Federal Labour Standards Review

Examen des normes du travail fédérales

Fairness at Work

Federal Labour Standards for the 21st Century

Canada

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BIOGRAPHY

HARRY W. ARTHURS

Harry W. Arthurs is former Dean of Osgoode Hall Law School and University Professor Emeritus and President Emeritus of York University. He is an Officer of the Order of Canada, a member of the Order of Ontario and a fellow of the Royal Society of Canada and of the British Academy.

His publications cover the fields of labour and employment law, administrative law, legal education, ethics, history and theory, globalization and constitutional law. He was the first adjudicator of the Public Service of Canada and has served extensively as a labour arbitrator and mediator. He is a former member of the Economic Council of Canada and of the governing body of the Law Society of Upper Canada.

Professor Arthurs holds a Bachelor of Arts and a Bachelor of Laws (University of Toronto), a Masters in Law (Harvard University) and a number of Honorary Doctorates (Brock, Law Society of Upper Canada, Lethbridge, McGill, Sherbrooke, Montréal, Toronto and Windsor). He was awarded the Canada Council's Killam Prize in 2002 for his lifetime contribution to the Social Sciences and in 2003, the Bora Laskin Prize for his contribution to labour law.

The Honourable Jean-Pierre Blackburn, P.C., M.P.
Minister of Labour and Minister of the
Economic Development Agency of Canada
For the Regions of Quebec
House of Commons
Ottawa, ON
K1A 0A6

Dear Minister Blackburn:

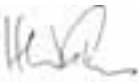
I have the honour to submit the final report of the Federal Labour Standards Review.

I hope and believe that this report will assist you and your colleagues to modernize Part III of the *Canada Labour Code*, to address some of the difficult issues confronting workers and employers in the federal domain and to ensure that the Labour Program, custodian of Part III, is able to contribute to broader public policy discussions which touch on the matters under review.

While this report is mine, in the sense that I have signed it as the sole Commissioner, a number of people have left their stamp on it. John McKennirey, ADM Labour, was instrumental in conceiving and launching the review of Part III. My expert advisors – Daphne Taras, Gilles Trudeau and Sherry Liang – have been full intellectual partners in the development of my analysis and recommendations. My management and labour advisors – Andrew Finlay, Don Brazier and Hassan Yussuff and Andrew Jackson (as alternate for Ken Georgetti) – have been at all times knowledgeable, frank and constructive. My staff – largely seconded from the Labour Program – worked tirelessly and with great competence on all aspects of the review under the leadership of Neil Gavigan, Senior Director, and Kevin Banks, Director of Research. And finally, the report has benefited immeasurably from the information and advice which scholars and experts, workers and employers, public servants and interested citizens contributed in the form of studies, briefs and submissions.

Finally, on a personal note, I am grateful to your predecessor for appointing me to this challenging Commission, and no less to you for your kind interest and support, which has enabled me to carry the review through to completion.

Respectfully,



Harry W. Arthurs
Commissioner

Fairness at Work

Federal Labour Standards for the 21st Century

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EXECUTIVE SUMMARY

MANDATE

Commissioner Harry Arthurs was appointed by the Minister of Labour in October 2004 to review Part III of the *Canada Labour Code*. Part III establishes labour standards for workers employed in federally regulated enterprises. It is administered by the Labour Program of the Department of Human Resources and Social Development.

WHAT ARE LABOUR STANDARDS?

Part III regulates hours of work, minimum wages, statutory holidays and annual vacations, statutory leaves (maternity, parental, compassionate care, bereavement and sick leave) and the termination of contracts of employment. It lays down procedures for workers to challenge their unjust dismissal and to recover unpaid wages, and also deals, to a limited extent, with human rights in the workplace (pay equity, sexual harassment).

WHO IS SUBJECT TO FEDERAL LABOUR STANDARDS?

Some 12,000 enterprises are subject to federal jurisdiction. Approximately 840,000 of their employees are subject to Part III; they work in banks (30%), telecommunications or broadcast firms (18%), postal services and pipeline companies (14%), airlines (12%), road transportation firms (12%) and a miscellany of other jobs in airports and seaports, grain handling facilities, nuclear facilities and First Nations governments (14%). And some 86% of all federal jurisdiction workers are employed in firms with 100 employees or more. Unionized workers (32% of the total workforce), managers and professionals are covered by some provisions of Part III but not others.

WHY WAS THIS REVIEW NECESSARY?

Many significant changes have taken place in Canada's workplaces since Part III was enacted in 1965. The intervening decades have seen the rise of a new economy characterized by startling changes in technology, growing international economic integration, deregulation, intensified competition and a shift to a knowledge-based economy that depends heavily on the effective deployment of human capital. They have also witnessed enormous changes in the stock of human capital found in Canada's workplaces,

in the age, gender, educational, ethnic and cultural mix of the people who work there. And these changes have in turn reshaped the needs, values and expectations of Canadian workers, employers and governments.

The regulatory and policy context has also evolved: experience has taught us a great deal about efficient and effective regulatory strategy; there have been major changes to social programs that support workers over the course of their careers; and the pace of change has accelerated, making it more difficult for regulators to keep up. So much has changed that labour standards that once seemed appropriate may now seem inadequate; regulatory machinery that was state-of-the-art 40 years ago may now be obsolete; and some issues that Canadians are dealing with in the 21st century had not even appeared on the horizon in 1965. The issue of work–life balance is a case in point.

THE PRINCIPLES UNDERLYING THE REPORT

These complex changes in demography, technology and political economy make a careful review of Part III necessary. However, employers, workers and community-based organizations differ as to both diagnosis and prescription. In general, business groups favour less regulation; workers and others favour more. The Commission's report seeks to maintain a balance between the two positions, based not only on extensive research and consultation (described below), but also on the 12 principles set out in Chapter Three.

The fundamental principle of decency at work underlies all labour standards legislation and is the benchmark against which all proposals must be measured:

> *Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.*

This decency principle must be read alongside a number of other important principles. For example, Canada must maintain the dynamism of its market economy in order to sustain high labour standards; regulatory interventions in that economy must be carefully considered and implemented in such a way as to ensure that competing employers operate on a level playing field; labour standards can and should balance the legitimate interests and

concerns of workers and employers through a strategy of "regulated flexibility;" and legislation should be drafted and administered so as to achieve the highest possible levels of compliance consistent with the efficient use of public resources and the achievement of multiple public policies.

THE REVIEW PROCESS: RESEARCH AND CONSULTATION

The Commission was assisted by two advisory panels, one of impartial experts, the other of labour and management representatives. It engaged leading Canadian and foreign experts who undertook 23 research studies on labour standards and related subjects. Further studies were provided by Commission staff, including a rigorous analysis of actual experience under Part III, and comparisons between Part III and labour standards legislation in the provinces and territories, and in other countries. The Commission heard from 171 groups and individuals at public hearings across the country and received 154 formal briefs and numerous other informal submissions. Finally, it met both formally and informally during the course of its work with labour, management and community-based organizations, and labour standards administrators and practitioners.

Documentation prepared by or for the Commission, including briefs and research studies, is available via its website: www.fls-ntf.gc.ca.

THE COMMISSION'S FINDINGS AND RECOMMENDATIONS

The Commission's report comprises 11 chapters. The first three provide general background and analysis. Chapter Four deals with several groups whose status under Part III has been controversial, including autonomous workers, managers and professionals. Chapter Five deals with the formation and enforcement of the contract of employment, and Chapter Six with the interface between labour standards and human rights legislation. Chapter Seven — the longest chapter — deals with issues relating to control over time, and especially with issues of work–life balance. Chapter Eight deals with termination of employment for business reasons, and with the difficult issue of unjust dismissal. Chapter Nine proposes a whole new mechanism for enforcing Part III. Chapter Ten asks whether Part III does enough, or does the right things, to protect workers who most need protection. The concluding chapter, Chapter Eleven, suggests how labour standards can contribute to the success of a dynamic, modern economy.

Key findings and recommendations include the following:

Coverage

- Part III should be amended to provide definitions of key terms, including "employee," "autonomous worker" and "independent contractor."
- Sectoral conferences, described in Chapter Seven, should be used to develop special regulations regarding autonomous workers in sectors such as trucking.
- The Labour Program should assume primary responsibility for maximum hours and working time rules in the trucking sector.

The contract of employment

- Employers should provide all workers, including autonomous workers and independent contractors, with a written notice of their status, and should provide employees with notice of the terms of their employment contract, as well as their rights under Part III.
- The procedural provisions of Part III should be reviewed to ensure that they do not impose unnecessary burdens on small and medium enterprises.
- Workers who have been wrongly denied wages or benefits should receive better assistance from the Labour Program in collecting what is owing to them.
- The government should proclaim into force Bill C-55, which protects workers' wages and benefits in the event their employer becomes insolvent.

Part III and human rights

- In order to ensure full implementation of both human rights and labour standards, and to make the best use of available resources, the Labour Program and the Canadian Human Rights Commission should enter into formal cooperation agreements in order to avoid conflicts and overlaps between the two regimes.
- Inspectors enforcing labour standards should be allowed to report evidence of violations of human rights legislation to the Canadian Human Rights Commission.
- Psychological harassment (bullying) should be dealt with as part of a broader program of violence prevention under Part II of the *Canada Labour Code*, which deals with health and safety in the workplace.

Control over time: the work–life balance

- Existing statutory standards of an eight-hour workday, a 40-hour work week and a maximum work week of 48 hours should be maintained.
- However, workers need more control over their time at work and after work in order to fulfill their responsibilities as family and community members, and employers need more flexible working time arrangements in order to compete in a highly volatile global marketplace. At present, Part III does not adequately accommodate the interests of either workers or employers.
- One size does not fit all. Airlines, banks and nuclear facilities need different rules governing working hours. Sectoral conferences of workers and employers should provide advice to the Minister of Labour so that Part III requirements can be customized to meet these special needs.
- Employers should be able to seek approval for adjustments to certain statutory standards directly from their workers, rather than having to make formal applications to the Labour Program, as at present. New workplace-level procedures should be established to facilitate meaningful consultations between employers and workers. These procedures should be monitored to ensure that employers are complying with them.
- To accommodate employers who prefer to work within the present system of approvals, the Labour Program's procedures for approving adjustments to existing statutory standards should be made more transparent and efficient.
- Some of the problems of adjusting the competing interests of workers and employers concerning the regulation of time can be resolved only outside the context of labour standards and the employment relationship because they involve broad aspects of social and economic policy. For example, families with two working partners depend on child care to maintain their work–life balance; and programs of income support are needed if workers are to be able to take leave to improve their education or to look after ill or elderly relatives.
- While Part III cannot provide the necessary financial supports, it should do what it can to create an awareness of the issues and to enable workers to find some time for necessary social and civic functions as well as to accommodate religious and cultural needs. New unpaid leaves should be established that will enable workers to deal with family responsibilities, medical issues, bereavement, education or court attendance.

- Provisions in Part III governing maternity, parental and compassionate care leave should be made more flexible.
- Workers should have a limited right to refuse overtime in order to meet family obligations and attend scheduled educational programs.
- Workers should be able to request individual accommodations concerning their hours and location of work.
- Vacation leave should be modestly increased for long-serving employees so that Part III reflects widespread practices in federal sector employment.
- Employers should enjoy greater latitude in responding to emergency situations.

Termination of the contract of employment

- Severance pay should be improved for long-service employees.
- Employees should be required to give their employer notice of termination.
- Workers claiming to have been unjustly dismissed should have access to speedier and more user-friendly procedures.
- Complaints of unjust dismissal should be screened to ensure that employers are not subjected to frivolous and vexatious claims.
- Assistance should be provided to employers and workers who lack legal representation so that they can better represent themselves in unjust dismissal proceedings.

Compliance and administration

- The best prospects for securing compliance with labour standards involve programs to educate workers and employers concerning their rights and responsibilities under Part III. Where possible, these programs ought to be undertaken in cooperation with employer, worker or advocacy organizations. However, Labour inspectors now spend almost all their time responding to individual complaints, and very little on educational programs.
- A small minority of "bad actors" is responsible for most intentional violations of Part III. However, at present, inspectors take virtually no proactive initiatives, such as audits, to detect possible offences before they occur. Nor does the Labour Program have the statistical capacity to identify such employers in order to concentrate its scarce resources on bringing them into compliance.

- Part III ought to provide an enhanced and modernized array of sanctions to deter and punish employers who have committed repeated and serious offences, such as discharging whistle-blowers.
- While the Labour Program has had some success in recovering unpaid wages and benefits for workers, it has no capacity to deter or punish persistent or egregious offenders. While prosecution is the remedy provided by the statute to deal with these offenders, the present fines are derisory and — apparently due to the priorities of the Department of Justice — no prosecution has in fact been brought since 1987.
- The Labour Program ought to appoint a Chief Compliance Officer to coordinate all of its compliance initiatives, including analysis, education, audits and enforcement proceedings; the latter should be undertaken by the Labour Program itself, not by the Department of Justice.
- A new cadre of full-time Hearing Officers ought to be appointed to provide expert, impartial and independent adjudication of all complaints.

Vulnerable workers

- In general, workers in the federal jurisdiction tend to be higher paid and enjoy better overall working conditions than their counterparts under provincial jurisdiction. However, workers with certain demographic characteristics (women, recent immigrants), working in certain industries (trucking, courier services) and under particular contractual arrangements (part-time, temporary, agency and autonomous workers) are more likely than others to receive very low wages and few benefits, if any.
- Part-time and temporary workers should receive equal pay if they perform the same work as full-time and permanent workers.
- Temporary workers should be entitled to accumulate periods of service for the same employer so that they ultimately qualify for statutory benefits that are triggered by length of service, such as vacation leave or access to unjust dismissal. They should also be eligible to be considered for permanent employment after they have completed a year's service, or any longer period normally required by the employer for probationers.
- Given contradictory evidence concerning the contractual arrangements of workers employed by temporary placement agencies, the government and the industry should cooperate on a study to assess working conditions in the temporary placement industry. In the interim, the industry should develop, in consultation with the government, its own code of conduct laying down proper standards of treatment

for temporary workers. Federally regulated employers, and the federal government itself, should deal only with those agencies that adhere to the industry code.

- If agencies fail to pay wages or benefits earned by workers while on assignment with client firms, those firms should be liable for any sums owing.
- Autonomous workers, most often found in the trucking sector, are not now covered by Part III. Their conditions of work affect the conditions of their co-workers who are covered, and they themselves sometimes need the protections offered by Part III. However, many autonomous workers do not want or need to be covered by all of Part III. Special regulations should be enacted, following a sectoral conference, to permit them to be covered in limited respects.
- Vulnerable workers — especially temporary, part-time, agency and autonomous workers — are often ineligible for the benefits (drug, dental or disability insurance, and pensions) provided by employers to the full-time, permanent workforce. Workers of all kinds employed by small firms are also unlikely to have access to such benefits, as are the proprietors of these firms themselves. The federal government should investigate the feasibility of establishing a public or private sector "benefits bank," which would assist vulnerable workers and small businesspersons to secure coverage.
- The federal government should ensure that domestic and agricultural workers who enter the country on temporary work permits are treated fairly.
- The federal government no longer makes its own decisions about a minimum wage; instead, it adopts the minimum wage in each province as its own. The government should resume responsibility for ensuring that a proper minimum wage covers the small number of vulnerable employees in the federal domain who are in need of protection against exploitation or abuse. Rather than adopt a specific dollar figure, which would likely become the subject of debate from time to time, the government should accept the principle that no Canadian worker should work full-time for a year and still live in poverty. This principle should be translated into practice over a phase-in period of several years, during which the federal minimum wage should be raised until it meets the low-income cut-off (LICO) index. Thereafter, it should be adjusted at fixed intervals according to an agreed formula. This is an issue of fundamental decency that no modern, prosperous country like Canada can ignore. Fortunately, a minimum wage can be established with few, if any, negative consequences on employment in the federal sector.

Labour standards in a dynamic economy

- Federal labour standards under Part III are, in important respects, lower than those in other highly successful economies, and are in many respects lower than those that actually prevail in some of Canada's most successful enterprises. There is therefore no reason to fear that they represent a drag on our economy.
- It is widely accepted that high labour standards and high performance workplaces often go hand in hand. However, it does not follow that Part III should be the primary means of enhancing productivity and other improvements in Canada's economic performance. Rather, labour standards should be part of a larger "flexicurity" initiative, which simultaneously provides more flexibility for employers to adapt to changing technologies and competitive conditions, while ensuring that workers are made more secure by being provided with retraining opportunities as well as other resources needed to adjust to new labour market requirements.
- Existing provisions in Part III dealing with group termination represent an important example of the positive potential of "flexicurity," and those provisions should be maintained and, in certain respects, improved.
- The federal government, in cooperation with the provinces and the workplace parties, should adopt a broad-ranging and actively managed policy to enhance training for federal sector workers, and in other ways to improve productivity by promoting high performance workplaces and best practices. As this policy takes hold, adjustments will have to be made in Part III to ensure that workers can take full advantage of the new opportunities it provides. In the absence of such a policy, but in acknowledgement of the importance of training, five days of unpaid leave should be made available to workers each year for educational purposes.

Chapter One

Introduction

ONE
INTRODUCTION

The Minister of Labour appointed me as Commissioner in October 2004 to conduct a comprehensive review of Part III of the Canada Labour Code, which establishes labour standards for workers employed in the federal jurisdiction (Appendix One). While I am the sole Commissioner, I have worked closely with three groups: a panel of stakeholders representing labour and management, a panel of academic and professional experts, and an able and dedicated staff (Appendix Two). From each I received valuable information, insightful analyses and candid advice; to each I give my earnest thanks as well as absolution from responsibility for the contents of this report, which is mine alone.

1. THE MANDATE OF THE REVIEW

Part III of the *Canada Labour Code* was enacted in 1965. It addresses a wide and complex range of matters conventionally covered by labour standards legislation — hours of work, vacations, holidays, wages, leaves and termination of employment — and some not usually found in such legislation, including sexual harassment, unjust dismissal and pay equity. While Part III has been amended several times since, it has never been reviewed comprehensively.

The current review is timely. Much has changed since 1965: the demography of Canada's workforce and the structure of Canadian families; global and continental economic integration; the technology used by banks, communications and transport companies and other employers under federal jurisdiction; preferred techniques for securing compliance with legislation; and even our expectations of what is best left to the market and what is best undertaken by the state. My terms of reference ask me to take such developments into account. They also especially invite me to consider whether, and, if so, how, amendments to Part III might help workers strike the right balance between their work and their personal lives and to acquire the training and skills they need to function effectively in Canada's knowledge-based economy.

The first purpose of this review, then, is to consider whether the labour standards enacted in 1965 — and those added subsequently — remain relevant, and whether Part III requires further revisions. But my terms of reference ask that I go further, by recommending ways to improve the effectiveness of labour standards. This means that I must consider how the design and administration of labour standards can best ensure that they are respected in federal jurisdiction workplaces. It also means that I should look at what underlying public purposes labour standards serve today, how other government policies and programs can support those aims, and how the Labour Program of Human Resources and Social Development Canada (HRSDC) can engage with other programs and departments to ensure policy coherence. Finally, I should consider what role workers and employers themselves can and should play in addressing the issues that animate this review. Not surprisingly then, I have been asked to make both legislative and non-legislative recommendations.

As I will explain, some of these matters can be dealt with by fairly routine amendments to the *Canada Labour Code* or other federal statutes. Others depend on more extensive legislative changes, or cooperation between government departments directly responsible for labour standards and those responsible for other social and economic policies that indirectly affect labour standards, or promotional strategies designed to raise awareness of and rewards for good practice. Still other matters can be resolved only in the workplace itself, by employers and workers. And not a few depend ultimately on the willingness of all of us to rethink our attitudes to work, to personal relationships and to what it means to be individual and corporate citizens of a community that is committed to fairness and decency.

2. THE STRATEGY OF THE REVIEW

The importance, variety and complexity of issues confronting the Commission defined our approach to our tasks. We needed to understand how existing labour standards work — *if* they work — in the world in which we now live; how other jurisdictions deal with similar problems; what the implications might be of changes in our existing standards or in the machinery that enforces them; how to bring about such changes if they are needed; how to ensure that a new Part III does not quickly become obsolete; how to define and administer labour standards that will be suitable for a wide variety of workplace contexts; and how to move forward in addressing issues that cannot easily be dealt with by labour standards legislation.

The Commission decided to explore these topics in three ways. First, after consulting with a wide range of scholars (Appendix Three) we commissioned a number of research studies from leading experts in Canada and abroad, taking care to ensure that their findings were based on the latest research and that their conclusions were fair and balanced (Appendix Four). Second, we undertook a series of staff studies into the operation of Part III and related matters (Appendix Five). Third, we asked Canadians to share with us their experiences, aspirations and fears concerning labour standards. This they did, to our great benefit, in public hearings across the country, through the submission of formal briefs, and by means of on-line and postal correspondence (Appendix Six). All of this material is available through our website: http://www.fls-ntf.gc.ca. Much of it is referenced in the technical annex that accompanies this report.

The Commission also arranged to meet knowledgeable and interested parties in relatively informal circumstances that permitted more open and extended discussion of the issues. We organized several meetings with representatives of the Canadian Labour Congress (CLC), the Canadian Bankers Association (CBA) and the Federal Employers in Transportation and Communications (FETCO — an umbrella organization of employer associations), with other labour, employer and community groups, and with officials from federal government departments and provincial government ministries concerned with labour standards. We also brought together employers' and workers' representatives with some of the Labour Program field staff who implement Part III, in an attempt to see if they could work through certain technical issues among themselves. Finally, in February 2006, the Commission convened four off-the-record round tables with invited participants from labour, management, advocacy organizations and expert bodies so that they could discuss some of the most important issues confronting the Commission.

The result, I hope, is that this report is informed not only by considerable knowledge about labour standards and related technical matters, but also by an appreciation of the variety of needs, understandings, concerns and expectations of those whose lives are affected by them. That is what I hope, but of course I cannot know everything, have not heard from everyone, have not accommodated all points of view, cannot foresee all future developments. That is why I regard the tasks of setting and enforcing labour standards necessarily as a work in progress, and why many of my recommendations leave open the possibility of making adjustments during the years ahead within a broad framework of fundamental principles.

3. WHAT ARE LABOUR STANDARDS?

"Labour standards" is not a precise term. In their inception in the United Kingdom, early in the Industrial Revolution, labour standards reflected widespread public sentiment, given force by legislation, that no employer should be allowed to impose, and no worker should be obliged to endure, working conditions that fell below the standard that a decent society would tolerate. The decent societies of the time were particularly concerned with the plight of women and child workers; later they became concerned with adult male workers as well. They were initially concerned with safety issues and hours of work; they ultimately became concerned with wages, leaves, vacations and other benefits.

As the provisions of Part III suggest, the concerns of decent societies continually evolve. Part III is still concerned with hours of work, minimum wages, statutory holidays and annual vacations. But it now deals as well with statutory leaves (maternity, parental, compassionate care, bereavement and sick leave), with the termination of employment (mass terminations, termination of injured workers or workers whose pay has been garnisheed, unjust dismissal) and, to a limited extent, with human rights in the workplace (pay equity, sexual harassment).

The development of early labour standards legislation also involved a series of experiments in public administration. Initially, compliance was entrusted to employers themselves, and to a body of "visitors", often clergymen, with no legal powers. However, this approach permitted unscrupulous employers to compete against those who were more enlightened by ignoring the statutory requirements, thus creating pressures for all employers to do the same. It soon became clear that standards would have to be enforced across the board if they were to be effective. Accordingly, factory and mine "inspectors" were given the power to enter premises, to require the production of records, to compel the adoption of safe equipment and detailed working rules, to determine whether violations had occurred, to make remedial and stop-work orders, to impose fines, and to conduct prosecutions of serious offences. As appears below, the need for further experiments with techniques for securing compliance continues.

Finally, Part III — like most such legislation — exhibits symptoms of inner turmoil. It requires that legislated labour standards "apply notwithstanding any other law or any custom, contract or arrangement." However, Part III specifically allows derogation from some provisions under emergency conditions and from others for good reasons related to the operational realities of particular enterprises or industries ("custom"). When derogation

is permitted, it usually requires the agreement of individual workers or their union or some other collective expression of employee wishes ("contract"); however, it sometimes requires ministerial approval in the form of regulations or permits ("arrangement"). And of course deviations from the statutory terms are freely permitted so long as they are enhancements or improvements rather than derogations. In fact, many enhancements — paid vacations or maternity leave, for example — begin life as enlightened management policies or pioneering provisions in collective agreements, and then are enacted into law as "labour standards" as they become more commonplace.

This suggests that although the state is formally committed to decent standards for all workers, it also defers — tacitly or explicitly — to the tendency of employers to apply the standards that they deem practical or desirable in particular sectors and circumstances. In short, labour standards often turn out to be more flexible in practice than they seem in principle. This report therefore explores techniques for ensuring that flexibility — already amply provided for under Part III — is not exercised arbitrarily or in ways that undermine decent labour standards.

As this brief summary of Part III suggests, it is hard to lay down a bright-line test that distinguishes labour standards from other workplace norms. No doubt that is why my mandate instructs me to undertake a "comprehensive review" of Part III having regard to "developments [that] have profoundly affected the workplace," identifying specifically the increasingly knowledge-based nature of work, globalization, new forms of employment relations, the work–life balance and demographic changes in the workforce. In this perspective, almost anything could be termed a "labour standards" issue.

To complete my task within the assigned time and in a manner that would permit me to recommend a sensible distribution of legislative and administrative responsibilities, however, I have had to adopt a more restrictive definition of "labour standards." Essentially, I have decided to focus my attention on matters that are already covered by Part III, other matters analogous to them and new matters that are arguably better located in Part III than elsewhere. Where Part III may have a subsidiary role to play, but primary responsibility for policy and administration logically resides elsewhere, I have noted the possibilities but made no firm recommendations for statutory change. For these reasons, I do not propose to deal with matters of collective bargaining or occupational health and safety, which are dealt with under Parts I and II of the *Canada Labour Code*, except insofar as those matters may be directly related to Part III. Nor, with the same *caveat*, do I intend to deal with matters covered by the *Canadian Human Rights Act*.

4. LABOUR STANDARDS IN THE FEDERAL DOMAIN

In enacting Part III of the *Canada Labour Code*, the federal government has exercised its constitutional jurisdiction to establish labour standards for workers in federally regulated private sector industries, and in First Nations governments. Federally regulated industries include several in which enterprises typically operate across the country, such as banks, broadcasting and telecommunications companies, interprovincial and international transportation firms, and Crown corporations such as Canada Post; and a number of others as well, such as sea ports, airports, nuclear facilities and grain elevators. The federal government, however, lacks jurisdiction, except in unusual circumstances, to regulate labour standards in most ordinary enterprises — manufacturing firms, restaurants and retail stores, timber or mining companies — all of which come under provincial jurisdiction.

This is not the place to revisit the well-established doctrines that assign default jurisdiction over labour law to the provinces and restrict federal jurisdiction to the short list of industries mentioned above. They are familiar to constitutional and labour lawyers, though perhaps not to all Canadians. However, I mention them for three reasons.

The first is to underline the fact that the federal government has no power to enact labour standards legislation outside its own limited domain, described above, even though the Canadian economy operates on a regional, nationwide, continental and global basis, and even though Canada belongs to many international organizations that affect labour market norms or dynamics, including the International Labour Organization, the World Trade Organization and NAFTA. This constitutional reality has perhaps diminished the overall influence of international labour norms in Canada.

The second is to note that constitutional arrangements sometimes complicate the enforcement of labour standards legislation. For example, workers seeking to assert their rights may be confused about whether their employer falls under federal or provincial jurisdiction. Employers may be tempted to reconfigure their operations so as to move themselves to whichever jurisdiction has more congenial standards. And the federal government must deploy its small labour inspectorate across a huge country, while provincial governments, which might more efficiently enforce labour standards in a given locale or sector, may lack jurisdiction to do so.

The third reason is by far the most important. The constitutional parameters of labour jurisdiction have resulted in a constituency of federally regulated employers and workers whose profile differs in many significant ways from that of its provincially regulated counterparts. This profile suggests that labour standards in the federal legislation may have to be designed to operate in a context that is very different from that of other jurisdictions.

The 2005 Statistics Canada Federal Jurisdiction Workplace (FJW) Survey — the first-ever survey of federal employers — provides much valuable information. An estimated 1.132 million workers — about 8.4% of the Canadian workforce — are employed by employers subject to federal jurisdiction. Of these, some 840,000 are subject to the Part III labour standards. These workers mostly work for banks (30%), telecommunications or broadcast firms (18%), postal service and pipeline companies (14%), airlines (12%), or road transportation firms (12%).

The first thing that is notable about this population is that employment is highly concentrated in large enterprises in most federally regulated sectors, with 86% of employees working for employers with 100 or more employees. To look at it another way, although federal jurisdiction employers covered by Part III account for about 6% of employment in Canada, they comprise only about 1% of Canada's employers. Exceptions to this concentration of employment in large enterprises are found in the road transportation sector (where enterprises with fewer than 100 employees accounted for 55% of employment), the maritime transport sector (50%), and the feed, flour, seed and grain sector (48%). However, of these sectors, only road transportation accounted for a significant proportion of federal jurisdiction employment.

Second, as a group, workers in enterprises covered by Part III are more likely than other Canadian workers to enjoy working conditions above the national norm. In 2004 more than half (52%) of them were paid more than $20 per hour, versus 37% of all workers in Canada, while only 2% were paid less than $10 per hour, versus 16% nationally. Among Part III employers with 100 or more employees, 83% report offering some form of pension plan to their staff. Overall, 28% of Part III employers reported offering a pension plan to their employees, compared with 19% for the wider Canadian labour market. Similar trends can be observed with respect to insurance benefits, paid leave and personal support programs. Outside of the banking sector (which is only 1% unionized), rates of unionization in the federal jurisdiction tend to be higher than the national average for the private sector, which is approximately 19%; by sector, unionization ranges from 23% in road transportation to 81% in rail transportation, with an overall rate of 32% that rises to 46% if banking is excluded.

Third, the demographic profile of workers covered by Part III differs somewhat from the Canadian norm. They tend to be somewhat older, with fewer workers aged under 25 (8% versus 17%) and more aged 45 to 54 (29% versus 23%). This is particularly notable in rail transportation, road transportation, maritime transportation, and postal services and pipelines, where the percentage of the workforce aged 45 years or more ranges from 44 to 56%, compared with the national average of 34%. Except in banking

(which is 72% female), federal jurisdiction industries also tend to be male dominated to varying degrees (ranging from 60% in postal services and pipelines to 92% in rail transportation), with the overall result that a greater percentage of the federal workforce are men than is the case for the Canadian workforce as a whole (57% versus 51%).

Of course, the constitution is not the only place in which the boundaries of federal labour standards are drawn. I have been referring to the "workers" who populate the federal domain. But federal labour standards do not currently protect all "workers," only those who are legally defined as "employees" rather than as "contractors" or "autonomous workers." Unfortunately, there is no definition of "employee" in Part III, so definitions have been borrowed from other policy domains, such as taxation or vicarious liability for civil wrongs. These definitions may be inconsistent with each other and may have little relevance to the objectives of labour legislation; they are typically vague and may give rise to unnecessary litigation; and most importantly, they have been explicitly rejected as inappropriate in other labour statutes and indeed by recent amendments to Part I of the *Canada Labour Code*. Who should be included and who should be excluded from coverage under Part III is a subject addressed later in this report.

Finally, it is important to remember that Part III is not the only source of labour standards legislation in the federal domain. Transportation workers are covered by federal labour standards for most purposes, but their maximum hours of work are currently left to be regulated through public safety regulations established by Transport Canada, which permits longer work weeks than are generally permitted under Part III. The *Canadian Human Rights Act* outlaws certain kinds of workplace discrimination and harassment, both of which Part III deals with in certain respects as well. Like most labour standards legislation, Part III establishes a minimum wage; but since 1996, that minimum has been fixed at whatever rate prevails in the province where the federal employee happens to be working; in effect, provincial policies set minimum wages for federal employees.

To sum up, the domain of federal labour standards is configured as much by constitutional and legal doctrine as by economic or policy logic. As a result, the demographics of workers and employers in the federal domain differ from those of workers and employers covered by similar legislation elsewhere; some workers who might arguably have a claim to protection under federal labour laws are not currently protected because they are not "federal," or are not "employees"; and labour standards that govern certain federally regulated workers are established under statutes other than Part III. All of these anomalies receive attention later in this report.

5. STARTING POINTS: SOME NON-CONTROVERSIAL ASSUMPTIONS CONCERNING THE REFORM OF LABOUR STANDARDS LEGISLATION

The need for decent labour standards has preoccupied employers and workers, economists and philosophers, regulators and concerned citizens for over two centuries. Of course there have always been significant debates over which workers are entitled to what kind of protection, over precisely what standards are "decent," over how such standards can be maintained while preserving and enhancing the efficiency and profitability of enterprises, over what roles the state and the workplace actors ought to play in setting and enforcing decent standards, and over the use of legislation to promote optimal conditions of work, rather than just minimum decent standards. These debates are reviewed elsewhere in this report.

However, not everything is in dispute. Once the need for some kind of labour standards legislation is accepted, a number of fairly large and relatively uncontroversial assumptions come into focus. At least, these assumptions were not seriously challenged by most of the groups and individuals who submitted written briefs to the Commission or participated in its public hearings.

- The federal government has the obligation to use its constitutional and legal powers to enact decent labour standards that will promote the establishment of fair, safe, healthy, stable, cooperative and productive workplaces that contribute to the social and economic well-being of all Canadians. These standards should reflect the fact that Canada is an affluent and dynamic society, committed to fair and equal treatment for all.
- Canadian public policy generally acknowledges the freedom of workers and employers to agree upon whatever standards they wish, so long as the agreement is authentic, the standards are in fact decent, and they are applied fairly and without discrimination.
- Whether standards are established by legislation or by agreement, workers and employers should comply with them. Compliance should be secured without the application of legal sanctions, if possible. However, if legal sanctions are needed in some cases, they should be readily available and fully effective.
- Workers and employers are both entitled to be regulated by laws that are clearly drafted and easily understood. Laws that are ambiguous or unenforceable invite violations by employers and employees, discourage responsible employers and employees from cooperating to ensure voluntary compliance, and increase the costs of enforced compliance that must be borne by the state and, ultimately, by the whole community.

- Workers and employers are entitled to ready access to reliable information about those laws and to assistance from knowledgeable officials who can interpret and explain them so as to avoid unintended violations and unnecessary disputes.
- So far as possible, employers acting in good faith to maintain decent standards should be free from unnecessary regulatory burdens, and should enjoy reasonable flexibility in implementing those standards in the manner that is most appropriate to the particular circumstances of the enterprise. To ensure that such flexibility is indeed "reasonable" and exercised in a "reasonable" manner, it should be exercised with the consent of the workers affected and/or a responsible regulatory authority.
- So far as possible, workers should be able to play a significant role in setting and protecting their own workplace conditions. This means that they should enjoy real contractual and statutory rights, should know what those rights are and should have reasonable access to the means of asserting or defending them.

Of course, labour standards are not just about decency for workers. As we were often reminded, they structure and regulate labour markets as well. They may therefore affect the productivity of workers, the profitability of businesses, the prices consumers pay for goods and services, the availability and quality of jobs for workers and Canada's prosperity in general. Labour standards may also reinforce or undermine other public policies that deal with human rights, family life, social development, the economy, immigration, collective bargaining and highway safety — to name a few. And, of course, they require an investment of public funds so that staff are available to educate people about labour standards, to keep them up to date and to ensure they are complied with. This suggests that there may be agreement concerning two more assumptions:

- In the design of any labour standards regime, the implications for business, consumers, future jobholders and the general community must all be taken into account, as well as those of the workers who will benefit from labour standards. Decisions about how to reconcile other interests with those of workers ought to be made following empirical investigation, public discussion and principled choice.
- To ensure efficiency and consistency, labour standards legislation should not be designed or implemented in isolation from other relevant policy domains; nor should other policies be designed or implemented without due regard for their potential effect on labour standards.

Finally, many improvements in working conditions and in workers' lives require cultural, attitudinal, behavioural, institutional and structural changes that cannot be accomplished exclusively or even primarily through labour standards legislation, though such legislation may sometimes contribute incrementally to them. Hence a final assumption:

- Public authorities responsible for designing and implementing labour standards should neither rely on legislation when alternative strategies are likely to be more effective, nor use other strategies when legislation is needed.

Of course, these assumptions are relatively non-controversial only when stated at a high level of generality. When they are used to justify specific proposals for changes in Part III, consensus becomes more elusive. Why then might such changes be needed? The answer is that the Canada of 1965, when Part III was enacted, is not the Canada of today. The intervening decades have seen the rise of a new economy characterized by startling changes in technology, growing international economic integration, deregulation, intensified competition and a shift to a knowledge-based economy that depends heavily on the effective deployment of human capital. They have also witnessed enormous changes in the stock of human capital — in the workers — found in Canada's workplaces. The age, gender, educational, ethnic and cultural mix of the Canadian workforce have also changed. And these changes have in turn reshaped the needs, values and expectations of Canadian workers, employers and governments.

The regulatory and policy context has also evolved: experience has taught us a great deal about efficient and effective regulatory strategy; there have been major changes to social programs that support workers over the course of their careers; and the pace of change has accelerated, making it more difficult for regulators to keep up. So much has changed that labour standards that once seemed "decent" may now seem inadequate; regulatory machinery that was state of the art 40 years ago may now be obsolete; and some issues that Canadians are dealing with in the 21st century had not even appeared on the horizon in 1965. Part III has, of course, evolved since that time, but there is a real need to step back and take stock of these changes and their implications for the overall strategic direction of labour standards and their administration.

6. THE PLAN OF THE REPORT

The next chapter reviews key changes in the economic, social and regulatory environment mentioned above in greater detail, identifying the challenges facing federal labour standards today, and their implications for a modern labour standards policy agenda. It pays particular attention to the relationship between economic performance and labour standards in today's international economic environment. Chapter Three then articulates a set of principles designed to guide the translation of that agenda into practical recommendations, situating the federal jurisdiction within a Canadian and international comparative perspective.

Chapter Four deals with groups of employers and workers whose status under Part III is contested or controversial; Chapters Five and Six explore the formation and enforcement of the employment contract and the interface between labour standards and other legal regimes affecting the employment relationship including human rights. Control over time, a topic of great concern, is dealt with in Chapter Seven, a major chapter. Chapters Eight and Nine deal with remedial issues. Chapter Ten examines how Part III could assist workers most in need of protection. And Chapter Eleven reviews the role of labour standards in a dynamic economy.

Each chapter contains analysis and recommendations that flow from that analysis. However, some details of the analysis, especially references to the research or submissions on which it is based, have been consigned to a technical annex. And some recommendations, especially technical recommendations that do not involve significant policy choices, have been collected in appendices. These documents are also available on our website.

Chapter Two

The New Economy, A Changing Society and a Renewed Agenda for Labour Standards

TWO
THE NEW ECONOMY, A CHANGING SOCIETY AND A RENEWED AGENDA FOR LABOUR STANDARDS

After reviewing the major changes in Canadian society and the new economy that are shaping the concerns of workers and employers, this chapter considers the policy implications of those changes, and the extent to which they constrain the choices confronting labour policy makers. It then turns to the questions of how the policy goals underlying labour standards can be most efficiently and effectively achieved. Finally, it raises key issues to be addressed and suggests six common sense guidelines that the Labour Program ought to keep in mind as it prepares to meet the challenges of revising Part III of the *Canada Labour Code*. First, however, I want to offer some general observations on the perspectives I bring to these tasks, and to this entire report.

1. CONFLICT, COMPROMISE AND COMPLEXITY

The Commission's public consultations brought into sharp relief the pressures facing Canadian employers, workers, families, communities and governments as a result of the new economy and the new realities of the workplace, as mentioned in Chapter One and analysed in greater detail later in this chapter. My reaction to those developments differs somewhat from that of worker, employer and community representatives who appeared at public hearings or submitted briefs, and it may be useful to reflect briefly on that difference.

Worker and community groups argued that the new economy and new workplace realities require significant changes in Part III if it is to continue to perform its historic function of protecting the most vulnerable members of the workforce. But more importantly, they argued that Part III ought to be assigned new functions that differ considerably from those it has performed in the past. Essentially they argued — though not in these words — that Part III ought to provide a framework of rights that would ensure that all members of the labour force — not just employees — enjoy the opportunity

for decent livelihoods, fair working conditions, a sensible balance between one's working life and personal life and the flexibility necessary to accommodate individual, cultural and religious preferences.

Ironically, many employer submissions also argued for significant revisions to Part III that would enhance flexibility — but flexibility for employers, not employees. Such revisions are necessary, they claimed, if Canadian businesses are to succeed in an increasingly competitive environment. Specifically, employers sought flexibility in order to make compliance with Part III less burdensome and time-consuming, to accommodate new forms of work relations unencumbered by the obligations associated with traditional "employment," to ease restrictions on hours of work, and in general, to modify working conditions in ways they deemed necessary in order to respond to the new and difficult economic environment.

I was not surprised that these positions of worker groups and employers were at odds. After all, the historical challenge for labour policy has always been to reconcile the divergent interests and aims of employers and workers. However, I was somewhat taken aback by the insistence by some worker and employer representatives that Part III must either respond to the needs and aspirations of Canada's workers *or* promote competitiveness and the success of Canada's economy. The logic of the first position was that because we must reinforce our commitments to social justice and fairness in the workplace, extend their reach to new constituencies and new concerns, and make labour standards more rigorous and less flexible, we must therefore consciously give the protection of workers' rights and interests priority over the promotion of productivity and competitiveness. The logic of the second requires that competitiveness should trump all other considerations; that we should give employers maximum freedom to manage without restrictions; and that Part III should be more flexible and less rigorous, less inclusive not more, even though the result is to diminish workers' rights and entitlements.

As I acknowledge in the next sections of this chapter, we are indeed living in a new economic environment, and with new social realities. However, it does not follow that these new circumstances force us to make brutal, binary choices between the interests of workers and the interests of employers, as so many submissions implied. On the contrary, a significant body of evidence suggests that working conditions have actually improved over time — albeit more slowly and unevenly in recent years; that they have improved both as a result of economic growth *and* as a result of innovative protective legislation; and that these two influences, far from being always opposed, are often mutually reinforcing. Consequently, this report seeks a sensible and practical balance between the positions advanced by worker advocates and those advanced by employers.

Such a balance is never easy to find, of course, but it has become especially difficult as our world has become more complex. I cite just a few of the many complexities through which I have had to navigate in order to recommend balanced and practical revisions to Part III:

- identifying the appropriate policy platforms upon which to construct different worker protections; and managing the connections among these platforms;
- developing new, effective approaches to regulation in a world in which events move, information travels, structures change, knowledge expands and expectations evolve at unprecedented speed; and
- deploying new labour standards and compliance strategies that protect both Canada's most vulnerable workers and the broad middle range of the workforce.

The way to take the measure of these complexities, and to begin to find ways to resolve the difficult choices they present, is to better understand their sources.

2. THE CHANGING CHARACTER, NEEDS AND ASPIRATIONS OF THE WORKFORCE

The Canadian workforce is radically different from what it was when Part III was first enacted in 1965. First and foremost, it is more diverse. Women have entered the workplace in dramatic numbers. In 2004, 58% of all women aged 15 and over were part of the paid workforce, up from 42% in 1976. Women accounted for 47% of the employed workforce in 2004, up from 37% in 1976. Today, the two-income household has become the norm. In 1961, 68% of households were supported by a single breadwinner — usually male; in only 19% did both partners work. By 2001, in 62% of all households both partners were in the workforce while in only 15% was the male partner the sole breadwinner. Family structures have also become more diverse. In 2001, one in five families with children was headed by a female single parent, double the proportion in 1971. Immigration has transformed the ethnic, racial, cultural and religious make-up of Canadian society and its workplaces. According to Statistics Canada, immigration represents close to 70% of current population growth, up from under 20% in 1976. Nearly three quarters of recent immigrants are members of a visible minority. Today, about 44% of Torontonians are members of visible minorities, one of the largest percentages in the western world. The pattern is being repeated in many of Canada's large cities and their suburbs. Finally, other groups

that have for a very long time been underrepresented in Canada's workplaces are now present in more significant numbers. Aboriginal peoples are one such group; disabled persons are another — and neither was on the labour policy agenda in 1965.

Demography has changed, then; but not only demography. The content of many jobs has changed from 1965 to the present, and what people expect of their jobs has changed accordingly. The workforce is on the whole better educated and credentialed than it was in 1965 and increasing numbers of men and women work in knowledge-based occupations. Workers have also had to upgrade their job-related knowledge and skills, and employers have had to pay more attention to education and training, both on the job and off. Estimates suggest that more than 70% of all new jobs created in Canada require some form of post-secondary education and about 25% of new jobs require a university degree. Only about 6% of new jobs are likely to be held by those who have not finished high school.

All of these changes have enhanced workers' mobility to the point where many not only anticipate, but actively seek, career changes. Or so they claim: the percentage of employed workers reporting that they are seeking new jobs doubled from the mid-1970s to the mid-1990s, even though voluntary quit rates have in fact declined. However, more and more workers are opting for a different kind of mobility, one based on the autonomy that self-employment and entrepreneurship can provide, resulting in increasingly ambiguous relationships between these workers and the people they work with and the enterprises they serve.

Finally, the Canadian workforce is aging. Birth rates in Canada have declined sharply since the 1960s. The large "baby boom" cohort (born between 1945 and 1960) is moving toward retirement. Between 1991 and 2001, the median age within the core working group of the Canadian population (20 to 64) rose 3.2 years to 41.3, the biggest increase since 1921. By 2011, this median age is projected to reach 43.7.This particular demographic change will have far-reaching effects. Statisticians project — and some employers already detect — a shortage of skilled workers and professionals such as nursing, engineering and management personnel. The Canadian Federation of Independent Business reported in late 2000 that up to 300,000 jobs were vacant because of lack of suitable workers in skilled trades, especially in construction. The Conference Board of Canada forecasts a shortfall of nearly one million workers within 20 years. These facts perhaps explain why mandatory retirement is itself being retired as public policy.

Not all of these nationwide trends are precisely replicated in the federal jurisdiction workforce. For example, given the nature of their employment, workers in some parts of the federal jurisdiction are likely to be better

educated with jobs that are more knowledge-intensive than in the Canadian economy overall. In addition, some federal sectors are more male-dominated than the national average, and some have a somewhat older workforce. However, while we now know a good deal about employers and workers in the federal jurisdiction, these statistics have become available only recently, and no reliable time series presently exists that might enable us to predict future developments with great accuracy. I therefore proceed on the basis that overall demographic trends in the Canadian workforce are generally reflected in the federal jurisdiction, subject to best-guess adjustments based on what we know about its current profile.

Subject to this *caveat*, the demographic and social changes described above have important potential implications for federal labour standards, which were cited repeatedly in the briefs and research received by the Commission.

First, a great many workers are experiencing growing conflict between work and family responsibilities. Families with two working partners — now a majority of families — must somehow find time not only for two careers, but for the child-rearing and care-giving tasks that were formerly performed almost exclusively by women who did not enter the waged workforce. Canada's growing complement of single-parent families faces similar pressures in even more extreme form. So too do those people who care for family members who are aged, chronically ill, or both. The continuing unequal sharing of care responsibilities between women and men has operated to limit career options for many women, and probably accounts significantly for their higher rates of involuntary part-time work and very low pay. Available evidence suggests that lack of affordable child care and home care for the ill and elderly acts as a further constraint upon women's full labour market participation. These pressures — the direct result of demographic changes in the workplace and in society at large — are taking a mounting toll on workers' health, but also on their productivity, as I discuss more fully in Chapter Seven. For now, it is sufficient to note that the Commission heard a number of forceful pleas for greater flexibility for workers around hours of work, leave for caring responsibilities, and measures to balance the distribution of caring responsibilities between women and men, as well as greater opportunities for education, and for rest and recreation in order to restore the work–life balance.

Second, the increased diversity of the workforce has made inclusiveness and tolerance at work an important issue for employers and workers alike, not only because this is what human rights laws require, but because to ignore the issue is to risk disruption of harmonious workplace relations and the loss of valued talents and energies.

To take one example, declining birth rates and the aging workforce threatens the Canadian economy with future shortages of skilled labour and brings into focus the need to maintain high rates of labour force participation. But labour force participation is difficult for parents (especially women) unless arrangements are in place that enable them to keep work and family life in balance; it is difficult for highly qualified immigrant workers if they are denied access to jobs either by hostility in the workplace or by the discounting of their foreign experience and credentials; it is difficult for older workers unless they are allowed to reduce their work hours while remaining attached to the workforce; and it is difficult for aboriginal people unless they can overcome educational and cultural barriers. Is the greater workforce participation of women, immigrants, older workers and aboriginal peoples something that will come about as a result of market forces that make such protection a matter of good business practice? Or is it a task for legislative intervention? If the latter, should it fall within the mandate of departments concerned with labour standards, education, social policy or human rights?

Since 1965, human rights law has extended its reach into the workplace, prohibiting not only overt and intentional, but also unintentional or systemic, discrimination. Human rights law now obliges employers to take proactive measures to prevent sexual harassment and gender-based discrimination in pay, and requires that the needs of members of protected groups be accommodated up to the point where doing so would impose undue hardship. In the federal jurisdiction, the *Canadian Human Rights Act* represents the primary expression of public policy in this field and many of its provisions are clearly aimed at the employment relationship. However, as a result of amendments adopted piecemeal over the years, Part III now complements or supplements human rights legislation in the employment context by providing maternity and parental leave, requiring the re-integration into the workforce of injured workers and the protective re-assignment of pregnant workers and, as noted, preventing sexual harassment and suppressing discriminatory pay practices. As some or all of these matters are, or could be, dealt with under the *Canadian Human Rights Act*, it is clear that the time has come to review the relationship between human rights legislation and Part III. I address this issue in greater length later in this chapter, and again in Chapters Three and Six.

Third, workers feel much less securely attached to their jobs than they did in 1965, and many of them actually are. Both phenomena reflect not only structural changes in the economy — the shift from manufacturing to the service sector; changing patterns of investment and ownership — but also the accelerating pace of technology-driven innovation. Such innovation makes work more knowledge-intensive, but it also alters the nature of the knowledge that workers now need to do their jobs — not only job-specific

skills, but also more varied, generic and sophisticated forms of knowledge that allow them to adapt rapidly to new technologies and work requirements. Workers who "own" such knowledge are therefore in a position to sell it on the open market by moving to other jobs. Employers, on the other hand, want to be in a position to replace those employees who cannot adapt to rapid change with new recruits who can; in fact, they want to be able to radically alter the configuration of their workforce when conditions warrant.

For all of these reasons, job mobility is much more of an issue than it used to be for both employers and workers. As noted earlier, workers quit much less frequently than they say they would wish to, partly because they are reluctant to leave behind the drug, disability and dental plans that their employers provide. And contrary to expectations, employers seem to be spending much less on training than they ought to in a knowledge-based economy and much less than their counterparts in other OECD countries. The reasons for this are not clear, but employers may be afraid that their investment in training will be lost if and when their employees move to new jobs. In other words, mobility can be something of a mixed blessing for both workers and employers. Unfortunately, although both subjects are dealt with later in this report, benefits and training are difficult to address in the context of a review of Part III since both depend so heavily on public policies formulated elsewhere, if at all. As for mobility itself, that too is a difficult subject to explore in the present context. Essentially, while Part III has something useful to say about all three subjects — mobility, benefits and training — for reasons I explore in Chapters Ten and Eleven, labour standards legislation has tended to follow, not lead.

To sum up, these demographic changes, which affect the needs and aspirations of Canada's workers and employers, have made Part III potentially more relevant to more Canadians. To become more relevant, Part III may have to be radically revised — even reinvented — but by no means should it ever abandon its historic task of protecting the most vulnerable workers from exploitation. Given the disparities of power between employers and workers, and the potentially debilitating consequences of a "race to the bottom" triggered by employers competing on the basis of cheap labour, Part III must continue to provide a floor of rights and protections, such as minimum wages and limits on maximum hours of work. However, the issues catalogued above — concerns about work?life balance, ensuring the accommodation of diversity, providing access to training and learning opportunities, and facilitating labour mobility and high rates of labour market participation — would add a new and broader social policy dimension to traditional labour standards laws.

This is a critical point. If Part III is to be linked to the broad agendas of family policy, human rights, social inclusion, skills training and workforce development, how is this to be accomplished?

Up to now, as I have suggested, Part III has been amended on a piecemeal basis. Maternity leave was added in 1971, parental leave was added and expanded between 1984 and 2001, and compassionate care leave in 2003. Reflecting the evolution of family structures, the definition of "family" has been updated over time, most recently in 2005. Provisions outlawing gender discrimination in wage rates were adopted in 1977 and in 1984 employers were required to put in place policies to eliminate sexual harassment.

However, it is clear from submissions made to the Commission that numerous Canadians, many of whom are knowledgeable about social policy, believe that such incremental adjustments are insufficient and that social policy should play a pre-eminent role in the redesign of Part III. The logic of their position is easy enough to understand. For most working people, their job is the great indisputable fact that looms over the rest of their lives. It provides them with sustenance and status and hopefully, with security and satisfaction; but it also casts its long shadow over their aspirations for personal development and professional advancement, over their identities and relationships, and over their chance for participation in community and civic life, in ways that could scarcely be imagined 40 years ago. But, as I have to say later in this report, their logic is not impeccable.

As jobs become more insecure, they also become increasingly inappropriate platforms on which to build social aspirations, entitlements and protections. However, Part III is primarily about jobs and therefore an unlikely vehicle for social policy. Moreover, it is about jobs in a very particular sense: it lays down rules. It tells employers how they must conduct their contractual relations with their employees, and provides employees with the means to insist on compliance. But social policy is not much advanced by rules. It depends crucially on the reallocation of resources to turn good social policy into practical reality. This, by and large, Part III does not do. True, Part III requires employers to pay at least minimum wages, and to provide termination and severance pay, paid holidays and vacations. But it does not require employers to establish generous benefit plans (or any at all, except for injured workers), does not commit the state to provide income replacement for workers on pregnancy, parental, sickness, compassionate or educational leave, and does not provide subsidies for employers who establish child care facilities or extensive training programs.

Some of these resource issues are dealt with in other policy domains, by other statutes and under different administrative auspices; some are not dealt with at all, but ought to be; some are almost certain to be left in

the domain of private or community action; but none is dealt with by giving the Labour Program control over spending programs. So long as this is the case, it is difficult to see how Part III can play a central role in addressing many of the legitimate and pressing concerns brought to the attention of the Commission.

3. THE NEW ECONOMY: COMPETITIVENESS AND VULNERABILITY

It is now a commonplace to say that we live in a "new economy." While the term is ambiguous and sometimes controversial, it is widely understood that we are indeed experiencing the effects of several inter-connected trends, each of which has significant implications for labour markets and labour policy.

First, markets have become more competitive. The deepening and broadening of international economic integration has fostered greater competition for investment and market shares. Since 1991, exports have grown as a share of the Canadian economy from 25% to nearly 38%. We have also seen a similar growth in imports. Because about 84% of our merchandise export trade is with the United States, we are particularly aware of developments in that country that may have an impact on Canada's economy and labour markets. The growing importance of international capital flows has only reinforced this awareness. Moreover, deregulation has opened up many Canadian markets that were once largely closed to new entrants, which in turn has fostered increased price competition and put new pressures on operating costs, including labour costs. These pressures are especially severe where goods or services can be sourced directly from abroad.

The second trend, as noted earlier, is for firms to increasingly rely upon skills and knowledge and their application through technology for a competitive advantage. This has led to greater demand for skilled and knowledge workers, and to fewer opportunities for the unskilled, at least in relatively high wage labour markets such as Canada's. It has also led in some sectors to shortages of skilled workers (partly due to the aging of the workforce), which are not easily remedied because of lags in training policy and increased worldwide demand.

Third, competition has become more time-sensitive. Because many firms now do business on a continental or global basis, they are required to respond to customer demands on a 24/7 basis. Consequently, many employers have been asking their existing workforce to accept more flexible, less sociable and sometimes longer work schedules. They have also asked workers to be on call if needed to work off-site in their "non-working" hours, which

technology now allows them to do. Through these strategies, employers have been able to not only avoid the costs of hiring and training additional workers but, to some extent, to actually lower their labour costs.

The fourth trend is that currency, commodity and product markets are becoming more volatile. This has in turn led employers to respond by seeking greater flexibility in introducing technology, in acquiring needed supplies and services and in gaining access to new distribution channels and markets. However, the increasing pace of technological change and global integration also means that competitive advantages may prove to be more short-lived than they once were. One result is that many firms change the size and deployment of their workforce with increasing frequency and rapidity, which in turn leads them to experiment with contractual arrangements that give them greater freedom to do so.

Finally, many firms have reorganized their competitive and operational strategies, partly in response to market competitiveness and volatility, partly in order to exploit new technologies and partly to take advantage of gaps in legal regulations that exist at the boundaries of labour law. Specifically, firms have restructured their production into core and contingent elements, using outsourcing strategies — including supply chain contracting, often with smaller enterprises in a position of economic dependence — in order to reduce costs, focus on core competencies, and achieve greater flexibility to cut back, expand or redeploy the workforce in the face of market changes. Many firms have also sought greater flexibility and/or profitability by expanding their use of part-time, agency and temporary workers.

How do these general trends affect the employers regulated by Part III? It is hard to say with certainty for several reasons. First, federal enterprises have seldom been studied in isolation from related enterprises under provincial jurisdiction. Second, unique competitive, technological and even geo-political factors influence business conditions in particular sectors under federal jurisdiction. Third, labour practices vary enormously among federal employers. Nonetheless, some generalities are possible. Many federal jurisdiction employers, under the pressure of enhanced global and domestic competition, have resorted to some, if not all, of the responses outlined above. Many, too, have taken advantage of new technologies in order to alter their employment practices and reconfigure their workforces. One side effect worth noting is that as they outsource functions to call centres and temporary agencies operating abroad or under provincial jurisdiction, some federal enterprises may also become less "federal."

Nonetheless, the labour forces and labour practices of federally regulated enterprises differ somewhat from those of most Canadian companies.

One explanation may be that many of them operate in markets that are still somewhat sheltered from international competition — the result of a combination of factors including the large capital investment needed to enter the Canadian market (in the case of banks, airlines and telecommunications), the well-established market position of a small number of dominant players in those and other sectors, and in some cases, legal restrictions on foreign ownership or competition. Thus it is probably fair to say that the competitive pressures of the new economy are somewhat more attenuated in some federally regulated sectors than in, say, manufacturing, which is exposed to the full force of globally competitive markets.

The emergence of this new economy — even allowing for jurisdictional and sectoral variations — has had important implications for workers.

First, the new economy has transformed working time practices. Flexible schedules and longer hours, now much more common than in the 1960s and 1970s, can impinge dramatically on workers' personal lives, especially if they are required rather than voluntary. In many cases this adds to the pressures already faced by two-income and single parent families. There is evidence that long and unpredictable work hours are taking a toll on the health, well-being and productivity of workers, and there is reason to believe that they are having harmful effects on family and civic life as well.

Second, the rise of the new economy has coincided with a significant increase in income inequality. During the period of considerable economic growth between 1980 and 2000, median real household incomes rose because more of them contained two earners, and those earners were working longer hours. But median real individual incomes did not rise. The proportion of low income earners (less than $10 per hour in today's terms) remained the same — about 16% of the national workforce — but their share of GDP declined. On the other hand, top income earners significantly increased their share, with the greatest increases at the very top. Even within the lower- and middle-income tiers, inequality increased. Wages of young workers and new hires — especially among men both more and less educated — fell significantly relative to other workers, and have not been rising more steeply with experience to offset this. The real annual earnings of less educated males fell sharply. These trends place greater pressure on Canadian workers seeking opportunities to enter high-paying niches within the economy to acquire the necessary knowledge and credentials. But finding the opportunity, time and resources to do so is not easy under current conditions.

The third implication, and perhaps the most important given the traditional focus of labour standards legislation, is that the rise of the new economy

has been accompanied by a rise in what can be termed "precarious work." Precarious work combines relatively low pay with one or more of the following: an unstable or at-risk source of income, few or no benefits, limited or inaccessible legal protections, and uncertain prospects for future advancement, profit, or other compensatory opportunities or advantages.

While there are some difficulties in precisely measuring precarious work, there is not much doubt that it had been increasing until recently. Most recent figures suggest that about 32% of Canadian workers — up from about 25% at the end of the 1980s — hold temporary or part-time jobs, or are self-employed on their own account. The increase is largely accounted for by very significant growth in temporary employment and own-account self-employment. Not all of these people are in precarious work; some have voluntarily chosen it for lifestyle or other reasons, and some are in fact entrepreneurs. However, it appears that as many as 75% of temporary employees would prefer permanent employment, as would about 25% of own-account self-employed workers. About 25% of part-time workers would prefer full-time work.

The disadvantages of precarious work are often multiple and overlapping. Compared to full-time permanent workers, who now make up just over 60% of the workforce, temporary full-time workers are much more likely to have low incomes and no access to benefits; own-account self-employed workers are much more likely to have low incomes and no access to benefits; and low income workers generally are far less likely to have insurance or pension benefits or to be unionized. Research tends to show that temporary workers have significantly higher rates of employment strain than other workers due to uncertainty of employment and earnings, among other things. Employment strain, in turn, leads to health problems, tension and exhaustion. Moreover, for many people, precarious work is persistent, not transitory. For example, about 50% of workers earning less than $10 per hour find themselves in the same situation five years later. Finally, it is worth noting that workers experiencing disadvantages are more likely to be young, women, recent immigrants, members of visible minorities or some combination of these characteristics.

The underlying causes of these labour market trends continue to be debated. However, a number of them are apparently linked to features of the new economy itself. It is widely accepted that globalization and technological change have increased the demand in Canada for skilled workers relative to unskilled, which would account for the decline in the relative incomes of the latter. The growth of precarious work and the rise in pay inequality also appear to result from workers being relegated to the contingent workforce rather than finding places at the core. These are not the only causes of precariousness: declining rates of private sector unionization

and the presence on the job market of immigrants lacking basic language proficiency or negotiable credentials also play a role. Moreover, precariousness and vulnerability become self-perpetuating. As I suggest in Chapter Ten, workers are often vulnerable precisely because the law provides them no protection, and when it does, because they are vulnerable, they often lack the means, confidence or knowledge to enforce their rights.

These are general tendencies in labour markets across Canada. To what extent are they reproduced among workers in the federal domain? As the Federal Jurisdiction Workplace (FJW) Survey shows, federal workers on the whole are somewhat better off than the national norm. However, small but not insignificant pockets of precarious work persist even under federal jurisdiction. Within those pockets, workers seem to experience many of the overlapping disadvantages associated with such work in the wider Canadian labour market. The concentration of precarious work in road transportation, the postal sector and among small employers suggests that its underlying causes may well be structural aspects of the markets in which employers in these sectors sell their goods or services. Moreover, as data cited in Chapter Ten confirms, high rates of precarious work correlate with high rates of non-compliance with Part III. Whether that correlation identifies the causes of non-compliance or its effects remains unclear.

This last observation raises the more general question: what are the implications of the new economy for the revision of Part III?

On the one hand, the new economy clearly sets in motion pressures that threaten the long-established rights of workers to decent working conditions. On the other, it raises questions — canvassed earlier — about whether a new generation of legislated labour standards is needed to open up opportunities for workers to pursue training, seek advancement, secure much-needed insurance coverage, and lead a satisfying life at home and in the community. Some maintain that workers would not be the only beneficiaries of these opportunities. Employers would also benefit from having workers who are better trained, less stressed and more committed to the enterprise, especially in light of impending labour shortages. Families, communities and the economy would benefit as well from the presence of more skilled, secure, productive, affluent and engaged workers; and society as a whole would benefit from having workers who are less exposed to the detrimental health and social consequences of stress, and therefore less likely to have to seek social assistance when their precarious job disappears.

These considerations have prompted a series of proposals to the Commission: raise the minimum wage; extend labour standards protections to workers in precarious jobs; prevent employers from forcing workers to work

excessive, unpredictable or unsociable hours of work; require employers to provide training to their employees; and deploy a new compliance strategy to ensure that the rights of all workers are better protected. The cumulative effect of these proposals, the argument proceeds, will be to force employers to rethink their present competitive strategies and to abandon their unhealthy dependence on precarious work and low labour standards in favour of greater reliance upon entrepreneurship, innovation, technology and the skilled and committed workforce needed to pursue such strategies.

However — there is always a "however" — business representatives, economists and other policy analysts, remind us that in the context of the new economy especially, new or higher labour standards may have unintended and unwanted consequences. Where product markets are highly competitive and product demand is elastic, employers may not be able to pass on the costs imposed by new regulations to customers, and may not enjoy sufficient profit margins to absorb the higher costs themselves. This could result in some businesses failing altogether, or work being assigned to machines, or outsourced or sent offshore, with consequent job losses among the very workers who were the intended beneficiaries of higher labour standards. Or, cruel irony, those workers may indeed secure higher labour standards in the form of improved benefits, access to training, more agreeable working conditions and the like, but may end up paying for it themselves by having to accept lower wages.

This does not mean that workers must inevitably suffer adverse consequences from the new economy. Some employer representatives argued that the best way of protecting workers today is not through new and enhanced labour standards, but rather through education and training policies and programs, which prepare them to function more successfully in the new economy. Nor did labour representatives necessarily disagree. But questions remain: What of workers who lack the basic education or literacy skills to undertake advanced training, or who work in sectors that are not technologically intensive or are not experiencing skilled labour shortages? Who will provide and pay for their further education and training? Will they be given time off work to undertake it? How and where will workers who have been re-educated or retrained find new and better jobs? How will they survive the transition until they do? And how will young workers or others who experience difficulty in gaining initial access to the labour market find a way in?

Other employer representatives argue that current and anticipated labour shortages have already shifted the balance of bargaining power in the labour market so that employers must provide improved working conditions in order to attract and retain workers. The market, they contend, has done its work and there is no need for more legislation. This argument, of course,

accords with classical economic theory and with views that are frequently heard in debates over Canadian public policy. However, the evidence is somewhat equivocal. Some Canadian workers in some labour markets have indeed been able to take advantage of the opportunities offered by the new economy, either by upgrading their skills or by shrewd risk-taking and hard work or by having the good fortune to be unskilled and only moderately industrious in the right place at the right time. Still, even for these workers, the new economy offers no guarantees except that things will change one day, and when they do even highly skilled and supposedly secure workers may find themselves at risk. More importantly, to repeat an earlier point, the growth in inequality among wage earners and the long-term persistence of precariousness suggest that there are some workers whom the market will likely never assist. In other words, whatever the power of the market to improve social conditions, it has its limits.

What, then, to make of the argument that state regulation also has its limits, that if regulation places excessive burdens on business and cripples the economy, we will all be worse off — vulnerable workers, their employers and all the rest of us?

This is not merely a legitimate concern; it is a crucial question. Nonetheless, most people agree that at some undefined point this concern must be set aside, and moral or normative concerns must be allowed to trump economic or business concerns. In this day and age, in a country with Canada's affluence and moral aspirations, we are not likely to tolerate certain kinds of working conditions. No one would publicly argue — at least no one did argue to the Commission — in favour of allowing employers to become more profitable by hiring child labour, or cancelling all vacation entitlements or paying wages too low to live on. No one would argue that labour standards should be debased in this way to enable airline passengers or cable subscribers to pay a few dollars less for the goods or services they purchase or shareholders to receive a few dollars more in dividends.

Moreover, it was widely accepted by both business and labour representatives that Part III provides a much-needed level playing field for employers. It reinforces not only everyone's commitment to morally acceptable minimum standards, but also the capacity of good corporate citizens who obey the law to resist pressure from less principled competitors who do not. And a final implication: decent standards, properly enforced, may require that some enterprises either change the way they do business, or fall by the wayside. Given sufficient time, most will change; they will introduce new management techniques, machinery or marketing strategies and become more efficient and better able to afford the costs of decent wages and working conditions. But some will fail, and when they do, their customers will have to find other sources of supply, their suppliers other outlets, their investors

other opportunities, their workers other jobs. We cannot expect to have decent workplaces free of charge; the only question is, "how much or how little are we prepared to pay for them?"

To sum up, the new economy and the new demography have destabilized many of our assumptions about what labour standards can and should do; they have certainly changed the context within which the purposes and effects of labour standards must be evaluated; but they have not eroded the moral foundations of Part III.

That said, it remains an open question as to whether or to what extent new, perhaps more relevant, policy platforms can be constructed on those same moral foundations. That question, of course, is provoked by the changing nature of jobs. For many people — especially those who need protection most — jobs are becoming more insecure, ephemeral and unrewarding. Making their access to protection contingent on their access to a job would seem to be a self-defeating strategy. Even for those who already have jobs, marketable skills, negotiable credentials and reasonable prospects of being able to navigate the labour market, tying security to a job can be counter-productive. It creates incentives for workers to stay where they are rather than moving somewhere else where they can be more productively employed.

4. LABOUR STANDARDS AND ECONOMIC SUCCESS

I begin with the following proposition: employers in the federal jurisdiction are being asked to respect labour standards that meet public expectations of decent behaviour, that establish a level playing field as among domestic competitors and that place Canadian firms at no significant disadvantage vis-à-vis foreign competitors.

Employers appear to agree with this proposition. A 1997 survey of federal employers indicated that compliance with Part III imposed no significant cost burdens for them; except for the introduction of unpaid parental and compassionate care leave provisions, little has changed since; and their response would likely be the same today. Moreover, the 2005 FJW Survey shows that most federally regulated employers exceed the requirements of Part III along many dimensions of the employment bargain — a strong hint that Part III does not impose excessive financial burdens on cost-conscious employers. These impressions are consistent with the empirical evidence, summarized in Chapter Three, which shows that Canada's labour standards are neither more costly nor less flexible than those of international comparators.

Finally, few employer briefs to the Commission seriously challenged my characterization of labour standards and virtually none complained that Part III taken as a whole represented a significant burden for them. Of course, specific labour standards were problematic for some sectors or enterprises, but the only concern consistently expressed by employers related to their need for greater flexibility with regard to scheduling hours of work and paying for overtime. I deal with this issue at length in Chapter Seven.

Nonetheless, even accepting that labour standards do not presently impair the competitiveness of federal enterprises, it is possible that expensive new requirements could have that effect. So too could the existing standards if they remain unchanged while global economic conditions become ever more difficult. These risks are worth taking seriously. Substantive labour standards and their enforcement vary widely from country to country, and their variability has only increased with the entry of China, India and the former eastern block states into the world trading system. Nor is it easy to see how domestic experience with labour legislation can be replicated internationally to produce a global floor of labour standards, to create a global level playing field and to take labour standards out of competition. Consequently, both proponents and opponents of globalization cite a scenario in which the new, expanded, low-cost global labour supply asserts downward pressures on real labour costs in countries such as Canada, despite their advantage in productivity. Labour costs, in other words, are likely to come more prominently into play as the crucial factor that determines where goods and services are produced, where investment goes, and who wins out in international markets.

In such a scenario, it is often argued, a new competitive dynamic will effectively create a global market in labour regulation in which attempts to legislate high workplace standards will be increasingly self-defeating. That is the theory at least. However, a substantial body of new empirical research enables us to see how this theoretical scenario is being played out in practice. That research has focused directly on whether international economic integration has led to an actual lowering of labour standards in industrialized countries, and whether those countries have lost overall investment or trade shares as a result of specific labour protections that have tended to raise their costs of production. The consensus among researchers, perhaps somewhat surprisingly, is that these negative outcomes have not occurred and that they are unlikely to occur in the foreseeable future.

The explanation is that other things matter much more than labour costs in determining competitiveness in international markets — political and social stability, the quality of the local labour force and infrastructure, the transparency of the legal system, and the size and growth potential of local markets. Most wealthy industrialized countries, Canada included,

provide these things very well, but they tend to be scarcer in other parts of the world. In fact, some of the most competitive economies in the world, according to the World Economic Forum, are Scandinavian countries that have very high labour standards and high rates of unionization. There is even some evidence that high labour standards may, to some extent, actually contribute to social and political stability and thus promote economic success.

No doubt, particular sectors in countries like Canada will face intense competitive pressures driven by labour costs. However, the temptation to respond by lowering legislated labour standards should be resisted for the following reasons. First, doing so would make little difference in terms of our ability to compete with emerging economies, since high labour costs are primarily attributable to labour markets, not to labour laws. Second, the wage gap between Canada and those of emerging economies is simply too wide to be offset through changes either in Canadian labour markets or in our labour laws. And finally, at the level of the national economy, such a strategy would needlessly harm the majority of Canadians who work in sectors that face different competitive challenges at home and abroad. This latter consideration is particularly relevant to federal jurisdiction enterprises, which are sheltered rather more than most from international competition.

Ultimately, there is ample evidence to support the view that Canada's competitiveness and prosperity depend upon increasing productivity, not upon reducing wages and lowering labour standards. Enhancements in economic performance resulting from even small increases in productivity growth will, over a relatively short period, overshadow any competitive advantage achieved by reducing labour costs. The key question, then, is not how do labour standards affect costs, but rather, what impact, if any, do they have on productivity?

Most research on determinants of productivity identifies major drivers other than costs imposed by labour laws. These include: macro-economic stability, the competitiveness of product markets (including exposure to international trade), the efficiency of financial markets, the predictability and transparency of business regulation, levels of private sector and university research and development, the ability of firms — and especially their managers — to keep abreast of world technological developments and assimilate them and, by no means least, the level of investment in technology, and in physical and human capital. Thus, for example, while there is understandable concern about the emergence in recent years of a productivity gap between Canada and the United States, research shows that this gap is largely attributable to rapid increases in productivity in the information technology sector and a handful of other sectors, and the fact that those sectors represent a larger share of the U.S. economy than the Canadian. These findings have

led me to conclude that, contrary to some briefs I received, the productivity gap between the United States and Canada is not attributable to our more generous labour laws; it in fact resulted from other causes.

This is not to suggest that labour laws and policies are irrelevant to productivity. Indeed, since the workplace is where the skills, commitment and human capital of the labour force are deployed, it would be surprising if the rules governing workplace relations did not affect productivity one way or the other.

Research shows, and practical experience teaches, that well-conceived policies and well-executed laws can have a positive impact on productivity. They may, for example, stimulate the generation of human capital in the workforce by bringing new education providers into existence, persuading or requiring employers to facilitate access to them by their workers, and providing workers with safeguards or incentives that will enable or encourage them to continually upgrade their skills and knowledge over the course of their careers. "Flexicurity" strategies may provide employers with the flexibility they need to respond quickly to new technologies and new competitive challenges while reinforcing workers' security by training them to perform their new duties, by giving them the chance to "retool" so they can move to new jobs, or by providing them with transitional income support if required. Labour standards legislation may enable the efficient deployment of the workforce, reduce worker stress and enhance productivity by striking the right balance between the needs of workers and employers around the regulation of working time. And, a final example, labour ministries may promote the dissemination of advanced workplace practices that directly or indirectly enhance productivity. Each of these four examples is explored later in this report.

To sum up, federal policy makers should be cautious about adopting labour standards that impose significant costs on employers without the prospect of providing corresponding productivity gains. However, in my judgment, the proposals in this report do not involve costs significant enough to impair Canada's global competitiveness or injure federal enterprises. When coordinated with other policies, they offer the potential of at least some gains in productivity; they further the traditional ambition of labour standards to ensure decent conditions in federal sector workplaces; and they do all of this without undue elaboration of the regulatory machinery.

5. POSSIBILITIES AND LIMITATIONS OF LABOUR STANDARDS LEGISLATION: SIX COMMON SENSE GUIDELINES FOR THE LABOUR PROGRAM

This account of Canada's changing workforce and workplaces, of the new economy and policy environment in which they are situated, and of the possible scope of new approaches to labour standards, has thrown up a long agenda of complex issues that this report, and ultimately the Labour Program, will have to address:

- how to resolve the work–life conflicts that so many individuals and groups have brought to my attention?
- how to respond to the moral imperative of ensuring decent working conditions for the most vulnerable members of the workforce?
- how to foster a climate of inclusion and respect for human rights and dignity in the workplace?
- how to enlarge the adaptive capacities of enterprises in the federal jurisdiction, and how to enable workers to better respond to change?
- how to secure high levels of compliance with Part III?

Clearly, not all of these issues can be resolved by simply amending Part III. Rather, the Labour Program is going to have to determine on an issue-by-issue basis:

- whether legislation is likely to produce the desired results and if so, whether labour standards legislation is a better solution than legislation primarily concerned with human rights, health, social policy or taxation;
- whether the personnel and legal powers needed to secure compliance with labour standards legislation are likely to be deployed;
- whether there is a serious risk that new legislative requirements might produce undesirable side effects;
- whether non-legislative strategies have a better chance of attracting the support of the workplace parties and other non-governmental actors and of achieving compliance; and
- if non-legislative strategies seem preferable, whether they should be conducted in tandem with statutory regulation or at arm's length from it.

As I formulated my own analysis and recommendations, six common sense guidelines helped me to apply the above considerations to the agenda of issues. I commend them to the Labour Program as well.

First, "labour standards" is a policy domain with its own special logic, expert personnel and traditional clientele. As our experience of Part III over the past 40 years illustrates, logic, expertise and clientele may change over time, but at any given moment some issues are more easily recognizable as labour standards issues than others. In my view, the hallmark of a labour standards issue is that it speaks to workplace conditions and behaviour, and anticipates that improvements can be achieved primarily through changes in workplace relations and practices. In general, the relevant expertise in such matters already resides within the Labour Program and its labour standards staff, though I suggest later in this report that its staff should be modestly augmented and redeployed.

Second, the Labour Program can and should, if possible, play an important role by influencing the development of the larger policy environment in which labour standards will be revised and implemented. The Program should therefore position itself to intervene in policy debates around productivity, poverty reduction, child care and other issues that may have a labour standards dimension or affect labour standards outcomes. When these debates do not strictly involve labour standards or other "Labour Program" issues, and when other departments or agencies take the lead in formulating policy, the challenge for the Labour Program will be to ensure that Part III policies are closely coordinated with those originating elsewhere. Of course, public policy debates and legislative programs seldom run in straight lines to clear conclusions. Thus, whatever the outcome of a given debate — on how to promote skills training or discourage workplace discrimination, for example — it will always remain the Labour Program's responsibility to defend and advance the fundamental values informing its mandate in general, and labour standards legislation in particular.

Third, changes that have transformed work, workplaces and the workforce are unlikely to slow down or stop any time soon. Amendments to Part III should therefore not be understood as having definitively dealt with the effects of those changes; there will always be new effects to deal with. For this reason, revising labour standards legislation must be seen as an ongoing project, not one to be undertaken at 40-year intervals. This notion has led me to link my recommendations explicitly to what I perceive to be the momentum and direction of current developments. It has also led me to propose built-in mechanisms for adjusting minimum wages and regulating working time; to urge ongoing engagement with stakeholders and other interested parties; to exhort the Labour Program to once again actively intervene in debates over the long-term direction of social and economic policy; and to underline the need to coordinate with other policy domains, which are themselves experiencing the transformative effects of change.

Fourth, change is not only rapid — it also runs so deep that it is likely to undermine the whole conceptual foundation of labour standards. The workplace and the employment contract are critical components of that foundation. However, there are good reasons to believe that the nature, duration, content and social significance of the employment contract may be almost unrecognizable in another 40 years; or at least that a number of new relationships — as yet unnamed — will appear alongside the employment contract and fill some of the space it used to occupy. If this happens, we will either have to reinvent labour standards or create a new regulatory lexicon to describe who and what we are regulating. For this reason, I suggest in Chapter Four that we launch a modest experiment in extending labour standards on a selective, sectoral basis to individuals I have tentatively called "autonomous workers." For similar reasons, I suggest the establishment of a new institution called a "benefits bank," because I believe that nothing in Part III at present, and nothing likely to be added within the existing understandings of its purpose and function, will help precarious or vulnerable workers to participate in benefits schemes now widely available to more highly privileged workers. In short, radically new circumstances call for radically new concepts.

Fifth, legislation does not enforce itself. Assuming that we can identify appropriate substantive approaches to labour standards, compliance with those standards remains a make-or-break issue. Research strongly suggests that relying on the traditional complaints-driven approach to enforcement — the approach that now consumes the time of most federal labour standards staff — is likely to produce relatively low levels of compliance at relatively high cost. Better results can be anticipated from compliance strategies that involve the following elements: employers must know and understand what is expected of them; they must be given positive encouragements and incentives to comply; they must know that they will be subjected to proactive monitoring, and that if complaints are brought against them, they will be investigated promptly and thoroughly; and they must be made aware that significant sanctions will be used against offenders, especially those that are wilful and persistent. In order to deploy such sophisticated compliance strategies, however, regulators must have adequate resources available to them, including information systems, personnel and legal powers.

Sixth, my mandate invites me to recommend both legislative and non-legislative changes to labour standards. I have generally opted for the former on the assumption that there would be no need to recommend anything at all if non-legislative approaches had already resolved the issues. Nonetheless, I believe that legislation has its limits and when those limits are reached, other approaches must be tried. What are those limits?

It is clearly the case that legislation can distort market forces. This, after all, is what legislation is intended to do. The important thing is to ensure that the distortions introduced by legislation are justifiable and achievable. On the other hand, it is also true that market forces can make legislative regulation of labour standards unnecessary. For example, tight labour markets in recent years in some places in Canada have probably helped low-wage earners at least as much as minimum wage legislation has. However, this does not mean that markets can be depended upon to do all the work of legislation all the time. Market forces can also sometimes distort the effects of legislation and work against compliance. For example, employers wishing to escape what they perceive to be competitive handicaps may adopt new legal forms or workplace practices that transgress the spirit of labour standards legislation, though not its letter. In other words, choices between legislative and non-legislative measures must be made not on the basis of preconceptions about their respective virtues and vices, but more pragmatically, on the basis of empirical evidence.

Sometimes it is not the market that makes legislative solutions inappropriate, but rather the existence of legislation in adjacent policy domains. In an era of scarce public resources, it makes sense not to duplicate regulatory efforts. And in some fields of social regulation, such as human rights, where the training, experience, expertise and sensitivity of administrators count for a great deal, there are functional reasons not to entrust administration to labour standards officials whose training, experience, expertise and sensitivity differ considerably.

Further, one of the prime virtues of legislation — that it ensures equal treatment of all those affected — may turn out to be a vice if "one size does not fit all." No doubt that is why Part III establishes both labour standards and mechanisms to customize those standards, so that they "fit" different circumstances, enterprises and sectors. That said, as I explain in the next chapter, not all adjustment mechanisms are equally appropriate, only those that adhere to the fundamental values embedded in Part III. This example shows that sometimes it is necessary to combine legislative and non-legislative measures.

Finally, a legislative response may be the sensible way to deal with some issues, but legislation is premature when powerful cultural norms are likely to get in the way of compliance. The culture of long hours, for example, may prevent effective regulation of working time; the culture of risk-taking may block attempts to treat independent operators as employees. However much in an objective sense these cultures may disserve the interests of those who adhere to them, it is very difficult to enforce legislation against the wishes of those who are meant to benefit from it. In such cases, cultural change may have to precede legislation. However, cultural change does not usually happen of its own accord, as our experience with smoking reminds us; someone — the Labour Program in this instance — must bring it about. Only when values, perceptions and habits begin to change can legislation hope to tilt the balance in favour of high levels of compliance without invoking heavy-handed enforcement tactics.

To conclude my advice to the Labour Program on this point I will paraphrase its first Deputy Minister and Minister, W. L. Mackenzie King: "not necessarily legislation, but legislation if necessary."

Chapter Three

Setting the Bar: What Labour Standards are Appropriate for the Federal Jurisdiction?

THREE
SETTING THE BAR: WHAT LABOUR STANDARDS ARE APPROPRIATE FOR THE FEDERAL JURISDICTION?

1. INTRODUCTION

Part III aims to ensure decent working conditions for workers, to support — and if possible promote — competitive enterprises and a dynamic economy, and to operate in accordance with the requirements of sound public administration that policy interventions should be fair, effective and efficient. In the last chapter, I reviewed some of the forces at play that are affecting all three aspirations and the dynamic among them. In this chapter, I introduce two different approaches to "setting the bar." The first looks sideways: it measures federal labour standards against those of comparable jurisdictions. The second looks forward: it lays down principles that can be used to assess proposals for amending Part III.

2. COMPARING FEDERAL LABOUR STANDARDS WITH THOSE IN OTHER JURISDICTIONS

Whatever mix of strategic objectives we might regard as appropriate, it is tempting to benchmark federal labour standards against those of other advanced economies that share broadly similar values and that have had to grapple with similar issues. Numbers of submissions and research studies did just that. They argued — or merely assumed — that any given federal labour standard ought to be set no lower than the highest provincial standard dealing with the same matter, no higher than the lowest standards of our principal trading partners and competitors, or no different from jurisdictions whose successful economic and social policies we wish to emulate. Of course these comparisons are not entirely objective; indeed it would be fair to say that they are often coercive: they are put forward to push policy makers toward a desired outcome. Those who favour higher federal labour standards will select for comparison those jurisdictions — mostly members of the European Union, but also some Canadian provinces — that have higher

labour standards; and vice versa: those who favour lower federal standards will make comparisons to a jurisdiction — often, not always, the United States — whose standards are lower than ours in certain respects.

I agree that it is useful to have some overall sense of how federal labour standards measure up to those of other jurisdictions. To make effective use of comparisons, however, it is important to first understand their inherent limitations. Comparisons among jurisdictions, especially across international borders, are notoriously difficult because different jurisdictions use different strategies to ensure decent conditions in the workplace. Some use labour standards, some social welfare or economic policies; some regulate the employment bargain, some provide incentives to employers or subsidies to workers; some integrate employment standards with other forms of labour market regulation such as collective bargaining, some allow these systems to operate in relative isolation. Accordingly, a narrow focus on particular labour standards may obscure the fact that in different jurisdictions the same issues are dealt with in different but equally effective — or ineffective — ways.

Moreover, comparisons involve a host of technical problems. Data may not be collected on the same basis from jurisdiction to jurisdiction; categories and terminology in one jurisdiction may have no functional or conceptual equivalent in another. Differences in the profile of the workforce, of enterprises, of the industrial relations system, of the overall economic environment, or of cultural, political and social influences may mean that standards that appear to be similar operate differently, or those that appear to be different may have similar effects. And comparing individual employment standards provides no indication of the cumulative benefits that workers enjoy or the cumulative burdens that enterprises, sectors or economies must bear. For all of these reasons, evaluative comparisons are better drawn at the level of key policy aims or issues rather than at the level of particular legislative details.

Nonetheless, there are at least two good reasons for pausing to situate federal standards relative to those of other jurisdictions. First, Canadian labour standards laws reflect the values and expectations of workers, employers and the public across the country. While standards differ somewhat from jurisdiction to jurisdiction, reflecting variations in local economies and political approaches, there is also a surprising degree of convergence. Any government that finds itself an outlier ought therefore at least to ask itself whether it wants to be there and, if so, why. There may well be good reasons why federal labour standards should be lower (or higher) than those of most provinces but absent such reasons, comparisons may serve as a useful reminder that federal standards are lagging (or leading) and ought to be revised.

The second reason for making comparisons between jurisdictions is that they force us to think "outside the box." The experience of other Canadian jurisdictions, and especially of other countries, serves to remind us that people confronting challenges similar to our own have come up with very different responses, some of which have actually operated successfully over a period of many years. Even if we decide not to imitate their response, we are at least driven to examine our own more critically, and with an awareness that alternatives do exist.

With this in mind, the Commission has gathered a wealth of comparative material that is summarized in the technical annex to the report. Much of this material was helpfully analyzed by Professor Richard Block in a report to the Commission. The conclusions that I have drawn from this work, as well as other sources consulted, are as follows:

In most matters, federal labour standards provide a level of protection to workers that lies within the middle of the range found in other Canadian jurisdictions. This is most obvious with respect to minimum wages, given that federal rates are equal to the general minimum rate of the province where an employee is employed, but also with respect to standard hours of work and weekly rest periods, maternity and parental leaves, vacations and holidays. The federal jurisdiction provides most workers with greater access to severance pay but less notice of termination of employment than most of its Canadian counterparts, thus striking a balance different in its particulars but similar in its overall level of protection. It is also one of the few Canadian jurisdictions to have set maximum weekly hours of work, although this is subject to various exceptions and flexibility measures. In the areas of unjust dismissal, unpaid sick leave, mass terminations of employment, sexual harassment, and reassignment and leave rights for pregnant and nursing employees, Part III provides greater protections than are found in almost all other Canadian jurisdictions. On the other hand, federal labour standards currently do not provide access to short-term family-related leave, nor, oddly enough, do they require that employees have access to daily rest periods, including meal breaks. In these respects, federal standards lag most Canadian jurisdictions.

Within an international context, federal labour standards, like those of other Canadian jurisdictions, provide a somewhat higher level of protection to workers in most areas than do most U.S. jurisdictions. The United States is, however, an outlier among industrialized countries in most aspects of labour standards legislation. Canada's federal labour standards tend to be less protective of workers than those of most European countries with respect to hours of work, and markedly less generous with respect to vacation leave. According to a study from the OECD, they are also much less strict with respect to employment protection legislation — such as the length of notice

of termination, the amount of severance pay, restrictions on fixed-term employment contracts and temporary agency work — than the laws of all European countries except the United Kingdom. As of 2001, Canadian minimum wages, on average, constituted a smaller fraction of the average industrial wage than in many other industrialized countries, including the United States. On the other hand, the length of maternity, parental and compassionate care leave provided by Canadian legislation lies within the middle of the range of approaches taken by most of its industrialized counterparts.

These comparisons suggest at a minimum that while federal labour standards did not depart greatly from the Canadian norm, certain anomalies should be acknowledged. On the one hand, the absence from Part III of provisions for short-term family leave and daily rest periods should be reviewed in light of contemporary expectations. On the other, the presence of unique federal protections against unjust dismissal, relatively generous sick leave provisions and relatively strong group termination provisions make these less obvious areas for improvement.

However, many comparator jurisdictions — especially the provinces — are themselves grappling with change in their labour standards; their policy debates are under way; and existing solutions have become a work in progress. The most sensible approach, therefore, is to determine what broad labour standards issues are on the public policy agenda across Canada and among the world's advanced economies, and to make what I hope will be useful contributions to the ongoing cross-Canada and international discussions. Three areas seem to invite special attention.

First, while many Canadian jurisdictions have made significant strides in establishing a framework to enable workers to balance work and family commitments, the evidence noted in Chapter Two and summarized in Chapter Seven suggests that this remains a major concern, and is likely to grow in importance in the near future. Maternity, parental and compassionate care leaves, and associated Employment Insurance income support programs, have no doubt relieved many pressures. Yet many employees do not yet enjoy the flexibility they need to meet short-term and relatively unpredictable family care demands and other personal responsibilities. Here we might look abroad or devise practical solutions that build upon existing Canadian approaches.

Second, ensuring decent working conditions for the growing non-standard workforce remains a challenge for many jurisdictions. Within Canada, there have been only a handful of innovative measures in the labour standards field, though noticeably more outside of it. Quebec and Saskatchewan have provided limited statutory protections for part-time workers, and the Yukon has included "contract workers" among those covered by its employment

standards legislation. Meanwhile, minimum wage rates in many Canadian jurisdictions have declined in real terms over the last decade. Though a number of provincial governments are now moving to address this, the earnings of a full-time employee paid at the minimum wage remain in most provinces below standard measures of poverty. A number of European countries, including the United Kingdom, Italy and Germany, have broadened the scope of labour standards legislation to cover workers who would not fall within the traditional definition of employment, and the European Union has issued a directive requiring that temporary and part-time employees receive terms and conditions of employment equal to those provided to their full-time and permanent counterparts. Many European countries also regulate agency employment relationships in the interests of protecting agency workers from disadvantage or abuse. In most places, however, the issue of how to respond to non-standard work relationships remains a topic of lively debate; there is no received wisdom yet, either at home or abroad.

Finally, the challenge of ensuring that workers have opportunities to pursue and obtain training and education to keep current and to advance in a knowledge-based economy remains largely unmet. Despite the importance of this issue to the success of individual Canadians, and to the Canadian economy as a whole, and despite a general recognition that Canadian workers often receive relatively little training over the course of their working lives, no Canadian jurisdiction has put in place a system of study or training leaves for employees. Only Quebec requires that employers dedicate a minimum level of resources to on-the-job training. By contrast, many European countries have put in place a range of education and training leaves, often supported by income replacement programs funded through social or employment insurance schemes. We might draw some useful lessons from that experience, again being mindful of the differences between the Canadian and European context.

Each of these issues receives attention in succeeding chapters of this report. That attention is informed by comparisons and other forms of research. It should be principled as well. What follows is a brief summary of the principles that, in my view, ought to frame up my recommendations.

3. PRINCIPLES FOR EVALUATING PRESENT AND FUTURE LABOUR STANDARDS

Labour standards represent an attempt to reconcile strategic objectives that, to some extent, are in tension with each other. In this section, I set out the principles that I have used to evaluate proposals for changes to Part III, to formulate my own recommendations and to resolve these tensions. These principles did not fall from the sky. They are drawn from the academic

research studies and the submissions we received from representatives who appeared at our hearings, professionals working in the field, stakeholder organizations, community groups and earlier government reports. Moreover, they take account of the special characteristics of enterprises in the federal sector, as well as the new demography and the new economy discussed in the previous chapter. Finally, they are informed by general principles of good public policy making and sound public administration.

The principles fall into three groups: the *fundamental principle* of decency at work, which gives meaning and purpose to all labour standards legislation; a series of *strategic principles* that point the way toward realizing the decency principle in the context of a dynamic economy and diverse society such as Canada; and finally, several *operational principles* that influence the legislative or non-legislative instruments and administrative approaches used to translate the strategic principles into practice.

A. THE FUNDAMENTAL PRINCIPLE

Principle 1: Decency at work

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent." No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.

This first principle is the pre-eminent principle. In the event of conflict, it trumps the other principles. It will require interpretation when it comes to be applied, but it hardly requires justification. It is of the the essence not only of labour standards legislation, but of Canada's entire social, economic and political development. It appears to be widely, if not unanimously, accepted by workers, employers, social advocacy networks, research centres, political parties and the public. If this principle is not accepted, if it is not treated as pre-eminent, it is hard to see what justification there can be for labour standards legislation.

The decency principle requires special attention to background conditions within workplace relationships that generate vulnerability. These include limits on the coverage of employment standards laws and differential treatment of workers performing the same jobs. It also highlights the importance of a sound compliance strategy and protection against unjust dismissal as a means of sheltering workers from the risk of having to put up with working conditions that are not decent for fear of losing their job.

B. STRATEGIC PRINCIPLES

Principle 2: The market economy

Labour standards ought — so far as possible — to advance the decency principle in ways that allow workers to contribute to, and benefit from, the success of Canada's market economy. Because successful enterprises are better able to treat workers decently, labour standards should support and, if possible enhance, the competitiveness and adaptability of enterprises.

Labour standards bear some resemblance to legal standards governing other aspects of a market economy such as consumer transactions, the sale of securities or product safety. By ensuring that competition is carried on within the bounds of what most market participants consider fair and appropriate behaviour, they reinforce the confidence and encourage the participation of market actors. Of course, like any other regulatory regime, labour standards can be too onerous and overburden employers to the point where their competitiveness is impaired. However, on any informed reading of the evidence, this cannot be said of existing federal labour standards, or of those recommended in this report. Indeed, since workers who are decently treated are likely to be more productive than those who are not, it could be said that federal labour standards help employers to act in their own best interests.

The more difficult question is whether existing or proposed labour standards are doing as much as they might to contribute positively to the competitiveness of federal enterprises. Some argue that this is not a task for labour standards. My response is that if successful enterprises become good employers, labour standards ought to do what they can to contribute to business success.

Specifically, labour standards should be conceived, enacted and administered in such a way that employers can respect the decency principle while enjoying ample opportunity to meet time-sensitive market demands and to restructure or redeploy their workforces in the face of changing market conditions. This focuses attention on the need for mechanisms that permit the timely, orderly, equitable and accountable adjustment of workplace practices at both the sectoral and the enterprise level. Labour standards should also contribute to competitiveness by providing opportunities for workers to acquire new skills and credentials, thereby enhancing human capital. This will not only benefit workers, but will also ensure that firms have access to the highly trained personnel they need to compete effectively in today's economy. For similar reasons, labour standards should promote trust and cooperation in the workplace by providing forums for the discussion of issues of mutual concern to workers and employers. Finally, labour standards should be integrated with other social and economic initiatives in such a way that employers, workers and the general community share the costs and benefits of enhanced economic performance equitably.

Principle 3: Flexicurity

Labour standards should be coordinated with income security and other adjustment policies to provide protection to workers whose jobs are threatened by changing labour market conditions, employer strategies or job requirements. Labour standards, along with other legislation, should provide a framework for avoiding job losses, if possible; for planning and funding worker transitions to new jobs; and for reducing the impact of job losses on workers.

Greater flexibility for employers to reconfigure or redeploy their workforces — sanctioned by the market economy principle — must be firmly linked to the provision of greater security for any workers who may be adversely affected. This will require contributions from the employer, from social insurance programs (especially Employment Insurance), and from public or employer-funded programs designed to prepare workers for new jobs. If the security of workers is not properly safeguarded, the decency principle is put at risk, the possibility of building trust and openness to innovation is greatly reduced, and the case for the market economy principle is sharply curtailed.

Principle 4: The level playing field

Labour standards should ensure that competition is not based on differential interpretation or application of the decency principle. While variability in labour conditions among competing firms is to be expected, it should reflect the circumstances prevailing in particular labour markets or sectors of the economy and genuine differences in firm strategy, not degrees of compliance with statutory labour standards.

This principle applies the idea of the rule of law to labour standards. It ensures that all those who are similarly situated should be regulated according to the same rules, and that the law should guarantee equal protection for all its intended beneficiaries. It therefore serves to protect not only workers but also the majority of fair-minded employers who wish to meet their legal obligations without the risk of being undercut by those who do not. Clear laws, effective oversight, consistent interpretation and certainty of enforcement are critical to ensuring observance of the level playing field principle. However, variations attributable to the operation of the regulated flexibility principle, described below, do not violate the level playing field principle.

Principle 5: The workplace bargain

Labour standards should respect the right of employers and workers (or their collective representatives) to negotiate the terms of their relationship, provided that the negotiations are authentic and the resulting employment bargain is clear, respects the basic decency principle and conforms to law. They should also ensure that workers and employers enjoy the fruits of their bargain.

This principle may lack the moral force and near-unanimous appeal of the decency principle, but it reaches just as far back in the history of labour standards legislation and is just as deeply embedded in the assumptions around which our political economy is organized. The principle that bargains should be honoured subject to overriding public policy considerations is not itself controversial, though again its interpretation and application may provoke debate in some circumstances. The problem is that employers almost always have more power than workers, and therefore can almost always dictate the terms of the bargain. Of course, the employer's power is not unlimited. If job applicants can readily find work elsewhere on better terms, the employer will have to ratchet up its offer to meet the competition or risk being without workers. If workers bargain collectively, possess unique skills or benefit from local labour shortages, they can influence the terms of the bargain. But that said, in the real world of 21st century Canada, more often than not, employers set the terms of the employment bargain on a take-it or leave-it basis.

This explains the four qualifications written into this principle. The first two qualifications actually reinforce rather than limit the principle that bargains should be respected. If labour standards can help to make negotiations more authentic and employment bargains more transparent, there is less need for their content to be regulated by law. The third qualification — no one should be allowed to offer, agree to or work under conditions that we would not regard as decent — speaks to situations in which disadvantaged or ill-informed workers "agree" to do just that. If their agreement were enforced, not only would we be undermining the fundamental principle of labour standards, but we would also be risking a race to the bottom as employers that respected decent labour standards would have to compete with those that did not. The fourth — that the bargain must conform to law — is generally acknowledged, and ensures that private agreements do not circumvent or undermine public policies.

This principle also implies that in some cases workers and employers may agree to establish relationships that cannot be described as employment, because they involve greater worker autonomy and risk taking than employment usually does. A somewhat different notion of decent work may be appropriate to such relationships, but because they are sometimes difficult to distinguish from employment, and because they may have effects on adjacent labour markets, they should be subject to oversight, and if necessary, regulation. Finally, whatever the terms of the relationship, labour standards legislation should provide effective procedures to ensure that the parties live by them. While breaches of the agreement, such as non-payment of wages, can in principle be remedied by a civil action in the regular courts, this is often not a practical option, especially for workers.

Principle 6: Inclusion and integration

The decency principle requires that labour standards be inclusive, in the sense that all workers should enjoy in the workplace the full benefits accorded them by human rights legislation. The inclusion principle, in turn, requires that all workers enjoy like opportunities to integrate their working lives with their personal, family, cultural and civic lives in a balanced fashion.

In support of the decency principle, labour standards should help to ensure that human rights are respected in the workplace. They can achieve this in three ways: by helping to create workplaces in which workers enjoy the self-confidence, security and resources they need to claim their human rights; by ensuring that substantive labour standards conform to the letter and spirit of human rights legislation; and by reinforcing the administration of human rights laws. This last possibility involves a risk that human rights and labour standards agencies will duplicate each other's efforts or proceed on the basis of inconsistent understandings of what the law requires. The operational principle that public resources are to be used effectively and efficiently (see Principle 8) requires that such duplication or inconsistency be avoided.

Labour standards also help to advance the values of social well-being and good citizenship, which are inherent in the decency principle, by ensuring that workers are able to integrate their responsibilities at work with their commitments outside the workplace. They accomplish this by providing for leaves and vacations, by regulating hours of work and ensuring breaks during the working day, and by protecting the right of workers to perform civic responsibilities such as jury duty.

Integration affects both workers whose interests are protected and employers whose business practices and employment policies must be adjusted accordingly. Ideally, labour standards legislation itself should explicitly balance the interests of workers and employers and define the extent to which one should make room for the other. However, not all situations are foreseeable, and not all accommodations can be designed in advance. Consequently, labour standards legislation must provide mechanisms for working out more detailed arrangements at the workplace and the sectoral level. This engages the operational principle of regulated flexibility, discussed below.

Principle 7: Respect for international obligations

Labour standards and their administration should respect and reinforce Canada's obligations under international agreements and conventions.

Canada is party to a number of the conventions of the International Labour Organization (ILO), which establish global norms for labour standards legislation (see Appendix Seven). In addition, as one of the 179 member states of the ILO, Canada has committed itself to respect and promote four fundamental principles: freedom of association and the right to bargain collectively; the elimination of discrimination; the elimination of child labour; and the prohibition of forced labour. These and related principles are also inscribed in United Nations covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, to which Canada is a party. In many respects, these conventions and principles represent the embodiment in international law of the decency principle and the principle of inclusion and integration.

Canada is also party to a number of international labour cooperation agreements that accompany trade agreements, such as the *North American Free Trade Agreement*. These agreements commit the Government of Canada and its international trading partners to maintain high labour standards and to effectively, fairly and transparently enforce national labour laws. They thereby promote respect for human and labour rights both at home and abroad, help to embed concern for workers' rights and interests within the global economic system, discourage unfair competition based on the exploitation of workers, and reinforce commitments made by federal labour standards legislation by subjecting compliance to possible international scrutiny.

C. OPERATIONAL PRINCIPLES

Principle 8: Effective and efficient use of public resources
Labour standards should be designed and administered with a view to achieving the highest possible levels of compliance consistent with the efficient use of public resources and the achievement of multiple public policies.

It is a widely accepted principle of sound public administration that whenever possible, policy making, administration and enforcement functions should not be duplicated, and should be assigned to the agency or department with the greatest expertise and most directly relevant mandate. This enables the responsible agency to develop consistent policies and approaches to administration, interpretation and enforcement, to draw upon and deepen the expertise of its staff, and to deploy them in accordance with the priorities it has set based on that mandate and expertise.

Consequently, Human Resources and Social Development Canada's (HRSDC) Labour Program, which has responsibility for labour standards, should coordinate its policy-making efforts with those of other organizations whose policy mandates affect wages, working conditions, learning opportunities, the work–life balance and other aspects of labour standards. It should also

explore collaborative practical approaches that would allow both HRSDC and other federal government departments to be mutually supportive and to conserve resources.

The same general principle of effectiveness and efficiency requires that labour standards legislation be internally coherent and consistent with other federal laws, policies and programs that promote the well-being of workers and their families in other domains. In particular, labour standards should enable workers to benefit from federal income support, training and other programs related to labour market participation. This suggests, for example, that eligibility requirements for specific forms of leave under labour standards legislation should be aligned with eligibility requirements for income support programs that make it possible for workers to take advantage of those leaves.

However, while it might be possible to align federal labour standards with some provincial labour standards and with some income support or other social programs under provincial jurisdiction, in other cases it might not. The ultimate result of this approach would be a patchwork of standards for workers that would defeat the purpose of providing uniform rules for the interprovincial and national-scale enterprises that operate under federal jurisdiction.

Finally, while legislation is usually the instrument of both choice and necessity for labour standards, non-legislative approaches may be more effective and efficient in given circumstances. The workplace parties may have a role to play in regulating themselves and each other and in refining and adapting labour standards to particular contexts. Changes in workplace culture may have to precede legislation, if legislation is to have a chance of working effectively. Nonetheless, non-legislative measures are likely to be effective only if legislative measures, enforced by appropriate sanctions, represent a realistic alternative.

> ***Principle 9: High levels of compliance***
> *Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.*

Compliance is most likely to be secured through a range of strategies. Strategies should include information, education, persuasion and proactive monitoring — all designed to encourage compliance without coercion. But they should also include effective remedies and sanctions — administrative, civil and criminal — with gradations of severity. Sanctions should be used when non-coercive strategies fail to produce desired results, especially in

the case of egregious violations. Compliance strategies should operate proactively for the most part, rather than being invoked when violations have already occurred. And they should address root causes and patterns of persistent non-compliance as well as isolated violations.

Principle 10: Regulated flexibility
Labour standards that do not respond to the realities of employment in diverse circumstances are unlikely to attract the willing compliance of employers and, sometimes, of workers or to serve their mutual interests in the success of the enterprise. Labour standards legislation should therefore permit some degree of flexibility in the initial establishment or subsequent adjustment of standards, so long as employers do not gain advantages that contravene the level playing field principle, workers are not deprived of the protection of the decency principle and both sides continue to enjoy the benefits of their bargain.

Rigid and invariable application of labour standards may not be desirable or even possible due the unpredictability of operational requirements, the inability of employers to control or monitor compliance in off-site operations, the impracticality of specifying standards in broad statutory language that will produce comparable outcomes in diverse circumstances, or the wish of employees to adopt a different, but equally attractive, standard.

It is therefore often necessary to adopt or adjust standards at the workplace or sector level, rather than across the entire federal jurisdiction. Adjustments should be no more extensive than is required to deal with the problem giving rise to them and should always be consistent with the principles of decency, inclusion and integration, and a level playing field. To ensure compliance with these principles, all adjustments should be made through transparent procedures that take account of the views of workers and employers and are subject to regulatory oversight by Labour Program officials.

In the federal jurisdiction, the need for flexibility arises almost entirely with respect to rules on control over time. In Chapter Seven I propose new sectoral-level and enterprise-level mechanisms that aim to strike the right balance in permitting adjustments to those standards.

Principle 11: Clarity
Labour standards should be clearly stated, and workers and employers should have easy access to accurate and understandable information concerning their rights and responsibilities.

Because labour standards must be understood and applied on a daily basis, usually by workers and employers who lack ready access to legal or other professional advisors, it is particularly important that workers and employers be able to read and understand the statutory language on their own. Because labour standards govern so many aspects of employment in so many different contexts, however, statutory instruments that enact them often come close to being incomprehensible. While every effort ought to be made to produce labour standards statutes written in plain language, the complexity of the subject matter may make this impossible. As an alternative, the Labour Program should produce and disseminate more accessible texts, written especially so they can be read and applied by workers and employers and adapted to the unique circumstances of specific sectors in which atypical conditions prevail.

> ***Principle 12: Circumspection***
> *Labour standards should be designed and implemented so as to avoid unintended harm to workers who are the intended beneficiaries of the legislation, and to avoid unnecessary costs and inconvenience for employers who are intended to be regulated by it.*
>
> *Where standards seek to alter established practices, expectations or cost structures in a significant way, it may sometimes be appropriate to introduce changes gradually so as to permit necessary adjustments in management and personnel practices, and to minimize negative impacts on firms and workers.*

The rationale for the circumspection principle is clear on its face. It serves to ensure that legislation is designed carefully and implemented with due regard for practical consequences. Over the years, this approach has helped to maintain stakeholder confidence in new legislative initiatives by the Labour Program, and has thus facilitated innovation in labour standards and other matters. The Labour Program should be prepared to consider convincing evidence and arguments for the phasing in of new labour standards for all employers or for some subset of the employer community, such as small enterprises or employers in particular sectors.

The circumspection principle, however, is subject to two limitations. First, it should not be invoked under any circumstances as an excuse for failing to adhere to the decency principle. Second, it should not be invoked to delay the coming into force of legislation for more than a brief transitional period if the result is to violate the level playing field principle.

Chapter Four

The Reach of Labour Standards Legislation

FOUR
THE REACH OF LABOUR STANDARDS LEGISLATION

1. WHO IS COVERED BY PART III, WHO IS NOT AND WHY THIS IS IMPORTANT

Virtually every statute — Part III is no exception — begins with a statement of who is covered by it. This information is of obvious interest to workers who want to know whether they are eligible for the protections provided in Part III, and to employers who need to know to whom they owe legal responsibilities. However, it is also of interest to policy makers and to the public. This is true for several reasons.

First, general principles of fairness require that people with similar characteristics ought to be treated in the same way. If coverage under Part III were to produce some other outcome, this would be a strong argument for changing it.

Second, the prime principle underlying Part III is that no one should be permitted to work in conditions that cannot be described as "decent." It would be very unfortunate if the coverage provisions of Part III were worded so as to exclude some workers from the protection of the decency principle, introduced in Chapter Three.

Third, if coverage under Part III is not properly defined, the whole statutory scheme for federal labour standards is likely to be destabilized. This might happen in several ways. If significant groups of workers were excluded from coverage but were willing to work in conditions that Part III prohibits, employers might be tempted or pressured to reassign work to them, and take it away from workers who are covered. Likewise, if some enterprises were exempt from coverage under Part III and could operate with lower labour standards, those not exempt might be driven to ask for the same exemptions, or to seek amendments to Part III, which would reduce their obligations to their workers or, in extreme cases, to violate Part III. In all these cases, the result would be to generate downward pressures on labour

standards. Nor is destabilization a purely hypothetical possibility. It is striking that so many of the most vulnerable workers under federal jurisdiction — those who receive low wages and few if any benefits — also work at or beyond the margins of coverage under Part III.

All of these considerations raise a presumption in favour of broad coverage under Part III, rather than restricted coverage or non-coverage. And in certain very limited circumstances, they point to the need to regulate those who are not now covered, in order to protect the integrity of the statutory scheme.

Nonetheless, every statute has outer boundaries. These boundaries are reached when the presumption in favour of broad coverage results in its application to people who have nothing in common, or when it produces outcomes that were never intended. However, things are not quite so simple. Part III does not define the common characteristics of the people it covers, but states only that these people must be "employees" or "employers" in the federal domain. Nor does it specify in any detail what outcomes it seeks to achieve, only that these must relate to "employment." Part III does not define any of these three terms.

Consequently, Labour Inspectors and other officials who administer Part III must decide in each case whether they are dealing with situations involving "employees," "employers" or "employment." However, this approach has resulted in five problems.

First, officials who administer Part III, and lawyers advising enterprises and workers of their rights, typically try to ascertain the meaning of the key terms by turning to decisions of courts and other tribunals that have grappled with similar problems in the past. Unfortunately, these decisions often have nothing to do with labour standards or even with employment. For example, the widely used "four-fold" test of employment originates in a case dealing with the liability to municipal taxation of a company producing tanks for the Canadian army during World War II. Other definitions arise out of cases concerned with tort liability, insurance coverage, income tax and collective bargaining. Not surprisingly, attempts to define coverage under Part III by reference to these sources may produce inappropriate outcomes. Second, what people define as "employment" is often influenced by their own experience or self-interest. For example, Labour inspectors in different parts of the country sometimes arrive at inconsistent definitions; so too do worker and employer advocates in different sectors. The result is a lack of predictability, consistency and clarity in the administration of the statute. Third, to escape coverage altogether, employers (and occasionally, employees) may exploit the uncertainties created by the absence of a definition. And fourth, resolving issues of coverage introduces needless costs and delays

into the system — in some cases effectively depriving workers of their rights. During 2004–2005, for example, inspectors had to conduct some 740 "jurisdictional investigations."

Finally, new forms of work relationships are constantly appearing. Some represent a response to new business strategies and structures, some to opportunities created by new technologies, some to the need to recruit workers from new sources, and some to cater to the new lifestyle needs or preferences of workers. If coverage under Part III is too narrowly circumscribed by inappropriate definitions of "employment," workers who need protection will be deprived of it; and if coverage is too broadly defined, workers and employers alike will be denied the opportunity to work out new and mutually beneficial work arrangements.

In my view, therefore, coverage under Part III should not be determined by *ad hoc* administrative or judicial decisions, nor by the parties themselves, but as a matter of legislative policy by enacting clear definitions of the key terms of the statute. Of course, there is no need to invent an entirely new legislative lexicon. Some appropriate criteria, such as "control" or "economic dependence" have emerged in the jurisprudence, and can safely be incorporated into the new statutory definitions.

However, while statutory language defining who is an "employee" will remove some elements of ambiguity, achieve some degree of uniformity, avoid some needless disputes and accommodate some degree of change, it will not resolve all difficulties. As noted, in recent years "standard" employment contracts have increasingly given way to a variety of "non-standard" arrangements that vary from firm to firm, sector to sector and time to time. Consequently any "clear" statutory definition runs the risk of becoming obsolete — a risk to avoid if Part III is to be applied consistently and efficiently. While definitions are important, they must also be capable of being updated and customized to fit evolving contractual practices and sectoral requirements.

RECOMMENDATION 4.1 Part III should be amended to permit the Minister to enact regulations defining "employees," "employers" and "employment."

These definitions should initially codify elements of the current usage and jurisprudence under Part III. However, they should be reviewed from time to time to ensure that other persons who ordinarily perform functions substantially similar to those performed by "employees" under substantially similar conditions are covered by Part III. The Minister should be permitted to enact such regulations on either a general or a sectoral basis.

2. WORKERS ON THE MARGINS OF PART III: INDEPENDENT CONTRACTORS AND AUTONOMOUS WORKERS

In addition to establishing which workers are "employees" covered by Part III, it is also necessary to establish the status under Part III of other groups of workers who inhabit some of the same workplaces and labour markets and who must deal with many of the same practical and contractual issues. This is so for two reasons. First, the fundamental principle underlying Part III is the decency principle. If Canadians do not consider that certain kinds of working conditions are decent when experienced by employees, they are unlikely to consider those same conditions acceptable if experienced by other persons. Second, the working conditions bargained for, imposed on or accepted by non-employees may directly or indirectly influence the labour standards of employees and, for that matter, the intensity of business competition experienced by employers.

Who are these "non-employees?" Traditionally, legal and labour market experts have distinguished between "employees" on the one hand and "independent contractors" (the lawyer's term) or "own-account self-employed" (the statistician's term) on the other. According to the Federal Jurisdiction Workplace (FJW) Survey, about 10% of all workers in the federal sector were "self-employed, or contract workers" — yet another descriptor that potentially places them beyond the reach of Part III. The largest concentration of such workers is found in the trucking sector where they are often referred to as "owner-operators," although some are also found in banking, broadcasting, telecommunications and elsewhere.

Prof. Garland Chow's study of the trucking industry revealed the complexity of their situation. In some cases, "owner-operators" drive regularly for a particular trucking firm, in others they make themselves available directly or through brokers to a number of firms; in some cases, they operate their own trucks, in others they drive trucks owned by the employer or third parties; in some cases, the trucks carry their own insignia, in others, they bear the markings of a fleet operator; in some cases, they work alone, in others they may hire one or two drivers regularly or occasionally to handle assignments; in some cases, they are paid hourly rates, in others on a mileage basis, and in still others on the basis of a fixed price for a specific job.

These differences are all material to determining whether these owner-operators — and more generally, own-account self-employed persons — enjoy the legal status of "employees" under Part III, or whether they are excluded from it because they are "independent contractors." However, in real life terms, it is extremely difficult to distinguish among the variety of persons encountered in the workplace. In many cases, members of the two groups work for the same trucking firm, undertake similar assignments, drive

vehicles that are visually indistinguishable, and are subject to comparable degrees of managerial control; indeed individuals move back and forth from one status to the other.

Finally, and very importantly, whether own-account self-employed persons are covered by Part III affects not only their pay and working conditions, but the pay and conditions of other workers who are clearly "employees." That is why Part I of the *Canada Labour Code* categorizes owner-operators and other workers who are "in a position of economic dependence on, and under a duty to perform services for" another person as "dependent contractors" and deems them to be "employees." Indeed, Part I goes further by defining as "dependent contractors" not only some truck drivers, but also fishers who are part owners of a vessel and entitled to a share of the catch, as well other workers "in a position of economic dependence." Another federal statute — the *Status of the Artist Act* — extends collective bargaining rights to a different group of own-account self-employed persons: freelance performers, writers, producers, directors and other artists who are not "employees" under any conventional definition. The effect in both cases is to permit certain own-account self-employed persons to join unions and bargain collectively, even though that privilege is normally reserved for employees and denied to business people.

The question of whether language should be added to Part III to bring such individuals under its coverage has generated considerable controversy. For example, a brief from a union representing self-employed television artists, directors and producers proposed that its members be covered under Part III. Other unions and community groups argued that coverage should be extended to self-employed workers in general. The trucking sector became a particular focus for the debate. Predictably, management representatives in the trucking industry opposed attempts to subject owner-operators to labour standards legislation by carrying forward the dependent contractor provisions of Part I to Part III. However, I was somewhat surprised to learn from worker representatives that some owner-operators themselves do not want to be covered under Part III. Similar sentiments quite likely exist among own-account self-employed people in other sectors.

There are several possible reasons for this. Some owner-operators — and their counterparts in other sectors — genuinely see themselves as entrepreneurs in the making, and want to be free to hire more employees, expand their operations and increase their profits. Some are less ambitious, but value the freedom to work on their own when, where and for whom they choose. And for many, the preference not to be considered as "employees" has a

powerful economic logic. Owner-operators generally bear the costs of purchasing, maintaining, insuring and licensing their trucks. But so long as they are deemed to be "independent contractors" rather than employees, they can deduct these and other expenses from their earnings. As a consequence, their after-tax income may well be higher than that of employees receiving comparable pre-tax remuneration. Moreover, as independent contractors they may accept lower wages and work longer hours than employed truckers, so long as they do not exceed the maximum hours rules laid down by Transport Canada. Neither are they restricted to working only for their putative "employer," but they are free to accept work assignments from anyone. It is not surprising, then, that owner-operators and other own-account self-employed persons seem to feel that these options provide them with income-earning opportunities they would not enjoy as employees.

On the other hand, while the preferences of owner-operators and other own-account self employed persons should be taken into consideration, they should not automatically dispose of the coverage issue. If such workers are treated as independent contractors rather than employees and excluded from coverage under Part III, a number of undesirable results may ensue. Some of those results affect only the individuals themselves: they will have no right to claim statutory leaves, holidays, vacations and other benefits; no statutory recourse in the event their wages are not paid; and no access to unjust dismissal proceedings. But some also affect employees who are covered by the statute: the unregulated working conditions of owner-operators — especially long working hours and low levels of remuneration — may destabilize the industry; drive down the labour standards of their employed fellow workers; deprive their families and communities of their presence and support; and impose burdens on the health care system, which has to cope with the physical and mental stress they experience due to overwork.

There is a case to be made, then, for bringing some own-account self-employed workers under Part III, at least to the extent that doing so is necessary to protect the integrity of the statutory scheme. A further argument can be made that in specific circumstances they should be accorded coverage on a selective basis in furtherance of the decency principle, which underlies Part III.

The first challenge is to find a way to describe and categorize these workers in such a way that they can be dealt with as a category that is distinct from both employees and independent contractors.

RECOMMENDATION 4.2 A new category of "autonomous worker" should be established under Part III. "Autonomous workers" should be defined by Ministerial regulation as including persons who perform services comparable to those provided by employees and under similar conditions, but whose contractual arrangements with the employer distinguish them from "employees."

To the extent necessary to protect their basic right to decent working conditions, and to protect the interests of employees from unfair competition, "autonomous workers" should be eligible for limited coverage under Part III.

Part I of the *Canada Labour Code* also creates a special category of workers — "dependent contractors" — many of whom are in fact the same own-account self-employed persons whose coverage is under examination. However, whereas Part I deems all dependent contractors to be employees and endows them with full collective bargaining rights, this approach does not seem to be appropriate under Part III. On the one hand, although some autonomous workers in the trucking sector are apparently anxious not to be covered by Part III, other autonomous workers in other sectors may have different needs or views. It should be possible to treat the two groups differently. On the other hand, even though autonomous workers in a particular sector are to be covered by Part III, it may well be impractical to subject them to blanket coverage. In this respect Part I and Part III differ. Under Part I, the parties enjoy almost complete discretion to bargain over the norms that will govern their relationship; under Part III, the statutory norms define the minimum terms of employment with only limited provisions for adjustment. For this reason, it is important to ensure on a sector-by-sector basis that the provisions of Part III that are to apply to autonomous workers in that sector are appropriate to their special circumstances.

RECOMMENDATION 4.3 The Minister should have the power to enact regulations specifying sector-specific criteria for "autonomous worker" status, and determining on a sector-specific basis which protections are to be extended to autonomous workers. Any such Ministerial regulation should be adopted in accordance with the procedures proposed in Chapter Seven, following a sectoral conference of interested parties, including representatives of autonomous workers themselves.

Of course, there remains a group of persons who are even more autonomous than "autonomous workers," who are truly independent "independent contractors." The hallmarks of independence might be that they themselves employ others, they exercise complete control over the manner in which work is performed, they provide services to their own clients, they operate

as corporations rather than as individuals, they have their own business premises or they operate significant quantities of equipment rather than, say, a single vehicle. Independent contractors should be ineligible for any protection under Part III.

RECOMMENDATION 4.4 Persons who provide services to or on behalf of employers, but are neither "employees" nor "autonomous workers" should be clearly identified as "independent contractors" and expressly excluded from coverage under Part III. A definition of "independent contractor" should be provided by Ministerial regulation.

It is important for each type of worker — employee, autonomous worker or independent contractor — to know in which category they belong so they will have an opportunity to enforce the rights (if any) associated with that category. That is why I recommend below that employers supply all workers with a notice advising them of their status. However, this notice should be only *prima facie* evidence of a legal conclusion derived from the statutory definitions proposed above.

RECOMMENDATION 4.5 Employers should be required to provide employees, autonomous workers and independent contractors with a simple notice advising them of their status under Part III. This notice would be of no effect unless the person so described meets the relevant statutory definition.

Employers who fail to provide the required notice not only make it more difficult for workers to ascertain and enforce their rights; they make administration of Part III more difficult and costly. One way to encourage employers to provide the appropriate notice is to specify as the default position the option that is least attractive to them.

RECOMMENDATION 4.6 If an employer fails to provide a worker with a notice of his or her employment status, subject to written evidence to the contrary, the worker should be presumed to be an employee under Part III.

Employers should also be discouraged from attempting to create a false impression concerning the status of workers or from coercing or tricking them into accepting a status other than the one the statute stipulates as appropriate given the facts of their relationship with the employer.

RECOMMENDATION 4.7 An employer who coerces an employee into accepting the status of either an independent contractor or an autonomous worker, or who secures their consent to arrangements that produce that effect by using misrepresentation or undue influence, commits a violation of Part III. Consent provided under these circumstances should be of no effect.

3. WORKERS WHO ARE COVERED BY PART III BUT DO NOT BENEFIT FULLY FROM IT

A. PART-TIME, TEMPORARY AND AGENCY WORKERS

About 16% of those employed in the federal sector work under non-standard contractual arrangements, such as part-time or on short-term contracts. Another 1.3% work for temporary employment agencies that dispatch them on a short-term basis, often to large employers in the federal domain. Some of the workers in these three categories are highly skilled, their services are in demand, they are typically well paid and receive benefits, and they do not often need to invoke Part III to protect their rights and interests.

But many non-standard workers exhibit what I call in Chapter Ten "the vulnerability syndrome." They receive low wages and few if any benefits; they are likely to lack language or technical skills, placing them at a disadvantage in the competition for jobs; and they are often members of groups that have traditionally had a hard time gaining access to the labour market. These workers also tend to fall between the cracks of Part III because of their non-standard contractual arrangements; and because they often lack knowledge of their legal rights and the means to pursue them, they are more likely to be victims of outright violations. These are the workers most in need of protection, those whom labour standards legislation has historically been designed to help.

I deal with these workers in Chapter Ten.

B. MANAGERIAL AND PROFESSIONAL EMPLOYEES

Managerial and professional employees are covered by Part III in most respects. However, "managers and superintendents and [employees] who exercise management functions," as well as members of designated professions, are excluded from coverage by the provisions of Part III dealing with hours of work. In addition, "managers" (but not the other categories) are denied access to statutory procedures for adjudication under Part III in the event they are unjustly dismissed. These two issues are dealt with separately.

(i) Hours of Work

Some businesses operate 24/7. In others, specific tasks have to be performed outside of regular working hours, either as a matter of routine (say to serve customers in another time zone) or on an emergency basis (say to deal with a systems failure). Some part of this work must be done by managers and professionals. If the hours-of-work provisions of Part III were applied to them in the same way as to other workers, these managers and professionals might be entitled to claim overtime pay, refuse overtime assignments under certain circumstances, or insist on an absolute limit on their total work week. Should they be entitled to do so?

Their present exclusion from the working time provisions of Part III rests on a number of assumptions: that labour standards are intended to protect only vulnerable and low-waged workers while managers, superintendents and professionals are neither; that they hold positions of trust and responsibility, which sometimes require them to compromise their own personal interests to fulfill their duties; that they receive higher remuneration, better benefits and (usually) monthly or annual salaries precisely so that they will not "watch the clock;" and that since they supervise their own work, there is no way for an employer to challenge their claim that they have worked additional or unsociable hours. These assumptions appear to be widely held, not only by senior executives but often by line managers, superintendents and professionals as well. Indeed, exhibiting a willingness to sacrifice one's own interests for the good of the firm is a common way of signalling that one deserves promotion to a higher status job.

Obviously, it is technically possible to enact a simple amendment making managers, superintendents and professionals subject to all the provisions of Part III that govern the working hours of rank-and-file employees. However, because so many of the intended beneficiaries are so deeply committed to a culture of long hours, such changes are not likely to produce a high degree of compliance. Anecdotal evidence suggests that some countries and companies that have attempted to limit the working hours of upper echelon workers have failed to do so. In this particular instance, I believe, attitudinal or culture change must precede legislation.

RECOMMENDATION 4.8 Existing provisions of Part III, which exclude managers, superintendents, employees exercising management functions and professionals from hours of work regulations, should remain unchanged at present.

This is not to say that it is good public policy or sensible corporate practice to allow anyone to work unlimited hours, as the example of Japanese "salarymen" reminds us. Research suggests, and some sophisticated employers have come to accept, that excessive and unsociable working hours can be counter-productive from a business perspective. Moreover, "burn-out" due to overwork may be harmful to the mental and physical health of these key employees, to their family life, to the recruitment and advancement of women in the corporate hierarchy, to the health care system, and to society, as well as to the long-term interests of their employers.

However, many employers cling tenaciously to the old culture of overwork because they believe in it, while others do so because they are reluctant to pay overtime premiums, adjust work routines to offset the effects of reduced working hours, or take on the costs of hiring more managers. If these employers decline to adopt sensible working time practices, they will likely experience sub-optimal performance by managers and professionals and may encounter greater difficulty in recruiting their replacements. As this becomes more and more obvious, attitudes will slowly change and, I hope, the pressures of overwork now commonly experienced by managers, superintendents and professionals will slowly recede. Moreover, the Labour Program should not sit by and wait for this to happen. On the contrary, it should take the lead in documenting the effects of working time practices on health, family life and productivity and in disseminating information that might produce a more rapid change in these practices.

RECOMMENDATION 4.9 The Labour Program should carefully monitor trends in working time for all workers, including managers, superintendents, employees exercising management functions and professionals. It should promote employment policies that limit or discourage unsociable and excessive working time practices for categories of workers now excluded from regulation, as well as for those who are covered. It should publicize the positive consequences of more enlightened working time policies on recruitment, retention and productivity. The Program should also promote awareness among managers and professionals of the deleterious consequences for themselves and their families and ultimately, their job performances, of excessive and irregular working hours.

At the point at which fundamental social attitudes and patterns of workplace behaviour begin to change significantly, the Labour Program should revisit this recommendation and consider modifying or removing the present exclusion so as to extend the working hours provisions of Part III to managers, superintendents, employees exercising management functions and professionals.

However, there is no reason to delay one particular initiative. In my view, no employees — including managers and professionals — should be required to work such long hours that their health is actually endangered. Such work practices constitute a health and safety hazard no less significant than those now addressed by Part II of the *Canada Labour Code*.

RECOMMENDATION 4.10 Part II should be amended to explicitly ensure that no one — including managers, superintendents and professionals — is required to work so many hours that their health is endangered.

(ii) Unjust Dismissal

Whereas "managers, superintendents and [employees] exercising management functions" are excluded from the hours of work provisions of Part III, only "managers" — presumably a smaller, more elite group — are denied access to adjudication to challenge their dismissal. Of course, this does not leave them without a remedy. Part III preserves the right of managers to seek redress in the ordinary courts. While this right is of little use to most employees, for reasons I explore in Chapter Eight, higher-level managers have real prospects of collecting considerable damages in a civil action for wrongful dismissal.

Nonetheless, somewhat surprisingly to me, employers are extremely reluctant to channel potentially expensive wrongful dismissal claims into the adjudication procedures provided by Part III, where the quantum of damages is likely to be much less. Their concern is that if a manager were able to persuade an adjudicator that he or she had been unjustly dismissed, the manager would not only receive damages, but might also be reinstated in his or her former job. Reinstatement, some employers seem to feel, might endanger the enterprise.

This concern seems unfounded. As I note in Chapter Eight, reinstatement is a discretionary remedy granted sparingly by adjudicators, even in the case of rank-and-file employees. Adjudicators are unlikely to ignore plausible arguments by employers that a manager's reinstatement would endanger the enterprise. On the other hand, adjudicators may not find such arguments plausible. After all, professionals have enjoyed access to adjudication for some twenty years, during which many were no doubt eligible for reinstatement. However, not a single instance was brought to my attention in which an enterprise was adversely affected by the reinstatement of a professional. This is a telling point. Managers and professionals have a great deal in common: they are depended on to exercise their judgment in the best interests of the enterprise; they have access to confidential information

and are continuously and closely involved with senior management; they can do the enterprise considerable harm if they are so minded. Yet under Part III, engineers in the engineering department or lawyers in the legal department can seek redress for unjust dismissal, but managers in the finance or shipping department cannot.

This is an anomaly that invites correction. One response would be to deprive professionals of access to adjudication, as well as managers. However, as noted, there appear to be no good grounds for doing this. The other would be to grant managers the same access to adjudication as professionals now enjoy. However, managers are presently able to secure significant financial settlements through the threat of civil actions, and to win substantial awards if the threat does not produce the desired results; they do not seem to need access to adjudication. With some misgivings, I have therefore decided not to recommend a change in the present arrangements.

(iii) Defining "Managers" and "Professionals"

The Minister has the power to designate the professions whose members are exempt from the working time regulations of Part III. Given the evolving nature of those professions and changes in the work they perform, this seems to be a sensible arrangement.

However, Part III does not provide a similar mechanism for identifying which "managers or superintendents or [employees] who exercise management functions" are excluded from working time regulations. During the course of our hearings, unions and other groups warned of the dangers of allowing employers complete discretion to designate employees as managers, for fear that they would use this discretion colourably to deprive ordinary workers of their statutory rights. These concerns were accompanied by anecdotal evidence of apparent attempts to do just that, though no one suggested that the practice was widespread. Nonetheless, as federal sector workplaces become more knowledge-intensive, and as more of them operate globally and on a 24/7 basis, employers will likely experiment with new styles of management and new allocations of managerial authority. Litigation is likely to follow. I think it would be better to forestall such litigation and to define the term "manager" by legislation.

The difficulty is how to define it. Part I of the *Canada Labour Code* provides a definition that could be carried forward into Part III. However, that definition lays stress on the function of a supposed "manager" in controlling the conduct and performance of other employees, a logical emphasis given that Part I seeks to establish an arm's-length relationship between the employer and employees in order to ensure the integrity of the collective bargaining process. Different considerations ought to apply under Part III.

Among the factors proposed for my consideration are: control by "managers" over their own work or the work of others; control over important corporate functions; receipt of monthly or annual salaries, rather than hourly wages; absolute levels of annual pay in excess of, say, $75,000 or $100,000 per year; or some combination of these. Each of these suggestions has some merit but also some drawbacks. For example, annual pay of any given amount may mark an employee as having the capacity to look after his or her own interests, or as having been properly compensated for loss of statutory protection of working time. In some establishments, such financial criteria may identify a significant proportion of the workforce, but virtually no one in others. Control over one's own work may make managers out of large numbers of workers in "flat" organizations where responsibilities are widely dispersed, but these workers may in fact receive modest remuneration and no obvious compensation for loss of their statutory protection. It is apparent that further work needs to be done on a new statutory definition of "manager," perhaps involving sector-specific provisions. Nonetheless, it is important for all concerned that some certainty be introduced.

RECOMMENDATION 4.11 Part III should be amended to give the Minister power to enact regulations that provide a default definition of "manager or superintendent" and of "employees … exercising management functions." This definition should codify the existing jurisprudence.

Sectoral conferences should be allowed to propose to the Minister more precise, restrictive or expansive definitions and the Minister should have discretion to enact a regulation expanding or limiting the statutory definition.

C. TRANSPORTATION WORKERS

Road transportation workers — truck and bus drivers — do not enjoy the full protection of the working time provisions of Part III. Maximum hours of work regulations covering these workers, enforced by provincial and territorial governments, have been promulgated by Transport Canada (TC). While the TC regulations have been adopted under Part III, the Labour Program plays no active role in their amendment or enforcement.

This is not satisfactory. TC is primarily concerned with ensuring the safety and convenience of the traveling public and the efficient operation of transportation systems, rather than fair working time norms for workers. This is understandable, given its mandate and expertise. However, the result is that road transportation workers are not governed by maximum hours regulations deemed appropriate by the one agency — the Labour Program —

that has expertise in establishing and implementing labour standards; nor do TC regulations necessarily accord with the principles underlying labour standards, set out in Chapter Three. Indeed, there is significant evidence that truckers — especially those working in the long distance sector — work long hours and spend more time away from home than most other workers. Given this working environment, it is increasingly difficult to recruit and retain qualified drivers, leading to what employers described as a severe staffing crisis in that sector.

Further, regulations enacted under Part III establish different overtime thresholds for truck drivers than they do for other workers: they distinguish between long-distance "highway drivers" and so-called "city drivers" on the basis of local practice, and they establish higher overtime thresholds for the former. Implementing this distinction is time-consuming for Labour Program staff, and the results are often derided as illogical by employer groups and as unfair by worker representatives.

Workers and workers' organizations in the road transportation field asked the Commission to bring them back under the hours-of-work provisions under Part III. The case for doing so seems strong, and I accept it. However, this does not mean that the same hours of work should prevail in trucking as prevail in banking or broadcasting. The new arrangements I propose for sectoral standard setting in Chapter Seven should facilitate the adoption of overtime and other hours-of-work regulations for transportation that accord with the basic principles underlying all labour standards, but which also take into account the unusual business conditions and atypical workplace realities in that sector.

RECOMMENDATION 4.12 The Labour Program should re-assume primary responsibility for setting and enforcing maximum hours and other working time rules for road transportation workers. In exercising this responsibility, the Labour Program should adopt the procedures for sectoral standard setting proposed in Chapter Seven and should consult with other ministries, such as Transport Canada, to ensure that their legitimate concerns are accommodated.

Transport Canada regulations also cover air crews and helicopter pilots as well as railway and maritime workers. The first two groups in particular expressed concerns about their working time arrangements, citing long hours and the absence of breaks as a special concern. These matters are already regulated under Part III and, in some firms, covered by collective agreements. To the extent that they are not, the new sectoral arrangements

I am proposing should allow them to be addressed in an appropriate forum. As for the latter two groups, which are more highly unionized, collective bargaining seems to work reasonably well in addressing labour standards and related issues; at least I heard little to the contrary. However, to the extent that collective bargaining does not produce results that conform to the principles underlying Part III, the proposed new sectoral standard-setting arrangements ought to be used to investigate and, if necessary, rectify the situation.

D. WORKERS ABROAD

Because a number of large employers in the federal domain are involved in international transportation or other aspects of the global economy, some workers covered by Part III spend some part of their working time outside the country. However, regulatory statutes such as Part III are presumed not to apply extraterritorially in the absence of specific statutory language reversing this presumption. Since Part III is silent on the subject, there is some possibility that, in the normal course of their employment, Canadians working abroad may leave its protections behind when they cross the border. This is a matter of concern because the country where they are working may have lower labour standards than those provided under Part III, or indeed none at all; or it may have higher standards, but as a practical matter, Canadian workers posted abroad may be unable to invoke them.

The extraterritorial application of labour standards has been dealt with specifically under Quebec law. If the employer and employee are domiciled or resident in Quebec, or have certain other legal connections with it, Quebec labour standards follow the work even if it is performed entirely or partly elsewhere. Similarly, the Ontario *Employment Standards Act* applies to employees whose work "is performed in Ontario and outside Ontario [provided that] the work performed outside Ontario is a continuation of work performed in Ontario." It would be sensible to amend Part III to make Parliament's intentions equally clear.

RECOMMENDATION 4.13 Part III should be amended to apply extraterritorially to employees of federally regulated enterprises if they work partly in Canada and partly abroad, if their contract of employment is enforceable in Canada, or if they are covered by the collective agreement of a union that holds bargaining rights under Canadian law.

E. UNIONIZED WORKERS

Unionized workers are not affected by certain provisions of Part III so long as their collective agreement "confers … rights and benefits at least as favourable" as those conferred by the statute. They are also ineligible for adjudication in the event of unjust dismissal. While collective agreements are in fact generally "at least as favourable," unions continue to regard Part III as important because it creates a floor of rights over which the employer must bargain. Unions fear that if they are denied the protection of this floor, employers will either attempt to force them to agree to less favourable conditions, or insist on concessions in exchange for agreeing to remain at or above the statutory standard.

I understand the logic of this position. However, I must observe that despite this statutory guarantee, in numerous collective agreements on file with the Labour Program unions have voluntarily surrendered various protections provided by the statute, presumably in return for concessions offered by employers and desired by their members. I must also observe that while unions argued strongly against introducing procedures allowing employers to adopt more flexible approaches to applying Part III standards, unions themselves have become adept at using collective bargaining to customize workplace arrangements to suit the needs of their members.

I am optimistic that recommendations made later in this report will permit both labour and management to pursue the goal of establishing working time and other norms appropriate to specific employment contexts, and that they will do so without altering the balance of power between the two sides. I make no recommendations concerning the further exclusion of unionized workers from Part III protections, nor do I propose repealing or amending existing exclusions.

4. THE APPLICATION OF PART III TO SMALL AND MEDIUM ENTERPRISES

All enterprises that fall within the constitutional competence of the federal government are covered by Part III, regardless of their size or the sector in which they do business. Nonetheless, small and medium enterprises (SMEs), and organizations such as the Canadian Federation of Independent Business (CFIB) who speak on their behalf, made the case that they should be treated differently from other federally regulated enterprises. They expressed procedural concerns and concerns of a more substantive nature that, they claim, Part III must treat differently.

In part, the concerns of SMEs related to procedural matters. Complex and time-consuming statutory requirements for consultation and reporting represent a much more onerous administrative burden for SMEs than for larger enterprises. As I was reminded, SMEs seldom employ specialized human resources staff and cannot easily afford outside professional advisors; often the owner of the business must personally attend to all such matters despite his or her lack of technical knowledge and the burden of other responsibilities. In part, however, their concerns were substantive. They argued that the actual costs of compliance — of paying higher minimum wages or adhering to more rigorous restrictions on working hours — would impair their competitiveness or even put them out of business. Procedural and substantive concerns must be treated differently. Submissions concerning the actual, substantive costs of compliance were advanced with somewhat less conviction and less plausibility than the procedural concerns. Since existing or enhanced provisions of Part III impose comparable labour costs on all SMEs in any given sector, all should be equally able to absorb these costs or pass them along to their customers without suffering a competitive disadvantage. However, the question remains as to whether additional costs under enhanced Part III standards might make some SMEs uncompetitive in international markets.

SMEs (at least those with fewer than 100 employees) account for only 14% of the total federal workforce, and most of them do not compete in international markets. The one prominent exception is the trucking sector, where SMEs are a significant presence, and where they compete directly with firms based in the United States. The need to be sensitive to the special problems of this sector explains my recommendations that some labour standards should be set on a sectoral basis.

In addition, on any fair calculation, my recommendations are likely to result in only marginal cost increments, since they relate to minimum standards that most firms in the federal sector already exceed. In fact, SME representatives themselves pressed this point when they insisted that their workers did not need greater protection under Part III because they already enjoy more favourable conditions than those required by statute. Moreover, they said, many of Part III's requirements were unnecessary because SME workers and employers usually enjoy open and mutually respectful relations that allow them to resolve workplace issues without recourse to the statutory framework.

I accept that these views were advanced in good faith and accurately reflect the beliefs and behaviour of the people who advanced them. However, other evidence casts some doubt on them as a reliable basis for legislation. For example, according to the FJW Survey, SME employees generally receive lower wages and benefits than those who work in larger enterprises.

Moreover, practices that fell below the requirements of Part III were self-reported by more SMEs than large enterprises. And finally, SMEs generated some 80% of all violations of Part III, vastly out of proportion to the 14% of the workforce they employ, while the motor transport sector — home to the largest contingent of federally regulated SMEs and employing 12% of all jobs in the federal domain — accounted for some 78% of all violations.

These figures suggest that many SME workers may be less contented than their employers believe. They also suggest that SME employers in general, and especially those in the trucking sector, may need special assistance in order to achieve their own ambition to treat their workers well and to meet, if not exceed, statutory standards.

Much of that assistance has to do with the procedural concerns expressed by SMEs — concerns that were altogether plausible. I believe that my recommendations will provide SMEs with the assistance they clearly need in order to comply with the law, as most wish and intend to do.

As suggested earlier, SMEs often do not have ready access to professional advice and may not understand what the law requires. As their spokespersons maintained, many violations of Part III are therefore likely to result from ignorance rather than from deliberate disregard for the law. Special educational and informational campaigns directed at SMEs should help to improve this situation. In addition, also noted above, under-staffed SMEs have difficulty in freeing up the administrative resources needed to comply with some of the procedural and reporting requirements of Part III. Some violations are therefore likely to result from organizational incapacity rather than wilful disobedience. To help remedy this situation in other departments, simplified filing requirements for SMEs have been introduced under GST, licensing and other legislation. If this can be achieved under Part III, the result ought to be better record keeping, timely submission of information and, generally, higher levels of compliance.

RECOMMENDATION 4.14 A special effort should be made to acquaint employers of small and medium-sized enterprises (SMEs) with their obligations under Part III and to work with them and their representatives to secure higher levels of compliance. In addition, all procedural provisions of Part III should be reviewed from the perspective of SMEs and, whenever possible, simplified forms, filing and reporting procedures should be adopted.

Although this recommendation primarily addresses procedural provisions under Part III, the fact remains that some SMEs — those in trucking in particular — claimed that they encounter practical barriers to complying with certain substantive provisions of Part III. That, presumably, is why they repeatedly stressed the need for greater flexibility and for the right to make appropriate arrangements with their employees regarding hours of work, vacations and other matters covered by the statute. I have found no actual evidence that Part III imposes inappropriate obligations on SMEs or on trucking firms. However, the principles that I articulated in Chapter Three, and the mechanisms for sectoral- and enterprise-level adjustments I have proposed in Chapter Seven, will allow their claims to be tested against appropriate benchmarks and in an appropriate forum.

Chapter Five

The Employment Contract: Clear Understandings and Fair Dealing

FIVE
THE EMPLOYMENT CONTRACT: CLEAR UNDERSTANDINGS AND FAIR DEALING

1. INTRODUCTION

In hearings, briefs and research reports, two broad views of the workplace relationship emerged. On the one hand, many employers tended to emphasize its contractual, consensual, bilateral character. "Let us work these matters out with our employees," they might say, or, "Our employees are happy with their working conditions," or even, "Terms and conditions should be a matter of contract between employer and employee." On the other hand, many unions, workers and advocacy groups tended to emphasize the inherent imbalance of power between workers and employers that, in their view, prevents fair dealing in the labour market in general, and in most employment relationships in particular. They argue that regulation is needed to undo the results of this imbalance, from which no fair consensual or contractual understandings could possibly emerge.

The first position may be somewhat closer to the way the law has historically regarded employer-employee relations; the second may often be closer to the realities of the contemporary world of work. However, neither perspective can be ignored. In life, as in law, workplace relations are shaped both by contract and by regulation. Oddly, while Part III does stipulate minimum terms and conditions of employment, it does not regulate the actual process of entering into an employment relationship. Oddly too, though Part III deals in considerable detail with the payment of remuneration, it fails to regulate several key aspects of payment that, in effect, put at risk the benefits for which the employee has bargained. In both cases, as I argue in this chapter, the task of regulation is less to prescribe the terms of the bargain than to ensure that those terms are clearly understood and agreed to by the parties, and that their agreement is in fact carried out.

2. CLEAR UNDERSTANDINGS

The terms of any employment relationship are laid down in part by legislation such as Part III, in part by oral or written agreements between workers and employers, and in part by the implicit, often invisible arrangements or customs that evolve in every workplace. Putting aside this third category of implicit arrangements or customs, it is highly desirable that both employers and workers have a clear understanding of the legislated and contractual terms.

Clear understandings will reduce the likelihood of disputes between the parties by focussing their minds on the content of their bargain — the things they need to know to carry on their relationship on a daily basis, such as wages, benefits, duties and hours of work. Clear understandings also increases the likelihood of compliance with public policies enshrined in Part III and other statutes by reminding employers of their obligation to obey the law, and by alerting employees to the possibility of taking remedial action if the law is violated. And if disputes should arise, or if violations of Part III should occur, clear understandings will facilitate legal recourse for the injured party and perhaps make the job of the defendant easier.

Legislation has been passed in New Zealand, the United Kingdom and other jurisdictions requiring the terms of employment to be clearly stated at the inception of the relationship. However, such legislation is not common in Canada. The only Canadian province to enact such a requirement is Newfoundland and Labrador, though at the federal level, the *Canada Shipping Act* has long required that sailors be informed of the terms of their engagement when they sign on. Fortunately, Part III seems to contemplate a similar requirement, though unfortunately the provision empowering the Minister to enact regulations requiring that terms of employment be clearly stated appears to have fallen into disuse.

RECOMMENDATION 5.1 The Minister should enact regulations requiring employers to provide employees with a written notice setting out their rates of pay, hours of work, general holidays, annual vacations and conditions of work. The written notice should be provided at the time of hiring, and updated each time material changes occur or at periodic intervals.

The regulations should also require that the same notice briefly advises workers of the existence of the *Canada Labour Code* and directs their attention to a website and a toll-free number where further information can be obtained.

Employers should not be required to provide such notices to employees covered by a collective agreement.

Perhaps this requirement will be viewed, especially by small and medium enterprises, as an unwelcome burden. However, apart from the fact that it may spare them difficulty in the event of a dispute, it is a small burden indeed. Employers are already required to keep records relating to similar matters under income tax, pension, employment insurance and other statutes. Under Part III they are already required to provide employees with pay slips, to generate detailed employment records and to keep them available for three years for review by Labour inspectors. In principle, employers can be prosecuted and fined for not doing so, though it must be said that the fines provided under Part III are derisory, the risks of prosecution are nil and the rates of compliance are likely well under 100%. From that perspective, those employers who regard as burdensome the additional requirement to provide written terms of employment to new employees risk being challenged as to whether they comply with laws and regulations already in force.

On the merits, if employment relationships are legally based on contract, if the parties have actually agreed on the terms, and those terms must already be kept on record for other reasons, there can be no possible objection to requiring the employer to provide a brief notice that clearly sets out those terms.

RECOMMENDATION 5.2 To help employers to comply with the requirement to provide employees a written notice of employment terms, the Labour Program should provide a standard or sample form that can be used or adapted to meet the employers' individual requirements.

However, the real issue is not whether records should be kept or which kinds of notice should be provided, but rather, what are the consequences to employers who ignore these requirements, as some already do?

Legislation in other jurisdictions takes two broad approaches to this issue. In some, workers must be provided with a written and binding contract of employment at the time of hiring, and with a revised contract from time to time as terms change. In others, the employer must provide a notice in writing of the most important terms of the agreement, but the notice is not itself an enforceable contract.

The first approach — the requirement of an up-to-date written and binding contract — has much to recommend it in principle because it promotes the greatest clarity and is the most easily enforced. However, it may be impractical, given the frequency with which terms of employment change and given the huge number of workers employed in some federally regulated industries. A version of the second option would appear to be a better approach.

RECOMMENDATION 5.3 The written notice of employment terms to be provided under Ministerial regulation should not be considered a contract of employment. However, it should be treated as *prima facie* evidence of the agreement between the parties.

Failure to provide the notice of employment terms should be subject to penalty, and repeated non-compliance perhaps treated as an unfair labour practice (see Chapter Nine). However, a more effective sanction would be to attach automatic contractual consequences to non-compliance by shifting the burden of proof from the employee — who normally must prove the contract to pursue a claim under Part III or in the civil courts — to the employer. Shifting the burden of proof seems only fair since the employer is already legally obliged to collect and report the relevant information and can easily supply the notice of employment terms, and because of the temptation to suppress the information to advance its own position in the event of a dispute.

RECOMMENDATION 5.4 For purposes of proceedings under Part III, if an employer fails to provide initially, or cannot produce a copy of, the written notice of the terms of employment, the employee's recollection of the terms shall be presumed to be accurate unless the employer can adduce persuasive evidence to the contrary.

Clear understandings of statutory rights ought to complement clear understandings of employment contracts. In Recommendation 5.1, I proposed that a brief reference to those rights ought to be included in the notice of employment terms. I now propose a second recommendation for which Ministerial authority also already exists.

RECOMMENDATION 5.5 The Labour Program should institute a toll-free number and launch a user-friendly website to which workers and employers can direct inquiries for detailed information on Part III. The notice that all employers are presently required to post advising employees of their rights under Part III should prominently display the relevant coordinates.

To avoid unnecessary duplication, the Minister should consult with other agencies mandated to protect workers (such as the Canadian Human Rights Commission) with a view to dispensing such information through a common poster, a common user-friendly website and a common toll-free number.

To be useful, websites and toll-free numbers must be easily accessible, accurate and user-friendly. During my public hearings, I received a number of indications that the Labour Program's information facilities do not meet this standard. However, I am aware that recent efforts have been made to improve them. It is crucial that these efforts succeed if the Program is to achieve higher levels of compliance with the statute.

3. METHODS OF REMUNERATION

Remuneration is the employee's most tangible benefit from employment. So long as the rate of pay exceeds the minimum wage and does not discriminate on grounds forbidden by human rights legislation, payment is timely, and proper records are kept, it presents few problems from a labour standards perspective. However, technical discussions with Labour Program and stakeholder experts revealed that variations in methods of calculating pay may give rise to problems in calculating statutory pay-related benefits.

When Part III was enacted, most workers received pay calculated on an hourly (or occasionally weekly, monthly or annual) basis. It was therefore relatively easy to calculate how much such workers ought to receive by way of overtime premium pay, vacation pay, severance pay or other pay-related statutory benefits. However, just as non-standard employment relationships have proliferated, so too have methods of remuneration diversified. Today, workers may be paid on commission, per task, or by way of lump sum upon completing a contract. Moreover, those who are paid hourly may work irregular hours rather than a standard work week. There is no intrinsic objection to such arrangements, but they vastly complicate what were once simple calculations.

Because there are so many variations, each will likely have to be dealt with on its own merits. While the guiding principle should be to establish equivalence of outcomes between hourly paid workers working standard work weeks, and those receiving other forms of payment or working other kinds of schedules, it may be impossible to accomplish this by means of a simple time-related formula. For example, if workers are paid on a per job or whole-contract basis, it may be necessary to calculate their entitlement to statutory benefits on the basis of a percentage of their earnings rather than on the basis of time spent, perhaps with a specified cap and/or minimum.

The Minister has enacted regulations for "calculating and determining the regular rate of wages, on an hourly basis" for workers who are paid on a basis other than hourly, and "respecting the calculation and payment of the wages and other amounts…paid…on any basis other than time." This power appears to be broad enough to resolve any possible difficulties, but if it is not, the power should be expanded.

RECOMMENDATION 5.6 The Minister should enact regulations that will permit easy calculation of benefits and other entitlements accruing to employees who are paid on any basis other than time.

4. DEDUCTIONS FROM PAY

Part III allows an employer to deduct from an employee's pay amounts authorized by a statute, court order or collective agreement; overpayments of wages in a previous period; and "amounts authorized in writing" by the employee. However, current interpretations of Part III do not permit an employer to make deductions if the employee incurs personal charges on a company credit card, uses a company computer, cell phone or vehicle for personal purposes, or violates some law, as a result of which the employer must pay damages or a fine. Even if the employee has agreed in advance to reimburse the employer for unauthorized credit card charges, personal phone calls or traffic fines, no deductions can be made because the employee did not "authorize" a specific "amount in writing," but agreed only to a generic category of permissible deductions.

Denied the right to make deductions, the employer can only sue the employee and, presumably, must do so each time new charges are incurred. At least in the examples cited, where specific charges can be traced to one particular employee, this seems unfair to the employer. On the other hand, a rule permitting the employer to deduct from the worker's wages any amount the employer unilaterally considers to be owing involves great potential for abuse. Some middle ground must be found.

RECOMMENDATION 5.7 An employer should be entitled to deduct from an employee's wages reimbursement for personal charges or fines incurred by the employee, provided that:

(a) the amount does not exceed one day's wages during each pay period;

(b) the rules governing personal use of company property or liability for fines have been announced and agreed to in advance;

(c) the sums owing are clearly specified in an account, legal notice, traffic ticket or similar document, which the employer provides to the employee;

(d) the employer has suffered an actual financial loss; and

(e) the employee does not deny incurring the charge or fine.

The employee should have the right to appeal against a deduction to an inspector, and if the appeal succeeds, the employer must forthwith return the money to the employee, together with interest.

Of course, employers may continue to make the deductions available under the existing statute. They also remain free to sue employees for any loss incurred as a result of the misuse of company equipment or credit cards, or for any liability to a third party incurred as a result of the employee's negligence or misconduct in the course of employment. This recourse will be most appropriate where, for example, the employee has been involved in some event that results in serious damage to company property, or to that of a third party, but denies being at fault.

5. CONTINUITY OF EMPLOYMENT

A number of rights and entitlements under Part III are dependent on the length of an employee's continuous service. This somewhat begs the question of "continuous service for whom?" The question becomes pertinent when the original employer sells the business to a third party, or transfers it to a new corporation owned by the same beneficial owners. The current successor rights provisions of Part III preserve the continuity of service of employees in these circumstances, and thus preserve any vested Part III rights that depend on length of service. This seems only fair. To allow an employer to slough off its obligations by simply changing its corporate identity creates perverse incentives for the avoidance of Part III. To allow a third party purchaser of a business to do so awards that purchaser a hidden subsidy in the form of reduced obligations to its inherited employees.

However, the successor rights provisions do not operate in two situations. The first involves workers whose employer provides services under contract to third parties. If the employer loses that contract, the new provider who takes it over often keeps the workforce in place in order to avoid having to train a new one, and in order to maintain continuity of service to the third party. The second, much less frequent situation arises when a provincially regulated business is sold or transferred to an employer under federal jurisdiction. In both cases, continuity of employment is interrupted — in a legal, if not factual, sense — and they become new employees for the purpose of Part III. The result is that from the moment of the change, they do not have the right to seek adjudication for unjust dismissal, which under Part III accrues to all workers after twelve months of continuous service; nor can they claim leaves, vacations or severance pay, all likewise dependent on previous continuous service.

To allow a service provider to keep in place the workers hired by its predecessor without acknowledging their continuous service permits the provider to have the advantage of their experience without giving them credit for it. This problem is addressed in the Ontario Employment Standards Act, where employees of building service providers have been singled out for

special protection. Similar protection should be extended to all workers in the federal domain who confront similar circumstances, as well as to those whose employer has moved from provincial to federal jurisdiction.

RECOMMENDATION 5.8 Part III should provide that the continuity of service of employees is not interrupted for labour standards purposes if the functions they are performing are transferred from one business to another, so long as they continue to work for the new owners or in the new business.

Part III should also be amended so as to preserve the continuity of service of employees of a provincially regulated work, undertaking or business transferred to a federally regulated employer.

6. RELATED EMPLOYERS

A further problem concerns employers who carry on their business through two or more corporations. Sometimes these employers transfer employees from one to the other, so that at any given moment, employees may be unclear as to which they are working for. However, transfers may have the effect of disrupting employees' continuity of service, thereby disentitling them to protections under Part III for which there is a qualifying period. Sometimes, too, employers who accumulate liabilities under Part III for unpaid wages or the like may simply shift their operations to a second corporation, leaving the first as a hollow shell with no assets. This prevents — or at least greatly complicates — workers' attempts to recover what is owing to them. The legislation addresses this problem by conferring on the Minister authority to declare that two or more employers who are operating associated or related businesses "under common control or direction" are "a single employer," so that claims against any one of the companies can be pursued against all, and service accumulated while working for one company can be added to service accumulated while working for any other.

This is a somewhat awkward resolution of the matter. There is no real reason to involve the Minister: the question does not (or should not) involve the exercise of Ministerial policy discretion; it is handled by officials and tribunals in other jurisdictions; and it is no more complicated than questions already resolved by inspectors, such as whether an enterprise falls under federal jurisdiction, or whether a person is an "employee" covered by Part III. Moreover, the present arrangements are likely to cause delay and inconvenience for all concerned, because if the "common control" question arises in the course of ongoing proceedings, they must be suspended so the issue can be referred to the Minister for determination.

RECOMMENDATION 5.9 Part III should be amended to permit any person or body exercising decision-making powers under Part III to determine that associated or related works, undertakings or businesses under common control or direction are a single employer for purposes of the statute. Such determinations should be subject to appeal in the same manner as other determinations made under Part III.

7. NON-PAYMENT OF WAGES

While there will always be cases of honest disagreement over the precise amount owing, employers who deliberately refuse to pay employees wages and benefits they have earned are guilty of reprehensible behaviour. This is a relatively rare event, and when it does occur, it usually involves one of two situations. On the one hand, a very small number of employers deliberately set out to cheat their workers, especially those who are unlikely to complain because they are desperate to retain their job, ignorant of their rights or, in some cases, working illegally. On the other, a rather larger number of employers fully intend to pay but find themselves in financial difficulties and are unable to do so.

Procedures under Part III for the recovery of unpaid wages are reasonably effective. They begin with an effort by an inspector to persuade the employer to make payment voluntarily. If that fails, several intermediate steps are taken, after which the inspector may make an order for payment. The inspector's order is subject to appeal to a Referee — an *ad hoc* appointee — who holds a hearing and has authority to make a final order. This order may be registered in the Federal Court and enforced as an order of that Court.

A study of wage claim recovery for the Commission undertaken by Prof. Roderick Wood, suggests that the system is basically sound. Indeed, it results in the recovery of some 75% of wages found owing. However, under the existing system, recovery of the remaining 25% presents great difficulty. Once an order for payment is registered in court, the onus of securing actual enforcement of that order falls on the unpaid worker. Given that the worker is by definition without an income, is likely searching for a job and almost certainly lacking the knowledge and means to move court officials to action, this is a heavy onus to discharge. Moreover, according to Labour Program staff, collection of wage payment orders is often impeded or prevented by evasive measures taken by the employer, or by the employer's subsequent insolvency, as well as by certain deficiencies in the system itself. The reforms set out in Recommendations 5.10 to 5.13, below, should help to make the system more effective.

First, there is some evidence that appeals from inspectors' orders for payment are not always conducted expeditiously and that the Referees who

conduct them do not possess the full range of powers they require to ensure the payment of wages owing.

RECOMMENDATION 5.10 Hearing Officers with expanded powers should replace the *ad hoc* Referees who now hear appeals from the decisions of Inspectors in wage recovery cases. Hearing Officers would also perform other adjudicative functions under Part III.

The powers and other functions of these new Hearing Officers are described in Chapters Eight and Nine.

Second, time delays generally work in favour of employers who hope to wear down unpaid employees to the point where they will abandon their claims or settle for less than they are owed. Delays also give employers an opportunity to conceal or dispose of their assets, which are then not available to satisfy employees' claims. Consequently, some employers may be tempted to appeal the inspector's payment order to a Referee simply to drag out the proceedings. The statute should create disincentives to such tactics, as I recommend in Chapter Nine.

Third, arrangements are presently in place to recover debts owing to the state, such as overpayments of welfare benefits, employment insurance or pensions, or unpaid student loans. While unpaid wages adjudged owing to workers are not debts owed to the state, the state should accept responsibility for enforcing these judgments. Even under optimal conditions, it is not easy for litigants to collect on a judgment if the losing party resists; for workers who have been fired or who have recently lost their jobs, collection is likely to be even more difficult. Knowing this, delinquent employers may be tempted to simply ignore payment orders by inspectors and Referees. At the very least, they are likely to use the time required to secure payment to take evasive measures, such as hiding their assets, which make collection more difficult.

RECOMMENDATION 5.11 The Labour Program should accept responsibility for securing recovery of wages found owing. This might involve arrangements with either a public or a private collection agency, or establishing a new wage collection unit within the Labour Program itself. The costs of proceedings to effect such recovery should be offset, so far as possible, by a surcharge added to the wages and costs in the original order, to be paid by the delinquent employer.

I was advised — not only by aggrieved employees — that some employers conceal their assets or, at the very least, refuse to disclose where they are located, to avoid payment orders. Part III presently provides that a Regional

Director of the Labour Program may, in effect, issue an order requiring any person who is, or is about to become, indebted to the delinquent employer to pay their debt instead to the Minister of Labour so that it can be used in turn to pay the unpaid worker. (Banks are deemed to be persons indebted so that, in effect, the employer's bank accounts can be attached.) However, this power does not extend to assets that cannot be described as "debts," such as real property, vehicles, equipment, shares or cash. Moreover, Part III does not appear to empower Regional Directors, inspectors, or Referees to require the employer to disclose who is indebted to them or the location of bank accounts, much less any other assets. They should clearly have this power.

Finally, the existing power under Part III to attach "debts" to make good unpaid wages should be expanded to enable Program officials to take two additional steps. The first is to enter an appropriate "notice of wages owing" on any land, vehicle or personal property registry on which the employer's assets are registered. This would place prospective purchasers on notice that they would be taking title to an asset that is subject to an employee's claim of unpaid wages. The second is to give the Program power to seize and sell unregistered assets that can be easily converted into cash and to take court proceedings to achieve the same result where the law requires court approval for a sale.

RECOMMENDATION 5.12 Inspectors, Referees (or Hearing Officers) and Regional Directors should be given the power to require employers to testify under oath as to the identity of persons indebted to them and the whereabouts of all of their assets.

Regional Directors should be given the power to attach not only debts owing to the employer but any other unregistered assets of the employer with a fixed or ascertainable value, such as stocks and bonds. They should also be empowered to place a "notice of wages owing" against any registered real or personal property owned by the employer.

However, where recovery of unpaid wages requires the seizure and sale of real or personal property that does not have a fixed or ascertainable value, this should continue to be undertaken by and under the order of the Federal Court.

Unfortunately, it appears that a small number of rogue employers manage to escape payment of unpaid wages by abandoning the corporate entity that incurred the wage debt and launching a new corporation under another name. Part III presently makes company directors jointly and severally liable with the corporation for up to six months' unpaid wages when "recovery of the amount from the company is impossible or unlikely." This provision might make it possible to treat shares in the second company as assets owned by the delinquent directors of the first company, thereby making it possible to ultimately sell the assets of the second company to satisfy an

unpaid wage order against the first. However, this process is cumbersome, and its success depends on discovering whether a second or subsequent company has been incorporated; whether the beneficial owner/director of the first company reappears as owner of record of the second or subsequent company; and upon various other circumstances that could provide further opportunities for evasion. My recommendation for examination of delinquent employers in order to trace their assets may overcome some of these difficulties, but two further recommendations are in order.

RECOMMENDATION 5.13 Any shares, licences, contracts or assets held by the director(s) of a delinquent corporation, or held by third persons on their behalf, should be regarded as assets that can be attached in order to satisfy an order for the payment of wages that have not been paid by the delinquent corporation.

If the assets of the delinquent corporation or its directors are transferred to another person or corporation subsequent to the registration of an order for payment of wages in court, the transferee shall be deemed to have acquired as well the obligation to pay the unpaid worker, unless the transferee is a purchaser at arm's length with no knowledge of the order. The onus of demonstrating the lack of knowledge should fall on the transferee.

A final issue relates to the status of wage claims in circumstances where a delinquent individual or corporate employer has become insolvent. This issue was recently the subject of extended investigation and public debate that culminated in the enactment of Bill C-55, *An Act to Establish the Wage Earner Protection Program*. This legislation provides two forms of protection for workers owed wages upon the bankruptcy or insolvency of their employer. First, it provides them with a super-priority claim on the insolvent employer's assets; this avoids a fairly common situation in which unpaid workers receive little or nothing because well-advised commercial creditors have secured priority for themselves in the event of bankruptcy under the terms of a loan or sale agreement. Second, if a delinquent company is completely insolvent and no assets are available to pay workers, it authorizes payment of up to six months' unpaid wages to be made from public funds. Given that the legislation attracted support across party lines when it was enacted, it would seem to represent a sensible compromise between the legitimate expectations of unpaid workers and those of other creditors. However, although Bill C-55 received royal assent on November 25, 2005, it has not yet been proclaimed in force.

RECOMMENDATION 5.14 Bill C-55 should be proclaimed in force at the earliest opportunity to protect employees owed wages and benefits by their insolvent employer.

Chapter Six

Rights and Respect

SIX
RIGHTS AND RESPECT

1. THE VALUES

"Work," observed Chief Justice Dickson, "is one of the most fundamental aspects of a person's life…A person's employment is an essential component of his or her sense of identity, self-worth and well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."

In this perspective, the workplace is not just a marketplace — a place where services are exchanged for money. It is also a social setting, a place where the quality of our personal and civic lives is defined. But defining the quality of our lives has become a very complicated business. "We" have changed, and so too have our lives and our workplaces, in ways outlined in Chapter Two. So too have some of our expectations of how people ought to relate at work.

We now accept that workers have rights, which are defined not only by their contract of employment but also by laws such as the *Canada Labour Code*. Under Part III, those rights include entitlements to pay, leaves, vacations and holidays — generally expressed as minimum rather than "best possible" standards — as well as the right not to be unjustly dismissed. Of course, these minimum entitlements may be enhanced by employers on the basis of additional terms agreed to by workers or their unions; and they generally are. But ultimately, it is the law — not the employer's enlightened self-interest or generosity — that grounds the claim of workers to decent minimum employment conditions, and it is the right to be protected from arbitrary or unjust dismissal that gives the law force and effect.

It is widely understood that people who are poor and insecure tend to suffer more violations of their rights than those who are not, and that such people are at a disadvantage when they have to claim or defend their legal rights

in general, and their human rights in particular. Because Part III has to do with improving material conditions and reducing insecurity in the workplace, in a sense the overall effect of Part III is to enhance the human rights of workers.

However, the human rights of workers are not simply those enumerated in Part III. Because everyone has an even more fundamental claim to be treated with due regard for their "dignity and self-respect," all Canadian jurisdictions have enacted human rights legislation to ensure that no one suffers discrimination at work based on race, gender, sexual orientation, religion, ethnicity, disability or other invidious grounds. They have also enacted collective bargaining, privacy, health and safety and other legislation designed to protect workers' "dignity and self-respect" in the broadest sense. However, I have no mandate to conduct a general review of all such legislation. Accordingly, the prime focus of this chapter is the intersection of human rights and labour standards. This involves three separate issues.

First, while the human rights of workers are greatly advanced by the protection against unjust dismissal that Part III provides, problems may arise when human rights and labour standards enforcement procedures overlap. Second, there may be a need to harmonize certain substantive provisions of Part III with the requirements of the *Canadian Human Rights Act* (CHR Act). Third, one particular work-related issue of "dignity and self-respect" — bullying in the workplace — has so far not been addressed either by the CHR Act or by other federal legislation. These issues are covered in succeeding sections of this chapter.

2. HUMAN RIGHTS AND UNJUST DISMISSAL: THE PROBLEM OF JURISDICTIONAL OVERLAP

Workers have long enjoyed the right — in principle — to sue civilly if they are unjustly or wrongfully dismissed. However, for reasons explored in Chapter Eight, they were left without practical recourse unless they worked under collective agreements that authorized their union to carry their grievance to arbitration. In 1978, the situation changed dramatically for unorganized workers in the federal domain when they gained the right to challenge their dismissal before an adjudicator appointed and paid for by the state — a right enjoyed even now by unorganized workers in only two other Canadian jurisdictions. This innovation was not only a significant enhancement of workers' employment of their rights under Part III but, I argue, also a contribution to their human rights.

First and foremost, the very fact that federal domain workers have access to an effective means of challenging their dismissal enables them to assert

all of their statutory and contractual rights — including their human rights — with greater self-confidence. Now, under Part III, they actually have access to remedies that are equal, or in certain respects superior, to those they might invoke in conventional court proceedings. Not only can they recover greater damages than courts usually award ordinary workers, they can also seek reinstatement, a remedy denied them altogether in civil litigation.

Second, as the jurisprudence has been developed by adjudicators under Part III, employers seeking to justify the dismissal of employees must generally demonstrate that they have adhered to the principles of progressive discipline. That is, they must show that they have attempted to deal with disciplinary or performance problems by pointing them out to the employee, working with the employee to rectify them, and imposing a graduated repertoire of sanctions before resorting to the ultimate sanction of dismissal. The evolution of this jurisprudence coincided with, reinforced and arguably brought about a significant change in the thinking of human resource and industrial relations (HR/IR) professionals who now commonly adhere to similar principles even when not subject to external scrutiny. Both the adjudication jurisprudence and the new HR/IR philosophy have enhanced the likelihood that workers will be treated more respectfully and fairly.

Third, the introduction in 1978 of procedures for the adjudication of complaints against unjust dismissal made available to non-unionized workers rights that had long been available to their unionized counterparts. Because large numbers of women and members of minority groups work in non-union federal enterprises, such as banks, this legislation contributed in an important way to achieving greater overall equality among Canadian workers.

RECOMMENDATION 6.1 The present provisions of Part III that permit workers to challenge their unjust dismissal and to receive effective remedies if they have been wrongly dismissed should be retained.

RECOMMENDATION 6.2 All employers in the federal domain should adopt procedures and practices for dealing with employee discipline that are based on the principles of respect for the individual, are corrective rather than punitive in character, and are fair.

Despite these very positive contributions of Part III unjust dismissal proceedings to the human rights of workers, difficult issues remain at the interface between the two legal regimes.

Employees may believe, or at least allege, that they have been unjustly dismissed or denied other rights under Part III, and that they have also been the victims of a human rights violation. They may therefore wish to bring proceedings under both Part III and the CHR Act.

There are obvious reasons to prevent workers from bringing multiple proceedings, whether they are concurrent or consecutive: the cost and inconvenience for the employer, the possibility of using the first proceedings as a dress rehearsal for the second, the risk of inconsistent results, and especially dissipation of the scarce public resources available to both labour standards and human rights agencies. At present, it is difficult, if not impossible, for an employee to bring two proceedings. On the one hand, Part III denies employees the right to complain of unjust dismissal if an alternative remedy is available under some other federal statute, even if that alternative is not as beneficial from the employee's point of view. This statutory rule has been complemented by the refusal of adjudicators in unjust dismissal cases to permit multiple proceedings. On the other hand, the CHR Commission and CHR Tribunal have committed themselves to legal doctrines and administrative practices that largely deny access to complainants who have chosen to litigate the same matter in another forum.

However, the present arrangements may be unfair to employees. After all, most workers do not have and cannot afford lawyers, and if forced to elect between proceeding under one statute and the other, may be unable to make an informed choice. Moreover, while the Part III and human rights complaints may each have something in common with the other, each may also be somewhat distinctive in certain crucial respects. Because the legal or factual issues that are "distinctive" can be resolved only in the particular forum empowered to deal with them, if forced to make a choice between Part III and human rights remedies, the employee may never be able to secure a full and fair hearing of their claim.

I believe that a more nuanced approach ought to be taken under both statutes, one that would prevent multiple proceedings, but would still ensure that legitimate claims are fully considered one way or another. This can be accomplished only by way of a cooperative effort by the Labour Program, the CHR Commission and the CHR Tribunal.

RECOMMENDATION 6.3 The Labour Program, on the one hand, and the Canadian Human Rights Commission and the Canadian Human Rights Tribunal on the other, should enter into a memorandum of understanding (MOU) to deal with complaints that may involve concurrent or consecutive proceedings under Part III and the CHR Act. The MOU would define a common approach to such proceedings, and would:

(a) provide simple, clearly written advice to complainants concerning the limits and possibilities of each type of proceeding;

(b) require that complainants make an election in writing to proceed either under Part III or under the CRH Act, and be advised of the consequences of doing so;

(c) confer discretion on decision-makers in all three agencies to transfer evidence and documents from one to the other, and confer the power to use such evidence and documents in a subsequent proceeding;

(d) confer power on each agency to deny complainants access to the others if it finds that no reasonable grounds of complaint exist or that the complaint is frivolous or vexatious; and

(e) confer power on each agency to transfer the case to the other if it finds that reasonable grounds of complaint do exist that lie within the jurisdiction of the agency to which the case is transferred.

If necessary, power to enter into such an MOU should be conferred on the Minister responsible for Part III and the Minister responsible for the CHR Act, and appropriate amendments should be made in Part III and in the CHR Act to enable an MOU to be given effect.

3. HUMAN RIGHTS AND LABOUR STANDARDS

Part III makes only a few explicit references to matters covered by human rights legislation. It protects the right of workers to take and return from maternity leave and job-related sick leave, and to have their special physical needs accommodated. Under the CHR Act, denial of these rights might be construed as discrimination on grounds of gender or disability. Part III requires employers to adopt a plan to deal with sexual harassment in the workplace — conduct that is also dealt with under the CHR Act. And Part III permits (but does not require) Labour Program inspectors to notify the CHR Commission if they uncover apparent violations of pay equity legislation.

Under the CHR Act, the CHR Commission can recommend that an order-in-council be enacted assigning duties and functions of the Commission "in relation to discriminatory practices in employment" to persons administering Part III. No such order-in-council has been made to date. This provides some indication that the people who know the human rights field best feel that out-sourcing of responsibility to the Labour Program would not be desirable. In short, a relatively clear line has been maintained between the administration

of labour standards legislation on the one hand, and the administration of human rights legislation on the other.

A number of briefs presented to me argued that human rights concerns should occupy a much more prominent place in the scheme of Part III than they do at present. Several urged, for example, that human rights should constitute a specific labour standard violation that would give rise to remedies under Part III. The integration of human rights and labour rights regimes has also been endorsed by the Supreme Court of Canada, and by both federal and provincial legislation.

Nonetheless, I am not persuaded that the wholesale importation of substantive and procedural rights from one regulatory regime into the domain of another is in the best interests of either. The CHR Commission and the CHR Tribunal possess a wealth of expertise in the human rights field. They have statutory powers to deal with discrimination and related issues, with appropriate policies and procedures in place to handle them. If different complaints-handling procedures were introduced and authoritative interpretations of legislation were issued by a different group of officials, the outcomes would likely be quite different and possibly less appropriate. Second, the resources presently available to the Labour Program are at best barely sufficient to enable it to properly discharge its existing responsibilities under Part III. Unless substantial new resources were provided, the labour standards regime would be seriously undermined if Labour Program staff were obliged to perform additional duties under human rights legislation.

That said, it makes little sense for the two regimes — human rights and labour standards — to operate in complete isolation, much less in opposition. On the contrary, with proper preparation, the cause of human rights in the workplace might well be advanced by the participation of Labour Program staff who are familiar with employment practices and relations and who understand the challenges of securing compliance in the workplace environment.

RECOMMENDATION 6.4 The Labour Program and the Canadian Human Rights Commission should discuss possible cooperative strategies to advance the cause of human rights in the workplace. Their discussions should address: (1) the need to respect the prime mandates of both agencies, (2) the importance for any joint initiative of personnel with expertise in both workplace relations and human rights, and (3) the need to ensure that all cooperative strategies are supported by adequate resources.

Pending the outcome of such discussions, three issues require attention. The first relates to the existing provisions of Part III requiring all employers to adopt a plan to deal with sexual harassment. This requirement obviously advances an important public policy that I would not wish to undermine in any way. However, the provision in its present form is somewhat problematic. It seems odd that employers should be required to adopt policies that address only sexual harassment and not racial or religious harassment, not harassment on grounds of sexual orientation and not, for that matter, other forms of workplace discrimination forbidden under the CHR Act. Moreover, the Federal Jurisdiction Workplace Survey revealed that some 80% of employers in the federal domain — most of them small enterprises, but some much larger — are operating in contravention of the law and are without a sexual harassment policy. This discouraging statistic raises for me the awkward question of why a seemingly sensible strategy for advancing important human rights concerns has been ignored by so many employers. Perhaps part of the explanation is the somewhat anomalous location in Part III of the requirement, where its implementation depends on staff that have no special training in human rights.

As recently as 2000, the La Forest Report, *Promoting Equality: A New Vision*, recommended establishing committees in every workplace with a broad mandate to promote human rights including, presumably, sexual, racial and other forms of harassment. However, the primary custodians of human rights — the CHR Commission and the Minister of Justice (who is responsible for the CHR Act and its administration) — have not yet seen fit to adopt this recommendation. Had they done so, I would have had to consider whether the Part III provisions requiring sexual harassment plans ought to be replaced by new, more comprehensive arrangements, either in the CHR Act or in Part III itself. However, given the lack of government action on the La Forest Report, it seems sensible on balance to leave the present provisions in place pending the outcome of the Labour Program–CHR Commission discussions recommended below.

RECOMMENDATION 6.5 The Labour Program and the Canadian Human Rights Commission, and the Ministers responsible for both, should discuss whether to leave in place the present Part III provisions dealing with sexual harassment, to expand these provisions to include harassment on other grounds forbidden by the *Canadian Human Rights Act* and/or other discriminatory employment practices, or to consolidate and administer all such provisions under the CHR Act.

They should also address the La Forest Commission's proposal for workplace human rights committees, either under Part III or under the CHR Act.

Appropriate legislative or administrative action should follow.

A second set of human rights issues flows from the premise that Part III ought not to permit or, worse yet, require, conduct that transgresses the CHR Act or the principles it embodies. This implies that Part III ought to encourage employers to accommodate the needs of an increasingly diverse workforce. For example, workers may need a day off in order to participate in religious or cultural observances that do not fall on existing statutory holidays, many of which have their origins in the Christian religious calendar. Aboriginal workers or immigrants from distant lands may need longer bereavement leave than Part III now allows. New mothers may need special breaks to facilitate the breast-feeding of their infant. Changes along these lines are recommended in Chapter Seven.

Additional changes may be necessary, as well. For example, Part III requires employers to accommodate pregnant women or those who have recently given birth by reassigning them to work that does not threaten their health or that of their foetus or child, if it is "reasonably practicable" to do so. This may be a somewhat lesser requirement than that established by the CHR Act, which imposes on the employer a duty to accommodate the employee's needs up to the point where doing so would involve "undue hardship." Similar considerations apply to workers returning to their jobs following a work-related illness or injury or following sick leave. In all these cases, only detailed technical analysis will reveal whether Part III actually does impose a lesser standard of accommodation than human rights legislation — but if it does, Part III will have to be amended. To set the stage for this analysis, I recommend adopting the following principle:

RECOMMENDATION 6.6 The Labour Program should ensure that Part III is drafted, interpreted and administered in such as way as to advance the principles embodied in the *Canadian Human Rights Act* as well as to comply with its specific requirements.

Of course, formal workplace arrangements or informal practices established by the parties may also provide something less than the standard of accommodation for women, disabled persons and other groups mandated by the CHR Act. They should be analysed by the parties and revised, if necessary.

RECOMMENDATION 6.7 Employers and workers should respect the principles of the *Canadian Human Rights Act* and adjust their workplace agreements and practices accordingly.

Furthermore, the successful harmonization of human rights with labour standards legislation requires a detailed review not only of Part III and the CHR Act, but also of legislation that provides workers with income replacement or equivalent financial support. For example, while childbearing women and disabled persons are entitled to leave under Part III, many are able to take full advantage of that entitlement only because they receive income support under the *Employment Insurance Act*. Similarly, in Chapter Seven I recommend the introduction of new categories of unpaid leave; and in Chapter Eleven I discuss the possible introduction of unpaid educational or training leave. However, unless Employment Insurance is amended to provide income support for workers who take leave under these new provisions, few are likely to do so.

RECOMMENDATION 6.8 The federal government should review the extent to which existing programs of income support are consistent with provisions designed to protect new and prospective mothers, ill and disabled workers and other categories of workers protected by the *Canadian Human Rights Act*.

A final issue relating to human rights has to do with an existing provision under the Act that permits Labour inspectors to report violations of the pay equity provisions of the CHR Act. For example, while reviewing an employer's records to determine whether employees were paid less than the minimum wage or improperly denied overtime, an inspector may discover that women have been paid less than men for work of equal value. Rather than disregarding the information, the inspector "may" notify the CHR Commission (the body responsible for pay equity legislation). Arguably, unless authorized to do so by such a provision, inspectors would be restricted to using information they obtain only to enforce the statute under which they are appointed.

The logic of this provision is clear but it is also truncated. Several submissions and research studies suggest that employers who are tempted or driven to deliberately disregard Part III might be tempted or driven to disregard other legislation as well. For example, we were told that some employers fail to remit statutory Employment Insurance premiums or withholding tax to the Canada Revenue Agency, despite making deductions for this purpose from employees' pay. But employers may be encouraged to comply with all work-related statutes if they knew that such violations were likely to be detected and reported as a result of regular Part III inspections or audits. However, given the small cadre of personnel available to conduct Part III inspections in thousands of federal business premises spread across a huge country, I hesitate to suggest that Labour inspectors be required to audit the employer's overall record of compliance each time they

respond to a complaint or conduct a routine inspection of records. On the other hand, if apparent work-related illegalities do come to their attention, inspectors should be authorized to pass the information along to the appropriate regulatory agencies. This approach requires that the current permissive statutory language be broadened.

However, this broader approach raises an issue of considerable sensitivity. In the course of their regular duties, inspectors may also learn that an employer has hired illegal or undocumented immigrant workers. Such workers are notoriously vulnerable to exploitation because their fear of discovery and deportation leads them not to complain if their workplaces are dangerous, their pay falls below the minimum or their vacation or overtime pay is withheld. Nonetheless, at one point U.S. Department of Labor (DOL) inspectors routinely reported them to the immigration authorities. However, in 1998, following a complaint under the *North American Agreement on Labour Cooperation*, the U.S. DOL announced that its duty to protect vulnerable workers took priority over all other considerations, and it ceased to report illegal immigrants.

RECOMMENDATION 6.9 Part III should be amended to provide that inspectors who have reasonable grounds to believe that an employer is violating the *Canadian Human Rights Act* or other work-related federal legislation be given discretion to notify the relevant authorities.

4. INTERFERENCE WITH DIGNITY: HARASSMENT, BULLYING AND ABUSE IN THE WORKPLACE

Human rights violations are not the only assaults on their dignity that workers may encounter on the job. In fact, the workplace is an especially likely venue for unpleasant and hurtful encounters. Employment relations, after all, are typically hierarchical. Workers have to obey orders and rules that they sometimes find distasteful, but seldom have any way to challenge their content or the manner in which they are conveyed and enforced. Moreover, people often work under stressful conditions which, from time to time, give rise to conflicts among workers, between workers and employers, or between workers and third persons, such as customers. In this context, things may be said or done that are highly inappropriate and hurtful.

In general, these difficulties have a way of resolving themselves. People will work best, will work most cooperatively, when they are treated respectfully. Employers know this; co-workers know this; customers and other third parties know this. They also know that if people feel themselves abused they will find overt or subtle ways to resist or to strike back, often with

negative consequences for the enterprise, for other people and even for themselves. Consequently, most managers try to avoid being overly "bossy," with a view to minimizing the resentment of subordinates; and most workers or third parties try to negotiate inevitable disagreements without giving offence, and to apologize if they become abusive in the heat of the moment.

However, in some cases, sensible behaviour does not prevail; bullying, harassment and abuse do occur; and workers suffer injuries to their dignity and, sometimes, to their physical and psychological well-being. Quebec has recently adopted legislation that requires employers to take measures to prevent such behaviour and provides remedies for victims. A research study undertaken for the Commission by Prof. Colleen Shepard suggests that this legislation is having a positive effect, although employers from Quebec and elsewhere maintained during our hearings that it was having, or would have, unintended and deleterious consequences. Time will tell which of these positions is correct. For the present, it seems to me that a different approach is more appropriate.

Assaults on a worker's dignity add stress to the victim's working life, impair their capacity to function effectively, damage their future prospects at work, and — as Chief Justice Dickson noted — potentially injure them in all aspects of their life. Sometimes abusive behaviour gives rise to a reasonable fear of injury. In extreme cases, it may trigger a series of actions that result in actual injury to the victim or, in retaliation, to the harasser. Recognizing these dangers, the federal government is already in the process of introducing regulations that will deal with actual or apprehended violence in the workplace. With appropriate modifications of language, these regulations could cover harassment, bullying and abuse.

RECOMMENDATION 6.10 The federal government should modify the language in its pending regulations on actual or apprehended workplace violence to include serious harassment, bullying and abuse.

While it is not inappropriate for these regulations to be adopted under Part III, I feel, for reasons that follow, that they should probably be associated with Part II, which deals with occupational health and safety.

Given their potential psychological and physical effects on the victim, harassment, bullying and abuse are closely analogous to other stress- or injury-causing agents, such as toxic substances, unsafe machinery or dangerous work practices — all of which are dealt with under Part II. Of course, the analogy is not a perfect one, and appropriate adjustments in legislative language may be necessary if the approach of Part II is to be successfully adapted to protecting workers against these newly acknowledged workplace hazards. For example, it may be necessary to ensure that Part II deals with serious or repeated abuse in the workplace rather than isolated incidents of incivility.

Moreover, like other occupational hazards, harassment or bullying should be the subject not only of remedial or punitive action after the fact but also — and more importantly — of appropriate prophylactic measures. Part II places prime responsibility on the employer to anticipate workplace hazards, if possible, and to remove them, if necessary. However, it also ensures that workers have a role to play in developing an appropriate workplace environment that reduces hazards and promotes health and safety. Having in place a system of internal responsibility involving both workers and employers is an appropriate means to deal with workplace abuse, bullying and harassment, any of which may emanate from members of either group. Finally, Part II establishes the right of the employee to refuse unsafe work, ensures that such refusals are dealt with promptly and objectively, and deters false allegations of unsafe work for ulterior motives. It makes sense to adopt similar measures relating to abuse, bullying or harassment. No one should be forced to choose between living in constant fear of such behaviour and quitting their job.

RECOMMENDATION 6.11 Part II of the *Canada Labour Code* should be amended to define abuse, bullying or harassment in the workplace as an occupational hazard, and to establish appropriate procedures for forestalling and responding to such conduct.

Chapter Seven

Control Over Time

SEVEN
CONTROL OVER TIME

1. INTRODUCTION

The regulation of working time affects all employees every day, both in their relations with their employer and in the rest of their lives. It affects the way in which employers conduct business; produce goods and services; relate to their suppliers, clients or customers; in some circumstances, it may also affect the profitability of the enterprise. And, as I explain below, it affects the public in many ways as well. The importance of the issue can be gauged by the fact that limitations on working time were among the first labour standards established early in the 19th century in the United Kingdom, in several Canadian provinces in the late 19th century, and in federal legislation during the first third of the 20th century. The subject has grown in importance over the years to the point where provisions dealing with time — working hours, overtime, breaks, rest periods, leaves, holidays and vacations — now comprise about half of Part III, and is the subject as well of other statutes relating to social policy and economic activities. The regulation of working time was addressed in almost two-thirds of the submissions received by the Commission.

This chapter first explores in some detail why time itself is an increasingly difficult issue and how its regulation affects us all. Next, it proposes a general approach to the regulation of time under Part III, evaluates current regulatory mechanisms under Part III and introduces proposals for alternative systems. Then, in a long and detailed section it examines one-by-one the many substantive provisions of Part III that relate to the control over time. Finally, in a brief conclusion to the chapter, several non-statutory initiatives are suggested, with a view to facilitating the Labour Program's efforts to assist employers and workers to achieve a better work–life balance.

2. MODERN TIMES: WHY THE WORK–LIFE BALANCE IS IMPORTANT FOR CANADAN WORKERS, EMPLOYERS AND THE REST OF US

Charlie Chaplin's famous film, *Modern Times*, portrays a man so overwhelmed by the demands of his job that he is, in effect, turned into a machine. Even when he stops working, his hands continue to perform the functions they performed while he was tightening bolts on an auto assembly line. Technology has changed since Chaplin made his film in the 1930s — indeed, since the *Canada Labour Code* was enacted in 1965. But if anything, the message of *Modern Times* has become even more relevant today: the requirements and rhythms of the workplace threaten to organize the rest of our lives.

Pressures faced by workers

Several key transformations have had a direct impact on the availability of workers' time to meet the demands of their paid work and those of competing family and personal responsibilities.

- The increased participation rate of women in the labour force and the growing proportion of dual earner couples have resulted in a rise in the average number of hours spent by household members in paid work.
- The increased instability of family units means that many single-earner households are actually lone-parent families where an individual (usually a mother) must meet work and care giving responsibilities with limited support from the other parent.
- Population aging resulting from a declining birth rate and the growth in average life expectancy has led to a rising demand for elder care, a demand that must often be met by prime age workers, particularly those in the "sandwich generation."
- Older workers are a more significant presence in the workplace but are more likely than their younger counterparts to face health problems, to require special accommodations such as time off for medical reasons, and to gradually reduce their paid working time to facilitate their transition to retirement.
- Immigration from abroad and the internal mobility of workers have contributed to the wide dispersal of family members, thus weakening family support networks, which traditionally helped share the burden of child- and elder-care.

- While the average work week of Canadians has increased only marginally, significant differences are developing between the extremes. Many underemployed workers would like to increase their hours of paid work, but an increasing proportion of those who work long or very long hours are seeking more time off, or at least more control over the scheduling of their hours of work.
- A decreasing percentage of workers is now working regular nine-to-five schedules, Monday to Friday. Many more workers now work shifts, irregular hours, weekends or on a part-time or casual basis than 40 years ago. More also work under temporary employment contracts, normally for a short period of time or to complete a specific project or task, but sometimes over several years through a series of contract renewals.
- Developments in information and communication technology increasingly allow work to be performed outside the confines of the workplace and at any hour of the day or night. Although this may provide workers more personal freedom over the scheduling of their work, it may also make it possible for work demands to intrude on personal time.

Many studies report that in recent years the work–life balance of Canadian workers, including those covered by Part III, has deteriorated significantly. While a solid majority of workers rate a good work–life balance as important to them, survey evidence suggests that only a fraction have been able to achieve it. This is a worrisome trend, since there is growing evidence that individuals who work overly long or unsociable hours, and those who have high levels of work–life conflict, are more likely to experience stress, strained relationships at home and at work, and various adverse health consequences. This has consequences not only for workers and their families, but also for employers who suffer the effects of absenteeism, staff turnover, loss of productivity, and increased benefit plan costs. Studies also suggest that employees who work excessive hours, whether voluntarily or not, help perpetuate a "culture of long hours," thereby exerting pressure on other employees to do the same, lest they be suspected of lacking commitment to their job.

Beyond actual health and economic impacts, excessive hours of work adversely affect workers' quality of life. They cannot find the time to engage in unpaid but socially desirable work related to family and other responsibilities, to study, to participate in community or civic life or simply to enjoy leisure pursuits. The result, according to surveys, is that many workers would be willing to accept lower levels of remuneration if they could reduce their current hours of work.

But not all workers feel that way. Some want and need more hours of paid work, not fewer. The availability of work is a major determinant of their economic security, their entitlement to statutory and contractual benefits, and more generally, their well-being and that of their families. Unduly rigid restrictions on hours of work can thus adversely affect the standard of living of vulnerable workers, such as those earning close to the minimum wage, seasonal workers and employees on short-term contracts. But of course, they are the very workers most likely to be unable to resist the opportunity or the requirement that they work longer than is lawful or desirable.

Finally, for many workers in search of a better work–life balance, the actual length of the workday or work week may be less problematic than the intensity of work, the unpredictability of work schedules, the difficulty of securing leave to deal with specific responsibilities or unexpected emergencies, and the absence of guaranteed sociable time off during the week.

Many employers are sensitive to their employees' needs and have put in place a wide array of arrangements, including generous leave and vacation provisions, family-friendly schedules, employee wellness programs, workplace childcare centres and eldercare referral services. However, even when employers have adopted well-defined and enlightened working time policies, employees may not take advantage of them because they do not know about them, are ineligible because of exclusions or stringent qualifying requirements, hesitate to irritate their supervisors or fellow workers, or fear becoming known as a person who cannot be depended upon to be available for work assignments. As well, many employees benefit from informal under-the-radar arrangements with their supervisors that accommodate their needs and preferences. However, such informal arrangements have obvious limitations. They may be impossible if either party stands on its rights, unfair if the stronger party (usually the employer) takes advantage, and on occasion difficult to reconcile with the requirements of Part III or other laws.

Many employers, then, have dealt with working-time issues by means of non-statutory policies and practices that range from the highly responsive to the barely acceptable. However, many have not adopted any such policies or practices at all because they are concerned about long-term costs, dubious about potential benefits, fearful that their employees will abuse them or simply ignorant of the need to do so. In the end, many workers depend wholly on the standards established by Part III to protect their work–life balance.

How robust should such standards be? Before answering that question, it is necessary to examine claims by employers that they need a significant degree of "flexibility" in setting working time standards, both to meet their own operational requirements and to enable them to agree upon sensible arrangements with their employees.

Pressures faced by employers

Like workers, employers confront problems that were not foreseen when Part III was adopted over 40 years ago. Many employers face growing competitive pressures as a result of globalization, changing trade and capital flows, new technologies, deregulation of some key economic sectors, anticipated labour shortages and evolving consumer demands. Even companies that previously dominated some sectors are no longer immune from competition. In order to regain, maintain or improve their competitiveness, employers contend, they need greater flexibility concerning the scheduling of work and less burdensome requirements to provide leaves, vacations and other time-related benefits to employees. However, "flexibility" is a broad term that involves many aspects, not all of which are equally important to every employer.

Due to consumer demands, the need to amortize the cost of expensive capital equipment, the structure of their business operations, or the nature of the services they offer, more employers nowadays claim to need "timing flexibility" — the ability to schedule work so as to operate 24/7 — or at least beyond the once-standard nine-to-five, five-day work week. To avoid having to hire extra staff to cope with extended hours of operation or unexpected situations, employers may require existing employees to work shifts, to accept longer workdays or variable schedules, to remain on call after their regular working hours or to work overtime.

"Numerical flexibility" is what other employers need: the ability to increase or decrease their labour force in order to respond to cyclical or seasonal fluctuations in the demand for their goods and services. It may be possible to cope with these fluctuations by laying off some workers as labour force requirements decline, or by bringing in extra workers on a short-term basis as requirements increase. But both of these strategies may be problematic in terms of employee morale, productivity and cost. A better strategy may be to schedule the existing workforce so that its hours of work grow or shrink in response to predictable peaks and valleys in labour force requirements. However, this strategy may be difficult to implement if labour standards legislation imposes strict limits on maximum weekly hours and requires premium pay for overtime work.

Many employers seek more "labour cost flexibility" to enable them to remain profitable in the face of enhanced domestic or international competition. While this concern involves many aspects of regulation and other matters, such as payroll taxes, in the present context they argue that their unit labour costs are increased by having to pay statutorily mandated benefits, and by having to abide by legal rules that hinder the optimal deployment of their workforce.

Another common complaint, particularly from small business owners is that, apart from its substantive content, the very complexity of working time regulation puts them at constant risk of unintentional non-compliance, forces them to incur the expense of hiring lawyers or HR advisors, wastes time, creates uncertainty and causes friction and frustration in the workplace. The flexibility they seek is fewer rules and greater freedom to depart from them in clearly defined circumstances.

Finally, not all requests for less rigid statutory regulation of working time are driven by demands from employers for reduced costs or greater control over their workforce. Some employers argue that greater flexibility would allow them to accommodate the different lifestyle preferences and family needs of present or prospective employees. It is difficult, they contend, to work out flexible working time arrangements with their employees within the constraints imposed by legislation. Interestingly, a review of collective agreements on file with the Labour Program reveals considerable variation in working time provisions, at least one of which – time off in lieu of overtime pay — is not, strictly speaking, lawful. This suggests that workers and their representatives acknowledge that greater flexibility might sometimes be to their benefit as well as that of employers.

Broader societal concerns

These competing concerns of workers and employers are real and compelling, and somehow a way must be found to strike a fair balance among them. However, because working time policies and practices can have large, cumulative effects well beyond the boundaries of the workplace, they must also be assessed from a broader societal perspective.

For example, there is evidence that stress and other problems related to work–life imbalance, entails direct costs to Canada's health care system. Excessive hours of work or shifts that disrupt workers' sleeping patterns have a public safety dimension; fatigued workers who operate dangerous equipment — trucks and airplanes, for example — may constitute a danger not only to themselves but also to others in their vicinity. Restrictions on employees' working time, such as maximum hours, minimum rest periods, and overtime premiums, may force employers to hire additional full-time staff, with implications for overall levels of unemployment and underemployment. In certain labour markets, additional hiring may not be possible, or it may have the effect of driving up the cost of labour. Conversely, at a time of rising dependency ratios (the ratio of children and seniors to working-age individuals) and anticipated shortages of skilled labour, flexible working time arrangements may help to attract groups of people, such as those with care giving responsibilities and older workers, back into the labour force.

Studies submitted to the Commission also indicate that there may be a link between the regulation of working time and such issues as fertility rates and early childhood development. It is also often argued that appropriate working time policies and practices can help foster greater gender equality by allowing a more equitable sharing of domestic and family care responsibilities, with attendant improvements to women's employment prospects and earnings.

Lastly, if employment-related obligations prevent working men and women from participating in parent-teacher groups, political parties, sports leagues or arts organizations, the social, cultural and political life of communities will be inhibited, even impoverished.

3. ASSUMPTIONS THAT HAVE SHAPED MY RECOMMENDATIONS CONCERNING CONTROL OVER TIME

My recommendations for changes to the provisions of Part III dealing with time rest on a series of assumptions, which are in turn informed by what I have heard from workers, employers, community representatives, researchers and Labour Program staff.

- Both employers and employees want more predictability but also want more flexibility. Paradoxically, flexibility for one party may jeopardize predictability for the other.
- The labour standards set out in Part III must combine elements of flexibility and predictability in order to ensure that employers and workers can realize their legitimate goals within the system. However, the appropriate balance between flexibility and predictability can seldom be captured in a single statutory provision with a 40-year life expectancy. Not only does "one size not fit all"— even if it does fit some workers and employers some of the time, it will likely not do so for long.
- Consequently, Part III must provide a mechanism for readjusting the balance from time to time. If it fails to do so, not only will employers and workers experience inconvenience, frustration and even injustice during the long intervals between statutory amendments, they are likely to find themselves in frequent conflict in the interim. This is not an environment in which mutual accommodation is likely to flourish, nor one in which productivity is likely to rise.

- Any mechanism for readjusting the balance between flexibility and predictability must exhibit certain characteristics: it must allow for input from both employers and workers; it must operate with reasonable speed and preferably on the basis of sound information; it must be fair and transparent; and the results it produces must ultimately conform to the principles underlying the legislation, set out in Chapter Three. A mechanism that gives employers unilateral and non-reviewable power to derogate from the statutory standards does not display these characteristics.
- Balance is important, but the right balance — the one that reflects the principles in Chapter Three and respects the fundamental interests of the parties and of society — is the one that Part III should embody and promote.
- Consequently, some provisions of Part III should be essentially immune from adjustment or variation because they express fundamental principles and broad social policies that trump even the legitimate operational concerns of a particular employment sector or enterprise and the preferences of employees. However, minor adjustments in the way these provisions are implemented might be permitted, so long as they do not undermine their substantive effect and are made in the appropriate manner.

The balance of this chapter is given over to translating these six assumptions into a series of practical recommendations. The first group of recommendations, collected under the title of "regulated flexibility," has to do with the adjustment mechanisms that, in my view, should be built into Part III. The second, proposes some amendments and additions to the substantive content of existing federal labour standards. The third comprises a series of non-legislative initiatives that the Labour Program should undertake.

Most of my recommendations take as their point of departure procedural arrangements and substantive standards already in place; however, some are new, at least to the federal jurisdiction. I am hopeful that all of them — if not individually, then taken together — will strike workers, unions, employers, the Labour Program and other informed readers of Part III as a sensible, affordable and even-handed treatment of this difficult area of workplace regulation.

4. FOUR MODELS OF REGULATED FLEXIBILITY

As John Dunlop — a distinguished American scholar and former Labour Secretary — famously noted, every workplace is governed by a "web of rule," a metaphor that is particularly apt in describing a system that combines flexibility and strong, predictable regulation. In this section, the focus is on how the web is woven, or at least that part of it that originates in Part III.

The present system of regulating working time can fairly be described as the ministerial model. Under Part III, the Minister is not only responsible for enforcing the statutory rules, but is also empowered to introduce flexibility into them by a system of regulations and permits that exempt certain enterprises, classes of workers or industries from particular statutory rules on an ongoing basis or for finite periods of time. The Minister has considerable scope to act on his or her own initiative, but in practice, generally acts in response to requests made by employers and, on occasion, workers. The ministerial model has been criticized by different stakeholders in different ways — as being sometimes too slow and cumbersome, perfunctory or opaque and, on occasion, even unfair. I address these criticisms and suggest how the ministerial model can be improved.

However, my principal recommendation is to provide as alternatives to the ministerial model two other models — the sectoral model and the workplace model. Under these two models, responsibilities for achieving flexibility are more appropriately divided between the Minister on the one hand, and unions, workers and employers on the other; ministerial oversight and approval functions are simplified and streamlined but also made less perfunctory; and fail-safe mechanisms are introduced, which should lend greater speed, transparency and clarity to the system. At very least, even if the ministerial model is retained as a default mechanism, these two additional and complementary models of regulated flexibility should be enacted and made available to those who wish to use them.

The sectoral model is based on the conviction that many regulatory problems relating to working time — and other problems, as well — flow from the structure of particular industries or sectors. This is true in three senses. First, requirements for flexibility often result from the nature of the service provided by the industry — the vulnerability of airline schedules to disruption due to weather conditions, for example, or the need for railways to run freight trains round-the-clock. Second, unless all enterprises in the sector are regulated by the same rules and have access to the same mechanisms for securing greater flexibility, they may be pressured to compete with each other by reducing labour standards. And third, other actors in the sector — unions and workers, obviously, but also groups such as independent contractors — are directly affected by the regulatory regime and should have a voice in any amendments to it. These considerations shape the

proposed new system of sectoral regulation, which enables the participants to address a broad range of issues and ensures that all enterprises in the sector compete on a level playing field.

The workplace model locates the mechanisms for balancing predictability and flexibility closest to those most directly affected — employers and workers. This is also the location of another important balancing mechanism, collective bargaining, whose role in the workplace model is acknowledged in my recommendations. The great virtue of the workplace model is that it enables rules to be fine-tuned to match the business strategies and operational requirements of particular firms, as well as the needs and preferences of particular groups of workers. In the workplace model that I propose, this fine-tuning can take place with relative speed and informality, providing certain conditions are met.

The fourth model discussed below is the consensual flexibility model, a model that largely abandons attempts to regulate the workplace and accepts as legitimate whatever contractual arrangements are entered into between individual workers and employers. Despite its appeal, for reasons explored in my discussion of that model, I find its potential application quite limited.

A. THE MINISTERIAL MODEL

The provisions of Part III that deal with vacations, holidays and leaves provide little scope for ministerial action. Generally these provisions do not contemplate variations or exemptions except in limited circumstances defined in the statute itself; nor should they. However, the Governor in Council — effectively the Minister of Labour — does contribute to the flexible implementation of these time-related provisions by enacting regulations that define who is entitled, how entitlements are to be calculated, and in one or two instances, how the statute is to operate in exceptional circumstances. These provisions are dealt with extensively in section 5 of this chapter.

By contrast, the provisions that deal with the regulation of hours of work are built around the ministerial model, which operates at three levels. First, the statute establishes rules of general application; second, it empowers the Governor in Council to enact regulations that permit variations to those rules for specific sectors or classes of employees; and third, it allows exceptions to those rules for individual enterprises by ministerial permit or subject to ministerial review, under defined circumstances and after compliance with specified procedures.

Part III lays down standard hours of work after which overtime rates must be paid (eight hours per day and 40 hours per week) as well as maximum hours (48 hours per week). These provisions are subject to variations and

exceptions written into the statute itself, such as those dealing with emergency work. However, the Minister may also introduce further variations and exceptions in order to enhance the flexibility of the statutory scheme. A detailed summary of these exceptions and variations is provided in Appendix Eight. The system of flexibility created under the ministerial model can be described as follows:

- The Minister may grant exceptions to maximum hours and standard hours provisions in the statute by enacting a regulation that covers an entire sector or class of workers or a single enterprise, if the application of the statutory provisions "would be…unduly prejudicial to the interests of the employees…or seriously detrimental to the operation" of the enterprise, or if the provisions "cannot reasonably be applied" or where "work practices…are followed which make the application of [the provisions] unreasonable or inequitable." Regulations can be enacted on the Minister's own initiative, and presumably, at the request of employers or workers. However, prior to enacting a regulation, the Minister must, in most cases, await the report of an inquiry "into and concerning the employment of employees liable to be affected…" A number of such regulations have in fact been enacted, including those varying hours of work in road transportation, and exempting many marine, rail and road transportation workers from maximum and standard hours rules.
- Federally regulated enterprises can also apply for a ministerial permit to exceed maximum hours, if justified by "exceptional circumstances." The Minister, in granting a permit, must have regard to "the conditions of employment in any industrial establishment and the welfare of the employees."
- Standard and maximum hours of work can be varied through so-called averaging arrangements. Where there is an operational necessity for irregular distribution of hours, such that employees either have no regularly scheduled hours or their regular hours vary from time to time, an employer may unilaterally introduce an averaging arrangement. The effect of such an arrangement is that the average hours worked by an employee will conform to the statutory norm when calculated over a period of weeks or months. The employer is required to post the details of such arrangements and notify the Minister 30 days prior to introducing them. The Minister may, of course, intervene on the grounds that there is no operational requirement for averaging, or that the scheme proposed does not in fact respect the statutory norms.

The employer is also required to notify any union representing affected employees so that it can negotiate for appropriate modifications to its collective agreement. Averaging arrangements can last only as long as the conditions necessitating the irregular distribution of hours, but in any event, for no more than three years. In practice, however, in sectors where continuous operations are the norm, these arrangements often remain in place indefinitely.

- Modified work schedules can also be instituted with the consent of the workers affected by them. In unionized environments, consent is obtained through collective bargaining. In non-unionized environments, the employer is required to obtain the approval of 70% of the affected employees. If only a single employee is affected, the consent of that employee suffices. The ministerial model provides no ongoing oversight of these arrangements.

Many employer and worker representatives expressed concerns about the ministerial model. Employers argued that some of its procedures are too time-consuming and cumbersome, that it makes it difficult for employers to accommodate individual employees who request variations in their hours of work, and that the limitations it places on variations from standard hours rules are out of touch with current workplace expectations and practices. Some employee representatives opposed on principle all forms of flexibility around hours of work. Others recognized that some adjustments to the rules may be necessary, and may indeed serve the interests of employees. However, even those who acknowledged the need for some flexibility often argued that the present criteria for allowing exceptions to hours of work rules through permits or by regulation are excessively vague, that the scope of unilateral employer action to implement averaging arrangements or modified work schedules is too wide, and that the system needs greater transparency and more aggressive oversight.

Finally, from a public policy perspective, a number of features of the ministerial system are unsatisfactory. Delays in the excess hours permit system often mean that approval cannot be obtained before the work needs to be done. Employer decisions to institute averaging arrangements based on operational necessity may be implemented with very little scrutiny, although they involve extensive adjustments to regular and maximum hours rules. The level of support required for voluntary modified work schedules may be so difficult to obtain that employers may decline to seek it, thus precluding arrangements that might be of value to both employers and employees.

However, once such schedules are adopted, there are neither reporting requirements nor monitoring processes to ensure that they are not abused. And some rules, such as those requiring that overtime be compensated through pay rather than time in lieu, cannot be varied at all, despite the fact that both employers and employees might prefer greater flexibility (and often agree to it not withstanding the statute).

The requirement of ministerial approval of permits is also unsatisfactory in that it creates the impression that the Minister will personally consider the matter, even though it is effectively decided by officials who report to the Minister. Moreover, many exceptions to or variations in hours of work rules can legally be made with little or no participation by affected workers or employers. True, in some cases the statute mandates the holding of an inquiry, and where it does not, Ministry officials routinely consult the workplace parties. However, inquiries and consultations conducted by third parties do not necessarily afford employers and workers an opportunity to hold direct discussions, share information, exchange viewpoints, or build consensus.

Unfortunately, Part III does little to encourage genuine workplace-level interaction between workers and employers on issues relating to working time. For example, in situations of operational necessity, employers may unilaterally institute and maintain averaging schedules for up to three years with no requirement to consult with the employees involved. Not only does this put the statutory policies at risk and potentially disadvantage the workers; it deprives the employer of the benefit of their informed opinions and advice.

Even when Part III purports to create incentives for interaction between employers and workers, it does so in ways that are less than satisfactory. For example, in "exceptional circumstances" employers are entitled to apply for a permit allowing them to schedule employees to work excess hours, However, the requirements that employees be given 30 days advance notice of an application, and that the application receive ministerial approval prior to the introduction of the new schedule, create the possibility that the "exceptional circumstances" will have ceased to exist before the excess hours can legally be worked. Further, employers may institute modified work schedules with the consent of their employees rather than on the basis of a ministerial permit. However, while the statute requires that "consent" must be manifest by 70% of the affected employees, it neither requires prior consultation with them nor affords them the opportunity to put forward alternative approaches. Indeed, in a sense, the 70% supermajority requirement actually stands in the way of mutual agreement by allowing a relatively small minority of workers to veto arrangements that are acceptable to a significant majority.

Of course, these problems are largely mitigated in unionized workplaces through the inherent checks and balances of the collective bargaining process. However, the majority of workers under Part III are not unionized, unionization is not expanding in the federal sector and, in any event, super-majorities are a relatively crude substitute for dialogue and problem solving.

To sum up these concerns with the ministerial model, it too rigidly constrains initiatives by employers, workers and unions to devise and implement flexible and mutually agreed arrangements regarding working hours at either the workplace or the sectoral level. That said, the reasons for rigidity are obvious enough. If some employers are allowed to depart from the statutory rules, others, invoking the level-playing-field principle, will press for similar variances. And if variations are allowed on the basis that a worker or group of workers has consented, some employers will likely use their bargaining strength to coerce consent. Consequently, Part III relies heavily on the Minister to enable variations by enacting regulations, or by issuing permits, or by monitoring unilateral employer action to ensure that it keeps within the bounds laid down by statute.

But this reliance on the Minister creates problems, too. Under Part III, the Minister may intervene to provide flexibility when conditions are "unduly prejudicial" or "unreasonable or inequitable" after determining what is required for "the welfare of employees." These terms are very open-ended and confer almost unlimited discretion on the Minister or the officials who act on his or her behalf. The absence of more precise benchmarks for triggering flexibility measures creates a situation in which decisions must often be made out of context, at some distance from the workplace, and without direct contact between the decision-maker and the workers and employer who know a great deal about what is "unreasonable" or what does or does not contribute to "the welfare of employees." Worst of all, such language provides officials little practical guidance in the exercise of their discretion, makes consistency impossible and accountability difficult, introduces a great deal of uncertainty into the system, and tempts employers to try their luck with schemes they can manage themselves or with ministerial approval, rather than construct mutually agreeable solutions in consultation with their workers.

The sectoral model and the workplace model, explored below, differ from the ministerial model in one crucial respect: they assign both employers and workers a role in regulating working time. I believe that this approach has great potential, for reasons I explain below. However, I also recognize that models based upon consultation and dialogue may not be suitable in every case, and in any event, depend on the willing participation of the parties, which may not always be forthcoming. It is therefore appropriate to retain the flexibility mechanisms of the current ministerial model as an option. However, steps should be taken to remedy the defects of that model.

RECOMMENDATION 7.1 The provisions of Part III that authorize variations in standard and maximum hours of work or work weeks — the statutory standard — should be simplified and consolidated.

RECOMMENDATION 7.2 Variations in the statutory standard should be allowed only to the extent, for the reasons and in accordance with the procedures prescribed in the statute itself or by ministerial regulations.

RECOMMENDATION 7.3 The grounds justifying such variations should be set out in the statute, or in ministerial regulations, with greater precision than at present. These grounds should take the form of a codification of criteria presently used to justify regulations or approve permits, and might include the cyclical, seasonal or continuous nature of operations, technological or other operational requirements, the need to maintain service to customers or contact with suppliers, or similar operational necessities.

The grounds for not permitting variations should also be set out in the statute or in regulations with greater precision than at present. These grounds might include the effect of a proposed departure on the welfare of employees, including their health, well-being, safety and ability to meet family responsibilities.

In order to ensure that the statutory procedures for variations or adjustments are observed and the statutory conditions are complied with, employers should be subject to either scrutiny in advance or scrutiny after the fact. Scrutiny in advance occurs when the employer seeks a ministerial permit.

RECOMMENDATION 7.4 When determining whether to grant or deny a permit, the Minister should provide interested parties with an opportunity to make their views known, weigh up the competing considerations and allow variations or adjustments only if on balance a reasonable case has been put forward for doing so.

Scrutiny after the fact may be more appropriate if the employer has involved other parties in a consultative or negotiating process, and has complied with all procedures required by statute to ensure the proper working of that process.

RECOMMENDATION 7.5 No permit should be required for variations authorized by a collective agreement, or arrived at through the sectoral or workplace procedures described in Recommendations 7.12 to 7.29. However, the Labour Program should be notified of such variations, maintain records of them, subject them to occasional audit or other oversight procedures and ensure that they do not violate any substantive provisions of Part III.

Situations where employers are allowed to institute variations unilaterally, without the participation of another party and without a ministerial permit, require special vigilance. The most obvious example under the present provisions of Part III is the averaging procedure described above. The provision for modified work schedules is another example.

RECOMMENDATION 7.6 Prior to initiating an averaging scheme or modified work schedule, the employer should be required to provide the Regional Director with:

(i) a notice setting out the terms and proposed duration of the scheme;

(ii) a statement disclosing the grounds on which the scheme has been instituted and the procedures, if any, adopted by the employer to ascertain employee support; and

(iii) an undertaking to discontinue the scheme if the conditions justifying it expire.

To ensure compliance with these provisions, the Regional Director should maintain active oversight of averaging and modified work schedule schemes, and from time to time, conduct random audits of workplaces that are subject to such schemes. Non-compliance should be regarded as a violation of the statute, should result in cancellation of the scheme, and should disqualify the employer from applying to initiate a new scheme for up to six months.

My sense is that variations in and adjustments to statutory standards — however instituted — are not only extensive but fairly routine. This undermines respect for labour standards and creates a climate in which compliance is no longer regarded as appropriate, even by those who have not been authorized to depart from the statutory standard. One way of ensuring that this does not happen is to require employers, workers and the Labour Program itself to pay closer and more frequent attention to the exceptional nature of authorized variations. I believe that this can be done without imposing undue administrative burdens on either employers or regulators.

RECOMMENDATION 7.7 All variations from or adjustments to the statutory standard through averaging, permits or modified work schedules should be limited to one year's duration, except in the following cases:

(i) when they have been instituted by an employer under the terms of the present legislation, for the unexpired portion of that scheme or schedule;

(ii) when they are contained in the provisions of a collective agreement, for the duration of that agreement or for the period of time specified in it; or

(iii) when they result from the operation of workplace adjustment procedures described in Recommendation 7.20, for the term agreed, or, if no term is agreed, for three years.

RECOMMENDATION 7.8 When an employer seeks renewal of a permit, the Minister should presume that renewal is appropriate unless:

(i) the Minister has reason to believe that conditions have changed since the permit was originally issued;

(ii) the employer has exceeded the variation authorized by the previous permit; or

(iii) the employer has been guilty of an unfair labour practice under Part III.

RECOMMENDATION 7.9 The Labour Program should introduce expedited procedures, including on-line applications, to ensure that employers are able to receive permits and renewals with reasonable dispatch. These procedures might include a default arrangement whereby an employer is entitled to a temporary permit in the event of undue delay. The Minister should delegate power to issue permits to a senior official of the Labour Program.

RECOMMENDATION 7.10 The Minister should create a publicly accessible on-line register of notices, permits and regulations. The Minister should review the register at intervals of no more than three years to determine whether a significant proportion of the employers in any sector have received permits. If this is the case, the Minister should seek the advice of a sectoral conference or an Industrial Inquiry Commission as to whether the matters dealt with in notices or permits should be dealt with instead by way of a regulation applicable to that sector.

Because variations through ministerial regulations are usually enacted after a report by a Commissioner, which ensures some public airing of the issues, it is not necessary to review them with the same frequency as other types of variations. However, as a matter of good policy-making, they too should be reviewed from time to time with a view to ensuring that the underlying factual assumptions have not changed, and that the policies sought to be implemented are in fact being implemented and producing the desired results.

RECOMMENDATION 7.11 Ministerial regulations that authorize departures from the statutory standard should, as a general rule, be reviewed every five years. Interested parties should be given notice of the review and afforded an opportunity to contribute to it.

With these refinements, the present ministerial model would function more transparently, more accountably, more fairly and — I believe — more speedily and smoothly. Employers who prefer to avoid the proposed workplace model (outlined below) could do so, and workers seeking assurance that their concerns and interests were being taken into account would have greater confidence that this was the case.

B. THE SECTORAL MODEL

As noted earlier, the introduction of flexibility at a sectoral level may have important advantages. Compared with a statute or regulation of general application to all employers and workers in the federal domain, sectoral adjustments can take account of the unique structural and other characteristics that give rise to regulatory difficulties in particular types of employment and business conditions. Compared with workplace-level adjustment, the sectoral approach can engage a wider range of participants, address a broader spectrum of concerns, bring more extensive expert resources to bear on the issues, and better maintain a level playing field among competing enterprises. And finally, as I suggest in Chapter Eleven, sectoral procedures have the beneficial side effect of contributing to more positive relations among the significant actors in a particular part of the economy.

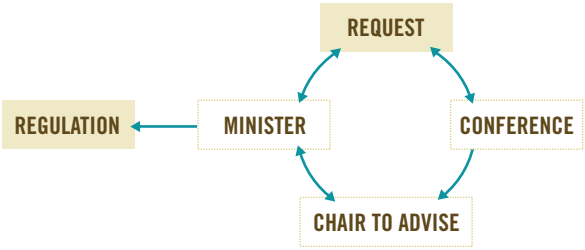
RECOMMENDATION 7.12 The Minister should be authorized to convene on his or her own initiative, or at the request of interested parties, a sectoral conference to consider adjustments to the regulation of working time or to any other provisions of Part III that contemplate sectoral adjustments. The advice or recommendations of the sectoral conference will have effect only if approved by the Minister and promulgated in the form of a regulation.

This recommendation does not represent a radical innovation. The possibility of providing flexibility at the sectoral level is already implicit in Part III, which authorizes the Minister to make orders that "apply generally or in particular cases or…to classes of employees or industrial establishments." Moreover, ministerial regulations introducing elements of flexibility into the control of working time may be made with regard to "classes of employees." As noted, this authority has already produced sector-specific regulations concerning working time in several sectors. The Minister is also authorized to establish "consultative or advisory committees to advise…on any matters arising in relation to the administration of [Part III]" and has done so on many occasions. And finally, the Minister is already required to "cause an inquiry to be made" and to consider the resulting report before making certain kinds of regulations respecting working time.

At least some employer groups seem well disposed to the sectoral approach. For example, the Canadian Trucking Alliance proposed a special "Trucking Industry Part III." However, even though the sectoral approach has been used in Quebec for decades, was a crucial feature of Ontario's now-repealed *Industrial Standards Act* and has been proposed and implemented in the labour standards legislation of other jurisdictions, it would be fair to say that it is neither widely understood nor universally accepted. Unions, in particular, seem concerned that sectoral conferences would be dominated by employers, especially in sectors without a significant union presence.

Notwithstanding these reservations, I believe that if the procedures for convening sectoral conferences are properly designed, and if the recommendations that emerge from sectoral conferences are subject to appropriate scrutiny, sectoral standard setting has much to recommend it. Indeed, it is difficult to believe that anyone would prefer that the Minister exercise his or her powers to make sectoral regulations having had recourse only to the imperfect consultative machinery now provided under Part III.

The arrangements described in the following diagram and text are designed to provide appropriate assurances that sectoral conferences will be well-informed, orderly and transparent consultations among interested parties, and that their recommendations will be fair, reasonable and responsive to the interests of workers and employers.



- Chair/Commissioner
- sector (open-ended)
- informed
- participatory
- transparent
- criteria to evaluate advice
- force of law
- fixed duration

Sectoral conferences should operate within a fairly loose framework of understandings.

RECOMMENDATION 7.13 Before implementing any future regulatory provisions directed to "classes of employees" or sectorally based categories of employers, the Minister of Labour should convene a conference involving all significant interested parties in the sector, class or category that would be affected.

The Minister should have discretion to define the boundaries of the sector, to set the agenda of the conference and to determine who is an "interested party."

"Interested parties" might include employers' associations, trade unions, associations of unorganized workers, autonomous workers and independent contractors, and spokespersons appointed to represent the interests of workers and employers who are not represented by any organization. In appropriate cases, organizations with special expertise in the matter being discussed might also be invited to participate as observers or advisors.

RECOMMENDATION 7.14 The Minister would appoint a Chair for each sectoral conference, who would hold the title and exercise the powers of a Commissioner under Part III.

The Chair would be supported by a secretariat and technical experts or advisors who would make enquiries, conduct any research the Chair deems relevant and prepare reports and position papers for the Chair and the conference participants, preferably in advance of the conference. The Minister, in consultation with the Chair, should lay down a firm schedule for the proceedings appropriate to the nature of the matters under discussion, so that the conference operates with some sense of urgency. One of the principal tasks of the Chair should be to promote dialogue and, if possible, consensus, among the conference participants; to ascertain and record their views; and to report them to the Minister.

RECOMMENDATION 7.15 The Chair should prepare a report advising the Minister as to whether proposed adjustments to labour standards should be implemented, or whether some other approach should be pursued with regard to the issues giving rise to the conference.

RECOMMENDATION 7.16 The Minister should be free to accept the advice of the Chair in whole or in part, or to reject the advice. To the extent the advice is accepted by the Minister, it should be implemented by the enactment of a regulation that would have the force of law.

To avoid any misunderstanding, sectoral conferences would have the power to recommend adjustments to the provisions of Part III only where the legislation itself contemplates such adjustments. Consequently, such matters as minimum wages, vacations, statutory holidays and leaves would not be subject to sectoral adjustment procedures. On the other hand, I have recommended in Chapter Four, for example, that limited coverage under Part III might be extended on a sectoral basis to autonomous workers. A sectoral conference would have to be convened in order to implement this recommendation.

C. THE WORKPLACE MODEL

Numerous employer briefs maintained that the present ministerial system prevents them from working out appropriate and mutually agreed arrangements with their employees. I accept this position. So long as workplace-level arrangements are in fact "appropriate" in the sense that they protect the fundamental rights and interests of employees, and are actually "agreed" in the sense that employees freely give their informed consent, there is much to be said for relaxing direct ministerial regulation. This, presumably, is the logic of several provisions of Part III, which give employers and unions considerable latitude to adopt working time rules through the collective bargaining process.

However, it is not easy to see how discussions between employers and workers might be structured in the absence of a union. Unions solve certain problems that might otherwise complicate such discussions. They identify the workers' authorized spokespersons; they place information and technical expertise at their disposal; they provide mechanisms by which the rest of the workforce can approve or disapprove of the position taken by their representatives; and of course, they even out discrepancies in power that might otherwise cause workers to agree to things that are not in their interest.

On the other hand, if these problems can be solved, the potential gains for workers and employers are considerable. Workplace-level arrangements allow for statutory standards to be customized so that they suit the needs of real life workers and employers rather than hypothetical average workers and employers; they can mobilize the first-hand knowledge of local conditions that both sides bring to the table to produce better practical outcomes; they are potentially faster than the present ministerial model; they shift the burden of devising solutions to those who have to live with them; and they are more transparent to all workplace parties than either ministerial decrees or unilateral action by the employer.

Such a system might provide indirect advantages as well. A significant body of research suggests that consultative practices can help to reduce workplace irritants that impair employee morale, engagement and productivity. Indeed, without such practices it is difficult to see how concerns about work–life balance issues can be met; on the contrary, if all innovative arrangements designed to accommodate employee needs and desires were forced through the regulatory process under Part III, the statute would operate as a deterrent to innovation.

Many enlightened — and self-interested — employers understand these potential advantages and have experimented with strategies for taking the measure of employee preferences concerning working time issues. Focus groups and questionnaires are fairly widely used in large businesses; non-union employee representation committees are by no means unknown; and of course in small workplaces, direct discussion between workers and employers remains possible. These developments offer some hints as to how workplace consultations might be organized. However, union representatives and others remain sceptical about the extent to which employers are likely to dominate workplace-level discussions and use the appearance of agreement to legitimate whatever arrangements management itself would prefer to put in place. They maintain — and I accept — that agreements between individual workers and their employers are especially vulnerable to the effects of undue influence. And there is always the possibility that even a genuine agreement between workers and employers might not be in the public interest. These are understandable concerns, and they too must be taken into account.

Part III at present provides only minimal, and somewhat crude, mechanisms for workers to express their preferences with regard to working time issues. It mandates employers to consult with workers concerning the development of sexual harassment policies, and it provides for joint consultative committees to deal with group terminations. In addition, Part II of the *Canada Labour Code* mandates the establishment of workplace-level committees to deal with occupational health and safety issues. None of these consultative mechanisms, apparently, would justify great optimism concerning the experiment in workplace-level consultation that I am proposing. However, each of them operates in a different context, deals with different problems and is constructed on a design different from the one outlined below. Moreover, various approaches to workplace consultation seem to be operating with some success in a number of non-union settings such as the banking sector, which includes some 30% of all workers covered by Part III, as well as in a host of foreign jurisdictions. I am therefore persuaded that it is necessary to establish a new workplace-level process to deal with the complex issues of the regulation of working time.

RECOMMENDATION 7.17 Part III should be amended to facilitate consultation between employers and workers concerning any statutorily permitted variation from working time standards.

The challenge of course is to design a workplace mechanism that meets the needs of the parties for flexibility while ensuring that the fundamental principles underlying Part III are respected. I believe that this can be done, provided first, that variations from statutory standards amount to customizing — rather than repealing or undermining — those standards so that they better suit the parties' needs; second, that adjustment procedures are informed, participatory, transparent and free from coercion, misrepresentation or fraud; and third, that regulatory oversight is maintained to ensure that process rules are respected and substantive outcomes are consistent with the legislation. I discuss each of these matters in turn.

To ensure that the new workplace consultation procedures are used to customize, not overturn or undermine, the statutory standards, it is necessary to define the scope of the process with some care.

RECOMMENDATION 7.18 The new workplace consultative process should be available as an alternative to existing statutory procedures of Part III, which now permit or require employers to consult with their workers on working time issues, permit workers to vote on such issues or allow employers to vary statutory standards unilaterally or on the basis of a ministerial permit. In addition, the new process should extend to variations in other standards, including rules on time off in lieu of overtime pay, notice of shift changes, timing of rest periods, rules on the fractioning of vacations and other matters of comparable significance.

RECOMMENDATION 7.19 Where workers are represented by a trade union, the scope and manner of the workplace consultative process should be determined under the law of collective bargaining.

The use of the consultative mechanism to address particular issues, as well as limitations on its use, is discussed in the next part of this chapter. If the process comes to be regarded in a positive light by workers and employers, employers may decide to expand the range of subjects appropriate for consultation to include other aspects of the employment relationship not covered by Part III. However, they are under no obligation to do so, nor are they bound to accept the outcome of any such consultation.

The effect of the new process will be to animate and systematize the existing limited opportunities for worker involvement under Part III. The first concern should therefore be to ensure that workers are appropriately and effectively represented. This is not a concern when workers are represented by a trade union for collective bargaining purposes. However, where no union holds bargaining rights, workers should be represented by a new body, the Workplace Consultative Committee (WCC).

RECOMMENDATION 7.20 In any non-union workplace in which the employer wishes to initiate workplace-level consultations, the employer may form a Workplace Consultative Committee (WCC). The WCC must be broadly representative of the workers affected by the matters under discussion. It can be formed by nomination, election or lottery, by volunteers, or in any other manner, so long as the employer does not attempt to control the outcome of the consultation through its selection of WCC members. In any workplace in which fewer than twenty workers are employed, the employer may elect to conduct the consultation by means of meetings open to all employees.

RECOMMENDATION 7.21 The employer should be allowed to establish a timetable for consultation, allowing adequate time for the various steps, and should be allowed to terminate the process if it does not conclude within a reasonable period.

RECOMMENDATION 7.22 If a union represents affected workers in the workplace, the employer must conduct workplace-level consultations with the union, which, in respect of those workers, retains all of its authority and powers under the *Canada Labour Code*, Part I.

RECOMMENDATION 7.23 Members of the Workplace Consultative Committee should be given paid time off from their work in order to participate in its activities, and should be protected against reprisals by the employer related to such participation.

RECOMMENDATION 7.24 The Workplace Consultative Committee should hear and consider all proposals put forward by the employer; it should be entitled to request and receive relevant information concerning the need for and consequences of the proposals; and it should be allowed to offer its own suggestions concerning the matters under discussion by way of amendments to the employer's proposals.

Because many employers already have workplace consultation procedures in place, I hesitate to prescribe the detailed means by which employee views should be solicited. For example, if the employer has already established a system for surveying employee preferences, the role of the WCC might be to vet the survey instrument and to help to interpret the results. If no such system exists, the WCC might choose to initiate a series of meetings with workers, to launch a website and invite electronic submissions, or to use some other method that seems appropriate to the issue and the circumstances. WCCs should be especially careful to ensure that the interests of employees in different locations and of all occupational and demographic groups affected by the proposal(s) receive consideration during the consultative process. Otherwise, the employer and the WCC should be left free to devise their own arrangements.

However, given the necessarily idiosyncratic and improvised nature of the consultative process, it should conclude with a fair and democratic opportunity for affected workers to express their views.

RECOMMENDATION 7.25 Upon conclusion of the consultative process, or upon expiry of the time allotted for it, the Workplace Consultative Committee and the employer should prepare and submit to a secret ballot vote of the employees affected one or more proposals concerning the matters under discussion. In advance of the ballot, each employee should receive a brief, written statement of the issues and of the proposals to be voted on. If a proposal receives 50% + 1 of the votes cast, notice of approval should be forwarded to the Regional Director of the Labour Program.

If the employer withdraws the proposal from consideration rather than allowing amendments proposed by the Workplace Consultative Committee to be voted on, if the process is terminated because of time delays, or if the proposal is not approved by the necessary majority, it will have no effect.

If the employer withdraws the proposal from consideration, the employer will be precluded from implementing changes to working time arrangements pursuant to any other statutory procedures for a period of six months.

If the workers are represented by a union, the union should follow its normal process for consideration and approval of the proposal.

In light of the disparity of power between the employer and a WCC, it is important to discourage employer attempts to manipulate or abuse the process.

RECOMMENDATION 7.26 Any attempt by the employer to determine the outcome of the consultation or the ballot by manipulating the selection of the members of the Workplace Consultative Committee or by the use of coercion, undue influence or misrepresentation should be regarded as an unfair labour practice. Similar conduct by the employer in connection with securing 70% support for its proposals for a modified work week should be also be regarded as an unfair labour practice.

In order to ensure that the process functions as intended, and that it produces proposals for modifying work schedules or other matters that are lawful and that fall within its mandate, the Labour Program should retain active oversight of its operation.

RECOMMENDATION 7.27 No approval of a proposal for modifying work schedules should take effect until a notice of approval has been filed with the Regional Director.

RECOMMENDATION 7.28 The Regional Director should maintain a file of all proposals approved through the workplace consultation process, and should develop periodic assessments of how the system is working overall.

The Regional Director may, upon receiving a complaint, or randomly from time to time, audit any approval on file in order to verify that the Workplace Consultative Committee was properly constituted, that the employer did not engage in forbidden conduct, that the ballot was secret and that the required majority of affected workers voted in favour of the proposal. The Regional Director may also determine whether any proposal is in violation of the provisions of Part III. Any proposal that is in violation should be deemed void.

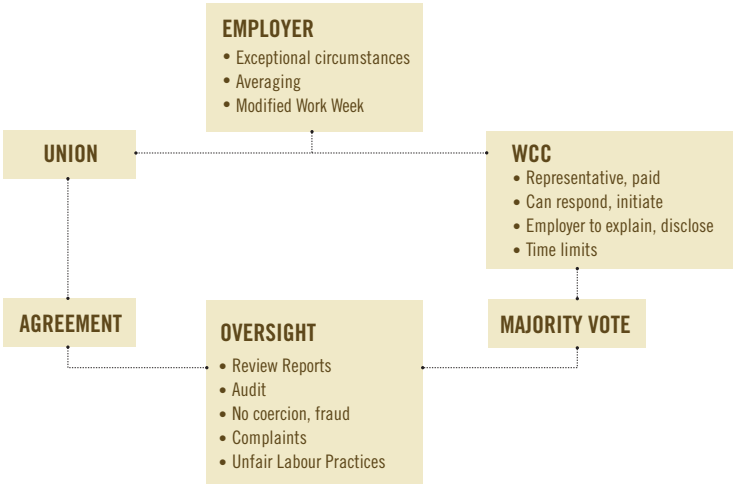
RECOMMENDATION 7.29 Proposals lawfully approved and filed with the Regional Director should have effect for three years or for any longer or shorter period specified in the proposal itself.

Finally, it is particularly important for the ultimate success of the scheme that early attempts to utilize the workplace consultative mechanism should be facilitated by Labour Program staff. The Program should also make known the outcomes of initial experience with workplace consultation and inform employers and workers about its positive potential and, as well, its risks.

RECOMMENDATION 7.30 The Labour Program should prepare a guide for the use of employers and workers wishing to use the workplace consultation process that outlines its main features, provides suggestions concerning consultative strategies, and identifies features of the process that might facilitate or frustrate it.

The Labour Program should also offer to train worker and employer representatives and, at least initially until the process is well understood, to make a staff person available to the parties to assist them in organizing their consultation. Finally, the Labour Program should publicize the results of the process.

The following diagram illustrates how workplace consultation procedures would operate:



D. THE CONSENSUAL FLEXIBILITY MODEL

In addition to the three models of regulated flexibility described above, I was asked on several occasions to consider a fourth: to allow individual workers and employers to simply agree upon whatever arrangements concerning hours of work (or other matters) suited them best. Such individual, consensual arrangements, which might well be described as deregulated flexibility, seem to run contrary to one of the key provisions of Part III, which states that statutory labour standards must apply "notwithstanding any other law, or any custom, contract or arrangement." However, such arrangements are not without some appeal. After all, it is well known that individuals may ask employers to "bend the rules" to accommodate specific requests for flexibility in their working time arrangements; that employers, in all good faith, often respond positively to such requests; and that this may speak to very positive relations between employers and their employees.

However, such individual consensual arrangements involve significant risks: that employers may force vulnerable individuals to "request" or "agree" that their rights be surrendered; that employers may use the precedent of one employee's "rule-bending" to pressure others to do likewise; and that concessions to favoured employees may result in non-favoured employees having to assume heavier workloads or less acceptable working conditions.

I have therefore not accepted the notion that flexibility for workers and employers should be achieved by means of an expanded, general system based on individual, consensual arrangements. However, in the next section I do propose several specific situations in which individual arrangements can and should be allowed within a system of regulated flexibility.

5. CONTROL OVER TIME: A BALANCED SYSTEM OF SUBSTANTIVE RULES

In this section, I review the current substantive provisions of Part III relating to the control over time and propose a series of modest changes that will:

- permit employers to operate efficiently in a competitive environment;
- provide reasonable scope for employers to implement work schedules, such as those involving continuous operations, that require variation of standard or maximum hours of work;
- allow employers to deal with a broad range of emergency situations;
- enable workers to meet family, civic, educational or training needs and commitments by allowing them to protect time outside of their standard working hours, and to take reasonable job-protected leaves for those purposes;
- limit excessive hours of work;
- ensure workers reasonable notice of changes in their working hours; and
- modernize the requirements for breaks, holidays and vacations to accommodate religious, cultural, health and educational needs, and ensure that workers have access to a decent minimum amount of time for rest and recreation.

A. HOURS OF WORK

(1) Standard Workdays and Work Weeks

As noted in the previous section of this chapter, Part III establishes a standard eight-hour workday and 40-hour work week beyond which overtime rates apply, and imposes a 48-hour limit on weekly hours of work. (It also requires a minimum weekly rest period of 24 hours, a provision that will be discussed below). Maximum and standard hours of work are subject to a number of exclusions, industry-specific regulations, and recognized workplace practices, such as shift exchanges, as well as a variety of flexibility

measures to exceed maximum weekly hours, such as averaging and modified work schedules. Ministerial permits may also be issued under certain conditions. And employees may work in excess of the 48-hour maximum in defined emergency situations.

These provisions shape the routines of working life in many enterprises, demand considerable attention by worker and employer representatives and regulatory authorities, and were the subject of a large number of submissions to the Commission.

Some submissions — mainly but not exclusively from employer representatives — proposed that current standard workday and maximum work week provisions are unnecessarily restrictive, and that they should be repealed, or at least relaxed to the point where they would become much less intrusive. The current provisions, it was argued, involve too much bureaucracy for too little benefit, either to workers or employers. They not only prevent businesses from operating as efficiently as they should in today's competitive, 24/7 world; they also unnecessarily shackle employees who, for their own good reasons, want to work on idiosyncratic schedules or to exceed the present 48-hour maximum in order to increase their overtime earnings or to accumulate time-off "credits" redeemable at a later date. These significant critiques of the present system were mirrored by equal but opposite complaints — mainly but not exclusively from worker representatives: that Part III provides insufficient protection to workers and inadequate deterrence to employers with poor working time practices; and that it should be amended to reduce current thresholds for standard and maximum hours, set an annual cap on overtime hours, increase overtime rates to discourage the scheduling of long working hours, provide employees with an absolute right to refuse overtime, guarantee them daily breaks, and significantly curtail existing flexibility measures available to employers.

I examine both these positions as I review the existing and proposed substantive provisions of Part III. First, however, I want to stake out my own position on whether the fundamental building blocks of the regulation of working time under Part III ought to be retained, replaced or simply discarded.

I begin by reiterating the decency principle I proposed in Chapter Three: no one ought to be subject to indignity or unwarranted danger in the workplace, or be required to work so many hours that they are effectively denied a personal or civic life. This principle does not tell us precisely how many working hours a day or week ought to be the norm or the maximum, or at what point extra hours ought to be discouraged by requiring overtime to be paid at premium rates or forbidden altogether. However, it does tell us that there must be boundaries around working time, and that those boundaries should be fairly tightly patrolled. To be denied the right to take a break

for lunch or personal needs is to be subjected to indignity; to work so many hours that one's mental and physical faculties are depleted is dangerous; to be routinely prevented by work commitments from sharing domestic responsibilities with one's partner, from attending a meeting at the local school, or from simply relaxing at the end of a hard day's work is a *prima facie* violation of the decency principle. Other principles, other interests, are important too, and occasionally they put small dents in the decency principle; but they never deflate or destroy it.

The decency principle does not just speak to us from Chapter Three. The same principle is embedded in 200 years of labour standards legislation, and in the ILO Constitution and Conventions and other international legal regimes to which the federal government is a party. It is also inscribed in the actual work practices of many enterprises in the federal domain that meet or exceed the standards in Part III. Indeed, with a few sectoral exceptions, most federal employers have been able to operate within the existing parameters of Part III with relative ease, and those that have not have generally been able to use the flexibility mechanisms of Part III — for all their imperfections — to cope with the restrictions. No one told me that they could not operate profitably under the present statutory regime.

As noted, I was pressed to recommend that working time regulation should be much more stringent than it now is. Shorter hours, I was told, would improve the quality of life of workers and their families; would lead to employers having to hire more workers, including the unemployed, the underemployed and new labour market entrants; would reduce health care costs and contribute to community development; would improve productivity; would pay for themselves. These are large claims, although I believe that they can be sustained at least in part. However, while boldness is justified in order to ensure basic decency at work, greater caution seems in order when attempting to translate best practices into statutory requirements.

My recommendations, above, for streamlining the flexibility mechanisms should assist employers, though no doubt many would prefer to have even more freedom to schedule working hours as they please. My recommendations, below, for enhancing the rights of workers to fair treatment in connection with working hours, and for better protection of their non-working hours, should lead to a noticeable improvement in their situation, though certainly not to ideal arrangements. However, no case has been made, in my view, for departing significantly in either direction from the present standard workday and work week.

On the contrary, in an era when the work–life balance is increasingly acknowledged as an issue of economic and social importance, there is every reason to maintain these norms as a benchmark against which variations

can be measured. This is not to say that variations are always or usually inappropriate; it is only to say that an onus ought to fall on those who propose them to come forward with adequate justifications for intruding into the non-working lives of workers.

RECOMMENDATION 7.31 The current provisions of Part III establishing a standard eight-hour workday and 40-hour work week should be retained.

RECOMMENDATION 7.32 The current provisions of Part III that require employers to pay overtime pay for work performed outside the standard workday and work week should be retained.

RECOMMENDATION 7.33 The current provisions of Part III establishing 48 hours per week as the maximum work week should be retained.

While these provisions provide a clear and appropriate baseline for evaluating working hours policies and practices in specific sectors and enterprises, given the variety and volatility of situations in which they operate, some elaboration of them, and exceptions to them, must be provided. These are dealt with next.

(2) Special Sectoral Rules and Exemptions

A considerable debate arose during the Commission's hearings around the "one size fits (or does not fit) all" issue. To summarize that debate, on the one side there are those who contend that labour standards are basic rights that should be available to all workers wherever they happen to be employed; on the other are those who argue that to apply precisely the same regulations across the board, to all employers, is to strive for a uniformity that is not only unnecessary but utterly impractical. And to summarize my own conclusions: it ought to be possible to achieve equality of outcomes for workers by ensuring the equivalence of regulatory protections; however, equivalence must be based on an acknowledgement of differences in context. "Context," for me, means that a well-designed regulatory scheme ought to pay attention to the particularities of the technologies, markets, working procedures, physical environments and other factors that distinguish banking from busses, or airlines from artistic productions.

In section 4, above, I propose a new sectoral approach to setting labour standards. This approach has important advantages over possible alternatives, especially those that depend on unilateral changes by employers or applications for permits that require ministerial approval. First, given the presence of an impartial, expert Chair with sufficient staff and powers, the sectoral conference allows for a much better informed investigation of the arguments around proposed adjustments in the statutory standard than is feasible with an employer-by-employer approach. Second, the sectoral approach stands a better chance of permitting interested parties to participate on something approximating an equal basis than do workplace-level procedures in non-union workplaces. Third, sectoral adjustments level the playing field for all enterprises covered by them. Fourth, they avoid the administrative delays and costs associated with multiple applications by individual enterprises. And finally, the sectoral process is much more transparent, and the outcome — a ministerial regulation — a matter of public record.

That said, experience with sectoral approaches to date in the federal jurisdiction and elsewhere has not been completely satisfactory, nor will my recommendations allay all concerns about the future use of such approaches.

As mentioned earlier, special sectoral regulations already apply to motorized transportation, shipping, the railway running trades and commission salespeople in broadcasting and banking. Sectoral treatment of the first of these groups — transport workers — received considerable criticism during the Commission's hearings. Maximum hours of work for transport workers are not directly regulated under Part III. Rather, regulations under Part III reference the *Commercial Vehicle Drivers Hours of Service Regulations*, enacted by Transport Canada and enforced by the provinces. These regulations permit maximum driving times well in excess of 48 hours per week. As noted in Chapter Four, the purpose of this regulation is to promote the safety of truckers and other highway users — a subject on which Transport Canada is well informed and one on which it has a mandate to act. However, Transport Canada is not necessarily knowledgeable about workers' needs regarding work–life balance, the cumulative health impact of long hours of work and other matters that labour standards regulators must take into account. That is why I recommend in Chapter Four that the labour standards of transport drivers — and all other employees within federal jurisdiction — should be regulated under Part III rather than under some other statute. This, I believe, should reduce concerns that future regulations specific to the transport sector will suffer from the same defects as past regulations. Of course, Transport Canada may still require that any employee under Part III work shorter hours than the maximum permitted under Part III, if such a limitation is necessary for reasons of public safety or otherwise.

Turning to other concerns about the proposed system of sectoral conferences, I acknowledge that the absence of a significant union presence in some sectors creates a risk that employers will dominate the proceedings. On the other hand, this same risk exists under the present system where the Minister appoints a commissioner to report on matters that ultimately are dealt with in sectoral regulations. In fact, commissioners have developed various techniques for dealing with the problem of employer dominance — techniques that can be adapted for use in the new sectoral conference system, as well. The independent Chair can control the proceedings, can find ways of sampling the views of employees who are not formally represented, can conduct independent research, and can recommend to the Minister whatever she or he thinks appropriate based on all available information, not just based on the majority views of conference participants. Moreover, under the proposed system, the Minister may appoint spokespersons to represent unrepresented workers, and invite the participation of other persons and organizations — including independent contractors and organizations with special interests or expertise in the field. All of these techniques should assure that facts are brought forward, opinions widely canvassed and options carefully explored, before the Chair recommends that the Minister make regulations authorizing some adjustment of the statutory standards. I am therefore optimistic that those who have expressed concerns about a possible sectoral conference system will reconsider their position.

Finally, I return to the central issue with which I began. The rationale for allowing the Minister to make special regulations for different sectors is that conditions of work and of doing business differ so greatly from one sector to the other that applying the standard workday and work week to all sectors in the same way is simply not feasible. Two conclusions follow.

The first is that the objective of sectoral conferences ought to be to determine how working hours can be regulated in such a way as to facilitate the normal operating procedures of enterprises in a sector, while ensuring that workers employed in that sector enjoy working time arrangements that conform as closely as practicable to the statutory standard. In concrete terms, this may mean, for example, that flight crews or film producers do not work "bankers' hours" (nor do all bankers, for that matter); but that they work days and weeks that are as close to the statutory norm as sectoral conditions reasonably and realistically permit; that they are not worked to the point of exhaustion; and that they are assured time off from work at reasonably regular intervals to get on with the rest of their lives. It may also mean that if regular work schedules cannot meet these criteria, workers should receive some form of compensatory adjustment in their pay or working conditions. At least in the case of unorganized workers, it is not good enough to say that so long as workers are prepared to accept what the employer offers, there is no need for regulation.

The second is that a ministerial regulation adjusting statutory standards on a sectoral basis ought to be repealed, when and if the case for the regulation can no longer be sustained. However, law-abiding employers that may have constructed their employment relationship around these adjustments should be allowed a transitional period to re-arrange their employment practices, if the regulation is repealed.

RECOMMENDATION 7.34 The process to establish new exemptions from or special rules regarding hours of work or other labour standards should be based on the sectoral conference model. The same model should also be used to review existing exemptions and special rules. Repeal of, or changes to, existing regulations should be implemented gradually, bearing in mind the impact on both employers and employees.

RECOMMENDATION 7.35 As soon as reasonably possible, a sectoral conference should be convened to review the *Motor Vehicle Operators Hours of Work Regulations* and to determine appropriate hours of work provisions for transport drivers under Part III. Similar conferences should be convened to deal with groups, if any, whose hours of work are not now covered under Part III.

(3) Workplace-level Procedures for Adjusting Hours of Work Requirements through Averaging Schemes and Modified Work Schedules

I have already accepted that existing averaging and modified work schedule provisions should not be abolished outright. However, by suggesting that these provisions should be made more consultative, transparent and accessible to review, I have implicitly accepted the two main criticisms made against them: that employers are able to use these schemes in order to avoid the provisions of Part III that require overtime payment and fixed maximum hours of work; and that the Labour Program has not always maintained vigilant oversight of these schemes either before or after they have been initiated.

However, to reiterate a point made in the previous section, while I have recommended improvements in these employer-managed flexibility mechanisms, the right approach would be to achieve flexibility through better-designed workplace-level procedures using the consultative model based on Workplace Consultative Committees (WCC).

(4) Flexibility for Exceptional Circumstances: Ministerial Permits

Part III requires that employers obtain a ministerial permit before employees are allowed to work "in exceptional circumstances" more hours than the statutory maximum. The fact that the employer cannot implement excess hours schemes without a permit, unlike averaging or modified work schedules, suggests that the stakes are higher. And indeed they are: important issues of public policy are involved in allowing employees to work very long hours. One might therefore gain the impression that ministerial permits are hard to come by. Employers reinforce that impression by complaining that the approvals process is extremely time-consuming. However, applications for excess hours permits that reach the Minister's office are virtually never refused: there were only two rejections compared with 65 permits granted from April 1, 2002 to August 31, 2005.

This startling statistic can be explained in several ways: the Minister's decision-making process is more perfunctory than might be expected; or Labour Program staff weed out unmeritorious applications before they reach the Minister; or employers who cannot wait for approval simply proceed without it; or perhaps there are other explanations. Whatever the explanation, there appears to be something wrong with the present system. It surely cannot be right that employers should have to navigate a protracted process in order to receive a permit that, on current odds, they are likely to receive about 97% of the time. This arrangement is not only prejudicial to employers; it wastes the time of the Minister and senior officials and it fails to locate responsibility where it ought to be, and apparently is, exercised: by someone other than the Minister.

There are two possible approaches to reforming the permit system. The first — outlined in section 4, above — is to impose greater structure on the discretion to grant permits by setting out the grounds in the statute, and to delegate that discretion from the Minister to a senior Labour Program official, such as the Director of Operations. This should result in more prompt, but also more rigorous, scrutiny of applications for permits. The second is to allow the employer to negotiate excess working hours with a trade union that represents the employees affected, or as an alternative, to submit the excess hours issue to workplace-level consultation and, ultimately, a vote of the employees. Both approaches have some attractions, and both should be permitted, as I have already recommended.

(5) Emergencies

The emergency work provision in Part III has been designed to provide additional flexibility to employers. This flexibility is needed not only to deal with damaging and sometimes life-threatening emergencies in the workplace, but also to minimize potential disruptions to vital elements of the national infrastructure. However, changes in the organization of work and in business structures have shifted the locus of some emergencies from the employer's premises to the premises of suppliers of vital services such as information technology. They have also shifted the onus of performing emergency work from the employer's own workforce to workers employed by the supplier. Finally, the effects of the emergency may not fall on the employer or even the supplier, but on the employer's customers or, in some cases, the public.

All of these considerations require some broadening of the current provisions of Part III that presently allow an employer to require employees to work beyond the statutory maximum of hours only in the event of emergencies that occur on its own premises and in its own organization.

RECOMMENDATION 7.36 The definition of emergency work in Part III should be expanded to clearly specify that maximum hours of work may be exceeded to the extent necessary to deal with an emergency that poses a significant and immediate threat to human life, health or safety, or extensive and irreparable damage to property. However, emergencies should not include foreseeable or regularly recurring cyclical fluctuations in demand for the employer's goods or service.

In addition, the definition of emergency work should be expanded to cover urgent and essential work to assist customers facing similar emergencies.

(6) Rights and Obligations of Individual Employees

It is difficult to see how a fair and balanced system of time regulation can be built around choices made by individual workers. They generally have too little knowledge or power and too few resources to deal with their employer on anything resembling an equal basis. On the other hand, it is difficult to see how any fair and balanced system can ignore individual workers. Their work must be performed or not, their needs and wishes must be accommodated or not. Part III relies either on regulation by the state, or on giving workers a collective voice — through ballots, sectoral conferences, unions, or as I recommend, WCCs — to resolve this dilemma. However, Part III should provide some opportunities for individual workers to register their individual concerns, to make their individual decisions and to experience the consequences of those decisions for themselves.

(i) Limited Right to Refuse Overtime

Many presenters to the Commission argued that Part III should give workers the right to refuse overtime assignments. This would give employees more control over the number of hours they can be required to work, and when those hours would be worked. As a corollary, the ability of employers to schedule overtime, and to exceed maximum hours of work in certain circumstances, would have to be exercised in a way that took account of the preferences and commitments of workers.

However, I am aware that giving workers an absolute right to refuse overtime, applicable in any and all circumstances, could have a deleterious impact on employers, their customers, and the Canadian economy in general. Employers do need to resort to overtime, at least from time to time, to deal with unexpected situations, such as absenteeism or supply chain problems.

Four provinces already provide for such a right in their labour standards legislation, although the scope of this right and the conditions under which it can be exercised vary somewhat in each of these jurisdictions. As for the federal jurisdiction, I believe a first step would be to provide a general right to refuse overtime after a set number of hours in a day or in a week. But the weekly threshold should be aimed first and foremost at buttressing the 48-hour maximum work week provision. In that sense, it should be seen as counterbalancing greater employer flexibility to exceed maximum hours of work.

In light of the above, I recommend that the following employee rights be added to Part III.

RECOMMENDATION 7.37 An employee should have the right to refuse to work overtime if this would require him or her to work more than 48 hours per week or more than 12 hours per day, except in the event of an emergency or where some other threshold for refusing overtime is provided:

(i) in a ministerial regulation or excess hours permit;

(ii) pursuant to a collective agreement; or

(iii) under working rules approved by employees following consultation between the employer and a workplace consultative committee.

In order to facilitate transition to this new arrangement, employers that presently require employees to work overtime above the limits specified should be allowed to continue to do this for a period of one year following the coming into force of the new provisions.

The first of these rights may conceivably present difficulties in certain sectors or occupations where employees are presently scheduled to work more hours than contemplated in this recommendation under the authority of a regulation, modified work schedule or otherwise. It should therefore be fully implemented only following consultation at the sectoral level with regard to transitional arrangements.

In certain cases, an obligation to work overtime would be particularly harmful to the interests of employees and their families. Employees may face a domestic emergency if forced to work beyond regularly scheduled hours. For instance, a single parent may have to leave work to collect a child at the end of the school day, a concern that informs Quebec's labour standards legislation. Employees committed to attending educational or training programs at the end of the regular working day may also be particularly disadvantaged by an unexpected request to work overtime. Finally, part-time employees who have to hold several jobs in order to make ends meet could face scheduling conflicts if forced to work overtime by any one employer.

RECOMMENDATION 7.38 An employee should have the right to refuse to work beyond his or her regularly scheduled hours of work:

(i) if this would conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid;

(ii) if this would interfere with scheduled educational commitments; or

(iii) in the case of a part-time employee, if this would create a scheduling conflict with other employment.

(ii) Working Time Flexibility Measures to Accommodate Individual Employees

Flexibility measures in Part III need not serve only employer interests. As many research papers and submissions to the Commission demonstrated, employees could also benefit if new flexibility measures were added to Part III. Four key measures are modified work schedules, time off in lieu of overtime pay, time swaps, and a right to request changes to working time arrangements.

Modified work schedules for individual employees

Modified work schedules, discussed previously, may be instituted under present legislation for a single employee, with that employee's consent. However, there is no reason why such an arrangement should be available only on the employer's initiative. For example, an employee may wish

to work longer days in exchange for longer weekends, or take time off during the week to attend classes. Although such a compressed work week may not meet any immediate business needs, there is no obvious reason why the employee ought not to be allowed to request such a modified schedule, nor any reason why the employer ought not to be allowed to agree to it. Indeed, under the present statute, it is possible for an employer to do so. The statute should be amended to make this clear.

RECOMMENDATION 7.39 Part III should be amended to ensure that employers may accommodate genuine requests by individual employees for a modified work schedule.

Time off in lieu of overtime pay and banked overtime

Part III does not currently authorize an employer to agree with employees, or with their unions, that overtime be compensated with time off rather than with premium pay. Many briefs received by the Commission from various groups and individuals across the spectrum requested that Part III be amended to permit this arrangement, which is already lawful in seven Canadian jurisdictions and is found in numbers of workplaces in the federal domain, notwithstanding that it is not lawful there. This would allow employees to take additional time off with pay for leisure or to meet certain responsibilities. For employers, this may also lead to a marginal reduction in labour costs if time off is scheduled during slow periods.

RECOMMENDATION 7.40 Part III should permit an employee and his or her employer to agree that overtime hours will be compensated by time off with pay, at the rate of one and one half hours for every hour worked as overtime, to be taken at a time mutually agreeable to the employer and employee.

Whether overtime work is compensated in the form of premium pay or in the form of time off in lieu, its accumulation presents both opportunities and risks. As for opportunities, employees may wish to use banked overtime to provide them with pay while on unpaid leave under Part III, such as compassionate care leave. As to risks, "banked overtime" could be lost if an employer becomes insolvent, or defers paying it in either form, and then lays off or discharges the employee, or threatens to do so unless the employee surrenders his or her claim to overtime.

RECOMMENDATION 7.41 Banked overtime should be used or paid out in accordance with rules established by a collective agreement or developed by the employer in consultation with a Workplace Consultative Committee, or in the absence of either, within three months of being earned. However, an employee should have the right either to request an extension in writing or to seek immediate payment notwithstanding any other arrangement or rules. The employer should be obliged to pay banked overtime at the end of the pay period next following a request for payment.

RECOMMENDATION 7.42 Banked overtime should be deemed to be wages earned and owing under both Part III and Bill C-55, *An Act to Establish the Wage Earner Protection Program*.

Time swaps

Several employer briefs contended that employees wish to occasionally work additional hours on one day so that they can take time off on another day. This might provide employees with a greater measure of flexibility and enable them to attend one-off events, such as family celebrations. However, employers are concerned that they cannot accommodate such requests without being obligated to pay overtime, if the additional hours worked bring the employee over the daily or weekly overtime thresholds in Part III.

The statute does provide some scope for employers to accommodate such requests without risking exposure to overtime charges, provided they result either from modified work schedules or from an agreement between two employees to swap shifts. However, each of these exceptions to overtime limits is confined to specific objective circumstances, whereas the "time swap" proposal is not.

Any "time swap" at straight time rates should be permitted only where the employee so requests in writing, when the number of hours to be swapped is clearly stated in the request, and if any such request can subsequently be withdrawn at the employee's sole discretion. Time swaps should be an arrangement of last resort.

RECOMMENDATION 7.43 An employer should be allowed to permit an employee, upon his or her written request, to work in excess of daily or weekly standard hours of work at straight time rates, in order to make up for time off taken, or to be taken, at a time specified in the request. However, the employee should not be allowed to work more than 48 hours per week.

Right to request change to working time arrangements

Many workers would prefer to have different working time arrangements. Some part-time workers would like to work longer hours. Some full-time workers would like to work shorter hours. And some workers, while satisfied with the number of hours they work, seek more flexibility as to when and where they will be worked. The desire for change is often linked to the worker's concerns about child-rearing, education or care-giving, or about declining capacities associated with aging or recovery from a debilitating tragedy. Consequently, workers often seek temporary rather than permanent adjustments to their work schedules. Part III presently provides no mechanism to facilitate such adjustments.

Some argue that full-time employees should have the right to unilaterally reduce their hours of work or transfer from full-time to part-time work with no loss of pension rights or access to benefits, and then to return to full-time work at their own discretion. While no doubt such a right would assist workers who want to alter their work–life balance, its exercise could be quite disruptive and expensive for employers. Conversely, some suggest that part-time employees who want to work longer hours should have a priority claim on any additional working time that comes available, or that employers should be required to guarantee their part-time employees a minimum number of hours of work per week. While I am concerned about the vulnerability of part-time workers, I am reluctant to recommend measures that would force employers to assign particular work to them, at least in the absence of evidence that they are better equipped than anyone else to do that work. However, I have made recommendations in Chapter Ten that will remove or reduce incentives employers now have for retaining workers as part-timers rather than hiring them as full-timers.

I return, therefore, to the general question of how workers can go about altering their hours of work. A number of European countries, including the United Kingdom, affirm the legal right of workers to request that their employer vary the hours, times, and place of work in order to accommodate child caring and other needs. In the UK, this right is quite limited, since employers are given broad discretion to decline an employee's request. However, studies suggest that despite its discretionary character, the UK legislation has in fact prompted employers to be more willing to accept requests for accommodation. The explanation, it seems, is that employers are obligated to meet employees to discuss their request and to provide a written rationale for rejection within a specified period. In addition, the fact that workers enjoy legal protection against reprisals for making a request apparently makes them less reluctant to ask for changes.

I can see that establishing a similar right to request schedule changes in Part III might encourage federal domain employees and employers to discuss working time arrangements more openly and rationally, and to establish working schedules that are agreeable to both parties. Based on the UK experience, there is little likelihood of a down side for employers, and indeed, employees working on their preferred schedule are less likely to call in sick or to quit than those who are frustrated because they have no way to seek a change. Finally, under-employed part-time workers would at least have the chance to remind their employer of their value, and to make the case for more hours in an appropriate context.

RECOMMENDATION 7.44 Employees should be provided a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer would be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused in whole or in part. There would be no appeal of an employer's decision on the merits, although an employee could file a complaint if the employer has failed to adhere to the procedure.

Some employers might fear having to spend an inordinate amount of time responding to endless requests, particularly from newly hired employees who have only recently agreed to their work schedules. To limit potential administrative burdens:

RECOMMENDATION 7.45 The employer's obligation to respond to an employee's request should be limited to one request per calendar year, per employee. Employees should be entitled to invoke these provisions only after completing one year of service with the employer.

Maintaining the integrity of the system of working time arrangements for individual employees

Individualized working time arrangements give rise to at least some potential for abuse. Employers may disguise their own initiatives as requests from employees; genuine employee requests may be used to undermine arrangements agreed to by the group; and some practices, such as time-swaps, may be manipulated by employers to allow them to escape responsibility for premium overtime pay or other statutory obligations.

RECOMMENDATION 7.46 Employers should be required to maintain records of all individualized arrangements concerning working time, and to provide copies of such records to the employee concerned and, upon request, to the Labour Program.

RECOMMENDATION 7.47 Any attempt to coerce or mislead employees in connection with their individual requests for changes in working time arrangements, or to create the false impression that requests originate with an employee when they in fact originate with the employer, should be treated as an unfair labour practice (as described in Chapter Nine).

(7) Enhancing Predictability: Notice of Shift Changes

Improving the work–life balance of employees depends not only on controlling the duration of their working days and weeks, and ensuring their access to leaves and vacations — it also depends on making work schedules more predictable. Employees with family, personal, educational or second-job commitments often make elaborate arrangements to honour these commitments, proceeding on the assumption that they will be at work at certain times and will not be there at others. If their working hours are changed, especially on short notice, their lives can be thrown into disarray. This is especially true for workers who work irregular shift schedules, and who — studies show — suffer elevated levels of job strain, psychological distress and health problems as a result.

This is a significant issue in the federal domain where 33% of all permanent full- and part-time employees, and 44% of all non-permanent employees, work rotating or irregular shifts; percentages are even higher in the transportation sector.

Obviously, requiring proper notice of shift changes will not solve all problems, but it may help to ameliorate the consequences of sudden changes. At least it will afford workers a little time to alter their personal arrangements rather than having to do so with little or no warning. However, Part III is silent on the issue of notice. The only provision intended to give employees some predictability is the obligation to pay at least three hours of wages when an employee reports to work at the request of the employer. Only two Canadian jurisdictions have legislation requiring employers to provide notice of shift changes.

Requiring employers to provide significant advance notice of changes in work schedules might inhibit the "timing flexibility," which enables them to react quickly to sudden market changes or customer service requests. Moreover, employers often have to act on short notice to replace employees

who are ill, have gone on leave or become unavailable for other reasons. They typically cover off the functions performed by the missing workers by redeploying those who remain. If they cannot do this fairly rapidly, there is a risk that the productivity and efficiency of their business may be compromised. Finally, the notion that employers ought to be considerate of workers has a corollary. If workers do not provide reasonable advance notice to their employers of their intended absence, they are likely to cause their employer considerable inconvenience.

Clearly then, some kind of balance has to be struck between giving workers — especially shift workers — as much notice as possible, and giving employers as much latitude as possible to reassign workers in response to unanticipated, short-term operational requirements. And a similar balancing process must operate on the other side of the equation, so that employees exercise their rights without inflicting avoidable harm on their employer.

RECOMMENDATION 7.48 Except in cases of unforeseeable circumstances beyond the control of the employer, employees should be entitled to advance notice of shift changes of at least 24 hours, or such other period as may be specified in a collective agreement or developed in consultation with a Workplace Consultative Committee.

An employer should be prohibited from firing or otherwise penalizing an employee who is unable to come in to work as a result of the lack of notice. This prohibition would also apply with respect to employees who are not available to perform work for part of the shift, or who are unable to perform work during those hours, including overtime hours added to a previously scheduled shift without at least 24 hours' notice.

RECOMMENDATION 7.49 Employees who wish to exercise their right to refuse overtime, or any other right that will result in their not being available for work, should provide their employer with as much notice as is reasonably possible in the circumstances.

B. LEAVES FOR FAMILY AND CIVIC RESPONSIBILITIES

Part III permits employees to take a variety of leaves in addition to annual vacations and general holidays. These include maternity and maternity-related leave, parental leave, compassionate care leave, sick leave, job-protected absences due to work-related illness or injury, and bereavement leave. Except for bereavement leave, employers are not required to pay workers on leave; however, they must maintain their coverage under specified benefit plans, such as health insurance and pension plans, and their seniority is deemed

to accrue during the leave. Employees may also benefit from income-replacement programs under other legislation. Indeed, the parental and compassionate care leave provisions of Part III were specifically designed to mesh with the corresponding benefits provisions of the Employment Insurance (EI) program. The combined effect of EI and Part III is that employees can not only take leave without fear of losing their jobs, but also draw benefits to sustain them while they are off work.

The current leave provisions under Part III play a positive role in helping employees achieve a better work–life balance. However, there are concerns that their duration is too short in some cases, that eligibility requirements are too restrictive and that they may create incentives that help perpetuate a gendered division of labour, with women taking on more domestic tasks and responsibilities at the possible expense of their long-term career goals. Moreover, federal labour standards are criticized for addressing pressures faced by workers at some stages of their lives (the birth of a child, personal illness, the critical illness or death of a family member), but not others. For example, Part III does not entitle employees to take leave for brief episodes of parenting or care giving, or for participation in important civic activities such as jury duty. Consequently, many submissions called for the establishment of new short-term leave provisions to deal with such matters.

Predictably, the call for more extensive leave provisions was far from unanimous. Several submissions expressed worries about the negative effects on employers, in terms of disruptions and enhanced costs, which might ensue if employees were absent for significant periods or at inopportune times. The idea of translating some or all of the current provisions for unpaid leave into paid leave entitlements provoked even stronger reactions, partly because of the direct costs, but partly because paid leaves enhance the take-up rate and may even encourage abuse. Employers were not attracted by the prospect of instituting a general leave entitlement covering multiple exigencies, as opposed to providing leaves targeted to specific needs.

On balance, I accept the case for improving some leave provisions under Part III in order to better respond to evolving employee needs. However, to ensure that the impact on employers is minimal, I have recommended no new leaves with pay; I have assumed that all leaves lasting significant periods of time be coordinated with income replacement schemes under EI; and I have tried to focus on improvements to the statutory leave provisions that are likely to benefit both employers and workers to some extent. Lastly, with the notable exception of education leave (discussed in Chapter Eleven), all proposed changes to leave provisions under Part III fall within the range of similar provisions in labour standards legislation across the country.

(1) Short Term Leaves to Meet Family Needs and Responsibilities

Family responsibility leave

I was frequently asked to recommend the introduction of a new unpaid "family responsibility" leave, which would be available to employees to meet short-term family obligations without fear of losing their job. Such leave, which falls outside the ambit of compassionate care and bereavement leave, is generally recognized as an important (albeit limited) tool to improve work–life balance; its absence in Part III is seen by many as a significant problem. Indeed, eight provinces now provide for short-term family responsibility leave for periods ranging from three to 12 days per year. While there is some variation among the provinces, family responsibility leave can generally be used to deal with family illnesses and child- and elder-care related needs. It is clearly a useful way of helping employees to deal with issues of work–life balance.

RECOMMENDATION 7.50 Employees should be entitled to take up to ten days of family responsibility leave without pay per calendar year to meet responsibilities regarding the education of a child or the care and health of a family member. Unused family responsibility leave should not be carried forward from one year to the next.

At the request of the employee, and with the employer's consent, family responsibility leave may be divided in periods shorter than a day.

Bereavement leave

Bereavement leave provisions in Part III were criticized as failing to take account of the needs of a culturally and ethnically diverse workforce.

Currently, an employee who has three months of continuous service is entitled to leave on the three calendar days immediately following the date of death of a family member. If any of those days is a working day, the employee is entitled to be paid for that day. The relatively brief duration of bereavement leave is not sufficient for many bereaved immigrant or aboriginal workers to travel to and return from a funeral at their family's home in distant countries, or in remote Canadian communities, nor is it sufficient to permit participation in protracted rites associated with some religions, communities and cultures.

Moreover, bereavement leave must be taken immediately after the death of the family member, even though a funeral may not be scheduled within the three days following the relative's death. Nor can it be used to attend a memorial held some time after a person's death, as is the custom in certain Aboriginal and other cultures.

In light of the above, I believe modest improvements in terms of the duration and timing of bereavement leave are in order.

RECOMMENDATION 7.51 Employees should be entitled to take up to seven consecutive working days of bereavement leave. An employee who meets the current three-month length of service requirement would be entitled to be paid for the first three regular working days occurring during this period. The balance of the leave would be provided without pay. Bereavement leave could start on any day, as long as the period of leave accommodates the day of the death or the day of the funeral. At the employee's discretion, some part of the bereavement leave could be postponed for the purpose of organizing or attending a funeral or memorial at a later date.

(2) Maternity, Parental, Sick and Compassionate Care Leave

Bringing Part III leave provisions in line with EI special benefits

As noted in Chapter Three of this report, one of the principles guiding my recommendations is that labour standards should be coordinated with other federal laws, policies and programs that promote the well-being of workers and their families. More concretely, federal labour standards should enable employees to access special benefits under EI. The length of maternity, parental and compassionate care leave provided under Part III is sufficient for employees to receive their full maternity, parental and compassionate leave entitlements under EI. However, while workers who meet qualifying requirements can receive up to 15 weeks of sickness benefits under EI following a two-week waiting period, sick leave under Part III is limited to 12 weeks. To take full advantage of EI sickness benefits, an employee would need five additional weeks of leave (including two weeks to serve the waiting period).

One apparent solution to this problem — to increase maximum sick leave under Part III to 17 weeks (15 weeks of EI benefit plus two qualifying weeks) — on close examination would only create another problem. Whereas Part III allows employees to take multiple periods of sick leave during a given year, EI contemplates only one. Without canvassing all of the alternatives, suffice it to say that in this particular instance the two statutes cannot easily be reconciled unless both are amended in reciprocal fashion. Given that EI does not fall within my mandate, my somewhat pragmatic solution is to suggest that maximum sick leave under Part III should be extended not as a general matter, but only so far as may be required to allow an employee to receive full EI sickness benefits.

Part III and EI are also not quite compatible with respect to eligibility requirements for maternity, parental and sick leave and benefits. In the case of EI benefits, eligibility is based on attachment to the labour force; under

Part III eligibility for job-protected leave depends on an employee's continuous length of service with his or her current employer. This discrepancy causes difficulties because many employees who have been employed in a series of relatively short term contracts with different employers may nonetheless have a long-term attachment to the labour force. Such an employee might never accumulate enough service credits to qualify for leave under Part III, but would nonetheless qualify for EI benefits.

A number of briefs have suggested that all length-of-service requirements for leaves under Part III should be eliminated or, at the very least, shortened and standardized. However, in my view there are valid reasons to require that an employee serve a probationary period and demonstrate some attachment to the job before taking an extended leave, especially if there is a fair likelihood that he or she might decide not to return at the end of the leave. On the other hand, some employees with lengthy labour force attachment may have been induced by their present employer to change jobs. It would seem very unfair, in such a situation, to deny the employee leave that would allow them to access the EI benefits to which they are entitled. For these reasons, I recommend maintaining current eligibility requirements, but adding an exception for employees who are eligible for EI benefits.

RECOMMENDATION 7.52 Employees who do not meet the current length of service requirement under Part III but who qualify for maternity, parental or sickness benefits under the Employment Insurance program should be entitled to maternity, parental or sick leave, as the case may be.

An additional period of leave without pay should be provided under Part III to cover any period during which an employee is receiving — or is serving a waiting period before receiving — sickness benefits under the Employment Insurance program.

Parental leave duration

I received several suggestions that the existing period of parental leave should be increased beyond the current 37 weeks. Some research studies have cautioned, however, that an overly long period of leave may in many cases have negative repercussions in terms of loss of human capital and reduced career prospects for individuals on leave.

Many submissions argued in favour of amending Part III so that parental leave taken by one parent is no longer deducted from the other's maximum entitlement of 37 weeks. There is evidence that this provision may discourage fathers from taking parental leave, thereby helping perpetuate a gendered division of labour, whereby mothers take greater responsibility for and spend more time on child care-related tasks, to the possible detriment of

their careers. Some have also argued that eliminating the requirement to share the leave entitlement would allow at least some fathers to spend more time bonding with their newborn child, although limits on the duration of EI parental benefits could still curtail leave uptake. Finally, the provision applies only when both parents are working under federal jurisdiction. This is an anomalous provision that is impossible to administer unless both parents happen to work for the same federal employer.

Prospective adoptive parents and adopted children could also benefit if the sharing requirement were removed. Assuming that adoptive parents took their leave consecutively, this would allow the child to be with at least one parent during the full year following the adoption.

It is also clear that as a result of the sharing requirement, current federal parental leave provisions provide less protection to employees than those of a majority of Canadian jurisdictions, which permit each parent to take the full period of parental leave.

RECOMMENDATION 7.53 The current duration of parental leave should be maintained. However, each parent should be entitled to the full entitlement of parental leave.

Another issue is whether any additional leave should be provided specifically for fathers. Several submissions argued in favour of establishing a new paternity leave under Part III to allow fathers to provide care and support during their partner's labour and in the period immediately following the birth. A father could then take parental leave at a later date for the purpose of bonding with the child.

Although the idea of establishing a new paternity leave has merit, I believe that this issue has ramifications that go well beyond labour standards and should therefore be examined further within a broader policy context, bearing in mind the importance of income replacement measures.

In the meantime, however, a potential solution is to allow employees to fraction their parental leave entitlement into two segments, one of those segments to provide support in the period immediately surrounding the birth of a child, and the other to be taken subsequently. Of course, employees should be made aware of the potential repercussions of taking their parental leave in this manner on their entitlement to EI benefits.

RECOMMENDATION 7.54 An employee should be entitled to fraction parental leave into two periods, so long as sufficient notice is provided to the employer.

It is worth noting that the two previous recommendations would have the added benefit of allowing employees of federally regulated employers in Quebec to take advantage of the new provincial parental insurance program which, in addition to maternity and parental benefits, provides for a maximum of five weeks of paternity benefits, for a total of up to 55 weeks of benefits.

Compassionate care leave

Part III currently provides for up to eight weeks of compassionate care leave, which may be used to provide care or support to a family member who has a serious medical condition with a significant risk of death within 26 weeks, as attested in a medical certificate. Where two or more employees provide care to the same person, the eight weeks of leave are to be shared among them.

Many stakeholders appropriately criticized the previously narrow scope of the compassionate care leave provisions because they did not cover the provision of care to members of one's extended family. This limitation — which was particularly prejudicial to workers from certain cultural backgrounds — has recently been removed by the considerable broadening of the definition of "family member" for the purposes of EI compassionate care benefits. The EI definition is automatically incorporated by reference into Part III.

Another point of contention is the requirement to provide a medical certificate attesting that a family member is likely to die within 26 weeks. This was criticized as overly harsh, and as having a potentially deleterious psychological impact on both patients and relatives. There were claims that some physicians are reluctant to issue such certificates for that reason. More importantly, many noted that even though a family member's illness or injury may not be fatal, it may still be serious enough to require significant care giving. Indeed, two provincial statutes provide leave to enable workers to care for family members who suffer serious illness or injury, whether likely to be fatal or not.

Part III's requirement that compassionate leave be shared among family members has also been criticized for a variety of reasons, of which the most telling is that it is both unenforceable and irrelevant unless the employees required to share the leave happen to work for the same employer. Four provinces provide compassionate care or family illness leave to all eligible employees and do not require that it be shared among caregivers.

RECOMMENDATION 7.55 The scope of compassionate care leave under Part III should be expanded by eliminating the requirement of proof that the family member receiving care is likely to die within 26 weeks. Compassionate care leave should also be available to provide care to a family member who is seriously ill or who has had a serious accident, regardless of whether such illness or accident is likely to be fatal in a given period.

The requirement that compassionate care leave be shared where two or more family members provide care to the same person should be removed. Each employee should be entitled to the full period of leave.

Similar changes to Employment Insurance compassionate care benefits should also be considered.

(3) Meeting Civic Responsibilities: Court Leave

No court leave is specifically provided under Part III or other federal legislation. I agree with the view expressed in several briefs that employees performing their civic duty as jurors or witnesses should not have to worry about their jobs, nor should those who are parties to legal proceedings.

RECOMMENDATION 7.56 Employees should be entitled to unpaid leave while they attend court proceedings as a party, witness or juror. Reasonable advance notice should be provided to the employer.

(4) Public Emergencies

As recent fears over SARS and a predicted avian flu pandemic clearly illustrate, there may be situations in which it is imperative to prevent the spread of contagious diseases for public health reasons. Providing job protected leave may be one way to ensure that employees comply with any quarantine orders.

There may also be other types of public emergencies, such as a natural disaster or a severe disruption to the transportation network, that prevent employees from reporting to work, or that require the support of volunteers for relief efforts.

RECOMMENDATION 7.57 Part III should be amended to give the Governor in Council the power to make regulations to declare that defined classes of workers are entitled to take unpaid, job-protected leave in the event of a public emergency such as a natural disaster or pandemic.

C. HEALTH, REST AND RECREATION

Adequate time for workers to rest and recuperate from work is a prominent item on the agenda of everyone concerned about the work–life balance. Insulating workers from the demands of work for designated periods helps to ensure that they will, in fact, take the time to eat, sleep and do whatever else is necessary to restore their health and well-being. Earmarking specific daily, weekly and annual times as nonworking times, and ensuring that they are relatively sacrosanct, makes it possible for workers and their families to plan and participate in the large and little events that are a necessary feature of busy lives — when to do the shopping, when to book a vacation trip, when to schedule a trip to the dentist. Expectations of work without respite simply do not conform to our basic notions of decency.

Part III currently requires that employees receive a minimum weekly rest period, general holidays and annual vacation with pay. However, federal labour standards have been criticized for many omissions — especially of breaks and rest periods during the working day — as well as for inadequate provision for vacations. In effect, the critics argue, Part III seems more concerned to protect employees once they fall ill, than to prevent or reduce illness by providing breaks and time off and encouraging workers and employers to attend to the physical and mental health implications of excessive and unrelenting working time requirements.

(1) Meal Breaks and Minimum Rest Periods

Many submissions criticized the absence of breaks or daily rest periods in Part III, and others the inadequacy of the 24-hour weekly rest period now provided. Most argued, convincingly, that requiring employees to work for eight or more hours a day without a break accords neither with standards of decency nor with almost universal practice. Moreover, a compelling case was made that 24 hours is insufficient time to adequately rest from a week of work, or to engage in all the other activities necessary to meet one's responsibilities and sustain one's health.

Although I do not believe that any reasonable employer would require its employees to work without any opportunity to eat, rest or engage in other activities, I was told during the Commission's hearings that such abuses do actually occur. And the fact remains that federal labour standards are somewhat anomalous when compared with legislation in the provinces and territories, many of which provide for meal breaks and longer minimum daily and weekly rest periods.

There is no evidence that providing for meal breaks or a slightly longer weekly rest period would create major difficulties for employers in most circumstances. Based on data from the Federal Jurisdiction Workplace (FJW) Survey conducted by Statistics Canada, employees are typically given two days of rest per week. And regardless of the data, it is difficult to justify depriving employees of a minimum period of time to eat and rest during the day, barring an emergency.

RECOMMENDATION 7.58 The minimum weekly rest period should be increased from 24 to 32 consecutive hours. Part III should also provide for at least eight hours of rest without pay in every period of 24 hours, and an unpaid meal break of at least 30 minutes within every period of five hours of work. Meal breaks would have to be remunerated if the employee is not permitted to leave the work site.

Meal breaks and rest periods could be postponed where emergency work is required. Moreover, an employer, through the workplace adjustment model could request an authorization to postpone one or more rest periods. Exemptions or special rules could be established by regulation under the sectoral level adjustment model, for cases where an employee might be prevented by practical considerations from taking a meal break or rest period.

(2) Special Breaks and Time Off: Health Needs

Many briefs and presentations have emphasized the considerable health benefits of breastfeeding, for both mother and child. These benefits have informed the latest ILO Maternity Protection Convention, which calls for nursing breaks at work, among other measures. Although this Convention has not been ratified by Canada, Part III ought to be amended in response to its logic. Other employees may also need short breaks, for health reasons, for example. Many stakeholders have argued that the duty to accommodate under human rights legislation does not provide adequate protection in these circumstances, and breaks for nursing and other health reasons should be mandated under Part III.

RECOMMENDATION 7.59 Part III should provide for short breaks during working hours to afford nursing employees reasonable time off, without pay, to breastfeed a child and/or to express milk on the work site. Similar breaks should also be available to employees who need them to inject medications or for similar medical purposes. Such breaks should be subject to operational considerations, but should not be unreasonably denied.

Emphasizing prevention through regular medical checkups can help to maintain workers' health while potentially reducing the future use of sick leave. Taking a few hours off to go to a medical appointment may also be preferable, for both the employee and the employer, to taking a full day of sick leave for the same purpose.

RECOMMENDATION 7.60 Employees should be entitled to time off without pay for personal medical appointments. Employees should give reasonable notice to the employer, and take all reasonable steps to minimize the number and duration of such absences.

(3) Annual Vacations and General Holidays with Pay

Part III stipulates that employees who meet certain eligibility tests are entitled to two weeks of vacation with pay after one year of service, and three weeks after six years of service. It also provides for nine general holidays with pay. However, an employer may require employees to work on one or more general or statutory holidays, so long as compensation is provided in the form of premium pay or, in some cases, another day off with pay is provided in lieu.

Many briefs argued for more generous vacation and general holiday entitlements. At issue is not only the number of vacation weeks and general holidays, but also such factors as vacation fractioning and scheduling, vacation waivers, the calculation of vacation and general holiday pay, and the substitution of general holidays.

Duration of annual vacations

Vacations allow employees to rest and recuperate and can therefore have a positive impact on productivity as well as on workers' health and family life.

Most Canadian workers would like to receive additional vacation leave and, according to a recent survey, 22% would even consider taking a lower salary if necessary to gain this concession. However, vacation entitlement in Part III lags that in several Canadian jurisdictions and most OECD countries other than the United States. While increased annual vacations were one of the most frequent proposals in union and employee submissions, employer briefs expressed concern about the cost implications of significant increases.

FJW Survey statistics show that a moderate increase in annual vacation entitlements would not bring the provisions of Part III beyond what is currently available under collective agreements or employer policies to most employees covered by federal labour standards. Indeed, data from the survey indicates that almost three-quarters of companies under federal jurisdiction —

which together employ 90% of employees in the federal domain — provide 15 or more days of annual vacation leave to full-time employees with at least five years of service. Almost 85% of full-time employees under federal jurisdiction are granted at least 20 days of annual vacation leave after 10 years of service, and a large majority can expect to receive five or more weeks of annual vacation if they accumulate sufficient service with their employer.

RECOMMENDATION 7.61 The minimum duration of annual vacations with pay should remain two weeks after one year of service, and thereafter be increased to three weeks after five years of service, and four weeks after ten years of service. Vacation pay should be raised in line with increases in paid vacation leave.

RECOMMENDATION 7.62 Employees with less than five years of service should be entitled to a third week of leave without pay, upon written request. This unpaid leave would have to be taken at a time agreed to by the employer, and to be used in the year in which it has been requested; it should not be carried forward from year to year.

Given that this recommendation for increased vacation entitlements merely brings a small residue of workers up to the level already provided in the great majority of workplaces, it will represent a negligible increase in costs for federal jurisdiction employers as a whole. And even this increase can be discounted because longer vacations are likely to reduce absenteeism and increase productivity and because employers will find ways to offset any increase in costs attributable to the new vacation entitlements.

Fractioning of vacations

Although most briefs concentrated primarily on the minimum duration of annual vacations with pay, another important question is whether employees and employers should be entitled to split their annual vacation leave in two or more segments, and if so, under what conditions. This can have significant implications on employees' work–life balance.

On the one hand, the traditional purpose of annual vacations was to provide for a complete psychological and physical break from the workplace. This is an argument for scheduling an employee's vacation leave, or at least the bulk of it, in one block. However, allowing employees to split their vacations into shorter periods, such as one-day increments, can help them to meet short-term responsibilities, deal with emergencies, take a series of long weekends or participate in cultural or religious celebrations. These are all attractive possibilities for the employee, and may in some cases

suit the employer better than having to do without the employee for more protracted periods.

Part III is currently silent on the issue of annual vacation fractioning, which can create some confusion for employees, employers and even labour standards officials. Fractioning is permitted in all but two provinces.

The task of calculating the vacation entitlement of non-standard employees who do not regularly work complete weeks — such as part-time and casual employees — is inherently complicated. Vacation splitting makes it more so. Clarification is needed.

RECOMMENDATION 7.63 Part III should specify that annual vacations must be provided in one unbroken period, unless an employee requests in writing that his or her vacation be divided into two or more segments and the employer agrees. Collective agreements or arrangements arrived at through consultation with Workplace Consultative Committees could provide more detailed rules, if needed.

RECOMMENDATION 7.64 The Minister should enact a regulation specifying how and on what basis vacation pay is to be divided and, if the vacation is fractioned, when it is to be paid.

Waiver of annual vacation leave

Under the *Canada Labour Standards Regulations*, an employee, with the employer's agreement, may waive his or her annual vacation leave for a given year, but cannot waive vacation pay.

A recent survey of Canadian workers shows that about 25% do not use their entire vacation entitlement, while about 10% uses none at all. Although the reasons are various — short-term financial troubles, problems in synchronizing with the vacations of family members, career pressures, workaholism — the statistics are troubling. For reasons of health and productivity, workers should take, and should be encouraged to take, all of their earned vacation leave. Nonetheless, the decision must ultimately rest with the worker. For that reason, it is important to protect workers from pressure by employers to remain on the job rather than take their vacation.

RECOMMENDATION 7.65 A waiver of annual vacation leave should be permitted only if requested in writing by the employee. Any such waiver should be subject to withdrawal at the sole discretion of the employee.

Number of general holidays

In addition to seeking increased annual vacation entitlements, many briefs pressed for the designation of additional general holidays under Part III. Some proposed specific holidays, others the addition of one or two "floating" holidays to be used at the discretion of the employee.

No doubt a longer list of general holidays would be welcomed by most workers. However, this would represent an additional direct cost for employers, with little promise of compensatory productivity gains. Moreover, in the matter of general holidays, the federal jurisdiction is already among the most generous in Canada. I prefer to focus my recommendations on improving vacation and other leave entitlements, as well as several flexibility measures such as holiday substitution.

RECOMMENDATION 7.66 The current number of general holidays with pay under Part III should be maintained.

General holiday substitution

Part III presently provides that an employer may substitute one statutory or "general" holiday for another, with the consent of the applicable union or, in the absence of a union, with the consent of 70% of the affected employees. This provision has been criticized by both employers and employee representatives as overly restrictive. First, it provides only for the substitution of one general holiday for another, whereas workers might prefer to substitute a day that is not a holiday. Second, it deals explicitly only with substitutions favoured by groups of workers, not with substitutions requested by individuals.

The latter criticism is particularly telling, given the diverse nature of the federal jurisdiction workforce whose members celebrate a plethora of cultural and religious festivals. An individual worker and his or her employer should therefore be allowed to replace a general or statutory holiday with one that has greater religious or cultural significance for the employee. This would not only benefit the worker, but assist employers in discharging their duty to accommodate the needs of members of religious and cultural minorities under the *Canadian Human Rights Act*.

RECOMMENDATION 7.67 Part III should allow the employer to substitute any other day for a general holiday under Part III, with the consent of 70% of affected employees, or a Workplace Consultative Committee, or the union representing them.

RECOMMENDATION 7.68 Part III should allow the employer, on the written request of an individual employee, to substitute one or more cultural or religious holidays for any general holiday under Part III. The Labour Program, in cooperation with the Canadian Human Rights Commission, should remind employers of their legal obligation to accommodate such requests.

6. TOWARD MORE PRODUCTIVE, HEALTHY AND SOCIABLE WORKPLACES

This chapter has sketched out the general outline of improved procedures for regulating flexibility in the workplace. It has also set out a number of recommended changes in the substantive rules governing the demarcation between working and non-working time. However, an issue such as achieving a better work–life balance is too important to entrust entirely to a formal, statute-based system. Employers, workers and Labour Program authorities should resolve to work together not only to achieve minimum compliance with Part III but to create a climate in which greater sensitivity to the issue of work–life balance is part of the calculus of all decision making in business planning, in social policy making and in individual and family lifestyle choices.

Greater sensitivity is essential because our assumptions about work, its benefits and its risks are built into the deep structures of our economic system; are secreted in the interstices of taxation, social services and income support programs; and are embedded in the culture of our workplaces and communities. But if essential, greater sensitivity to the work–life balance issue is not necessarily accomplished well — or at all — by legislation.

As some of the following recommendations reveal, moving forward on a variety of non-legislative measures implies a modest expansion in the Labour Program's mandate and resources, and in its capacity to coordinate its efforts with those of other significant public and private actors.

A. RESEARCH

The lack of solid evidence on the potential costs and benefits of work–life balance measures has been identified as a potential obstacle to their more widespread adoption. In addition, although the FJW Survey has helped fill certain gaps in our understanding of actual conditions in federally regulated industries, it is clear that more information is needed to assess whether Part III and other regimes of workplace regulation meet their own objectives, or whether they need to be amended.

RECOMMENDATION 7.69 The federal government should conduct or sponsor research to monitor changes in the working environment and conditions of employment for employees under federal jurisdiction.

The government should also try to measure the impact of various workplace conditions and practices on workers' health, well-being and productivity, with a particular emphasis on work–life balance policies and practices.

The government should strengthen its research and analysis capacity with respect to labour standards issues.

B. PROMOTIONAL ACTIVITIES

As noted by a number of stakeholders, and in this report, Part III does not constitute an adequate platform for a comprehensive work–life balance policy. Indeed, as noted above, there are limits on the extent to which any coercive legislation is likely to change social customs or workplace practices. Customs and practices must be challenged head-on, as they were so successfully in anti-smoking campaigns.

RECOMMENDATION 7.70 The federal government should raise awareness about the issue of work–life balance and encourage workplace parties to voluntarily adopt measures to improve it. It should focus on disseminating accurate and comprehensible information on work–life balance matters.

The Labour Program should work in cooperation with provincial and territorial departments of labour, as well as other federal departments and private sector agencies concerned with the issue, acknowledging and building upon work already under way.

The Labour Program should also consider providing training and advice on various aspects of work–life balance to employers and unions, as well as possible financial incentives and recognition awards to employers who institute innovative practices and policies.

C. WORK–LIFE BALANCE UNIT

The Labour Program should have sufficient staff and resources to carry out research and promotional activities in this field. Ideally, this work should be coordinated through a specialized unit, as is the case in several Canadian and foreign jurisdictions.

RECOMMENDATION 7.71 The federal government should consider setting up a work–life balance unit within the Labour Program, with dedicated resources. This unit would be responsible for research and promotional activities.

D. THE LABOUR PROGRAM'S ROLE IN BROADER POLICY DEVELOPMENT

As mentioned in Chapter Two, the Labour Program should play a role in influencing the larger policy environment in which labour standards are established and implemented. This is particularly important with respect to working time and work–life balance issues, given that these are questions that touch on many different policy domains (such as EI special benefits, hours of service regulations, and child care). However, to play such a role, the Labour Program requires both a commitment to participate in such policy coordination and the necessary resources to do so.

RECOMMENDATION 7.72 The capacity of the Labour Program to participate in interdepartmental policy coordination should be strengthened. The Labour Program should participate in developing policies that can have a direct bearing on labour standards pertaining to working time.

Chapter Eight

Termination of the Employment Contract

EIGHT
TERMINATION OF THE EMPLOYMENT CONTRACT

1. INTRODUCTION

This chapter is concerned with termination of the employment contract, which is crucially important for several reasons. First, a job is often a worker's most important asset, the source of his or her personal and family security, and a defining attribute of social status and self-image. To lay down the substantive and procedural rules for termination is to establish the social and economic worth of that asset. Second, if employers could fire employees without fear of legal repercussions, they could effectively override employment contracts and the rights granted by Part III. Rules for termination are therefore critical and the whole scheme of Part III. Third, sensible rules for termination of the employment contract can assist both employers and workers in orderly planning for the future.

Part III provides three different approaches to termination:

- Employers, who for legitimate business reasons propose to dismiss employees may do so, but must give them at least two weeks notice or pay in lieu. Employees whose contract is terminated in these circumstances are also entitled to at least two days severance pay for each year of service, with a five-day minimum entitlement. If employers propose to dismiss or lay off 50 or more workers at the same time, they must give notice to the Minister and establish a joint planning committee to review alternatives to termination, and if necessary, develop a plan that will help workers adjust to the loss of their jobs.
- Employers who dismiss employees other than for legitimate business reasons may have to defend their action before an independent, government-appointed Adjudicator. If an employer cannot demonstrate that a dismissal was for just cause — such as serious work deficiencies or misbehaviour — the Adjudicator may award compensation to the employee and reinstate him or her in their job. The employee may also sue civilly for wrongful dismissal.

- Employers who dismiss employees in contravention of the statute — for example, for exercising their right to take leave or for "whistle-blowing" — are guilty of a criminal offence. In addition to imposing a fine, the convicting judge may order the employer to reinstate the dismissed employee and to compensate him or her for any loss.

Before exploring these three types of terminations, however, it is important to understand how the general law deals with the end of the employment contract, putting Part III to one side.

2. THE EMPLOYMENT CONTRACT AND THE CIVIL COURTS

Part III preserves "any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to an employee than [his or her] rights or benefits" under Part III. Why should this reference to "law" and "contract" matter? After all, one might expect that Part III protects workers much more effectively than the ordinary law of contracts or obligations.

Until well into the 20th century, employers could — and often did — dismiss workers for any and no reason, with little or no notice, and with scant regard for their seniority, work performance or utter dependence on their job. However, at some point during the postwar period — especially during the 40 years since Part III was enacted — litigation over employment contracts became more frequent and legal doctrine began to change. Courts indicated that they would no longer enforce contracts that were grossly unfair or that workers had not consciously agreed to. Confronted with employment contracts that were silent on the question of termination, they began to imply a requirement that — absent just cause for discharge — workers be given "reasonable" notice of termination or pay in lieu. Over time, judicial interpretations of what constituted "reasonable" notice became more generous, to the point where employees are now entitled to quite lengthy notice depending on their length of service and their status within the enterprise. Recent surveys of court rulings suggest that employers may be required to provide 50 or more weeks notice to long-serving rank-and-file workers, and 80 or more weeks to those higher in the corporate hierarchy. In most cases, employers prefer to provide pay in lieu, rather than keep departing employees on the premises for such protracted periods.

Finally, courts gradually began to firm up the long-standing requirement that in the absence of just cause, employers may not dismiss workers until the employment contract (including the "reasonable" notice period) has come to an end. Employers who do not wish to give such notice, or pay in lieu, must now show that discharge is justified because the employee has been guilty of serious misconduct or exhibits gross incompetence,

that earnest efforts have been made to remedy the situation before resorting to discharge, and that the discharge itself — even if justified — has been undertaken in such a way as to avoid collateral damage to the employee's reputation, psyche or dignity.

These developments, originating in judicial pronouncements and enshrined in the Quebec Civil Code in 1994, seem to offer significant protections for employees facing dismissal. However, they are not quite as significant as they seem. Some judges are less committed to these new doctrines than others; some are less familiar with workplace realities than others (or perhaps more willing to trust employers' judgments); and all judges are constrained by well-entrenched legal taboos, especially the one that prevents them from ordering the reinstatement of employees who have been wrongfully dismissed. Still, the greatest obstacle confronting discharged workers is not one made by judges; it is inherent in our system of civil litigation. Few ordinary workers can afford to sue. Litigation is too slow, risky and expensive for working people who have just lost their greatest asset — their job. Predictably, then, most wrongful dismissal lawsuits are brought not by ordinary workers but by highly paid managers, salespersons, professionals and technical experts who have greater resources and better prospects of significant recovery.

Part III seeks to square this circle. It gives ordinary workers some measure of financial compensation if they are dismissed for legitimate business reasons. It protects them against being dismissed without proper cause. It allows them to seek relief before Adjudicators and sometimes in the criminal courts, where cost does not represent a barrier. It authorizes Adjudicators and criminal court judges discretion to grant them the remedy they often need and want — reinstatement. And it gives unorganized workers protection against unjust dismissal somewhat comparable to that enjoyed by unionized workers under collective agreements (who, for that reason, have no access to adjudication under Part III).

In the following sections of this chapter, I assess the extent to which Part III succeeds in its various approaches to dismissal and make suggestions for improvement.

3. TERMINATION FOR LEGITIMATE BUSINESS OR ECONOMIC REASONS

At common or civil law, employers who wish to reconfigure or reduce their workforce for business reasons are obliged to give "reasonable" notice to employees they intend to dismiss, unless the contract of employment provides otherwise. Of course, as with other protections supposedly enjoyed

by workers under the general law, this one has always been difficult to enforce. Nonetheless, it remains the law today, and Part III does nothing to change it. What Part III does do is establish a different, more accessible procedure under which workers confronting discharge for business or economic reasons can claim notice and compensation without having to sue.

A. NOTICE OF TERMINATION AND TERMINATION PAY

Part III requires that any employee who has been employed for at least three months be given two weeks notice of termination or pay in lieu. This is considerably less than the courts deem to be "reasonable notice," at least for employees with any significant length of service. However, the statutory requirement is not quite as negligible as it might seem, since employees are entitled under Part III to an additional sum by way of severance pay (see below). I am not recommending any change in this provision.

Part III does not require that employees give equivalent notice to their employers if they intend to quit. However, the general law imposes such a duty on employees, as do employment standards statutes in eight Canadian jurisdictions. Some employer representatives argued that Part III should be made to reflect the general law in this respect. No doubt sudden quits may disrupt an employer's operations or burden an employer with the additional expense of hiring a temporary replacement or paying overtime to another employee in order to cover the work of the employee who has quit. Moreover, anecdotal evidence suggests that the problem is a very real one in the trucking industry, where employees have been known to quit without giving any notice at all, leaving stranded vehicles and cargo to be retrieved by the employer from some remote location.

However, while it is important to ensure that workers do not put their employers to trouble and expense, it is not necessary to create complete symmetry of obligation between the parties. Employers can afford to provide compensation in lieu of notice much more easily than workers; they are unlikely to sue to collect damages for want of notice; and in any event they can often cope with an employee's departure with few or no adverse consequences. The most sensible solution, it seems to me, is to create a modest deterrent to inconsiderate employee behaviour that causes an employer actual loss.

RECOMMENDATION 8.1 Employees should be required to give their employer two weeks notice of their intention to quit. This requirement should apply only if:

(a) the employee has been employed for at least three months;

(b) the employee has not first been given notice of termination by the employer; and

(c) the employer has provided the employee with a written statement of employment terms that stipulates that notice to quit must be given and that failure to give it will result in a monetary penalty.

RECOMMENDATION 8.2 If an employee quits without giving notice, and the employer suffers actual loss as a result, the employer should be able to withhold one day's pay from any monies owing to the employee for each week of the notice period that the employee has failed to complete. If an employer wrongfully withholds pay from an employee, an inspector may order the employer to repay any such sum, together with interest.

B. SEVERANCE PAY

Severance pay, like "reasonable notice" under the law of employment contracts, is based on length of service. For each year served, two days severance pay is required, with a minimum of five days payable to all workers. Consequently, under Part III, a 25-year employee would be entitled to 10 weeks (50 paid days) of severance pay in addition to two weeks termination pay (or notice in lieu) — a total of 12 weeks compensation for loss of their job. Compared with what the courts are likely to award an employee with similar seniority — 50 or more weeks of "reasonable notice" — this is a modest sum indeed. On the other hand, it is provided without the worker having to confront the costs and contingencies associated with civil litigation. Moreover, it equals, and generally exceeds what workers receive under labour standards legislation in other Canadian jurisdictions, all but one of which cap severance and/or termination pay at 10 weeks or less.

Should entitlements to termination pay and/or severance pay under Part III be changed? I believe that a modest increase is justifiable, especially for long-serving rank-and-file employees. Higher severance pay would reflect the fact that older workers are likely to suffer a significant disruption of earnings when they suddenly find themselves on the labour market after many years in one job. Moreover, in a sense, severance pay represents a return on their investment of skills, effort and loyalty over the long term, to the benefit of the employer. I note also that many federal employers already provide long-service employees more generous termination and/or severance pay than is required by Part III.

RECOMMENDATION 8.3 Entitlement to severance pay should accumulate at the rate of three days per year for workers with over 10 years of continuous service.

C. GROUP TERMINATIONS

Under Part III, special provisions deal with the dismissal of 50 or more employees during a four-week period. These provisions are designed to facilitate labour market adjustments and are dealt with in that context in Chapter Eleven.

D. DISENTITLEMENT TO TERMINATION AND SEVERANCE PAY

If employees who have been given notice of termination quit work before the expiry of the two-week notice period to search for or take up other employment, they forfeit not only their right to unpaid termination pay but also their entire entitlement under Part III to severance pay. This seems inappropriate. It is the employer who has initiated the termination of the employment contract for its own business reasons by giving notice. It is foreseeable and desirable that workers facing loss of their jobs should begin to look for other work and understandable that they should start their new job sooner rather than later, if required to do so. And it is often the case that the original employer will benefit from their departure before the end of the notice period. If this employer does suffer a modest loss or dislocation by reason of their early departure, being relieved of the obligation to pay them for the rest of the notice period should provide adequate compensation.

RECOMMENDATION 8.4 Workers who quit after being given notice of termination or layoff by their employer, but prior to the expiration of such notice, should forfeit any unpaid termination pay, but retain the right to severance pay. However, if they are discharged for just cause, they should forfeit their right to both termination pay and severance pay.

Part III also denies workers severance pay if they are "entitled to a pension" at the date of termination. The original intent of this language is not obvious, and whatever was its purpose, circumstances have changed since it was enacted two decades ago. Employees are no longer automatically retired at age 65 as they once were, nor will they likely receive a "defined benefit" pension actuarially calculated to replace a fixed portion of their earnings. Today, more and more jurisdictions are ending the practice of mandatory retirement, and workers' pensions are usually calculated on the basis of contributions made by them and their employers. Moreover, people often receive pensions, either before they actually retire from the workforce, or

some time after, and the pensions they receive may bear no relationship at all to their earnings or years of service. The present wording, moreover, creates extreme and unjustifiable anomalies: denial of severance pay does not hinge on actual receipt of a pension, but only on entitlement; nor does it hinge on whether the employee in question is or is not actively seeking work. Thus, a long-serving employee whose employment is terminated a month after she or he becomes "entitled" to a pension of any sort or size is totally disentitled to severance pay even though working at a new job; however, a colleague with comparable service who is two months younger and not yet "entitled" to a pension on the date of termination would receive full severance pay, perhaps amounting to 50 days (10 weeks) or more, even though they decide to give up working altogether.

Clearly these outcomes are difficult to justify on any obvious policy ground. However, the issues are complicated and require closer technical analysis than they can receive in the context of my review.

RECOMMENDATION 8.5 The provisions of Part III that disentitle workers to severance pay if they are entitled to pensions should be reviewed in light of changes in the law and practice governing the age of retirement and the shift from defined benefit to defined contribution pension plans. The purpose of the review should be to ensure that Part III does not prematurely, unfairly or unnecessarily deprive older workers of severance pay.

Finally, it is important to acknowledge that the sum of all these recommendations will leave federal jurisdiction workers well short of the protection their counterparts receive in most European Union countries. In deference to the market economy principle and the circumspection principle articulated in Chapter Three, however, I have opted for gradual and modest increments that are well within the capacity of employers to provide. I note, further, that these costs do not represent a significant burden for federal sector employers.

4. TERMINATION FOR JUST CAUSE

A. BACKGROUND

Employers may discharge employees at any time for "just cause," a somewhat open-ended term that includes serious misbehaviour, gross incompetence and other egregious conduct that violates the general law or the norms of the workplace. However, such discharges are subject to challenge both in the ordinary courts under the general law of contracts or obligations, and before an Adjudicator under Part III. In both types of proceedings, the

employee will prevail if no just cause in fact existed, if discharge is deemed an excessive penalty for the wrongdoing, or if it is "unjust" for some other reason such as procedural unfairness by the employer. The way these arguments are framed, the weight attached to them, the method of proceeding, the rules of evidence and the relevance of certain legal arguments concerning what is expected of both parties differs somewhat as between the ordinary courts and Part III adjudication. However, the two types of proceedings differ most importantly in other respects.

The first relates to remedies. If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course — that is, for whatever period of notice would have been "reasonable." If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages. By contrast, if successful before an Adjudicator under Part III, an employee is entitled both to reinstatement and to compensation, not only for the duration of the notice period, but for all losses attributable to the discharge. These are potentially more extensive and expensive remedies than those a court might award.

The second difference relates to cost, which effectively keeps most workers out of court. If employees sue, they have to hire a lawyer; if they seek adjudication under Part III, they can appear on their own behalf; and if they do, an Adjudicator will conduct the hearing in such a way as to ensure that they are not prejudiced because they lack legal representation. If the case is heard in court, it will be conducted in formal fashion, will likely last some time, and may be prolonged even further by an appeal; adjudication is normally speedier and less formal (there are exceptions to this generality) and no appeal is possible. If an employee loses in civil court, he or she will be liable for legal costs incurred by the employer; not so in Part III adjudication.

In effect, then, one great merit of Part III is that it overcomes the main deficiencies of civil litigation. It provides effective remedies and it removes cost barriers to access to justice. It thereby translates a universally accepted principle — that no one should be dismissed without just cause — into a practical reality. Part III can therefore be understood as an exercise in the reform of civil justice. As such, it deserves strong support. Indeed, while most employers would likely prefer not to have to deal with unjust dismissal claims under Part III, surely few would openly embrace the idea that people should be denied a proper hearing because they cannot afford to go to court, or that they should be denied a proper remedy if they have been done a serious injustice.

However, the introduction of adjudication of unjust dismissal claims under Part III in 1978 has produced more far-reaching consequences. As Prof. Geoffrey England's study for the Commission shows, over the years the adjudication system has not only remedied many of the procedural shortcomings of civil litigation, it has significantly modified the old civil and common law doctrines governing wrongful dismissal. Part III Adjudicators, borrowing extensively from the jurisprudence developed over the years by arbitrators in unionized workplaces, have built up their own distinctive doctrines that confer on unorganized federal workers quite extensive substantive and procedural protections. As I note in Chapter Six, this has coincided with, and arguably hastened, the adoption of progressive attitudes and practices in the field of workplace discipline, many of which were also advocated by human resource and industrial relations professionals as a matter of best practice.

Prof. England's study concludes that the adjudication system is fundamentally sound. This view seems to be widely shared: not a single brief received by the Commission called for its outright abolition. On the other hand, Prof. England identified a number of structural and procedural problems with the system, while additional concerns were identified by the Commission's own staff studies and by briefs and submissions from Adjudicators, lawyers, employers, workers and unions.

B. ACCESS TO ADJUDICATION

The first of these concerns deals with potential barriers to access. Only some 1,400 claims for unjust dismissal are filed in an average year by the 500,000 to 600,000 non-unionized workers in the federal domain. While we have no way of knowing how many workers are actually dismissed each year in circumstances that might be considered unjust, this number seems very low. The explanation may be that workers are unaware of their rights or do not know how to protect them. If so, better information and more accessible procedures, both recommended elsewhere in this report, should remedy the situation.

Not surprisingly, some employer groups took the opposite position, that recourse to Part III procedures was already over-generous. Pointing to the fact that similar recourse in Quebec and Nova Scotia is available only to employees with two and 10 years of service, respectively, they suggested that the one-year qualification period under Part III be lengthened. However, on average only some 250 cases per year are actually heard and decided, of which no more than about 75 originate in any one sector under federal jurisdiction. It is therefore difficult to see that employers are being subjected

to an excessive volume of claims that might justify restricting access to the unjust dismissal procedures for employees who are presently eligible and who have plausible claims. Nor could the volume be described as excessive even if improvements in the system and its greater visibility resulted in more claims being brought than at present.

Employers also argued that one year was insufficient time for them to evaluate a newly hired employee, and that a person denied a permanent job after one year should not be able to challenge the denial through adjudication. Apart from the fact that employers seldom extend probationary periods beyond a year, the answer to this argument is as follows: if an employee, however long-serving, cannot do the job, the employer may terminate the employment contract; however, the employer must be prepared either to give the employee notice or pay in lieu, or to defend their decision in front of an Adjudicator.

In sum, I see no grounds for making access to adjudication more restrictive than at present.

C. THE PROCESSING OF UNJUST DISMISSAL CLAIMS PRIOR TO A HEARING

At present, complaints of unjust dismissal are assigned to Labour inspectors who work out of regional offices across the country. These inspectors attempt to resolve such complaints informally, initially through a process they refer to as "shuttle diplomacy" and ultimately through more formal mediation. If they do not succeed, an Adjudicator is appointed. The Adjudicator then has the responsibility of carrying the matter forward to a hearing and, ultimately, of writing a decision.

I will deal with the Adjudicator's role below. In this section, I deal with the inspector's management of the proceedings at the initial stages. By way of background, inspectors do not deal only with adjudication — they handle all complaints under Part III, conduct audits, provide educational and informational services to the workplace parties and perform other functions, as well. This broad range of responsibilities has one great advantage: it makes them highly knowledgeable not only about Part III but about the general conditions within which the legislation operates in the local geographic area and in particular sectors and establishments. However, a price is paid for this advantage: they are not always able to give unjust dismissal cases prompt or adequate attention.

In my view, complaints of unjust dismissal involve such important interests of both workers and employers that they ought to be dealt with on a priority basis with a view to resolving or deciding them at the earliest possible

moment. This requires that inspectors handling complaints initially should be able to deal with them immediately. Moreover, initial handling often determines what happens to complaints as they subsequently move toward adjudication. It is therefore essential that a single, vertically integrated system should be put in place to handle complaints of unjust dismissal. Unfortunately, so long as these complaints form part of the busy and varied workloads of inspectors working under the direction of Regional Directors who have even broader responsibilities, this is unlikely to happen. I therefore recommend below that unjust dismissal complaints be treated differently from other complaints and be handled within a separate administrative structure, designed and directed by a Director of Adjudication Services (DAS).

However, I am keenly aware that the presence of regional offices and locally situated inspectors enables unjust dismissal complaints to be processed in close proximity to the complainant and the employer. This is especially important if there is to be a chance of resolving complaints amicably without a hearing. To retain this advantage, it is important that personnel be locally available to receive and process complaints in their early stages and to resolve them through negotiations, if possible. Three strategies are available, any of which might work.

The first is to require all inspectors to process unjust dismissal complaints as their first priority, and to give them a defined period of time within which to either resolve complaints or send them forward to the DAS. The second is to designate one or more inspectors in each regional office as specialists in unjust dismissal, and to ensure that they are allowed to give unjust dismissal complaints priority, even though they may perform other functions from time to time. The third is for the DAS to develop a local presence by assigning a staff member to each regional office to perform all necessary technical and logistical functions relating to unjust dismissal, as well as the dispute-resolving functions now performed by inspectors.

D. DISPOSING OF UNJUST DISMISSAL COMPLAINTS PRIOR TO A HEARING

Employers complained that what they described as frivolous, vexatious or clearly unmeritorious claims are sometimes permitted to move through the adjudication system with the result that they confront protracted, costly, acrimonious and ultimately pointless proceedings. No doubt some such claims exist, and there ought to be a way to screen them out of the process at an early stage. Present procedures do not seem to be working well in this regard and should be changed. My recommendation for the appointment of a DAS with power to dismiss patently unfounded claims should resolve

this problem. Similarly, the new procedures that I envisage would allow claims to be diverted to some other forum if that is where they belong. This is most likely to occur in connection with complaints of unjust dismissal that could also be characterized as violations of human rights legislation (see Chapter Six).

Worker representatives, staff studies and other submissions focus on the obverse of this problem: claims that on their face seem meritorious but take an excessive amount of time to find their way to adjudication. On average, six months elapse from the time a complaint of unjust dismissal is submitted until an Adjudicator is appointed, a further delay of three months until the case is actually heard, and yet another delay of three months before a decision is rendered, as discussed below. Of course, this is not all wasted time. During this period, about three-quarters of all claims are settled or abandoned. The question is whether and to what extent this attrition is caused by delay. If delay is causing employees to abandon arguably meritorious claims, the longer it lasts, the more likely it is that injustice will result.

We have no direct evidence of why workers settle or abandon their claims. No doubt some receive fair offers of settlement and others come to accept that their claim lacks merit. However, a reasonable hypothesis is that since most dismissed workers are suffering the psychological and financial consequences of losing their job, are likely without income, and are unfamiliar with legal procedures and generally without legal representation, many will abandon their claims or settle at a deep discount simply because they cannot afford to wait for a better result. More efficient management of the complaints handling process by the DAS should shorten time delays and alleviate — if not eliminate — many of these difficulties.

E. DELAYS IN HEARING AND DECIDING CASES

I heard anecdotal evidence concerning the extraordinary amounts of time consumed in scheduling hearings and deciding cases. In the most extreme cases, several years may elapse between the appointment of an Adjudicator and the rendering of a decision. However, even putting these extreme cases aside, the average delay still runs to about six months. This is far too long both for workers who have lost their jobs and for employers who may ultimately have to compensate and reinstate them.

These delays seem to stem partly from the non-availability of Adjudicators. The Labour Program presently appoints Adjudicators *ad hoc* from an approved list. Most persons on that list — but not all — are highly experienced and knowledgeable individuals who arbitrate grievances in unionized workplaces in the private sector. These individuals frankly have little to gain from adjudicating dismissal cases under Part III where they are paid according

to a fixed fee schedule at a fraction of their normal rates; but they accept Part III adjudication assignments because they feel they have a professional responsibility to do so. However, because they have competing prior commitments elsewhere, they are often not able to hear Part III cases promptly or, for that matter, to issue awards within a reasonable time.

In Chapter Nine I recommended the appointment of a permanent panel of full and part-time Hearing Officers to deal with non-payment of wages. These Hearing Officers should also be assigned to hear unjust dismissal cases. They would be deployed on the cab-rank principle: as soon as a case is ready for adjudication, it should be assigned to the first available Hearing Officer. Moreover, since Hearing Officers are to operate under the direction of the DAS, it should be possible to develop guidelines for processing cases through the successive stages of the system on a fixed and compressed schedule. This would help resolve another difficulty that afflicts the present system: the non-availability of counsel. Armed with guidelines and fixed schedules for the proceedings, Hearing Officers would be able to insist that lawyers make themselves available for proceedings. All of these innovations should ensure that cases are heard and decided much more expeditiously.

F. THE MECHANICS OF THE SYSTEM

The day-to-day mechanics of the adjudication system should be entrusted to a small staff working under the direction of the DAS. Staff members would process complaints as they are received; screen out those that are clearly ineligible for the adjudication system or are clearly without merit; divert those that belong in other forums to their appropriate destination; provide assistance to unrepresented parties and to advocates who are unfamiliar with the process; and organize the logistics of the hearing, the release of the decision to the parties, the filing of the Hearing Officer's decision in court and, if necessary, the referral of the decision for enforcement.

Some of these mechanical and logistical tasks, such as organizing the hearing, are presently undertaken by the Adjudicator. Delegating them to the DAS staff would relieve the new Hearing Officers of this burden and allow them to concentrate more fully on the actual hearing process.

G. OVERALL MANAGEMENT OF THE ADJUDICATION SYSTEM

As noted, the DAS would have broad responsibility for managing the adjudication system, as well as other responsibilities. This should help to resolve some other issues confronting the adjudication process. For example, the DAS should provide unrepresented complainants with self-help kits so that they can act as their own advocates; direct them to legal clinics or other possible sources of representation; and organize training sessions for worker

and employer representatives — both lawyers and lay advocates — who may be unfamiliar with unjust dismissal proceedings under Part III. The DAS, working with the new Hearing Officers, should also develop strategies for ensuring that unrepresented parties — most often workers, but sometimes employers — receive fair treatment during hearings, that obstreperous or abusive litigants and advocates are dealt with promptly and effectively, and that when some special knowledge of cultural context or industry practice would be helpful in dealing with a case, a Hearing Officer is available who possesses such knowledge. Finally, the DAS should, over time, be able to design and implement expedited and informal procedures that will make the whole process work more smoothly and rapidly. For example, it may be possible to deal with some preliminary matters by teleconferencing; others may require only an exchange of documents and written arguments rather than face-to-face hearings. Procedures should be redesigned with these possibilities in mind.

H. THE APPOINTMENT, POWERS AND JURISDICTION OF HEARING OFFICERS

A concern expressed from time to time is that some inexperienced or unsuitable Adjudicators have been appointed to hear unjust dismissal complaints, that they conduct hearings in an inappropriate manner and that they render decisions that are out of line with the developed jurisprudence under Part III. The system I have recommended addresses these concerns.

If my recommendations in Chapter Five are followed, the persons appointed as Hearing Officers will be highly qualified. Moreover, the "users committee," recommended below, will have a vested interest in ensuring that only appropriate persons are appointed. I therefore anticipate that all Hearing Officers will have sufficient ability, knowledge and experience to hear cases in a fair and efficient manner and to decide them expertly.

Of course, their ability to do so is not entirely a matter of selecting the right people and instituting appropriate system management strategies. It is also a matter of what powers Hearing Officers are granted by Part III. I offer three important examples of the need to attend to this question.

The first relates to the power of Adjudicators (Hearing Officers, under my proposals) to make certain kinds of procedural, evidentiary and substantive rulings. Prof. England's report, staff studies and various briefs by interested parties suggested that Part III ought to be amended to confer on Hearing Officers powers to excuse non-compliance with statutory time limits under special circumstances, to dismiss clearly unmeritorious claims short of a full hearing, to grant interim relief in limited circumstances, and to deal with egregious behaviour and abuses of process. No doubt other aspects of their powers should be reviewed as well. Given the technical nature of

many of these issues, it is not possible for me to do more than recommend that all of these suggestions should be examined closely if and when new legislation is drafted.

The second relates to remedies. Employers expressed the view that reinstatement was an inappropriate remedy, especially for workers who have only one year's seniority. This is a rather surprising claim since reinstatement is awarded in barely 25 cases in a typical year — only about 10% of all cases assigned for hearing on their merits, and only about 30% of successful claims. Admittedly, the possibility that an employee will be reinstated may prompt some employers to offer higher settlements than they otherwise would do. On the other hand, most employers know that the odds against reinstatement are strong, most are advised by lawyers, and most can afford to risk litigation. Accordingly, the chances of their being pressured into inappropriate settlements are relatively small. Indeed, given that so few successful claimants actually receive the reinstatement remedy, it is conceivable that it is underutilized by Adjudicators, for reasons suggested in Prof. England's report and elsewhere.

Adjudicators apparently differ among themselves about when reinstatement should be awarded or denied, and about the nature and extent of other forms of relief. I do not intend to rehearse these debates. They will largely resolve themselves once cases are heard exclusively by well-trained and highly experienced Hearing Officers. I will note only that the absence of a make-whole remedy such as reinstatement is an anomaly in the common and civil law, largely confined to litigation involving contracts of employment. In most other contexts, courts find ways of restoring the parties to the *status quo ante*. There is no obvious reason to expand this legal anomaly rather than eliminate it.

The third issue relates to the power of Hearing Officers to hear and decide cases that involve not just claims of unjust dismissal, but complaints alleging violations of other provisions of Part III, Parts I and II of the *Canada Labour Code*, other statutes such as the *Canadian Human Rights Act*, the civil or common law or the *Canadian Charter of Rights and Freedoms*. For example, employees may claim to have been dismissed because they were whistle-blowers, or claimed parental leave, or because they were members of a union or a minority group, or because their job had been downgraded in circumstances that would amount to constructive dismissal at common law, or because they exercised their right of free speech. Should all such claims be justiciable in adjudication proceedings?

In Chapter Six I deal specifically with unjust dismissal claims that also involve allegations of human rights violations and recommended that an understanding be reached with the Canadian Human Rights Commission and the

Canadian Human Rights Tribunal to avoid overlapping or multiple proceedings and to ensure that the appropriate expertise is brought to bear on both human rights and unjust dismissal cases. In all other cases, if it becomes clear at the outset of unjust dismissal proceedings that some different set of legal rules is at the core of the complaint, and if adequate remedies are available under those rules to protect the complainant, then the claim of unjust dismissal should be adjourned and the matter remitted for hearing to the court or tribunal with primary jurisdiction over the subject matter.

Obviously, different considerations apply to cases where a complainant alleges violations of substantive provisions of Part III itself. For example, a complainant may allege that he or she has been unjustly discharged; the employer may respond that the dismissal was provoked by poor work performance or workplace misconduct; and the complainant may then rejoin that in truth they were dismissed for whistle-blowing. In such a situation, under my proposal, Hearing Officers would hear and decide all issues related to Part III, not simply those directly implicated in the claim of unjust dismissal.

I. OVERSIGHT OF THE ADJUDICATION SYSTEM

The job of the Director of Adjudication Services is to promote the efficient operation of the adjudication system and to create conditions that are conducive to fair outcomes. This will require care in the initial drafting of regulations, the design of administrative systems, the selection, training and deployment of Hearing Officers and staff, and the development of innovative day-to-day operating procedures. It will also require the ongoing evaluation of how well all of these, and the legislation itself, are working and, if necessary, periodic re-engineering of the process.

In this connection, input from those who deal with the adjudication system on a daily basis can be most helpful. Accordingly, the DAS should establish a "users committee" that would include knowledgeable representatives from stakeholder groups, from other interested bodies such as legal and community clinics, paralegal advocates and the labour bar, and perhaps persons knowledgeable about justice delivery systems. The committee's mandate should be to receive and consider periodic statistical and analytical reports on the system, to make practical recommendations for improving the efficiency and fairness of the system, to advise on training courses and educational materials, and to recommend criteria and procedures for appointing as Hearing Officers only those individuals who are highly qualified.

J. RECOMMENDATIONS

I now summarize my recommendations, emphasizing that they must be read in conjunction with those in Chapter Nine, which deal with compliance more generally.

RECOMMENDATION 8.6 Access to adjudication by employees claiming to have been unjustly dismissed should continue to be provided under Part III to employees who have completed one year of service.

RECOMMENDATION 8.7 The adjudication system should come under the direction of a Director of Adjudication Services (DAS), who should be administratively responsible for its fair and efficient operation.

The DAS should have the authority to:

(a) provide information to workers and employers concerning their procedural and substantive rights and responsibilities;

(b) receive and process complaints concerning unjust dismissal;

(c) assist the parties to such complaints to resolve their differences;

(d) dismiss claims that are patently frivolous or vexatious or belong elsewhere;

(e) assign cases for adjudication; and

(f) take all necessary steps to ensure the proper operation of the adjudication system.

RECOMMENDATION 8.8 Adjudication should be undertaken by a new panel of permanent full- and part-time Hearing Officers, rather than by Adjudicators appointed *ad hoc*, as at present. A detailed review of the procedural and remedial authority of Hearing Officers should be undertaken to ensure that they enjoy the full array of powers needed to conduct hearings and dispose of cases in a fair and effective manner that protects the rights of both workers and employers. If necessary, changes in their powers should be enacted in legislation or by regulation. The power of Hearing Officers to award reinstatement should be retained in its present form.

RECOMMENDATION 8.9 Complaints of unjust dismissal based primarily on legal rights other than those conferred by Part III should be referred for adjudication to the appropriate court or tribunal. Unjust dismissal complaints that also allege violations of Part III should be dealt with in full by a Hearing Officer.

RECOMMENDATION 8.10 A "users' committee" should assist the DAS in maintaining general oversight of the adjudication system.

5. WRONGFUL TERMINATION AS AN OFFENCE

In certain circumstances, dismissal of an employee may constitute an offence for which prosecution may take place in criminal court. For example, an employer may refuse to accept the return to work of an employee following pregnancy or compassionate care leave, or may discharge an employee for giving information to an inspector. Such offences are punishable on summary conviction by a fine not exceeding $5,000. The convicting judge may also order that compensation be paid to the employee "not exceeding … the wages that would have accrued to the employee up to the date of conviction," and may reinstate the employee in employment.

There are many difficulties with these provisions: criminal court judges are seldom knowledgeable about employment standards; standards of proof are higher in criminal proceedings than in administrative proceedings; judges used to hearing cases involving bodily harm or theft of property are notoriously reluctant to convict or severely punish white-collar offenders; the fines provided are derisory; and the monetary relief for workers is ungenerous. But these difficulties are all overshadowed by a more fundamental one: no prosecutions at all have been brought since 1987 — almost twenty years ago; nor is one likely to be brought soon, given present arrangements.

In Chapter Nine I make a series of recommendations concerning the handling of unfair labour practices — acts of serious or systemic employer misconduct that undermine the integrity of Part III. "Unjust dismissal" in the ordinary sense would not amount to an unfair labour practice. However, dismissal in violation of the statute, and especially dismissal of whistle-blowers, could

indeed be described in those terms. If my recommendations are followed, and if the Chief Compliance Officer assumes primary responsibility for prosecutions, criminal proceedings may once again be used to deal with these egregious cases — though they would be used sparingly. This would require significant overhaul of the present statutory provisions. Recommendations in this regard also appear in Chapter Nine.

RECOMMENDATION 8.11 Dismissal of employees in violation of Part III, including dismissal of those who provide information or evidence to inspectors or bring complaints under Part III, should be more clearly identified as an offence. Cases of unjust dismissal not involving statutory violations would not constitute an offence.

RECOMMENDATION 8.12 In addition to paying a fine, upon conviction employers should be ordered to reinstate the employees and to compensate them fully for past or future losses attributable to the offence and for any other unpaid wages or benefits owing to them, whether under Part III, under contract or otherwise. In appropriate cases, company officers or directors should be liable to prosecution and, upon conviction, to fines or imprisonment.

Chapter Nine

Compliance

NINE
COMPLIANCE

1. WHY COMPLIANCE IS IMPORTANT

Compliance may be the single most important issue confronting this review. To put the matter succinctly, if employers do not comply with Part III, if workers do not receive the protections it promises, if government is not prepared to ensure that it is having the intended results, there is not much point in having labour standards legislation at all.

Unions, workers and advocacy centres argued that the rights conferred by Part III are often ignored by employers and that the machinery of enforcement is inadequate. They contended that enforcement of the legislation ought to be more proactive, that significantly more resources ought to be devoted to detecting and punishing violations, and that sanctions ought to be much more severe than at present. Their views were supported by several independent researchers, one of whom asserted that securing higher rates of compliance with the present legislation would do more to advance the interests of workers than any substantive amendment to Part III.

Employers and employer organizations claimed, to the contrary, that compliance with Part III was the rule, not the exception, and that most violations resulted from unintentional misunderstandings of the requirements of complex laws and regulations. However, they generally acknowledged, as well, that a small number of irresponsible firms might deliberately or systematically violate Part III, and that appropriate means had to be developed to deal with such firms. That said, they maintained that compliance strategies ought to focus on simplifying the language of Part III, educating workers and employers concerning their rights and responsibilities, and responding to their need for flexibility by allowing them to adapt the statute to suit their particular circumstances.

However, compliance is not simply a matter of interest to employers and workers. Historically, Canadians have accepted the moral imperative of ensuring that workers enjoy decent minimum working conditions. More recently, as we have come to understand that high labour standards are

associated with high-performance economies, we have also come to expect that many employers will not only meet, but exceed minimum standards — as most major federal employers do most of the time. Both objectives would be thwarted if any significant degree of non-compliance were allowed to persist. Non-compliance is contagious. If a small minority of firms secures a significant competitive advantage by operating with substandard labour conditions, it may ultimately drive the majority of law-abiding firms to follow suit.

Further, the public has an interest in ensuring respect for law. Part III affects hundreds of thousands of Canadians. If it can simply be disregarded, if those Canadians cannot claim and do not receive the protections that the law provides, our system of government falls into disrepute. And finally, there is a public interest in ensuring that the energies and resources invested in administering Part III are well spent. Successive federal governments have promoted what is sometimes called "smart regulation." On the one hand, this approach seeks to ensure that state intervention — in this case, in the workplace — is justified in public policy terms. On the other, it seeks to ensure that where intervention does occur, regulatory processes operate as efficiently and effectively as possible. This chapter pays special attention to the latter concern.

2. THE EXTENT, CAUSES AND CURES OF NON-COMPLIANCE

A. EXTENT

Is Part III being complied with? This question is difficult to answer because the available evidence consists in part of anecdotes or impressions, and in part of statistics that are less than satisfactory. That said, the Commission took steps to become as well informed on the subject as possible. It examined the findings of the 1997 Labour Standards Evaluation (LSE) survey (now somewhat out of date but a likely approximation of present experience), and of the 2005 Statistics Canada Federal Jurisdiction Workplace (FJW) Survey of employment practices in 12,000 federally regulated enterprises. And it commissioned several independent research studies on compliance, initiated a staff analysis of Labour Program case-handling statistics, and drew on the experience of Labour inspectors and stakeholder representatives who deal with compliance issues on a daily basis.

Each year, the Program receives complaints under Part III from about 3,000 workers, who comprise a mere 0.36% of the estimated 840,000 workers in the federal domain (unionized workers are covered by some provisions of Part III and not others). These complaints typically result in some 3,900 findings of violations — some complaints allege multiple violations — a rate

of only 0.215 violations per 1,000 workers. This modest number of complaints and violations might lead one to conclude that there is a remarkably high level of compliance with Part III. However, both the LSE survey and the FJW Survey suggest otherwise. The LSE survey reported that about 25% of all federal employers were not in compliance with most obligations under Part III, and that 75% of these employers were not in compliance with at least one provision of Part III. This latter figure was confirmed by the more recent and comprehensive FJW Survey.

These surveys are subject to certain methodological and interpretative caveats, not least that they are based on self-reporting by employers and are therefore likely to understate non-compliance. Even so, they point to a significant discrepancy between the very low level of formal complaints and findings of violation on the one hand, and widespread self-reported non-compliance on the other. This discrepancy can be explained primarily by the fact that — as experts on compliance have often noted — counting complaints is likely to reveal only the "tip of the iceberg" of non-compliance.

Workers may not complain because they are ignorant of their rights under Part III, because they fear employer reprisals, or because they lack the stamina or means to pursue their remedies. Difficulties within the enforcement agency may compound the problem. Understaffing may slow the response time of inspectors and lead them to focus on resolving individual complaints, rather than taking the initiative to seek out non-compliance or trying to eradicate systemic patterns of violation. Lack of appropriate legal powers may hamper their search for evidence, and awkward legislative language may make it difficult for them to prove violations. Such difficulties may not only dissuade complainants from coming forward, but may also tempt employers to ignore the law as they take note of the long odds against being caught.

Conversely, a more proactive inspectorate with an expanded mandate and new powers — which I propose below — will almost certainly generate more complaints, more enforcement proceedings and more findings of violation, as recent experience in Ontario confirms. However, over the medium- to long-term, the message sent by this approach is likely to prompt more employers to comply with the law and consequently, to reduce the number of violations, complaints and enforcement proceedings.

Complaints-based statistics lead not only to serious overestimation of overall levels of compliance, but also to potential misidentification of the issues and industries that generate the most violations. For example, our staff analysis showed that 92% of all complaints under Part III were filed by workers who were no longer employed in the same workplace. This striking statistic suggests that some workers are so concerned that they will

be fired that they abandon their statutory rights. Or to take another example, complaints statistics suggest that non-compliance typically involves such fundamental issues as non-payment of wages, benefits or overtime. However, estimates of non-compliance based on survey evidence suggest otherwise. The FJW Survey showed that 12% of federal employers failed to provide three weeks of annual vacation to employees with ten years of service, even though they are entitled to it after only six years; that 53% sometimes provided compensation for overtime worked in the form of time off rather than premium pay, as the law requires; and that 78% had no policy on sexual harassment in the workplace, as required by law.

It is important to identify which employers are most likely to violate the requirements of Part III. Complaints-based statistics point to strikingly different levels of compliance between sectors and among enterprises of different sizes. For example, in 2004–2005, the banking sector accounted for almost 30% of all workers in the federal domain, but only .005% of labour standards violations. By contrast, truck transport accounted for just over 12% of all workers but almost 78% of violations. Or to take another example, in 2003–2004 and 2004–2005, some 79% of all violations were committed by enterprises with fewer than 100 employees, although such enterprises employ only 14% of the federal jurisdiction workforce. These are significant numbers.

However, while survey data confirms this pattern, it also provides a more nuanced picture. The LSE survey showed that employers not in compliance with Part III were most likely to be smaller and non-unionized; to have access to little or no professional human resources, accounting or legal support; to have gone into business only recently; to operate in the trucking sector — or all of the above. Conversely, firms most likely to be in compliance were those that were larger and could therefore employ human resource and other specialists within an established administrative structure. In some sectors, many of these highly compliant firms were unionized and operated with collective agreements whose terms exceed those required by Part III. And they tended also to have been in business longer and to have more experienced managers and administrators who were more familiar with the legislation.

The FJW Survey confirms and refines these general observations. For example, non-compliance with the statutory requirement to adopt a policy on sexual harassment was highest among the smallest firms (93% of firms with one to five employees), declining sharply as the size of firms rose (70% of firms with six to 19 employees, 55% of firms with 20 to 99 employees, and 13% of firms with over 100 employees). Non-compliance with this provision also varied by sector, reaching 87% in road transport, and exceeding 63% in all sectors other than rail transport (24%) and banking (11%).

If small employers and those in the trucking industry seem most likely to offend, as statistics indeed suggest, the situation may be even worse than appears. Small employers are likely to know their workers better than large employers; if complaints are made they are likely to be able to identify complainants and to take steps to get rid of them. Conversely, workers in small enterprises are more likely than those in large enterprises to know their employer personally and to have a better understanding of whether the enterprise is thriving or in difficulty. They are therefore more likely to refrain from making complaints on grounds of personal loyalty or self-interest. All of these considerations make under-reporting by small enterprises more likely, rather than less.

In trucking, the situation is somewhat similar. As noted in Chapter Four, that sector has a high incidence of workers whose employment status is ambiguous. Some of these workers will not know they are covered by Part III and others may not wish to know. Truckers, moreover, are mobile and work irregular hours. They are therefore less likely than workers in more conventional settings to talk to each other about their entitlements or to be able to seek information from Labour Program sources. Further, the demand for trained drivers, we were told, greatly exceeds supply. In such a labour market, truckers who have been treated badly or illegally will be tempted to move to another job rather than file a complaint. Finally, entry into the trucking industry is relatively easy, so there is a high turnover of firms. Since the longevity of a firm correlates positively with its compliance record, the more ephemeral firms are, the likelier it is that they have come and gone leaving violations in their wake. All of these considerations suggest that non-compliance in the trucking sector is, if anything, seriously under-reported.

To sum up what we know about compliance: statistics are not kept on an ongoing basis; data retrieved from records of complaints and violations almost certainly understates overall rates of non-compliance by a wide margin; and even surveys in which employers self-report significant levels of non-compliance are likely to be underestimates. Furthermore, rates of non-compliance clearly vary according to sector, size of firm and type of offence. Though the data is unreliable for various reasons, non-compliance is almost certainly lowest in large firms, and with respect to "bread and butter" issues like unpaid wages and benefits; it is highest among small firms, in the trucking industry and with regard to non-monetary workplace issues such as posting sexual harassment policies.

B. CAUSES

While we lack conclusive evidence concerning the causes of non-compliance, a number of factors are likely at play. The first is simple ignorance. Many small employers do not know what Part III requires of them, many workers do not know that they have rights or that they can secure redress against their employers, and finding out is made more difficult for both groups by the inherent complexity of Part III and by the extremely technical — occasionally impenetrable — language in which it is drafted. The second is that some aspects of Part III are either in fact unsuited to the contemporary world of work, or perceived by employers to be so. This establishes in the minds of some employers a justification for ignoring the law much as, say, some drivers feel justified in violating speed limits on an empty highway. Third, inconsistencies and inefficiencies in administering Part III may tempt some employers to ignore it — they think they will not get caught, or that if caught, they will suffer no serious consequences. Fourth, there is the competition factor: as the experience of trucking shows, deregulation of the industry — compounded by cross-border security problems and rising fuel prices — has generated intense pressure on employers to cut labour costs. And fifth, there is simple greed: a few employers evidently feel that any business strategy — including one that involves violating the law and exploiting workers — is legitimate so long as it leads to higher profits.

C. CURES

I propose four cures for non-compliance:

1. **Remove or reduce the causes of non-compliance.** Ensure that statutory requirements are appropriate to the contemporary federal workplace — and are seen as such; re-engineer reporting and other procedural requirements to ensure the lightest possible paper burden, especially on small employers; re-draft Part III, or at least make plain-language summaries of the legislation widely available; and explain to employers why maintaining decent labour standards can make them more, not less, competitive.
2. **Educate and engage the stakeholders.** Provide information via pamphlets, toll-free numbers and on-line; educate and train workers, employers and their advocates; and involve all stakeholders in the design and implementation of a compliance strategy.
3. **Get organized.** Develop clear lines of responsibility for various aspects of a compliance strategy; build an information base to identify industries, firms and practices requiring special attention; and organize and deploy staff more effectively.

4. **Get tough.** Make more proactive use of available compliance tools and personnel; redesign the existing enforcement mechanisms and processes to make them more efficient; and ratchet up the price of non-compliance.

These approaches can be mutually supportive. If the substantive aspects of Part III are brought up-to-date, some pressures and temptations that now lead employers to violate the statute will be reduced or eliminated. This will free up resources presently used for complaints processing and redirect them to information and educational campaigns. These campaigns will, in turn, reduce the number of unintentional or trivial violations and allow a further redeployment of resources into problem areas and against persistent offenders. Closer monitoring and enhanced sanctions will make non-compliant employers more attentive to their responsibilities and less willing to risk the consequences of being caught. And better organization of administrative responsibility for Part III will facilitate coordination of these different approaches and ensure the optimal use of resources.

Other chapters of this report deal with the modernization of Part III. This chapter deals with the remaining aspects of a new compliance strategy.

3. EDUCATING AND ENGAGING THE STAKEHOLDERS

The LSE survey suggests that lack of awareness is likely the major cause of non-compliance, with significant percentages of employers reporting that they did not know what Part III required of them. This impression was repeatedly confirmed in briefs and presentations to the Commission. The Commission heard that many small employers struggle under the burden of complying with a mass of regulations, many of which they treat as having higher priority than Part III; that they cannot afford professional advisors to help them interpret and apply the legislation; that many — especially those who do not speak either official language — find provisions of Part III unclear and that little clarification is available on the web or elsewhere; and that some are confused over whether they fall under federal or provincial jurisdiction. Employer representatives therefore stressed the need for significant improvement in the information provided to employers and in education campaigns to alert them to their responsibilities. Unions and other worker advocates similarly stressed the need to improve the information provided to workers so that they would become more aware of their rights under Part III, and of the means of enforcing them. Researchers who provided us with studies on compliance issues and front-line enforcement staff also supported increased emphasis on education and information.

Without this emphasis, it seems clear, many employers will continue to violate Part III out of ignorance, and many workers will fail to claim their rights and entitlements for the same reason.

RECOMMENDATION 9.1 The Labour Program should greatly increase the resources available for education and information. Every federal workplace should post a notice that summarizes Part III and directs readers to a toll-free number and website where they can receive authoritative and accessible information concerning federal labour standards. Information should be customized to fit the needs of specific sectors or constituencies, such as First Nations, and should be translated for the benefit of workers and employers who are fluent in neither English nor French.

Of course, it is important that requests for information receive clear and helpful responses. The present responses of the Labour Program seem to elicit mixed reactions. The Program has prepared some excellent pamphlets that translate the statute and regulations into something like plain English and French; however, it appears these pamphlets are not readily available. The Program has a website containing important information about workers' rights and how to protect them, but it is not presented in a form that would be easily understood by ordinary workers and small businesspersons who are covered by Part III. And finally, the Program provides information by phone through its local and regional offices; however, several presenters at our hearings reported that phone calls sometimes elicit unhelpful or contradictory responses, suggesting the need for better coordination and greater expertise.

Some employer groups indicated that they would cooperate with the Labour Program in preparing educational programs and disseminating information to their members. No doubt some unions are ready and willing to do the same, even though most workers protected under Part III are not unionized. In addition, a number of organizations offer legal, paralegal and advisory services to workers who have encountered difficulties with labour standards legislation. Although most of their caseload seems to originate in provincial, rather than federal, workplaces, these organizations can and do contribute to securing compliance with Part III by advising workers of their rights. But they could make a bigger contribution if they were better funded and if they existed outside the large urban centres where most are presently located.

RECOMMENDATION 9.2 The Labour Program should enter into partnerships with employer associations, unions, legal clinics and other advocacy groups in order to improve the dissemination of information about Part III and to educate workers and employers about their rights and responsibilities. Because some of these groups lack resources, the Program should provide them with assistance in kind — materials, training and advice — in order to enable them to educate, inform and advise their members and clients.

Unless the Labour Program takes the lead, I am afraid the positive attitude of all of these organizations toward such initiatives is unlikely to be translated into effective action. Unfortunately, the Labour Program is not presently configured so as to provide a sustained, professional and integrated approach to education and information, especially one that is coordinated with other elements of a comprehensive compliance strategy. Rather, education and information remain largely the responsibility of field staff who are already hard-pressed to conduct inspections and process complaints.

RECOMMENDATION 9.3 The Labour Program should establish a properly funded unit with a mandate to provide education and information to workers, employers and other interested parties, and to work directly with them to promote compliance.

Numerous briefs and oral submissions also focussed on the potentially constructive role that stakeholder organizations might play in securing compliance. For example, some employer organizations reported that their formal codes of conduct or membership policy statements already require compliance with all relevant laws; others said they were prepared to adopt similar documents. This is an approach to voluntary compliance that is well worth exploring. However, as Profs. Michael Trebilcock and Patrick Macklem note in their review of the literature, codes of conduct and voluntary compliance strategies are most likely to succeed when the alternative confronting employers is a real likelihood of serious legal repercussions. Since elsewhere in this report I make a number of recommendations to improve detection of wrongdoing, to make remedies more accessible and effective and to enhance legal penalties for violations, perhaps a more favourable context can be created in which voluntary measures are encouraged without any implication that they are meant to offer offenders a "soft landing."

To have any credibility or effect, voluntary codes of conduct should exhibit several characteristics: they should be fairly clear and precise in what they require; someone within the organization or enterprise should be fixed with responsibility for compliance; there should be an avenue for complaints

to someone with power to investigate; and there should be some means of acknowledging that violations have occurred, even if there is no legal power to remedy them. Sectoral organizations or individual firms that adopt and live by codes that meet these criteria would not only enhance labour standards for their workers, but also set a good example for others and earn themselves the respect of the whole community.

RECOMMENDATION 9.4 The Labour Program should invite sectoral organizations and individual firms to voluntarily commit themselves to complying with Part III and other labour standards, and to adopt codes of conduct embodying these commitments. The Program should assist them in drawing up appropriate codes and in monitoring their effectiveness. It should also publicly acknowledge examples of successful implementation.

As noted above, a number of organizations — such as legal clinics and community service groups — provide advice to workers concerning Part III, represent them in negotiations with their employers, and advocate their claims in enforcement and unjust dismissal proceedings. These organizations almost always operate on short rations. They are typically funded by charitable donations, or in some cases, by provincial governments or other institutions such as universities, unions or churches. Moreover, they tend to exist — if at all — only in major urban centres. The result is that many, perhaps most, workers do not have access to them; nor can workers normally afford to consult or retain lawyers or paralegal representatives of their own; nor do most workers have the knowledge or skill to represent themselves; nor can they — except in Quebec — obtain legal representation at public expense. Clearly, if advocacy and advice-giving organizations were better funded, workers would be better informed about Part III, and their rights under the statute would be better protected. Consequently, notwithstanding my tenuous claim to the attention of provincial legal aid authorities, I make the following recommendation:

RECOMMENDATION 9.5 Provincial governments that do not already do so ought to consider providing funding to clinics that advise or represent workers in connection with their employment rights.

While the federal Labour Program is in no position to directly fund workers' advisors and advocates, it can certainly assist them in discharging their functions. I have already recommended that the Labour Program work

with them in conducting educational campaigns and distributing information to their members. Another area where assistance is needed is in the education and training not only of workers' representatives but of lawyers and advocates, human resources and industrial relations personnel in large corporations, and the owners and managers of small and medium enterprises (SMEs). It will be especially important that such individuals become knowledgeable about Part III in the period immediately following amendment of the present statute. An investment in their education will pay dividends in terms of achieving much higher levels of compliance and much lower levels of friction in the operation of the new regulatory scheme.

RECOMMENDATION 9.6 The Labour Program should provide education and training for worker and employer representatives in order to assist them in performing their advice-giving and advocacy functions.

Whether or not the Labour Program embarks upon a partnership strategy in the field of education and training, actively encourages the adoption of codes of conduct and other self-regulatory measures, or adopts a sectoral approach to standard setting, it must engage closely with interested parties from time to time. The Program presently maintains close informal liaison with major labour and employer organizations, and convenes its Labour Standards Client Consultation Committee on an *ad hoc* basis. However broader, more formal links ought to be established.

RECOMMENDATION 9.7 The Labour Program should broaden the membership of its Labour Standards Client Consultation Committee to include other stakeholders, including organizations that advise or represent non-union workers. It should seek the committee's help in developing strategies to achieve better compliance levels, in improving operational aspects of the administration of labour standards and in responding to new issues generated by changing labour market conditions and practices

Finally, it is important that all of these initiatives involving stakeholder participation be coordinated with more conventional approaches to enforcing the statute. Coordination will be facilitated by adopting a new administrative structure within the Labour Program, directed by a Chief Compliance Officer (CCO). This structure is described next.

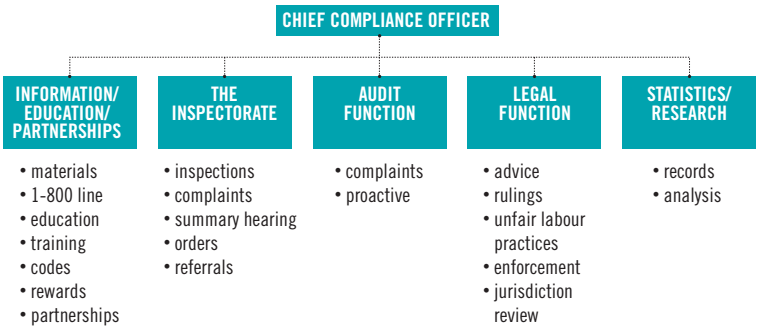
4. GETTING ORGANIZED: A MORE STRATEGIC APPROACH TO SECURING COMPLIANCE

A. COORDINATING COMPLIANCE INITIATIVES

The Chief Compliance Officer

In order to obtain the optimal combination of education, enforcement and cooperation, the most efficient use of administrative resources and ultimately the highest possible levels of compliance, a greater degree of central strategic direction is clearly needed. Currently, the Labour Program is fortunate in having a number of highly knowledgeable Regional Directors who can contribute greatly to designing new structures and implementing new strategies. However, it lacks a Part III champion at the centre, a senior officer with a mandate and the requisite resources to implement a new, multifaceted Part III compliance strategy.

RECOMMENDATION 9.8 A Chief Compliance Officer should be appointed with the authority to deploy inspectors and other field staff, obtain legal advice and representation as required, order audits and investigations, secure statistical and other analyses of issues related to compliance, and conduct educational and information campaigns, as depicted in the following diagram:



As I explain below, a separate structure should be created with responsibility for the important adjudicative functions that are needed to effectively enforce Part III. These functions should be organized under the Director of Adjudication Services (DAS) to emphasize the independence of decision makers from the investigative and prosecutorial staff operating under the direction of the CCO.

To avoid any misunderstanding, my concern is not to propose a new organizational chart, as such. Rather, it is to make clear that the appropriate array of functions must be assembled under some kind of central direction. A brief discussion of each of the relevant functions follows.

Information/Education/Partnerships

For three reasons, it is my view that these functions (described in the previous section of this chapter) ought to respond in some way to the new CCO. The first is that research studies almost unanimously conclude that voluntary compliance initiatives are most likely to be successful when employers confront a real likelihood of serious sanctions for non-compliance. That connection would be made more visible if the CCO were responsible for both functions. The second is that by centralizing the direction of education, information and partnership initiatives, these functions will likely operate more efficiently and with greater consistency. A toll-free number, for example, could be staffed by a small number of well-trained service representatives who provide standard and accurate advice to employers and workers across the country; standard training materials could be developed centrally for use locally; and partnerships with national stakeholder organizations could provide a framework for regional or provincial collaboration. The third reason is that feedback between education and enforcement initiatives would benefit both. Confronted with a significant number of complaints regarding, say, vacation pay, the CCO would initiate not only enforcement proceedings but an educational campaign. Conversely, formal or informal discussions with workers, employers and interested organizations might reveal shortcomings in the Labour Program's compliance strategy, which could then be addressed.

The Inspectorate

Labour inspectors are thinly spread across the country, with broad responsibilities for more enterprises, workplaces, workers and statutory requirements than it is reasonable to expect them to fully discharge. Most of their efforts are therefore devoted to the one thing it is most difficult to ignore: complaints by individual workers who have been deprived of their rights. However, because of their preoccupation with complaints processing, they are unable to undertake many other tasks whose performance would greatly assist in achieving higher rates of compliance, to the ultimate benefit of those same workers.

Further, the mix of inspectors' activities and their workload varies from one region to another, apparently because the regions operated for some time without significant direction from the centre, and with a varied orientation toward certain policy issues. In recent years, the Labour Program has taken steps to address these disparities by instituting national management of

its field services. The CCO would carry forward that initiative and integrate local service delivery with functions that are better performed at the centre; ensure that inspectors are properly trained and understand and apply policy consistently; deploy the corps of inspectors to maximum advantage across the country; and assume accountability for their success in achieving higher overall levels of compliance.

Inspectors themselves acknowledge that they are unable to do everything that Part III expects them to do and that a sound compliance strategy requires. They also believe that they lack adequate enforcement powers and that some powers they do possess they are unable to exercise in such a way as to adequately protect workers. It is almost certain that the Inspectorate must be expanded somewhat, its procedures modernized and its remedial powers enlarged. The new CCO would assess the concerns raised by the Program's knowledgeable front line staff and, to the extent they are justified, make a well-informed and persuasive case for appropriate financial, administrative and legislative responses.

In the end, however, resources will never be sufficient to proactively inspect all workplaces, audit all complaints-intensive sectors, vigorously pursue all complaints or aggressively impose significant sanctions on all offenders. A truly effective compliance strategy therefore depends on the success of measures designed to inform employees of their rights and employers of their responsibilities, to secure the commitment of employers to voluntarily discharge those responsibilities and to persuade the employer community to accept some responsibility for achieving higher levels of compliance. The CCO would be responsible for maintaining the right balance among these varied approaches.

RECOMMENDATION 9.9 The Labour Program Inspectorate should be expanded, its procedures modernized and its powers enlarged. The Inspectorate should be strategically deployed under the overall direction of a Chief Compliance Officer.

Audit functions

Various statutes impose on employers a responsibility to maintain accurate records concerning the pay, benefits, hours of work and working conditions of their employees. Some of this information is to be filed with taxation and regulatory authorities, some is to be made available under Part III for inspection by the Labour Program, and some is to be routinely provided to employees. In principle this information should be of great assistance in developing a better compliance strategy.

However, I have the impression that, on the one hand, the potential contribution of detailed data to improved compliance is not fully appreciated by the Labour Program, and that on the other, record keeping represents a significant burden, especially for SMEs. This tension must be resolved. I was also struck by the fact that under present arrangements, audits of this important information are usually triggered by complaints rather than conducted routinely or randomly, and that they are carried out by inspectors — who have many other functions — rather than by a specialized audit staff. I believe that forming a small audit unit with trained and dedicated staff would be a valuable aspect of a new compliance strategy. The unit could devise simplified forms of record keeping that would simultaneously meet the requirements of Part III and of other statutes — preferably in electronic form so as to facilitate audits. Audits should be conducted not only when a complaint is lodged by a worker, but at random intervals or when there is some reason to believe that the employer is violating Part III, even though no complaint has been lodged. Where an offence is detected, the cost of the audit should be charged to the employer.

RECOMMENDATION 9.10 A small audit unit should be established under the direction of the Chief Compliance Officer to design convenient systems for keeping employment-related records and to conduct audits randomly, as part of a proactive enforcement strategy, or in response to complaints.

Legal functions

The legal support provided to the Labour Program is not adequate at present. The main difficulty is that its legal officers are not authorized to undertake prosecutorial functions, which are reserved for Department of Justice counsel. As a result of that department's priorities, or for want of instructions from its "client" department, or perhaps for some other reason, no prosecution under Part III has been initiated since 1987.

The proposed new arrangements for more vigorous enforcement of Part III require that a small legal staff working full-time in the Program be available to undertake certain kinds of prosecutorial functions in both administrative and court proceedings. These lawyers should also be available to defend administrative practices or adjudicative decisions under Part III in the event they are attacked in judicial review proceedings. These advocacy functions would be informed by the strategic approach laid down by the CCO.

However, I understand that the policy of the Department of Justice prevents departmental staff lawyers from undertaking advocacy functions. No doubt there are good reasons for this policy in general, though it is not one shared by a number of provincial ministries of justice. However, there are also good reasons to alter or amend the policy in the present context. First, unless the Labour Program acquires the capacity to prosecute unfair labour practices in either administrative or criminal proceedings, the burden of doing so will fall on individual workers. Second, discretionary decisions to initiate enforcement proceedings rather than negotiate a settlement or pursue other remedial strategies ought sensibly to be made by those who are immersed in labour standards issues on an ongoing basis; Justice counsel are not. Third, I note respectfully that its 20-year moratorium on prosecutions under Part III might create the impression — however mistakenly — that Justice is indifferent to the rights of workers, or at least considers them less important than other rights it defends so vigorously and effectively. For all of these reasons, I hope a way can be found to give the Labour Program access to the legal resources it needs.

Not all of the legal functions to be performed under my recommended compliance policy involve litigation. Many briefs and research studies argued that new contractual arrangements governing relations between workers and employers raise questions concerning the applicability and practicability of certain provisions of Part III. The Labour Program ought to be able to issue information or interpretation bulletins so that workplace parties can take timely steps to ensure compliance, and so that new regulations or statutory amendments can be adopted when necessary to resolve any ambiguities concerning the applicability of the legislation. Taking the measure of new arrangements, identifying issues for the attention of the workplace parties and responding with timely legal changes all require the presence of dedicated legal staff operating under the general direction of the CCO.

Finally, the new compliance strategy contemplates greater cooperation between the Labour Program, on the one hand, and the Canadian Human Rights Commission and stakeholder groups on the other. Some cooperative arrangements may be incorporated in memoranda of understanding, others in industry or enterprise codes of conduct, still others in the administrative practices of the Labour Program itself. Staff lawyers could provide invaluable assistance in constructing and implementing such arrangements.

RECOMMENDATION 9.11 The Labour Program should assemble a small legal staff mandated to perform the advocacy, negotiating and advice-giving functions required under the new compliance strategy.

Statistics and research

As I worked on this report, two things became clear to me. The first was that Labour Program staff members possess a great deal of practical knowledge concerning the actual operation of Part III, and that they use this knowledge to good effect in difficult circumstances. The second was that few — if any — statistics are available in usable form to verify this practical knowledge or to build upon it as the predicate of a sound compliance strategy. To cite a few examples: until the information was collated at my request (and, at some expense, by hand), there were no statistics that would enable anyone to determine how rapidly unjust dismissal complaints were being processed, or where delays were being encountered; there is no database that easily identifies repeat offenders on a real-time basis, or enables them to be targeted in enforcement proceedings; and there is no way to accurately estimate the success or failure of particular compliance initiatives.

In short — at least so far as Part III is concerned — the Labour Program appears to be much better organized to perform its ordinary day-to-day operations than it is to use information to formulate and execute a compliance strategy. In my view, this imbalance is likely to continue until the Program develops a stronger statistical capacity and techniques for using this capacity to inform compliance initiatives.

RECOMMENDATION 9.12 The Labour Program should develop a strong in-house statistical and analytical capacity that will assist the Chief Compliance Officer in strategic planning as well as operational decision-making.

B. ADJUDICATION OF COMPLAINTS

The Director of Adjudication Services

To greatly enhance the enforceability of Part III, I propose — in the final section of this chapter — a new approach to offences, remedies and sanctions. Part of this approach involves creating a new structure for formal adjudication of unjust dismissal complaints (discussed in Chapters Five and Eight) and other complaints under Part III. Given that adjudication may involve very serious consequences for employers found guilty of violations, the new adjudication system should be designed and administered in such a way that its fairness and integrity are beyond question. This can best be accomplished by insulating it from direct or indirect control by the CCO, who is responsible for detecting and prosecuting violations of Part III.

RECOMMENDATION 9.13 A new adjudication system should be established under a Director of Adjudication Services (DAS). The DAS should report not to the Chief Compliance Officer, but to a more senior official in the Labour Program.

The Director of Adjudication Services (DAS) would be responsible for ensuring the fairness, independence and efficiency of the adjudication system; recruiting, training and deploying Hearing Officers; and ensuring that Hearing Officers are readily available in all regions of the country and are sensitive to the special needs of particular clienteles. The DAS would also be responsible for developing and implementing triage, pre-trial and expedited procedures to ensure that the adjudicative process is not encumbered by cases that ought to be settled, dismissed or heard elsewhere.

Hearing Officers

At present, adjudicative functions under Part III are performed by a variety of decision makers. Labour Program inspectors have the power to investigate and summarily dispose of complaints under Part III and should continue to do so. However, two additional groups of *ad hoc* decision makers are presently employed under Part III on a fee-for-service basis. Referees hear appeals from inspectors' decisions in wage recovery cases, and Adjudicators hear cases involving unjust dismissals. Consolidating these functions would contribute to both efficiency and the quality of outcomes, and potentially would reduce the costs per case. I therefore propose that a permanent roster of Hearing Officers should be appointed to do what Referees and Adjudicators presently do, and also to hear appeals from inspectors' decisions in certain cases.

Hearing Officers would hold their positions for a fixed term, be paid a salary commensurate with the importance of their work and perform the adjudicative and related functions assigned to them by the DAS. They would not necessarily have formal legal training or credentials, but should be experienced in conducting hearings and knowledgeable about labour relations and/or labour standards. Provision should also be made for appointing to the roster a small number of part-time Hearing Officers to deal with peak workloads and the special needs of remote communities.

Will the creation of this new group of officials — the Hearing Officers — entail a significant additional investment of departmental resources? I believe not. To a significant extent, Hearing Officers will be doing things presently done by *ad hoc* Adjudicators and Referees. Moreover, with strong administrative leadership from the new DAS, they should be able to perform these tasks more efficiently than they are performed under present arrangements. Moreover, the promise of more timely and effective decision making by

Hearing Officers should deter some potential wrongdoers. True, in the short term, greater publicity and improved procedures may generate a somewhat higher volume of complaints and thus a need for more Hearing Officers and, for that matter, more staff. However, over the medium to long term, the more efficient adjudicative system I have proposed, together with an increased emphasis on positive measures to secure compliance, should result in fewer adjudicative proceedings and a gradual reduction in staffing levels.

The key to ensuring that the adjudication system operates economically is "smart public management," the necessary corollary of "smart regulation." In context, "smart" implies attention to recruiting and training Hearing Officers, and to systems-driven decisions concerning their numbers and deployment. This, I hope, will be accomplished by the new DAS.

RECOMMENDATION 9.14 A permanent roster of full- and part-time Hearing Officers should be appointed to hear appeals from the decisions of inspectors in certain cases and to perform adjudicative functions now undertaken by Referees and Adjudicators, as recommended in Chapter Eight.

Hearing Officers should possess knowledge of and experience in labour standards issues, labour law, industrial relations or related disciplines. Senior departmental field staff should be eligible for appointment, as well as arbitrators, tribunal members and persons who previously represented workers or employers.

Hearing Officers should be paid at a level commensurate with their responsibilities; they should be well trained; they should be hired in sufficient numbers to enable them to perform their functions efficiently; and they should be deployed in accordance with a well-designed and carefully monitored strategy.

In order to ensure that the adjudicative and appellate functions of Hearing Officers are performed at arm's length from the enforcement arm of the Labour Program, which is to operate under a Chief Compliance Officer, I have recommended that the Hearing Officers who perform them should operate under the administrative direction of the DAS, who in turn should report not to the Chief Compliance Officer but to some other official. The result will be that Hearing Officers will both be and appear to be independent of the compliance and enforcement arm of the Labour Program.

RECOMMENDATION 9.15 Separate reporting lines and a clear division of responsibilities should be established between the Chief Compliance Officer and the Director of Adjudication Services, in order to ensure the adjudicative independence of Hearing Officers.

DAS Staff

Careful system management is essential for the efficiency of the adjudication process. This means that cases entering the system, whether by way of appeal or, in the case of unjust dismissal, at first instance, must be subject to some form of triage. Cases that are clearly frivolous and vexatious or allege no violation of Part III should be dismissed or diverted to some other forum. Those that can be settled should be settled. And those that must be heard on the merits should be processed in such a way as to quickly define the issues and bring them forward for adjudication. This should be done by staff who report to the DAS, who in turn should be ultimately responsible for designing and administering the triage procedures. In Chapter Eight, I outline a role for DAS staff in streaming complaints brought in unjust dismissal cases, while suggesting as a possible alternative that the task might be assigned to inspectors. Similar options exist in dealing with other complaints under Part III.

RECOMMENDATION 9.16 Staff of the Director of Adjudication Services should process incoming unjust dismissal complaints and appeals from inspectors' decisions; ensure that those that are ineligible for adjudication are dismissed or diverted elsewhere; and assist the parties to resolve their differences, if possible, and if not, bring matters forward to a hearing promptly and with the issues clearly defined.

Assistance for litigants

The machinery of adjudication works best if those involved with it are well informed. In fact, unless they are well informed, for lay persons it may not work at all. For that reason, workers not represented by unions and employers (especially SMEs) who similarly lack representation should be provided with pamphlets that explain in clear and simple language how adjudicative proceedings work. They should also have free access to kits that might assist them in representing themselves, if needed. They should be referred to local lawyers, paralegals, legal clinics, advocacy groups, employers' associations, trade unions and other possible sources of free or low-cost advice and representation. Finally, DAS staff should be available to respond to inquiries from unrepresented parties about how to make or respond to a complaint, how to participate in a hearing and other such matters.

Moreover, even when professional and paraprofessional representatives are involved, they will serve their clients better if they are well informed about Part III. Since high quality representation will contribute in turn to the overall efficiency of the adjudication system, educational programs must be made available for lay and professional advocates representing workers

and employers, especially immediately following the introduction of any amendments to Part III. So far as possible, such programs should be undertaken in partnership with employer associations, legal clinics, trade unions and other groups.

The presence of unrepresented litigants — workers and, often, small employers — poses a special problem for Hearing Officers who must strive to be, and appear to be, neutral. However, if one side is represented by a competent advocate and the other is unrepresented, the Hearing Officer is placed in an awkward position. If he or she does nothing, the unrepresented party is at serious risk of losing because of ignorance, rather than on the merits; if the Hearing Officer intervenes to protect the rights of the unrepresented party, the other party may understandably, if incorrectly, conclude that the Officer is biased against them. It is therefore important that the DAS develop techniques to enable Hearing Officers to ensure fairness in cases where one or both of the parties is unrepresented.

RECOMMENDATION 9.17 The Director of Adjudication Services should develop strategies for assisting unrepresented workers and employers to secure representation or to represent themselves at hearings.

Making the adjudication system transparent

Finally, because Part III is not just words in a statute, but a body of actual experience that gives meaning and force to those words, it is important that that experience be carefully analysed and widely shared. Earlier in this chapter I recommended that the Labour Program collect statistics to support its compliance strategies. I now add the recommendation that these statistics should be posted on a website so that professionals in the field can draw their own conclusions about their operational and policy implications. In addition, it is important that the full text (or at least summaries) of decisions made in enforcement proceedings by inspectors, Hearing Officers, the Canada Industrial Relations Board, and civil and criminal courts or arbitrators should be posted promptly and made freely available to interested parties. Transparency is a good in itself. But more importantly, it will help a diverse community of decision makers to develop more consistent and sophisticated interpretations of the legislation, advisors and advocates to assist clients, and employers and workers to understand what the law expects of them. It may also give increased prominence to the field of labour standards law that has been largely ignored by academic critics and professional commentators, one of whom — Prof. Judy Fudge — ironically referred to it as

"labour law's little sister." Critique and commentary in turn will keep the Labour Program on its toes, and will help to lay the foundation for future reviews of Part III.

RECOMMENDATION 9.18 The Director of Adjudication Services should pursue an active program of providing information concerning adjudicative processes and outcomes under Part III to individual clients and client groups, to worker and employer advocates, to interested professional and academic communities, and to the general public.

5. GETTING TOUGH: PROACTIVE ENFORCEMENT, IMPROVED PROCEDURES, ENHANCED REMEDIES, NEW FORUMS

No matter how successfully the Labour Program organizes its information and education efforts, a small minority of employers will likely not get the message. Non-compliance will persist and in some cases, I am afraid, will have to be dealt with by severe enforcement measures. How are these measures to be organized?

A. TARGETTED AND PROACTIVE ENFORCEMENT

The problem, according to experienced field staff, is that a relatively small contingent of "bad actors" is responsible for a significant proportion of all violations, including some of the most egregious. These bad actors, I was told, often violate the rights of numbers of workers, rather than just individual complainants; they repeat their offences over protracted periods of time, sometimes under cover of new corporate identities; and they sometimes violate other employment-related legislation, for example, by failing to remit EI premiums. The LSE survey confirms these anecdotal reports. It found that a small minority of employers acknowledged that they had knowingly — deliberately — violated some provision of Part III; this group comprised no more than 5% of respondents, depending on the provision in question. Moreover, the survey found that past violations were a meaningful predictor of future non-compliance, which suggests that many non-compliant firms persistently violated the Code. An analysis by Commission staff corroborates the findings of the LSE survey: in each of the six years 1999–2004, on average some 30 employers were the subject of 10 or more reported complaints.

The fact that so many complaints are generated by small enterprises signals yet another problem. These enterprises tend to come and go, often before inspectors become aware of their existence and sometimes even before employees become aware that they have been wronged. Some small enterprises tend

to operate on thin margins and face considerable financial pressures — especially in their start-up phase — and some, apparently, are tempted to resolve these pressures by illicitly reducing their labour costs. And, as noted, small enterprises can seldom afford professional advisors. Responsibility for compliance with Part III and other regulatory statutes tends to fall on the proprietor, who is also responsible for the operational aspects of the business. In such a situation, it is highly likely that labours standards and perhaps other legal requirements will be overlooked, if not deliberately disregarded. Likewise, it ought to be possible to develop some sensible hypotheses about why trucking gives rise to so many complaints, or why some employers in other sectors are shown by survey evidence to disregard particular provisions of Part III with virtual impunity.

These examples suggest that the Labour Program's scarce enforcement resources can and should be focussed on sectors and employers that have a bad record of violations, and on workplace practices that generate significant numbers of complaints or that are revealed by surveys to give rise to widespread non-compliance. However, at present, the Program has not developed information systems that allow it to track compliance levels in different sectors, to identify repeat offenders or to detect emerging patterns of non-compliance with specific provisions of Part III. This deficiency will have to be addressed. Whether the emphasis is on education and prevention on the one hand, or detection and remedial action on the other, efficient and effective compliance strategies depend crucially on the availability of accurate, timely and user-friendly data, as I have urged in Recommendation 9.12.

The Labour Program's current compliance policy contemplates that inspectors will maintain active surveillance of federal workplaces. However, in practice their activities are almost wholly reactive and complaints-driven. In 2005–2006, for example, a mere 120 full-time equivalent field staff — inspectors, managers and support staff — were responsible for the labour standards of 840,000 workers employed by 12,000 enterprises and located in a much higher number of individual workplaces spread a *mari usque ad mare*. Not surprisingly, inspectors devoted some 87% of their time to reactive functions such as responding to complaints; they conducted few proactive inspections; and they undertook few workplace audits other than those provoked by complaints. Worse yet, very little of their time was devoted to educational and outreach activities, though these are obviously important, and have been for years a feature of the Labour Program's compliance policy.

I received many submissions to the effect that the Labour Program's enforcement strategy ought to be more proactive. Instead of concentrating on processing workers' complaints, inspectors ought to take the initiative

by randomly auditing sectors or enterprises that exhibit a profile of non-compliance, or making a concerted effort to enforce particular provisions of Part III that seem to be violated with unusual frequency.

These submissions make good sense, and I accept them. However, it is hard to see how such a proactive strategy could be sustained while maintaining current or improved levels of complaints processing, without some expansion of the Inspectorate. True, more carefully planned deployment of existing staff resources might yield "more bang for the buck." Of course, if educational functions were primarily conducted by a specialized staff (as I recommend above), inspectors would have more time to give to enforcement activities. Conversely, inspectors might retain their present responsibilities but change the balance of their work in order to achieve better overall outcomes. Some examples: a day spent educating 100 employers might achieve higher levels of overall compliance than a day spent prosecuting one employer for a relatively trivial offence; the proactive audit of a known repeat offender might expose more offences than responding to an individual's complaint; a high visibility crack-down on employers guilty of some specific form of illegal conduct might dissuade others from engaging in similar behaviour.

Still, it is very difficult to turn away a complainant with a seemingly meritorious case. The likelihood is, therefore, that if inspectors were to become more proactive, more wrongdoing would be uncovered and more employees would be emboldened to make more complaints. No doubt in the short term this would place additional stress on scarce personnel and limited budgets. Over time, however, this stress would likely abate, as improved enforcement procedures caused more employers to comply with Part III. But initially at least, more resources are needed, especially in the early phases of implementing the new approach.

RECOMMENDATION 9.19 The Labour Program's field staff should be increased significantly to ensure that the proposed compliance strategy can be successfully implemented. The adequacy of the staff and its effective use should be reviewed periodically.

B. IMPROVED PROCEDURES

Assuming that inspectors will both investigate complaints and proactively detect violations, the question remains: what to do about the very small group of employers who, in effect, thumb their noses at Part III? These repeat offenders do not seem to be deterred by their previous encounters with Part III enforcement procedures. Tougher measures are obviously required. These measures should be graduated in their severity so that repeat offenders are

not treated as lightly as first time offenders, relatively minor infractions are not dealt with in the same way as serious offences that compromise the integrity of the whole system, and orders of all kinds will be obeyed promptly once they are issued by inspectors or other compliance staff.

Under present arrangements, no such gradations exist. There are only three options: workers who have been unjustly dismissed may seek reinstatement and damages through adjudication; offenders may be prosecuted criminally; and administrative proceedings may be taken to recover unpaid wages or benefits for employees. Adjudication of unjust dismissal cases presents unique issues and is dealt with in Chapter Eight. No one has been prosecuted in almost 20 years, nor are many prosecutions likely, even if my recommendations for improvements in criminal procedures and remedies are accepted. This leaves administrative remedies as the primary vehicle for effective enforcement of Part III. But administrative remedies are at present inadequate.

The case for more effective measures becomes clear when one reviews the record of inspectors in recovering wages and benefits that employers illegally denied to their workers in 2005–2006. Within 100 days, inspectors had resolved 70% of the cases and recovered 50% of the money owing; further proceedings resulted in the recovery of a further 25% of the money owing. At first glance this seems like an impressive record: 100 days may seem like a long time to a worker with no job and few savings, but it is fairly short compared with many other debt recovery processes.

On closer examination, however, the record is somewhat less impressive. Over two-thirds of all recoveries resulted from voluntary — or at least uncontested — payments, less than one-third from a formal order for payment by an inspector. In effect, as the data shows, the more recalcitrant the employer's stance, the less chance there is for recovery. Indeed, in 2005–2006, orders to pay were made in favour of 127 workers who recovered no money at all from this process. Their unpaid wages and benefits represented about 25% of all monies claimed during the year. Worse yet, their cases occupied much more of their time, and of an inspector's time, than the average case — but to no avail. The problem is that once an inspector has issued a payment order, it is up to the worker to enforce it through the slow, awkward and complex procedures of a civil court. This problem is addressed by Recommendation 5.11.

This empirical analysis of problems encountered in recovering wages and benefits points to problems in the present enforcement procedures, which are serious enough. But these are by no means the only problems. The analysis,

of course, deals only with monetary claims that workers were willing and able to pursue — not those they abandoned by choice or under duress, which, for reasons canvassed at the beginning of this chapter, I believe may equal or exceed the claims captured in the analysis. Nor did the analysis deal with non-monetary violations of Part III. Given that survey data disclosed that non-monetary violations were often the most frequent violations — rising in some instances to well over half the enterprises under federal jurisdiction — it is perhaps fair to conclude that enforcement procedures in non-monetary matters are in even more urgent need of repair.

In addition to the problems noted above, my attention was drawn to a number of detailed concerns with the existing enforcement mechanisms under Part III. All of these help to explain why some wrongdoers seem to violate the law with relative impunity.

- While Part III does not forbid third parties to make complaints or to pursue them, it does not clearly permit their intervention. As a matter of administrative practice, third-party complaints are discouraged. This impairs the ability of advocacy centres and legal clinics to carry claims forward and, as a side effect, prevents them from carrying some of the burdens that now fall entirely on the Inspectorate.
- While Part III allows complainants to request that their names and identities not be disclosed, as a practical matter, employers — especially in small enterprises — have no difficulty in determining who has made a complaint. Understandably, many employees with good grounds for complaint are reluctant to expose themselves to reprisals.
- While Part III protects whistle-blowers from reprisal by their employer, it does not do so clearly or effectively. The absence of effective protection may mean that some egregious offenders are able to continue to violate the law long after they might otherwise have been apprehended.
- And a further point, previously mentioned, bears reiteration:

  The powers and responsibilities of inspectors are not clearly defined, are insufficient for the tasks at hand and, in certain respects, are encumbered by inappropriate procedural arrangements. These problems lead to a dissipation of inspectors' time and energies, resulting in their inability to pursue questionable cases that might, in some circumstances, reveal larger problems that ought to be addressed by new regulations or statutory amendments.

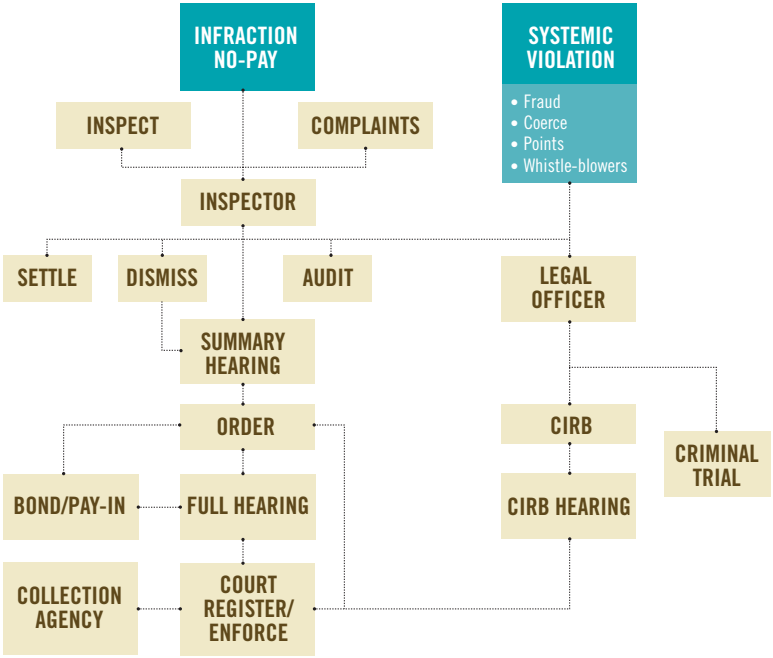
My conclusion is that there is ample room for improvement in the present enforcement procedures. In recommending a new approach to enforcement, however, I have kept in mind two legitimate concerns raised by employers and their representatives:

- Enhanced enforcement procedures should not impose undue procedural burdens on employers, especially SMEs.
- A more effective form of screening or triage should be introduced to shield employers from frivolous or vexatious complaints.

The recommendations that follow do not address all of these issues. For example, the powers of inspectors must be enhanced to enable them to serve notices electronically and, when employers are evading service, by proxy; to require the prompt and full production of documents and records; to garnishee or attach the employer's assets or funds in the hands of third parties; and to draw inferences from the presence or absence of documents. Whatever the fate of my recommendations in general, these and similar matters must be attended to in the context of revising the present legislation.

RECOMMENDATION 9.20 Enforcement procedures under Part III should be re-designed in order to secure higher overall levels of compliance, to achieve more efficient and effective remedies for workers whose rights have been violated, to ensure fairness in the enforcement process and to protect employers against frivolous and vexatious claims.

The new enforcement procedures outlined above require a preliminary assessment of the nature of the offence. Offences would be categorized as either *infractions* — isolated acts of non-compliance, perhaps the result of an employer's ignorance or misunderstanding of the requirements of Part III, or *unfair labour practices* — systemic violations involving deliberate, flagrant conduct that undermines the integrity of the labour standards system. *Infractions* would include all one-off violations of Part III, including non-payment of wages or benefits. *Unfair labour practices* would include repeated or multiple infractions, fraudulent attempts to conceal non-compliance, threats, coercion or undue influence designed to force or persuade employees to abandon their rights or remedies, and reprisals against whistle-blowers. The two types of offences and their procedural implications are depicted in the following diagram.



Of course the two categories are not mutually exclusive: what might look like flagrant disregard of Part III could on closer examination turn out to be the result of ignorance; what might appear to be an isolated infraction could turn out to be but one in a long series of violations. Consequently, it must be possible at appropriate stages in any enforcement proceedings to shift from one category to another. However, subject to that possibility, the two kinds of violations should be dealt with differently. Infractions should be dealt with summarily, subject to protecting employers from frivolous or vexatious complaints and ensuring the procedural rights of both employers and employees. Unfair labour practices should be dealt with more formally and in a different forum. Offenders found guilty of infractions should be exposed to a graduated series of conventional remedies and sanctions; those guilty of unfair labour practices should be exposed to more intrusive and far-reaching remedies and, in extreme cases, to significant criminal penalties.

(1) Infractions

Infractions may come to the attention of an inspector either as a result of complaints filed by employees or third parties, or as a result of a proactive audit or inspection. The inspector's first responsibility would be to conduct a triage to screen complaints and deal with them in one of several ways: (a) by referring them to the Legal Officer if they appear to involve unfair labour practices; (b) by referring them for an audit, if required; (c) by dismissing them if they appear to be frivolous or vexatious; or (d) by settling them, if agreement can be reached between the employer and the employee. If the inspector does none of these things, she or he will then proceed to conduct a summary hearing.

Summary hearings ought to be held within a short period of time, perhaps a week, following triage. This would involve meeting with the parties, determining the facts, considering any legal or other arguments and reaching a decision. The hearings should be inquisitorial rather than adversarial in nature, which is to say that the inspector should require the parties to produce information, and provide them with an opportunity to provide their explanations and arguments, but should not conduct a trial-type hearing. The employer's failure to produce proper records and to give plausible explanations should give rise to a presumption of fault. The parties should be allowed their choice of representatives (including lawyers, paralegals and other advocates) but the hearings should be informal, legal rules of evidence should not apply, and the inspector should actively manage the hearings. If possible at the conclusion of the hearing, and if not, shortly thereafter, the inspector should render a decision. If the complaint is sustained, the inspector should at the same time make a remedial order. The range of possible remedial orders is described below. After a brief period to permit the employer to comply, the inspector should register the order in a court of appropriate jurisdiction, and it should be enforceable by court officials in the same way as any order of the court.

However, because this initial hearing is summary in nature, the losing party should have the right to appeal the inspector's decision within seven days of receiving the decision. The appeal would be heard by a Hearing Officer, who should convene a brief pre-hearing meeting to narrow the issues and to provide the parties with an opportunity to reconsider their positions. The Hearing Officer should then conduct a full hearing on the merits, which should proceed somewhat more formally than the inspector's summary hearing. However, while both parties should be allowed to present their case, relatively relaxed procedural and evidentiary rules should be adopted that are appropriate to a forum in which one or both parties may appear without legal or paralegal representation.

The effect of an appeal will be to stay the inspector's original order. However, employers should be deterred from bringing appeals in order to exhaust the employee's resources or patience.

RECOMMENDATION 9.21 Before bringing an appeal from any order of an inspector, an employer must deposit with the Labour Program any amount found owing by the inspector or provide a bond to ensure payment. In addition, the employer must deposit an administrative surcharge equal to 10% of the amount owing, or $100, whichever is the greater. If the appeal is successful, both amounts should be returned to the employer.

There should be no appeal from a Hearing Officer's decision. However, in the event an employer applies for judicial review, the funds should remain available to satisfy the employee's claim in the event the employer's application is ultimately denied.

(2) Unfair Labour Practices

As noted above, systemic violations, or unfair labour practices, involve serious, wilful and/or repeated breaches of Part III that not only injure individual workers but undermine the administration of the legislation itself. Because they involve public as well as a private harms, because they are likely to involve complicated evidence that only Labour Program staff can generate, and because remedies awarded are intended to have important demonstration and deterrent effects, carriage of unfair labour practice complaints should rest primarily with the Legal Officer rather than with individual complainants. However, third-party agencies that provide advocacy services for workers — such as legal clinics or unions — should also have the right to initiate and carry forward unfair labour practice complaints. This would permit them to make use of their technical expertise and special experience with the employment practices of particular employers or industries. It would also ensure that the burdens of enforcement are not borne exclusively by the state.

As with infractions, the Legal Officer should have the obligation to perform a triage, or screening, of unfair labour practice complaints, and the discretion to settle cases, return them to the infractions stream or dismiss them if they appear to be frivolous or vexatious. This triage function should extend to complaints initiated by third-party agencies.

Unfair labour practice complaints should proceed either (a) by way of administrative proceedings before the Canada Industrial Relations Board, or (b) in exceptionally serious cases, by way of criminal proceedings.

Administrative proceedings

Unfair labour practice complaints alleging systemic violations ought to be dealt with primarily by an administrative body that has, or can develop, expert knowledge of the legislation and the context in which it operates, the special procedures needed to investigate and evaluate alleged violations, and the remedial interventions that discourage or eliminate such violations. This approach has been followed successfully for many years under labour relations statutes, such as Part I of the *Canada Labour Code*, as well as in other regulatory domains. Much depends, however, on sufficient resources being assigned to the administrative body, the quality of its personnel and members, and the extent of its statutory powers. Shortcomings in any of these respects would obviously undermine its performance.

In an ideal world, I would be tempted to recommend establishing a new Canada Labour Standards Tribunal (CLST), which would be assigned powers and personnel uniquely suited to the labour standards field. However, on balance I am persuaded that unfair labour practice complaints should be assigned to the Canada Industrial Relations Board (CIRB). The CIRB is used to dealing with systemic complaints of a somewhat similar nature; it has its own triage procedures; it has an existing staff and infrastructure; unfair labour practice complaints under Part III are not likely to greatly increase its caseload; and other labour relations boards, notably Ontario's, have successfully assumed even more extensive responsibility for enforcing labour standards.

While I believe that assigning these cases to an existing body is the more cost-effective solution, it is obviously not cost-free. Consequently, modest additional resources should be provided to the CIRB to enable it to take on this new jurisdiction. In order to ensure that it does in fact develop expertise in labour standards, special rules may have to be developed for processing Part III complaints. These should be heard by a specialist panel of CIRB members (who, of course, would continue to hear Part I cases). Finally, it may be necessary to revise the CIRB's somewhat generic remedial powers so as to clarify its power to impose the new pre-emptive remedies that I propose below.

Criminal proceedings

The existing provisions of Part III permit the prosecution of wrongdoers. However — to repeat a revealing and disturbing statistic — the total of all Part III prosecutions since 1987 is zero. This is not simply because enforcement of Part III appears to have been accorded a low priority. It is also because, even if prosecutions were undertaken, they might not succeed, and if they did succeed, they might not deter. In this regard, one must acknowledge that prosecution has fallen into general disfavour as a method for enforcing

regulatory legislation. As I explain in Chapter Eight, criminal courts typically lack specialized expertise in regulatory matters and are bound by procedural and evidentiary rules, which are inappropriate in such matters.

Moreover, under Part III at least, the penalties provided are derisory: a maximum fine of $5,000 — except with regard to group terminations where fines rise to maxima of $10,000 or $100,000, depending on the nature of the proceedings. For failure to keep, file or produce records, the maximum fine is $100, a virtual license fee for employers who ignore this crucial aspect of the statute. (By contrast, under comparable Ontario legislation, individual offenders may be fined up to $50,000 and sentenced to imprisonment for up to twelve months; and corporations fined up to $100,000 for a first offence, $250,000 for a second, and $500,000 for a third or subsequent offence.)

Under Part III, judges, upon convicting an employer, may order that workers be made whole and reinstated in employment. However, because judges lack access to the full range of remedial options for inspectors, Hearing Officers and the CIRB proposed in this report, I considered recommending that recourse to criminal prosecution be deleted from Part III, and that priority be given to enhancing administrative remedies. However, I ultimately decided that criminal prosecution, which might be used to deter and, if necessary, punish the worst offenders, ought to remain an option. Because the Legal Officer would, under my recommendation, have carriage of all unfair labour practice proceedings, including prosecutions, there would be no need for the Department of Justice to assess whether enforcing Part III is more important than other claims on its resources. Prosecutions should and will remain rare, but they ought to be undertaken from time to time against the most egregious offenders.

To facilitate prosecutions, conventional criminal procedures should be adapted to the special context and circumstances of Part III prosecutions. At present, the prosecutor must prove guilt beyond a reasonable doubt. This obligation should be modified by shifting to the employer the onus of explaining why employees have been discharged in whistle-blower cases, and by permitting the criminal court to draw inferences adverse to the employer where legally required records or notices are not produced. At present, fines provided under Part III are derisory, as noted above; they should be significantly increased. At present, no criminal proceedings can be brought against managers or proprietors who have personally decided to disregard Part III, only against the offending corporate employer; this too should be changed.

RECOMMENDATION 9.22 Part III should be amended to ensure that prosecutions remain a practical and effective option for dealing with the most serious unfair labour practices.

RECOMMENDATION 9.23 Maximum monetary penalties should be raised from $5,000 to $50,000 for a first offence; to a maximum of $100,000 for a second offence; and to a maximum of $250,000 for a third or subsequent offence. Each day that an offence continues should be deemed to be a separate offence. Individual employers and corporate officers should, in extreme cases involving deliberate fraudulent conduct or the use of threats or coercion, be liable to prosecution and imprisonment.

C. ENHANCED ADMINSTRATIVE REMEDIES

Despite the changes recommended above, which would facilitate prosecution in appropriate cases, the great majority of unfair labour practice complaints should be dealt with in administrative proceedings.

While many, perhaps most, infractions and unfair labour practice complaints will be settled or otherwise disposed of short of adjudication, some will necessarily result in remedial orders being made against an offending employer. It is important that these remedial orders should be effective, not only to secure relief for the victim but also to discourage repetition of the offence by the same or other employers. Under the present legislation, employers are likely to suffer no adverse outcome other than being ordered to pay employees what they ought to have been paid in the first place. This is neither a sufficient deterrent to future misconduct, nor in fact full recompense for losses caused by the present violation.

RECOMMENDATION 9.24 Part III should be amended to enable inspectors and Hearing Officers to impose a graduated range of remedies and to confer similar remedial powers on the Canada Industrial Relations Board and criminal courts.

Inspectors and Hearing Officers should retain their present power to require the payment of unpaid wages, overtime, benefits, vacation pay and other entitlements. However, employees may have to incur out-of-pocket expenses to pursue their rights. They may have to take time off work to attend a hearing, travel to or communicate with a Labour Program office, or hire a lawyer or other advocate to represent them in certain types of proceedings. Given the relatively small amounts usually claimed in Part III proceedings, such expenditures may seriously erode the amount recovered, to the point where employees are in effect deterred from seeking remedies at all.

RECOMMENDATION 9.25 Inspectors and Hearing Officers should have the right to order full compensation for employees whose Part III rights have been violated, including some compensation for advocacy and other costs incurred in seeking redress.

Finally, employees should not have to file a new complaint each time their employer repeats a previous offence such as denying them overtime or refusing them leave to which they are entitled. For example, an employer who refuses to allow a worker to return to work after maternity leave could be ordered to terminate this refusal and to compensate her for wages lost from the date when the refusal first occurred to the date when it ceases and she returns to work. Such cease-and-desist orders, like compensation orders, should be capable of being registered in court and enforced as a court order.

RECOMMENDATION 9.26 Inspectors and Hearing Officers should have the power to order offending employers to cease and desist from future violations.

Violations represent not only a financial loss to employees, but a financial cost to the public fisc — specifically to the budget of the Labour Program.

RECOMMENDATION 9.27 Inspectors and Hearing Officers should have the power to order the employer to pay the Labour Program's cost of investigations and hearings, according to a fixed tariff.

In cases where the employer has been found guilty of a single infraction — and in the absence of aggravating circumstances — this normally represents the extent of its exposure to sanctions. However, in some cases, employers may be guilty of repeated or multiple infractions that have not yet assumed the proportion of systemic violations. In such cases, it is necessary that deterrents be available to prevent them from violating Part III in the future. Other regulatory regimes have instituted a system of administrative fines, and such a system is appropriate for Part III.

RECOMMENDATION 9.28 Inspectors and Hearing Officers should have the power to levy fines of fixed but significant amounts for first offences, escalating for second or subsequent offences.

Finally, the goals of Part III are most fully realized not when offending employers are punished, but when they alter their behaviour and become law-abiding.

RECOMMENDATION 9.29 The Labour Program should institute a "points" system, similar to that used in many jurisdictions for repeated and serious driving offences. Points should be awarded according to the severity of the offence, and should remain on the employer's record for three years.

Employers who exceed a given number of points should be regarded as systemic offenders and automatically referred for unfair labour practice proceedings.

A "points" system would also be useful because it would require the Program to track the behaviour of individual employers. Data gathered in this way would lay the groundwork for sector-specific or conduct-specific compliance campaigns.

The CIRB must be able to deploy a comparable repertoire of remedial powers to deal with unfair labour practices under Part III. While that body already possesses broad remedial powers under Part I, it is not clear to what extent those powers would have to be enlarged by a statutory amendment in order to match those I have proposed for inspectors and Hearing Officers. This question requires further technical analysis.

Finally, it is important to draw a distinction between remedies that address past offences and those that are designed to pre-empt or forestall future offences. Evidence suggests that "bad actors" are prone to re-offend. Hopefully, they will be deterred by the measures outlined above, or by the prospect of unfair labour practice proceedings before the CIRB or in criminal court. However, if they are not, the worst of the "bad actors" — those deemed most likely to re-offend — ought to be subjected to sanctions designed to forestall future violations.

RECOMMENDATION 9.30 In addition to any other remedies or penalties imposed by the Canada Industrial Relations Board or by a criminal court, employers found to have committed unfair labour practices should be subject in appropriate cases to pre-emptive remedies designed to prevent future violations.

RECOMMENDATION 9.31 Pre-emptive remedies should include a requirement that offenders: file periodic reports, post bonds to be available to reimburse employees in the event of future violations, be subject to regular audits at their own expense, be disqualified for specified periods from receiving government contracts or, in extreme cases, lose their right to engage in businesses requiring government approvals or permits.

D. NEW FORUMS

For reasons noted, the Labour Program's Legal Officer will have carriage of unfair labour practice proceedings before the CIRB or, in rare cases, of prosecutions in the criminal courts. However, this leaves open the possibility that the same employer conduct that gives rise to such proceedings may also give rise to proceedings in other forums or under other legislation. For example, discharging a whistle-blower would constitute an unfair labour practice under Part III, which could be remedied by a reinstatement order by the CIRB or made the subject of a criminal prosecution. However, the same facts might also give rise to a complaint of unjust dismissal under Part III, or to a civil action for damages for wrongful dismissal or — if the workplace is unionized — to a grievance for unjust dismissal. If the Legal Officer decides for whatever reason not to proceed, clearly the whistle-blower ought to have the right to pursue other options. However, if the Legal Officer proceeds, but fails, should the complainant be permitted to then seek alternative relief on his or her own behalf?

Employers have a legitimate concern that they not be subjected to repeated legal proceedings arising out of the same conduct. On the other hand, in other non-labour contexts — say traffic accidents or contractual disputes — one set of facts may give rise to both criminal and civil proceedings, and sometimes to proceedings before a regulatory agency as well. Striking the right balance between bringing closure to proceedings and acknowledging the multiple interests at stake is a task for the legislative draftspersons who undertake revision of Part III and for those who administer it on a daily basis thereafter.

In one respect, however, the question is going to have to be addressed from the outset. Several hundred thousand workers under federal jurisdiction are covered both by Part III and by collective agreements. Putting aside the issue of whether collective agreements may deviate substantively from the requirements of Part III, there remains the issue of remedies. Should unionized workers have to seek redress for violations of Part III through the grievance procedures and arbitration under their collective agreements, or should they have access to statutory remedies as well?

Unions argued strongly that as Part III expresses public policy, they should not have to bear the evidentiary and financial burdens of enforcement. However, several decisions by the Supreme Court of Canada take the opposite tack. They hold (though not without some reservations and ambiguities) that, in the interest of disposing of all workplace disputes in one forum at one time, arbitrators have the implicit right and responsibility to deal not only with breaches of the collective agreement but with breaches of all employment-related legislation (as well as civil causes of action and Charter claims). Ontario anticipated these decisions by legislation to the same effect; indeed, it went further by denying unionized employees access to the enforcement machinery under its employment standards statute. That said, Part III could presumably be framed so as to expressly negate the interpretation placed on the relevant labour legislation by the Supreme Court, and to reject the Ontario position on the merits, if that is the right thing to do.

On balance, and with some reluctance, I am not persuaded that it is. In the end, the problem of compliance is essentially one of resources. If scarce resources can be stretched further by diverting some enforcement proceedings into arbitration, then the outcome would be greater protection for unorganized workers, who are more likely to need it than organized workers. Moreover, as a by-product of diverting enforcement proceedings into the grievance procedure in organized workplaces, the possibility of multiple proceedings by unionized workers would be reduced, if not entirely avoided. Other advantages may accrue as well. For example, if employers and unions are to become involved in negotiating marginal adjustments to labour standards (see Chapter Seven), then it is appropriate that labour standards be enforced in the same forum as other terms negotiated by them. If arbitrators, who have developed a useful jurisprudence and effective remedies in relation to collective agreements, become involved with labour standards, this legal field may also benefit from their contributions. And if inspectors and Hearing Officers turn out to be too timid in their interpretation of Part III, that fact will become obvious when their record is placed alongside that of arbitrators interpreting the same legislation; and *vice versa*.

RECOMMENDATION 9.32 Violations of Part III in unionized workplaces ought in general to be dealt with through the grievance procedure and arbitration.

However, this general approach should be subject to two exceptions: (a) when the employer's violation amounts to an unfair labour practice under Part III; and (b) when the union refuses to process the employee's complaint under Part III to arbitration.

As to the first exception, unfair labour practices represent an attack on the systemic integrity of Part III. The Legal Officer therefore ought to be allowed to pursue them in the normal way, even though they arise in unionized workplaces. As to the second, unions control access to the grievance procedure and have a duty to use that control with due regard for the worker's right to fair representation under Part I. If they refuse to allow an employee to take a Part III grievance to arbitration, they should be required to provide a written statement to that effect. Armed with such a statement, the employee ought to be allowed to seek a remedy outside the grievance procedure by making a complaint directly to a Labour Program inspector. Unless such recourse is permitted, the employee would have to either accept the loss of his or her statutory rights, or challenge the union's decision in lengthy and expensive duty of fair representation proceedings under Part I. These are excessive obstacles for aggrieved employees seeking to enforce rights that originate in legislation rather than in a collective agreement. If the complaint is obviously without merit, the inspector can dismiss it following an initial screening. If it seeks to overturn a term of the collective agreement negotiated in apparent compliance with Part III, it should be remitted to arbitration. But if it otherwise appears to have merit, it deserves to be heard.

Chapter Ten

Workers Most In Need of Protection

TEN
WORKERS MOST IN NEED OF PROTECTION

1. INTRODUCTION: THE VULNERABILITY SYNDROME

The protection of workers most in need of protection — sometimes described as "vulnerable workers" — is the original moral justification for all labour standards legislation. The business of this chapter is to explore to what extent the changes I have already recommended for Part III will benefit these particular workers, and to suggest additional changes.

There is considerable controversy over who can properly be described as "vulnerable workers." In one sense, all workers are potentially "vulnerable." If the economy goes into decline, if their employer encounters financial difficulty, if new technology or a reorganization of the business makes their jobs redundant, they are at risk of losing their jobs or having to accept less favourable wages and working conditions. Labour standards legislation, collective bargaining and good management practices offer some limited protections against "vulnerability" in this generic sense. However, this chapter focuses on a more specific population of workers — those who are vulnerable beyond the norm, those who experience deep and multiple disadvantages.

The consequences of vulnerability are obviously serious. Vulnerable workers by definition lack either collective or individual bargaining power. They are therefore less likely than most to secure or retain a decent job, and more likely than most to work under conditions that most Canadians would view as highly inappropriate or even exploitative. Typically, they are paid low salaries and receive few — or no — fringe benefits, work unsociable hours or in difficult conditions, have limited or no access to training, enjoy poor prospects of career advancement and relatively short job tenure. And — as tends to be the case with vulnerable people — they often lack the knowledge, capacity or financial means to enforce whatever statutory or contractual rights they supposedly enjoy.

Labour standards legislation makes an important contribution to protecting workers against the consequences of vulnerability, but other social and economic developments and public policy initiatives may be at least as

important, and possibly more so. Whether particular groups of workers are likely to feel the effects of vulnerability, or escape them, depends to a large extent on the overall strength of the economy, general labour market conditions and conditions within particular sectors, the redistributive effects of tax and welfare policies, the availability of child care and social housing, strong public education and skills training programs, effective human rights protections and other public policies.

2. WORKERS MOST IN NEED OF PROTECTION: DEMOGRAPHIC AND OCCUPATIONAL CHARACTERISTICS

In this section, I would have preferred to sketch a demographic and occupational profile of vulnerable workers in the federal domain. However, because of the difficulty of defining who is an employee and who is subject to federal labour jurisdiction, I have had to rely primarily on general data about the Canadian workforce, adding specific details about employees covered by Part III where they are available from the Federal Jurisdiction Workplace (FJW) Survey.

What is clear is that the proportion of workers in the federal domain who exhibit symptoms of vulnerability is somewhat smaller than the proportion of vulnerable workers in the Canadian workforce as a whole. Taking very low earnings as one rough-and-ready indicator of extreme vulnerability, 16% of all Canadian workers earn less than $10.00 per hour or $20,000 per year; only about 2% of federal domain workers earn such low wages.

Moreover, there are significant differences between vulnerable workers in the federal domain and their counterparts as described in the general literature on vulnerability. In the general literature, non-standard forms of employment — part-time, temporary, agency and self-employment — are important indicators of vulnerability. This group accounts for about 32% of the total Canadian workforce, but in the federal sector, only about 26%. Moreover, some aspects of non-standard work are quite concentrated within particular sectors of the federal domain, especially the road transportation sector. In that sector, 23% of workers are self-employed or contract workers hired directly by employers and another 6% are supplied by employment agencies, versus about 10% in total for the two groups within the overall federal jurisdiction workforce. Temporary employment and contract work are also much more common in small and medium enterprises (SMEs) than in the larger firms, which employ the overwhelming majority of federal jurisdiction workers.

According to the general literature, workers with non-standard arrangements are more likely than most to receive low wages and less likely to receive benefits. This is largely confirmed in the federal domain where temporary and permanent part-time employees are far more likely to receive low wages than full-time permanent employees. Moreover, employers are at least twice as likely to offer extended health, dental, insurance and pension benefits to full-time permanent employees as to part-time and temporary employees.

In the general literature, women, young people and members of disadvantaged minorities, including aboriginal workers, tend to be overrepresented in the ranks of the vulnerable. In part because many recent immigrants to Canada are members of racial, ethnic and religious minorities, and in part for other reasons, these immigrants figure prominently among the vulnerable. I assume — in the absence of evidence to the contrary — that what is true of the overall Canadian workforce in this respect is likely true of the federal sector as well; further research is needed to determine whether my assumption is justified. However, the federal domain does appear to be rather unusual in that some of its most dense concentrations of vulnerable workers are found in male-dominated sectors, such as road transport, courier services and grain handling.

In the general literature, certain occupations and sectors are closely identified with vulnerability — food service, domestic work, the garment industry, light manufacturing, building maintenance. None of these is much of a presence in the federal jurisdiction where low-wage jobs are heavily concentrated in small firms, the road transport sector, postal services (presumably courier companies), telecommunications and broadcasting, the feed and grain sector and air transport (presumably in airport security screening).

Finally, in the general literature, farm and domestic workers tend to exhibit many of the symptoms of vulnerability, and among members of those occupations, foreign workers in Canada on temporary work permits are thought by many to be especially at risk of encountering poor working conditions. Young workers are yet another category of persons who are considered very vulnerable. The legal status of these groups is somewhat anomalous from the perspective of federal labour standards legislation. They are all examined in greater detail below.

To sum up: in the federal domain, as elsewhere, the sector in which workers are employed, the size of the enterprise in which they work, the non-standard nature of their employment contracts and their demographic characteristics are markers that help to identify them as "vulnerable." Moreover, because vulnerability is a relative, not an absolute, descriptor, the more of these

markers a worker collects, the more likely it is that he or she needs protection under Part III. But in the end, any profile of vulnerability is only an approximation: some vulnerable workers do not fit the profile and some who do fit it are not especially vulnerable.

3. WORKERS MOST IN NEED OF PROTECTION: NON-STANDARD CONTRACTUAL ARRANGEMENTS

Not only do vulnerable workers tend to display certain demographic or occupational characteristics, their vulnerability is sometimes inscribed in the contractual arrangements under which they work. In fact, those arrangements are often the source of vulnerability.

A. AGENCY AND TEMPORARY WORKERS

About 45,000 workers in federally regulated enterprises — about 5% of the workforce — are employed on a temporary basis. Some have been hired directly by the employer; some have been dispatched by placement agencies to clients on temporary assignments. In the former case, workers are paid directly by the client firm. In the latter, they are paid by the agency, which in turn is paid by the client employer.

Temporary placement agencies help employers find workers with specialized credentials or training, enable employers to meet peak demand or replace employees who are temporarily absent, provide training and experience to new entrants in the labour market, and respond to the wish of some workers for varied, non-continuous work experiences. All of these are highly desirable outcomes, and ought not to be interfered with. However, it is also the case that the unregulated use of temporary workers — whether hired by employers directly or through agencies — represents a potentially serious threat to the maintenance of labour standards of both those workers and others.

Temporary workers, it appears, sometimes receive less pay than long-term employees doing comparable work, even allowing for differences attributable to experience in the specific job or enterprise. Agency workers often receive less remuneration than they would if they were employed directly by the client firm and — we were repeatedly told — are sometimes prevented from applying for permanent jobs with client firms as a result of contractual arrangements between the agency and themselves, or the agency and the client firm or both. Temporary workers usually enjoy reduced access — or no access — to statutory or contractual benefits based on their length of service, because their employment is likely to be terminated before they qualify. And those who

work for agencies by definition receive no benefits from the client firm, and may not receive benefits from the agency either, if it chooses to terminate their employment at the end of each short assignment, and then re-employ them when they are needed for dispatch to another client.

A further problem: in order to avoid having to pay benefits, and sometimes to justify paying workers at a lower scale, employers may set aside a significant number of jobs for temporary or agency employees. In extreme cases, temporary or agency workers may be kept in place for months or even years on a series of short contracts, and may perform the same work as permanent employees and do it just as well, but be paid significantly less and have fewer benefits — or none. Reputable employers, as the Canadian Bankers Association noted, have no desire to have recourse to "disguised employment" as a way of reducing labour costs. The logic of this position applies not only in cases of employment masquerading as an independent contract, but also where permanent employment is disguised as temporary. Nor should such arrangements be countenanced under Part III.

Finally, some temporary and agency workers are highly paid professionals or skilled workers, in great demand in the labour market, and their labour standards are unlikely to be threatened. However, most have only generic skills, perform routine work and wield little bargaining power with either the client firm or the agency. We have been told that many in the latter group are women and members of disadvantaged groups who have to take temporary work because they cannot find permanent jobs. While we cannot verify this suggestion by reference to statistics dealing specifically with the federal sector, the possibility that it is true makes the case for dealing with this issue even stronger.

One approach would be to regulate placement agencies directly, so as to ensure that workers receive appropriate pay, benefits and job opportunities. Representatives of the placement industry resisted this approach. They claimed that agencies — at least reputable agencies that hold membership in industry associations — already complied with all relevant labour standards. However, this is a somewhat ambiguous claim. It might mean either that agency workers receive the bare minimum of wages and benefits mandated by an ungenerous reading of provincial or federal legislation, or that they receive compensation and benefits equivalent to that received by persons employed directly by client firms to do comparable work. It might mean that reputable member agencies adhere to high standards, but non-member and non-reputable agencies do not. Or it might mean that firms in the latter category should be subject to more extensive regulation than at present, while reputable, law-abiding firms should be left to regulate themselves through their own industry associations. It is important that these ambiguities be resolved. For that purpose, more extensive engagement with temporary employment agencies and industry associations is essential.

I say this for three reasons. First, in order to evaluate claims on both sides of the argument it is important that we should know much more than we do about the actual operation of placement agencies. For example, we do not know whether workers dispatched to work in federally regulated enterprises are treated in accordance with federal or provincial labour standards legislation, nor do we know how they are treated in areas not covered by such legislation, such as access to permanent jobs with client firms. Unfortunately, it appears that no comprehensive Canadian study of the placement industry has ever been undertaken. Industry cooperation would be most helpful in connection with such a study. Second, industry associations that are willing and able to ensure that agency workers are not only accorded their rights under labour standards legislation but also receive fair treatment with regard to sector-specific issues, should be strongly encouraged to achieve this outcome. And third, direct regulation of the placement industry may be beyond the constitutional competence of the federal government except with regard to agencies that specialize (as some do) in providing temporary workers to employers in telecommunications, air transport, trucking or banking. Self-regulation may be the only alternative.

RECOMMENDATION 10.1 The Labour Program, or some other branch of the federal government, should undertake a study of employment practices in the temporary placement industry, in cooperation with the industry, if possible. The study should attempt to determine (a) the extent of compliance with existing federal and provincial labour standards, and (b) whether inappropriate practices exist within the industry that ought to be regulated under Part III, so far as that is constitutionally feasible.

The federal government, in consultation with other interested parties, should encourage placement industry associations to draw up a code of conduct that requires agencies to comply with all relevant legislation, and prohibits practices or contractual terms that (a) deprive agency workers of access to proper pay and benefits, (b) interrupt their tenure of service after each assignment, or (c) prevent them from taking permanent jobs with client firms after a defined interval. The code should also stipulate that agency workers must be made fully aware of their rights before being dispatched to client firms, and it should contain a mechanism for identifying and rectifying violations.

The federal government should require all corporations, institutions or agencies receiving federal grants or contracts to certify that they neither do business with temporary placement agencies nor utilize agency workers in violation of the provisions of the proposed code of conduct. The government should adopt a similar policy in its own direct dealings with such agencies.

However, temporary agencies that are not members of the industry association may decline to adhere to the code and even member firms, though technically bound, may sometimes violate its terms. Moreover, placement agencies, whether members or not, may sometimes violate relevant legislation.

If, as a result of such violations, agency workers suffer loss of pay, benefits or opportunities, they ought to be able to look to the client firm for recompense. After all, the client firm has had the benefit of their work; it has the leverage to insist upon compliance by the agency; and it has the means to protect itself from adverse consequences by insisting that the agency provide a bond or other financial guarantee of compliance.

RECOMMENDATION 10.2 Part III should make federally regulated enterprises jointly and severally liable with temporary employment agencies for non-payment of wages or benefits owing to agency employees who work in those enterprises.

Temporary employees who work directly for employers rather than for an agency are in a somewhat different position. They are often hired to meet peak demand, to replace permanent employees on vacation or leave, or to perform some special, time-limited task. So long as this is clearly understood, and the terms of employment are clearly agreed, there is no reason to interfere with the arrangement. However, we were frequently told that many workers are hired on a series of short-term contracts, with the consequence that they become members of the employer's ongoing workforce in fact but not in name, work for less pay and fewer benefits than regular employees, and do so without job security or chance of advancement. This seems unfair. If they are doing the same work as their colleagues they should receive comparable compensation. The difficulty is to distinguish between those cases where temporary employment status is a sensible response to the employer's real but short-term needs, and those where it is used as a colourable device to avoid normal contracts of employment, or worse, to evade statutory requirements. Again, clarifying the terms of the contractual arrangements is the first step toward avoiding abuse.

RECOMMENDATION 10.3 Employers should be required to provide temporary employees with a statement setting out the nature of the relationship, its anticipated duration, and the conditions — if any — under which the employee may be considered for permanent employment.

However, even if the terms are properly established, it is still possible for employers to create an unfair or potentially illegal situation by entering into a series of contracts that, effectively, make workers "permanent temps." There is no reason to privilege temporary workers so that they are automatically treated as permanent employees without being subjected to the usual probationary period or to a proper assessment process. However, they ought at least to be considered in good faith for permanent jobs.

Employers should be encouraged to afford them such consideration by being prevented from prolonging their temporary status beyond one year or from using periods of discontinuous service to avoid having to provide them with their statutory entitlements. This will have to be accomplished by amendments to Part III.

RECOMMENDATION 10.4 Temporary employees who have worked for an employer for continuous or non-continuous periods that cumulatively total one year — or longer if that is the normal probation period fixed by the employer for permanent employment in similar work — should be deemed to have completed the probation period and should be entitled to be considered for permanent employment on the same basis as probationers. The burden of proof of compliance with these requirements should rest on the employer.

RECOMMENDATION 10.5 Temporary employees who have worked for the same employer for periods that cumulatively total at least one year should be entitled to access to the same pay that the employer provides to other employees with equivalent jobs, length of service and abilities, and should be deemed to have completed the period of service required for statutory rights under Part III as if their service had been "consecutive," provided that the interval between successive periods of service does not exceed sixty days.

B. PART-TIME WORKERS

Some 100,000 workers in the federal jurisdiction work part-time — about 12% of the total federal workforce. No doubt many do so by preference because they have family responsibilities, hold other jobs, are students or wish to have time free for other pursuits. Moreover, general studies show that a considerable number of households depend on the income of a part-time worker in order to make ends meet, that in many cases the part-time worker is the only earner in the household, and that many part-time workers would prefer to work full-time if offered an opportunity to do so. Finally, while not all part-time workers are poorly paid, a significant number of highly vulnerable workers are also part-time workers. Women are disproportionately represented in this group. It is therefore important that Part III should contain appropriate provisions to ensure that part-time workers are not exploited and that part-time work does not become a dead end for those who engage in it.

Obviously, employers may have legitimate reasons to hire part-timers. Part-timers may bring specialized skills or personal qualities to their work, or assist employers in responding to peak demand when it is not practical

to hire additional full-time employees. Part-time work arrangements may also allow employers to retain valued employees who wish to stop working full-time for a period, and also to screen new part-timers for future full-time jobs. Nothing should be done that might impair the use of part-timers for these legitimate reasons.

However, it must be said that some employers appear to use part-time employment in order to undercut the labour standards of full-time workers. This at least is the conclusion one might plausibly draw from the fact that part-time workers often receive lower remuneration than full-time workers. Unless discrepancies in wage levels can be objectively justified on the basis of different levels of skill or experience, or different job content, they are unfair to part-timers and, in the long-term, subversive of the standards of full-timers.

RECOMMENDATION 10.6 Part-time workers should receive the same pay as full-time workers with equivalent jobs.

Adherence to this principle would not only provide a measure of fairness to part-timers, but it would better protect the standards of full-timers.

C. BENEFITS FOR WORKERS IN NON-STANDARD EMPLOYMENT RELATIONSHIPS AND SMALL AND MEDIUM ENTERPRISES

(1) Statutory Benefits

Most provisions of Part III require workers to accumulate a period of "continuous service" in order to qualify for rights under the statute. This requirement has particularly severe consequences for those who work under non-standard arrangements. Even if temporary and agency workers work for protracted periods for the same employer, they may not do so on a continuous basis and, consequently may never qualify for vacations, leaves or protection against unjust dismissal. For this reason, I have recommended that Part III should be amended to enable them to qualify. Autonomous workers, of course, do not presently come under Part III, but I have recommended in Chapter Four that they might be covered on a selective basis and for limited purposes, including perhaps access to some statutory entitlements.

Part-time workers are, in principle, eligible for all rights under Part III, including those that require continuous service, subject of course to pro-rating to reflect the fact that they work fewer hours per week. While I have no information as to whether or to what extent they actually receive their statutory entitlements, as I explain next, many employers do not treat

part-timers on an equal basis with full-timers in respect of non-statutory benefits. It would therefore not be completely surprising if some failed also to provide them with their Part III entitlements.

The improved compliance strategy I recommend in Chapter Nine would enable the Labour Program to focus inspections and audits on issues where there is reason to suspect extensive non-compliance with Part III. Statutory benefits for non-standard workers may invite such a focus.

(2) Non-statutory Benefits

The literature suggests, and the FJW Survey confirms, that employers tend not to provide non-statutory benefits, such as dental or drug insurance, disability insurance and pensions, to employees who work under non-standard contractual arrangements — temporary, part-time, agency and autonomous workers. The same sources show that in general, even for full-time workers employed under conventional contracts, the size of the enterprise determines the level of benefits workers are likely to receive: the smaller the enterprise, the fewer the benefits.

The absence of coverage for non-standard workers and workers in smaller enterprises has serious consequences for them personally. Without a company pension, and with no personal savings because of their marginal connection with the labour market, they will have to retire on their government pension, which is modest indeed. With no disability insurance, they will be in particularly difficult circumstances if they suffer a serious illness. With no dental insurance, a predictable hazard, such as the need for dental work, represents a serious risk to their budget. The public policy consequences are serious as well. If their income is interrupted by illness, they may have to seek income support or other forms of public assistance; if their medical condition deteriorates because they cannot afford drugs, the public health care system may ultimately have to bear additional costs of hospitalization; and if SMEs cannot offer coverage to potential recruits or if self-employed persons and autonomous workers cannot secure it, the dynamism of these sectors of the economy may be impaired. (Parenthetically, non-standard workers and SME workers are not alone in confronting the hazards of life without benefits coverage or with minimal coverage. Many independent contractors and autonomous workers lack coverage; so do many SME proprietors.)

Of course, many of these difficulties could be avoided if universal dental, drug and disability coverage were provided under a publicly funded scheme. But that is a debate for another forum. For purposes of this report, my assumption is that the employment relationship — whatever its limitations — will continue to serve as the policy platform from which many benefits are delivered. If my assumption is correct, it is important to understand the

consequences: vulnerable workers — those who need benefits coverage most — are much less likely to receive it than other workers.

In order to propose a response to this situation, it is necessary to understand why non-standard workers and those in small and medium enterprises are so frequently denied benefits by their employer.

No doubt some employers decide to deny coverage to non-standard workers purely and simply in order to lower their payroll costs. However, it is also likely that providing coverage for non-standard workers and those employed by SMEs is more complicated and expensive than for regular full-time workers in larger enterprises. The actuarial problem of spreading risks across a small group, the administrative diseconomies of small-scale plans and the problem of pro-rating certain benefits for part-time workers all represent potential disincentives to employers considering whether to provide benefits coverage to non-standard workers. These problems are severely exacerbated by the difficulties of collecting premiums from and providing benefits to a transient population, such as temporary and agency workers.

It is not completely clear whether the barriers to benefits coverage that I have identified are real or merely hypothetical. However, I am not prepared to recommend that employers be required to provide benefits to non-standard workers unless and until I am convinced that it is practicable for them to do so.

It ought to be possible either to utilize an existing vehicle to provide coverage, or to create a new vehicle for the purpose. The existing vehicle, of course, is the array of insurance companies that currently design and administer benefit plans for employers. Anecdotal evidence from Saskatchewan, which has mandated that part-time workers be covered, suggests these companies may be willing and able to simply extend existing plans to cover non-standard workers more generally. If so, the solution is obvious.

On the other hand, it may be possible to invent a new vehicle to provide coverage for non-standard workers. There is a special need for innovative measures if coverage is to be provided to temporary and agency workers who are seldom employed long enough in any one establishment to qualify for benefits, whether provided voluntarily or under legal compulsion. For example, the situation of these employees might be addressed by allowing them to collect the workplace equivalent of "frequent flyer points." This is the approach Canadian governments have adopted to deliver coverage to all workers under the Canada Pension Plan and Employment Insurance. Under these plans, contributions are paid into a central fund held by the state, and eligibility for benefits is determined and benefits provided on the

basis of aggregate contributions, or total hours worked, largely without regard to where the hours were worked or by whom the contributions were made. Registered Retirement Savings Plans comprise a different model in which the employee creates his or her own fund, or buys into a mutual fund, and makes tax-sheltered contributions derived from employer contributions and other sources; the contributions comprise a single retirement fund for the employee. Affinity plans established by organizations such as the Canadian Automobile Association are another model for providing insurance coverage outside of the employment relationship; trade or professional associations might organize affinity groups for workers employed by their members. A fourth model might be based on "facility insurance," which covers auto owners who cannot find coverage elsewhere; in Ontario this facility is provided as a collective project of the insurance industry itself, in other provinces in different ways. The point is that private providers in this instance have found a way to respond to public policies that require insurance coverage. Were Part III to require such basic benefits coverage for workers in the federal domain, perhaps they could do likewise.

Whatever is the right model, some way must be found to provide benefits coverage for vulnerable workers who do not now have access to it. Moreover, it would be better if the solution were found sooner rather than later. As unionization rates decline, as more workers move from large firms to small firms, as more workers move from regular employment to non-standard contracts or self-employment, the case for a new approach to benefits insurance comes to rest on a new basis: not only do vulnerable workers need protection, but so too does a growing proportion of the entire workforce. Nor is this just an issue for workers. I believe that more and more SMEs may feel obliged to provide coverage in order to attract high quality employees who will otherwise not come to work for them, and that more and more small businesspersons, self-employed professionals and others may feel the need to secure coverage for themselves.

RECOMMENDATION 10.7 The federal government ought to investigate a range of possibilities for providing benefits coverage to temporary workers, agency workers, self-employed persons and others presently without coverage. It ought specifically to consider establishing a "benefits bank" through which employment-related benefits coverage could be purchased by workers themselves or by their employers, as well as by other persons seeking coverage. This "bank" might be established by private insurance companies or organized by a public agency.

If coverage can be provided in a practical fashion, the Labour Program ought to revisit the issue of whether non-standard workers must be provided with benefits on the same basis as other workers employed by the same firm.

4. WORKERS MOST IN NEED OF PROTECTION: YOUNG PEOPLE AND WORKERS ON TEMPORARY WORK PERMITS

A. CHILDREN AND YOUNG WORKERS

The employment of children was one of the first issues addressed by labour standards legislation at the beginning of the 19th century. However, so far as I am aware, very few children are employed in federal jurisdiction enterprises. At least, virtually no one suggested to me that the prohibition of child labour was a significant issue for this review, although it may well be for provincial labour standards regimes.

In all provinces, compulsory school attendance laws effectively preclude the employment of children under the age of 16, except in narrowly defined circumstances. Presumably, these laws have the effect of preventing children from working in federal as well as provincial enterprises. In any event, no evidence was offered to me that suggests they need reinforcement by explicit language in Part III forbidding the employment of children.

In some provinces, labour standards legislation regulates the daily and/or weekly maximum hours of work by young persons when they are not at school, as well as their participation in night work. Part III does not now deal with these matters. However, in case the need for regulation of child labour should arise in the future in the federal domain, it would be prudent to ensure that the Minister has the necessary powers.

RECOMMENDATION 10.8 The Minister's regulation-making power should be amended to enable the Minister to adopt regulations dealing with the employment of persons under the age of 16, or between the ages of 16 and 18.

The only language in Part III presently dealing with this subject imposes a ban on employing young people in dangerous work if they are under the age of 17. As it happens, however, Canada has acceded to an ILO convention that specifies 18 as the minimum age for dangerous work.

RECOMMENDATION 10.9 Part III should ban dangerous work for workers under the age of 18.

B. DOMESTIC AND AGRICULTURAL WORKERS ON WORK PERMITS

Significant numbers of foreign workers enter the Canadian labour market on permits each year to take up temporary employment as domestic or agricultural workers. Legislative power to regulate working conditions in these labour markets clearly resides with the provinces, not with the federal government. However, the federal government has a clear responsibility to ensure that these workers are decently treated, not exploited or abused. This responsibility stems in part from the federal government's obligation to implement several international agreements it has signed concerning migrant workers, in part from its constitutional jurisdiction over immigration, and in part from the general mandate of the Labour Program to promote "fair, safe, healthy, stable, cooperative and productive" work environments.

The Government of Canada — in some cases, as noted, pursuant to agreements or understandings with foreign governments — has established programs through which migrant workers are recruited, and has laid down the terms on which they may work in Canada. Under these programs, the federal government issues work permits to migrant workers that contain conditions relating to the length of their stay in Canada, their obligation to remain employed with the employer named in the permit, the reporting of any changes in their arrangements and so forth.

The federal government also cooperates with provincial authorities to ensure acceptable minimum standards of treatment for these workers, including medical coverage and healthy and safe accommodations and workplaces. So far as wages, benefits and working conditions are concerned, foreign workers on permits must generally be remunerated on the same basis as agricultural or domestic workers recruited inside the country, and of course they are entitled to the same protections under provincial legislation as the province extends to their Canadian counterparts.

While this may ensure proper treatment for some foreign workers in some provinces, it does not do so in other provinces that have either no labour standards or low standards for locally recruited domestic and agricultural workers. Even in provinces with high labour standards, compliance remains a significant challenge. Migrant foreign workers are isolated physically and linguistically from the general community, are often ignorant of their rights, are liable to be on their way home before labour standards complaints can be processed, are worried about being labelled as trouble-makers and debarred from participating in the program in the future and, for all of these reasons, are susceptible to intimidation. Submissions to the Commission alleged that, as a consequence, abuse of foreign workers is not uncommon, and at least some incidents have come to light in the media over the past few years that lend credence to these allegations.

For all of these reasons, I believe that the federal government should take a more active role in protecting migrant foreign workers. How can it do this?

While it has no legislative authority to regulate farm or domestic employment directly, the federal government does have at its disposal the power to grant or withhold work permits for foreign workers, to assign or not assign them to particular employers, to impose conditions on employers who hire these workers, and to enforce those conditions by withdrawing existing permits or refusing future permits if the employer fails to treat them properly.

If exploitative working conditions or practices are brought to its attention, Citizenship and Immigration Canada (CIC) presumably has the power to allow victimized employees to move to other jobs and ban the offending employer from future participation in the foreign workers scheme. However, to the best of my understanding, CIC does not actively oversee its own foreign worker scheme, leaving that task to provincial labour officials. This is perhaps understandable, as CIC is not primarily concerned with regulating workplaces. On the other hand, if provincial authorities take a hands-off attitude as well, the resulting gap in enforcement could be highly prejudicial to vulnerable foreign workers. To some extent, that gap is filled by local consular officials from the workers' own countries or by local support groups that report abusive or exploitative behaviour. However, it is more appropriate that the Government of Canada should accept its own responsibilities in this matter.

RECOMMENDATION 10.10 Whether or not they are protected under provincial statutes, foreign agricultural and domestic workers in Canada on work permits should be protected by mandatory employment agreements with their employer. The terms of such agreements should be established by the federal government, after consultation with provincial authorities, with a view to ensuring that workers receive basic labour standards protections. Agreements should specify that foreign workers will receive:

(i) wages equal to those of locally recruited workers;

(ii) rest and meal breaks, and weekly rest periods;

(iii) protection against unauthorized deductions from pay; and

(iv) in the event that they are dismissed and liable to repatriation, access to an informal and expedited hearing by a Labour inspector, during which they will be permitted to remain in Canada; if found to have been unjustly dismissed, they will be reassigned to another employer if one is available.

RECOMMENDATION 10.11 Foreign agricultural and domestic workers should receive information in their own language concerning the protections available under provincial legislation, and under their employment agreements. They should be provided with access to a toll-free number where they can seek advice, report violations and request assistance, and Labour inspectors should ensure that they have access to the use of a telephone.

RECOMMENDATION 10.12 The federal government should enter into agreements or arrangements with provincial authorities to ensure that provincial Labour inspectors will inspect workplaces to which foreign workers are assigned, and report to Human Resources and Social Development Canada any employer who violates either the terms of the employment agreement or provincial labour standards legislation. Where provinces decline to enter into such an agreement or arrangement or to provide inspection services, Labour Program inspectors should be authorized, under the terms of the relevant federal foreign worker program, to carry out the necessary inspections.

RECOMMENDATION 10.13 Employers who repeatedly or systematically violate provincial labour standards or the terms of employment agreements should be denied future access to workers under the relevant foreign worker program for a period of not less than one year.

5. MINIMUM WAGE

According to a study undertaken for the Commission by Prof. Morley Gunderson, many different rationales may be used by governments to justify minimum wage legislation: to alleviate poverty; to protect workers with little individual or collective power; to provide incentives to work rather than relying on income maintenance programs; to encourage movement up the value-added chain by eliminating low-wage jobs; and to stimulate overall demand by raising levels of earning and spending.

However, it is difficult to determine which of these aspirations, if any, informs the present minimum wage provisions of Part III. After leaving the federal minimum wage unchanged in the 10 years following 1986, the federal government in 1996 initiated a policy of adopting as the national minimum whatever rate was in force in the province in which work happened to be performed.

This approach might conceivably be justified on some policy ground if provincial minimum wage rates reflected differences in the local cost of living, local labour market conditions or the sectoral and occupational mix of

the provincial economy. However, as Prof Gunderson suggests, that does not appear to be the case. Rather, provincial rates reflect philosophical differences among governments over the objectives of a minimum wage policy, disagreement among experts about the stimulus or dis-employment effects of raising the minimum and, not least, political pressures from provincial advocacy groups that fear or favour higher rates. Obviously, a national policy based on the resulting provincial patchwork lacks coherence or direction. Its only merit is that it relieves the federal government of the need to make its own decisions.

This diffidence about deciding how to handle minimum wages is not shared by other governments. In the two decades since the federal government last addressed the issue on its merits, several provinces have significantly adjusted their minimum wages, almost always upwards though often not at the rate of inflation. The United Kingdom instituted a national minimum wage for the first time in 1999, and more and more American states and cities have been adopting "living wage" policies, which significantly increase the remuneration of low-wage workers. Given that so many governments in countries with strong market economies are instituting or reviving minimum wage or living wage policies, I see no reason why the federal government should not do likewise. The real question is, at what level?

Unions, poverty advocates and social policy analysts urged in briefs and oral submissions that the federal government should reinstitute a national minimum wage that focuses first and foremost on reducing poverty. The minimum wage, they said, should be set at a level that ensures that a single worker employed full-time for a year in a federally regulated enterprise would not live in poverty. The figure most often suggested was $10.00 per hour, benchmarked to the low-income cut-off (LICO) index and adjusted automatically at regular intervals.

Studies by Drs. Richard Chaykowski and Ron Saunders show that those who receive low wages also frequently receive few benefits, enjoy relatively brief job tenure and have little chance of advancement to higher paid jobs. Low-wage work therefore condemns them and their families to the many disadvantages associated with long-term poverty. Moreover, because disproportionate numbers of low-wage workers are women, single parents, aboriginal persons or recent immigrants, low wages tend to have socially regressive effects. Consequently, it is argued, the reintroduction of a federal minimum wage should be seen as a key element in a broader anti-poverty initiative.

Other arguments in favour of a higher national minimum wage were made as well: keeping minimum wages low in effect forces poor workers to subsidize affluent consumers who benefit from the cheap goods and services they provide; low minimum wages shield employers from having to improve

the efficiency of their businesses by other means; and higher minimum wages would lure workers back onto the labour market at a time of labour shortages.

But there are strong arguments to the contrary. Submissions from some business and employer groups opposed the reintroduction of a national minimum wage because increased labour costs might drive some marginal SMEs out of business (a point on which proponents and opponents seem to agree); because employers must already offer decent wages if they hope to be able to hire workers in the current tight labour market; because many recipients of minimum wages are not primary wage earners in their family and therefore do not live in poverty; and because increasing minimum wages is not an efficient way to attack poverty as compared with, say, targeted wage supplements.

In the end, however, the argument over a national minimum wage is not about politics or economics. It is about decency. Just as we reject most forms of child labour on ethical grounds, whatever their economic attractions, we recoil from the notion that in an affluent society like ours good, hard-working people should have to live in abject poverty. The fact that all Canadian jurisdictions have minimum wage legislation leads me to believe that there is broad support for this ethical stance. Of course, like so many ethical principles, disagreement begins when it comes to application. A national minimum wage of, say, $6.00 per hour would generate little resistance or enthusiasm, but a national minimum of $12.00 per hour would generate considerably more of both.

How, then, to flesh out the ethical principle to the point where it can be translated into an actual dollar figure that will gain a large degree of public acceptance?

I approach the question with some caution because, as Prof. Gunderson notes, a substantially increased national minimum wage might lead to significant job losses. He points to a view widely shared among economists to the effect that a 10% increase in the minimum wage will likely trigger job losses of 1% to 3% among those affected by the increase — primarily young workers in the low-wage hospitality and service sector.

However, this view is not uncontested among economists, who have begun to consider evidence — arising from recent experience with the minimum wage in the U.S. and the UK — that suggests that over the slightly longer term, any job losses are likely to be made good. More importantly, the profile of employment in the federal domain is quite unusual. Very few workers covered by Part III are young, unskilled hospitality or service workers of the type most likely to lose their jobs if the minimum wage is increased. Indeed, most are employed by relatively large enterprises

that operate primarily in markets characterized by natural or regulatory constraints on competition, and which therefore have the capacity to absorb wage increases. Furthermore, Canada is presently experiencing a fairly tight labour market, and employers in some sectors, notably trucking, actually complain of labour shortages; any short-term dis-employment caused by a higher minimum wage is therefore likely to be quickly recouped as displaced workers find better jobs elsewhere, or as employers raise wages to retain them in their present jobs. Finally, even assuming the maximum predicted dis-employment effects — concentrated in small enterprises, especially trucking firms — the total number of workers potentially affected across the whole federal domain is negligible. As noted earlier, only about 2% of workers in the entire federal domain — just over 18,000 workers — make less than $10.00 per hour. The actual number of workers displaced by an increased federal minimum wage (if any) is likely to be statistically insignificant.

I therefore feel that I can approach the question of where to set the new federal minimum wage on its merits without being unduly concerned that it would have a negative impact on the Canadian economy, the labour market that serves federal enterprises or the jobs of workers in that labour market.

I am attracted by the formulation that no worker should be paid so little that, after working full-time at a regular job for a full year, they will still find themselves with less money than they need to live at or just above the poverty line. I believe that while most Canadians would prefer to pay less for what they consume, most would be willing to pay just a little more if doing so gave their neighbour or fellow worker or the person who serves them in a restaurant the chance to lead a decent life. People who live in poverty do not have that chance. Their health, their education, their housing, their encounters with officials, their participation in civic life, their chances of advancement, and those of their children are all stunted by poverty. That is why I believe that, in accordance with the decency principle articulated in Chapter Three of this report, the national minimum wage should be benchmarked to the LICO index.

However, this approach to benchmarking has some potential weaknesses. First, some low-wage workers might receive more than they need to boost them out of poverty, others less. The problem is not only that workers have different family and personal needs; it is that the cost of living varies considerably, especially between rural and metropolitan areas. A single national minimum wage might therefore either over-shoot or under-shoot the mark. This fact needs to be taken into account in any formula that ties the minimum wage to the LICO index. While not wishing to introduce undue complexity into the fixing of a benchmark that would actually affect relatively small numbers of people, it might at least be possible to add a special increment to the minimum wage for workers in high-cost-of-living metropolitan areas.

Second, while the long-term national effects of a federal minimum wage would likely be modest, the short-term and localized effects may be more dramatic. It is possible, for example, that a federal minimum wage set well above provincial levels — especially if introduced suddenly — could trigger some short-term spillover effects in adjacent provincial labour markets. However, the precise nature of these effects is difficult to predict because provincial minimum wage levels seem to correlate neither with the state of local labour markets nor with the extent of the federally regulated workforce within the province. As a result, one can only say that while all provinces will in due course likely adjust to the spillover effects of a new national minimum wage, and all will ultimately benefit, they will adjust and benefit in different time frames. Phasing in the new federal minimum seems the best way to avoid extreme short-term effects at the provincial level.

Third, even if the new national minimum were benchmarked as suggested, there is no guarantee that it would stay benchmarked. As Prof. Gunderson notes, governments have a tendency to simply ignore the minimum wage for long periods of time, with the result that its purchasing power erodes due to inflation. This certainly happened with the federal minimum wage for a lengthy period from the mid-1980s to the mid-1990s. From this experience — and that of many provinces — I conclude that a process ought to be set in place to automatically update the minimum wage at fixed intervals.

RECOMMENDATION 10.14 The federal government should re-institute a national minimum wage and should cease to set the minimum wage by reference to provincial standards. However, variations should be permitted based on documented differentials in the cost of living in different population centres.

The new national minimum wage should be benchmarked to the low- income cut-off (LICO) index or some similar standard, and should be adjusted automatically at intervals of one or two years. The formula for fixing and adjusting the national minimum should be set out in Part III itself, rather than in regulations.

In order to minimize dislocation in local labour markets, the new national minimum wage should be introduced in two phases. In the first phase, lasting two or three years, a national minimum should be established by gradually disengaging it from the lower province-based variants. In the second phase, lasting a similar period of time, the national minimum should be increased until it conforms to the benchmark proposed above. During both phases, adjustments should take into account cost-of-living increases.

6. OTHER PROTECTIONS FOR VULNERABLE WORKERS

Proposals made elsewhere in this report should have a positive impact on vulnerable workers. For example, I proposed that autonomous workers should be eligible for certain kinds of protection under Part III, that part-time workers should have a right to refuse overtime assignments that conflict with their other job commitments and that the maximum hours of work in the road transport sector should be set under Part III. Most importantly, since vulnerable workers find it especially difficulty to claim their entitlements and defend their rights, the new compliance system described in Chapter Nine would likely benefit them more than most other workers.

Recommendations made in this chapter — enhanced protection for non-standard workers, moving forward to develop some form of access to non-statutory benefits, an indexed national minimum wage, and others — are specifically designed to assist vulnerable workers. However, my recommendations are modest and incremental, not dramatic and transformative. Indeed, I acknowledge that some of my recommendations — unpaid leaves, for example — are likely to be of limited use to vulnerable workers.

The problem is that many of the difficulties encountered by vulnerable workers originate outside the workplace and have to be addressed there, rather than under Part III. Income support programs, social housing, day-care, access to training programs and the like are of particular concern to workers who earn the lowest wages and have the greatest difficulty in finding jobs that offer them a promising future. However, these are not issues that I could investigate extensively or deal with directly, given that my primary mandate has Part III as its focus. I therefore conclude this chapter on vulnerable workers by reminding readers that the decency principle — the principle that is fundamental to this report — is one of broad application. How to ensure that all workers work in conditions we consider decent — and, by extension, that all Canadians live in conditions we consider decent — is the question that is central to all public policy debates.

Chapter Eleven

Labour Standards in a Dynamic Economy

ELEVEN
LABOUR STANDARDS IN A DYNAMIC ECONOMY

1. INTRODUCTION

In the previous chapter I suggest that Part III ought to be judged by how well it protects workers most in need of protection. In this chapter, I put Part III to a different test: does it make a positive contribution to Canada's economy? This question is likely to puzzle some of the people who study labour standards closely. "Of course labour standards are a drag on a dynamic economy," classical economists are likely to respond, though sometimes adding "but it is legitimate to choose to forego economic gains for better social outcomes, provided the policies adopted actually achieve those outcomes." The responses of worker representatives and social activists are likely to be quite different. "An inappropriate question," they will surely reply. "Labour standards are about social justice. Asking whether they make a positive contribution to the economy is a strategy for persuading people they ought to be lowered or done away with altogether." And they will add as a footnote, "Of course we favour a dynamic economy, but not one that exploits workers."

The intellectual assumptions and ideological preferences that underpin such reactions weave back and forth throughout the entire 200-year history of labour standards legislation. However, they do not do much to assist a review of Part III. In the here-and-now of 21st century Canada, labour standards are not going to be abolished; neither is a market economy. The issue is not *whether* to maximize social justice outcomes in the context of a dynamic economy; it is *how*.

In order to address that issue, it may be useful to remind ourselves of the particular character of those parts of Canada's economy and labour market that fall within federal jurisdiction. Part III does not apply to a cross-section of Canada's workers and employers. Most workers in the federal domain are employed by fairly large enterprises, many of which are somewhat buffered from competition by circumstances, law or public policy. Only about a third of the workers in the federal domain are unionized, but the great majority receive wages, benefits, holidays and leaves that exceed the minimums specified in Part III.

No doubt Part III requires federally regulated enterprises to do some things they would rather not do, such as submitting the dismissal of workers to independent adjudication, discussing their plans to cut jobs with their employees or seeking regulatory permission for changes in working time arrangements. But to the extent that these requirements are capable of being measured, their cost to employers is fairly modest. Indeed, Organisation for Economic Co-operation and Development (OECD) studies indicate that, compared with their counterparts in most countries, Canada's employers are relatively unencumbered by restrictive labour standards. As a result, Canadian employers are able to adjust to changing competitive conditions more easily than their counterparts elsewhere, an issue explored in Chapter Two.

My conclusion is, then, that while the cumulative cost of present and proposed Part III standards may have some impact on federally regulated enterprises, they do not represent a clear or present danger to the efficiency, competitiveness or profitability of most enterprises in the federal domain. This is not to say that we can ignore that danger. We live in a highly volatile national and global economy and in an era of rapidly changing demographics, technologies and expectations. It is therefore likely that we will experience frequent and sometimes traumatic adjustments both in external labour markets and in the internal labour markets of particular sectors and enterprises. Such adjustments hold out the prospect of significant gains for workers and employers alike, but also the risk of significant losses. If statutory labour standards over-burden adjustment strategies with excessive costs and unreasonable delays, they may seriously affect the profitability, even the viability, of the enterprises they regulate. On the other hand, as I suggest below, appropriately designed labour standards can make a modest but positive contribution not only to the well-being of workers but to the success of the enterprises that employ them.

To make this contribution, Part III and the federal government should not impede, but should preferably promote:

- a reduction in work–life conflict and related stress and absenteeism;
- "flexicurity" — a coherent balance between security and flexibility;
- high levels of human capital formation through training programs and opportunities; and
- an atmosphere of trust and cooperation in the workplace that leads to the adoption of best practices, including high performance workplace systems.

In Chapter Seven I discuss and provide recommendations with respect to reducing work–life conflict. This chapter focuses on the other three components of this strategy.

2. PROMOTING FLEXICURITY

The notion of "flexicurity" has gained considerable traction in the European Union — notably in Denmark and the Netherlands — and in various forms elsewhere. It combines, in word and deed, measures that enhance worker well-being and mobility, with greater flexibility for employers to redeploy resources to respond to changing market conditions. Significant differences between Canadian labour market institutions, social policies, governance structures and economic environments and those in Denmark and the Netherlands preclude the direct trans-Atlantic transplantation of the concept. However, its basic assumptions are as relevant to Canada as they are to other countries:

- economic success is a precondition of states being able to sustain their commitment to social justice;
- the long postwar commitment to full employment, secure job tenure and job-based social entitlements can no longer be sustained in an environment of rapid economic change;
- the willingness and capacity of workers and employers to adjust to change is an essential element of success in the new economic environment;
- adjustment will not take place unless alternative strategies are put in place to ensure that workers do not bear the entire burden of adjustment and are able to share in the benefits; and
- these alternative strategies must be constructed not only on the traditional platform of specific jobs, but on other platforms as well, including the labour market, the social security system and the educational system.

Even this barebones account of flexicurity suggests that a traditional labour standards statute such as Part III may not be the best place to anchor such an approach. Part III deals with regulating existing job relationships, while flexicurity seeks to facilitate access to new employment opportunities. Part III deals with individual enterprises or sectors, while flexicurity deals with broader labour market policies and the reinforcement of social citizenship.

However, this is not to say that Part III has nothing at all to do with promoting flexicurity. On the contrary, the provisions dealing with group terminations, which were added to the statute in 1971, represent an example of flexicurity *avant le mot*. Originally meant to operate alongside ambitious legislation designed to facilitate labour market adjustment (since repealed), these provisions require an employer to give 16 week's notice to the Minister of Labour of its intention to terminate more than 50 employees within a four-week period, or to place them on long-term layoff. Following the

giving of notice, a joint labour-management planning committee must be convened "to develop an adjustment program to…eliminate the necessity for the termination of employment…or to minimize the impact of the termination on the redundant employees and to assist those employees in obtaining other employment." If the parties are unable to agree on an adjustment plan, an arbitrator may be appointed to assist them. In addition, Part III requires that the employer provide employees with two days severance pay for each year of service, a useful sum though not a large one. These provisions constitute implicit acceptance of a number of flexicurity-like premises: that redundancies should be avoided if possible; that redundant workers need assistance to cope with the adjustment process; that their employer and the state should share some of the costs of adjustment; and that redundant workers must in the end seek employment elsewhere.

Despite the end of the federal program under which transitional assistance was originally provided, the adjustment process continues to attract the participation of federal agencies involved in labour market adjustment issues, including Human Resources and Social Development Canada and the Canada Employment Insurance Commission, and of municipal governments and other actors concerned about the effects of group termination on the local community. It generally results in a sensible, though not painless, transitional process, and hardly ever requires the intervention of an arbitrator. In the result, then, by requiring advance notice of group terminations, Part III increases the likelihood that displaced workers will be matched to new jobs and to that extent, it facilitates enterprise adjustment to new market conditions.

However, this example of flexicurity writ small is not without its critics. On the one side, they argued, while workers are provided with severance pay, the sums involved are very modest compared with those provided in most OECD countries, and in some cases, much less even than what the common law would provide. Moreover, the schedule of compensation reflects neither the needs of particular workers during the transition period, nor the full costs associated with their move to new jobs. Therefore, a case might well be made for more generous severance payments. On the other side, several management representatives pressed for what would amount to a reduction in severance pay. Severance pay, they argued, is intended to buffer workers against the consequences of losing their jobs; accordingly, if workers become reemployed before exhausting their entitlement to severance pay, the employer's obligation to provide it should cease.

Aside from a modest increase in severance pay for long-serving employees, I reject the first proposal — for an overall increase — because it would fix the employer with costs of readjustment that, under the logic of flexicurity, ought to be shared to some extent by society as a whole. I reject the second — for a partial roll back — because it would undercut the bargain implicit in flexicurity: that employers should be willing to share the benefits of

adjustment to the new economic environment as well as the burdens. A partial roll back would also be difficult to administer and would likely generate obstacles to creative problem solving during the joint committee negotiations, which lie at the heart of the scheme.

But most of all, I recommend only minor changes in the mass termination provisions of Part III because I believe that labour standards legislation is neither the only nor necessarily the best way to work toward flexicurity. For example, if the benefits now provided by employers in the form of insurance coverage were provided instead through a universal public scheme, workers would be less nervous about losing their jobs and there would be no need for the benefits bank I propose in Chapter Ten. If Employment Insurance (EI) made up more of the earnings loss suffered when workers are made redundant, they would be less dependent on severance pay. If the *Income Tax Act* provided significant tax credits to cover the costs of relocation to new jobs, if the Canada/Quebec Pension Plan provided that tax-sheltered contributions could be drawn down for educational purposes, or if additional public funds were devoted to facilitating labour market adjustment, a more multi-faceted approach to flexicurity might be possible. And that, of course, is the most important point of all: flexicurity represents an attempt to coordinate public policies and private initiatives to produce optimal economic outcomes for workers, employers and the entire community. It therefore requires a forum in which coordination can be discussed and agreed, and agencies through which it can be accomplished. Neither policy coordination, nor a forum for achieving it, nor agencies for implementing it presently exist — nor are reforms on Part III likely to conjure them up. A more extensive, inclusive and well-prepared initiative is required.

RECOMMENDATION 11.1 The federal government should initiate a conversation with labour, management and the provincial governments with a view to exploring "flexicurity" — a strategy to enhance labour market flexibility while protecting the long-term economic and social security of workers.

Pending such a conversation, minor adjustments to the group termination provisions of Part III will make them work better. These adjustments to the machinery and the compensation schedule will, I believe, be to the advantage of both employers and workers.

RECOMMENDATION 11.2 The current provisions of Part III dealing with group terminations should be retained, subject to the following modifications designed to make the procedures more fair, consistent and expeditious:

(i) the Minister's power to waive the required procedures should be delegated to Regional Directors of the Labour Program;

(ii) the criteria for exercising this power should be more clearly defined than at present; and

(iii) provision should be made for approved adjustment plans to operate over longer periods of time than currently provided for.

Perhaps, then, I should amend my earlier assertion that changes to Part III are neither the only nor the best way to promote flexicurity. Labour standards legislation is clearly not sufficient in itself; however, it may complement or reinforce larger policies that attempt to strike the right balance between flexible labour markets and economic and social security for workers. Moreover, innovations in labour standards legislation may generate momentum in the direction of flexicurity to the extent that they explicitly acknowledge and successfully balance the needs of workers for security and the needs of employers for flexibility. The proposed "regulated flexibility" regime for the control of working time recommended in Chapter Seven and the "benefits bank" proposed in Chapter Ten are examples of such innovations.

3. ENHANCED HUMAN CAPITAL FORMATION: EDUCATION AND TRAINING

Most federal domain enterprises depend heavily on the sophisticated skills and advanced knowledge of their workers. This is obviously true for banks, airlines and telecommunications providers who employ large numbers of technicians, professionals and other specialists. However — less obviously — it is also true for workers in sectors such as trucking, who must deal with more complex automotive equipment, digital record keeping and communications devices, and new regulatory regimes having to do with border security and highway safety.

Indeed, as I suggest in Chapter Two, given the rapidity and extent of change in the external environment, virtually all workers must be able to adapt smoothly and rapidly to new technologies, new corporate structures and strategies, and new knowledge requirements and work routines. However, it is difficult, if not impossible, for workers to adapt unless they are both initially well trained and willing and able to undergo the further training necessary to take on new challenges. Consequently, study after study makes the case for employers to devote considerable resources to training their

existing cadre of workers. Some do, and by and large the results are very positive. But some do not, as surveys show, and the results are often less than satisfactory.

Moreover, as my discussion of flexicurity notes, not all adaptation and adjustment takes place within a given enterprise. Very often, employees are required to move on to other jobs where they will have to acquire and exercise new knowledge and skills. In order to become more mobile, they need more generic skills training, rather than more knowledge or know-how specifically related to the requirements of their present job. In addition, workers know — at least they are encouraged to accept — that they will likely hold many jobs during a lifetime, and will likely pursue many different careers. Thus, both public policy and private prudence require that workers prepare themselves for this eventuality by improving their credentials and broadening their knowledge base and the spectrum of their skills. However, there appear to be a number of obstacles to more extensive and intensive training programs for workers.

The first has to do with incentives. It may seem obvious that if training will enhance workers' productivity, adaptive capacity and mobility, they and their employers should be willing to invest heavily in training programs. However, employers asked to pay for generic skills training for their workers may well hesitate to do so if, in effect, they are helping prepare them to move on in the next few months or years, possibly to work for their competitors. And conversely, workers may not see any point in upgrading their job-specific skills if those skills are soon likely to be made irrelevant and they themselves made redundant.

The second has to do with costs. From the perspective of employers, especially SME employers, training can be quite expensive. Training providers must be hired, programs must be designed and delivered, facilities must be built or leased and workers must be given paid time off to participate in programs. From the perspective of workers, time and money are also significant deterrents. Many workers are already hard pressed to maintain an acceptable work–life balance and cannot fit courses into their "leisure" time. Moreover, they generally cannot afford to forego their pay cheque in order to enrol in lengthy training programs, and they usually cannot afford to pay fees to training providers. Indeed, one might say that the less training workers have — and therefore the more they need — the less likely it is that they will be able to secure it.

The third obstacle to more training has to do with information. While there may be a broad consensus that training is a "good thing," it is much more difficult to establish which workers ought to receive what kind of training,

when, from whom, and with what short- and long-term beneficial results. This information deficit may be minimal among large employers like banks — which in fact invest significantly in certain types of training — but it may represent a significant deterrent to small and even medium-sized firms.

It might seem sensible, then, for the federal government to assist in removing the obstacles of incentive, cost and information experienced by workers and employers. However, despite frequent expressions of concern about present deficiencies and an apparent commitment to overcoming them, the government has not been especially active in promoting or providing access to training, even for federal domain workers. Its current effort, the federal Workplace Skills Strategy, operates at a rather modest scale and with a relatively low profile. This may reflect some combination of concerns: that federal training initiatives should neither duplicate nor trench upon provincial initiatives; that employers can better define and meet their own training needs than can governments; and that no one federal agency or department has the necessary mandate or resources to act as champion for a comprehensive and active skills training initiative. These are legitimate concerns, but unless they are somehow overcome, the present situation will continue.

More generally, until the federal government redefines its overall role in connection with training, especially for workers in the federal domain, it will be difficult to assemble all the components of a workable policy. While the existing federal Workplace Skills Strategy will doubtless continue as part of a more comprehensive and aggressive strategy, the new strategy should also address such issues as the funding of programs, income replacement for workers enrolled in them, relationships with public and private sector providers of training and education, and workplace rules that facilitate access to education and training opportunities.

RECOMMENDATION 11.3 The federal government should develop a comprehensive strategy for funding, designing and ensuring the delivery of training and educational programs to support the ability of workers and enterprises in the federal domain to participate fully and effectively in today's knowledge-based economy. As part of this strategy, its existing Workplace Skills Strategy should be broadened, properly resourced and assigned to an appropriate champion, whether Human Resources and Social Development Canada as at present, its Labour Program or some other organization.

Notwithstanding the absence of such a comprehensive strategy, several briefs and research studies suggested ways in which Part III might be used to advance a training agenda.

The most far-reaching was that I should recommend the adoption of a scheme similar to one in force in Quebec, whereby a firm must spend 1% of its payroll costs to train its workers or, if it does not, contribute any unspent balance to a provincial training fund. A useful study provided to the Commission by Prof. Jean Charest documents this scheme, which was also the subject of conflicting assessments from several presenters at our hearings. However, while funds are obviously needed to support any serious training initiative, and while I regard a payroll levy as one source worth considering, I hesitate to recommend adoption of such a scheme until other alternatives have been adequately investigated.

These alternatives might include: cost-sharing among workers, employers and governments; learning accounts for workers taking designated educational or training programs to be administered through EI or some other federal income support program; learning partnerships among employers, unions and education providers, to be brokered by the federal government; tax incentives for employers and workers pursuing an approved education strategy; and unpaid educational leave of up to one year for workers who are willing or able to finance their education by some other means.

RECOMMENDATION 11.4 As part of its comprehensive training strategy, the federal government should review all potential means of providing resources to support training and life-long learning including, but not limited to, a payroll levy, tax credits, learning accounts supported by contributions from workers and employers, labour-management partnerships and income replacement schemes.

The federal government will have somehow to coordinate its training programs with those of the provinces and of employers themselves. While the federal government can almost certainly initiate training programs for employees in federally regulated industries, it might make more sense for it to rely on provincial programs, especially when these are generic, like computer programming or business management. It might also be advisable for the government to rely on employers to provide job-specific or enterprise-specific training for occupations in the federal domain, like air traffic control, maritime navigation or telecommunications.

A second suggestion was that Part III should ensure that workers required by their employer to attend training programs be paid while doing so. While most firms apparently do pay, I was advised that some do not. Failure to pay for required training is, arguably, a violation of the statute as it presently

stands. However, if the statute does not now require payment, it ought to. An employer should not be able to take advantage of its superior bargaining position to intrude on workers' personal time without compensating them for the intrusion. This is especially true when the employer will reap the benefit of the worker's enhanced skills and knowledge.

RECOMMENDATION 11.5 Employers who require their employees to attend training sessions should pay during their participation.

A special problem apparently arises in the aviation industry where — I was told — pilots must sometimes post a training bond to ensure that they do not depart for other jobs after having received extensive training or retraining at their employer's expense. If this is indeed true (I did not investigate the facts), such arrangements in my view ought to be subject to regulation.

If an employer requires existing employees to retrain, or enters into an agreement with prospective or probationary employees guaranteeing them regular jobs upon successful completion of a specified training program, the employer should pay both the training costs and the employee's wages during the training period. In these circumstances, an employer may seek assurances, in the form of a bond, to ensure that the employee will not defect to another firm before the cost of the training is amortized. This is not necessarily inappropriate, provided the terms of the bond, and of the employment agreement, are fair and reasonable.

Consequently, regulations should be enacted under Part III governing the use of training bonds. These regulations should provide that the amount of the bond should not exceed the cost of the training program (excluding the employee's wages); the value of the training bond should be reduced at fixed intervals as the employee works off his or her obligations during the post-training period; the employer should not be entitled to terminate the employment relationship except for just cause so long as the training bond remains in force; the training bond should be cancelled and the employee relieved of liability under it if the employment relationship is terminated or suspended for any reason other than the employee's decision to resign; and the training bond should not become payable if the employer has become insolvent or is in breach of its obligations under the contract of employment during the agreed post-training period. Finally, to avoid undue restrictions on the mobility of labour, the maximum duration of training bonds should be fixed by regulation, as well.

RECOMMENDATION 11.6 Employers should be permitted to require employees to post training bonds so as to ensure that they do not resign for an agreed period following completion of a training program for which the employer has paid. The terms of training bonds should be established by regulations under Part III.

A third suggestion was that Part III should guarantee workers time off for educational purposes. This suggestion in fact prompted several earlier recommendations, found in Chapter Seven, including procedures to facilitate the rearrangement of work schedules, the banking of overtime, and the scheduling of vacations so as to permit workers to assemble blocks of time for study. I also recommended that workers be entitled to refuse overtime assignments that interfere with their scheduled educational commitments. All of these recommendations would be of special benefit to workers enrolled in courses or programs that are not organized by their employer during working hours. Some may be directly related to the work the employee is presently doing; but they are more likely to be either general interest courses, or courses that will prepare the worker to find a better job in another field. It is the latter, likely more common, situations that give me pause. While I believe that workers should be given every opportunity to pursue whatever educational path they choose for themselves, I cannot accept that the employer should have to pay for them to do so. None of my previous recommendations involves the employer paying the piper, except where the employer calls the tune. Nor does the recommendation I make now.

RECOMMENDATION 11.7 Employees should be entitled to take unpaid educational leave of up to five days per year at a time mutually agreed with their employer.

This may seem — this is — a modest proposal. But if accepted, Canada would become the first jurisdiction in North America to enshrine a right to educational leave in legislation. Moreover, the value of such a provision would be more than symbolic. Workers would be able to plan ahead to take week-long courses, to combine educational leave with banked overtime or vacation time for courses of longer duration, or to use their week's educational leave to complete assignments or prepare for examinations in courses they are taking after work.

The key obstacle to longer study or sabbatical leaves, which are common in Europe, is that at present employees have no means of replacing their income while they are engaged in full time studies over a protracted period. Introducing some such support through tax credits, an EI training account, or one of the other strategies mentioned earlier would, of course, place the issue of six-month or full-year educational leaves in a new light.

4. PROMOTING BEST PRACTICES, TRUST AND HIGH PERFORMANCE IN THE WORKPLACE

Any government that defines its ambitions for the workplace in terms of ensuring compliance with minimum labour standards sets its sights too low. Governments ought to be encouraging employers to give a larger and ever more generous interpretation to the decency principle proposed in Chapter Two. One way of doing this is simply to ratchet up the statutory standards and use coercion to ensure that employers comply with them. However, as standards move from the merely minimal to the generous and optimal, this approach may well produce diminishing returns. Employer resistance will mount; objections about cost and practicality will proliferate and gain credibility; rates of non-compliance will almost certainly increase. Paradoxically, governments stand a much better chance of improving labour standards beyond the statutory minimum by persuading employers that adhering to "best practices" in their treatment of their workers is essential if they want to achieve "best results" on the balance sheet.

How do "best practices" help employers to achieve better business results? In colloquial terms, "what goes around, comes around." If people are not only accorded their bare legal rights, but treated generously, they are more likely to work together harmoniously, to rise to the challenges of the workplace, and to approach their interactions with their employer and others open-mindedly. As it happens, these are the very attributes that, according to many contemporary observers, are required for success in today's world of work. Without trust, employers will hesitate to give workers access to the knowledge they need to do their own jobs well, and workers will be reluctant to share new knowledge they gain on the job with their colleagues and supervisors. Without cooperation, it is not possible to integrate the work of the planners and designers, technology specialists and highly skilled operational staff, analysts and managers who populate many contemporary workplaces.

Much of the recent human resources and industrial relations literature therefore focuses on the need to overcome adversarial attitudes, to build trust and cooperation, to promote teamwork and foster a sense of shared responsibility for the enterprise, and to introduce less hierarchical management structures and transfer a good deal of authority and responsibility to workers themselves. Of course such innovations may sometimes be tainted by ulterior motives, such as a desire to inoculate workers against unionism. However, they also have a functional logic that is hard to deny and practical and symbolic payoffs that are hard to dismiss.

Recommendations in Chapter Seven may help to promote trust and foster cooperation. For example, I proposed new sectoral and workplace forums in which workers and employers can discuss adjustments to standards dealing

with working time. I also proposed that employers should give workers written notice of the terms of their employment contract — a foundation for greater transparency in their relationship — as well as procedures for individual workers to propose alterations in their work schedules, and bilateral arrangements for dealing with the banking of overtime, time swaps and other matters.

None of these recommendations represents a major initiative in terms of building trust and fostering cooperation. Indeed, none was intended primarily for that purpose. However, my hope is that as workers and employers learn to address their common concerns about working conditions on a daily basis, they will begin to experiment with small acts of cooperation and, hopefully, to lay down the foundations on which larger and more ambitious structures of cooperation can be built.

The Labour Program, which has been promoting positive relations between employers and workers for over a century, must surely be a repository of expertise in such endeavours. Indeed, its Labour-Management Partnerships Program has trust and cooperation at its core. I therefore encourage the Labour Program to take the lead not only in convening sectoral conferences and facilitating the establishment of Workplace Consultative Committees, but also more generally, in persuading employers, workers and their unions that trust and respect, leading to cooperation in the workplace, advances their respective interests more than unilateral or conflictual approaches.

One important technique for promoting trust and cooperation is, of course, to collect information on "best practices" — practices that work — and to disseminate that information to others who can imitate them or adapt them to suit their own particular circumstances. But more can be done than merely collecting and transmitting information. I have in mind that the Labour Program should initiate or sponsor experiments in workplace governance, subject these experiments to critical evaluation, develop credible hypotheses about what does and does not work, and use these hypotheses to assist employers and workers in improving their relationships.

By way of example, recent literature draws attention to the potential of so-called high performance workplace systems (HPWS) to directly or indirectly enhance productivity and profitability. Elements of HPWS typically include:

- designing jobs so as to broaden and deepen the range of workers' tasks and responsibilities, expand job autonomy and promote teamwork;
- involving employees in decision making;
- establishing compensation practices that link pay to performance of individuals or groups;

- training employees, especially on the job;
- allowing flexible working time rules and teleworking; and
- ensuring non-discriminatory hiring practices, and hiring and promotion opportunities for minority groups.

There is also evidence that workplace well-being programs, such as those for health and fitness, stress management and employee assistance, as well as family-friendly working time policies and provisions for child care, tend to improve employee morale and commitment and reduce stress levels and absenteeism. However, there is greater uncertainty about whether any such program actually pays for itself, in a strict accounting sense. Rather, the success of each of these measures seems to be enhanced when they are clustered with others, integrated into an overall HPWS strategy, and supported by managers, supervisors and unions, if the latter are present in the workplace. Together, they create a virtuous circle that tends to take competitive pressures off labour costs and standards.

That said, a critical evaluation would likely reveal that prospects for sustaining this virtuous circle in any given workplace, and of reproducing it elsewhere, are by no means assured and are, in fact, often constrained by significant and legitimate concerns. These concerns fall into four categories. First, there is genuine uncertainty about which practices work best in different kinds of workplaces, and in what combination. Second, there is resistance on the management side to sharing commercially sensitive information with employees, to investing in training (for reasons discussed above) and to making long-term and expensive commitments to practices and programs that have not yet proved their worth. Third, there is resistance by, and on behalf of, workers who often suspect management's motives, fear the erosion of their intellectual capital and job security, resist incursions into the sphere of collective bargaining if they are unionized, and if they are not, resent being the passive recipients — rather than the active authors — of "improvements," however welcome they might otherwise be.

Finally, some elements of HPWS may collide with assumptions underlying collective bargaining and labour standards legislation. Collective bargaining assumes that workers and managers will maintain an arm's-length (and sometimes adversarial) relationship, that the union — not individuals or groups of workers — will negotiate all terms and conditions of employment, and that wages and working conditions will usually be standardized and predictable rather than individualized and variable. Labour standards legislation assumes that arrangements concerning hours of work will either conform to statutory norms or depart from them only in accordance with procedures laid down in the statute. Each one of these assumptions may constrain the implementation of HPW systems.

An important challenge for scholars, public policy makers, human resource and industrial relations practitioners and line administrators will therefore be to reconcile the development of HPWS with these other important workplace regimes. However, this report on Part III — on minimum, not optimal, labour standards — is not the place to attempt such a reconciliation. Rather, what is required is ongoing, patient and respectful dialogue between the custodians of present legislative policies and proponents of new HPWS approaches.

RECOMMENDATION 11.8 The federal government should establish a unit whose mandate is to investigate the potential of high performance workplace systems and other "best practices," to disseminate information about them, to promote their adoption, to evaluate their outcomes, and to ensure that in their design and operation they are consistent with other important public policies affecting workplace relations.

The unit should operate either as part of the Labour Program or in close association with whatever department or program is responsible for the proposed comprehensive job training strategy.

Appendices

APPENDIX 1
THE MANDATE OF THE COMMISSION

IN THE MATTER OF A REVIEW OF PART III OF THE *CANADA LABOUR CODE* (LABOUR STANDARDS)

WHEREAS the *Canada Labour Code*, Part III, (Labour Standards) establishes basic working conditions which are intended to promote fair, stable, cooperative and productive workplaces, while maintaining workplace flexibility;

WHEREAS the following developments have profoundly affected the workplace:

- the changing nature of work, growth of knowledge-based economy, and need for extensive learning in the workplace;
- intensity of competition in the global marketplace with corresponding increased pressure on workplace productivity and responsiveness;
- increased heterogeneity of the workplace – new forms of workplace structures and new forms of employment relationships;
- increased work-life pressures and the need to accommodate evolving family structures;
- demographic changes – such as increasing diversity (immigrants, visible minorities, Aboriginals) and aging of the workforce;

WHEREAS there are linkages between the coverage and protections provided by Part III and Part I of the *Canada Labour Code*;

NOW THEREFORE, the Minister of Labour and Housing appoints Harry Arthurs pursuant to Sections 106 and 248 of the *Canada Labour Code* to conduct a comprehensive review of Part III of the *Canada Labour Code*, taking into account the above noted developments and other factors he may consider pertinent, and to make recommendations for legislative changes with a view to modernizing and improving the relevance and effectiveness of federal labour standards, including their relationship to collective agreements, and to the relevant definitions related to employment under the

Canada Labour Code. Mr. Arthurs may also make recommendations of a non-legislative nature which identify options for consideration by government, business, and labour in light of the changing world of work. Mr. Arthurs is to hold consultations in the manner he deems productive with labour and management organizations whose members are subject to the Code as well as with any other interested individuals, experts, or groups which he feels would assist him in achieving his goals. Mr. Arthurs is to submit a final written report to the Minister of Labour and Housing no later than January 31, 2006, subject to extension at the discretion of the Minister.

Mr. Arthurs, with the prior approval of the Minister of Labour and Housing, may retain such assistance as is necessary to facilitate his work.

IN WITNESS WHEREOF the Minister of Labour and Housing has hereto set his hand this 1st day of October, 2004.

APPENDIX 2
COMMISSION SECRETARIAT, EXPERT ADVISORS AND STAKEHOLDER ADVISORS

COMMISSION SECRETARIAT

Neil Gavigan	Senior Director
Kevin Banks	Director of Research
Fred Chilton	Manager, Policy and Legislation
Antonio Bakopoulos	Senior Policy Analyst
Charles Philippe Rochon	Senior Policy Analyst
Lubaki Zantoko	Policy Analyst
Tania Claes	Project Officer
Carli Disano	Project Officer
Caroline Laverdière	Project Officer
Kathryn Secord	Project Officer
Émélie Pendergast	Administrative Officer
Claudette Yee Kin Shin	Office Coordinator
Roger Trahan	Clerk
Arghavan Gerami	Student Researcher
Claire Mummé	Student Researcher
Nicole Poulin	Student Researcher

EXPERT ADVISORS

Sherry Liang

Sherry Liang has been a labour relations tribunal member, arbitrator and mediator. Recently, she was appointed Legal Counsel to Ontario's Information and Privacy Commissioner.

Daphne Taras

Dr. Daphne Taras is a Professor of Industrial Relations in the Haskayne School of Business, University of Calgary and at the University's Institute for Advanced Policy Research.

Gilles Trudeau

Dr. Trudeau is Professor of Law at the Faculty of Law at the Université de Montréal. He is a former Director of the École de relations industrielles from 1995 to 1999 at this university.

STAKEHOLDER ADVISORS

Don Brazier

Don Brazier is the Executive Director of Federal Employers – Transportation and Communication (FETCO). He was formerly Assistant Vice-President of Industrial Relations of Canadian Pacific Railways.

Andrew Finlay

Andrew Finlay is Vice President and Assistant General Counsel with the Employee Relations and Employment Law Group of Scotia Bank. He is also Chairperson of the Canadian Employers Council.

Ken Georgetti

Ken Georgetti is the President of the Canadian Labour Congress. He was formerly President of the British Colombia Federation of Labour.

Andrew Jackson (Alternate)

Andrew Jackson is National Director, Social and Economic Policy of the Canadian Labour Congress.

Hassan Yussuff

Hassan Yussuff is the Secretary – Treasurer of the Canadian Labour Congress. He is also Vice-President of the American Hemispheric Organization of the International Confederation of Free Trade Unions (ORIT).

APPENDIX 3
ACADEMIC ROUNDTABLE PARTICIPANTS

Toronto, Ontario, March 11-12, 2005
and Montreal, Quebec, March 18-19, 2005

Academic roundtables were held to secure the advice of academic and other experts concerning possible research initiatives of the Commission and the persons best qualified to undertake them.

Convener: Bernard Adell, Queen's University

Anand, Anita, Queen's University

Berg, Peter, Michigan State University

Bernier, Jean, Laval University

Bernstein, Stephanie, Université de Québec à Montréal

Blackett, Adelle, McGill University

Block, Richard, Michigan State University – Transportation and Communication

Brazier, Don, Federally Regulated Employers (FETCO)

Charest, Jean, Université de Montréal

Chaykowski, Richard, Queen's University

Coiquaud, Urwana, HEC Montréal

Craven, Paul, York University

Dau-Schmidt, Kenneth, University of Indiana

England, Geoffrey, University of Saskatchewan

Etherington, Brian, University of Windsor

Fredman, Sandra, Oxford University

Fudge, Judy, York University

Gallina, Paul, Bishop's University

Giles, Anthony, HRSDC

Green, Andrew, University of Toronto

Gunderson, Morley, University of Toronto
Kuttner, Thomas, University of New Brunswick
Langille, Brian, University of Toronto
Leamen, Nancy, Canadian Bankers Association
Liang, Sherry, Expert Advisor, Federal Labour Standards Review (FLSR)
Murray, Gregor, Université de Montréal
Ritchie, Laurel, Canadian Auto Workers (CAW-Canada)
Saunders, Ron, Canadian Policy Research Networks (CPRN)
Shapiro, Daniel, Simon Fraser University
Sossin, Lorne, University of Toronto
Taras, Daphne, Expert Advisor, Federal Labour Standards Review (FLSR)
Trubek, David, University of Wisconsin, Madison
Trudeau, Gilles, Expert Advisor, Federal Labour Standards Review (FLSR)
Vallée, Guylaine, Université de Montréal
Verge, Pierre, Université Laval
Verma, Anil, University of Toronto
Vosko, Leah, York University
Zumbansen, Peer, York University

APPENDIX 4
INDEPENDENT RESEARCH STUDIES

1. Stéphanie Bernstein

Conceptual Approach to Identifying Workers Most in Need of Labour Standards Protection

2. Richard Block

Labour Standards in the Canadian Federal Jurisdiction: A Comparison with Canadian Provinces and Territories, States in the United States, and Selected European Nations

3. Jean Bernier

The Scope of Federal Labour Standards and Non-traditional Work Situations

4. Jean Bernier

Social Protection for Non-standard Workers outside the Employment Relationship

5. Jean Charest

The Role of Labour Standards in a Human Capital Strategy

6. Richard Chaykowski

Canadian Workers Most in Need of Labour Standards Protection: A Review of the Nature and Extent of Vulnerability in the Canadian Labour Market and Federal Jurisdiction

7. Richard Chaykowski

Employment Conditions and Work Arrangements in Federal Jurisdiction Industries: Comparative Analysis of Employee and Employment Characteristics of Workers Related to the Federal Jurisdiction, using the Workplace and Employee Survey and the Labour Force Survey

8. Garland Chow

Labour Standards Issues in the Inter-provincial Canadian Trucking Industry

9. Geoffrey England

Unjust Dismissal and Other Termination-Related Provisions

10. Sandra Fredman

Control Over Time and Work-Life Balance: Comparative / Theoretical Perspective

11. Judy Fudge

Control Over Working Time and Work-Life Balance: A Detailed Analysis of the *Canada Labour Code*, Part III

12. Paul Gallina

New Compliance Strategies: "Hard Law Approach"

13. Morley Gunderson

Social and Economic Impact of Labour Standards

14. Morley Gunderson

Minimum Wages in Canada: Theory, Evidence and Policy

15. Robert Howse

The Effect of Jurisdictional Issues on the Application and Administration of Part III

APPENDIX 5
STAFF RESEARCH STUDIES

1. Analysis of Survey of employers in the federal domain
2. Federal-Provincial Comparison of labour Standards
3. International Comparison of Employment Standards
4. Canada's International Obligations Regarding Labour Standards
5. Existing Workplace Practices in the Federal Jurisdiction Analysis of Collective Agreements
6. Empirical study on connections among regimes relating to termination (EI, termination provisions, human rights complaints)
7. Review of briefs and submissions, technical meetings
8. Compliance Statistics
9. Contracts of employment and access to statutory rights

APPENDIX 6
LIST OF BRIEFS AND OTHER SUBMISSIONS

Air Canada Pilots Association (ACPA)
Air Line Pilots Association (ALPA)
Air Transport Association of Canada (ATAC)
Amalgamated Transit Union (ATU)
Anonymous individual
Assembly of First Nations (AFN)
Association of Canadian Search, Employment and Staffing Services (ACSESS)
Association of Food Banks (CAFB)
Atlantic Turbines International Inc.
Au bas de l'échelle
Bahá'í Community of Canada
Balancing Work and Family Alliance
Best Start Resource Centre
Black, Alan
Blanchette, Gary
Bailey, David H.
Bonellie, Roxann
Breastfeeding Coalition of Newfoundland and Labrador
British Columbia Human Rights Coalition
Budgell, Chris
Calgary Chamber of Commerce
Campaign 2000
Canadian Association of Counsel to Employers (CACE)
Canadian Auto Workers (CAW)
Canadian Bankers Association (CBA)
Canadian Bar Association (CBA)

Canadian Cable Telecommunications Association (CCTA)
Canadian Chamber of Commerce (CCC)
Canadian Construction Association (CCA)
Canadian Council of Human Resources Associations (CCHRA)
Canadian Council on Social Development (CCSD)
Canadian Federation of Independent Business (CFIB)
Canadian Labour Congress (CLC)
Canadian Media Guild (CMG)
Canadian Professional Drivers Association (CPDA)
Canadian Restaurant and Foodservices Association (CRFA)
Canadian Teachers' Federation (CTF)
Canadian Trucking Alliance (CTA)
Canadian Union of Postal Workers (CUPW)
Canadian Union of Public Employees – Airline Division (CUPE)
Citizens for Public Justice
Collective of the Canadian Working Poor
Confédération des syndicats nationaux (CSN)
Conférence des arbitres du Québec (CPQ)
Congress of Aboriginal Peoples (CAP)
Conseil du Patronat du Québec
Crawford, Kathy
Crawford Transport Inc.
Cultural Human Resources Council
Dietrich, Krysten
Dunlop, Dick
Duxbury, Linda
Face of Poverty Consultation – Halifax Regional Municipality
Federally Regulated Employers – Transportation and Communication (FETCO)
Fédération canadienne de l'entreprise indépendante (FCEI)
Fédération des femmes du Québec
Fédération des travailleurs et travailleuses du Québec (FTQ)
Feed Nova Scotia
Fight Child Poverty, Raise the Minimum Wage
Force Jeunesse

Gault, Bill
Geltman, Harold
Gobin, Marty
Godard, John
Gosal Trucking Ltd.
Gracie, Sheila
Grain Services Union (ILWU-Canada)
Hamilton, Sandra
Hansen-Carlson, Jeffrey
Hill, Bruce
Income Security Advocacy Centre (ISAC)
International Labour Affairs (HRSDC)
International Longshore and Warehouse Union Canada (ILWU)
Johnston, Ken R.
KAIROS: Canadian Ecumenical Justice Initiatives
Kovach, Dave
Labour and Housing (HRSDC)
Land, Steph
Lavender, Steven
Lewis, Fred
L.P.R. Sabourin Transport Limited
McArthur, Sean
M.A.D.J. Trucking Inc.
Manitoba Chamber of Commerce
Manitoba Federation of Labour
Marciszyn, Dale
Matachewan First Nation
Mathers, Murray
McDougald, Kevin
Moms for Milk Breastfeeding Network
Moore, Corey M. – C/T/Y TCRC Division 510
Moore, Graeme
National Anti-Poverty Organization (NAPO)
National Academy of Arbitrators (NAA)
Native Women's Association of Canada (NWAC)

Nepveu, Raymond
Newfoundland and Labrador Employers' Council
Newfoundland and Labrador Federation of Labour
Nochowny, Mr.
Nova Scotia Advisory Council on the Status of Women
Olynick, John
Ontario Milk Transport Association (OMTA)
Ontario Public Service Employees Union (OPSEU)
Otter-COOP
Prince Edward Island Area Council
Pereira, Richard
Petrie, Bill
Premier Van Lines
Price, Jeremy
Public Services Alliance of Canada (PSAC)
Quinet, Félix
Reiner, Barbara
Reproductive Health Program, Peterborough County City Health Unit
Resolution House Inc.
Sabourin Seed Limited
Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (ILWU-CLC)
Saskatchewan Legislative Board of the Teamsters Canada Rail Conference
Saskatoon Caregiver Information Centre
SaskTel
Seafarers' International Union of Canada (SIU)
Smith, Beverley
St. John's Board of Trade
Strickland, Paul
Success by 6 Saskatoon
Swick, Carol A.
Syndicat des communications de Radio-Canada
Teamsters Canada

Thomson, Bruce
Trade Union Research Bureau
Transport Bourassa
United Food and Commercial Workers International Union (UFCW)
United Steelworkers
Vanier Institute of the Family
Wagner, Brenda
Wannop, Cyril
Wannop, Joyce
Wentzell, Tony
WestJet
WesTower Communications Limited
White, Paul
Women's Legal Education and Action Fund (LEAF)
Women's Network P.E.I.
Work and Family Unit, Saskatchewan Labour
Work Less Party of British Colombia
Workers' Action Centre

APPENDIX 7
ILO CONVENTIONS RATIFIED BY CANADA

C1 Hours of Work (Industry) Convention, 1919
C7 Minimum Age (Sea) Convention, 1920
C8 Unemployment Indemnity (Shipwreck) Convention, 1920
C14 Weekly Rest (Industry) Convention, 1921
C15 Minimum Age (Trimmers and Stokers) Convention, 1921
C16 Medical Examination of Young Persons (Sea) Convention, 1921
C22 Seamen's Articles of Agreement Convention, 1926
C26 Minimum Wage-Fixing Machinery Convention, 1928
C27 Marking of Weight (Packages Transported by Vessels) Convention, 1929
C32 Protection against Accidents (Dockers) Convention (Revised), 1932
C45 Underground Work (Women) Convention, 1935 *(denounced in 1978)*
C58 Minimum Age (Sea) Convention (Revised), 1936
C63 Convention concerning Statistics of Wages and Hours of Work, 1938 *(denounced in 1995)*
C68 Food and Catering (Ships' Crews) Convention, 1946
C69 Certification of Ships' Cooks Convention, 1946
C73 Medical Examination (Seafarers) Convention, 1946
C74 Certification of Able Seamen Convention, 1946
C80 Final Articles Revision Convention, 1946
C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 (fundamental Convention)
C88 Employment Service Convention, 1948
C100 Equal Remuneration Convention, 1951 (fundamental Convention)
C105 Abolition of Forced Labour Convention, 1957 (fundamental Convention)
C108 Seafarers' Identity Documents Convention, 1958

C111 Discrimination (Employment and Occupation) Convention, 1958 (fundamental Convention)

C116 Final Articles Revision Convention, 1961

C122 Employment Policy Convention, 1964

C147 Merchant Shipping (Minimum Standards) Convention, 1976

C160 Labour Statistics Convention, 1985

C162 Asbestos Convention, 1986

C182 Worst Forms of Child Labour Convention, 1999 (fundamental Convention)

Other fundamental Conventions not ratified by Canada:

C29 Forced Labour Convention, 1930

C98 Right to Organise and Collective Bargaining Convention, 1949

C138 Minimum Age Convention, 1973

However, under the 1998 ILO Declaration on Fundamental Principles and Rights at Work, all ILO members, regardless of whether they have ratified fundamental Conventions, "have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions".

APPENDIX 8
SUMMARY OF EXISTING HOURS OF WORK EXCEPTIONS AND VARIATIONS

SUMMARY OF CURRENT PROVISIONS PROVIDING FLEXIBILITY WITH RESPECT TO HOURS OF WORK UNDER PART III OF THE CANADA LABOUR CODE

- Part III and regulations made under this statute contain exemptions for a number of occupations, including managers, designated professionals and certain commissioned salespeople. Special rules, such as different overtime rules for truckers and persons employed on ships, are also established by regulation.
- Overtime pay rules may be ignored if certain work practices are established under which an employee is required or permitted to work overtime for the purpose of changing shifts, permitted to exercise seniority rights to work in excess of standard hours pursuant to a collective agreement, or permitted to work overtime as the result of a shift exchange with another employee.
- Maximum hours under Part III can be exceeded if authorized by ministerial permit. Among other conditions (such as notice and reporting requirements), a permit may be issued only if the Minister of Labour is satisfied that there are exceptional circumstances justifying the excess hours. The Minister must also consider the conditions of employment in the industrial establishment and the welfare of the employees concerned. Such a ministerial permit may also exempt an employer from weekly rest period provisions.
- The emergency work section under Part III also allows maximum hours of work to be exceeded to the extent necessary to prevent serious interference with the ordinary working of the industrial establishment affected in cases of accident to machinery, equipment, plant or persons; urgent and essential work to be done to machinery, equipment or plant; or other unforeseen or unpreventable circumstances.

Part III also provides two distinct mechanisms by which an employer may average employees' hours of work over a certain period for the purpose of calculating maximum hours and any overtime pay entitlements.

- "Averaging" provisions apply where the nature of the work in an industrial establishment necessitates that the hours of work of certain employees be irregularly distributed, such that those employees have no regularly scheduled daily or weekly hours of work, or have regular hours of work that vary in number from time to time. An employer can establish an averaging period of two or more weeks, but this period may not exceed the number of weeks necessary to cover the period in which fluctuations in employees' hours of work take place. Weekly rest periods under Part III can be disregarded during an averaging period.

  Unless the parties to a collective agreement have agreed in writing to averaging, the employer must meet specified notice and posting requirements. It should be noted, however, that there is no requirement that affected employees (or their union, if applicable) consent to averaging. Averaging is not allowed for certain occupations already covered by special regulations, such as city and highway truck drivers.

- Under a "modified work schedule," hours of work may be averaged over a period of two or more weeks, as long as the average does not exceed 48 hours per week. Overtime is payable for time worked in excess of scheduled daily or weekly hours, or in any event for time worked in excess of 40 hours times the number of weeks in the averaging period. In addition to notice and posting requirements, the modified schedule (or any modification) must be agreed to in writing by the employer and the applicable union, or by the employer and 70% of affected employees, if the latter are not covered by a collective agreement. At the request of any affected employee, a Labour inspector may conduct a secret ballot vote to ascertain whether the required proportion of employees consent to the modified work schedule. In contrast to averaging provisions, a modified work schedule must include at least as many rest days as the number of weeks in the schedule.

- Averaging arrangements and modified work schedules can remain in effect for a finite period: they are limited to the duration of the written agreement between the employer and the union, or to three years with respect to employees not covered by a collective agreement.

As the above list demonstrates, Part III does contain several flexibility measures. However, for a variety of reasons, many employers feel that these mechanisms are insufficient or unwieldy. They are also concerned that overly restrictive standards may prevent employers from accommodating the needs of certain employees. Conversely, some labour organizations contend that current flexibility measures are already too broad and that they too often allow employers to circumvent statutory restrictions on hours of work.

APPENDIX 9
TECHNICAL RECOMMENDATIONS

These recommendations respond to issues raised in discussions with labour and management representatives, and Labour Program staff. In some cases, they are the result of analysis which was undertaken in connection with the development of major recommendations which appear in the body of the Report. They are "technical" in the sense that they are deemed not to involve major issues of principle or policy, but rather to clarify the intention of the statute or facilitate its administration.

CHAPTER FIVE: THE EMPLOYMENT CONTRACT

Electronic Pay Statements

Under section 254, an employer shall, at the time of making any payment of wages to an employee, furnish the employee with "a statement in writing" setting out the period and number of hours for which the payment is made, the wage rate, details of wage deductions, and the actual sum being received by the employee. The part of this provision which stipulates that employers must provide such a statement "in writing" has been interpreted to mean that employers must provide pay statements in hard copy and not only in electronic format. Many employers have requested that they be allowed to provide employees a pay statement in electronic format, in part to save money and in part to conform to modern human resource practices. These employers have also indicated that their employees have the ability to download the pay statements should they wish to retain a hard copy. The federal government already provides its employees with downloadable electronic vacation and other leave statements and may similarly issue only electronic pay statements in the future. Some unions have expressed a general preference for paper records citing a concern for potential fraud and the inability of some employees to download hard copy.

RECOMMENDATION T5.1 Part III should be amended to permit employers to issue pay statements by electronic means subject to defined conditions, and to provide the Minister with the authority to make regulations related to the accessibility, privacy, retention and content of pay statements.

Liability of directors in cases of bankruptcy

The current Part III makes corporate directors liable for outstanding severance pay to which employees are entitled where the entitlement arose during the director's incumbency and where recovery of the amount from the corporation is impossible or unlikely. Entitlement to severance pay under the present Code arises only upon the termination of the employee by the employer. From time to time directors, knowing the corporation is falling into bankruptcy, will resign ahead of the bankruptcy and the resulting employment terminations, in part, to avoid severance pay obligations under Part III. Directors, with their insider knowledge, who undertake this maneuver, defeat the objectives of the director liability provisions (section 251.18).

RECOMMENDATION T5.2 Part III should be amended so as to prevent a corporate director from avoiding liability for unpaid wages, benefits or severance pay by resigning at a time when she or he knows or ought reasonably to know that the employer is likely to become insolvent.

Limitation period on complaints

Unlike many provincial labour standards laws, the Code establishes no time limits after which employees will be precluded from claiming unpaid wages or benefits. Delays in making complaints complicate the task of investigation and recovery, and in some cases, may be prejudicial to the employer.

RECOMMENDATION T5.3 Part III should be amended to establish a six month limitation period within which complaints concerning unpaid wages or benefits must be initiated. The limitation period should run from the date on which the complainant discovers non-payment. The amendment should allow for the possible extension of the limitation period on defined grounds, including fraud or coercion.

Retroactivity period for unpaid wage complaints

Part III establishes no limit on the number of weeks or months for which wages and benefits may be recovered. Because delay complicates investigation and recovery, and is potentially prejudicial to the employer, some limit should be established. As a matter of administrative practice, the Labour Program presently pursues complaints involving up to one year's unpaid wages. However, because the Code requires employers to maintain pay records for up to three years, this same period should be established as the period for which retroactive payment can be sought.

RECOMMENDATION T5.4 Part III should be amended so as to set a thirty-six month limit on the period in respect of which the Labour Program collects unpaid wages.

Production of agreement of purchase or transfer

Part III stipulates that continuity of employment is preserved for a variety of statutory purposes when a sale, lease, merger or other transfer of a business occurs. Consequently, employees who remain employed by the new business are not entitled to severance pay. However, some employees may actually stop working on the date of the transfer, and others shortly thereafter. It therefore becomes important to understand whether employment is terminated as a result of the change in ownership, or for other reasons. In order to clarify the situation, and determine the employee's eligibility for severance pay, an inspector may need to examine various documents. Currently, inspectors have no power to require the agreement of purchase, transfer or merger.

RECOMMENDATION T5.5 Part III should be amended to give inspectors power to order production of an agreement of sale or transfer so as to determine which party to the agreement is liable to employees for wages or other entitlements under Part III.

CHAPTER SIX: RIGHTS AND RESPECT

Wage replacement for injured workers

Section 239.1 requires employers to subscribe to a plan that provides employees absent from work due to work-related illness or injury with wage replacement, equivalent to that provided under the workers' compensation legislation in the employee's province of permanent residence.

In some cases, they are able to satisfy this obligation by securing voluntary coverage under a provincial workers' compensation scheme. However, some provincial schemes apply to employees working in that province, not those residing there. Consequently, employers may find themselves in violation of Part III because they are complying with the applicable workers' compensation schemes to which they subscribe.

RECOMMENDATION T6.1 Part III should be amended so that the minimum level of wages provided to injured workers under a wage-replacement plan is that of the province or territory where the work is performed, rather than that of the workers' place of residence.

CHAPTER SEVEN: CONTROL OVER TIME

Time period within which vacation pay must be paid

Section 247 requires employers to pay employees any wages or other amounts owing under Part III within thirty days from the time when the entitlement to the wages or other amounts arose. Vacation pay is considered "wages" for purposes of this section. However, section 188 obligates employers to pay outstanding vacation pay "forthwith" to employees when they cease to be employed - not "within thirty days". This conflict between the two sections must be resolved.

RECOMMENDATION T7.1 Section 188 of the Code should be amended to provide that employers pay employees any wages or other amounts owing under Part III within thirty days from the time when the entitlement to the wages or other amounts arose, so as to ensure that section 188 operates consistently with section 247 of the Code.

Clarifying the meaning of standard hours

Many employers complained that the current wording of the "standard hours" provisions in Part III is confusing: some readers seem to interpret existing overtime thresholds as constituting maximum hours.

RECOMMENDATION T7.2 The wording of section 169 of Part III should be changed to clarify that standard hours of work do not constitute "maximum" hours of work.

Postponement or interruption of vacation

Under section 185, an employer must schedule an employee's vacation within the "ten months immediately following the completion of the year of employment for which the employee became entitled to the vacation." However, an employee may be on statutory leave (such as sick leave or maternity leave) at the relevant time. In addition, an annual vacation and statutory leave may overlap. For example, an employee might need to take bereavement or compassionate care leave in the middle of a vacation. Employees should not be deprived of either annual vacation or other leave entitlements in these circumstances.

RECOMMENDATION T7.3 Part III should specify that an employee on a leave recognized under Part III (such as sick leave, maternity leave, parental leave, compassionate care leave or bereavement leave, etc.) at a time when vacation leave must be provided under Part III may postpone his or her vacation until the end of the leave, or to another time with the employer's consent.

Likewise, an employee should be allowed to interrupt a vacation and postpone unused vacation days to a later date, to be agreed with the employer, when another leave recognized under Part III coincides with the vacation period. Alternately, the employee could decide to waive that portion of the annual vacation which coincides with the other leave, as long as waiver requirements recommended in Chapter Seven are met.

Simplifying the length of service requirement for general holidays and the formula for calculating general holiday pay

Many employers and labour organizations, as well as Labour Program staff, have remarked that current provisions regarding the calculation of general holiday pay are very difficult to administer. There is also a great deal of confusion with respect to certain eligibility requirements. As a result, it is not always clear whether certain non-standard workers are entitled to general holiday pay. And determining the actual amount owed to different employees can be quite complicated, given the existence of multiple formulas.

A number of provincial jurisdictions have resolved this problem by adopting a single formula for calculating general holiday pay, applicable to all employees.

RECOMMENDATION T7.4 The length of service requirement to qualify for general holiday pay under Part III should be maintained. However, the obligation to work a minimum number of days in a given period to qualify for general holiday pay should be repealed.

RECOMMENDATION T7.5 A single formula should be used to calculate general holiday pay. An employee's general holiday pay entitlement should be equal to the regular wages earned in the four complete work weeks preceding the week in which the holiday occurs, divided by 20.

Where an employee is paid at least in part by commission, general holiday pay should be equal to the employee's wages earned in the 12 weeks preceding the week on which the holiday occurs, divided by 60.

However, where an employee has completed fewer than 12 weeks of service, general holiday pay would be calculated on the basis of wages earned in the four weeks preceding the week in which the holiday occurs, divided by 20.

Method of compensation for work on a general holiday

Since one of the aims of general holidays is to give employees some time off, many feel that employees who must work on a holiday should be offered compensatory time off. Indeed, some employees would rather have time off than extra income. Given the inconvenience of working on a holiday for most workers, they should at least get to choose how they are to be compensated.

RECOMMENDATION T7.6 Employees required by their employer to work on a general holiday should have the right to determine the manner in which they will be compensated. Employees could choose to receive either (a) time-and-a-half for hours worked, plus general holiday pay, or (b) time-and-a-half for hours worked, plus another day off with pay, to be taken within a specified period.

Suspending parental or maternity leave in case of hospitalization of child

If a newborn child must be hospitalized, it may be pointless for the parent to be on maternity or parental leave if he or she is not in a position to provide care to the child. An employee in such a situation may also need more time off after the child leaves the hospital to provide additional care.

Many submissions have suggested that Part III should include a provision similar to legislation in two provinces whereby an employee could suspend maternity or parental leave while a child is hospitalized. However, it may be difficult or costly for an employer to reintegrate an employee for a brief period, especially where a replacement has already been hired.

RECOMMENDATION T7.7 Part III should be amended to allow an employee to suspend his or her parental or maternity leave once, and postpone remaining weeks of leave, where a child is hospitalized for a period likely to exceed two weeks. If for any valid reason the employer cannot reinstate the employee during the child's hospitalization, the employee should be entitled to a leave extension equivalent to the duration of the hospitalization.

Accumulation of service for certain purposes while on leave

Currently, an employee who takes maternity, parental, sickness or compassionate care leave under Part III continues to accumulate seniority and pension benefits. However, nowhere does Part III specify whether an employee's service continues to accumulate with respect to other entitlements, such as severance pay and vacations. This may engender some confusion. Some labour and community organizations have also argued that employees who take leave under Part III — who are disproportionately women — should not be disadvantaged compared with other employees who do not take such leave.

RECOMMENDATION T7.8 Part III should be amended to specify that the service of an employee continues to accumulate while on a leave recognized under Part III, with respect to the calculation of annual vacation entitlements and severance pay.

CHAPTER EIGHT: TERMINATION OF THE EMPLOYMENT CONTRACT

Severance pay entitlements

The intent of the current section 235(1) is that the severance pay entitlement is the greater of either two days wages for each completed year of employment or five days of severance pay. Apparently, in part because the current text uses "and" instead of "or", employers and employees have confused the two amounts.

RECOMMENDATION T8.1 Section 235(1) should be amended to clarify that the severance pay entitlement under the Code is the greater of either five days pay or two days pay for each completed year of employment.

Calculation of individual termination and severance pay entitlements and entitlement to notice of termination while on layoff

An employee is entitled to either two weeks notice of termination of employment or two weeks pay in lieu of notice at the employee's regular rate of wages (s. 230). An employee upon termination is also entitled to severance pay, again, at the his or her regular rate of wages (s. 235). Under Part III, a layoff is not considered a termination if it lasts for less than three months, or in other defined circumstances. Therefore, an employee may be laid off for a period of time, without work or pay, but still remain technically "employed" for purposes of Part III. Subsequently, the employee may be terminated either because the "layoff" lasts three months and becomes a "termination", or because the employer actually dismisses the employee. Two difficulties arise when an employee is terminated after a period of being laid off without pay. One, how is the employee's regular rate of wages to be determined? Two, even if two weeks' notice is provided, it is not provided while the employee is working and being paid as required by section 230. Further, Part III prohibits any reduction in wages or alteration of any other term or condition of work once the notice has been given. This creates an anomaly in that employees still at work may receive their regular wages during the two week notice period, while those on layoff simply receive notice without pay. Thus, there is an incentive for an employer who seeks to avoid the obligation to pay wages during the notice period, to do so by first instituting a layoff of unspecified length, and then before the expiry of three months - which would convert it into a termination and trigger severance pay - to give notice of termination. This practice clearly violates the intent of Part III.

RECOMMENDATION T8.2 Part III should be amended to provide a means of calculating "regular rate of wages for the employee's regular hours of work" for the purposes of sections 230(1) and 235(1), in circumstances where an employee has been laid off without wages for a period of time immediately preceding the termination of his or her employment.

RECOMMENDATION T8.3 Part III should be amended to ensure that an employee on layoff at the time of termination of employment receives either two weeks notice and his or her regular wages during the notice period or two weeks pay in lieu of notice.

Notice of Termination by Trustees in Receivership

On occasion, an employer goes into receivership and the trustee operating the business on behalf of creditors then discharges some or all of the workers. The employer is obligated under Part III to provide notice of both individual and group terminations. However, the employer in these circumstances no longer has control over the decision and the timing of the discharges. The trustee does, but it is unclear whether the trustee inherits the employer's obligation to provide termination notices under Part III.

RECOMMENDATION T8.4 Part III should be amended to make clear that a trustee in receivership inherits the obligation of the employer to give notice of termination and to comply with any other relevant provisions of Part III.

CHAPTER NINE: COMPLIANCE

Production of records

Currently, inspectors do not have clear authority to obtain records from employment agencies or other third persons, even when they are needed to resolve a dispute concerning the status of workers – whether as coming under federal jurisdiction or as employees covered by Part III.

RECOMMENDATION T9.1 Part III should be amended to provide inspectors with the authority to obtain records in the hands of third parties where such records are relevant to determining any matter arising under the Code.

Currently, the Minister may order employers to produce records, and refusals to comply are in principle subject to prosecution. However, prosecutions seldom if ever occur. Labour Program personnel should be able to obtain a subpoena requiring employers or other persons in possession of records to produce them, enforceable by any court of record, not merely a criminal court.

RECOMMENDATION T9.2 Part III should be amended to give inspectors the ability to obtain a court subpoena ordering production of employment records or other documents relevant to proceedings under Part III.

Failure to keep records or to produce records on request should give rise to a presumption that the employee's claim is valid.

NOTES