Together with the government’s decision in Bill 6 to break with the traditional Canadian “quick vote” model, the apparent intent of Bill 85 is not only to encourage raiding and decertification campaigns, but also to give employers more time to use their superior access to, and power over, workers to lobby against collective bargaining and attempt to defeat new certifications.

Section 6-35 permits an employer, or a group of workers representing at least 45 percent of the bargaining unit (or 100 employees, whichever is less) to request a vote on the employer’s “last offer” in bargaining. The “final offer” provisions promise to inject greater hostility and mistrust into the negotiation process, and similar laws have been linked empirically to higher strike frequency. The new provisions undermine the traditional role of elected bargaining committees and will have major and unpredictable consequences for bargaining strategies and relationships. In this case as in others, the likely result will be higher levels of conflict, uncertainty, and instability in Saskatchewan’s industrial relations environment.

2. Employment Standards

It is well established that employees without access to union representation and collective bargaining are much less likely to be able to monitor employers' adherence to employment standards or to enforce their statutory rights. Yet, basic employment standards remain the main line of legal protection for employees making individual contractual bargains with employers. In these circumstances, the clarity of the rules is key for encouraging employers to abide by, and employees to insist upon, minimum standards of work. With few exceptions, Bill 85 does not simplify the relevant law but actually makes it more complex and ambiguous, undermining basic employment standards.

The most obvious case is Bill 85's provisions around overtime pay. In the place of a simple rule – overtime payment will be made when an employee works more than the prescribed number of daily or weekly hours – we are now faced with a complex layer of exceptions, exemptions, waivers, and special arrangements that erode the basic standard and expand the opportunities available to employers to avoid paying overtime.

Bill 85 gives employers greater discretion to manage the workplace in other areas. It drops the longstanding direction to employers to grant two consecutive days off, ending the longstanding legal protection of a 'weekend' period to spend with family and friends. The bill eliminates the requirement that employees' wishes be taken into account in substituting another day for a public holiday. It also gives employers the right to deny employees a meal break based on "unexpected or unusual" circumstances, or if the employer simply deems it "not reasonable" for an employee to have a meal break.

Viewed in isolation, each of these changes can be considered relatively minor tinkering with the system, yet the pattern overall is clearly a move towards greater employer control over work, and fewer checks and balances over how employers exercise that discretion.

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Saskatchewan's Bill 85: A Rebellion Without A Cause

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I have reviewed Bill 85, *An Act respecting Employment Standards, Occupational Health and Safety, Labour Relations, and Related Matters and Making Consequential amendments to certain Acts.* This report focuses on Parts VI (Labour Relations) and II (Employment Standards). Part I provides an overview and critical discussion of the process and alleged purposes for the wide-ranging omnibus Bill. Part II is a discussion of some of the key provisions of Bill 85, and my assessment of their potential impact.

PART I: THE POLITICS AND RISKS OF ONE-SIDED LABOUR LAW REFORM

The most glaring question that arises from a close reading of Saskatchewan's Bill 85 is this: *What Problem Is Bill 85 Purporting to Solve*?

This is no mere academic question. Systems of law that govern work and employment are highly complex, held together like the strands of a spider's web, each strand connected to the next in an intricate layering based in historical learning, conflict and compromise, and social and legal norms that are deeply embedded in a culture. Haphazard reform consisting of a tug here and there on strands of the complex web of rules can be dangerous, and irresponsible. Caution is warranted, because the strands are interrelated and interdependent. Pull on one strand and there can be reverberations throughout the entirety of the system with unpredictable and harmful effects. That is why governments should work closely with stakeholders, and consult with experts who can study how proposed changes are likely to influence industrial relations outcomes.

A government contemplating substantial labour law reforms should clearly set out its policy objectives in concrete terms, and be able to explain to its citizens how its proposed laws will achieve those objectives. Those explanations should be supported by careful research.

How does Bill 85 stand up to that standard? The process leading to Bill 85, as well as the substance of its provisions, is notable for its lack of substantive balance in addressing the concerns of labour, employers, and employees, and the striking absence of independent research into the potential effects of a dramatic reworking of the system of rules that govern work in the province. This is a telltale sign of reform driven by partisan ideology rather than sound, thoughtful public policy considerations.

It is relatively easy to assess what the bundle of laws found in Bills 5, 6, and now 85 are intended to achieve. The predominant goals that emerge are the following:

- To impede access to collective bargaining by making it more difficult for unions to organize and obtain certifications from the labour board to represent new workers;

- To weaken or undermine unions in existing collective bargaining relationships through a variety of mechanisms, including:
    - Encouraging more fragmented, smaller bargaining units that will have less bargaining power
    - Removing 'open periods' so that unions are under perennial threat of decertification
    - Extending the period during which union raids are possible, thereby introducing instability into labour relations
    - Dividing up existing bargaining units to create greater pools of potential internal replacement workers in the case of strikes or lockouts
    - Imposing greater administrative burdens on unions in the form of mandatory auditing requirements
    - Introducing new procedural and substantive hurdles as prerequisites, and other limitations on the right to strike
    - Introducing new mechanisms to allow union bargaining committees to be challenged in 'final offer votes' initiated by employers or factions of workers
- To grant employers greater discretion—or 'flexibility', to use the contemporary popular slogan—to control the workplace by making employment standards more malleable and reducing the oversight role of the state and unions.

The International Labour Organization has already chastised the Saskatchewan government for Bills 5 and 6, finding that these laws violate the government's obligations under international law to protect labour rights.[1] Bill 85 was the government's chance to comply with the ILO's direction to amend the provinces labour laws to provide for *more* robust access to and protection of collective bargaining and less government interference in the internal workings of employee associations. However, in an embarrassing move for Canadians, the Saskatchewan government snubbed its nose at the ILO and its international human rights obligations, and in Bill 85 actually took steps to further *weaken* labour rights and *further* interfere with the internal governance of labour associations.

What explains the government's blatant disregard for its international law obligations?

This is the crux of the mystery that is Bill 85, particularly Part VI of that legislation (Labour Relations). The law introduces reforms that discourage cooperation and goodwill between

[1] ILO, Reports of the Committee on Freedom of Association, 356th Report of the Committee on Freedom of Association, Case No. 2654, Complaint Against the Government of Canada (Saskatchewan): http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_124972.pdf

employers and unions, that strip workers (including many professionals) of rights and protections, and that could lead employees to work longer hours for less pay. But why are these desirable results for Saskatchewan at this time? Who will benefit from the changes, and are those benefits so great that they justify the poisoning effects that the Bill will have on Saskatchewan's industrial relations climate? I will explore some of these questions in the following section.

Lessons from History: One-Sided Work Law Reforms are Divisive and Unsustainable

For most of the twentieth century, laws governing work had a transparent mission: to improve the lives of workers within a system of economic capitalism. It went without saying that workers were the weaker party and that, because workers are human beings, the state had an interest in ensuring that weakness was not exploited in the pursuit of profits. A balance was needed; the pursuit of profits was good, and capitalists who took risks should be rewarded. However, the pursuit of profits was a means to an end, not the end in itself. The real goal of the economic and legal model was to produce decent, safe jobs that encouraged a fair distribution of wealth throughout society so as to reduce inequality and produce a vibrant, self-reproducing, healthy society and democracy. The common law model of employment, based in contract and tort law, reinforced the inherent imbalance of power in the employment relationship, too often producing working conditions that fell well below acceptable social, moral, and economic standards of the day.

Two principle regulatory devices were deployed in Canada (and elsewhere in the democratic world) to strike a balance between the pursuit of a fair profit, on one hand, and ensuring workers were protected and income was distributed throughout society, on the other hand. The first involved a series of regulatory standards that fixed basic minimum conditions of work: employment standards, health and safety, workers' compensation, and later on, human rights and other equity seeking legislation. With these laws, governments told employers and employees that there is a floor of basic legal protections below which it is unlawful to contract. Fixed employment standards represented an explicit recognition that, owing to their vulnerability and lack of bargaining power, employees would often feel pressured to agree to less than the state deemed acceptable for society.

The second regulatory tool has been laws that facilitated collective bargaining. These laws arose in Saskatchewan, as in the rest of the democratic world, not out of some great 'aha' moment by politicians, but following many years of negotiation, compromise, conflict, violence, and even deaths. Collective bargaining laws strike a complex balance between competing tensions that exist in every society. Workers will come together to protect their interests, in pursuit of a voice mechanism at work, and to improve their bargaining position, and employers will usually resist them doing so. This has and always will be so. It is not a dynamic the law creates, nor one that the law can totally control. Law's role is to channel as much as possible this social reality into productive, rather than disruptive and destructive activities.

This is no easy task. We are dealing with real people, complex institutions, and clashing interests, as well as competing social, economic, and cultural norms. However, history

provides lessons. We know some things about how to design work laws, and how not to. For example, history demonstrates time and again that one-sided, ideologically-driven work law reform is unsustainable and disruptive. It is easy, and no doubt tempting, for a government in a majority situation to impose an entirely new vision of work law on its citizens and the industrial relations actors, one that will please its most ardent political supporters in the short run. It is considerably more difficult to make that model function as envisioned, and to sustain it over time. Each tug on a strand of the web of rules provokes a series of effects, some predictable, many not so.

An important historical lesson is that goodwill and legitimacy are inputs in the industrial relations system. If the *process* and *substance* of the law are manifestly one-sided and unbalanced, the legitimacy of the legal system is endangered. Goodwill dissolves, conflict escalates, the willingness to compromise fades, and short-term resistance overwhelms the tendency of the actors to work towards longer term, cooperative solutions and problem solving.

These points have long been emphasized by the leading figures in Canadian industrial relations law. It's worth reciting the observations of Professor Paul Weiler, architect of the B.C. *Labour Code* in the 1980s, and world-renowned Harvard Law School labour law professor:

> **"***The important lesson to draw from this narrative is the need for reciprocity—for balance—in labour law reform.* ***When a government starts out to make substantial changes in labour legislation, both the process it uses and the package it proposes have to been seen as decently responsive to the interests of both sides in labour/management relations…*** *It is the nature of politics that one party will have the support of employers and the other of unions. It becomes terribly important that the elected government restrain its own supporters from the all—too—human bent to translate a victory in the political arena into major gains in the legal balance of power against its opposite number at the bargaining table.*
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> *Why is this a vital principle? The first and foremost reason is that* ***the political pendulum swings and governments change.*** *If one side induces its party in office to use a current legislative majority to force through one-sided changes in the law, this will serve as a precedent for the other side to have its representatives do the same thing when its political turn comes.*
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> ***If the process of labour law reform is perceived to be one-sided and unfair, this will have a corrosive effect on the legitimacy of the law it produces and on the degree of voluntary acceptance of that law by those whom we are trying to control with it. I cannot over-emphasize the importance of this simple point.*** *Labour/management relations involve powerful organized bodies on each side of the table engaged in a sharp adversarial struggle over the division of the economic pie. The law aims to establish standards and institutions which will minimize the harmful impact of such conflict and, hopefully, promote creative and co-operative problem-solving…*

> *The [labour] board must ultimately rely on a shared sense that everyone needs [the Code], even if this means grudging acquiescence in the decisions one loses. As long as the spirit of voluntary compliance is widespread in both the employer and the trade union communities, the board can deal effectively with the occasional defiant party.* ***But if one side is convinced that the law by which it is governed is thoroughly unfair because of the manner in which it was produced, it will not provide tacit support to the board in the enforcement of the law in these trouble cases.*** [2]

Kevin Burkett, one of Canada's most respected labour relations neutrals, made a similar point in an article criticizing the overtly political labour law reforms that took place in Ontario during the 1990s:

> **"**...*the history of labour law reform demonstrates that one-sided reform is both shortsighted and corrosive, and that for the most part governments have resisted the urge to reward their supporters in this way. They have opted instead to travel down another path: a path marked by meaningful consultation, earnest problem solving and balanced initiatives."*[3]

There have been lots of thoughtful, balanced work law reform processes of this sort over the years. For example, the Federal government retained Professor Harry Arthurs and Andrew Sims before considering reforms to the *Canada Labour Code*'s sections on employment standards and collective bargaining law, respectively. Professor Arthurs commissioned academic studies from 23 respected academics, and an additional 9 research studies from in-house researchers, in addition to wide ranging consultations with stakeholders, before setting out his suggestions for reform.[4] The Sims report was led by a 3 person panel of highly regarded neutrals, and involved 7 months of research and consultation.[5] The highly influential 1968 Woods Task Force was comprised of the leading labour law and industrial relations professors in Canada, and was prefaced by an extended period of study and consultation.

The process leading to the very complicated omnibus Bill 85 in Saskatchewan stands in stark contrast. Firstly, there was no independent and rigorous study of the possible impacts of the reforms on workers, employers, and unions, and the broader industrial relations system. I have been unable to locate a single study of the potential effects of Bill 85, or even one that explains the specific problems that the government's labour law reform of recent years was intended to solve. This is important, because Saskatchewan's economic challenges are quite distinct.

As I will discuss in more detail below, by the government's own account, the most daunting labour market challenge facing Saskatchewan is the need to attract tens of thousands of new workers to the province to fill a labour shortage. Economists recognize that this will require a system that produces better jobs than those in competing jurisdictions. An obvious empirical question is how labour law reform could help achieve that goal. This is a question that should have been studied and debated by knowledgeable experts in the field as part of the process

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[2] P. Weiler, "The Process of Reforming Labour Law in British Columbia" in J. Weiler & P. Gall, *The Labour Code of B.C. in the 1980s* (Carswell, 1984), 25 at 29.
[3] K. Burkett, "The Politicization of Ontario Labour Relations" (1998), 6 Can. Lab. & Empl. L.J. 161 at 164.
[4] H. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (HRSDC, 2006)
[5] A. Sims, *Seeking a Balance* (Government of Canada, 1996).

leading to the design of Bill 85. The absence of those studies is notable, and may prove to be a legacy of these reforms when labour law historians look back on this controversial period in Saskatchewan's political development.

Secondly, there was no attempt by the government to develop a package of reforms that would be considered fair and balanced to all of the industrial relations actors. Not one amendment in Bill 85 encourages collective bargaining or assists unions in the performance of their duties, or improves access to collective bargaining by employees who desire collective representation, though many clearly are intended to undermine collective bargaining. Again, for reasons I will discuss shortly, this contempt for collective bargaining is particularly surprising in Saskatchewan, where the policy goal should be producing high paying jobs with good benefits and job security. We know empirically that reducing collective bargaining coverage leads to lower average wages and jobs with fewer benefits and less security, the opposite of what labour market economists believe Saskatchewan needs in order to overcome its pending labour scarcity crisis.

The original draft of Bill 85 consisted of a wish list, presumably based on requests from radical voices within the business lobby that would like to see the elimination of collective bargaining and the dismantling of the labour movement in the province. It included remarkable provisions, unprecedented in Canada, that would have allowed employers: to thrust organizations and collective agreements on employees with no consideration of the employees' wishes; to block access to the right the strike; to bypass the duty to bargain in good faith and union representation altogether; and to strip countless numbers of workers of the right to collective bargaining.

A political strategy frequently used in Canada has a government propose highly controversial labour law reforms, only to later withdraw the most divisive provisions. The purpose of this ritual is to enable the government to tell the public (and the courts) that they 'consulted and listened' to the concerns of the stakeholders. The Saskatchewan Party followed this strategy with Bill 85. However, even stripped of its most outlandish provisions, Bill 85 in its final version remains a one-sided package of reforms. The Bill's Labour Relations provisions in particular are designed to impose new obligations, new restrictions, new costs, and new challenges on unions. Although the employment standards provisions include some new benefits for nonunion workers, the overriding theme of those reforms is greater discretion for employers and less government oversight. Nor is there anything in Bill 85 that should lead to optimism that enforcement or compliance with employment standards in nonunion workplaces will improve in the future.

The Saskatchewan Party missed an opportunity to forge a more sustainable process based in thoughtful analysis and a fair and balanced conversation about the best way forward for Saskatchewan's industrial relations system. It has opted instead to reward those of its supporters who would like to see collective bargaining eroded and unilateral employer discretion over working conditions further extended.

WHAT IS THE PUBLIC POLICY OBJECTIVE OF BILL 85?

I opened the previous section by asking this question: *What problem is Bill 85 purporting to solve?* I return to this question below.

(1) *Creation of New High Paying Jobs?*

Governments that set out to reduce protective work regulation and collective bargaining coverage usually argue that both are impeding job growth. Whatever one might think of this argument, it certainly cannot explain the labour law reform that has occurred in Saskatchewan.

From the neoliberal perspective, labour laws and protective labour standards are believed to impede job creation. Both increase costs for employers, and restrict employer discretion. In this worldview, employers are assumed to prefer a system in which they are free to fix whatever employment practices they wish, subject only to whatever marginal restrictions on this unilateral power an individual employee can 'bargain' on their own. Opponents of protective employment regulation and collective bargaining emphasize that employers are free to roam the planet in search of the most "business friendly" jurisdictions. Businesses will bypass places where employees are protected by strong employment standards and collective agreements. Therefore, the argument goes, governments must 'compete' by lowering legislative protections for workers and by weakening the right of workers to opt for collective bargaining.

In fact, there is little evidence supporting the claim that work laws are an important determinant of inward investment.[6] Other factors, like tax rates, exchange rates, infrastructure, and access to key markets, production inputs, quality of life, and a skilled workforce are far more important to investment decisions than labour and employment laws. However, even if we are prepared to accept that in some places, at some times, labour and employment laws might discourage investment and job growth, this argument is certainly not true of Saskatchewan at this time. Saskatchewan's labour and employment laws are demonstrably *not* a deterrent to private sector job creation.

As the government regularly boasts, Saskatchewan's economy "is experiencing a period of unprecedented growth" driven by the province's abundant natural resources.[7] The antiunion, corporate funded 'think tank' *The Fraser Institute* ranked Saskatchewan second in North America on labour market performance, with the lowest unemployment in Canada and second best job growth.[8] This strong performance dates from before the passage of Bill 6, and before the election of the Saskatchewan Party.[9] Thus, if one believes that work laws and collective

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[6] See discussion in OECD, *Trade, Employment, and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996), which surveys existing literature and concludes that labour standards play a minimal role in determining international competitiveness. See also D. Doorey, "In Defense of Transnational Domestic Labor Regulation" (2010), 43 Vanderbilt Trans. Law J. 953 at 981-82.

[7] Government of Saskatchewan, *Economy*: http://www.saskimmigrationcanada.ca/economy

[8] Fraser Institute, *Measuring Labour Markets in Canada and the United States* (September 2012) at 16-17.

[9] E. Weir, "The Great Wall Ties Chairman Calvert's Five-Year Plan: Employment Growth in the New Saskatchewan" (June2013), CCPA: http://www.policyalternatives.ca/sites/default/files/uploads/publications/Saskatchewan%20Office/2013/06/Employment_Growth_in_Saskatchewan.pdf

bargaining rates influence economic performance, then Saskatchewan's labour laws must be considered a part of this success story. Saskatchewan is less susceptible to the globalizing forces of regulatory competition because of its heavy reliance on businesses in the natural resources sector. Compared to industrial manufacturers, for example, these businesses are far less able to pull up stakes and bolt for other jurisdictions simply to avoid an irritating employment law or to feed their managers' appetite for operating without a union.

In fairness, the Saskatchewan government has not emphasized job creation and concerns over capital flight as the justification for Bill 85, compared to other neoliberal governments trying to justify regressive work law reforms. Perhaps this is because the argument is so obviously superfluous in the current Saskatchewan context.

Saskatchewan's situation is very different from the usual context in which neoliberal governments argue for the dismantling of worker protection laws. More often, the debate takes place in the context of a struggling economy with high unemployment. This adds credibility to the government's claim that the 'barriers' to investment they identify (like work laws and unions) must be removed in order to attract new investment. Saskatchewan's most pressing problem is not unemployment or slow job growth at all. It is *labour scarcity*. The government predicts that it will need to attract an additional 60,000 workers to Saskatchewan by 2020.

This creates an entirely different set of policy concerns. Economists recognize that a *high wage strategy* based on a foundation of more *secure employment practices* is necessary to make Saskatchewan sufficiently attractive to lure the large numbers of workers needed going forward. Professor Emery explained this point as follows:

> …the sizable seasonal fluctuation in Saskatchewan employment is a feature of the labour market that will create challenges for employers seeking to attract labour. Other provinces can offer employment that is less variable in annual hours, meaning incomes will generally be more stable for workers. ***The earnings risk, or volatility of employment and earnings in Saskatchewan will make the province a less desirable location for migrants.***
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> Saskatchewan will inevitably need to meet growing labour demand by focusing on increasing its levels of interprovincial migration, immigration and retention of skilled labour. ***Increasing interprovincial migration levels will prove to be a challenge, however, as wage rates across provinces have converged, meaning that wage increases in Saskatchewan are keeping pace with those of other provinces, rather than stimulating further in-migration.***[10]

Saskatchewan needs policies that will encourage high wages, better benefits, more stable employment conditions, and less precarious employment patterns. Bill 85 should have been about achieving those objectives. The policy question should have been: How can work laws help produce high paying, more stable and less precarious jobs, with decent benefits?

[10] J.C. Herbery Emory, "Labour Shortages in Saskatchewan", University of Calgary, School of Public Policy, SPP Research papers, Volume 6, Issue 4 (January 2013) at 10, 26.

We know from reams of Canadian and international studies spanning decades that one of the most effective ways to raise wages and benefits, and to improve working conditions, is through collective bargaining. This is a longstanding lesson. It is the basic insight that led the United Nations to create the International Labour Organization. Collective bargaining helps to distribute wealth down to the masses, and is thus directly related to a reduction in income inequality within societies.[11] In Canada, studies have shown that unions raise wages anywhere from 8 to 12 percent, that union wage gains have a trickle over effect into nonunion workplaces, and that unionized workers have better benefits and pensions.[12] Given the current Saskatchewan government's policy turn against collective bargaining, it is not surprising that the ILO has singled out the province for criticism and expressed concern about the province's policy direction.

Private sector union density in Saskatchewan is about 17 percent, just slightly higher than the national average of 15.9 percent.[13] That means that about 83 percent of private sector employees in the province are nonunion, and the odds of those workers ever gaining access to the collective bargaining model are declining. Almost four out of ten employees in Saskatchewan are now employed in workplaces with fewer than 20 employees, and the number of smaller workplaces is growing. Unions are virtually non-existent in workplaces this size in Saskatchewan, as in the rest of North America. Collective labour laws are largely irrelevant to small workplaces in Canada, because the Wagner model of labour law used in North America was never designed to foster collective bargaining in these types of workplaces.

Thus, even under the pre-Bill 6 *Trade Union Act*, the odds of a private sector workplace in Saskatchewan being newly unionized was negligible. Moreover, union density would likely have continued to decline on its own, without any legal reforms, because of the common transition happening throughout Canada towards smaller workplaces. Collective bargaining is fading as an institution in Saskatchewan, as it is elsewhere in North America, because its legislative foundation is rusted, based in a prior era, and badly in need of reforms that will give access to collective bargaining to people employed in smaller, service sector workplaces.

For many scholars and policy experts throughout the world, this decline in collective bargaining is troubling, because we know empirically, from many years of study, that collective bargaining is one of the most powerful tools available for distributing wealth to the working population. As collective bargaining coverage declines, income inequality grows, because workers are less able to bargain their share of economic rents. This is true in Canada and elsewhere.[14] Policies that undermine and discourage collective bargaining encourage greater income inequality.

This all leads to the following observation: *If the policy objective of the Saskatchewan government is to produce high paying, decent jobs sufficient to attract tens of thousands of*

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[11] See the discussion by the International Labour Organization in ILO, "Perspectives on Labour Economics for Development" (Geneva, 2013), at 100-105: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_190112.pdf

[12] See M. Lynk, "Labour Law and the New Inquality" (2011) UNB Law J. at p. 24-25, and the sources he cites. T. Fang & A. Verma, *Union Wage Premium* (2002), 14(4) Perspectives on Labour and Income 17-23

[13] Statistics Canada, Labour Force Survey Estimates, (NAICS), Saskatchewan (2012)

[14] D. Card, T. Lemiuex, C. Riddell, "Unions and Wage Inequality", available at: http://faculty.arts.ubc.ca/nfortin/econ560/card04.pdf; Lynk, *supra* note 12.

new workers to the province in the coming years, as economists say it should be, then attacking and undermining collective bargaining is counter-productive.

Just as President Roosevelt saw in collective bargaining a tool for putting money in the hands of American workers to lift the country out of the Depression, so too might we expect the government of a province desperate to create thousands of good high paying jobs to see collective bargaining as a potential tool, rather than an obstacle and vice to be undermined.

Yet Bill 85 adopts policies designed to weaken and undermine collective bargaining, rather than protect, promote, and extend it. The government enacted Bill 6 to make it *even more difficult* for workers to access collective bargaining than before; the objective appears to be to reduce the 17 percent union density figure even further.[15] Bill 85 deepens the project of weakening collective bargaining, while it substitutes less government oversight of employment standards protections for greater employer discretion.

> **Nowhere in the world, ever, has a strategy of giving workers *less* statutory protections and *less access* to effective collective bargaining led to higher wages, better benefits, and more stable, secure employment.**

Bill 85 reduces workers' bargaining power, so we should expect that it will contribute to a deterioration of Saskatchewan's historically favourable record on income inequality. It facilitates a model that will result in a smaller share of the economic 'rents' in the province going to workers. That is a peculiar policy strategy for a government desperate to attract a huge new workforce in a short period of time.

If Bill 85 cannot be justified as a mechanism for creating the large number of new, high paying, attractive private sector jobs that Saskatchewan so desperately needs, what *is* its purpose? The Government has offered a number of other standard justifications for its work law reforms. I will consider them in turn.

(2) The Need for "Modernization"

Firstly, the government argued that many of the province's work-related statutes "**have not been substantively reviewed in almost 20 years, while others have not been reviewed in more than two generations."**[16] The purported need for 'modernization' is standard fare in labour law reform debates; almost every government embarking on reform cites it. There is nothing wrong with updating laws to fit the times, and 'modernization' of old laws is very often a good idea. However, note that the claim of modernization is not an explanation or justification of any particular policy agenda. It is used to explain to the public a government's decision to embark on a process of reforming laws in the first place. Obviously, the fact that legislation has

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[15] Chris Riddell, "Union Certification Success Under Voting Versus Card Check Certification Procedures: Evidence from British Columbia, 1978-1998" (2004) 57 Ind. & Lab. Rel. Rev. 493, demonstrating that the move from card-check to mandatory ballots impedes access to collective bargaining.

[16] Ministry of Labour Relations and Workplace Safety, "A Consultation Paper on the Renewal of Labour Legislation in Saskatchewan" (2 May 2012) [hereinafter "Consultation Paper"], p. 1. Also, see the government's webpage entitled: "Modernizing Employment and Labour Relations Legislation": http://www.lrws.gov.sk.ca/modernizing-legislation

not recently been revised does not mean that it is bad law; its longevity may be due to the fact that it works better than the next best alternative.

A justification for undertaking the famous Woods Task Force Report in 1968 was the notion that existing labour laws had become outdated and were in need of modernization. After an assessment of the existing labour law model that had emerged from the World War II era, the Woods Task Force concluded that, "as imperfect an instrument as (collective bargaining) may be, there is no viable substitute in a free society".[17] The Woods task force proposed a series of reforms to strengthen collective bargaining. Years later, reflecting on the Woods Report, Professor George Adams wrote that the eminent list of scholars and practitioners who participated in the Report rightfully concluded that collective bargaining was the most pragmatic solution for organizing a mixed-enterprise liberal democratic society, because "it purports to accommodate…a society's concerns for both the welfare of individuals and the preservation of competitive markets, private property, and freedom of contract."[18]

'Modernization' is not a value in itself. It tells us nothing about what reforms should look like; it provides no guarantee that reforms will not make matters worse. It can be deployed to justify any set of work law policies imaginable, so it tells us nothing.

For example, an objective observer could look at the Saskatchewan situation and conclude, quite sensibly, that the 'old' *Trade Union Act* model needs modernizing, since less than 2 out of 10 private sector workers are able to exercise their internationally recognized, fundamental human right to have their conditions of work determined through collective, rather than individual, bargaining. Since the traditional model was designed to facilitate collective bargaining in large industrial and resource-based workplaces, a revised model is needed to facilitate collective bargaining in the new economy characterized by small workplaces and non-industrial work. This analysis would lead to a set of reforms that *promote* collective bargaining in the new economy.[19] The Saskatchewan Party has looked at precisely the same landscape and come up with a very different recipe, one that calls for putting up even greater obstacles to collective bargaining. Claims about 'modernization' tell us nothing about which approach is 'correct'.

Nor is the claim of 'modernization' a guarantee that new ideas will spring forth. In Ontario, the Conservative Party is currently promising to 'modernize' labour laws by repealing the "Rand Formula" of union security dating from the mid-1940s and replacing it with a model allowing workers to free-ride on union services with even older roots. By moving away from fixed employment standards and granting greater discretion to work around those standards, and by eliminating the statutory 'open period' in collective agreements, Bill 85 owes more to bygone eras than to any modern or futuristic vision of labour relations.

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[17] *Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, December 1968)

[18] G. Adams, "Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation" (1991), 23 Ottawa L. Rev. 139.

[19] This was the perspective of the Ontario NDP government when it surveyed the economic landscape in the early 1990s, and concluded that the labour law model there needed 'modernization'. It enacted provisions designed to encourage more unionization, particularly in the private service sector, where workers historically had not been able to access collective bargaining and where wages and benefits coverage were low.

My point is that calling for 'modernization' of laws is little more than a political slogan that political parties of all stripes deploy. It tells us nothing about whether change is good or bad, about whether workers will be better or worse off. It is a communications strategy, not a justification for any particular package of substantive regulatory reforms.

(2) "Simplification"

The Saskatchewan Party government has also claimed that it wanted to '**simplify the legislation'**. While simplification of legislation may be a desirable goal, it is not a public policy end in itself. Ultimately legislation must be measured by what it achieves. A simple law that makes citizens worse off is a bad law.

However, taking the government's stated objective of simplification at face value, on what basis can it be said that Bill 85 simplifies anything? Bill 85 reduces the number of statutory pages devoted to the regulation of work in Saskatchewan, but page length is too simplistic a measure of regulatory complexity. Some very short statutes are among the most complex and difficult to apply in practice. Just think about the Charter of Rights and Freedoms. How much confusion and costly litigation has been squeezed from three short words: 'freedom of association'? In fact, Bill 85 is a study in complexity and opacity. It leads the reader down paths that have no obvious end. Many times we are left wondering, "Now what happens"? So much is left to be decided later in Regulations that we cannot possibly know how the Bill will operate in practice. Employment standards are created, only to then be made subject in the fine print or in unwritten Regulations to waiver or exemption altogether.

This is not a frivolous point. Legal uncertainty in labour relations breeds conflict, distrust, instability, costs, and business uncertainty. It creates the antithesis of a good business climate. Bill 85 guarantees years of costly and disruptive litigation, both in the courts and at the Labour Board, to sort out the layers of ambiguity in the legislation. It also guarantees years of costly Charter litigation, as the exclusions and other provisions are constitutionally tested. No one can predict with any certainty the substantive outcomes of these battles. In any case, until the dust settles years from now Saskatchewan's workers, employers, and unions will be operating in an environment of uncertainty, in which agreements, decisions, and practices will be subject to being overruled. Tensions will be high, and the willingness of the industrial relations parties to cooperate and work together towards shared problem-solving will be compromised.

(3) *Restoring "Balance"*

Finally, the government has argued that Bill 85 merely restores balance to a system that has long been tilted too much in favour of unions and workers.

Arguments for *rebalancing* are as ubiquitous as those for 'modernization'. Like 'modernization', *balance* is one of those words politicians use to convey a belief that something in the world is askew, and that simple common sense can fix it. The claim of imbalance is not substance neutral. It conveys a normative judgment. We know what a political party means when it says labour laws are "out of balance" before we hear a single word about what concrete legal reforms might 'fix' this problem. We need only know which political party, or which politician, is

speaking. If it is the Saskatchewan Party speaking, we know they mean that employers should have *more* power, and unions and workers should have *less*. The rest is details.

What evidence supports the claim that Saskatchewan's 'old' laws are heavily tilted against employers?

Not private sector unionization. As noted earlier, only about 17 percent of Saskatchewan's private sector workers are unionized, close to the national average. This is hardly evidence that Saskatchewan's labour laws are unfair to employers or to employees who would prefer to remain non-union. In Saskatchewan, as in most of Canada, it is extremely difficult for private sector workers to access collective bargaining.

Public sector union density in Saskatchewan is about 74 percent, again, similar to the average rate of public sector unionization in Canada (about 72 percent). Canada's public sector is heavily unionized everywhere. There is nothing special about Saskatchewan in this regard and, in fact, due to Bill 5, Saskatchewan's public sector unions may have been rendered the weakest in Canada even before Bill 85.

The average union hourly wage ($27.61) in Saskatchewan is about $5 higher than the average non-union wage rate ($22.45), which is almost identical to the differential in Alberta and across Canada as a whole, and less than the union wage effect in both Ontario and Manitoba.[20] The fact that employees represented by unions earn more on average is normal and to be expected, and as noted above, a reason why a province with labour scarcity and in need of a high wage strategy would be foolish to attack collective bargaining. Certainly, there is nothing to suggest Saskatchewan's unions have an unusual degree of bargaining power relative to other places.

Nor do Saskatchewan's citizens appear to believe that unions have too much power in the province. A recent survey by University of Regina scholars recorded that 64.8 percent of Saskatchewan residents agreed with the statement that, "strong unions are needed to protect employees".[21] It is a reasonable assumption that these respondents do not believe that laws should be reformed to *weaken* unions.

So what is left to defend the government's claim that Bill 85 was needed in order to restore 'balance' to a labour law system that was too favourable to unions? Union density rates in both the public and private sectors are comparable to national averages; the union wage effect is at a normal level; employment levels are growing; the economy is booming; unemployment is low. Once we cut through the political rhetoric, the claim that Saskatchewan's labour laws were one-sidedly tilted in favour of labour is revealed as an empty shell.

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[20] Statistics Canada, Average Hourly Wages of Employees by Selected Characteristics and Profession, Saskatchewan (May 2012 to May 2013): http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69i-eng.htm

[21] Saskatchewan Election Study Team, Attitudes *Towards Union Issues in Saskatchewan* (February 2012), http://www.schoolofpublicpolicy.sk.ca/_documents/_other/Attitudes%20towards%20Unions%20in%20Saskatchewan.pdf

Conclusion

It is no doubt the case that some Saskatchewan employers *perceived* that the labour laws were 'out of balance'. They would like more power over their workers, and not to have to deal with unions. That is nothing new. There are employers, unions, and employees everywhere who feel work laws should be reformed in this way or that. A majority government is always seen as an opportunity by one side or the other to finally get the model that favours their interests. That was Professor Weiler's point in the passage I cited earlier. He described how the most sustainable, legitimate reform initiatives in Canadian history have occurred when governments have resisted the short-term temptation to swing the legal pendulum to satisfy the secret or overt desires of supporters to heavily stack the system in their favour.

With Bill 85 (and Bills 5 and 6 before it), the Saskatchewan government has opted not to take that high road. It has instead chosen an ideological attack on the right to collective bargaining, not because there were pressing problems with the model, but because it saw an opportunity to weaken a political foe and respond to some of the demands of political backers, including the Canadian Federation of Independent Business. If the past gives us clues to the future, we should expect this swing to the right to one day swing back. Divisive policies that ignore the benefits of balance and objectivity have a way of crumbling under their own illegitimacy.

In the meantime, Bill 85 will have repercussions for the functioning and legitimacy of Saskatchewan's work law model. The government has pulled roughly on strands of the proverbial web of rules. There will be costs to pay for this. Much remains uncertain, because the Bill itself is so vague, and the government has not bothered to conduct independent studies of the possible effects of the Bill. A large volume of litigation seems inevitable. Lawyers will do well.

Employees, particularly unionized employees, are entering uncertain territory. Many unionized workers will wake up to find that collective agreement protections built up over many years have been stripped away with the stroke of a legislator's pen. Nonunion employees may find they are being asked to work longer hours for less pay. Unionized employers will probably confront new tensions, more conflict, and less cooperation from unions and their workers. How all of this will benefit Saskatchewan, and address its need to attract tens of thousands of workers by offering high wages, good benefits, and stable decent jobs, is anyone's guess.

PART II: DISCUSSION OF BILL 85 PROVISIONS

In what follows I review Part II (Employment Standards) and Part VI (Labour Relations) of Bill 85. Time constraints have not allowed discussion of other parts of the Bill.

A. Part VI: Labour Relations

My aim is to emphasize general themes by referencing specific sections of the Bill, rather than embark on a substantive legalistic assessment of every section of the Bill. An earlier draft of this report included discussion of many other highly controversial provisions that were repealed at the last minute. I have deleted those sections in this version.

The Labour Relations section of the Bill includes some relatively standard provisions designed to regulate and restrict trade unions that are, or have been at one time or another, found elsewhere in the country, but that are new to Saskatchewan. It includes many new provisions the intent and potential effects of which are unclear. However, there are some obvious themes that emerge from the bundle of reforms in Part VI. None of the provisions are designed to strengthen or encourage the spread of the institution of collective bargaining. The objective clearly lies in the opposite direction. The government has decided that collective bargaining, and the improved wages and working conditions that we know empirically are associated with it, should be discouraged in Saskatchewan.

The discussion follows the order of the provisions as they appear in Part VI.

New Definition of the Confidential Employee Exemption

One way to impede collective bargaining is to narrow the scope of workers who have access to the legislative collective bargaining machinery. Bill 85 includes a peculiar new definition of **'confidential employee',** found in section **6-1(1)(h)B**. This is one of many reforms in Bill 85 that complicates rather than simplifies the existing law, and for no obvious labour relations benefit. The language is ambiguous, so it will require litigation to sort out.

The definition of 'employee' is crucial in the labour relations scheme, because it explains who the state believes is deserving of the state's statutory collective bargaining protections. Someone who is excluded from the definition of 'employee' is effectively barred from collective bargaining in Saskatchewan, since very few workers are able to exercise the fundamental right to collective bargaining without the protection of the statute. Therefore, we usually begin in Canada with the proposition that workers should not be exempted from labour laws unless there is a very pressing public policy matter justifying this exceptional step.

With this in mind, the 'confidential employee' exception has been read extremely narrowly. Only people who have regular access in their normal activities to information that is confidential (not available beyond a small circle of workers) and that is directly related to the labour relations function have been included in the exemption. The policy objective is to avoid direct conflicts of interest and divided loyalties where a person may be tempted to leak valuable labour relations information to a union in order to advance their own objectives or

those of the bargaining unit as a whole. Justice Rand of the Supreme Court of Canada described the confidential employee exemption in this way:

> …the question under the statute is not to be determined by the test whether the employee has incidental access to this information; *it is rather whether between the particular employee and the employer there exists a relation of a character that stands out from the generality of relations, and bears a special quality of confidence*… Between the management and the confidential employee there is an element of personal trust which permits some degree of 'thinking aloud' on special matters…; but *that information is of a nature out of the ordinary and is kept within a strictly limited group*.[22]

This passage reflects the cautious approach Canadian labour boards have taken, one that recognizes that the removal of a worker from the statutory labour relations regime should be extraordinary.

This narrow approach to the confidential employee exclusion has been applied in every jurisdiction in Canada, including Saskatchewan, as discussed recently by the Saskatchewan Board in *Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union*:

> [58] The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would *create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit*. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit.[23]

Section 6-1(1)(h)B makes two changes to the scope of confidential employee. Firstly, it changes the reference found in the *Trade Union Act* to '***regularly*** acting in a confidential capacity', and substitutes "a person *whose* ***primary duties include*** activities that are of a confidential nature."

The meaning and intention of this change is uncertain. One argument is that this change actually *narrows* the scope of the exemption, since a person may 'regularly' do something, without that something being one of their ***primary duties***. For example, the assistant to the VP of Human Resources may spend about 5 percent of his/her weekly time transcribing notes about confidential labour relations matters. This task could not reasonably be described as one of his/her "primary duties", but if she/he does it on a consistent (though infrequent) basis, it

[22] *LRBBC v. Canada Safeway* [1953] 3 D.L.R. 641 (SCC) at 647.
[23] 2009 CanLII 72366 (SK LRB)

could be said that she/he 'regularly' does it. As with many parts of Bill 85, the intention of this change is unclear, with the result that it will require needless and costly litigation to sort out. Therefore, it is possible that the new definition will lead to *fewer* workers being excluded from the statute. If so, then this change would go against the general trend of Bill 85.

The second change is found in the apparent extension of the *subject matter* that counts as confidential. Bill 85 maintains the normal reference to "labour relations" matters found in every other Canadian jurisdiction, but then surprises the reader by also listing three additional new subject areas: *business strategic planning, policy advice*, and *budget implementation or planning*. In a last minute revision to Bill 85, the government added the words, "*and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph."*

What are we to make of these changes?

One interpretation is that the government is simply codifying existing case law. The sort of information that could lead to an employee being excluded under the category of a confidential employee has arguably always included strategic business information, policy advice, and budgetary information, *provided that information was directly related in some manner to labour relations*. Therefore, it may be that this reform ends up not changing the law in any noticeable way. Indeed, in some of the government's materials, the change in 'confidential employee' language has been explained as an exercise in 'clarifying the definition of employee". Given time constraints I have not reviewed Hansard debates or other public statements by government officials to try to gather clues about the government's intentions.

Of course, if the new definition of 'employee' is intended to merely codify existing law, one can only wonder why the change was necessary. What was the problem with the existing law? I am at a loss to explain why the government would make a meaningless amendment, creating a need for new litigation, just to hold the law stationary.

Therefore, perhaps the purpose of the amendment was to cast the 'confidential employee exemption' over a broader range of employees than in the past. This would be the result if the Board interprets the new categories—business strategic planning, policy advice, and budget implementation or planning—as a deliberate intention to expand the scope of jobs that fall within the exemption. No doubt, cases will arise in which the Board will be asked to interpret the meaning of the words "direct impact on the bargaining unit" in litigation over whether a new category of exempted confidential employee has been created by this amendment.

If in fact the amendments do extend the scope of the exemption, then we are left wondering why the government would want to exclude new groups of workers from their protective statutory collective bargaining regime. The move would amount to yet another example of the Saskatchewan government moving in the opposite direction of its international legal obligations. According to the ILO, and Convention 87, Article 2, which Canada has ratified, every worker "without distinction whatsoever" is entitled to have their right to collective bargaining respected, and made effective by enabling labour legislation. The only exceptions, where limitations are permissible, are in respect of workers who perform jobs without which

public safety and health would be put at risk. A 'confidential' employee would not be included by that exception.

On a broad interpretation of the new law, many Saskatchewan employees could wake up to find that their collective agreement entitlements, built up over many years of bargaining, have been stripped by the mere swipe of a legislator's pen. This interpretation of **Section 6-1(h)B** raises interesting Charter issues. Workers stripped of collective bargaining rights by this section would have a reasonable argument that the government has rendered the exercise of the Charter right to collective bargaining effectively impossible.

The New Class of "Supervisory Employee", and What it Might Mean in Practice

A government can weaken the institution of collective bargaining in less obvious ways than an outright exclusion of workers from the labour relations provisions. Sometimes, it takes a deeper understanding of how things work in practice to understand the potential impacts and probable objectives of legal reforms. Let's use the new category of employee created by Bill 85 called 'supervisory employees' to explore this point.

Section 6-1(1)(o) of Bill 85 defines the new 'supervisory employee'. Unlike a 'confidential' or 'managerial' employee, this new category of worker is not excluded from the legislation altogether, and they can still unionize and engage in collective bargaining under the umbrella of the legislation. However, as we will see, in practice, the new provisions may have the effect of making it much more difficult for these workers to exercise the right to collective bargaining in practice.

A supervisory employee is defined in Bill 85 as an employee "whose primary function is to supervise employees and who exercises one or more of the following duties":

> (i) independently assigning work to employees and monitoring the quality of work produced by employees
> (ii) assigning hours of work and overtime
> (iii) providing an assessment to be used for work appraisals or merit increases for employees
> (iv) recommending discipline for employees;
>
> but does not include an employee who:
>
> (v) is a gang leader, lead hand, or team leader whose duties are ancillary to the work he or she performs;
> (vi) acts as a supervisor on a temporary basis; or
> (vii) is in a prescribed occupation.

A "supervisory employee" is not someone whose primary responsibility is to exercise real authority over other employees. If they have that authority, they would be managers, and exempt from the statute altogether. We are talking about non-managerial workers, who nevertheless help direct the workforce.

The significance of the new class of employee flows from the new **Section 6-11**, which directs the Board to separate 'supervisory employees' from other employees when it crafts bargaining units, unless the employer and union "make an irrevocable election" to allow the combined unit.

The purpose of this new category is to overrule years of labour board jurisprudence intended to promote viable collective bargaining structures and avoid undue fragmentation of bargaining units within single employers. At first glance, this change does not seem helpful to employers at all. It may result in many employers having to deal with more bargaining units and possibly more unions, with all the related burdens associated with bargaining and administering collective agreements. Common sense suggests that more collective agreements mean a greater potential for grievances, jurisdictional disputes, restrictions on job assignments and realignment, and industrial conflict. Empirical evidence has shown a positive relationship between the number of bargaining units and the number of strikes: more bargaining units equals more strikes.[24]

These concerns explain why most Saskatchewan employers asked the government to stay clear of legislating separate units for 'supervisors', or raised no concern at all about the existing model. The new supervisor provisions address a problem that even most employers do not seem to believe exists. Even if the employer and the incumbent union do not want to rock the cart by applying for an amendment to exclude supervisors, a new union can come along and apply to carve out 'supervisors' pursuant to the new **Section 6-10**, which permits applications for a 'portion' of an existing unit.

A question worth asking is why the government bothered to pull on this particular strand of the spider's web. What benefit will come of it, and for whom? What will be its effects on the broader industrial relations system?

The answers are not straightforward. Part of the problem is that Bill 85 is so ambiguous that we can only guess at how matters will play out in practice. **Section 6-11** regulates the union certification process. The picture is clearer there. Absent agreement from the employer, a new certification application cannot mix 'supervisory employees' with regular employees. Unions will need to obtain majority support in whatever unit of supervisors the Board finds appropriate. This could prove to limit access to collective bargaining for supervisory employees, for reasons I will discuss shortly. A small unit of supervisory employees may be deemed not to constitute a viable bargaining unit, leaving those workers in limbo, whereas a large unit of supervisory employees may be impossible to organize from a practical perspective under the government's new rules governing the organizing and certification process.

Less clear is what happens if an existing certificate is amended by the Board and 'supervisory employees' are carved out of a preexisting unit. The expectation is that employers will ask the Board to exercise its power to amend existing certificates following a material change in

[24] J. Schwartz & K. Koziara, "The Effect of Hospital Bargaining Unit Structure on Industrial Relations Outcomes" (1992), 45(3) Ind. & Labor Rel. Rev. 573 at 583m find a statistically significantly link between the number of bargaining units and the number of strikes experiences by employers.

circumstances, and carve out 'supervisory employees'.[25] This possibility creates a whole series of important questions that are not answered in the text of Bill 85.

Unanswered Questions Arising from the New Supervisory Employee Rules

Does the old collective agreement follow the carved out 'supervisors', through some at present unknown mechanism, into a new 'supervisors only' bargaining unit?

Do the supervisory employees instantly become nonunion the moment they are stripped from the bargaining unit?

If so, do they forfeit all of their former collective agreement entitlements, including seniority rights, pay grid placements, and other collective agreement benefits, often built up over many years of service?

Once the employees are ordered out of the bargaining unit, can they be dismissed with 'notice' rather than for 'just cause'? That is the usual effect of an employee who is statutorily expelled from a bargaining unit.

Must a new 'supervisors' unit include all supervisors employed by the employer, even those who were not part of the original larger bargaining unit?

This uncertainty makes it difficult to assess the purpose and possible effects of the Bill. It creates uncertainty and instability, and encourages expensive litigation for employers, unions, and Saskatchewan taxpayers, as these questions are sorted out in extensive legal proceedings.

One result that seems certain is that many workers with no real authority over the working lives of other employees will find themselves swept out of their existing union or collective agreements, against their wishes, and without anyone asking them their views on the matter. The government has spoken about strengthening worker choice in Bill 85, but this part of the Bill ignores the wishes of the 'supervisory employees' altogether. If the employer wants them out of the existing bargaining unit, it need only ask the Board to carve them out, and the Board will likely grant that wish. What happens to these workers then is anyone's guess. More litigation will be needed.

One possibility is that the supervisory employees just stripped of their collective agreement rights simply become nonunion workers. They are no longer covered by a collective agreement. On Monday, they had "just cause" protection and a grievance procedure under a collective agreement; on Tuesday, they are subject to the rules of common law, including the right of the employer to dismiss them for no reason at all, by just giving notice. For the nonunion employee, everything is subject to individual bargaining with the employer. Seniority rights and other benefits tied to the collective agreement could disappear overnight. This

[25] Section 6-105(2)(f) grants the Board power to amend a certification order, and (g) permits an amendment of a Board order on the Board's discretion if the 'amendment is necessary". Section 6-105(2)(i) grants the Board power to determine if a person is "or may become" a supervisory employee.

possibility should be very troubling to many Saskatchewan employees, particularly those who exercise functions that could place them in the new supervisory employee category.

Another possibility is that unions will begin raiding 'supervisory employees', which seems to be the intent of the new Section 6-10, which encourages unions to apply to carve out 'portions' of existing units. This strategy might at least have the benefit of causing the old collective agreement to carry over, via **Section 6(13)(2)(b**). This result would leave employers dealing with multiple bargaining units where before there was only one.

Some unions have expressed concern that this fragmentation will lead to weaker unions that will lack sufficient bargaining power to win decent collective agreements. That may indeed happen in some workplaces. Having a separate unit of quasi-supervisors will give employers a larger in-house population of potential replacement workers to perform work if the larger bargaining unit strikes or is locked out. Alternatively, if the 'supervisors' were to strike or be locked out, members of the regular employee bargaining unit(s) can be assigned the supervisory duties on a 'temporary basis'. Therefore, **Section 11** and the new 'supervisory employee' classification may have the effect of eroding the bargaining power of both supervisory and non-supervisory bargaining units. Indeed, that may be one of its purposes.

Another purpose may be to effectively block 'supervisory employees' from the right to collective bargaining. The government has not excluded them from the Saskatchewan Employment Act, like confidential employees. However, Bill 85 may result in a situation that makes it all but impossible for supervisory employees stripped of their collective agreement rights under Section 6-11 to re-acquire bargaining rights. To see why, it is useful to recall one of the central lessons from 'bargaining unit theory'.

In the majority-based, exclusive trade union model employed in Canada, the bargaining unit description plays two important functions. Firstly, it defines the group of workers that are entitled to organize collectively and thereby gain access to statutorily protected collective bargaining (the "constitutive" function). Secondly, it determines the bargaining structure going forward, and therefore, the level of stability of the collective bargaining relationship as well as the relative bargaining power of the parties (the "power broker effect").[26]

These two functions of the bargaining unit can pull in different directions. Smaller bargaining units facilitate unionization and access to collective bargaining, since it is easier for unions to collect majority support in a smaller unit. However, larger units create more stable collective bargaining relationships, while reducing harmful and costly fragmentation of bargaining structures within workplaces.

When left to their discretion, expert labour boards in Canada, including in Saskatchewan, have usually struck a sensible balance between the two functions. This is achieved by giving preference to larger bargaining units where possible, unless this would create an insurmountable obstacle to unionization.[27]

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[26] K. Stone, "Labor Law and the Corporate Structure: Changing Conceptions and Emerging Possibilities" (1988), 55 U. Chicago L. Rev. 73 at 82.

[27] *Saskatchewan Housing Authorityv. CUPE, Local 5004*, (2010) LRB File. No. 048-10

Recognizing that too large a bargaining unit can be an obstacle to unionization at the certification stage, labour boards have sometimes recognized smaller units at the union certification stage, provided the employees share a community of interest and collective bargaining is possible.[28] However, once collective bargaining is established, labour boards have looked with great suspicion at attempts to carve up existing units into smaller sub-units, since smaller units cause fragmentation that increases instability and imposes unnecessary additional costs on unions, employers, and workers alike.

Sometimes governments have intervened directly to exploit the dual function of the bargaining unit in order to promote or impede collective bargaining. For example, in 1993, the Ontario NDP government passed a law requiring the Board to 'consolidate' multiple smaller bargaining units of a single employer when a union so requests, unless doing so would cause the employer substantial business harm. The government's objective was to facilitate unionization in the low wage service sector by providing a means by which small units could become bigger units over time and thereby acquire greater bargaining strength. The Conservative government, which had no desire to see unionization and collective bargaining gain a foothold in the service sector, voided that law and 'deconsolidated' the affected bargaining units immediately upon being elected in 1995.

The most (in)famous example of a Canadian government legislating bargaining unit descriptions to prevent access to collective bargaining involved Nova Scotia's 1979 "Michelin Bill". A union had strong support at one of two Michelin factories in the province, but lacked sufficient overall support to be certified in both factories simultaneously. The government legislated that the only appropriate bargaining unit is one that includes all factories of a single employer in the province. The purpose, and effect, of the law was to prevent Michelin workers from unionizing by manipulating the construction of the bargaining unit in a manner that guaranteed a failed organizing campaign.[29]

Section 6-11 of Bill 85 embodies the spirit of the Michelin Bill.

To see how, consider the 1998 Board case *Saskatchewan Liquor and Gaming Authority* as an example.[30] SGEU applied for an amendment to an existing certificate in order to include some 70 'liquor store managers' in the broader all store employees unit of about 500 employees. At the same time, a second union, the Saskatchewan Liquor Store Managers Association (SLSMA) filed an application for certification to represent the same workers. The Board had already ruled that the liquor store managers did not exercise "managerial functions" sufficient to exclude them from the statute.[31] Therefore, the remaining issue was whether the 'store managers' should be included in the broader SGEU unit, in a stand-alone SLSMA unit, or some other option.

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[28] *Sterling Newspaper Group (A Division of Hollinger)* [1998] Sask. L.R.B. 770
[29] See a discussion of this Bill in B. Langille, "The Michelin Amendment in Context" (1980), 6 Dalhousie L.J. 537.
[30] [1998] SLRBD No. 44 (LRB File No. 037-95)
[31] Saskatchewan Liquor and Gaming Authority [1997] C.L.R.B.R. (2d) 251.

The Board reviewed its policy on carving out small occupation-specific bargaining units, and affirmed "its long standing policy of preferring large bargaining units over small specialized craft or occupational units", particularly when workers are already unionized and included in a larger unit. The Board noted that larger units promote industrial stability and therefore are to be preferred, except in exceptional circumstances. One such circumstance occurs when there are 'middle managers' who are in a position of *real conflict of interest* in relation to other workers in the larger bargaining unit. However, the Board noted that it has been careful to take a very restrictive approach in this regard:

> …the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit.

Small units based on occupational categories like 'supervisor', 'manager', or 'team leader' have been rejected, unless the Board is persuaded that a real conflict of interest exists between those workers and the employees in the larger unit such that they must be separated (para. 31). This is consistent with the approach of other Canadian labour boards.

After reviewing the facts, the Board ruled that about 50 of the 'managers' were not in a conflict of interest position (I will call this Group A managers), while about 20 were (Group B managers). All of the employees (both Groups A and B) performed the following functions:

- planning the operating and capital budgets for their stores, and monitoring those budgets
- monitoring employees' work performance and completing performance appraisal forms
- establishing and maintaining work schedules for staff
- assigning tasks to workers on a daily basis
- reporting to management on employee problems and recommending discipline or corrective measures
- participating in hiring casual workers

Although they exercised these functions, the Group A managers spent the majority of their time doing work performed by workers in the larger unit. The Board applied a 'quantitative assessment' of the work, asking whether the workers primarily performed the managerial-like functions or primarily regular bargaining unit work. The Group A managers could be included in the broader 'all employee' unit under the law as it then stood.

The Group B managers, who worked at larger stores, were in a conflict of interest position because they spent the '*majority of the time*' engaging in the managerial-like functions. The Board found that the Group B managers could not be included in the broader liquor store employee unit, because of the conflict of interest. But they also could not form their own bargaining unit, because a unit consisting of just the 20 Group B managers was 'not a viable or

appropriate bargaining unit". What would be an appropriate unit for these employees? The Board stated that a 'middle management unit' representing *all* managers employed by the Liquor and Gaming Authority (not just in the stores) would be, but as SLSMA had not applied to represent an 'all manager' unit of the employer, its application for certification was dismissed. Thus, the grouping of workers that share the most obvious community of interest, liquor store managers, was found to be an inappropriate bargaining unit. The union would need to organize majority support in a larger unit of middle managers dispersed across the SLGA.

Consider now how this scenario might play out under Bill 85. Some of the 'liquor store managers' could now be excluded altogether from the statute's protections because of the new definition of 'confidential employee' in **Section 6-1(1)(h)B**. As noted earlier, that definition now treats as an excluded worker anyone 'whose primary duties include activities of a confidential nature in matters relating to …*budget implementation and planning*." The evidence demonstrated that "all" liquor managers engage in budget planning and implementation. Whether that work qualified as a 'primary duty' would be the subject of litigation. If so, those workers would suddenly find themselves excluded from the statute altogether, stripped of all of the benefits they enjoyed under the collective agreement, for no other reason than the government believes they should not be entitled to collective bargaining.

For those liquor managers who are not excluded altogether from the statute, new surprises await. Many of them, especially the Group B managers, would probably be caught by the new definition of 'supervisory employee' in **Section 6-1(1)(o). Section 6-11** orders the Board to carve out 'supervisory employees' from all other employees, unless the employer and union agree to leave them in the broader unit. The purpose of this section is to overrule years of Board jurisprudence under which low level supervisory employees would have been left in the larger 'all employee' bargaining unit, in order to promote industrial stability, avoid fragmentation, and ensure viable collective bargaining.

Bill 85's changes could create a substantial hurdle for 'supervisory employees' who wish to enjoy collective bargaining. Recall that the Board has long taken the view that small, occupational units, like 'supervisors', should be discouraged. We get a glimpse of this in the *Liquor and Gaming* decision, where the Board said that the appropriate unit for the Group B supervisors would include *all supervisors* employed by the SLGA. Store managers may have no interaction whatsoever with managers from other areas or divisions within the SLGA, and there may be widely different views on the benefits of unionization throughout the corporation and among 'tiers' along the now vast supervisory spectrum. It may prove to be an insurmountable obstacle for a union to collect cards on behalf of 45 percent of a geographically dispersed unit of 'supervisory employees' within a period of 90 days. Think about how a new, large unit of 'supervisory' nurses could be crafted by the Board that would effectively block a successful certification.

In this way, Bill 85 may act like the Michelin Bill, by reconfiguring 'supervisory employee' bargaining units in such a way that union organizing and coordination become extremely difficult, if not impossible. While 'supervisory employees' are not excluded altogether from Part

VI of Bill 85, like 'confidential employees', the practical outcome may end up being substantially the same.

The Peculiar Pursuit of Instability and Fragmentation: Partial Raiding and the Perennial Open Periods

One of the more perplexing features of Bill 85 is the extent to which it promotes instability, workplace tension, and fragmented bargaining structures for no obvious benefit to any of the industrial relations actors.

I have already discussed how the new provisions governing 'supervisory employees' may result in existing units being carved up into multiple, smaller units. If this results in segments of employees being de-unionized, some employers may be happy. However, we can also assume that some of those supervisors will end up in new bargaining units, requiring employers to engage in more rounds of collective bargaining, with greater possibilities of grievances and work stoppages. In addition, since many 'supervisory employees' are really just regular employees with some scheduling or quasi-supervisory functions, problems are likely to arise about demarcation of bargaining unit work. Work assignment grievances and jurisdictional disputes are likely to increase. These are the predictable problems that the long-standing policy of avoiding fragmentation is designed to limit.

Bill 85 includes a series of additional provisions that will also destabilize workplaces. One is **Section 6-10,** mentioned briefly above**,** which permits a union to apply to be certified for a "portion" of an existing bargaining unit, if the unit applied for "should be separately certified". The practice of the Board for years has been to reject attempts to carve out small portions of a bargaining unit absent some "material change in circumstances" that necessitates such a change. Will the Board simply continue to apply the restrictive 'material change' approach when deciding if a portion of a unit 'should be separately certified'?[32] If so, then what new element does Section 6-10 add? As with much of Bill 85, the answers are uncertain, as is the intention of the government.

It is hardly surprising that employers with greater numbers of bargaining units and more fragmentation experience greater levels of industrial strife. For example, in a study of health employers in the United States, researchers confirmed a positive relationship between the number of bargaining units and both the potential for a strike and the number of strikes:

> As expected, there was a positive relationship between the total number of strikes, or the likelihood that a hospital would have a strike, and the total number of bargaining units.[33]

It is unclear why the Saskatchewan government believes that promoting the proliferation of smaller bargaining units is a good business policy for the province. We can call on the insights

[32] In *Liquor Board of Saskatchewan v. Saskatchewan Government Employees' Union*, [1984] Nov. Sask. Labour Rep. 38, LRB File No. 083-84, the Board ruled that a legislative change to the definition of "employee" in the *Act* could amount to a "material change" justifying review of a previous exclusion.

[33] J. Schwartz & K. Koziara, "The Effect of Hospital Bargaining Unit Structure on Industrial Relations Outcomes" (1992), 45(3) Ind. & Labor Rel. Rev. 573 at 583.

of the present Deputy Minister of Labour, Mike Carr, in this regard from his life before politics. In opposing a union's request to certify a small bargaining unit within a workplace, Mr. Carr emphasized "the importance of placing the parties in a stable negotiating environment for the purpose of reaching a first collective agreement from which a long term relationship may emerge."[34] According to Mr. Carr, if the goal is to encourage stable collective bargaining, then there should be a preference for "larger bargaining units over smaller bargaining units". And yet Bill 85 promotes smaller, fragmented bargaining units by promoting small 'supervisory' units, and encouraging unions to carve out "portions" of existing larger units. Is the policy goal now to promote *unstable* bargaining units from which long-term relationships will *not* emerge? That is a question for Mr. Carr, the Minister of Labour, and the government.

Another new device certain to inject new tensions and instabilities into Saskatchewan's industrial relations model are the changes to the '*open periods'*, the time periods during which applications to displace (raids) or decertify a union can be entertained. Throughout Canada, governments have promoted a 'period of calm' and stability during which campaigns to supplant or decertify a union are neutralized. This is achieved by limiting applications for certification or for termination of bargaining rights to a window of time near the end of a collective agreement (the open period). *This model benefits employers* by discouraging employee campaigning about unionization, which can be disruptive to workplace productivity and culture, to predicable and limited time periods.

In the *Trade Union Act,* applications for employees to terminate their union, or for another union to raid an existing union, were restricted to a short period between 30-60 days before the anniversary date of a collective agreement or of the certification order if there is no collective agreement in force. **Section 6-10** of the new Bill expands the window for raids from to 60-120 days, presumably to encourage more raiding in Saskatchewan. **Section 6-17** then all but eliminates the open period for decertification applications altogether, with only two narrow exceptions when decertification applications are barred: (1) during the first two years following a first certification order; and (2) within 12 months of a failed decertification attempt.

This change in policy will result in workplaces in constant election and campaigning mode. This is bad news for employers and unions alike. Multi-union employers with collective agreements that expire at different times—as in the health care sector—will be operating in an unstable environment in which a raid could occur at any moment, throughout much of the year. Unions in those workplaces may find themselves spending valuable time and resources defending against attacks by other unions, rather than representing their members and working with the employer to improve labour relations and productivity. Since a decertification application can now be brought at almost anytime, the benefits of a 'period of calm' long recognized by industrial relations experts and political parties of all stripes has been removed in favour of ongoing, perennial employee campaigning, and all the tensions and distractions this brings to a workplace. This new policy injects a disruptive new virus into Saskatchewan's unionized workplaces, one that is likely to poison relationships rather than promote greater productivity and cooperation.

[34] *Sterling Newspaper Group (A Division of Hollinger)* [1998] Sask. L.R.B. 770 at 783.

Since Bill 85 removes many of the restrictions on when decertification and raid applications can take place, representation ballots may become more common. This will strain the labour board's resources, unless substantial new funding is directed to administration of Act at cost to Saskatchewan's taxpayers. Funding levels should be watched carefully. Absent an infusion of new resources, more raid and decertification applications may result in greater delays in conducting votes, including new certification votes. Recall that Bill 6 introduced the only mandatory ballot system in Canada that does not impose a short time frame for holding the votes. The two reforms must be read together.

The rejection of the standard Canadian 'quick vote' model in Bill 6 allows the Board to deal with a greater intake of raid and decertification applications by simply delaying the amount of time it takes to process a file and conduct votes, including new applications for certification. A large volume of academic literature shows that delays in conducting representation ballots work against the interests of unions and union supporters.[35] Delay gives employers more time to use their superior access to, and power over, workers to lobby against collective bargaining.

The Saskatchewan Party is no doubt aware that delay in representation votes and expansive employer rights to campaign against collective bargaining are extremely effective weapons if the goal is to reduce union density. It exploited these devices in Bill 6. As the Court of Appeal noted, by introducing the mandatory representation ballots without a time frame and simultaneously expanding employer expression rights, the government's intention was to impede access to collective bargaining.[36] In Bill 85, the government may be moving in a more subtle way to make these antiunion tools even more effective. If the elimination of restrictions on raids and decertification applications leads to more representation votes, and this in turn leads to slower turnaround time for votes, union success rates, and therefore union density, are likely to fall over time. This may be the government's objective. Therefore, I recommend that unions and academics watch carefully how Bill 85 affects the timeliness of representation ballots conducted by the Board, remembering that delay is a tool for undermining collective bargaining rights.

Continuing forward with the spider's web metaphor, there are other implications that could result from introducing a perennial open period. One is that unions may be less willing to compromise and cooperate during the term of a collective agreement. Unions and their supporters are understandably and justifiably angered by one-sided reforms such as those brought forward by this government. This no doubt will reduce the level of goodwill and cooperation in Saskatchewan's unionized workplaces. The elimination of open periods in Bill

[35] For American studies, see: M. Roomkin & R. Block, "Case Processing Time and the Outcome of Elections: Some Empirical Evidence" (1981), U. Ill. L. Rev. 75; K. Bronfenbrenner, "Employer Behaviour in Certification Elections and First Contract Campaigns: Implications for Labor Law Reform," in S. Friedman *et al.*, eds., *Restoring the Promise of American Labor Law* (Ithaca: ILR Press, 1994) 75; C. Scott, J. Simpson & S. Oswald, "An Empirical Analysis of Union Election Outcomes in the Electrical Utility Industry" (1993), 14 J. Lab. Research 355; S. Murphy, "A Comparison of the Selection of Bargaining Representatives in the United States and Canada: *Linden Lumber*, *Gissel*, and the Right to Challenge Majority Status" (1988), 10 Comp. Lab. L.J. 65; R. Prosten, "How Come One Team Has To Play with its Shoelaces Tied Together?" (1993), 44 Lab. L.J. 477. For Canadian studies, see T. Thomason, "The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario" (1994), 47 Indus. & Lab. Rel. Rev. 207; K. Bentham, "Employer Resistance to Union Certification" (2002), 57 I.R. 159; M. Campolieti, C. Riddell & S. Slinn, "Employers, Bureaucrats and Certification Delay: Empirical Evidence from British Columbia and Ontario,1987-1998," unpublished manuscript (2004).

[36] *Saskatchewan v. SFL, et al.* (2013), SKCA 43 at 103.

85 may make matters much worse for employers interested in flexibility and cooperation from unions.

If a union is always facing a possible decertification vote or raid, then it is always in a state of having to prove its immediate worth to a majority of employees. This might be spun as a positive by the government, as making unions more responsive to members. The hope of the government is no doubt also that this change will make it easier for workers to decertify their unions. However, that view oversimplifies the tensions and interests that unions are asked to balance every day.

Unions frequently need to make decisions they know will be unpopular with some factions of bargaining unit workers. Balancing off competing interests is part of the role unions are asked to play by society, the state, and employers. Grievances that lack merit or that claim rights that if granted would harm others in the unit or the employer's legitimate economic interests sometimes must be dropped. Vocal union members may oppose employer requests for cooperation to achieve a shared goal, even though the union sees merit in the employer's arguments. We ask unions to have the courage to make these hard decisions, and they do so in the hope that, in the longer run, compromise with the employer will prove beneficial to the majority of workers. Employers benefit greatly from unions' policing role, and from their willingness to make difficult decisions that balance competing interests within a bargaining unit.

Bill 85 changes the environment considerably. Now, all decisions must be assessed according to a very short time frame. A union official might be prepared to make a sensible decision, one that the employer favours, knowing it will anger a small but vocal faction of a bargaining unit, when the open period is 18 months away. But that same official might see too much risk in angering members when the open period is always right now. Bill 85 discourages unions from making difficult, though sensible, decisions that might anger some members. The safer move for a union facing the threat of a challenge at all times is to avoid the difficult decisions and pay greater attention to the squeaky wheel. Bill 85 discourages unions from making decisions that will benefit the employer and members in the medium to long term, if there are more immediate negative effects. My prediction is that this change will worsen labour relations in ways that employers will notice, and will not appreciate. These negative effects will be most pronounced in bargaining units that are most vulnerable to internal (decertification) or external (raid) threats.

Final Offer Votes

Section 6-35 permits the employer, or an employee representing at least 45 percent of the bargaining unit or 100 employees, whichever is less, to request a vote in the employer's "last offer" in bargaining. A last minute reform introduced a requirement for the employer to at least bargain with the union before requesting a final offer vote.

Other Canadian jurisdictions have 'final offer vote' provisions. The usual justification for this law is to protect workers from a bargaining committee that refuses to put a reasonable offer to the employees because they have some ulterior devious motive. It is a popular device for neoliberal governments, because they believe strongly in the imagery of the 'union boss' who

runs the bargaining unit without regard for the wishes of the workers. The final offer vote casts the employer as protector of the workers from the tyranny of the union leadership. However, the effects of the law in practice paint a different picture.

It is a controversial law, because it injects hostility and mistrust into the negotiation process. Obviously, the union's elected bargaining committee perceives a final offer vote as act of aggression intended to undermine the committee's role as representative of the bargaining unit. It is an attack on the judgment of the committee. A failed final offer vote can cause bargaining to stall, and heels to dig in. It is not surprising that final offer vote laws are linked to higher strike frequency.[37] As noted earlier, there is also an increase in strike activity linked to fragmented, smaller bargaining units of the sort Bill 85 seems to encourage. Therefore, it appears that one objective, or at least a predictable consequence, is greater industrial conflict in Saskatchewan as a result of Bill 85.

Sensible employers understand the risks to the overall bargaining process associated with the final offer vote device. However, Bill 85 introduces a new and unpredictable element into the process: a right for groups of employees to force a vote, over the wishes of *both* the union and the employer. Granted, the threshold of 45 percent will likely mean that this option will be used sparingly in practice. However, this does not alter the fact that **Section 6-35** undermines the traditional role played by elected bargaining committees. No one can know how this will affect bargaining strategies and relationships. One likely possibility is that bargaining will be interrupted by the perceived need by both parties—employers and unions—to campaign for or against particular offers. Time that the parties would otherwise have spent in bargaining, looking for negotiated solutions to shared problems, will now be spent marketing proposals and ideas to warring factions of workers. This will discourage the sort of open and frank discussion in bargaining that industrial relations experts have long acknowledged produce the healthiest, most sustainable agreements.

New Requirements Relating to Strikes and Bargaining

Bill 85 introduces new prerequisites to a legal work stoppage, including a requirement to provide the Minister with notice of an "impasse", to complete mandatory government conciliation, and to wait out a cooling off period of 14 days. Some of these provisions mirror those in other provinces, which in turn date back to the 1940s vision of MacKenzie King. The impact of mandatory conciliation and cooling off periods on levels or duration of strikes and lockouts appears to be small, so these changes cannot be defended or explained on the basis of any empirical truth about their impact on bargaining outcomes.[38] Governments in Canada have gone back and forth on these sorts of strike restrictions. For unions in Saskatchewan, these changes create new challenges in the bargaining process.

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[37] M. Gunderson and A. Melino, "The Effects of Canadian Labour Relations Legislation on Strike Incidence and Duration" (1990), 8 J. Lab. Econ. 295 at 314 (studying 7500 Canadian strikes, and finding a positive correlation between strike incidence and 'final offer vote' laws)

[38] Ibid. at 310: "The cooling-off period is associated with higher incidence and duration (of strike activity), but the combined impact is very small." Mandatory conciliation was found to reduced the probability of a strike occurring, but strikes that occurred were longer than in jurisdictions without mandatory conciliation.

B. Part II of Bill 85: Employment Standards

Part II of Bill 85 introduces reforms to the province's employment standards machinery. These changes have been reviewed at length by several of the unions that made submissions on the Bill. Therefore, my comments will be brief in comparison to the section on Labour Relations.

The general theme of the reforms appears to be typical of the neoliberal philosophy on employment standards, which seeks to give employers greater 'flexibility': the ability to operate around fixed standards, with less oversight by the state. Bill 85 bucks the trend in some instances, for example by indexing the minimum wage to the Consumer Price Index, albeit at a low initial starting point, introducing some additional unpaid leave provisions, and increasing fines for non-compliance. But an increase in fines and substantive standards is merely symbolic unless the government invests considerably in enforcement. A common strategy of neoliberal governments is to point the public to 'strong' substantive standards on paper, whilst freezing or cutting the budgets of labour inspectorates, thereby rendering the regulatory regime impotent in practice. It will be important to watch the level of government investment in enforcement going forward.

Nonunion Employees Do Not Enforce Their Employment Standards Entitlements

A key to understanding the effectiveness (or ineffectiveness) of employment standards regimes lies in recognizing that (nonunion) employees in Canada do not enforce their statutory rights. For nonunion employees in Canada, employment standards legislation is a law that governs contracts only after the contracts have come to an end.

About 90 percent of employment standards complaints in both the Federal jurisdiction and Ontario are filed by workers who are no longer employed by the respondent employer.[39] We can assume that Saskatchewan's situation is similar. Nonunion workers, which comprise the vast majority of Saskatchewan's private sector workers, lack knowledge of the laws, and fear retaliation if they attempt to enforce their entitlements against their existing employers. Unions ensure their members' employment standards are complied with, but for nonunion employees employment standards legislation is something to consider after the contract has already expired. Even this assumes the ex-employees know about laws and have the wherewithal to actively pursue a complaint against their former employer. Many do not.

The Saskatchewan Party government is seeking to use its majority position to reduce collective bargaining coverage in the province and hence undermine a political foe. However, since unions are the most effective device we know of in the struggle to enforce employment standards, the decision of the government to attack collective bargaining and union density is also an attack on the province's employment standards model.[40] Nothing in Bill 85 leads me to

[39] See D. Doorey, "Improving ESA Compliance: Institutional Learning and the Dual Regulatory Stream", Submission to the Law Reform Commission of Ontario on Vulnerable Workers (2011), p. 3 and sources cited therein: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791815

[40] See esteemed American labour law professor, C. Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale U. Press, 2010), at 239, explaining how the decline in union density has threatened the floor of employment standards in the USA.

believe the government is committed to making that model more effective, despite its rhetoric to the contrary.

The fact that nonunion employees do not enforce their statutory rights has implications for the design of employment standards. Firstly, it means that it is impossible to assess the effectiveness of an employment standards regime simply by reading the legislation. Some of the jurisdictions with the worst employment practices have fantastic employment laws on the books. To state the obvious, what matters is not just what laws say, but how they are implemented and enforced in practice. Professor Harry Arthurs reported recently that 75 percent of federally regulated employers *admitted* to being in violation of labour standards.[41] As far as I can tell, the Saskatchewan government did not study and track compliance issues under the old provincial regime. This obviously would have been a useful exercise for a government truly interested in improving the effectiveness of the employment standards regime, if that was indeed their intent.

Secondly, the fact that employment standards laws are usually enforced only after the employment relationship is over for nonunion workers means that employers are usually free to interpret ambiguous legal rules in their own favour, knowing that their interpretations will rarely be challenged by employees or the state in practice. The clearer the rule, the less room exists for employers to interpret it in a manner that disadvantages workers, and the more likely an employee will be able to identify non-compliance. Therefore, it follows that the legal regime should be designed to be clear and understandable to the average employee. Complexity breeds non-compliance. There should be little room for debate about the employee's entitlements, and the standards should not be left to the goodwill or discretion of employers. The core philosophical foundation of employment standards laws is the realization that sometimes the state needs to use legal force to protect employees' interests, because economic forces and self-interest will often steer employers in another direction.

The Curse of Complexity: How it Undermines Employment Standards Effectiveness

Unfortunately, Bill 85 does not simplify the law, but rather makes it more complicated. "Flexibility", a concept associated with greater pliability of fixed standards, is a common catchphrase used by politicians intent on watering down employment standards protections. The driving ideology is that employers ought to have the ability to work around some standards when they believe it makes sense for them to do so. "Flexibility" is usually sold as beneficial to worker and employer alike, though the benefits to workers are far less obvious. Flexibility usually translates into eroded standards, and a more complicated legal regime characterized by layers of exceptions, exemptions, and waivers.[42]

Consider, for example, the new provisions in Bill 85 dealing with **overtime pay**. A simple rule would require overtime pay after, say, 40 hours in a week or 8 hours in a day. That is essentially what Section 6(2) of the *Labour Standards Act* required. The only potential area of dispute that arises from this simple rule is whether in fact the employee worked those hours.

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[41] H. Arthurs, *Fairness at Work*, Chapter 9; Compliance, available at: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/final/page47.shtml

[42] M. Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (McGill-Queens U. Press, 2009).

Both sides in the employment relationship understand the rule. Employers who regularly will require longer hours to be worked and who do not wish to pay the overtime premium will hire more workers. Hiring more workers is usually considered a good thing from the perspective of the overall economy.

However, in pursuit of 'flexibility', the simple rule begins to be eroded. The government introduces layers of complexity in an effort to allow employers to avoid paying overtime pay. Under the *Labour Standards Act*, an employer could require employees to work 10 hours in a day, for 4 days in a week, without paying overtime. However, that could only be done with the consent of the state, or with the consent of a 'trade union representing the employees' (Section 7, *LSA*). That was an exception to the basic rule, but at least there was a check on employer discretion.

Now we add another layer of complexity. Section 9 of the *LSA* introduced the now popular notion of an 'averaging agreement', whereby an employer can avoid paying overtime by averaging hours of work over an extended period of time, assigning long hours one week, and few hours another week to ensure that, on average, the employee does not exceed the overtime threshold. This model introduces uncertainty into the lives of employees, but is good for employers hoping to avoid overtime pay or having to hire new workers. To prevent employers from the obvious temptation to exploit this mechanism, the *LSA* required "written authorization from the director" or "written consent of the trade union representing the employees".

Bill 85 now introduces even more layers of complexity, opacity, and pliability into what could be a very simple rule requiring overtime pay after a fixed amount of hours worked. **Section 2-17** of Bill 85 begins by saying that overtime is payable for hours that exceed those determined in **Sections 2-18, 2-19**, and **2-20**. Now the employee can't begin to figure out what the starting point is without reading a series of other complicated sections. The employee must read on.

Section 2-18 is immediately made conditional on **Sections 2-19** and **2-20**, but at least introduces a basic rule: overtime is payable after 40 hours in a week. Subsection (2) then tells us that employers can require up to five 8-hour days or four 10-hour days in a week without need of approval from the state or union representing the workers. To give employers more 'flexibility', Bill 85 drops the watchdog role of the state, and grants employers the unilateral right to introduce regular 10 hour days, without having to pay overtime until 40 hours in a week or 8 or 10 hours in a day has been surpassed.

Section 2-18(3) then tells us that overtime pay can now be 'banked', a term that is not defined in the statute. No employee will know what that means; I do not. Since 'overtime' is defined as "*pay at a rate of 1.5 times an employee's hourly wage"*, 'banked overtime' should not permit an employer to avoid *paying* the employee for the overtime worked, but who knows for sure. To add more uncertainty, both Section 2-18(3) and the definition of overtime both warn that the rules are subject to some future, unspecified 'regulations'. Thus, even if a determined employee has made it this far into Bill 85, she now has to reckon with the possibility that everything she has learned so far has been altered in whole or part by a Regulation found somewhere else.

Moving on, we learn that overtime can only be 'banked'—whatever that means—under **Section 2-18(3)** if the employee "*agrees*" to this. Here we see another standard technique deployed by governments aiming to undermine employment standards. We are to fall back on the notion that employees and employers bargain from a position of relatively equal strength, and that therefore an "agreement" by an employee to waive an employment standard must reflect a rational and voluntary choice by the employee. The idea that employees can *freely* bargain away their employment standards has long been recognized as folly. Max Weber put it this way many years ago:

> The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process. It rather means…that the more powerful party in the market, i.e., normally the employer, has the possibility to set the terms.[43]

The reason we have employment standards is that we accept Weber's point that most of the time the employee will agree to whatever the employer wants. Employment standards are supposed to address that reality by fixing certain core standards society believes are deserving of support, and then denying the option of contracting around them. The Saskatchewan government, in typical neoliberal form, recognizes that the employer will usually be able to impose its will if standards are made subject to 'agreement' by individual employees, and therefore welcomes this device as a means for shifting power back to employers to work around the protective standards.

There is more still to this complicated story of overtime pay. **Section 2-19** says that overtime must be paid after 40 hours in a week, except as prescribed, or as defined in agreement between the union representing a bargaining unit and the employer. We don't know what the Regulations will say, but at least there is a check-and-balance here requiring a union's involvement.

Section 2-20 then permits the state to issue an authorization to permit overtime to be calculated based on an average of hours worked over a period of time. It takes the relatively straightforward Section 9 of the *LSA,* which had only 3 subsections, and extends it to 11 subsections. Yet, despite this apparent need for greater verbosity, the new section still manages to eliminate the requirement for a union's consent to the averaging formula. Nor did the government even bother here to ask for the employee's agreement. The averaging agreement can be imposed on employees against their will.

The point of this extended discussion of overtime pay under Bill 85 was to demonstrate how 'flexibility' as a political slogan in employment standards discourse inevitably means more complexity, less government oversight, and greater employer discretion to avoid fixed standards. The law begins with a simple rule (pay overtime after 40 hours in a week or 8 hours in a day), and then the government creates all sorts of complex exceptions and special

[43] M. Weber, "Freedom and Coercion" in M. Rheinstein, Ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard U. Press, 1954) at 188.

rules to enable employers to avoid that simple rule. Nonunion employees do not study these complex provisions, and rarely challenge their employer's application of the rules. At the end of the day, we can ask: Will Bill 85 make it more likely that more workers in Saskatchewan will receive overtime pay when they work long hours? The answer is surely 'no'. Simplifying the rules, and making them more effective and accessible for workers, was clearly not the government's objective.

Bill 85 gives employers greater discretion to manage the workplace in other areas as well.

For example, **Section 2-13** drops the long-standing direction in Saskatchewan for employers to grant two consecutive days off, including a Sunday 'wherever possible'. This brings to an end legislative protection for a 'weekend' off to spend with family and friends. **Section 2-31** eliminates the requirement for nonunion employees' wishes to be taken into account in determining whether an employer can substitute another day for a public holiday. **Section 2-14** grants employers the right to deny an employee a meal break by alleging that something 'unexpected or unusual' has occurred, or if the employer simply thinks it's 'not reasonable' for an employee to take a break. Viewed in isolation, each of these changes can be considered relatively minor tinkering with the system, yet the pattern overall is clearly a move towards greater employer control over work, and fewer checks and balances over how employers exercise that discretion.

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Biographical Information

Dr. David Doorey is an Associate Professor of Labour and Employment Law at York University. He is Director of Osgoode Hall Law School's Professional Master of Law program in Labour and Employment Law, and was called to the law Bars of British Columbia and Ontario. He was educated at Osgoode Hall Law School (LL.B., Ph.D.), the London School of Economics and Political Science (LL.M), and the University of Toronto (B.A., M.I.R.). Professor Doorey is Articles Review Editor for the Canadian Labour & Employment Law Journal, and a member of the Canadian Labour Law Casebook Group. He is the recipient of the Morley Gunderson Award for outstanding contribution to Canadian industrial relations, the David Watson Memorial Award for the law journal article making the most significant contribution to legal scholarship ("'Employer Bullying': Implied Duties of Fair Dealing in Canadian Employment Contracts"), and the Simon Fodden Award for the Best Law Blog in Canada (*The Law of Work*). In 2012-13, he was Visiting Scholar at the University of Toronto, Faculty of Law. His book *The Law of Work* will be published in 2014 by Emond Mongomery.

Professor Doorey's academic writings on labour and employment law have been published in leading North American law journals and books. Examples include the following:

"Graduated Freedom of Association: Worker Voice After the Wagner Model" (2013), 38 Queens Law Journal 511

"A Model of Responsive Workplace Law" (2012) 50 Osgoode Hall Law Journal 47

"The Transparent Supply Chain: From Resistance to Implementation at Nike and Levi-Strauss" (2011), 103 Journal of Business Ethics 587-603

"In Defense of Transnational Domestic Labor Law" (2010), 42 Vanderbilt Journal of Transnational Law 953-1009

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