

Focused Study on the Causes and Impact of Work Stoppages
in the Federal Private Sector

September 26, 2008

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, Ontario
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Dear Minister:

I am pleased to enclose the report on the Focused Study on the Causes and Impact of Work Stoppages in the Federal Private Sector.

I wish to thank you for entrusting me with this important assignment which encompassed a thorough, consultative process with stakeholders in the Federal Private sector, as well as discussions with labour relations practitioners and noted academics. I would be remiss if I did not offer my appreciation to those in the labour relations community who provided their observations and suggestions in a candid and cooperative manner, making my task that much easier to complete.

May I express my best wishes and hope that this study will assist in your future consultations with unions and employers and that the options proposed will contribute to reducing the risk, frequency and duration of work stoppages in the Federal Private sector in Canada.

Yours sincerely,

Peter Annis

Enclosure

**WORK STOPPAGES IN THE
FEDERAL PRIVATE SECTOR:
INNOVATIVE SOLUTIONS**

PETER ANNIS

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Biographical Note

Peter Annis is a labour and administrative law lawyer with extensive experience in dispute resolution practices. He has been providing dispute resolution services for over a decade. He was formerly the part-time Chair of the Canadian Artists and Producers Professional Relations Tribunal and part-time member of the Ontario Human Rights Tribunal. He obtained his Doctorate in comparative law from the University of Aix-Marseille.

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WORK STOPPAGES IN THE FEDERAL PRIVATE SECTOR: INNOVATIVE SOLUTIONS

Executive Summary

Chapter 1: Introduction

The Terms of Reference of a “focused” study on work stoppages are briefly examined, noting that the causes and management of work stoppages encompass much of industrial relations law and policy. Comments are also made on the mandate - to provide “options” to manage work stoppages - distinguishing this study from past inquiries where the Terms of Reference required the commissioners, where appropriate, to make recommendations for legislative change. The report replies to suggestions that somehow the study was intended to favour employers, pointing out the neutrality of most options and others tending to favour unions, while submitting that the underlying need for competitiveness through reduced work stoppages is a shared interest of the stakeholders if it can be achieved in a mutually acceptable fashion. The introduction concludes with remarks on the meaning of the “Federal Private sector” defined similar to the jurisdiction described in the *Canada Labour Code*, Part I.

Chapter 2: Person Days Not Worked in the Federal Private Sector

In response to concerns raised by stakeholders, a review was conducted of the results of an article published by the British Office for National Statistics describing Canada as having a higher rate of person days not worked (PDNW) from work stoppages than any other G-7 country and ranking Canada second amongst states in the Organisation for Economic Co-operation and Development (OECD) between 1997 and 2006. These results followed Canada’s already dubious distinction of having the highest PDNW rate from 1986 to 1995.

Caveats concerning the limitations of the British study raised by its author and others were examined including consideration of the sources of data on work stoppages, the different thresholds used by countries for counting PDNWs, the variance in types of strikes included, and some of the political and structural causal links that affect work stoppage data, in particular union density. Our review concluded that despite these caveats, the British study was generally reliable in depicting Canada as having one of the highest levels of person days not worked in comparison with other countries.

To provide a better benchmark, data was developed by the Research and Data Development Division (RDD) of the Strategic Policy, Analysis and Workplace Information Directorate of HRSDC comparing Canada’s situation with that of United States, but using a standardized

threshold and rates of unionization. The ratio of the average PDNW in Canada versus the United States for the period in question dropped significantly from three times more PDNW in Canada to 1.33 times more, but still a significant disparity, particularly as United States data includes some indirect PDNW which are not counted in Canada.

Further data was developed to determine the relative contribution of the Federal Private Sector to Canada's total PDNW. The federal jurisdiction (CLC Part I) was found to be the highest relative contributor in Canada, surpassing the provincial private jurisdiction by an unadjusted ratio of more than four times. This data confirmed that Canada must work harder at finding ways of reducing the number of PDNW due to labour disputes and that the Federal Private Sector, with its relatively higher PDNW and comprising significant national infrastructure industries, should be the focus of attention.

Because some of these results were not readily apparent, our analysis provided options calling for better data collection and more transparency in the breakout of information relating to work stoppages to facilitate accurate comparisons with the EU and OECD and the contribution of different jurisdictions. At a minimum, work stoppage data comparisons with the United States should be compiled on an annual basis and published by the federal government. In addition, the establishment of work stoppage goals could contribute to achieving results that would better protect Canada's international reputation in the increasingly competitive global economy.

A statistical review was undertaken of some of the factors relating to work stoppages and their causes. It was determined that between 2000 and 2007 most of the stoppages occurred in the telecommunications, broadcasting or transportation sectors and that mergers and acquisitions were a factor in 74% of the PDNW during that time. Moreover, the very large majority of PDNW arose from two or three major work stoppages each year.

The total number of PDNW is calculated from the number of work stoppages, their duration, and the size of the bargaining units participating in the stoppages. It was determined that the Federal Private sector has experienced a definite trend, shared worldwide, towards fewer work stoppages, although it was a more moderate decrease than experienced in other jurisdictions in Canada. While a number of factors could account for the falling incidence of work stoppages, some would include: a decrease in the number of collective agreements, an increase in the length of agreements and a decline in union density (the degree of unionization).

The duration of work stoppages in the Federal Private Sector increased dramatically starting in 1995, continuing on an upward trend until 2004 after which it rapidly fell back to more traditional levels by 2007. This situation distinguished the sector from other jurisdictions in Canada where the duration of work stoppages had seen only moderate increases. Given that PDNW decreased significantly provincially during this period, the increased duration of work stoppages in the federal sector appears to have been a major contributing factor.

Chapter 3: Causes of Work Stoppages and Their Economic Impacts

Aggregated information obtained from the Federal Mediation and Conciliation Service of Canada (FMCS) on causes of work stoppages is described. There was a general consensus that work stoppages were very idiosyncratic, making them difficult to classify. Often they appeared to occur as a result of a combination of problems involving difficult bargaining issues, personality and conduct of negotiation obstacles arising in inopportune circumstances.

FMCS mediators were of the opinion that economic concession bargaining, and mandate and authority issues at the bargaining table, were significant causes of the major work stoppages occurring in the sector. Additionally, problems with Canadian Industrial Relations Board (CIRB) procedures were identified as a factor in one third of the major work stoppages occurring after 2000, confirming the concerns of stakeholders raised with respect to the Board's activities. For confidentiality reasons, the FMCS could not provide information on conduct of negotiation issues, although it was clear that they had played a significant role in a large number of work stoppages.

Stakeholders provided more limited information, but also described a wide variety of causes for major work stoppages. These appeared to support the statistical findings that transition issues from mergers and acquisitions were a major factor in work stoppages, with CIRB difficulties also frequently cited. Some unions indicated that competitive forces and the demands that employers were making on unions for concessions were important cause of major work stoppages.

An analysis was conducted of some of the determinants generally identified as giving rise to work stoppages with the intention of linking them to options to reduce their incidence and duration. Initially, bargaining table factors were considered, such as the relationships and attitudes of the participants, the skills of negotiators and mediators, the mandate and authority of negotiators, and problems and issues relating to the efficiency of the bargaining process.

In addition, the subjects of negotiations were reviewed as work stoppage determinants. These included tangible and economic bargaining issues and theories relating to the causes of work stoppages. Analysis also included the challenges in predicting work stoppage outcomes from changing power relationships in mergers and acquisitions and from governmental policy decisions. These introduce competitive forces, and with them increased cost constraint bargaining, into a previously monopolistic sector.

The behaviouralists' perspective was considered. It views strikes not in terms of rational economic factors, but as a "collective voice" of discontent premised on collective worker resentment around issues such as fairness and legitimacy. Work stoppage duration issues were also examined, given the non-economic factors which sometimes appear to contribute to the duration of work stoppages when rational economic outcome analysis no longer applies.

The primary causes of work stoppages in the Federal Private Sector were thought to be:

- organizational change from restructuring driven by employer demands for improvements in productivity;
- behavioural and process factors in collective bargaining, such as attitudinal, competency and efficiency factors (including CIRB processes) that can prevent meaningful negotiations from occurring; and
- intra-organizational issues raised away from the bargaining table, but affecting the authority and decision-making processes.

No reliable conclusions on the causes for the duration of work stoppages were offered. Work stoppages were affected by cost-benefit considerations, particularly in the initial stages, but thereafter it was thought that the clashes of productivity demands, particularly those relating to worker security, raised fundamental interests that compromised the ability of either side to back down without a long work stoppage occurring. The absence of legislation banning replacement workers did not appear to be a factor in the increase in the duration of work stoppages that occurred after 1995.

Some comments were offered with respect to predicting work stoppages. In the view of the stakeholders, the risk of work stoppages relates primarily to the nature of the issues being bargained by the stakeholders and, thus, prediction is not readily made with respect to sectors and regions until this information can be obtained from the field. No comments were supplied by the Labour Program due to confidentiality concerns. Given that mergers and acquisitions have accounted for a major portion of the significant work stoppages in the last decade, future restructuring situations once identified would appear to present a heightened risk for a work stoppage. Since restructuring appears to be occurring more often in the telecommunications sector because of competitive pressures, this sector was identified as one where future work stoppages could be expected to occur. Data was provided on upcoming collective bargaining situations and past bargaining history, but it was not considered useful without the development of more sophisticated assessment tools. The data did however point to situations, such as those involving Air Canada in 2009, where a considerable number of agreements expire, increasing the risk of a work stoppage next year.

More reliable predictions will require the creation of longer term systematic collection and analysis of pertinent information relating to work stoppages, combined with the development of enhanced assessment procedures and analytical tools within the Labour Program. Even then, the prediction of work stoppages faces inherent limitations due to the idiosyncratic nature of each event.

Finally a brief analysis was attempted of the economic consequences of work stoppages, but it was concluded that research on economic impacts has tended to focus on industries that operate in a competitive environment and do not share the strategic importance of firms falling under the federal private jurisdiction making that analysis of lessened relevance to this report. Given that the Federal Private Sector provides our country's core economic infrastructure in transport, communication and financial intermediation and arguably merits greater attention, an option was advanced to expand activities to measure the direct and indirect effects of work stoppages in the federal private jurisdiction on third parties. This exercise would also require assessing the potential importance of work stoppages per sector and taking into account the behavioural adjustments of third parties. Information from this analysis could be combined with results generated from work stoppage predictive analysis discussed above to perhaps help to reduce the economic costs of work stoppages under federal jurisdiction by suggesting to companies at risk of a work stoppage with high economic impact that the FMCS proactively intervene to receive training tailored to their needs, or by sponsoring special sessions on best practices in conferences on industrial relations.

Chapter 4: The Options

Improving union-management relationships in a more concerted and strategic fashion is the overriding objective of the primary options upon which there was a general degree of consensus amongst the stakeholders. This goal is premised upon the widely-held view that better labour-management relationships reduce the risk, frequency and duration of work stoppages. These improved relationships are also the first step towards achieving greater productivity through more innovative and flexible workplaces. The federal government should initiate a "surge" of new and improved initiatives to radically transform "old-style" labour relations, utilizing modern dispute resolution techniques to meet the challenges of industrial relations in an era of global competitiveness.

Two proposed options are foremost. The first, building on the mature and sophisticated relationships of the stakeholders, foresees the establishment of a joint leadership structure described as the Federal Labour-Management Relations Council. It would bring together not only the labour-management representatives, but also key players of the Labour Program and other industrial relations experts. Its implementation and the resulting cross-fertilization of ideas of participants collaborating in a stable national structure would arguably produce better possibilities for leadership, changes in attitudes, improved communications and the introduction of innovative options for relationship-building and the creation of cooperative workplaces. In addition, the Council, if implemented to its full potential, could: provide a forum for strategic initiatives with the government to improve industrial relations; seek accommodation on issues of productivity and worker security; and consider other measures that are key to the reduction of the incidence and duration of work stoppages, thus improving Canada's competitiveness.

The second important option which had strong consensus involves the expansion, improvement and marketing of the preventive mediation services of the FMCS. The Labour Program activities would be rebalanced from their present emphasis on mediation and conciliation services during the formal negotiation period at the end of the collective agreement to improving and even dramatically changing the union-management relationship during the totality of the life of the collective agreement. The direction of these efforts moves away from traditional adversarial positions centered on negotiating and enforcing the terms of the collective bargain. Instead, accommodation and resolution of differences become the focus of the agreement, solidifying the relationship of the parties and the mutual reward and fulfillment of their respective needs.

The implementation of this second option foresees the development of a strategic plan for the expansion and promotion of preventive mediation services tailored to the specific needs of each region and different sectors. It also requires the adoption of a proactive culture at the Labour Program to improve and market preventive mediation services, replicating private sector service models to the extent possible. Restructuring and rebranding of the program would assist in providing the government leadership and developing the momentum required to bring about the fundamental cultural change in union-management relationships envisaged by this option.

Other potential options were also considered. A third important option involves processes to resolve workplace grievances which by their extremely adversarial nature represent significant obstacles to improving union-management relationships. This would include best practices to clear grievance backlogs with the aid of FMCS or other mediators. Other options focus on the early resolution of complaints by making mandatory mediation part of the grievance process or imposing preliminary mediation processes as a condition to the right to file grievances.

Grievances involving human rights, which have overwhelmingly become employment rights, raise challenges to options being proposed to resolve grievance disputes. They are considered to significantly erode the value system of collective agreements, introducing more complex and absolutist values into the workplace, and substantially adding to the degree of prescriptiveness in the workplace by acting as constraints on management and union prerogatives. A broad policy discussion and analysis is needed to find better accommodation between individual employment rights and the economic reality that requires less prescriptive workplaces that can compete effectively.

A series of options are reviewed which are intended to make the formal collective bargaining process more efficient and less prone to complications and distractions, thus lowering the risk of work stoppages. These include: changing the open period for decertification of a union in order not to overlap with the formal bargaining period; similarly changing the timing and requirements of maintenance of activities agreements (intended to prevent work stoppages causing health and safety problems); extending or delaying the formal conciliation period where no meaningful attempt has been made by the parties to negotiate; and promoting recourse to external mediation

services (a non-legislative policy measure) where more proactive approaches may be successful, such as in assisting the parties reach final agreement in deadline bargaining situations. Although no consensus was reached on these options, they appear to offer solutions worth exploring in the future should amendments be considered to the *Code*.

An important option, much of which had the strong backing of the stakeholders, included measures intended to improve the timeliness and quality of decisions by the CIRB. As noted previously, problems involving CIRB procedures were concluded to have been important contributing causes to major work stoppages over the last decade. However, the CIRB Consultation Committee has primary responsibility for these issues and it was recognized that their recommendations should form the basis for options to reduce the risk of work stoppages, subject to comments made with respect to the proposed appointment procedure for Vice-Chairs. In addition, options intended to introduce aggressive case management at the CIRB and to attract recognized private interest arbitrators for appointment as part-time Vice-Chairs, by establishing reasonable remuneration scales comparable to those paid other skilled professionals engaged by the federal government, could be important measures to assist in resolution of many of the performance concerns relating to the CIRB.

Also considered were measures to improve the efficiency of interest arbitrations, including those intended to induce the parties to settle in lieu of the arbitrator rendering a decision to settle the terms of a collective bargain. Voluntary settlement of the terms of a collective agreement is preferred to that imposed by an interest arbitrator's decision, even where the parties agree to arbitrate their dispute. In particular, a promising variant of "med-arb" (employing mediation processes to settle the matter prior to the arbitration) described as "arb-med" was considered in some detail. In "arb-med", a mediation is conducted by the arbitrator after the hearing, but before the decision is released as a means to promote settlement by the parties. Consideration was also given to the advantages and disadvantages of Final Offer Selection (FOS) interest arbitration which was recently featured in legislation ordering an end to a work stoppage. Despite complaints from some stakeholders and interest arbitrators, with some enhancements it appears to offer important advantages to encourage a higher settlement rate and to overcome serious limitations of conventional arbitrations which are inherently conservative due to their tendency towards "split the baby" outcomes.

Another option considered was based on models contained in Alberta and some American legislation. It would allow the Minister to defer the commencement of a work stoppage until after a conciliation-type board had made recommendations for settlement and a mandatory union vote had been conducted on the recommendations. This option, or variants of it, was opposed by the stakeholders.

The preceding options were intended to prevent the occurrence of a work stoppage. It is considerably more difficult to bring a work stoppage to a conclusion, which perhaps explains why so few "neutral" options appear available to limit their duration. Two were considered

(apart from that of improving union-management relationships) both involving a temporary return-to-work “cooling off” period: the first, ordered by the Minister on the advice of FMCS in stalemated work stoppages; the second, on the Minister’s initiative prior to Parliament ordering back-to-work legislation. The latter option was based on the premise that a legislated end to a work stoppage represents a worst-case scenario for the conduct and reputation of industrial relations. Both options were opposed by the stakeholders, although no other neutral options were brought forward to end work stoppages. In addition, the stakeholders acknowledged that the government must not routinize its options and providing the Minister with a discretion to exercise measures that stakeholders disagree with suggests that they could nevertheless serve some purpose to encourage settlement, even if never exercised.

Several other non-neutral options were considered which were opposed by one side or the other and usually impacted on the power relationship of the parties. The Power is defined for these purposes as the ability of the parties to enforce or resist demands by the other side. Two “employer” options were considered. The first related to a request by several employers that the membership be required to vote on the employer’s last offer prior to initiating a strike. The *Code* already contains provisions giving the Minister discretion to order a vote and, as well, the issue had been recently studied and the idea rejected. There were also concerns that a mandatory vote rule could undermine union-membership relationships which would ultimately increase the risk of a work stoppage. Best practices for communication of information by unions to members were vetted in addition to practices that might improve the ratification process of tentative agreements which was an issue considered under the same option.

Measures from other jurisdictions providing for the termination of work stoppages by the Governor-in-Council or Ministerial declarations of public emergency were examined. These provisions would simply allow the termination of the work stoppage (or to prevent one from commencing) in situations of emergency or undue hardship to third parties with interest arbitration ordered to settle the terms of the collective agreement. The employers did not advance this as a theme, but some did seek limitation on the right to strike in industries which they considered to be crucial to the economic infrastructure, such as ports and aeronautical operations. The only justification for such a measure would be to obviate the need for Parliament to intervene. But it would not appear to have any substantive impact on the voluntary reduction of the incidence or duration of work stoppages.

The labour representatives raised a number of measures that they argued would reduce the frequency and/or duration of work stoppages. The first related to expanded Board-ordered arbitration of first contract collective bargains which were stalemated. These represent a significant percentage of work stoppages (13%), but entailed less than 1% of the total person days not worked for the period examined. The present policy of the Board is not to order first contract arbitration where the parties are unable to negotiate it themselves unless there is bad faith involved on the part of the employer. The resolution of this policy issue appears beyond the mandate of this study. But it is not clear, in any event, whether any reduction in work stoppages

over first agreements would not simply be postponed to the next round of collective bargaining as some mediators have suggested.

Far and away the most contentious option was the unions' submissions that legislating a general ban on the use of temporary replacement workers would reduce the incidence and duration of work stoppages. Most stakeholder arguments (economic and social factors), although relevant to the issue, did not relate to managing work stoppages and were beyond the mandate of this study. Empirical evidence was inconclusive on the impact of legislation banning the use of temporary replacement workers on the incidence and duration of work stoppages. Although introducing replacement workers into work stoppages aggravates union-management relationships, recourse to them tends to occur when relationships are already adversarial. Moreover, almost as a "Catch - 22", very contentious work stoppages appear to be an important impetus to improving union-management relationships. Most importantly citing other industrial relations experts, it was concluded that the highly contentious and see-saw political nature of this issue was counterproductive to sound labour relations. Instead, emphasis should be placed on improving union-management relations as the optimal measure to reduce the frequency and duration of work stoppages, as well as to limit the use of replacement workers.

The final option examined related to stalemated work stoppages in which the Minister or the CIRB could order a return to work while imposing interest arbitration on the parties to settle the terms of the collective agreement. Consideration was given to recent Manitoba legislation implementing a similar option with respect to work stoppages that had run 60 days or longer. This legislation was vigorously opposed by employers when enacted. Although viewed as a measure which would favour unions, because longer strikes are generally considered to be losses and are problematic for them, the union stakeholders opposed any provision whereby the Minister could terminate a work stoppage and order compulsory arbitration.

Chapter 5: Overcoming the Challenge to Change Union-Management Relationships

Means to transform the nature of union-management relationships were considered. On those occasions where relationships had improved in the past, they most often followed a mutually painful work stoppage or when the parties shared a common interest facing a crisis over the firm's survival, in both cases usually accompanied by enlightened leadership. The study searches for a shared common interest and recognizes that better relationships standing by themselves without evolution, or as a means to realize other ends, may not achieve the full potential for reducing work stoppages.

Improved relationships will come from the continuing effects of competitiveness and technology that will constantly play havoc with workplaces, abetted by government policy options to make the Federal Private sector more competitive. A deliberate policy strategy to enhance the flexibility of labour markets, work organizations and labour relations on the one hand, and employment and income security on the other, could be the driving force for these initiatives, in line with similar initiatives being played out on the global stage.

Employers need flexibility to compete and this option is preferred by unions over other cost-restraining options such as reducing personnel or reducing wages and benefits. Workplace flexibility and innovation are best achieved through improved relationships that lead to collaborative workplaces. Changed relationships have advantages for unions, including the possibility of better bargaining opportunities and the fulfillment of the promise of greater democratization of the workplace.

Ultimately overcoming these challenges will require real leadership decisions by the stakeholders to commit their members and firms to high integrity industrial relationships. This leadership can be enhanced by options being proposed in this study in combination with a new more proactive culture to “spread the word” at the Labour Program supported by new government investments to achieve these goals.

Modern dispute resolution techniques to overcome past history to negotiate new relationships are also explored. Methods described by Dr. Christopher Moore, an internationally recognized author in the field of negotiation and dispute resolution, are cited. On a more concrete plane, a fairly detailed description of some of the features of a relationship improvement scenario that occurred in Western Canada is also presented. It demonstrates that it is possible to change the fundamental nature of union-management relations using much of the new knowledge and many of the techniques relating to conflict management, even for the most intractable of relationships.

Chapter 6: Consensus Options

The consultation process used to obtain stakeholder input and consensus on options to manage work stoppages is described. After some initial research, a request was made to stakeholders for written submissions to respond to some of the terms of the study’s mandate. This was followed by informal meetings with stakeholders, some industrial relations experts and practitioners, resulting in the preparation and distribution of a discussion paper on 12 “neutral” options. Cross-country consultations followed with several of the stakeholder organizations and a further report, detailing the options on which there appeared to be some degree of consensus, was prepared and distributed. Finally, a roundtable meeting with union and employer representatives was held on July 18, 2008, in Ottawa with about 30 stakeholders attending. It resulted in the adoption of the three consensus options which were finally approved on July 18, 2008.

The process was not without some controversy. Many stakeholders questioned the necessity of a study into work stoppages because of the low numbers of work stoppages and the small contribution to work stoppage numbers by the federal private sector due to its relatively small size. Others were of the view that these matters could not be appropriately addressed within the time frame allotted to conduct the study and compared the process with previous more comprehensive reforms, despite attempts by the author to distinguish between the levels of commitment necessary merely to permit discussions on future options, as opposed to recommendations for legislative change. There was also some disquiet about the political context in which the study was being conducted - a minority government and with matters presently

before Parliament on replacement workers. These concerns lead to the development of a general consensus to avoid options that could require legislative amendments to the *Code*. Despite these reservations, the stakeholders participated fully and generously in the process and provided important information and advice that forms the basis of much of the study.

The three consensus options involve the Federal Labour-Management Relations Council, the expansion of FMCS services, and ameliorations to the process of the CIRB and appointment of members. The options agreed to are considerably briefer than those outlined in Chapter 4. With regard to the Council, the stakeholders wish to review the matter with the FMCS to determine what they view will work best. They wholeheartedly support the expansion, improvement and marketing of FMCS services, including the suggestion that the process be initiated by a national consultation process, again with final details to be worked out in conjunction with the FMCS. Finally, the stakeholders supported initiatives to improve the appointments process and other measures to prevent delays in proceedings, emphasizing that the Client Consultation Committee be strongly endorsed and its recommendations supported.

Given some of the views expressed by the stakeholders at the commencement of the study, the consensus results surpass expectations. Nevertheless, the opportunity and timing appear propitious for the stakeholders to embark upon a course that could significantly change and improve how industrial relations are practised in the federal private sector to their mutual benefit and that of the country. Without more concrete buy-in from the stakeholders on the parameters of the options, and agreement to use this opportunity to aggressively address relationship improvement, the level of investment and commitment to new programs and cultures that underlie the options for the Council and FMCS described in Chapter 4 may be difficult to justify.

Chapter 1: Introduction

The Terms of Reference of the Study

This study was announced by the Minister of Labour, the Honourable Jean-Pierre Blackburn, on March 6, 2008, for the purpose of conducting a focused examination of the causes and impacts of work stoppages in the federal private sector with a view to identifying options to reduce their risk, frequency and duration. It was to involve consultations with labour and management representatives to identify options acceptable to both. A final report was required to be submitted to the Minister within 180 days. The Terms of Reference are at Appendix A.

Some comments are necessary on the nature and scope of the Terms of Reference, including the particulars to the mandate described in its preamble.

- While the mandate is described as focusing on work stoppages, this subject is nevertheless vast, complex and amorphous. The causes and management of work stoppages encompass much of industrial relations law and policy. These are concerned primarily with managing conflict and the frameworks put in place to achieve this by “cooperative efforts to develop good relations and constructive collective bargaining practices”.¹ Many options are considered, but the effective ones focus on the application of new techniques developed in the last couple of decades. These await full application and implementation to modernize dispute resolution in industrial relations.
- The Terms of Reference cite statistics from the Organisation for Economic Co-operation and Development (OECD) as the tacit impetus for the study. They suggest that Canada had a high rate of work stoppages compared to other industrialized nations. Stakeholders raised concerns about reliance upon the OECD statistics and the contribution of the federal private sector to Canada’s work stoppage situation. Accordingly, Chapter 2 provides a brief analysis of the OECD study and the contribution of the federal private sector to work stoppages in Canada.
- An analysis of the causes that influence the risk, frequency and duration of work stoppages in the federal private sector is provided in Chapter 3. It is undertaken with the caveat that analysis of causality and the prediction of outcomes of work stoppages is restrained by inherent limitations due to the variety, interrelatedness and often indistinguishable determinants which cause a work stoppage.

¹ Preamble to the *Canada Labour Code*, Part I, R.S., 1985, c. L-2 June 29, 2000.

- The task of describing the impact of work stoppages and examining the current industrial relations situation in Canada is included with the analysis of causes in Chapter 3. Some comment is also made regarding the identification of areas at greatest risk of increased work stoppages. This subject is limited by the inherent difficulty in predicting work stoppages and the need for better assessment tools to undertake this analysis. . Finally, a brief review is made of the economic impact of work stoppages in the federal private sector.
- The Terms of Reference direct an inquiry into “best practices” both in Canada and internationally on legislative and non-legislative approaches to manage work stoppages. These have been incorporated throughout the document in options as examples of how such “best practices” could be implemented.
- The core of the study is the development of a series of options to manage work stoppages. The most promising options are solution-based and involve improved stakeholder relationships through the establishment of a Federal Labour-Management Relations Council and the enhancement of preventive mediation facilities of the Federal Mediation and Conciliation Service (FMCS). These options are intended to fundamentally affect the style and content of traditional industrial relations and are described at some length in Chapter 4 along with fourteen other options which apart from options involving the grievance process, are about better management of collective bargaining and work stoppages as opposed to changing the nature of the union-management relationship.
- Chapter 5 is devoted to examining the challenges that confront unions and employers transforming adversarial relationships into collaborative ones. The chapter also provides some theoretical guidance to overcoming negative relationships and describes an actual best practice scenario where relationships were radically transformed. Although not stated as such, the success of this scenario resulted from the application of modern techniques of industrial relations.
- Chapter 6 responds to the direction in the Terms of Reference to identify options acceptable to both labour and management. It contains a brief description of the consultation process engaged in to generate consensus, along with the three consensus options adopted by the stakeholders with their comments.

Options versus Recommendations

The mandate of this study was to identify options to manage work stoppages. This distinguishes it from past inquiries where the Terms of Reference required the commissioners to both identify options “and where appropriate, to make recommendations for legislative change.”²

This distinction was conveyed to the stakeholders at the commencement of the study to encourage broader agreement with the nature and scope of the options. It was understood that there would be no commitment to anything but continuing work with the Labour Program to determine if any options, as modified by the discussion process, could become recommendations for legislative change.

A Study for both Union and Management

Concerns were raised by unions that this study was intended to favour employers. The statistical measure of person days not worked (PDNW) used to rank Canada in the OECD study is claimed by some to predominately favour employers, since it is seen as a measure of macroeconomic productivity and competitiveness. This runs counter to the behaviouralists’ approach that seeks to express the experiential measure of loss to the striking worker.

Others have suggested that the concept of reducing or eliminating strikes misunderstands their function in collective bargaining. They are considered neither good nor bad, but merely the ultimate manifestation of the collective will of employees to match that of the employer in the process of free collective bargaining, when no other viable means exist to resolve fundamental differences in their relationship.

In response to these concerns, it should be emphasized that this study is not intended to undermine the principle supporting union activities or their rights “to freedom of association and free collective bargaining as the basis of effective industrial relations for the determination of good working conditions and sound labour-management relations.”³ The options proposed are premised on voluntarism except where grounds may exist to intervene after a work stoppage has occurred, which in many instances favour unions. Moreover, the options being considered to reduce work stoppages are congruent with enhancing the worker experience. The principal ones are intended to reduce the negative aspects of the workplace in terms of worker subordination, lack of respect and exclusion from decision-making processes that arise from traditional adversarial relationships.

² Sims, Andrew C.L. *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada), 1995, p. 3.

³ Preamble to the *Canada Labour Code*, Part I, R.S. 1985, C.L-2, June 29, 2000.

Neither the quest for competitiveness, nor its reduction because of a work stoppage record less favourable than our international competitors, should be seen as bias in the Terms of Reference of the study. Unions and employers share a common interest in ensuring that Canada remains competitive with the rest of the world. Others who have successfully led reforms to the *Canada Labour Code*, Part I have acknowledged that reform may be necessary to “enhance the ability of management and labour to adjust and thrive in an increasingly global workplace.”⁴ The global workplace makes the need to remain competitive a shared interest of the stakeholders and one of the fundamental necessities for sound labour-management relations.

The Federal Private Sector

This is a study of work stoppages of employees covered by the *Canada Labour Code*, Part I. The Terms of Reference however, refer to the “federal private sector.” Technically speaking, this latter description could be interpreted to exclude employees in certain Crown corporations (including, among others, Atomic Energy of Canada Limited, the national museums, Via Rail) who are not part of the private sector.

Because of the need for accuracy of the titles of charts and tables, labelling of them will refer to *Canada Labour Code*, Part I. Otherwise, reference will be made to the federal private sector or jurisdiction throughout the body of the study.

⁴ Sims, Andrew C.L. *Seeking a Balance, Review of Part I of the Canada Labour Code* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 41.

Chapter 2: Person Days Not Worked in the Federal Private Sector

This chapter is divided into three sections. Section I provides information on Canada's work stoppage record on the international scene including an adjusted Canadian PDNW comparison with the United States. Section II reviews the relative contribution of the federal private sector to national totals of person days not worked (PDNW). Section III provides a statistical analysis of PDNW in the federal private sector, including reviewing the data by sector, nature of activities, size of work stoppages and other trends relating to frequency and duration of work stoppages.

Section I: Canada's Work Stoppage Record on the International Scene

The impetus for this study was an article entitled "International Comparisons of Labour Disputes in 2005" in which the author, Dominic Hale, presented data on labour disputes in member countries of the European Union (EU) and the Organisation for Economic Co-operation and Development (OECD) between 1997 and 2005.⁵

Hale published an updated version of his article in April 2008 which included 2006 data.⁶ In 2006, Canada had its lowest number of PDNW per thousand employees from work stoppages in the 10-year period of data that was the basis for the author's conclusions. The new data, however, did not affect the conclusions, only the magnitude of the relative differentials between Canada's position and that of other countries.

According to the 2008 study, Canada had a higher rate of PDNW than any other G-7 country and ranked second amongst states in the OECD. More specifically, between 1997 and 2006, Canada reported an average of 186 PDNW due to labour disputes as compared to the OECD average of 43 days. The average for the United States for the same period was 34 days, while the figure for the United Kingdom was 21 days. A closer examination of the data suggests that with the exception of a couple of years between 1997 and 2006 inclusive, Canada ranked annually in the top three in the combined EU/OECD countries in terms of PDNW through work stoppages per 1,000 employees.

⁵ Hale, Dominic. "International Comparisons of Labour Disputes in 2005," Economic & Labour Market Review 1:4 (2007).

⁶ Hale, Dominic. "International Comparisons of Labour Disputes in 2006," Economic & Labour Market Review 2:4 (2008).

Caveats Concerning the Hale Study

The British Office for National Statistics study must be approached with some degree of caution. As Hale admits, “an exact comparison between countries is not possible because there are important differences in the methods used for compiling statistics on labour disputes in the various countries.”⁷ He goes on to suggest that “labour disputes figures are erratic and year-on-year comparisons should be made with caution,”⁸ providing the example of Finland in 2005 where one stoppage in the manufacturing sector accounted for 98 per cent of [PDNW]. A similar occurrence in Canada in 2005 saw one dispute in the telecommunications industry account for 77% of the [PDNW] in the federal private sector.

What the Hale article does clearly demonstrate, despite the cautions in variations in data collection methodology and threshold levels for inclusion of specific work stoppages data in various countries, is that Canada’s performance in terms of PDNW due to labour disputes is cause for concern and merits attention on the part of both the federal and provincial governments as well as stakeholders. Academics consulted considered the Hale article to be generally reliable in depicting Canada as having one of the highest levels of PDNW in comparison with other countries. The data set out in Table 2-1 clearly indicate that Canada’s totals for PDNW to work stoppages continue to be among the worst by international comparison standards and substantiate the need for a study to determine causes and find solutions to improve our situation.

⁷ Hale, Dominic. “International Comparisons of Labour Disputes in 2005,” Economic & Labour Market Review 1:4 (2007), pg. 23.

⁸ Ibid., p. 24.

Table 2-1: Labour Disputes: PDNW per thousand employees⁹ in all industries and services (2006)

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	AVERAGE ¹⁰			Percentage change 1997-2001 to 2002-06
											1997-2001	2002-06	1997-2006	
United Kingdom	10	11	10	20	20	51	19	34	6	28	14	28	21	100
Austria	6	0	0	1	0	3	398	0	0	0	1	80	41	7,900
Belgium	13	28	*	77	*	*	*	*	*	*	41	*	41	*
Denmark	42	1,317	38	51	24	79	23	31	21	34	292	38	164	-87
Finland	56	70	10	126	30	36	32 ^R	21	322	40	58	91	75	57
France	16 ^R	15 ^R	20 ^R	27 ^R	21 ^R	11 ^R	10	9	10 ^R	*	20	10	15	-50
Germany	2	1	2	0	1	10	5	2	1	13	1	6	4	500
Ireland	69	32	168	72	82	15	26	14	17	4	86	15	47	-83
Italy	84	40	62	59	67	311	124	44	56	27	62	111	88	79
Luxembourg	0	0	0	20	0	0	0	0	0	0	4	0	2	-100
Netherlands	2	5	11	1	6	34 ^R	2	9	6	2	5	11	8	120
Portugal	25	28	19	11	11	29	15	12	7	11	19	15	17	-21
Spain	182	121	132	295 ^R	150 ^R	370 ^R	56 ^R	306	62	58	178	164	170	-8
Sweden	7	0	22	0	3	0	164	4	0	1	6	34	20	467
EU14 average	33^R	47^R	29^R	48^R	32^R	93^R	43^R	49^R	23^R	24	38	47	42	24
Iceland	292	557	0	368	1,571	0	0	1053 ^R	*	*	571	(353)	(486)	-38
Norway	4	141	3	239	0	72	0	68	5	68	78	43	60	-45
Switzerland	0	7	1	1	5 ^R	5 ^R	2	10 ^R	0	2	3	4	3	33
Turkey	19	29	23	35	28	4	14	8 ^R	15	13	27	11	18	-59
Australia	77	72	89	52 ^r	43 ^R	28 ^R	54	39 ^R	24 ^R	13	65	30	46	-54
Canada	296	196	190	126^r	163^R	220^R	122	223^R	283^R	54	192	180	186	-6
Japan	2	2	2	1	1	0	0	0	0	*	1	0	1	-100
New Zealand	18	9	12	8	37	22 ^R	13	4	18	17	17	15	16	-12
United States	38	42	16	161	9	5	32	8	10	20	54	15	34	-72
Mexico										24	*	(24)	(24)	*
Korea										77	*	(77)	(77)	*
OECD average¹¹	39^R	44^R	27^R	81^R	23^R	45^R	33	31^R	24^R	24	43	31	37	-23

⁹ Some employee figures have been estimated.

¹⁰ Annual averages for those years within each period for which data are available, weighted for employment.

¹¹ From 2000, the OECD average includes Hungary, Poland and Slovakia.

R Revised

* No data available.

() Brackets indicate averages based on incomplete data.

Sources of Data on Work Stoppages in Canada

As the Hale article suggests, the collection and dissemination of statistics on labour disputes is far from an exact science. Several OECD countries failed to supply data for specific years and others provided several revisions to the figures originally submitted, some of significant size variation. The federal government in Canada relies on work stoppages data input from a variety of sources, ranging from industrial relations centers to provincial labour ministries, as well as regional and local media reports. Unions and employers are under no statutory obligation to report work stoppage information to a government agency, but are often contacted to confirm information that has been obtained through other sources. Despite adhering to the same inclusion standards, data collection methods can also vary by province. Some sectors rely on direct contact with the parties to a labour dispute for their information; others employ a variety of methods to retrieve the data.

To have an accurate picture of the effectiveness of the labour legislative framework and the dispute resolution process for any sector, it is crucial to have comprehensive procedures in place to record information pertaining to work stoppages accurately - duration, workers involved, issues in dispute, etc. Without this information, it is impossible to assess the performance of those measures which are in place to resolve labour disputes and to assist in building better relationships between labour unions and employers.

Threshold for Counting Person Days Not Worked

As suggested in the Hale article, there is a wide variance in the threshold used by different countries in the data collection of PDNW due to work stoppages. Whereas Canada's data is based on strikes or lockouts lasting more than one-half day and resulting in at least ten person days not worked, other countries have a much higher threshold than ours. The United States, Canada's major trading partner and a country with a significantly larger work force, places the emphasis on larger work stoppages involving 1,000 or more workers and lasting one full shift or longer. On the other hand, some countries count all person days not worked. Differences have also been identified in countries' data sources. Whereas some countries have inspectors or require labour unions to report all work stoppages, others use more informal data collection methods, relying on media sources or voluntary reporting.

Variations in Types of Strikes Included

Additional variations in the way that countries calculate [PDNW] relate to the inclusion of information pertaining to illegal strikes, days not worked by indirectly affected workers and political strikes. Depending on the socio-economic or political context, the absence or inclusion

of such data can significantly alter a country's strike record in terms of actual impact on the economy. While Canada reports illegal and political strikes that conform to somewhat broader inclusion thresholds, it should be noted that Canadian statistics exclude days not worked by workers in the same firm or establishment who are indirectly affected by work stoppages. The omission of this data, reported by some OECD and EU countries, has the potential to skew Canadian PDNW data.

In some cases, the reported data will not always reflect the true picture of the effects of a work stoppage in a sector with significant infrastructure. In the August 2000 issue of *Monthly Labor Review*, the Bureau of Labor Statistics in the United States provided an example of the potential secondary effects of a strike on establishments which are not on strike, but which are dependent on the striking establishment.¹² On June 5, 1998, 3,000 employees went on strike at a General Motors (GM) fabricated-metal-stamping plant in Flint, Michigan. One week later, an additional 5,800 workers went on strike at a parts plant in Flint. Both strikes ended on July 29th. The strike occurred at only those two plants. However, because the plants were critical to GM's supply chain, the strike had a disproportionate effect on production and automobile assembly plants that relied on parts from the striking establishments which were forced to shut down. All told, 150,000 employees were out of work, due to the primary and secondary effects of the strike.

Given the vast infrastructure within the federal private sector in Canada, work stoppages occurring in a particular labour relations setting can have significant repercussions for workers in other collective bargaining relationships. For example, a work stoppage by a particular railway bargaining unit at CN Rail could impact on the shipment of various commodities to a major port in Canada, resulting in the layoff of port workers such as longshoremen, grain handlers, freight forwarders, customs officials, etc. In Canada, our system provides for the reporting of PDNW only for those members of the bargaining unit actually on strike or locked out. Utilizing a more inclusive method of reporting which extends to impacted workers outside the immediate enterprise, providing that such information is available, can produce a more realistic picture of the actual magnitude of work stoppages and their potential to inflict serious harm on the economic well-being of a region or a nation.

While the Hale article suggests that the PDNW figures for the United States include indirectly affected workers, recent communication between officials of the Labour Program of HRSDC and the Bureau of Labour Statistics suggest that this is an area which is subject to a great degree of interpretation and, as such, one cannot assume that the notation contained in the April 2007 article is absolutely correct. The U.S. Bureau of Labor Statistics indicates that it would include temporarily laid-off or locked out workers within the bargaining unit, but that non-unionized workers from the same company who are laid off or prevented from crossing picket lines would not be included in the total.

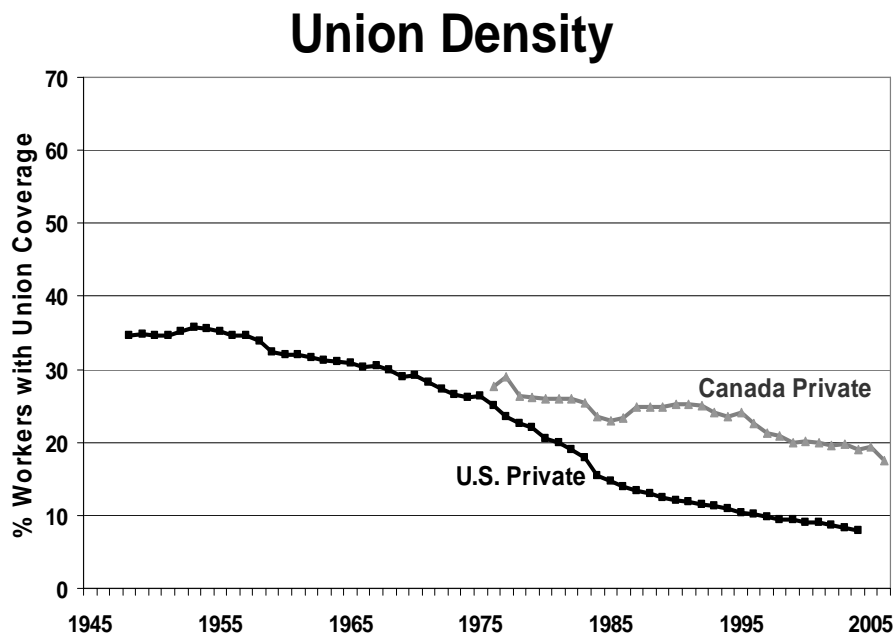
¹² Rao, Karthik A. "The Impact of Strikes on Current Employment Statistics," *Monthly Labor Review* (Aug. 2000), pp. 32-39.

Union Density

The union density issue is one which merits further analysis; countries with lower union density rates would be expected to experience fewer days not worked due to work stoppages. Days not worked per working employee do not measure how well countries are managing conflict between unions and management unless these figures are adjusted for union density. Any meaningful comparison for Canadian industrial relations performance must be with our major trading partner and competitor in the global economy, the United States. While the United States has experienced a rapid rate of decline in union density, from just over 20% in 1983 to 12% in 2006, Canada's union membership has increased by 72,000 to 4.2 million in the first half of 2007, a union density rate of 29.7%, virtually unchanged over the past decade.

The comparative situation in terms of union density in the Canadian and American sectors has been documented in various articles and presentations. In a Briefing Note prepared by the Commission for Labour Cooperation in August of 2003, it was observed that while the Canadian overall union density figure had remained relatively constant from 1998 to 2003 in the 30% range; the private sector rate had experienced a significant decline to approximately 18%.¹³ This gradual decline in the private sector density rate in Canada paralleled the United States experience where union density in the private sector fell to 7% from 18% (the current Canadian rate) in 1984.¹⁴ (See Chart 2-1).

Chart 2-1 Private Union Density Canada and United States

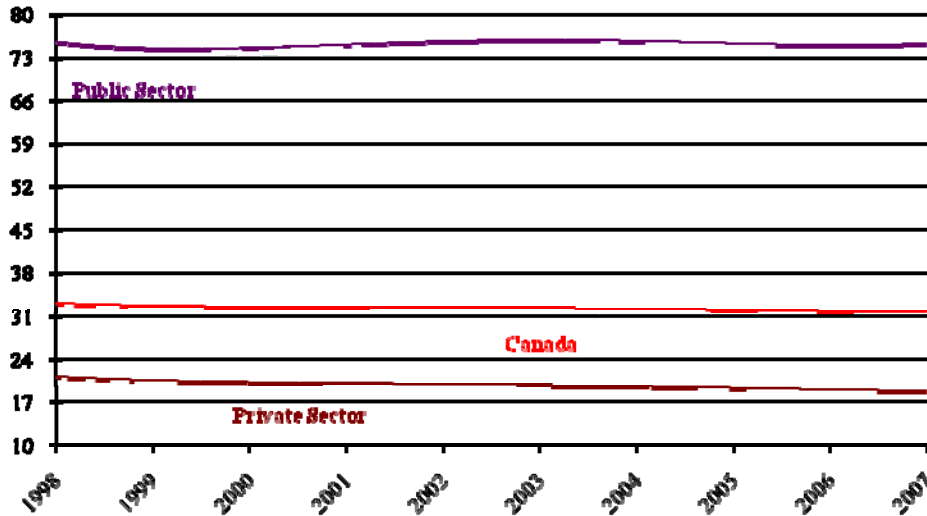


¹³ Commission for Labor Cooperation, "Recent Trends in Union Density in North America," *Briefing Note* (Aug. 2003) p. 1.

¹⁴ CAW-TCA Canada, *CAW & Magna: a Window of Opportunity*, (December 2007, Toronto, Ontario).

The Canadian trends in union density for both the private and public sectors are found at Chart 2-2. It should be noted that this chart does not reflect the full decline over the longer period from 30% in 1984 to 18% in 2007. Density in the private sectors is therefore on very different trend lines.

Chart 2-2: Trends in Union Density (%)



Source: HRSDC - Labour Program - RDD Division and Statistics Canada data

Causes of Declining Union Density

Declining union density is not unique to the United States but a phenomenon which has global dimensions. Across the industrialized world, labour movements are shrinking and the rationale has been the subject of many articles by labour relations experts. One of the factors mentioned is the relatively rapid increase in jobs in industries with traditionally low unionizations rates, such as information technology, and the slower increase in those occupations where union density is normally higher, such as the public service sector. Other factors suggested include the increase of female participation in the workforce and the steady growth in part-time employment. While structural factors play a significant role in union density in various sectors, the legislative framework for labour relations functions is perhaps the most influential determinant for the success or failure of the union movement to achieve organizational goals within a specific labour market. While Canadian labour laws are, for the most part, receptive to the concept of a

unionized workforce, many sectors in the United States project a legislative climate that is viewed as obstructive to organizational attempts by union.

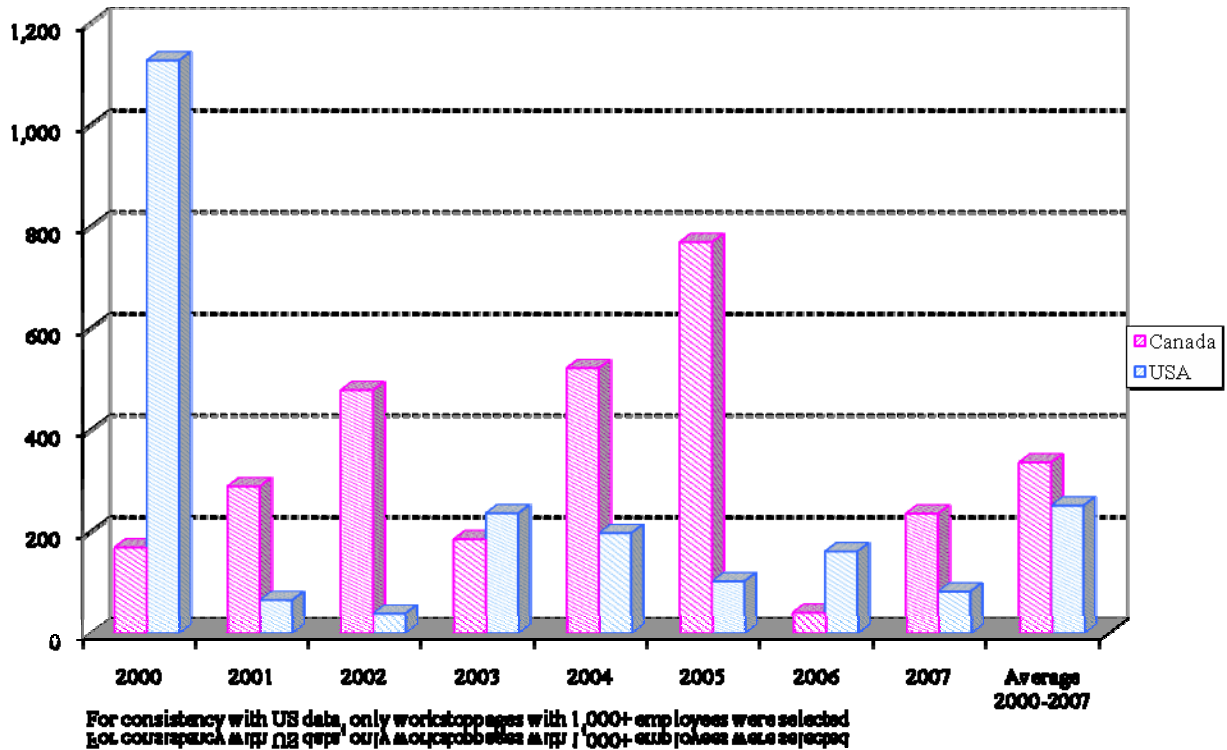
One of the more creative, although controversial, initiatives on the part of a labour union to bolster union density was the recent “Framework of Friendship” agreement reached between Magna International and the Canadian Auto Workers (CAW). The agreement, covering some 18,000 Magna employees at 45 facilities across Canada, allows the employees at each plant to vote on whether they wish to be represented by the CAW for bargaining purposes and to be covered by the agreement negotiated between the company and the union. In exchange for the access to Magna employees for organizational purposes, the CAW agreed to a framework which provides for the use of final offer arbitration to settle disputes rather than strikes, in effect banning strikes. It also introduced an interesting mediation-before-grievance process which will be discussed in Chapter 4. Despite coming under strong criticism from some members of organized labour, Buzz Hargrove, then CAW President, defended the approach taken and emphasized that the CAW and Magna both see such a non-traditional arrangement as a better way to go in an increasingly competitive global environment. He reiterated that the CAW will maintain a strong union presence within Magna, while at the same time affording the firm the required operational flexibility to compete in international markets and preserve Canadian jobs.

Adjusted Canadian PDNW Comparison with United States

To respond to some of the criticisms of the Hale data, as well as to evaluate the relative position of Canada with respect to the United States, a request was made to the Research and Data Development Division (RDD) of the Labour Program of Human Resources and Social Development Canada (HRSDC) to recalculate the PDNW adjusted to reflect the different thresholds for data inclusion methodologies and union density in the two countries.

Chart 2-3 utilizes work stoppages with 1000+ unionized employees to provide a better comparison between Canada and the United States over the period between 2000 and 2007 in terms of the capacity of the two countries to manage industrial relations conflict. It is worthy of note that the ratio of the average PDNW in Canada versus the United States for the period in question dropped significantly from three times more PDNW in Canada to 1.33 times more when the Hale data was adjusted to reflect a standardized threshold. Bearing in mind that there is some question as to whether the American data includes indirect PDNW caused by a work stoppage, the ratio could be considerably higher if these numbers were subtracted from the American work stoppage data.

**Chart 2-3: Annual and Average Person Days Not Worked per 1,000 Unionized Employees
Canada and United States**



Section II: Relative Contribution of Federal Private Sector to National Totals of PDNW

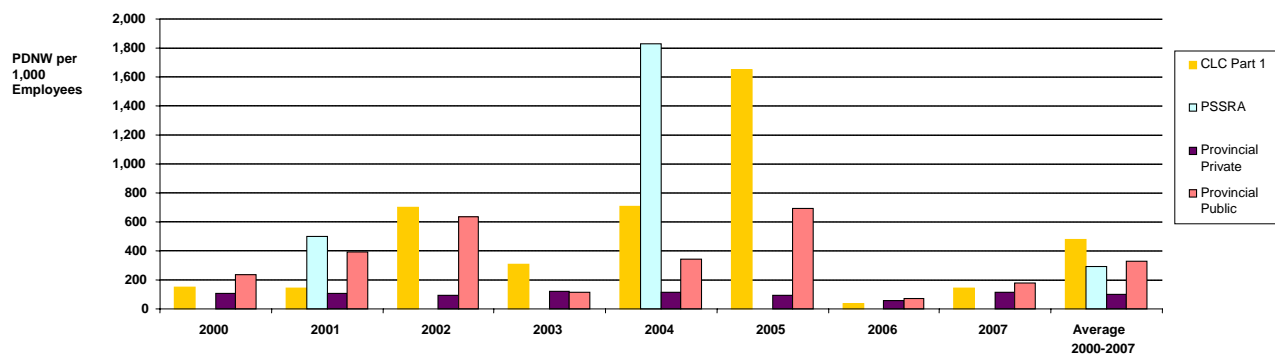
Stakeholders challenged the relative contribution of the federal private sector (FPS) to the overall Canadian data, for example that the FPS “is not driving Canada’s OECD standing.”¹⁵ The fact that the FPS only encompasses 5% of the workforce and thus contributes less in PDNW is not the issue. A better question is – what are the relative contributions to the overall results?

In examining the data on work stoppages in Canada gathered by the Labour Program of HRSDC, it becomes evident that the FPS falling under Part I of the *Canada Labour Code* has experienced substantial PDNW to strikes and lockouts. Despite a population of only 850,000 workers out of a total Canadian labour force of 18 million plus, PDNW in the FPS have contributed at a higher relative level than any other sectors in Canada to the total reflected in the Hale report.

¹⁵ FETCO submission, p. 4

Surprisingly, the data to make these comparisons was not available from the published statistics or within the Labour Program. At our request, Chart 2-4 was prepared by the RDD Division of the Labour Program at HRSDC.¹⁶ It sets out the relative contribution of the various sectors to Canada's PDNW from 2000 to 2007 plus the average over the eight years.

Chart 2-4: Annual and Average PDNW per 1,000 Employees, 1+ Workers by Federal and Provincial Jurisdiction (Public and Private)



Not only does this chart demonstrate that the federal private sector was the highest relative contributor to work stoppages of any of the Canadian sectors, it also demonstrates that in terms of managing industrial relations conflict, the provincial private sector, which is its real benchmark, were more than four times as successful during the same period.

However, these conclusions must be viewed with caution as the PDNW for 2005 skew the totals considerably. In addition, the figures should be adjusted for unionization rates as was done for the preceding comparison with United States. The unionization rate for the private sector in Canada has been dropping over several decades and now stands at 18%, whereas the federal private sector stands at 32%.

¹⁶ See Technical Note at end of Chapter containing an explanation of the methodology used to prepare the chart.

Section III: Statistical Analysis of Person Days Not Worked in the Federal Private Sector

The statistical analysis will examine the sources of PDNW by sector and concentration, followed by an analysis of the contribution of frequency and duration to person days lost. The analysis will also review the data broken down by federal and provincial jurisdictions and by their private or public sector nature for purposes of comparison.

Person Days Not Worked by Sector in the Federal Private Sector

To analyse PDNW, it is important to note where the losses are occurring in order to consider the determinants of those outcomes. In Table 2-2, it is evident that most of the stoppages occurred in the telecommunications, broadcasting or transportation sectors. It also shows the concentration of strikes and lockouts in significant infrastructure areas of the federal private sector which have a major economic impact.

Table 2-2: Person Days Not Worked (PDNW) by Industry Sector in the Federal Private Sector, 1995-2007

	Primary Industries	Public Administration	Manufacturing	Wholesale and Retail	Transportation and Warehousing	Information and Cultural Industries (Incl. Communications)	Finance	Education, Health and Social Services	Entertainment and Hospitality	All North American Industry Classification System (NAICS)
1995		1,230	21,340		231,160	1,860	6,930			262,520
1996					83,090	33,360	1,230			117,680
1997		1,300	200		548,270	4,130		200		554,100
1998	28,610		1,960		52,870	8,190				91,630
1999	13,780			1,750	42,640	384,220				442,390
2000	22,890		130		20,610	34,650	30,830			109,110
2001	10,470	10,330	2,800		33,000	30,400	18,720		1,830	107,550
2002	10,430			720	65,440	383,700	61,710			522,000
2003	4,920				31,720	183,060	19,440			239,140
2004			860		158,050	423,850	8,190		600	591,550
2005				6,400	60	1,438,930	960			1,446,350
2006	26,520	50			5,830			950		33,350
2007			10,420		111,290	320	2,650	920		125,600
Total	117,620	12,910	37,710	8,870	1,384,030	2,926,670	150,660	2,070	2,430	4,646,970
% of NAICS	2.5%	0.3%	0.8%	0.2%	29.8%	63.0%	3.2%	0.0%	0.1%	100%

Source: HRSDC, Labour Program

To a certain extent, these results are not surprising because, apart from the banking sector, the sectors other than Transportation and Warehousing or Information and Cultural Industries (Incl. Communications) have very low levels of employment in the federal jurisdiction. In addition, Finance has very low unionization rates and would not be expected to have large numbers of PDNW.

Table 2-2 reinforces the need to focus on work stoppages in high risk situations in industries which are the major contributors to the bulk of the PDNW in the federal jurisdiction.

Nature of Activities Giving Rise to Person Days Not Worked in the Federal Private Sector

Mergers and acquisitions (“M and A’s”) have been identified from the outset as a major contributor to work stoppages in the federal private sector. But their full impact was not known until this was confirmed in the course of analyzing Labour Program data with respect to work stoppages over first agreements. In Table 2-3, the information collected by HRSDC includes first agreements from “M and A’s” which, for the purpose of first collective agreements, was not considered pertinent. However, when the data was disaggregated, the results revealed the extent to which “M and A’s” contributed to PDNW in the federal private sector. The breakout of the data on first agreements for the years 2000 to 2007 demonstrates that “M and A’s” were a factor in 74% of the PDNW.

**Table 2-3: Aggregated PDNW Data on Mergers and Acquisitions under the Federal Sector
(CLC Part 1)**

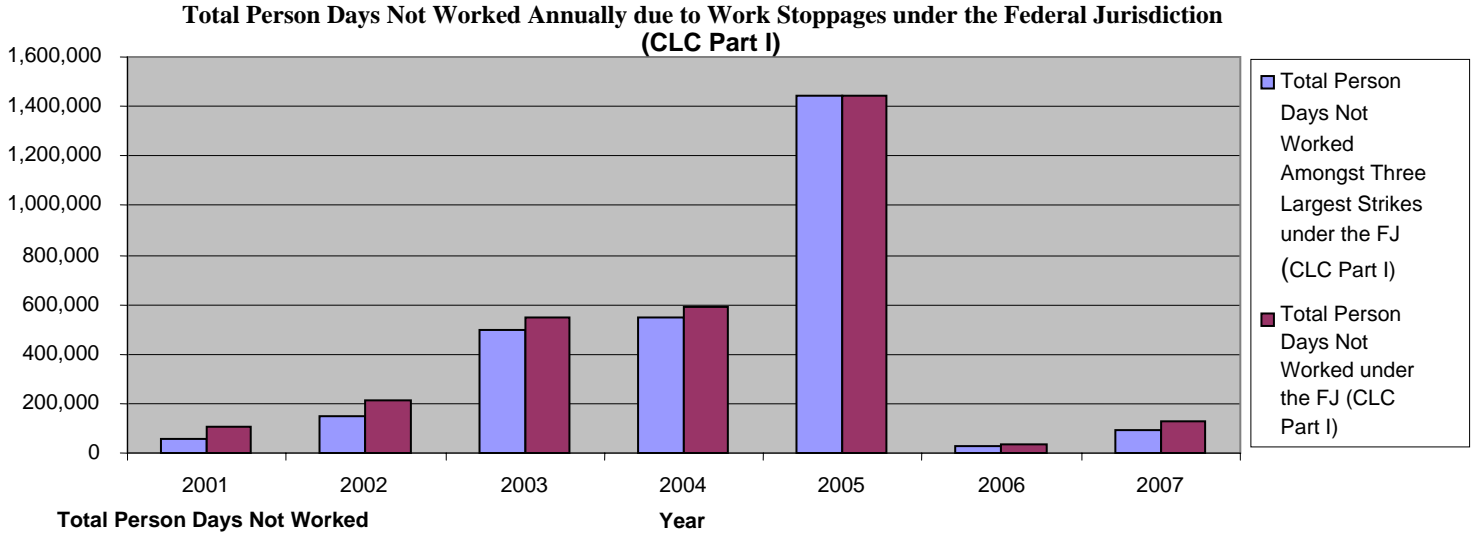
	PDNW (First agreements)	PDNW (First agreements) as a percentage of total under the Federal Jurisdiction (CLC Part 1)	PDNW Mergers & or Acquisitions	PDNW Mergers & Acquisition as a percentage of total in Federal Jurisdiction (CLC Part 1)	Adj PDNW
2000	2,650	2%	10,420	8%	132,000
2001	10	0%	26,520	80%	33,350
2002		0%	1,438,930	99%	1,446,350
2003	2,260	0%	409,430	69%	591,550
2004	13,210	17%	860	1%	77,780
2005	3,710	1%	468,070	68%	683,600
2006	4,630	5%		0%	100,900
2007	17,480	15%	8,920	8%	115,760
TOTAL	43,950	1%	2,363,150	74%	3,181,290

Source: HRSDC

Contribution of Major Work Stoppages to Person Days Not Worked in the Federal Private Sector

Reference has already been made to the year 2005 for its high contribution to PDNW statistics. In addition to the concentration in a few years since 2000, the large majority of PDNW have arisen from two or three major work stoppages each year. Chart 2-5 compares PDNW for the three largest work stoppages each year with the total.

Chart 2-5: PDNW from Three Largest Work Stoppages versus Total PDNW



Source: HRSDC - Labour Program - FMCS

These results should not be surprising since the federal private sector is made up of larger employers operating on a national basis, as compared to other jurisdictions. It requires only a few work stoppages of larger bargaining units for some duration to produce the statistics described in the Hale study.¹⁷

Trends in Frequency, Duration and Person Days Not Worked in Work Stoppages in the Federal Private Sector and Other Canadian Jurisdictions

The next charts provide a statistical profile of the contributors to PDNW including frequency and duration which contribute to the total of the PDNW in a work stoppage. They are presented with some of the factors that influence their levels.

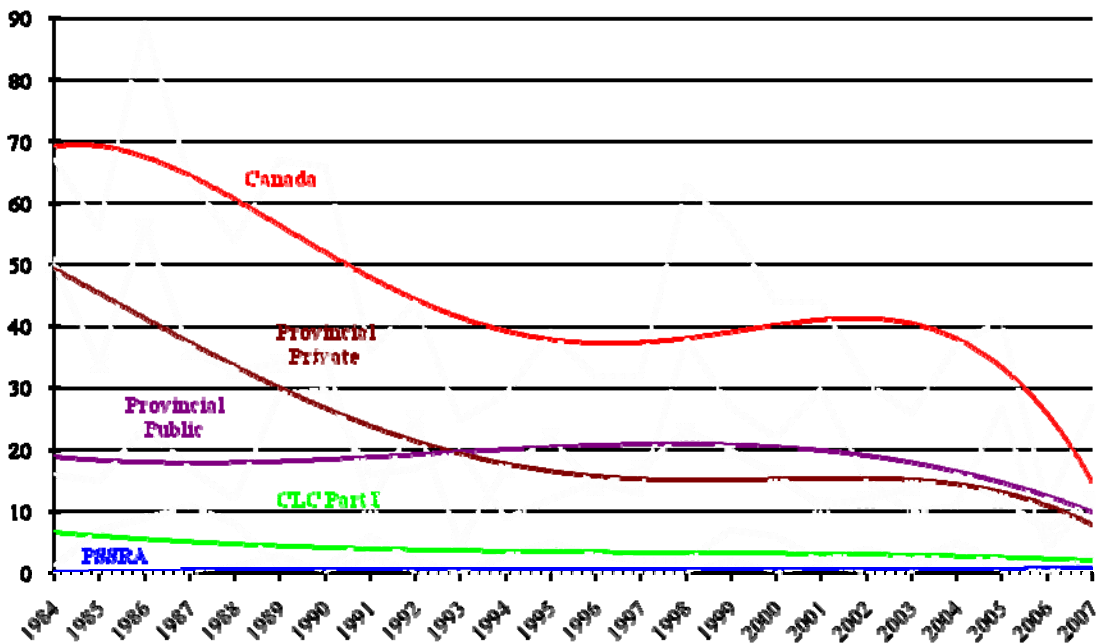
The data have been compiled by the Research and Data Development Division of the Labour Program of HRSDC and in many cases offer a perspective not only on the federal private sector, but a comparison with other federal and provincial jurisdictions.

¹⁷ Hale, Dominic. “International Comparisons of Labour Disputes in 2005,” *Economic & Labour Market Review* 1:4 (2007).

Frequency of Work Stoppages

Work stoppages are decreasing around the world. Canada and the federal private sector are following the same trend as seen in Chart 2-6. Of particular interest is the decrease in work stoppages in the provincial private jurisdiction which has led the way in the country. The federal private sector has experienced a more moderate, but definite trend towards fewer work stoppages. The work stoppages in the federal public jurisdiction (*Public Service Staff Relations Act* (PSSRA)) have been so few during this period that its trend line is barely visible at the bottom of the chart.

Chart 2-6: Trends in Frequency of Work Stoppages, 500+ Workers



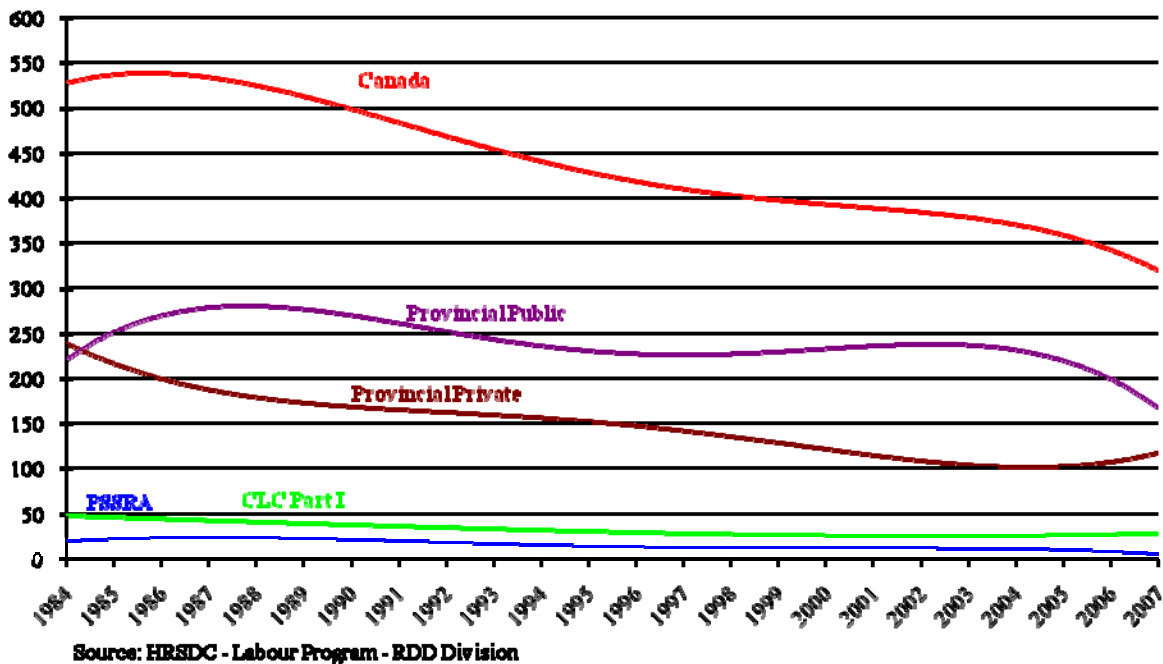
Source: HRSDC - Labour Program - RDD Division
 Source: HRSDC - Labour Program - RDD Division

Number of Collective Agreements

While a number of factors contributing to the falling number of work stoppages are unknown, some causes of these trends may be seen from other long term trends.

For example, work stoppages would be expected to fall if the number of collective agreements was also decreasing. This is in fact the case as seen in Chart 2-7. The falling number of collective agreements may be explained by falling union density or the increasing size of bargaining units through mergers. The provincial private jurisdiction leads the way in the decline in the number of collective agreements, while the number of collective agreements in the federal private sector is declining more moderately.

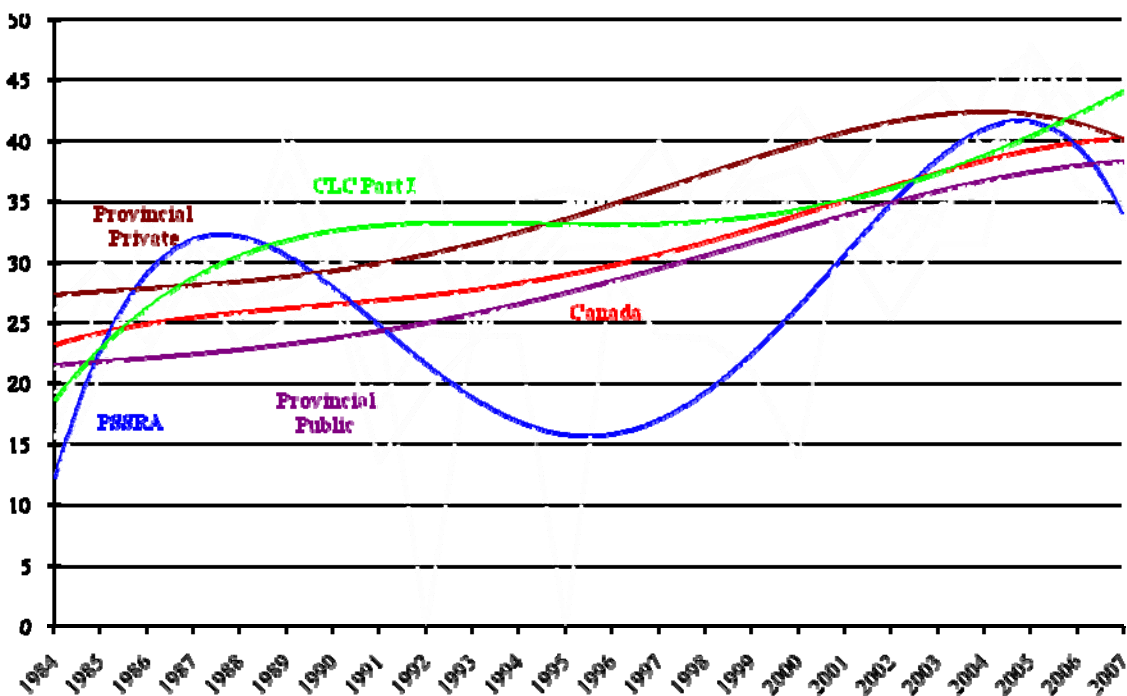
Chart 2-7: Trends in Number of Collective Agreements, 500+ Workers



Duration of Collective Agreements

If the length of agreements is increasing, a decrease in the frequency of work stoppages should follow. This is what is happening in Canada in all of the jurisdictions as seen in Chart 2-8. The average term of collective agreements is presently the highest in the federal private sector, but until recently, the provincial private jurisdiction led the way.

Chart 2-8: Trends in Average Duration of Collective Agreements (Months), 500 + Workers

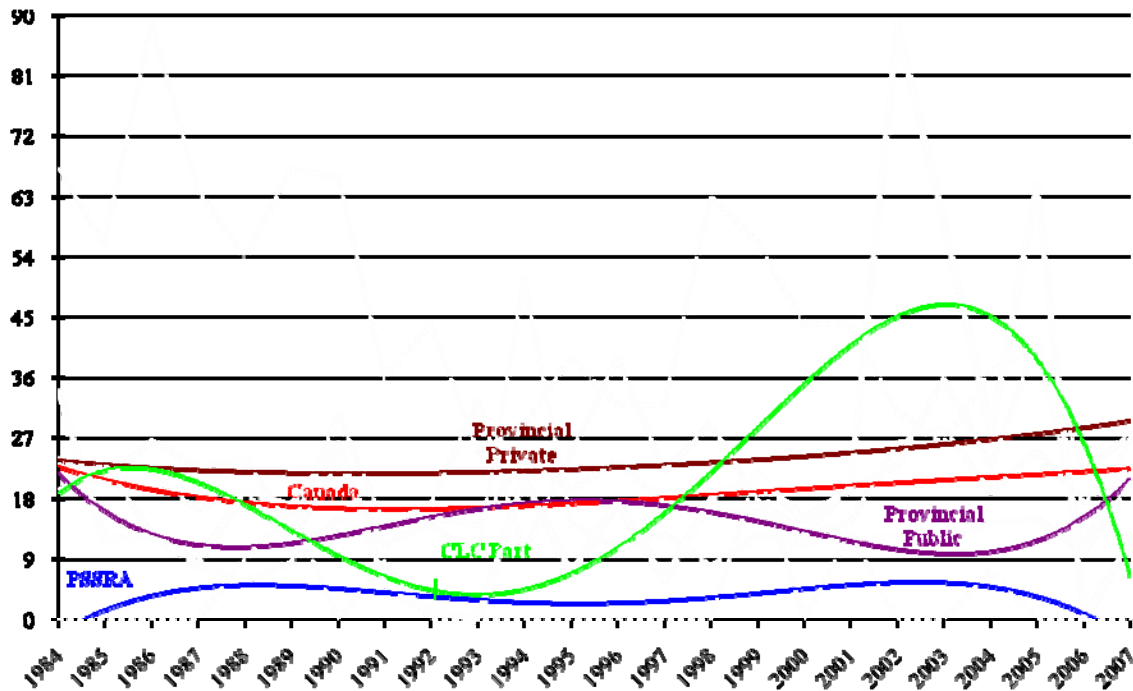


Source: HRSDC - Labour Program - RDD Division

Duration of Work Stoppages

The duration of work stoppages is one of the three factors, along with the frequency of work stoppages and the size of the bargaining unit, which makes up the PDNW figure. As can be seen from Chart 2-9, the duration of work stoppages has been increasing moderately in all jurisdictions except the federal private sector where starting in 1995, the duration of work stoppages increased dramatically.

Chart 2-9: Trends in Average Duration of Work Stoppages (Days), 500+ Workers

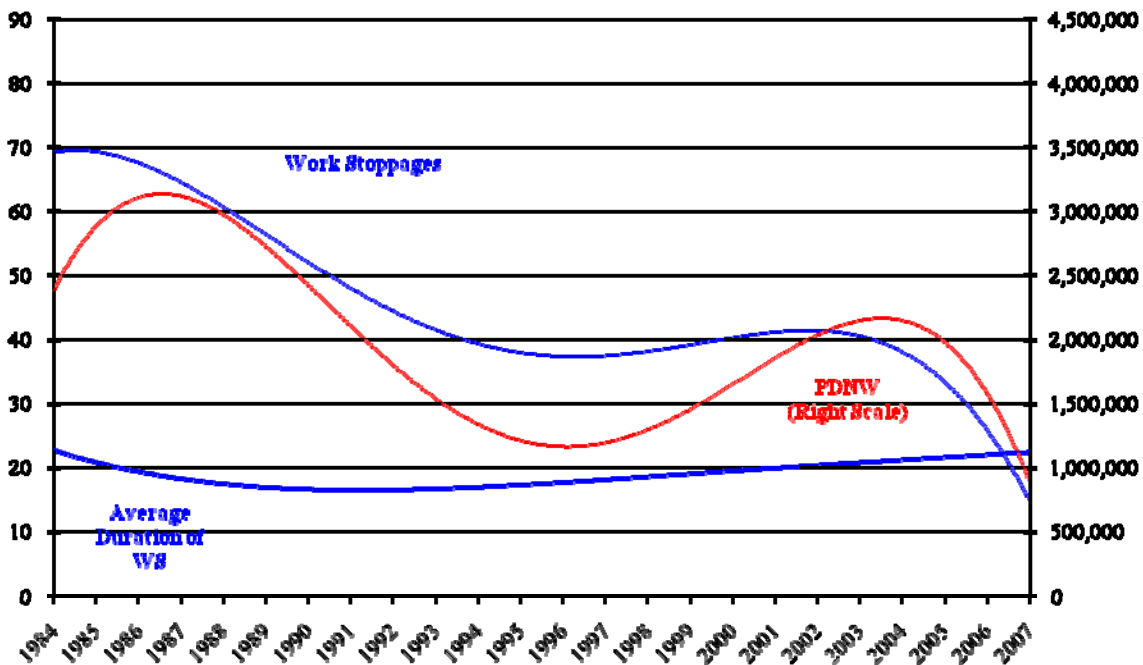


Source: HRSDC - Labour Program - BDD Division
 Source: HRSDC - Labour Program - BDD Division

Person Days Not Worked and Duration of Work Stoppages

Chart 2-10 tracks the trend lines of PDNW against work stoppages and the average duration of work stoppages. At a national level, it would appear that frequency of work stoppages played a stronger role than duration of work stoppages in the increase in PDNW that occurred starting in 1997.

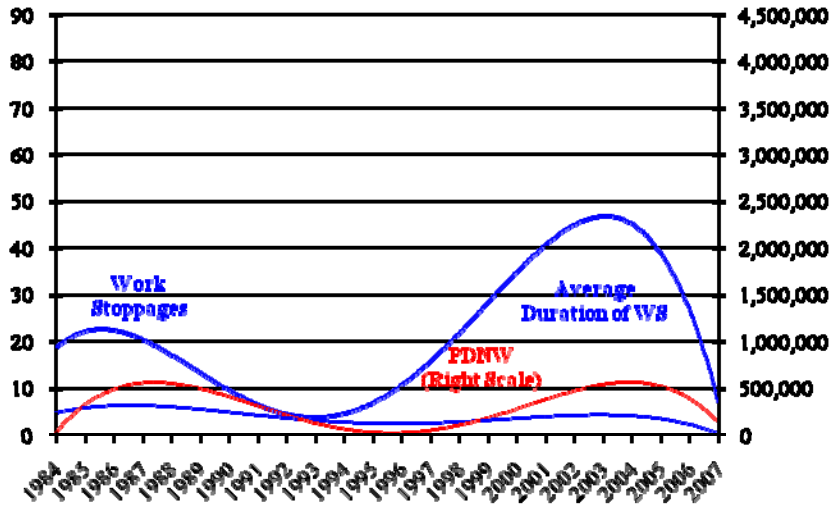
Chart 2-10: Trends in PDNW, Average Duration (Days) & Frequency of Work Stoppages, 500+ Workers, Canada



Source: HRSDC - Labour Program - RDD Division

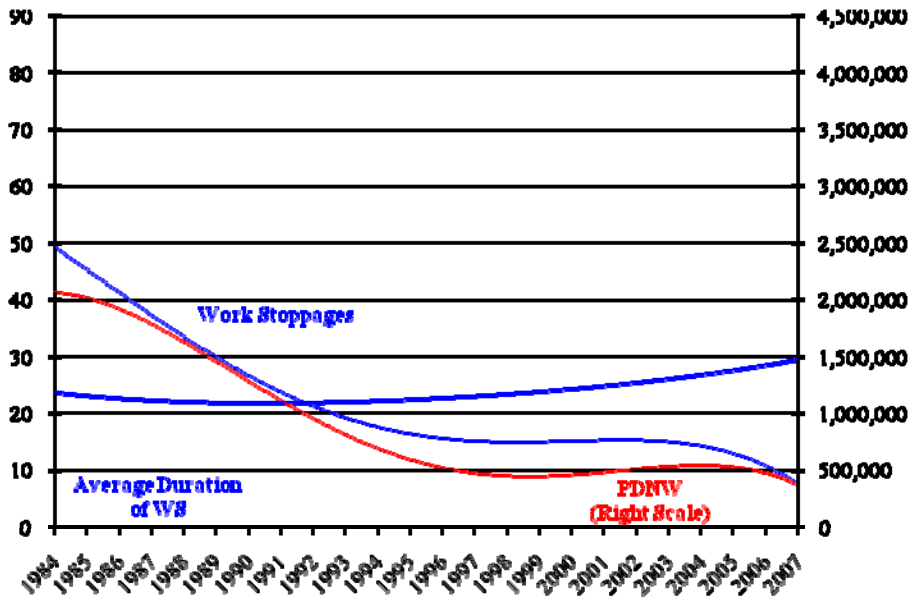
Charts 2-11, 2-12, 2-13 and 2-14 portray the same information as Chart 2-10, but for each of the four jurisdictions. Comparing the federal private and provincial private jurisdictions demonstrates very different situations. Duration has increased significantly in the federal private sector in comparison to the provincial private jurisdiction in which there was only a slight increase, whereas the PDNW has decreased significantly provincially, but increased significantly since the new millennium in the federal private sector. Given that the PDNW also increased significantly during this period, the duration of work stoppages was clearly a major contributing factor to these results and is an area that must be carefully considered in developing options.

Chart 2-11: Trends in PDNW, Average Duration (Days) & Frequency of Work Stoppages, 500+ Workers, CLC Part I



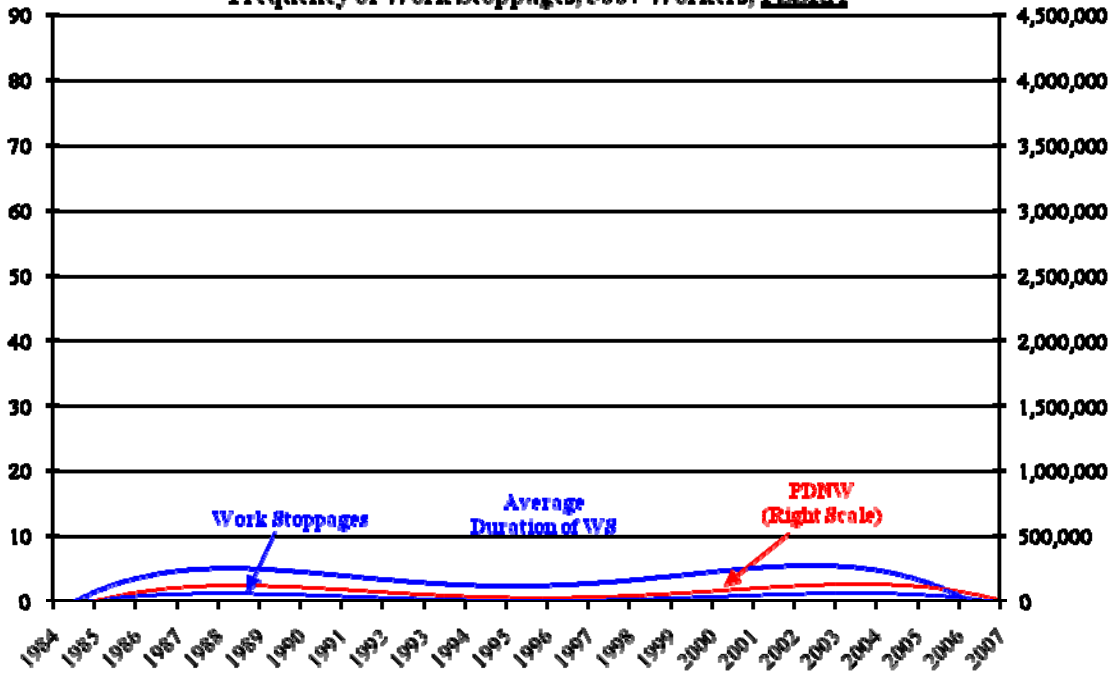
Source: HRSDC - Labour Program - RDD Division

Chart 2-12: Trends in PDNW, Average Duration (Days) & Frequency of Work Stoppages, 500+ Workers, Provincial/Private



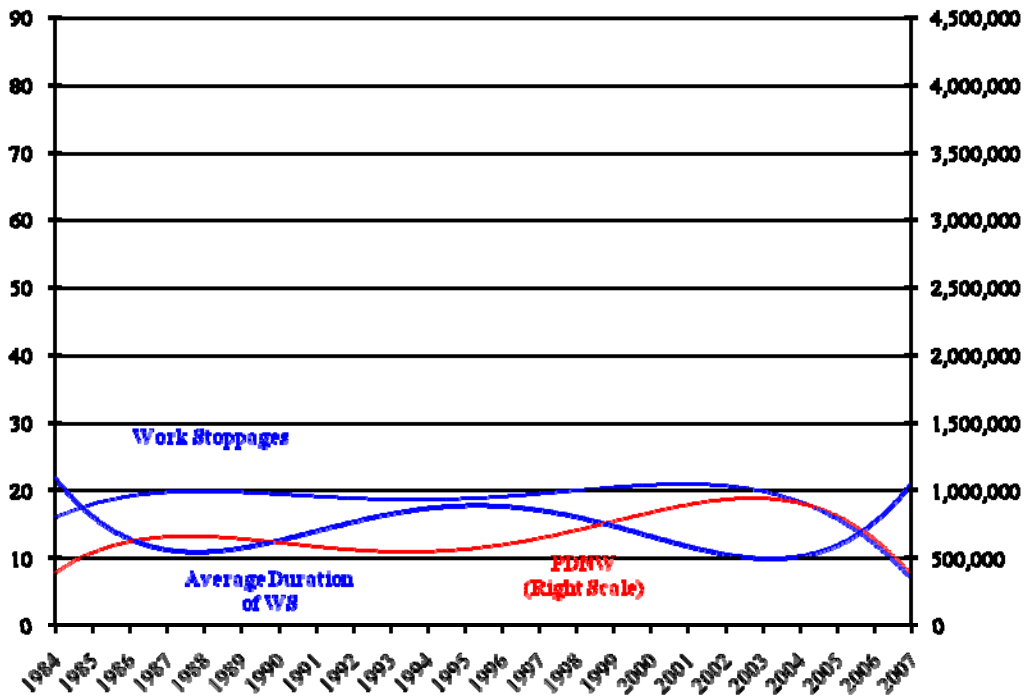
Source: HRSDC - Labour Program - RDD Division

Chart 2-13: Trends in PDNW, Average Duration (Days) & Frequency of Work Stoppages, 500+ Workers, PSSRA



Source: HRSDC - Labour Program - RDD Division
 Source: HRSDC - Labour Program - RDD Division

Chart 2-14: Trends in PDNW, Average Duration (Days) & Frequency of Work Stoppages, 500+ Workers, Provincial Public

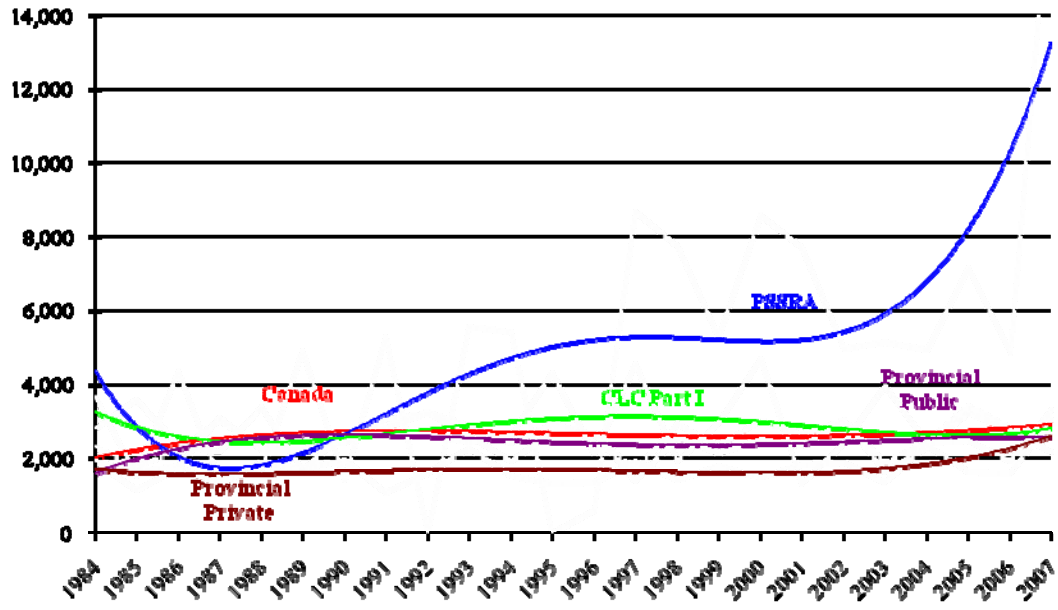


Source: HRSDC - Labour Program - RDD Division

Size of Bargaining Units

Chart 2-15 describes the average size of bargaining units in Canada in the four jurisdictions. Apart from the large increase in the size of the bargaining units in the federal public sector, most are rising slowly, except for the federal private sector in which the bargaining unit size appears to have a moderately downward trend line. It would not appear that the changes to size of bargaining unit would have any significant effect on the increase in PDNW, particularly where only a few work stoppages account for the large majority of PDNW each year.

Chart 2-15: Trends in Average Size of Bargaining Units , 500+ Workers



Source: HRSDC - Labour Program - RDD Division

Conclusions from the Statistical Evidence in Sections I to III

The statistical profile of industrial relations in the federal private sector would appear to confirm a number of points.

- Despite the cautions with respect to variations in data collection methodology and threshold levels for inclusion of specific work stoppages data in various countries, the Hale article appears to be generally reliable in depicting Canada as having one of the highest levels of PDNW in comparison with other countries.
- The federal private sector (*CLC Part I*) is the highest relative contributor to PDNW through work stoppages in the Canadian context.
- PDNW arise principally from a few major work stoppages each year.
- These occur more often in the transportation and culture and communications sectors and mergers and acquisitions. The latter accounts for 75% of the work stoppages since 2000.
- The increasing duration of work stoppages appears to have contributed significantly to the increase in PDNW in the federal private sector since 2000 despite the falling number of work stoppages.
- The decreasing number of work stoppages appears to have some correlation to the falling number of collective agreements and their increasing terms.
- In the private provincial jurisdiction, the decline in PDNW may also be a function of the decreasing density of unions.
- In comparing the federal and provincial private jurisdictions, the provinces appear to have a better record for PDNW, frequency and duration of work stoppages.

The Federal Private Sector Needs to do Better

Despite concerns about discrepancies in the collection of work stoppage data at the international level, it is evident from the Hale study that Canada must focus on finding ways of reduce the number of PDNW due to labour disputes. Canada already had the dubious distinction of having

the highest PDNW rate from 1986 to 1995¹⁸ and it does not appear to have changed that ranking significantly in the following decade. Canada has consistently ranked in the top four countries in terms of PDNW per 1,000 employees, suggesting that other industrialized countries are doing a significantly better job of managing industrial relations conflicts. For this reason, examining the causes and effects of work stoppages in the federal private sector and seeking ways to improve Canada's labour relations record merit significant study.

As demonstrated, the federal private sector (*CLC* Part I) is the highest relative contributor to PDNW through work stoppages in the Canadian context. The data needs to be adjusted to take into consideration the higher rate of unionization in the federal private sector than its provincial counterparts. In addition, the composition nature of the FPS with its national infrastructure industries makes major strikes relatively more frequent and contributes to the higher number of PDNW.

Based on the submissions of the stakeholders, it appears that they were not aware of the relatively higher number of PDNW in the FPS to enable relative comparisons of PDNW in the different Canadian sectors. In addition, their concerns over the reliability of the international data (although not justified) may have led to a conclusion that the federal sector under Part I of the *Canada Labour Code* was doing better than it has.

Developing Options Based on Better Targets and Data

Considering the central position of federal private sector industries in the Canadian economy and considering some of the circumstantial evidence supporting work stoppage figures in the last decade, there should be even more concern generated by these findings. The large infrastructure role of industries in the federal private sector means that the economic impact of major work stoppages has the potential to inflict serious harm to the Canadian economy. It is fair to conclude that the federal private sector must do a better job of limiting PDNW through labour disputes. One of the ways to meet this goal is to set realistic and achievable targets.

It would also be helpful if work stoppages targets could be based on accurate comparable international data. In order to achieve this goal, there exists an urgent and compelling need for better data collection and more transparency and consistency in the breakout of information relating to work stoppages in order to facilitate accurate comparisons between EU and OECD member countries. Canada could take the lead in urging all countries to negotiate, under the guidance of the International Labour Organization (ILO), terms and conditions which would provide for the collection of common data - either on the basis of 1,000 employees in the bargaining unit or at least 1,000 days not worked through a work stoppage. Admittedly, achieving this objective may be difficult for Canada.

¹⁸ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G. Union-Management Relations in Canada, Toronto: Pearson Addison Wesley, 2005 p. 334.

At a minimum, Canadian data on PDNW should be tracked for both the private and public sectors at both the federal and provincial levels through a cooperative effort of government agencies so that comparative data by sector is readily available and reviewed each year. There is also no reason why an accurate comparison of the Canadian work stoppage situation cannot be made against the United States, utilizing data from the Workplace Information Directorate of HRSDC, Statistics Canada and the Bureau of Labor Statistics in the United States. This data should be compiled on an annual basis and published by the federal government.

While some may question the practicality of establishing specific goals to minimize the impact of work stoppages through the limitation of PDNW, there is a need to protect Canada's international reputation in the increasingly competitive global economy. For example, trade missions by the Vancouver Port Corporation to various Pacific Rim countries regularly include labour union representatives to reassure our foreign customers for major export commodities, such as grain, lumber, potash and coal, that sound labour relations are a priority. Without taking anything away from the current hard work by the stakeholders and the FMCS to minimize work stoppages in a significant sector in an era of challenging issues and change, a study to provoke new ideas and fresh consensus for measures to reduce work stoppages seems to be a timely and worthwhile endeavour.

Addendum: Employees in the Federal and Provincial Sector: Technical Note

In order to compare the magnitude of work stoppages (frequency or duration) between federal and provincial sectors over time, a commonly used indicator is the number of person days not worked (PDNW) per 1,000 workers. While data on PDNW are readily available from the Workplace Information Directorate's database, the number of workers is not. The objective of this technical note is to explain the methodology used by the Research and Data Development Division to estimate these figures.

Federal Private Sector

The only source of information for the federal private sector is the Federal Jurisdiction Workplace Survey (FJWS), which covers the Canada Labour Code Part I (Private Sector plus Crown Corporations). However, the FJWS is only available for one year, i.e. 2004. To estimate the Canada Labour Code Part I employees from 2000 to 2007, we use the closest proxy, the Employment Equity Data from 2000 to 2006¹⁹ by calculating the growth factors from 2000 to 2007.²⁰ We then apply these growth factors forward and backward to the number of employees from FJWS 2004 under the assumption that the working population under Canada Labour Code Part I grows at the same rate as the total employees from Employment Equity Data.²¹ This assumption can be justified by the fact that 86% of the total surveyed employees in the FJWS belong to workplaces with 100+ employees. Subtracting the number of employees of the Crown Corporations (CANSIM Table 1830002) from the estimated numbers under Canada Labour Code Part I, we obtain the working population of the federal private sector.

Federal Public Sector

We add the number of employees of the Crown Corporations and Federal General Government provided by CANSIM Table 1830002 to obtain the total number of employees in the Federal Public Sector.

¹⁹ These data are extracted from LA 2000 database, which covers a wider range of employers under federal jurisdiction than FJWS (e.g. Federal Public Service organizations), but includes only workplaces with 100 or more employees.

²⁰ We conservatively assume the growth factor for 2007 is the same as 2006 (rounded up to 1.01).

²¹ We used the Employment Equity number directly for Nunavut instead of applying the growth factors because they were abnormal.

Provincial Public Sector

From CANSIM Table 1830002, we have nationwide employees in provincial and territorial governments; health and social service institutions; universities, colleges, vocational and trade institutions; local general governments; local school boards; provincial and local government business enterprises. The sum of all the above employees gives the working population of the Provincial Public Sector.

Provincial Private Sector

We start with the total number of non-farm employees for 2000 through 2007 from the historical review table for the Labour Force Survey 2007 (Table CD1T07an). After subtracting our estimated number of employees in the federal private sector, Federal Public Sector, and Provincial Public Sector, we end up with the total number of employees in the Provincial Private Sector.

Chapter 3: Causes of Work Stoppages and Their Economic Impacts

The Terms of Reference require the analysis of the variables that influence the risk, frequency and duration of work stoppages in the federal private sector, along with the identification of options acceptable to both labour and management that would reduce work stoppages. This chapter will focus on the first of these tasks, analyzing causes of work stoppages in the federal private sector, with an eye on the second task, providing acceptable options.

The chapter is divided into three Sections. Section I provides information gathered from stakeholders and others with expertise in work stoppages on the causes of work stoppages in the federal private sector. Section II analyses some of the conditions or determinants identified that give rise to work stoppages in the sector. These factors are also linked to options that might be available to manage them. Section III gives some consideration to the study's mandate of identifying the sectors and regions at greatest risk of increased work stoppages in the federal private sector. Section IV provides a brief review of some of the economic impacts of work stoppages.

Section I: Stakeholder and Federal Mediation and Conciliation Service (FMCS) Personnel Views on Causes of Work Stoppages

Solicitation of Information

In determining the causes of work stoppages in the federal private sector, advice was solicited from both stakeholders and past and present FMCS personnel. Instead of asking stakeholders about specific work stoppages, information was requested simply on causes and their relation to possible options.

FMCS was asked about issues for which work stoppages had occurred, and categories of causes that contributed to work stoppages as well as a ranking of their significance. However, FMCS personnel felt that the information with respect to specific negotiations was confidential, since they had been obtained through FMCS's capacity as a mediator. They did agree to provide aggregated data on the 32 major work stoppages from 2001 to 2007 without indicating the significance of any cause. The information supplied is set out in Table 3-1.

In addition, a request was made for aggregated information on conduct of negotiation issues that contributed to work stoppages. These included: inadequate decision-making authority of unions or employers; poor relationships, such as lack of trust or hostility, and whether they were pre-existing or generated over the course of negotiations; poor communications between parties; unrealistic expectations; failure to arrive at common standards to measure outcomes; negotiators' experience and competence; failure to separate issues from personalities; and questionable

negotiation tactics, like doctrinal bargaining, posturing, and surface bargaining. The FMCS declined to provide information of this nature even in an aggregated format, citing concerns about damage to relationships with clients.

While FMCS mediators were not prepared to provide their interpretations of behavioural factors relating to negotiations, they agreed to meet in a session to review dominant causes, without speaking to any specific work stoppage. Elizabeth MacPherson, the past Director General of FMCS and now chair of the Canadian Industrial Relations Board (CIRB), provided valuable insights on the determinants of past major work stoppages in the federal private sector.

Numerous discussions were also held with academics, lawyers and arbitrators at various points in the consultation process. Although more detail would have been preferred, there was sufficient information provided to create an understanding of causes in this sector.

FMCS Data

Table 3-1 sets out FMCS mediators' best estimates of the bargaining issues and causes of the federal private sector's 32 most significant work stoppages between 2001 and 2007. Since multiple causes can contribute to a work stoppage, they total more than 32. Not including those relating to duration, the sum of contributing factors is 64, on average, two for each work stoppage. In discussions with FMCS personnel and stakeholders, it was determined that conduct of negotiation issues would have added substantially to this total.

**Table 3-1 Causes of Work Stoppages in the Federal Private Sector, 2001-2007
Based on FMCS Officers' Opinions**

Work Stoppage Issues	Number	Total	%
Economic			
i. Union seeking betterment	25	32	78.13%
ii. Employer seeking concessions		32	53.13%
Workplace			
i. Union seeking betterment or resolution of outstanding issues	24	32	75.00%
ii. Employer seeking workplace productivity changes	22	32	68.75%
Security of employment (unrelated to employer seeking concessions, i.e. protecting against contracting out for the future)	18	32	56.25%
Contributing Factors			
Employer transition situations and other intra-organizational factors	17	32	53.13%
Union transition and other intra-organizational factors	9	32	28.13%
Collateral issues, in the sense of substantive external matters not at the bargaining table			
i. Employer bargaining driven by interests of structural or organizational issues not at the table or others	15	32	46.88%
ii. Union solidarity or other labour collective movement issues not at the table	11	32	34.38%
Conduct of negotiation issues *	0	0	0.00%
Collateral formal procedural issues			
i. Collective bargaining process under the CLC	1	32	3.13%
ii. Legal proceedings before the CIRB or the courts	11	32	34.38%
iii. Procedures affecting the duration of work stoppage after it begins	8	32	25.00%

Source: FMCS, Labour Program, HRSDC

*FMCS declined to supply specific conduct of negotiation issues.

Three findings stand out from this data. First, the number of demands for economic or workplace concessions from employers is similar to that of the unions. This confirms a reversal of bargaining patterns, where wage issues, the main subject in earlier decades, have been replaced by job security and workplace issues due to restructuring and cost concessions from employers. This speaks to the competitive pressures that the federal private sector appears to be facing. One could argue that the information is not conclusive. However, the frequency of unions raising security of employment issues would seem to confirm the competitive pressures on the sector. They are further confirmed by the fact that employer transition situations were identified as the most common contributing factor to the sector's work stoppages.

A second notable aspect of this data is the extent to which collateral issues (not directly at the bargaining table) impact on the sector's work stoppages. External issues on both sides played a significant role in triggering strikes and lockouts. These are amongst the most intractable bargaining issues.

The third (and not unexpected) finding is the contribution that legal proceedings before the CIRB or courts have had on work stoppages. FMCS reports that more than one third of the federal private sector's most significant work stoppages between 2001 and 2007 were adversely impacted by legal proceedings. Without knowing the breakout of this data between the CIRB and the courts, the extent to which these issues related to the CIRB is not clear. However, it can be assumed that these complaints were all directed at the CIRB inasmuch as the stakeholders complained that inconsistent decisions and legal procedural delays before the CIRB were a major factor in precipitating many of the sector's major work stoppages.

Views on Causes of Work Stoppages from Discussions with Stakeholders and Other Industrial Relations Experts

Discussions with stakeholders, mediators, arbitrators and academics reinforced most theoretical interpretations described in the next Section II of this chapter.

There was a general consensus that work stoppages are very idiosyncratic rendering them difficult to classify. Stakeholders agreed with the proposition that some work stoppages are inevitable and even necessary because of the interaction of different causes, the challenging nature of union-management and union-member relationships, and complications arising from the behavioural element of the bargaining process.

However, one mediator was of the view that nearly all substantive bargaining issues, no matter how complicated and challenging, could always be worked out if other variables did not contribute to the problem.

Work stoppages were described by one experienced mediator as being something of the nature of a perfect storm. They involve an unfortunate combination of personality problems, difficult

bargaining issues (concessions, pensions etc.) and surrounding circumstances (economic cycle, particular industry e.g. transportation) coming together in an inopportune manner to thwart settlement.

All cited a large variety of factors as having contributed to work stoppages in the sector over the past decade. These include:

- hardened attitudes from poor pre-existing relationships;
- parties avoiding meaningful bargaining by refusing to discuss legitimate concerns, imposing unrealistic conditions, and employing an overly-aggressive or formalistic style of negotiation;
- disrespectful and even outrageous behaviour by negotiators;
- doctrinaire attitudes among negotiators;
- mistaken perceptions of a party's own or their adversary's strength;
- unrealistic expectations;
- incomplete information on issues being bargained;
- failure to recognize bargaining as a strategic activity;
- failure to identify at the outset whether there is a settlement zone;
- inexperienced negotiators with an inability to read signals, strategize or focus on key issues, or pay attention to key details;
- leadership issues, particularly on the union side, exacerbated by internal politics or executive election cycles that lead to inconsistency in bargaining positions;
- poor communications skills;
- delays in the bargaining process as a result of poor scheduling, sometimes greatly complicated by outside processes;
- deadline bargaining without full disclosure of information resulting in breakdown of talks;
- parachuted union negotiators taking over from local committees and interfering with pre-existing relationships without always being well-informed;
- succession issues affecting negotiators: these range from retirement to burnouts and are a particular problem on the union side where negotiators face the additional stress of having to manage expectations; traditional pools of talent are drying up for these positions in line with falling labour density and funding; and diminished funding for or the closing down of training facilities;
- declining back up expertise, as evidenced from diminishing course lists in industrial relations at universities and colleges due to declining student interest and funding issues;
- union and management stakeholders not seeing issues in the same manner as a result of employing negotiators with different backgrounds, styles and attitudes e.g. employers tending to use university-trained personnel versus the more practical negotiators elected by unions;

- pattern bargaining (setting terms across the country without regard to local situations or real bargaining on positions);
- bluffing, typically in situations where profits and wages are rising quickly (e.g. Western Canada);
- overly complex negotiations on too many issues leading to frustration;
- a lack of trust or credibility;
- union militancy, especially in small communities where work stoppages can become a *cause célèbre* in the press, limiting room for flexibility for the parties;
- unions misreading membership interests, resulting in failures to ratify;
- real decision-makers not being at the table, particularly in large multi-national corporations;
- availability of alternate employment for strikers;
- situations of no cost to members for going on strike, e.g. strike pay better than if the employees had worked, or employers indirectly funding strikes;
- changes of ownership or CEOs, followed by plans to rapidly initiate new workplace procedures (e.g. over discipline) without meaningful discussion;
- employers not accepting the legitimacy of unions, particularly in situations of new certifications or acquisitions by foreigners;
- inexperienced mediators;
- mediators not being aggressive or creative enough to narrow the final bargaining positions gap;
- over-legalization of CIRB procedures and decisions;
- a CIRB decision forcing work stoppages as the only means to avoid its consequences;
- unions not understanding their own interests or refusing to follow them because of internal issues.

Some mediators concluded that work stoppage problems encountered because of organizational change reflected a lack of planning and experience with issues encountered. They noted that some employers did not recognize pending labour issues in meetings and public statements in lead up periods to organizational changes.

Views of Labour on Work Stoppages

The Canadian Labour Congress (CLC) indicated that a strike is only used when there is no other means to achieve a fair collective agreement. It added that work stoppages can and often do contribute to a long term improvement of labour relations between the parties.²²

²² Submission by the Canadian Labour Congress (CLC), June 2008, p. 4.

All of the unions indicated that the use of replacement workers increased the frequency and duration of work stoppages. The Teamsters union was of the view that the issue of replacement workers was not within the ambit of this study and that the speed and conduct of the study did not lend itself to meaningful discussions of the *Canada Labour Code*.²³ Teamsters stated that most work stoppages were caused by irreconcilable differences between the parties, where employers refuse to give sufficient pay raises while asking too much of their employees to be more productive. In other cases, employers are simply asking for too many concessions from employees. That situation is made more serious in the current globalized market.²⁴

The main cause from labour with respect to major work stoppages in the telecommunications sector was organizational change resulting from government deregulation and privatization policies, exacerbated by employers' use of replacement workers. United Steel Workers rejected the notion that the country's international competitiveness is dependent on reducing the frequency and duration of work stoppages; that all Canadians have an interest in advancing economic prosperity. They felt that prosperity should not and cannot be bought at the expense of labour or other basic human rights.²⁵

Most also acknowledged that the CIRB often played a role in complicating, if not precipitating, some work stoppages.

Employers' Views on Work Stoppages

Federally Regulated Employers –Transportation and Communications (FETCO) did not address the question of causes of work stoppages, but stressed the need for measures to ensure the competitiveness of Canadian employers in an increasingly global market.²⁶ Other employers described the causes of significant work stoppages as arising mostly from major organizational change in the form of companies or unions merging, privatization, downsizing or sub-contracting. They, in turn, attributed these transitions to tremendous competitive pressures and unparalleled technological change.

One employer representative described the complexity of the instabilities and stressors for work stoppages involving mergers and acquisitions in the following terms:

“These are difficult from an industrial relations (IR) perspective because every case is different and much turns on the facts (e.g. previous bargaining unit structure, plans to integrate, etc.). These events tend to be accompanied by some stress in the organizations affected.

²³ Submission by Teamsters Canada, May 2008, p. 2.

²⁴ Submission by Teamsters Canada, May 2008, p. 2.

²⁵ Submission by the United Steelworkers (USW), 2008, p. 4.

²⁶ FETCO Submission, p. 12.

First, the business drivers leading to the restructuring often are caused by market drivers (consolidation in the industry, competitive issues) so the LR (labour relations) issues are anything but “business as usual” and often deal with cost issues that are core to the business, no truer than when one or both of the firms is facing financial pressures.

Second, any significant organizational change brings with it changes to core processes/methods in the business - generally, basic contractual provisions in the collective agreement are often linked to how the work was previously performed (e.g. scheduling based on hours of operation, benefit and compensation plans, provisions related to contracting out, employment security, etc.) along with usually some level of downsizing, rightsizing, consolidation, etc - so there is “physically” (if that is the right word) a lot of work that must be done by the parties to understand the impact of those operational changes on contract provisions which often is uncertain until the corporate part of the transaction is completed - so you can somewhat be prepared but until the two organizations (in the case of a merger) actually merge, the management teams can make whatever assessments/decisions they need to make at the “shop floor” level that tend to be covered in contracts.

Third, reflecting the situation-specific nature of these types of transactions, although there are general principles and Code provisions that apply, it would be almost impossible for the CIRB, by example, to publish a comprehensive guidance that could be relied upon to tell the parties ‘this is what will happen, from a labour law perspective.’

And fourth, there are often either different unions and bargaining unit structures (what is included in the unit, what is excluded) or mixes of unionized and non-unionized teams that will be merged/affected as a result of the transaction.”²⁷

Some employers recognized that firms in large-scale change often fail to consider or acknowledge stakeholder issues in their decisions.²⁸ Other employers raised issues of leadership and poor communications as significant contributors to work stoppages.²⁹

Employers tended to be even more critical of the CIRB for delays in handing down decisions on issues that impacted enormously on collective bargaining. There were also numerous complaints about the inconsistency and poor quality of CIRB decisions. These included cases in which decisions ignored stakeholders’ positions and imposed remedies with consequences that neither side had requested.

²⁷ Human Resources Director that requested to remain anonymous.

²⁸ Submission by NAV Canada, May 2008, p. 3.

²⁹ Ibid., pp. 2-3.

Conclusions

Numerous reasons were cited for work stoppages from a myriad of sources, paralleling the list of causes provided by the texts on the subject. They varied from problems in the negotiating process, the nature of the parties and mandate issues, the nature of the work stoppage issues, and the prevailing circumstances.

There was consensus to support the statistical findings that transition issues involving employers and union restructuring was the principal cause. Competitive forces and the demands that employers were making on unions for concessions appear to be the source of the work stoppages that are causing the high number of person days not worked in the sector.

Section II: Analysis of Causes of Work Stoppages and the Collective Bargaining Processes

This section provides an analysis of some of the conditions or determinants identified as giving rise to work stoppages in the sector. These factors are related to options that may be available to manage them.

It is a challenge to explain the causes of work stoppages because they are, by nature, unique and in large part determined by the values and expectations of participants or the unique circumstances in which they occur. Many argue that work stoppages are not reducible to causal models, since collective bargaining is often far from a rational business process. The views of persons working in the field have shown that a number of different factors contribute to the risk or duration of work stoppage. The leading text in the field in Canada surmises that work stoppages “remain somewhat of a mystery, an area where we should be modest about our ability to predict behaviour and consequences.”³⁰

An Experiential Approach to Analysing Causes of Work Stoppages

In order to develop options to avoid these causes and the strikes, work stoppages will be assessed from the perspective of stakeholders, or someone at the bargaining table conducting a post-mortem on what went wrong to cause a work stoppage. This will put the focus on the participants, their attitudes and the nature of their relationship, as well as negotiators’ skills, competence, decision-making power and the nature of issues that are the subject of bargaining. The approach, while not comprehensive, will help identify options signalled by stakeholders. These revolve around improving union-management relationships and establishing a Council of stakeholders and the FMCS that would function in some measure to improve negotiators’ and mediators’ skills.

This approach has also been selected because there appears to be little in the way of recent research attempting to correlate relationships with work stoppage incidence and duration. To a certain extent, this is surprising and would appear to represent an omission in our literature on determinants of work stoppages. Multivariate analysis of some relationship-related issues based on 1981 data from employers concluded that strike activity is likely to be lower when workers are granted greater influence and autonomy in the workplace and when management adopts progressive human resources practices.³¹ Obviously more research is required in this area, particularly since industrial relations experts have long trumpeted integrative bargaining and

³⁰ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G., Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 369.

³¹ Godard, John “Strikes as Collective Voice: A Behavioural Analysis of Strike Activity”, Industrial and Labor Relations Review 46.1 (1992) p. 172.

collaborative relationships as the direction that unions and management should be pursuing to achieve a less adversarial workplace and better collective bargaining results.

Relationships and Attitudes of the Participants

Common sense confirmed by personal experience suggests that the relationships and attitudes that stakeholders bring to the table play a significant role in determining whether bargaining will lead to an agreement. The motivation to build relationships can, over time, foster the development of constructive practices that help parties resolve their differences. In contrast, long-standing adversarial relationships and the absence of common understanding or shared experience, normally reflect that parties have not developed the right attitudes to overcome their differences, to manage their conflicts or to arrive at solutions that build on shared interests or accommodate opposing ones. In the view of the stakeholders, developing good relationships will help reduce work stoppages.

Changes in attitudes do not arise out of thin air. While adversarial labour-management relationships may have their genesis from the inherently conflictual nature of the parties' interests, those beginnings do not necessarily determine the final outcome of their dealings. Numerous examples in the federal private sector demonstrate convincingly that parties ultimately determine the nature of their relationship. It is a function of their motivation and the effort they apply, abetted by training and assistance from experienced personnel in agencies like the FMCS.

Union-management relationships have traditionally been characterized by disputes over wages and benefits, a well-developed grievance procedure, strong adherence to seniority, and restrictive work rule and job classification procedures. They have typically been adversarial and power-oriented with both parties viewing their relationship as distributive and accepting the notion that management is responsible for increasing the organization's wealth, whereas unions' responsibility is to bargain on behalf of employees for a share of that wealth, including productivity bargaining.³²

While there has been progress made towards changing this traditional relationship, it continues to characterize most industrial relations in Canada and affects the determinants of work stoppages most often cited in academic literature. In particular, the theory expressed by academics such as Godard will be examined. He sees work stoppages as a manifestation of collective resentment - that distrust and resentment are almost always present in the workplace.³³

³² Wagar, Terry H. "The Labour-Management Relationship and Organization Outcomes, Some Initial Findings", *Relations Industrielles* 52.2 (1997) p. 431.

³³ Godard, John. "Strikes as Collective Voice: A Behavioural Analysis of Strike Activity", *Industrial and Labor Relations Review* 46.1 (1992) p. 162.

Adversarial relationships can also reflect questionable endgames or bad faith motives. Employers may act in a disrespectful but contemptuous fashion, reflecting the anti-union animus that can, in some cases, motivate their actions. Union representatives reported instances where employers attempted to deliberately sabotage relationships and have them destroyed. Others described instances of employers using work stoppages to dispose of excessive inventory or to profit in other ways at the expense of workers.

Unions can also be unhelpful if their negotiators approach bargaining with doctrinaire views or overly politicized values. This can result in similar over-arching negative attitudes towards all employers, and the employment of unnecessarily adversarial bargaining tactics. In addition, strikes may be used “to establish or enhance reputations for subsequent rounds of bargaining” or “by union leaders to solidify the rank and file, to find out what they really want and are prepared to give up, or to lower their expectations as the strike runs its course.”³⁴

Identifying measures to change such attitudes should be approached carefully, since they are prone to result in intractable situations. Such instances are fairly rare in the federal private sector; there appears to be a good deal of mutual respect and willingness to cooperate amongst the parties. Though somewhat adversarial, the nature of these relationships is sound. They should respond to processes and environments which foster improved attitudes.

Two options brought forward by stakeholders that would appear to advance this objective will be discussed in the next chapter. One involves an expansion and improvements to FMCS’ preventive mediation programs. The second proposes the establishment of a federal union-management relations council composed of stakeholders and FMCS personnel. Among other functions, it would assist in providing leadership on attitude improvements within the federal private sector. It would also undertake joint projects with the FMCS and industrial relations consultants to support relationship- building and to improve negotiators’ integrative bargaining skills.

Skills of Negotiators and Mediators

Work stoppages will be reduced by having competent and experienced negotiators at the bargaining table who conduct themselves professionally in accordance with strategic plans to achieve collective agreements that are mutually acceptable and meet the needs of all parties.

This is particularly so in the federal private sector where bargaining is increasingly complex. Relationships are fundamentally adversarial and based on power or perceptions of power. The challenges facing negotiators are truly enormous. They include:

³⁴ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G., Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 333.

- The **complex nature of issues at the table** relating to wages (employers seeking flexibility may insist on variable incentive packages and rates); benefits (disputes over changes to pension and disability entitlements); staffing (difficulties caused by the expanding court-imposed prescriptive rights on workplaces); training and the replacement of aging work forces; competitiveness (the need for flexible operational and motivational practices); sub-contracting and security issues; and other matters that make up the strategic negotiation model used by sophisticated negotiators;
- **Interpersonal issues** that arise across the table, amongst the negotiating team, from intra-organizational issues to outside intervenors (in a world dominated by instant messaging and even the media);
- **Expectations management**, complicated by intransigent attitudes as well as changes in decision-makers and challenges to their decisions (particularly problematic for union leaders who can face challenges to their authority and must endure a ratification process that calls their decisions at the bargaining table into question);
- The introduction of **integrative and distributive negotiation techniques** that require new approaches and special training (can entail working with facilitators or other new joint processes that require negotiators to fundamentally change the way they think and act during negotiations); and
- The **stress of failure** in a deadline-driven environment where the dynamic and often self-directed process that negotiations follow can take on a life of its own.

As a result of the behavioural context and the myriad of issues that can interrupt its progress, strategic collective bargaining has been described as “messy and complex” and “far from a rational business process.”³⁵ Its relation with work stoppages is perhaps best reflected in the oft-quoted statement: “the majority of actual strikes [and lockouts] are doubtless the result of faulty negotiation... Any means which enables either side to appreciate better the position of the other will always make a settlement easier; adequate knowledge will always make a settlement possible.”³⁶

The stakeholders consulted emphasized the absolute need for proper training of negotiators, particularly on the union side where some training facilities available in the past have been

³⁵ Smith, George C.B. 2006. *Strategic Negotiations: Perspectives from a Road Well-Travelled*. Fall 2006, p. 14.

³⁶ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G., Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 338.

discontinued. They also expressed concerns over succession issues, as many long-time experienced negotiators head towards retirement.

Negotiations also invariably involve conciliators and mediators. Their role is not limited to dealing with attitudinal issues, but also involves assisting parties to work through the permutations and combinations of bargaining proposals and introducing their own creative solutions when all else seems to fail. Some stakeholders will even go so far as to attribute a work stoppage to a failure by a mediator to intervene more aggressively or creatively when parties are stalemated. Their skills set and experience in modern negotiations is, in any case, clearly seen to be as important as that of negotiators.

In addition, if developing good work relationships reduces the risk of work stoppages, then more focus should be placed on integrative and interest-based bargaining. The latter, it must be stressed, is considerably more challenging and time-consuming than traditional distributive adversarial models. It requires the free flow of information to allow parties to understand one another's real needs and objectives. Under such an approach, negotiations must emphasize commonalities while minimizing differences to find solutions that meet the goals and objectives of both sides. Integrative processes may not be as helpful for wage and benefit issues because of their inherently adversarial nature. They nonetheless perform the function of facilitating communication and thus decision-making based on reasoned outcome assessments.

Other options may be available to enhance the skills of negotiators and mediators. FMCS preventive mediation programs in particular, were considered by stakeholders to be highly effective because of the credibility and experience of its personnel. These programs add another dimension to traditional negotiators' training since modules are administered jointly, allowing union and employer representatives to learn from each other. In anticipating joint initiatives with the FMCS and industrial relations experts, the option promoting a Federal Labour-Management Relations Council holds prospects of improving the skills of negotiators and mediators.

Mandate and Authority of Negotiators to Bind the Parties

Employers' mandate

Restrictions to the mandate and authority of negotiators can also contribute to work stoppages. On the employer side, situations of inadequate decision-making authority can arise when the final decision on management's position is made outside of Canada. In addition, industrial relations issues may be of little concern to CEOs or Boards of Directors or not well understood by foreign owners who are removed from firms' daily operations. In mergers and acquisitions and in the face of competitiveness issues, these will most often be neglected by senior management.

Union negotiators quickly sense that their employer counterparts are either non-committal or mere messengers for the real decision-makers. Worse still, the negotiators may seek unrealistic objectives that reflect the uninformed and unrealistic expectations of their masters. This may incite unions to go on strike to determine an employer's actual settlement points and to bring executive decision-makers to the table.

Industrial relations clearly work best when senior human resource managers and operations personnel are integrated with firms' senior executives. This may be particularly difficult for multinational corporations. While studies show that companies tend to adapt their industrial relations practices to conform to the country in which they are operating, problems will persist when industrial relations issues are low in priority.³⁷ Options to reverse this tendency may lie with the potential role of the Federal Labour-Management Relations Council. Its mandate could include the promotion of industrial relations issues at senior policymaking tables that support the Labour Minister or to report on behalf of major economic institutions and agencies to the government.

Unions' mandate

Mandate problems for unions arise primarily from their democratic structure. Difficulties may be encountered in accurately representing member demands, and managing expectations if they become unrealistic. These challenges may be exacerbated by transitions arising from raids by another union or employer mergers (in which case employees who were formerly represented by different unions are forced to converge under a single bargaining unit). Though it is often the only mechanism by which unions can sort out internal difficulties, in the same manner that work stoppages test external power relationships, issues relating to intra-organizational transitions have contributed to some major work stoppages in the federal private sector.

Managing expectations is especially challenging for unions. To encourage union solidarity and support for negotiations, member expectations may be raised deliberately and form the basis of the negotiation mandate. During bargaining, when reality sets in, bringing these expectations down to reflect employer constraints may be problematic. A union representation election can set the bar particularly high and eventually serve to trigger an unnecessary work stoppage.

Even at the best of times managing internal conflict is problematic for unions. Their composition varies widely in terms of militancy and politicization and they will often contain factions representing different interests based on age, seniority and issues at the bargaining table.³⁸ Many

³⁷ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G., Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 345

³⁸ *Ibid.*, p. 344.

larger unions have adopted practices like internet polling to overcome communications barriers and to properly gauge members' wishes. Others employ an extensive consultation process to ensure that members agree with the terms of the tentative agreements that they reach with employers. Others have been less successful. Indeed at least one work stoppage of significant size and duration occurred recently as a result of the failure of representatives to negotiate a contract that captured the concerns of union members. There have been many other instances where a failure to ratify an agreement negotiated by the union has been followed by a work stoppage.

Management mentioned in relation to work stoppages in the federal private sector their perception that unions do not fairly describe employer final offers to their members and encourage them to adopt a more militant position than they would otherwise take. Internal union issues vary and are difficult to respond to in terms of creating options to reduce work stoppages. With respect to conveying an employer's offer accurately to union members, provisions in the *Canada Labour Code* requiring communication of this information could be strengthened. Another suggestion is to separate the open period for changing union representation from the negotiation period for new collective agreements - they now occur at the same time. There are similar issues relating to the negotiation of the maintenance of activities affecting employee health and safety where the timing might also be moved to avoid adding complexities to the negotiations.

Efficiency of the Bargaining Process

If the bargaining process used by parties is inefficient, or if it is made so as a result of unwieldy or protracted legislated bargaining rules and dispute resolution tribunals or the actions of parties, the risk of work stoppages will increase. Skilled negotiators will usually prevent this from happening. If unsuccessful, mediators from the FMCS can and customarily will bring order to bargaining processes.

Systemic impediments from legislated processes can also contribute to the problem. Mention has already been made of efficiency issues, such as changes to the timing of bargaining unit representation or the resolution of maintenance of activities issues which can become entangled with collective bargaining. Legislated processes may nonetheless also encourage insufficient preparation work by parties in advance of conciliation and in periods approaching a work stoppage deadline. Similarly, reference of disputes involving collective bargaining issues to the Canadian Industrial Relations Board (CIRB), (such as determination of bargaining unit composition or allegations of bad faith bargaining) may increase the risk of work stoppages if not dealt with in a timely or responsive fashion. These matters can be resolved by legislative initiatives to alter the timing of bargaining or to improve the timeliness and credibility of dispute

resolution mechanisms. Many options will be suggested with respect to the CIRB's structure and decision-making processes in Chapter 4.

The Subject Matter of Negotiations

Rational/Economic Issues

Most collective bargaining relates to tangible economic and workplace issues over which the employer and the union have opposing interests and views. They may relate to wages and benefits or working conditions where issues affect productivity. Party positions are generally adversarial on these issues due to the win/lose, zero sum game nature of the bargaining results, or that unions and employees are subordinate to management whose foremost goal is maximum productivity through cost restraints and efficiency.

The goal of the traditional collective bargaining process, from both a labour and management perspective, is to obtain as many objectives as possible, without the costs of a work stoppage. A negotiated collective agreement is the preferred solution in almost every case for both sides except, perhaps, where there may be some aberration in the motive of a party that seeks longer term goals or is simply irrational.

Nevertheless, at some point in negotiations when a demand is not met, one party, usually the union members, will decide that a work stoppage has become "BATNA" (the Best Alternative to a Negotiated Agreement) and launch a strike or lockout. Presumably it will make this decision following a cost-benefit assessment. This involves measuring the anticipated costs of a work stoppage (lost wages, goodwill, and pledged concessions) against predicted outcomes. Workers will withdraw their labour if the anticipated bargaining costs associated with striking are more than made up for by expected wage settlements.³⁹ When considering the preferred duration of work stoppages, employers will likewise contrast costs arising through interruptions to production against expected wage increases. In theory, work stoppages will occur only when the joint costs of both parties make that the preferred option.⁴⁰

Work Stoppages as "Mistakes"

Empirical literature on strike activity has traditionally been dominated by economic models that attribute bargaining failures to imperfect information, described as the "strikes as mistakes" approach. These models are based on the assumption that parties at the negotiating table are

³⁹ Cramton, Peter. Gunderson, Morley and Tracy, Joseph. "The Effect of Collective Bargaining Legislation on Strikes and Wages," *Review of Economics and Statistics* (1999) p. 2.

⁴⁰ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G. *Union-Management Relations in Canada*, (Toronto: Pearson Addison Wesley, 2005) p. 339.

engaged in rational bargaining processes over tangible economic issues and will avoid work stoppages if equipped with accurate information about their adversaries' economic flexibility. Rationally, if stakeholders have advance knowledge of the employers' ability to endure production losses and union members' ability to go without wages, work stoppages would not occur. Hence stoppages result only from inaccurate outcome assessments (or, more colloquially, "mistakes") by one or both parties.⁴¹

A number of mistake-based explanations relating to decision-making processes have been advanced to account for work stoppages in the federal private sector.

Limited Access to Information

Asymmetric information theories contend that the principal purpose of a strike is for unions to extract information or deter employers from bluffing about the actual economic condition of the firm. Control over information concerning the firm's economic situation is a source of power for employers. Unions charge that limiting information on the state of product markets to create a false impression of financial insecurity has become a prevalent employer strategy used to lower expectations of collective bargaining outcomes.⁴² Work stoppages, when initiated under these circumstances, effectively amount to calling management's bluff. A more equal power balance is established as firms are forced to choose between maintaining their position and avoiding a potentially costly interruption in production.

Stakeholders in the federal private sector have mature relationships, and being sophisticated, have in most cases developed the means to adequately assess each other's relative positions. This has not, however, prevented union members from refusing to ratify agreements negotiated by their union. A failure to ratify tentative agreements has come to represent an important risk to work stoppages in the federal private sector, especially when it comes to issues of salary and benefits. Often it appears to be related to a view by union members that more can be extracted from the employer by brinkmanship or going on a very short strike. By reducing incentives to bluff about a firm's financial constraints, the risk of work stoppages could presumably be reduced.

Options already exist through services provided by the FMCS that could be expanded to better share information, thereby reducing risks arising from asymmetrical information. Better still, more integrative approaches to collective bargaining could make communications more open and encourage greater sharing of information. To a large extent, this is what has happened in the

⁴¹ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G. Union-Management Relations in Canada. (Toronto: Pearson Addison Wesley, 2005), p. 338.

⁴² Tracy, J.S. "An Empirical Test of an Asymmetric Information Model of Strikes," Journal of Labor Economics 5:2 (1987), pp. 149-173.

imperilled manufacturing sector where employers have sought to gain trust and credibility with unions. There may also be scope for options to provide expanded use of independent third party information from sources such as the Workplace Information Directorate of HRSDC's Labour Program and Statistics Canada. This could assist union analysis of the employer's situation and provide substance for a union's bargaining assertions on employer profitability, placing the employer in the position of having to provide greater transparency of its financial situation. Interest arbitration also provides a means of forcing greater disclosure of employer circumstances to assist in the settlement of disputes.

Differing or Incompatible Outcome Assessment Processes

Another mistake-based theory has work stoppages arising from differences in the variables or decision-making processes parties use to predict outcomes. It has been argued that the probability of work stoppages increases when one party bases its perceptions of its opponent's position (and hence its offers and demands) on variables used to form its own stance. Some economists have argued that union demands are typically based on current indicators (e.g. past profits, employment and cost of living), as opposed to leading indicators (e.g. business failures, security of contracts) that customarily inform management offers.⁴³ Conflicting outcome expectations could also arise from differences in the method by which parties assess costs and benefits. Again these issues are more pertinent to negotiations over wages and benefits than other issues at the table.

Although monetary issues appear to have been less prominent as causes of work stoppages through recent economic boom times and periods of low inflation, this may be changing. Storm clouds are on the horizon with the spectre of stagflation, as experienced in the 1980s, returning. Options that could assist parties assess economic variables as a means of reconciling stakeholder interests and perspectives may increase in utility in terms of reducing the likelihood of work stoppages.

Integrative collective bargaining processes could again serve an education function, providing parties with a clearer understanding of each other's interests and the situations that are happening around them. Mediators, supported by economic experts and information from independent sources like the Labour Program and Statistics Canada, could deal with grievances in an open, credible and honest fashion. This should assist parties identify and pursue common interests and objectives. It might also create agreement on a common methodology to measure and apply economic indicators to the collective bargaining process.

⁴³ Rees, Albert. "Industrial Conflict and Business Fluctuations," Journal of Political Economy 60 (1952) pp. 371-382.

In terms of options, economic issues also lend themselves well to processes like interest arbitration. These rely on a principled analysis and recourse to comparators, using procedures that allow for a full and reasoned examination of the issues. Although both unions and management eschew mandatory interest arbitration, expanded recourse to voluntary arbitration in specific agreed upon circumstances would permit independent standards to be applied to reconcile differing evaluations of economic circumstances and related workplace issues. Studies suggest that on wage and benefit issues arbitrated results do not differ highly from outcomes achieved through work stoppages, although they are less effective on work rules because of the inherently conservative nature of arbitration. Outcomes resulting from voluntary arbitration should achieve comparable buy-in. In any event, they are preferable to the damage which could be caused to labour-management relations by a work stoppage.

In situations of integrative bargaining and collective agreements with terms exceeding three years, the convention of treating salary issues as a separate item in collective bargaining has gained acceptance. In some cases, unions and management have settled salary issues up front and agreed to work on the remainder of their agreements using interest-based negotiation, heavily supported by FMCS programs. Re-opener or cost of living adjustment (COLA) clauses have been included in others to allow parties to deal with price fluctuations over the term of the agreement. In either scenario, there is scope for expanded use of interest arbitration, particularly with some techniques that are now being adopted and favour settlements achieved without third party decisions.

If recourse to more mandatory measures seems appropriate, consideration could be given to extending the use of options available under the *Code* for the appointment of conciliation commissioners and boards or mediators with a mandate to make recommendations. These measures serve a similar purpose - providing an independent view on circumstances underlying economic disputes and appropriate principles for their resolution. Interventions of this latter type would be made by the Minister on the advice of FMCS staff.

Predicting Outcomes Based on Power Relationships

Power issues in the bargaining process do not readily lend themselves to empirical or other analysis when considering determinants of work stoppages. Nevertheless, it has been noted that “an analysis of labour law that ignores the underlying power relationships is doomed to failure.”⁴⁴ It is arguable that when circumstances introduce instability into union-management power relationships, the risk of a work stoppage increases significantly.

⁴⁴ Sims, Andrew C.L. “Reflections on Administering Labour Law,” Canadian Labour & Employment Law Journal 12, p. 116.

The challenging task of predicting a work stoppage is further complicated when uncertainties are introduced into the power relationship through business consolidations. A number of major work stoppages in the federal private sector have occurred within the context of mergers, acquisitions and bankruptcies that have undercut formerly stable power relationships. Recent work stoppages involving Telus (2005) and Bell-Aliant (2004) are good examples. Each followed in the wake of acquisitions or mergers through which operations were significantly altered or even expanded across provincial jurisdictions.

New bargaining units with new expectations and little pre-existing contact with management may be created in tandem with new employer structures. In these scenarios, parties will obviously be less capable of assessing the effects of the disruptions on operations. The uncertainties of these new power relationships may only “mature” through the experience of a long strike which has been found to make bargaining units less likely to strike in the future.⁴⁵

In considering power elements as predictors of work stoppages, there is also some utility in considering the “behaviouralist” approach which views strikes with a different rationality as expressions of collective discontent.⁴⁶ The explanation of “strikes as collective voice” is premised on the collectivization of worker resentment around sentiments such as fairness and legitimacy. The will or power to endure, therefore is not explainable in economic terms, but responds instead to a different set of unpredictable even irrational influences founded in behaviour and principle.

By the same token, employers may not always implement rational work stoppage contingency plans, because the ultimate decision-makers have issues of ego, incomplete knowledge, and other factors that can interfere with decision-making processes. Added to the enormous uncertainty that surrounds the negotiation process is the fact that, rational evaluations of the relative power of the parties (such as the capacity of its members to endure being off work, or to hobble the operations of the employer) are at best “guesstimates”.

FMCS has already implemented measures to assist workers and employers prepare the bargaining groundwork for issues arising from mergers and other transitions. Although it may not always be possible in situations of mergers and acquisitions, these relationship-building programs would be even more effective if used in an anticipatory fashion. There may also be scope to improve FMCS workshops by incorporating best practices from stakeholders who have experienced work stoppages.

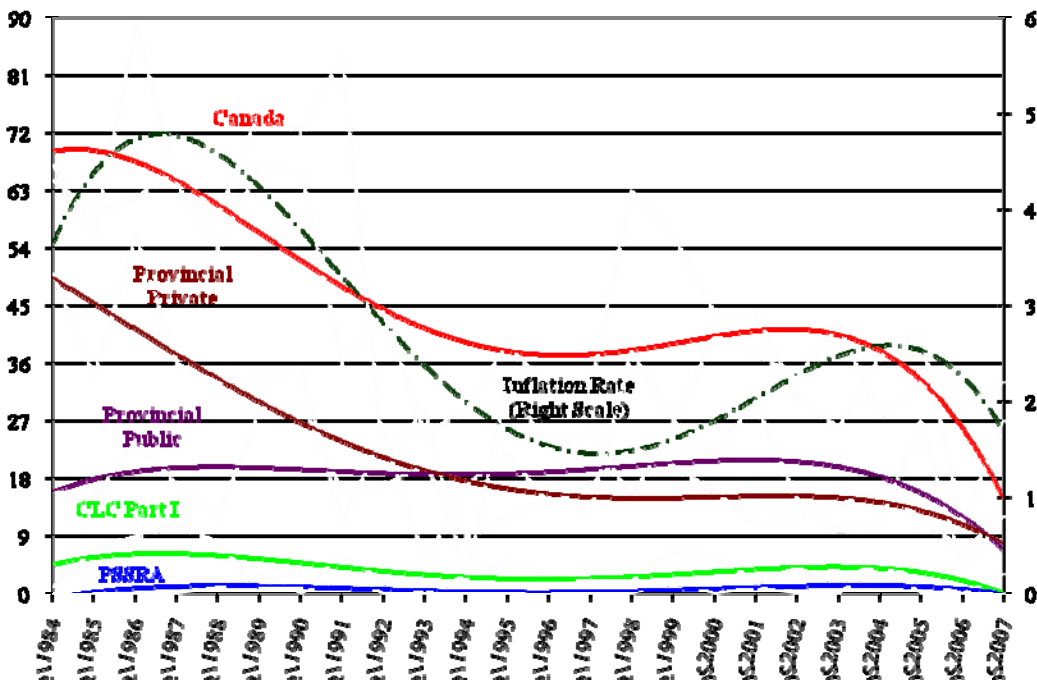
⁴⁵ Campolieti, Michele; Hebdon, Robert; and Hyatt, Douglas, “Strike Incidence and Strike Duration: Some New Evidence from Ontario,” Industrial and Labor Relations Review 58:4 (2005) p. 630.

⁴⁶ Godard, John. “Strikes as Collective Voice: A Behavioural Analysis of Strike Activity”, Industrial and Labor Relations Review 46.1 (1992) p. 162.

Economic Instability: Inflation Rates

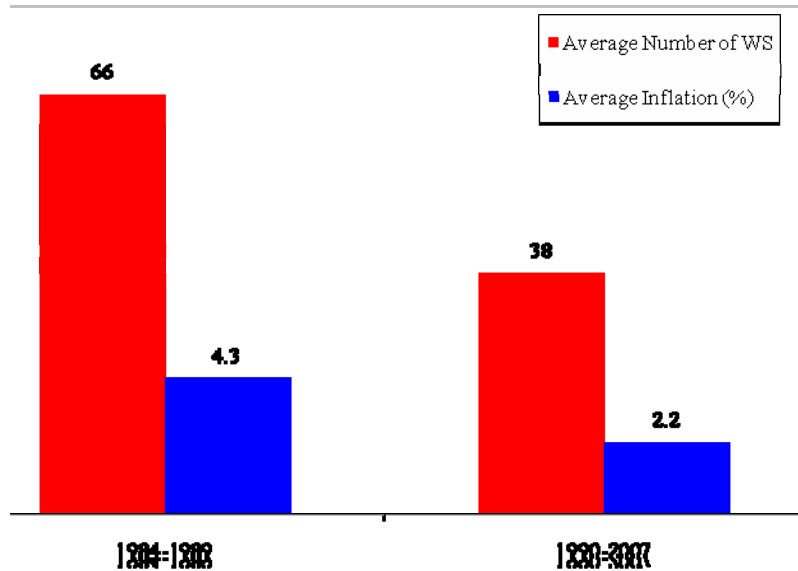
Economic factors can also influence the incidence of work stoppages. Inflation rates may be particularly important if the theory that work stoppages are caused by instabilities such as prices is true. Empirical research supports the conclusion that higher inflation correlates with increased work stoppage activity.⁴⁷ The trend lines for frequency of work stoppages and inflation in Chart 3-1 are similar in all jurisdictions. The correlation between inflation and work stoppages is even more evident in Chart 3-2 which compares two time periods. If a country is in a period of higher inflation, an increase in work stoppages may be expected.

Chart 3-1: Trends in Inflation Rate and Frequency of Work Stoppages, 500+ Workers



⁴⁷ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G. Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 341.

**Chart 3-2: Average Frequency of Work Stoppages and Inflation Rate
500+ Workers, Canada**



Issues Arising from Cost Containment and Efficiency

In discussions with stakeholders the question arose whether work stoppages in the telecommunications sector were the result of political decisions to liberalize and encourage competitiveness in this and other industry national regulatory regimes. Undoubtedly, the telecommunications sector has undergone wholesale change as a result of policies introduced to promote competition. While this has brought about restructuring and changes in power balances, these scenarios have also seen employers attempt to take advantage of changes in scale to rationalize operations and achieve productivity gains.

Traditional theory holds that when management’s strategy emphasizes cost containment and efficiency, the likelihood and duration of work stoppages increases.⁴⁸ This contrasts with situations in the “monopolistic core sector”, where management negotiation strategy emphasizes stability and accommodation, resulting in the reduction of these variables. Both models seem applicable to recent work stoppages in the federal private sector’s telecommunications industries as they move from protected regulated markets to the “competitive periphery.” These firms are being forced to concentrate their bargaining on cost containment and efficiencies. As mentioned, emphasis on these issues is believed to make the likelihood and probable duration of work stoppages greater.

⁴⁸ Godard, John. “Strikes as Collective Voice: A Behavioural Analysis of Strike Activity”, *Industrial and Labor Relations Review* 46.1 (1992) p. 162.

Competitive forces are pushing large employers to seek concessions from workers to increase productivity through more flexible workplaces, reduced salaries, and sub-contracting. Unions understandably have great difficulty accepting these. This view was expressed in the Teamsters Canada submission:

“Most work stoppages today are caused by irreconcilable differences between the parties where employers refuse to give sufficient pay raises while asking their employees to be more productive. In other cases, employers are simply asking for too many concessions from employees. This situation is made more serious in the current globalized market.”⁴⁹

There appears to be no avoiding the liberalization of competitive forces. Canada’s major concern in the face of globalization and relentless technological change is how to increase competitiveness to maintain our current standard of living. Indeed, there appears to be a large consensus in Canada, including from unions in the telecommunications sector, supporting competitive measures if properly implemented.⁵⁰

The challenge is to find the appropriate accommodation of needs that will foster competitive industries, yet still provide workers with the means to protect their interests and benefit from the results of productivity. While arising from challenging circumstances, it is not an insurmountable task. If work stoppages arising from competitive forces are to be avoided, and productivity and efficiencies sought by employers are to be achieved, options will have to be developed based on best practices that integrate and accommodate both parties’ interests as much as possible. Those proposed by stakeholders to expand and improve relationships through the FMCS and the Federal Labour-Management Relations Council represent the best hope for achieving these ends.

“Strikes as Collective Voice”

Reference has been made to the “collective voice” approach to evaluating strike determinants. Its proponents contend that while workers may seem irrational in causing themselves economic harm or jeopardizing concessions on other workplace issues by withdrawing services, strikes are indeed rational tactics by which bargaining positions are supported. As Godard explains, “the decision to strike often involves a much broader rationality, one which involves competing values, principles, and fairness beliefs, and often reflects underlying sources of discontent in the workplace.”⁵¹ Since it would appear to lend itself to the kind of options that stakeholders have

⁴⁹ Benson, Phil. Submission by Teamsters Canada, May 2008, p. 2.

⁵⁰ Submission by the Communications, Energy and Paper Workers Union of Canada to the Competition Policy Review Panel, January 11, 2008, paragraphs 3 and 4.

⁵¹ Godard, John. “Strikes as Collective Voice: A Behavioural Analysis of Strike Activity”, Industrial and Labor Relations Review 46.1 (1992): pp. 161-175.

been proposing concerning relationship building and the creation of more collaborative workplaces, this theory merits consideration.

The “collective voice” approach begins from the perspective that the decision to strike is by and large made by workers and their agents. It contends that virtually all strikes require mobilization which is achieved by appealing to workers’ conceptions of fairness and legitimacy – and not only economic self-interest. As such, strikes are expressions of collective discontent, either in general or with respect to management’s unwillingness to grant concessions to which workers believe they are entitled. The “collective voice” approach also contends that strikes are more likely to occur when union “strike power” is high.⁵² This is predicated on the view that strikes serve to not only secure economic concessions, but also act as a device for expressing discontent and getting back at management without fear of retribution. Strikes thus serve as the primary mechanism for workers to collectively voice their distrust and resentment.⁵³ While there are considerable variations possible based on the behavioural context of negotiations, the theory concludes that the likelihood of strikes and their duration increases in accordance with worker discontent and solidarity.⁵⁴

The philosophy of these propositions is by and large reflected in the attitude that negotiators bring to the table. A collaborative workplace which permits more labour involvement in decisions affecting the workplace, supports good communications, responds to worker concerns with concrete efforts to build trust and credibility, will likely have fewer and shorter work stoppages.

Duration Issues: Outcome Re-assessments in the Course of a Work Stoppage

Once a work stoppage has been triggered and previously unknown power variables are revealed, parties should presumably be in a better position to predict outcomes and thus negotiate reasonable settlements. However, with work stoppages declining in frequency and increasing in duration, this has not appeared to be the case.

No Clear Explanation for Duration

Chart 2-9 illustrated the increasing duration of work stoppages in the private jurisdictions which was considerably more significant in the federal private sector. This was assumed to have been one of the major contributors to the rapid increase in PDNW starting in the mid-1990s. The federal jurisdiction had always maintained a lower work stoppage duration than the provinces

⁵² Ibid.

⁵³ Ibid., p. 162.

⁵⁴ Ibid., p. 63.

until 1997 when duration increased dramatically up to 2003. It again decreased equally dramatically and is now once again well below the average duration of provincial private jurisdictions.

Research and analysis have not provided any concrete reasons to explain the significant increases in duration during this period. Possibly, concessions sought from unions and related security issues were so fundamental that neither side could back down. Also, the deregulation of formally monopolistic industries and the movement to competitive environments may have raised threshold issues not previously confronted by unions and employers who had operated under very different power relationships in the past. Or, technological advances may have allowed employers to better withstand the withdrawal of services by unions.

Better preparation for work stoppages by employers might also have been a factor. Gunderson theorized that both management and unions have gradually increased their ability to sustain long strikes by realizing ultimate production possibilities and building strike funds,⁵⁵ although it is not clear how this would apply to large national firms and unions in the federal private sector. One employer indicated that it had spent up to two years putting in place measures to enable it to withstand an anticipated work stoppage which subsequently occurred. The fact that the employer was preparing to meet this exigency would not have produced the type of attitude that is suggested to be helpful in successfully negotiating an agreement. In any event, none of these determinants of duration lend themselves to policy initiatives to curtail the length of work stoppages.

The stakeholders and experts consulted agreed that long work stoppages generally run counter to union interests. Their members, in an impasse, may have limited options for a graceful exit strategy. This view infers that unions may sometimes be ahead of their members (or vice versa) in finding a means to resolve work stoppages without losing face or generating internal conflict. If so, an option which might be considered would provide room for interventions by the Minister, forcing parties to return temporarily to the bargaining table.

The fact that some of the federal private sector's work stoppages are stalemated suggests that they are only partially propelled by motives relating to cost-benefit assessments. It may be that, once begun, the "rationality" of unions' militancy becomes a key factor in determining work stoppage duration. As one author expressed, "numbers can never adequately represent the anger, risk, struggle and solidarity involved in the strike experience."⁵⁶

⁵⁵ Gunderson, Morley; Ponak, Allen; and Taras, Daphne G., Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005), pp.353-354.

⁵⁶ Briskin, Linda. "From Person-Days Lost to Labour Militancy: A New Look at the Canadian Work Stoppage Data," Industrial Relations 62:1 (2007) p. 61.

All this serves to reinforce the stakeholders' consensus position that strengthening union-management relationships would lessen both the frequency and duration of work stoppages. Consideration of successful relationship models would provide scope for best practices to curb the resentment which is said to colour union attitudes towards the workplace. Some of these practices can already be observed in the federal private sector. Besides reducing the likelihood of work stoppages, constructive attitudes towards collective bargaining could hasten movement towards a settlement, thus preventing negotiations from "taking on a life of their own" and generating the type of animosity that is encountered in long, antagonistic work stoppages.

Replacement Workers

Unions cite replacement workers as a factor which extends the duration of work stoppages and increases their frequency. Replacement worker issues are very controversial between unions and management. Legislation banning the use of replacement workers is a significant power issue over which the two sides disagree vociferously.

Many of the union and management stakeholders provided data to support their side of the issue. Information taken from the various jurisdictions demonstrated that one province or the federal private sector had a higher number of work stoppages for certain years than others, or, that jurisdictions with or without replacement worker bans had more or less frequent and enduring strikes. While data of this nature is of interest, it is not appropriate to make conclusions on the basis of selected comparative data. To the extent possible, it is preferable to rely on the results of empirical analysis by industrial relations experts to draw conclusions on the impacts of various policy determinants on work stoppages.

In addition, there were some anecdotal statements from union representatives that resentment generated by the use of replacement workers contributes to the duration of work stoppages. This claim is consistent with the "collective voice" theories, that replacement workers would generate a great deal of resentment and anger to support worker solidarity for maintaining a work stoppage. This may be very accurate in some situations. However, the idiosyncratic nature of the work stoppage experience, and problems distinguishing factors said to affect duration caused by replacement workers from other determinants across a sector, make scientific measurement and analysis difficult.

One feature that challenges the labour militancy theory as the cause of increased duration in the federal private sector is the acknowledged sophistication of the unions involved in the larger work stoppages. Like the employers they face off against, they are extremely strategic in their methods and enter into and continue with work stoppages only if absolutely necessary to their interests. Worker resentment is not unimportant to them but in the final analysis, it would be only

one more arrow in their quiver of power tactics and unlikely to be the ultimate determinant of strategic decisions if not important to achieving their ultimate objectives.

Unfortunately, no information was available from the Labour Program on recourse to replacement workers, nor does the FMCS maintain information on replacement workers. On advice from the FMCS, inquiries were not made of stakeholders into the causes of specific work stoppages. Even so, the fact that replacement workers were used or not in a specific work stoppage would be inconclusive in the one or two major work stoppages involving mergers and acquisitions for which limited information was obtained. There were so many factors contributing to those work stoppages that the influence of replacement workers on either the occurrence of a work stoppage or its duration was not apparent.

The quantitative analysis is also inconclusive for these purposes. On the employer side, studies suggest that legislation in Quebec banning replacement workers had a marked effect in increasing both the incidence and duration of work stoppages between 1967 and 1985.⁵⁷ Gunderson cautions against reliance on the data, although adding that the results continue to hold based on updated analysis.⁵⁸ The updated study⁵⁹ did not include the effects of British Columbia and Ontario legislation which only came into effect that year. In addition, the study only found a negative effect from 1984 to 1988. A theoretical conclusion was also voiced that banning replacement workers increases the incidence and duration of work stoppages, suggests that these measures add to the union's uncertainty about the firm's unwillingness to pay to end the strike thus accounting for the apparent increase in work stoppages and their duration.⁶⁰

In addition, it difficult to attribute the large increase in the average duration of work stoppages in the federal private sector after 1995 to the use of replacement workers, since there has been no change to the legislation or other substantial factors affecting recourse to replacement workers. As seen earlier, prior to 1995, the average duration in the federal private sector was moderate and below that of the provincial private jurisdiction. Moreover, the 1999 amendments to the *Code* should have reduced the reliance on replacement workers in situations of bad faith. These amendments appeared to have had no effect on average duration which continued to increase significantly over the next three to four years before falling off dramatically to levels well below provincial private jurisdictions in 2007.

⁵⁷ Gunderson, Morley; and Angelo Melino. "Estimating Strike Effects in a General Model of Prices and Quantities," *Journal of Labor Economics* 5:1 (1987)pp. 1-19.

⁵⁸ Gunderson, Morley, Allen Ponak, and Taras, Daphne G. *Union-Management Relations in Canada*, (Toronto: Pearson Addison Wesley, 2005) p. 364.

⁵⁹ Cramton, Peter, Gunderson, and Tracy, "Impacts of Strike Replacement Bans in Canada," *Labor Law Journal* 50 (1999).

⁶⁰ Gunderson, Morley, Ponak, Allen and Taras, Daphne G. *Union-Management Relations in Canada*, (Toronto: Pearson Addison Wesley, 2005) p. 364.

On the union side, the contention that banning replacement workers increases the incidence and duration of work stoppages is contradicted by at least one other study.⁶¹ Budd adjusted for province-specific effects (e.g. militant labour federations unique to Québec) in a re-analysis of the data used in previous studies and concluded that banning the use of replacement workers revealed no significant effect on work stoppages. In addition, a study conducted on four work stoppages of two firms in two industries of similar circumstances in Ontario concluded that replacement workers extended the duration of work stoppages.⁶²

Without any conclusive empirical basis, the earlier studies may be less useful given that the source of demands leading to work stoppages appears to have switched from unions to employers seeking concessions from unions for increased productivity. It is not known what the effect of changing the source of the primary work stoppage issue would have on incidence and duration.

Similarly, it is not clear that empirical data from more competitive provincial jurisdictions translates well into the federal private sector with its large quasi-monopolistic national infrastructure firms. This comment is neutral for unions and management, because it is also arguable that union power in national infrastructure service entities is much greater than in manufacturing settings, meaning that replacement workers could provide proportionally greater leverage on the power scale in the federal private sector with unknown effects on the incidence and duration of work stoppages. The immediate effects of changing the power balance by banning replacement workers are unknown, since it could be introducing new instabilities into the power continuum that may or may not affect the incidence and duration of work stoppages.

Conclusions on Causes of Work Stoppages: Sections I and II

In part because of a lack of time and in part because the impetus for this study has been Canada's ranking in person days not worked, the focus has been largely on major work stoppages. These have tended to involve large bargaining units which have been off work for extended periods of time.

The analysis demonstrates that there are a wide variety of variables that can cause or contribute to work stoppages. Strikes and lockouts are idiosyncratic and are generally precipitated by a constellation of factors. How a work stoppage occurs and how it plays out are unique, sharing some, but not all characteristics with other work stoppages. From a generalized perspective there

⁶¹ Budd, John W., "Canadian Strike Replacement Legislation and Collective Bargaining: Lessons for the United States," *Industrial Relations* 35:2 (1996).

⁶² Singh, Parbudyal, Zinni, Deborah M. and Jain, Harish C., "The Effects of the Use of Striker Replacement Workers in Canada: An Analysis of Four Cases," *Labor Studies Journal* 30:2 (2005) p. 81.

appear to be four major contributing factors to work stoppages in the federal private sector which are described in order of ranking.

1. Organizational Change Driven by Employer Demands for Improvements in Productivity

Deregulation and competitive forces have pervaded the federal private sector since the mid 1990s, changing it into a hybrid sector where forces of competition have played an increased role. Seeking productivity gains appears to be the driving force for organizational change in the federal sector. The theory that the risk of work stoppages in peripheral competitive industries is higher than in monopolistic core industries seems to apply in the federal private sector. Theoretically, firms that bargain in pursuit of cost efficiencies are more likely to experience work stoppages than those in a monopoly environment. Organizational changes have included those caused by mergers, acquisitions, bankruptcies, downsizing, sub-contracting and situations where employers were seeking extensive improvements in the flexibility of firm operations.

Cost efficiency demands have always represented points of tension between unions and management. Though stakeholders in the federal private sector have been relatively successful in working these out, their progress has been overshadowed by work stoppages that involve larger bargaining units and which are of longer duration.

What has changed is change itself, both in its magnitude and speed. Change is occurring at an almost exponential rate and its impact on technology, particularly information technology, has globalized knowledge. As a result, a rapid large-scale restructuring of world economies has occurred and continues unabated. The federal private sector is caught in these processes. Formerly monopolistic or regulated oligopolistic firms are being transformed into competitive ones. Even relatively protected industries are under increased pressures from employers for productivity gains and more flexibility in operations than ever before.

Restructuring through mergers and acquisitions creates significant disturbances in the power relationships of the parties. Instabilities of any kind introduced into the union-management relationship, such as restructuring or decreasing wages in times of high inflation, raise the risk of a work stoppage. Restructuring alters the nature and organization of the employer and its unions, alters the balance in power relationships between the parties, and can result in the most intractable of all work stoppage scenarios. Until a new balance in the power relationship is established via a work stoppage, settlement of these already tough work stoppage issues is more difficult to achieve. Other changes in the power balance, such as those introduced by replacement worker legislation, could also increase the frequency of work stoppages until a new balance has been worked out.

The good news, as demonstrated by the high success rate of collective bargaining, is that the federal private sector is probably better positioned to meet these challenges than most. Its union-management relationships are mature and generally respectful at least at a surface level.

Options to meet global challenges should capitalize on these relationships and find better ways to accommodate each side's interests to avoid work stoppages due to productivity issues. This will require the type of leadership that is best achieved when stakeholders work together with the government at a senior level on policy issues and areas of common interest. They can seek compromise on solutions at a local level with the assistance of expanded and invigorated mediation services, both private and public, like those offered by the FMCS. A Council of stakeholders and the FMCS, with expanded research and analysis capacity from the Labour program and outside industrial experts, appear to be measures that could initiate a new era of relationship-building and strategic labour relations development. These options would greatly enhance processes for dealing with organizational change and managing work stoppages.

2. Behavioural and Process Factors in Collective Bargaining

This second cluster of determinants includes attitudinal, competency and efficiency factors that can prevent meaningful negotiations from occurring. These include: relationship difficulties; motivational problems discouraging real negotiation; inadequate negotiating strategies; the absence of negotiating experience and skills; adversarial forms of bargaining, such as deadline bargaining and pattern bargaining; and external judicial barriers and delays.

Again the federal private sector is relatively fortunate. Its stakeholders are highly sophisticated and, for the most part, conduct negotiations professionally and within the limits of the processes they follow. Integrative bargaining, supported by stronger relationships and collaborative workplace environments, would nonetheless bring about significant improvements on many of these issues. The FMCS is already working with stakeholders through its preventive and regular mediation services; but it is really just on the cusp of what it could achieve if its preventive mediation services were seriously upgraded. Options supporting increased procedural vigilance and commitment to deadlines by the CIRB, and initiatives to attract high-quality candidates for the Board's membership, would also help lessen the impact of these determinants.

3. Intra-organizational Issues

Intra-organizational issues, raised away from the bargaining table but affecting authority and decision-making processes, remain a challenge. Absentee leadership and a lack of authority at the bargaining table can undermine the bargaining process. Democratic processes affecting union leadership, distribution of authority, and ratification of tentative agreements are even more challenging. Options dealing with leadership issues at a senior level, spearheaded by a Council of

stakeholders and government officials, may assist in responding to employer leadership issues. Recourse to relationship-building initiatives, wider use of integrative bargaining procedures, support for collaborative workplaces, and expanded use of best practices for union membership communications on bargaining mandates and ratification procedures, along with legislative modifications to process rules governing changes to union representatives, could similarly assist in diminishing the risk of work stoppages.

4. Duration of Work Stoppages

The duration of work stoppages is affected by economic cost-benefit considerations, particularly in their initial stages. After two to three weeks, a work stoppage is normally considered to be “unsuccessful” by parties. By this time, considerable information is available as to the effectiveness of union power in preventing the employer from continuing to operate or generate profits. In situations where the employer’s contingency plans have been successful, it is difficult to determine whether it is the fundamental nature of the issues in contention in these major work stoppages caused by the forces of re-structuring or whether another form of “rationality” begins to operate. While in some situations smaller unions may be spurred on by collective resentment, it is difficult to imagine larger sophisticated, national unions veering from their very strategic approach to bargaining and the limited recourse they make work stoppages. The conclusion that better fits the evidence is that the clash between productivity demands and worker security is too fundamental to the interests of both sides for either to back down without a very enduring fight.

It is not clear what role replacement workers play in these issues as the competing theories and empirical data are inconclusive. There may be a different set of rules in play in a sector like the federal private sector which has a large number of national infrastructure entities which operate by their own rules. There does not appear to be any basis one way or the other to attribute the increase in the duration of work stoppages that occurred after 1995 in the sector to the absence of legislation banning replacement workers.

Better industrial relations and a more collaborative workplace should mitigate the duration as well as the frequency of work stoppages. The right attitudes and the desire not to damage those relationships should inspire a maximum effort on the part of the parties to quickly resolve a work stoppage. In a more adversarial context, voluntary options appear more limited. The ones that best come to mind would be: subtle measures to require continuous serious bargaining; improved influence of the Minister through better networking via a Council; and perhaps the spectre of some unwanted Ministerial-led or legislative interventions on the horizon. The prospect of the use of ministerial discretion for an order sending the parties back to work for a “cooling off” period, or even arbitration in stalemated situations, is the type of option that the parties would like to avoid and could encourage a voluntary settlement.

Section III: Predicting Work Stoppages

The Terms of Reference of this study included the requirement to identify the sectors and regions at greatest risk of increased work stoppages in the federal private sector. Beyond assessments of limited weight based on earlier comments in this chapter, practically this task proved to be unachievable. For more reliable evaluations, there is a need to create longer term assessment procedures and analytical tools within the Labour Program. Even then, the prediction of work stoppages faces inherent limitations due to the idiosyncratic nature of the subject matter.

As part of the information-gathering process, requests for assistance in predicting future work stoppages were made to stakeholders, the FMCS and the Data and Research Development Division of the Labour Program. NAV Canada provided some guidance on the issue. In its view the risk of work stoppages was related primarily to the nature of the issues being bargained by the stakeholders.⁶³ Thus, intractable issues such as those concerning defined pension benefits, employee concessions, or restructuring, for example, would create the highest risk of a work stoppage occurring. This view was confirmed by the Teamsters who indicated that employer concession bargaining was giving rise to work stoppages.⁶⁴

Also confirmed in discussions with stakeholders and FMCS was the preceding finding in this chapter that mergers and acquisitions accounted for a major portion of the significant work stoppages in the last decade or so. Accordingly, one could state with some degree of confidence that future restructuring situations present a heightened risk for a work stoppage. Inasmuch as restructuring appears to be occurring more often in the telecommunications sector, a related prediction would suggest that this sector would continue to be a likely source of work stoppages if this trend continues in the future.

To complete the assessment of bargaining issues and other pertinent variables, such as the nature of the relationships of the bargaining stakeholders in the sectors and regions, more information would have to be gathered and collated by the Labour Program. The FMCS is probably best situated to gather this information, but presently does not do so in a systematic fashion. There were, in any event, valid concerns (referred to previously) about providing information on the nature of the relationships of the parties which includes a risk evaluation of work stoppages in pending collective negotiations of FMCS client stakeholders. Nevertheless, we were advised that FMCS officers, in many cases, were aware of upcoming higher risk bargaining situations. This information is generally passed on to senior officials in the Labour Program on a confidential basis. Making such information available for a public study obviously raises different issues in terms of confidentiality. It is likely that the issue of confidentiality of information obtained from

⁶³ Nav Canada Submission, 2008, p. 3.

⁶⁴ Teamsters Submission, 2008, p.2.

stakeholders regarding risk assessment can be worked out with them in a satisfactory manner, but this could not be done in the time frame of this study. Also, to be more effective the risk assessment process requires the gathering, collation, and processing of information in a systematic fashion across sectors to assist in analysis. This undertaking exceeded the time and resource constraints of this study.

Information was also obtained from the Research and Data Development Division on potential collective bargaining sessions of the stakeholders during the next three years. The information supplied, which is contained in Table 3-2, includes upcoming collective agreements listed by employer with the collective bargaining history of the previous three agreements, including whether they resulted in a work stoppage and its duration. Analysis of this data indicates that there are some significant situations, such as that involving Air Canada where in 2009 no less than eight collective agreements will expire. Given the economic challenges facing airlines generally and the complexity and number of collective agreements to be resolved, one could conclude on a preliminary basis that the air transportation sector is at an increased risk of a work stoppage in 2009. However, no attempt was made to confirm or refute this assessment with Air Canada officials or any other stakeholder facing the expiration of a number of collective agreements in the coming years. The point is raised to demonstrate procedures that might be followed in order to provide ongoing assessments of the risk of work stoppages in any sector.

Table 3-2 Pending Expirations of Collective Agreements 2009-2011with past Negotiating History

No. of Agreements	Company name	Expiry date	No. of employees	Last negotiation status	Union name	Province	Jurisdiction
8	Air Canada (Sale Tickets rep)	31-May-09	6,430	Arbitration	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
8	Air Canada (Flight attendants)	30-Jun-09	6,000	Arbitration	Canadian Union of Public Employees	Multi	CLC Part I (Private)
8	Air Canada Jazz - Jazz Air Inc.	30-Jun-09	1,150	Other	Air Line Pilots Association International	Multi	CLC Part I (Private)
8	Air Canada Jazz Air LP	30-Jun-09	980	Arbitration	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
8	Air Canada Jazz Air LP	30-Jun-09	910	Arbitration	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
8	Air Canada Jazz Air LP	30-Jun-09	740	Arbitration	Teamsters Canada	Multi	CLC Part I (Private)
8	Air Canada (Maintenance Aircraft)	1-Jul-09	13,040	Arbitration	International Association of Machinists and Aerospace Workers	Multi	CLC Part I (Private)
8	Air Canada (Pilots)	1-Jul-09	3,100	Arbitration	Air Canada Pilots Association	Multi	CLC Part I (Private)
5	Canadian National Railway Company, Western Lines	22-Jul-10	1,250	Arbitration	United Transportation Union	Multi	CLC Part I (Private)
5	Canadian National Railway Company, Eastern Lines	22-Jul-10	1,200	Arbitration	United Transportation Union	Multi	CLC Part I (Private)
5	Canadian National Railway Company (Agt. No. 5.1)	31-Dec-10	2,150	Post-Conciliation bargaining	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
5	Canadian National Railway Company (Agt. 12 Shopcraft)	31-Dec-10	1,980	Post-Conciliation bargaining	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)

5	Canadian National Railway Co. (maintenance of way)	31-Dec-11	3,200	Bargaining	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Intl. Union	Multi	CLC Part I (Private)
4	Canadian Pacific Railway	31-Dec-09	2,320	Work stoppage	Teamsters Canada	Multi	CLC Part I (Private)
4	Canadian Pacific Railway (Non-Operating Empls.)	31-Dec-09	1,270	Bargaining	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Intl. Union	Multi	CLC Part I (Private)
4	Canadian Pacific Railway (Shopcraft)	31-Dec-10	2,290	Conciliation officer	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
4	Canadian Pacific Railway (Intermodal & Heavy Haul)	31-Dec-11	3,970	Post-Conciliation bargaining	Teamsters Canada	Multi	CLC Part I (Private)
4	CBC/Radio-Canada	29-Mar-09	1,460	Bargaining	Fédération nationale des communications	Multi	CLC Part I (Crown)
4	CBC/Radio-Canada	31-Mar-09	5,500	Work stoppage	The National Guild of Canadian Media, Manufacturing, Prof. and Service Workers/Communications Workers of America(TNG/CWA)	Multi	CLC Part I (Crown)
4	CBC/Radio-Canada	31-Mar-09	1,340	Bargaining	Syndicat des technicien(nes) et artisans(nes) du réseau français de Radio-Canada	Multi	CLC Part I (Crown)
4	CBC/Radio-Canada	26-Sep-10	580	Bargaining	Canadian Union of Public Employees	Multi	CLC Part I (Crown)
4	MTS Allstream Inc.	31-Dec-09	700	Conciliation officer	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
4	MTS Allstream Inc.	19-Feb-10	1,080	Mediation	Telecommunications Employees Association of Manitoba	Man.	CLC Part I (Private)
4	MTS Allstream Inc.	20-Dec-10	1,300	Post-Conciliation bargaining	Communications, Energy and Paperworkers Union of Canada	Man.	CLC Part I (Private)
4	MTS Allstream Inc.	31-Jan-11	850	Bargaining	International Brotherhood of Electrical Workers	Man.	CLC Part I (Private)
3	Canada Post Corporation	31-Mar-09	3,100	Bargaining	Association of Postal Officials of Canada	Multi	CLC Part I (Crown)
3	Canada Post Corporation (Revenue Postal Operations)	31-Dec-09	11,640	Post-mediation bargaining	Canadian Postmasters and Assistants Association	Multi	CLC Part I (Crown)

3	Canada Post Corp.(Carriers, Inside & Tech.)	31-Jan-11	48,000	Bargaining	Canadian Union of Postal Workers	Multi	CLC Part I (Crown)
3	NAV CANADA	31-Mar-09	2,300	Post-Conciliation bargaining	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
3	NAV CANADA	31-Aug-09	770	Arbitration	International Brotherhood of Electrical Workers	Multi	CLC Part I (Private)
3	NAV CANADA	30-Apr-10	850	Bargaining	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Private)
3	Via Rail Canada Inc. (#1 Off-Train Employees)	31-Dec-09	1,110	Conciliation officer	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Crown)
3	Via Rail Canada Inc. (#2 On-Board Services)	31-Dec-09	860	Conciliation officer	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Crown)
3	Via Rail Canada Inc. (Shopcraft-Agt. No. 3)	31-Dec-09	710	Conciliation officer	National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)	Multi	CLC Part I (Crown)
2	Atomic Energy of Canada Limited	31-Dec-10	550	Conciliation officer	Society of Professional Engineers and Associates	Multi	CLC Part I (Crown)
2	Atomic Energy of Canada Limited (Professionals)	30-Jun-11	530	Conciliation officer	Professional Institute of the Public Service of Canada	Ont.	CLC Part I (Crown)
2	Bell Aliant Regional Communications, Limited Partnership	31-Dec-11	3,700	Bargaining	Communications, Energy and Paperworkers Union of Canada	Multi	CLC Part I (Private)
2	Bell Aliant Regional Communications, Limited Partnership (technicians)	30-Nov-11	740	Bargaining	Communications, Energy and Paperworkers Union of Canada	Multi	CLC Part I (Private)
2	Penauille Servisair Inc.	30-Jun-09	1,200	Post-Conciliation bargaining	International Association of Machinists and Aerospace Workers	Ont.	CLC Part I (Private)
2	Penauille Servisair Inc.	31-Aug-09	500	Mediation	International Association of Machinists and Aerospace Workers	B.C.	CLC Part I (Private)
2	TELUS Communications (Québec) Inc.	31-Dec-09	1,010	Bargaining	Canadian Union of Public Employees	Que.	CLC Part I (Private)
2	TELUS Corp.	19-Nov-10	13,700	Work stoppage	Telecommunications Workers Union	Multi	CLC Part I (Private)

1	1641-9749 Québec Inc.	31-Dec-10	650	Bargaining	Teamsters Canada	Que.	CLC Part I (Private)
1	Aeroguard Company Ltd.	31-Mar-11	740	Post-Conciliation bargaining	International Association of Machinists and Aerospace Workers	B.C.	CLC Part I (Private)
1	Air Transat	31-Oct-10	1,100	Conciliation officer	Canadian Union of Public Employees	Multi	CLC Part I (Private)
1	Allied Systems (Canada) Company, Eastern Canada Car Carriers	31-Oct-09	900	Post-Conciliation bargaining	Teamsters Canada	Multi	CLC Part I (Private)
1	Bell Canada (Clerical & Associated Employees.)	31-May-09	11,200	Bargaining	Canadian Telecommunications Employees' Association	Multi	CLC Part I (Private)
1	Brink's Canada Limited	27-Aug-10	750	Bargaining	Teamsters Canada	Ont.	CLC Part I (Private)
1	British Columbia Maritime Employers Association	31-Mar-10	4,680	Conciliation officer	International Longshore and Warehouse Union Canada	B.C.	CLC Part I (Private)
1	Canadian Freightways Limited (Master Linehaul)	31-Dec-09	570	Conciliation officer	International Brotherhood of Teamsters	Multi	CLC Part I (Private)
1	CANPAR Transport Ltd.	31-Oct-09	1,370	Bargaining	United Steelworkers of America	Multi	CLC Part I (Private)
1	CHUM Television, Toronto	31-Oct-09	600	Bargaining	Communications, Energy and Paperworkers Union of Canada	Ont.	CLC Part I (Private)
1	Expertech Network Installation Inc.	30-Nov-11	1,500	Post-Conciliation bargaining	Communications, Energy and Paperworkers Union of Canada	Multi	CLC Part I (Private)
1	G4S Cash Services (Canada) Ltd.	30-Apr-10	700	Post-Conciliation bargaining	Teamsters Canada	Ont.	CLC Part I (Private)
1	Greater Toronto Airports Authority	31-Jul-10	650	Bargaining	Public Service Alliance of Canada	Ont.	CLC Part I (Private)
1	Groupe TVA Inc.	31-Dec-09	1,000	Conciliation officer	Canadian Union of Public Employees	Que.	CLC Part I (Private)
1	Kingsway	16-Jun-10	600	Bargaining	International Brotherhood of Teamsters	Multi	CLC Part I (Private)
1	Laurentian Bank of Canada & Laurentian Trust	31-Dec-11	2,300	Bargaining	Canadian Office and Professional Employees Union	Multi	CLC Part I (Private)
1	Purolator Courier Limited (Couriers)	31-Dec-11	9,000	Post-mediation bargaining	Teamsters Canada	Multi	CLC Part I (Private)

1	Riscon Services Limited C.O.B. as Garda of Canada (Pearson, Buttonville & Toronto City Center Airports)	31-Mar-09	1,200	Bargaining	International Brotherhood of Teamsters	Ont.	CLC Part I (Private)
1	Saskatchewan Telecommunications	20-Mar-10	3,460	Bargaining	Communications, Energy and Paperworkers Union of Canada	Sask.	CLC Part I (Private)
1	United Parcel Service Canada Ltd.	31-Jul-10	3,800	Bargaining after a work stoppage	International Brotherhood of Teamsters	Multi	CLC Part I (Private)
1	Vidéotron ltée	31-Dec-09	1,760	Bargaining	Canadian Union of Public Employees	Que.	CLC Part I (Private)

Other approaches which could be used to evaluate the risk of work stoppages would involve expanded analysis by the Research and Data Development Division. For example, statistical modeling could be applied to bargaining history described above to determine the likelihood of a work stoppage. Theory suggests that bargaining histories involving a work stoppage of long duration decreases the likelihood of future ones recurring, whereas short duration strikes or lockouts have the opposite effect.⁶⁵ As a further example, based on the information referred to previously in this chapter, price inflation appears to correlate with increased work stoppages. This and other variables, such as cycles and length of collective agreements, other economic conditions, and sector and region-specific data, could be collated and analyzed to provide improved predictability of situations giving rise to increased risk of work stoppages.

Accordingly, an option which could assist the Labour Program provide reliable risk assessment of increased work stoppages would be the establishment of the systematic collection and analysis of pertinent information relating to work stoppages by Labour Program personnel. If applied in a consistent fashion over time, it might be possible to improve the predictability of bargaining situations identified by region and sector where work stoppages present an increased risk.

⁶⁵ Gunderson, Morley, Allen Ponak, and Taras, Daphne G. Union-Management Relations in Canada, (Toronto: Pearson Addison Wesley, 2005) p. 364.

Section IV: Economic Impacts of Work Stoppages

Introduction

Although it is common ground that work stoppages have various and wide-ranging negative impacts, demonstrating these consequences by hard empirical evidence remains challenging and there is little research to support conclusions. Accordingly, in this section, we will cite some of the research findings while mentioning the constraints to detailing the impacts of work stoppages. If more concrete results are required, an option is described which will provide suggestions to provide better evaluations of the economic impacts of work stoppages.

It is also recognized that work stoppages have important non-economic impacts on individuals and families, as well as having other social and even political ramifications. These however are even more intractable to describe empirically and little was found in the literature researched on this subject.

Work Stoppage Economic Impacts

There is little in the way of comprehensive and rigorous studies on the economic effects of work stoppages because the specific data of firms thus affected are rarely available. Even businesses involved in work stoppages have difficulty measuring all of the costs. For workers of supplier or competitor firms directly or indirectly affected by a work stoppage, information is even more difficult to gather. Overall, partial approaches can under- or over-estimate all of the economic impacts because adjustments by parties and persons indirectly affected before, during and after work stoppages are not considered.

The following outline some of the conclusions of studies that have attempted to measure the economic impact of work stoppages.

- Production losses: Regarding the impact on costs and savings of companies in work stoppages it was found that the principle impact occurred from loss of sales and general costs (e.g. interest, insurance, etc.). Other less significant costs included general advertising, fines for late delivery, additional insurance costs and sabotage. Businesses attributed little importance to the savings realized during strikes.⁶⁶
- Expected negative effects on profits, productivity and shareholder yield:

⁶⁶ Tang and Ponak (1986), *Employer Assessment of Strike Costs*, Relations Industrielles, 41-3, pp. 552-571.

- During the period prior to the work stoppage, workers responded to employer offers by working with less care and effort. The loss in productivity ranged from 2% to 12%, based on the type of production and the duration of the work stoppage⁶⁷
- A two-year strike at the Decatur Bridgestone/Firestone (B/FS) tire plant in Illinois was associated with the recall of 14.4 million tires, 271 deaths and 800 injuries during or immediately after the strike. Poor quality tires were associated with the work stoppage. In the four months following the work stoppage, the market value of B/FS securities fell from US \$16.7 million to US\$7.5 million, and the B/FS management was replaced.⁶⁸
- For Canadian companies listed on the Toronto Stock Exchange that had undergone a work stoppage between 1972 and 1995, (i.e. 304 occurrences) yield decreased in the case of legal work stoppages 3.9% from when the work stopped. For illegal work stoppages, security yields had already begun decreasing in the 30 days prior to the work stoppage, i.e. at the time of the stoppage; security yields had already dropped an average of 3.2%. In the 30 days following the work stoppage, yields fell a further 4.3%. Overall, work stoppages resulted in an average a 4.5% drop in yields.⁶⁹
- Indirect effects: In an econometric analysis based on sector employment and production data in the American manufacturing industry between 1967 and 1981, it was found that work production fell by 2.7% for companies that used the products of companies on work stoppage. On the other hand, goods suppliers to companies on work stoppage incurred an 18% drop in productivity. The main reason put forth for this was that, even if production fell, these companies maintained their employment level to minimize the negative effects of temporary layoffs on labour relations. Lower profits from these companies were therefore expected.⁷⁰
- Total negative, microeconomic effects on companies affected by a work stoppage and the positive effects on competing companies.

⁶⁷ Imberman (1979), *Lost profits represent only the tip of an iceberg*, Harvard Business Review, 57-3, pp. 133-138.

⁶⁸ Krueger and Mas (2002), *Strikes, Scabs and Tread Separations: Labor Strife and the Production of Defective Bridgestone/Firestone Tires*, Working Paper 461, Industrial Relations Section, Princeton University.

⁶⁹ Hanrahan et al (1997), *The Effect of Work Stoppages on the Value of Firms in Canada*, Review of Financial Economics, 6-2, pp. 151-166.

⁷⁰ McHugh (1991), *Productivity effects of strikes on struck and nonstruck industries*, Industrial and Labor Relations Review, 44-4, pp. 722-732.

- Using an input-output model of the Canadian economy in 1961, the effects on intermediate and final demand of goods in the manufacturing sector in order were taken into account to evaluate the costs of work stoppages. They found that work stoppages in 1967 had cost the equivalent of 0.2% of GNP for that year.⁷¹
- Using quarterly data from the American manufacturing industry and an econometric model to assess the effects of work stoppages on work productivity between 1961 and 1981, it was estimated that one additional work stoppage during a quarter reduced industry work productivity for that period by 1% to 2%.⁷²
- With the help of sector production data in the Canadian manufacturing industry and different econometric models, production losses associated with work stoppages between 1971 and 1985 were assessed and it was estimated that production losses of less than 1% resulted for most sectors. Losses increased to 1.7% for the manufacturing sector, 2% for primary metals and tobacco products and 3% for pulp and paper. The greatest loss of approximately 9% was in the wood sector.⁷³
- Investment: Econometric estimates were used to assess the effects of work stoppages on net investments in Canada between 1967 and 1999. The number of workers involved in work stoppages over the last five years increased by 1%, which reduced total investment by 0.1%. In the construction sector, this 1% increase in affected workers caused investments to fall by nearly 3%.⁷⁴
- Foreign trade:
 - A significant work stoppage on the Australian economy reduced investments and consumption. This translated into lower imports and a depreciation of the Australian currency, which in turn, promoted higher exports. The net effect of a work stoppage during the year it occurred was a 6% real depreciation of the currency, along with a 4% reduction in imports and a 13% increase in exports. This result indicated the effects on foreign trade, but it depends on the work stoppage scenario examined and the structure of the Australian economy.⁷⁵
 - On the other hand, using a derived equilibrium equation of the Canadian trade balance from a summary model of the economy for the period of 1971–1993 with

⁷¹ Hameed and Lomas (1975), *Measurement of production losses due to strikes in Canada: An Input-Output Analysis*, British Journal of Industrial Relations, 13, pp. 86-93.

⁷² Flaherty (1987), *Strike Activity, Worker Militancy, and Productivity Change in Manufacturing*, Industrial and Labor Relations Review, 40-4, pp. 585-600.

⁷³ Ahmed (1989), *The effect of the joint costs of strikes on strikes in Canadian manufacturing industries - a test of the Redder-Neumann-Keenan theory*, Applied Economics, 21, pp. 1353-1367.

⁷⁴ Budd and Wang (2004), *Labor Policy and Investment: Evidence from Canada*, Industrial and Labor Relations Review, 57-3, pp. 386-401.

⁷⁵ Dixon and Wittwer (2004, op. cit.), *Forecasting the Economic Impact of the Industrial Stoppage Using a Dynamic, Computable General Equilibrium Model*, Australian Journal of Labour Economics, 7-1, pp. 19-51.

parameters that measured the effects of work stoppages on the equilibrium of the balance of trade, the net effect was found to be practically negligible for most sectors exporting goods.⁷⁶

An Option for Better Measurement of and Response to Economic Impacts of Work Stoppages in the Federal Private Sector

The strategic importance to the Canadian economy characterizes private companies under federal jurisdiction. The companies are linked to the core economic infrastructure for transport, communications, financial intermediation and certain companies deemed of national interest by Parliament.

Employment under federal jurisdiction represents approximately 7% of Canadian workers. A preliminary analysis showed that a work stoppage in these companies had potentially little impact on the suppliers of these companies. Conversely, some companies hold a strategic position because their production is used by large segments of the manufacturing sector (e.g. transportation companies are generally unionized) or by overall activity sector, such as banking (scarcely unionized).

We currently lack sufficient data to measure the importance of companies under the federal private jurisdiction to the functioning of the Canadian economy. An option to overcome these limitations would involve the Labour Program engaging in analysis of these issues using the facilities of the Research and Data Development Division. Measures would be taken to identify, as correctly as possible, all activity sectors under federal jurisdiction and this information used to develop measures of the direct and indirect effects of work stoppages in the federal private jurisdiction on third parties. This exercise would also require assessing the potential importance of work stoppages per sector. Related analysis could include developing measures of behavioural adjustments of parties to measure the short- and long-term economic impacts of work stoppages under the federal jurisdiction.

We are advised that information from this analysis could be combined with results generated from work stoppage predictive analysis discussed above. This could perhaps help to reduce the economic costs of work stoppages under federal jurisdiction were the FMCS to proactively intervene by suggesting to companies at risk of a work stoppage with high economic impact that they receive training tailored to their needs, or by sponsoring special sessions on best practices in conferences on industrial relations. The development of these indices would require active collaboration on the part of the FMCS and the Labour Program's Data Development and Research Division.

⁷⁶ Alvi (2001), *The Impact of Strikes on Canadian Trade Balance*, Applied Economics Letters, 8, pp. 389-396.

Chapter 4: Options to Reduce the Risk, Frequency and Duration of Work Stoppages

Introduction

This chapter will focus on options to reduce the risk, frequency and duration of work stoppages. A few points are in order by way of introduction. The Terms of Reference focus entirely on work stoppages and measures to reduce them. Hence, this is not a broad study on issues of reform. The options proposed relate only to their impact on work stoppages.

Second, it is widely recognized that voluntarism and consensus should be used to guide changes in the industrial relations field.⁷⁷ However, some options are included that would not be considered voluntary and which neither of the stakeholders would support. These are presented nevertheless as part of the Terms of Reference of the study.

Third, the highest priority will be given to options that could facilitate cooperation on security of employment and productivity, as clashes over these issues appear to be the primary source of significant work stoppages. Priority will also be given to options that could help improve the efficiency and timeliness of the collective bargaining process, and credibility among parties. This includes options in relation to the Canadian Industrial Relations Board (CIRB).

Fourth, with regard to both Canadian and international options on legislative and non-legislative approaches to manage work stoppages, it is clear that the industrial relations situations and environments often differ radically from jurisdiction to jurisdiction, limiting the usefulness of foreign options. The study therefore draws mostly from Canadian sectors.

Fifth, the procedures must not be “routinized”. Stakeholders are very sophisticated and strategic in their approach to achieving their ends. If a measure starts to take on a degree of predictability, the stakeholders will adjust and render it less effective. Measures are often said to decrease in effectiveness following the half-life theory. In addition, adjustments to measures may be unpredictable and may be counterproductive in unforeseen ways. If the intention, for example, is to simplify the collective bargaining process, the proposed measure, while perhaps effective for its purpose, may have unforeseen ramifications (e.g. changing the open period may cause union raiding). A good rule is to follow the lead of the stakeholders, since they usually know better than anyone else the impacts of proposed measures.

⁷⁷ Sims, Andrew C.L. “Reflections on Administering Labour Law,” Canadian Labour & Employment Law Journal 12. p. 140.

There is an underlying theme behind some of the options - that one or two “scary” ones in the Minister’s tool bag could prove useful, if only to bring pressure on stakeholders to settle when on the verge of or involved in work stoppages.

Finally, in order to give context to those unfamiliar with the measures in the *Canada Labour Code* relating to work stoppages, there is a summary of the relevant provisions in Addendum 4-1 at the end of this chapter.

Categorization of Options: Neutral and Non-Neutral

In organizing the options, a distinction has been made between those measures considered to be “neutral”, in the sense of not affecting power balances or otherwise not favouring one side or the other, and those that would seem to favour either workers or the employer.

A discussion paper proposing some potential options was circulated to the stakeholders to elicit comment from them through submissions and consultation meetings. The neutral options are set out in the following section, but have been enhanced in many areas as more information was gathered.

Non-neutral options include those favouring unions relating to measures banning replacement workers and the imposition of non-voluntary interest arbitration for first collective agreements. Many unions submitted that modification of the *Code* in these matters would reduce work stoppages. Whether or not this is valid, such changes would be at the expense of the bargaining power of employers who opposed them with equal vigour. Also added to the pro-union list is an option to impose interest arbitration on stalemated work stoppages as was recently legislated in Manitoba. It was also vigourously opposed by employers.

Conversely, some employers requested consideration of a measure to expand the requirement to hold votes by union members on final offers of employers. Others argued for the designation of certain activities with respect to aeronautical services and the operation of ports as constituting “essential services” or services requiring special protection from the consequences of work stoppages similar to section 87.7 of the *Code*. This provision limits the effects of work stoppages of longshoremen and related navigation activities from affecting the movement of grain in and out of ports. These options would also impact on the relative bargaining power of the parties.

Section I: Neutral Options

This section will provide extensive information on 12 neutral options. Each option will be described in detail including the response of stakeholders.

Option 1 - Establish a Federal Labour-Management Relations Council (FLMRC)

Establish a Federal Labour-Management Relations Council with representation from labour, management and the FMCS to improve labour relations in the Federal Private Sector

Summary

- *Council would play an important role in the reduction of work stoppages in the federal private sector providing:*
 - *More structure at a national level to the labour-management components of industrial relations in Canada*
 - *Leadership as one of the keys to effecting wholesale change in relationships*
- *Joint working groups would be created to study and report back to the Council on pertinent and timely issues of mutual concern in industrial relations*
- *Minister's capability to make last minute interventions in deteriorating collective bargaining situations would be strengthened (but no mandate to become involved in specific work stoppages)*
- *Could seek accommodation on issues of productivity and worker issues to reduce work stoppages*
- *Could assist in the development of a national strategy for industrial relations as part of the national economic strategy*
- *Would have no mandate to oversee the Canada Industrial Relations Board (CIRB)*

- *Staged Implementation of the FLMRC:*
 - *First meeting would be used to obtain agreement on the composition of the Council, its mandate and consideration of working groups or take on other initiatives*
 - *Co-chaired by labour and management*
 - *Labour Program personnel would play an important role as well as acting as its Secretariat*

- *Industrial relations experts would provide assistance and participate in specific tasks*
- *Meetings would allow the Minister to discharge his obligations under section 104.1 of the Code*
- *Council and working group activities could be eligible for funding under the Labour-Management Partnerships Program (LMPP)*

Rationale

As will be noted in Chapter 6, there is consensus that a Federal Labour-Management Relations Council would provide a stable structure for the labour-management components of industrial relations in the federal private sector. It would bring together not only the labour-management representatives, but also key players of the Labour Program and other industrial relations experts. Better possibilities for leadership, changes in attitudes, improved communications and the introduction of improved options from the cross-fertilization of ideas of the participants, should follow from a more stable national structure. This should, in turn, contribute to the reduction of work stoppages over time. Many representatives referred to the maturity - indeed sophistication - of labour relations in the federal private sector. There is a widespread shared recognition of the need to limit work stoppages by working on better relationships and better negotiation practices. The maturity in these relationships supports the conclusion that the timing is propitious for some form of joint leadership structure to lead the changes.

Leadership in Joint Relationship-building

In the consultation sessions, there was near consensus amongst stakeholders that better labour-management relationships reduce the risk, frequency and duration of work stoppages. Many commented that leadership is the key to effecting wholesale change in relationships. Top-down leadership initiated by key players that changes attitudes on both sides of the bargaining table has usually been the single most important factor in corporations and unions radically improving their relations. Similar results should occur in the federal private sector if senior union and management representatives meet regularly with the objective of developing effective industrial relations practices.

Sims recognized the “tremendous capacity of labour and management... to close the doors behind them and tackle, on consensual basis, the challenges faced in the administration of labour legislation.”⁷⁸ A joint Council would be the key element in providing leadership direction and

⁷⁸ Sims, Andrew C.L. “Reflections on Administering Labour Law,” Canadian Labour & Employment Law Journal 12. p. 140

creating a more collaborative relationship between labour and management. It would not only impact favourably on work stoppages, but also improve productivity.

An example of where the Council could provide leadership would be the encouragement of stakeholders to subscribe to FMCS workshops to improve relationships after work stoppages. All agreed that the imposition of these measures would not work; they would have to be adopted on a voluntary basis. Leadership at the highest ranks through the joint Council would be the best means to encourage acceptability of the workshops to stakeholders. The Council could, for example, convene a joint study group to examine post-work stoppage situations and recommend best practices, eventually encouraging these measures to be more broadly adopted throughout the sector.

In addition, acknowledging the importance of leadership in reducing work stoppages as part of the Council's mandate would emphasize the need to make major investments in leadership. The Conference Board of Canada's 2004 Report concluded that effective leadership at all levels was the most crucial factor in developing workable relationships.⁷⁹ It noted the concerns of stakeholders about the impending retirement of many seasoned labour relations professionals and the significant leadership void looming at the bargaining table.⁸⁰ The Report found that there was little in the way of leadership development, particularly for unions.⁸¹ Conversely, some mediators have suggested that many employers also have leadership issues at the table, even in some major corporations. They expressed the views that key experience comes from handling the negotiation committee, and that fairly senior VPs of human resources rotate so often that they sometimes do not have the same experience as larger unions that may have four different sets of negotiations going at any given time.

As another example, the Council could play a significant role in bringing about what was described by the Department of Human Resources, Labour and Employment of the Government of Newfoundland and Labrador during a meeting with representatives of the Canadian Association of Administrators of Labour Legislation (CAALL) as the struggle to bring about a cultural shift - how to change the old-style labour relations. This theme underlies the options relating to both the FMCS and the establishment of a Council. It is part of what Newfoundland indicated was a program it was considering which included "the movement to a social marketing model where the benefits of positive employment relations are promoted" and which may hold potential for encouraging a culture shift".⁸² The Labour Relations Agency is exploring the possibility of working with employer and labour groups to develop such a campaign in Newfoundland and Labrador.

⁷⁹ Lendvay-Zwickl, Judy The Canadian Industrial Relations System: Current Challenges and Future Options (Canada: The Conference Board of Canada, 2004) p. 16.

⁸⁰ *Ibid.*, Executive Summary, p. ii.

⁸¹ *Ibid.*, p. 24

⁸² Comments from the Government of Newfoundland and Labrador, CAALL meeting, Gatineau, May 2008.

In this respect the new Council could also play a role in developing a mission statement for the sector and act as a model for other sectors. The statement could speak to a new labour policy paradigm: an inclusive collaborative labour policy framework; an acknowledgement of worker input and support for unions; consensus on the need for and ways to implement change, to enhance the ability of management and labour to adjust and thrive in an increasingly global workplace.

A shortfall in leadership will result in a much greater risk of work stoppages. The Council could provide the impetus to fill this void. Working with the FMCS and other industrial relations experts, it could help ensure that practical leadership training programs and other tools are offered to build leadership that would improve the quality of collective bargaining as a key to reducing work stoppages.

Joint Working Groups and Diffusing Best Practices

The Council could work with the FMCS and other industrial relations experts to commission joint working groups on various subjects of common interest. These might focus on managing organizational change, training negotiators, developing best practices for grievance mediation and arbitration processes, or conducting research projects on relationships with the permission and participation of stakeholders. Such projects should have a symbiotic effect, improving FMCS services and enhancing research into industrial relations issues.

Commentators and authors indicated that in a highly decentralized and competitive labour market it is difficult to diffuse information about best practices.⁸³ The Council, in addition to initiating projects to create and improve best practices, could act as a communications portal with the FMCS for the diffusion of best practices and initiatives that will improve labour relations.

Examples of Joint Working Group Initiatives

- Training Industrial Relations Negotiators

Most industrial relations centers offer negotiation training courses in their teaching programs, as well as continuing education programs which are regularly attended by stakeholder staff. Nevertheless, both labour and management representatives expressed concerns about the adequacy and cost of some of the programs. These concerns are heightened by succession issues,

⁸³ Chaykowski, Dr. Richard P., State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie (2-3 Nov. 2000 at Queen's University, Kingston, Ontario) p. 78.

finding adequately trained negotiators to replace the large number of those intending to retire in the next few years. The FMCS has similar concerns about replacing its aging workforce of conciliators and mediators. The Labour Program has established a conciliator/mediator training program to respond to this need, which in many respects can serve as a model for other programs.

It may be appropriate to consider the establishment of a joint project involving labour-management stakeholders and industrial relations centers to train and certify negotiators/conciliators. The FMCS and other similar provincial agencies could participate. The concept would be to establish standards that would serve to improve programs presently available and to broaden their availability and ensure consistency of application for use by stakeholders.

First thoughts envisage the establishment of a steering committee or study group composed of representatives of the stakeholders along with the industrial relations experts and representatives of the Labour Program. The steering committee would engage experts from the IR centers working with the stakeholders to undertake a job analysis and program development procedure (Develop A Curriculum - DACUM procedures) for negotiators/conciliators. This process would generate competency charts, training gap analyses, program designs for training and certification, career development plans and job descriptions to be used by training institutions, stakeholders and others for various purposes, such as the training or hiring of industrial relations negotiators/conciliators.

Several benefits could arise from a joint training study of industrial relations negotiators/conciliators. Besides assisting them in meeting their practical need for well-trained negotiators, the fact that the stakeholders would be working collaboratively on a project of this nature would be beneficial in its own right. For example, programs would include practicum, as used in FMCS training, as part of the curriculum, involving rotations of students in co-op positions with stakeholders and government labour programs. If the industrial relations centers participate in this process, a joint training program for negotiators/conciliators would also ensure that training across the country would be uniform and meet the needs of the stakeholders. It could act as a catalyst to expand and enhance the training efforts now being offered. Another effect of a program focusing on the training and professionalization of industrial relations negotiators (and conciliators/mediators) could be the creation of professional associations for labour relations experts and even events to recognize the contributions of negotiators and conciliators in maintaining industrial harmony in the country.

- Development of a Code of Conduct for Negotiators

Another initiative that could impact positively on work stoppages would be the establishment of a code of conduct for negotiators, paralleling the codes that exist to govern mediator and conciliator conduct. Despite numerous codes providing guidance to mediators and conciliators, no similar code of conduct appears to have been developed for negotiators. A project to create a code of conduct for negotiators which engages the participation of the stakeholders in the process would appear to have some potential for improving the negotiation process by clarifying the ground rules for conduct of the parties in distributive and integrative bargaining situations. It could also strengthen the good faith bargaining rules found in industrial relations codes, as well as assisting in the evolution of collective negotiations procedures, from positional bargaining to a more integrative methodology which is based on relationships of mutual confidence and trust.

- Relationship-building: New Research and Information Needs

The establishment of a joint working group to review research needs in the field is another example of a relationship-building project by stakeholders that would make effective use of industrial relations experts and the Labour Program. The working group could oversee a review of the outstanding research materials and documentation available on various subject matters. Stakeholders could assist in the identification of new research and information gathering needs that could be the subject of university research programs or incorporated into the information gathering and analysis procedures of the Research and Data Development Division of the Strategic Policy Analysis and Workplace Information Directorate of the Labour Program.

The benefits of a joint working group to give direction to new research could be considerable. Having stakeholders involved in decisions on research projects would likely assist in obtaining invaluable insider information for studies that otherwise would remain hidden in the bargaining rooms. A research needs analysis in conjunction with greater access to data from the stakeholders and potentially from the FMCS and other branches of the Labour Program would be beneficial to all stakeholders. This should encourage more focused and perhaps practical research projects which could generate increased funding for this important area of industrial relations research.

Wagar outlines some needs for future research on labour-management relationships: factors affecting the quality of the relationship; how an employer and union go about changing the relationship; the costs and benefits of adopting a cooperative or adversarial approach to collective bargaining; the impact of employee involvement programs, total quality management initiatives and workforce reduction/restructuring efforts on the relationship⁸⁴

⁸⁴ Wagar, Terry H. "The Labour-Management Relationship and Organization Outcomes, Some Initial Findings", *Relations Industrielles*, 52.2 (1997) p. 443.

Enhancing the Minister's Role in Reducing Work Stoppages

The Council could play an important role in enhancing the Minister's capacity to interact with stakeholders in the discharge of ministerial functions. The Council would not merely provide a venue for the Minister to discuss industrial relations issues in accordance with section 104 of the *Code*. Building good communication paths with stakeholders should prove helpful on those occasions when the Minister intervenes at the last minute to request that parties return to the bargaining table. The importance of this appeal as a last barrier to work stoppages should not be underestimated, particularly now that compliance with such requests is on a strictly voluntary basis.

Stakeholders indicated that it was important that the Minister have excellent working relationships and credibility with them to facilitate interventions at crucial last moments when a work stoppage is looming or has run part of its course. The Council could help the Minister establish communication links and confirm his or her neutrality which are important assets to enhance effective interventions in work stoppages. Moreover, because Ministers change with a fair degree of frequency, the Council could help new Ministers network quickly with stakeholders. Anything that enhances the Minister's credibility and persuasiveness reduces the likelihood of a work stoppage occurring.

Each Minister should define the specifics of the role that he or she wishes to play with the Council. Different Ministers may wish to play a more active role than others in the Council. The essential point is that a minimum level of participation is necessary to support the Council's activities and to allow the Council to help the Minister play a more effective role in work stoppages.

One thing must be clear. The Council would have no involvement in any specific work stoppage. To do so would undermine its ability to achieve its mandate. It should adhere to a policy of strict neutrality, to remain a positive force for building healthy work relationships.

Seeking Accommodation on Issues of Productivity and Worker Security

As noted in Chapter 3, some of the most significant work stoppages arose because of organizational changes by employers to meet the need for improved productivity to compete in a global economy. These came into conflict with collective agreements, workplace operations, and the interests of collective employee rights for security and increased input into decision-making processes affecting them. In both the short and long run, balancing the productivity needs of employers with the collective interests of workers appears to be of fundamental importance for

the development of better relationships and collaborative workplaces to avoid work stoppages. This type of debate requires a forum where the parties, as one stakeholder indicated, “could take off their hats” and deal together in a constructive fashion with issues that lie at the heart of competitiveness and improving relationships in the industrial relations sector.

Chapter 5 will present a best practices scenario to improve relationships. There are many successful initiatives to build on, a number of which have come from unions. Many unions with experience in the provincial manufacturing sector have been working closely with employers on ways to meet productivity objectives while serving the interests of their members. If unions and managers are able to work out these issues on a local basis, there is good reason to believe that progress could be achieved at the senior levels in a stakeholder Council. Regardless of the inherent conflict in interests that exists between employers and employees, these must be managed in a solution-oriented manner that encourages accommodation, meets the needs of the two sides and lets both concentrate on meeting shared challenges to prosperity and well-being in a world undergoing radical transformation.

Strategic Initiatives to Improve Canada’s Competitiveness

Canada needs to remain globally competitive. Resolution of union-management tensions over issues that arise from competitive pressures will assist in reducing work stoppages and impact positively on Canada’s competitiveness at a micro level - in the workplace - where so many answers to the productivity challenges lie.⁸⁵ The factors promoting competitiveness described in the recent report of the Competition Policy Review Panel focus on the macro level.⁸⁶ The report does not include strategies that consider productivity issues at the worker level where industrial relations determinants affect economic outcomes. Much of productivity is micro achieved on the ground at the local level. The Council could be a strategic vehicle to contribute to a successful competitiveness strategy and assist with the necessary buy-in of the stakeholders to make it work.

The stakeholders have indicated that they would like to work closely with the Minister, Deputy Minister and other senior government officials to ensure that industrial relations issues are properly represented and advocated for at the Cabinet table and among senior bureaucrats. They feel that there has been insufficient attention paid to industrial relations issues and that the economic leaders ignore these issues at their peril. These concerns are legitimate and

⁸⁵ See: Innovative Workplaces, Lessons Learned, Final Report, Evaluation and Data Development Strategic Policy, HRSDC, June 1999, “indeed, there seems to be a shared view that organizational innovations have the potential to enhance business performance, to increase quality of work and ultimately to contribute to aggregate productivity and income growth.” p. 1.

⁸⁶ Wilson, L.R., Edwards, Murray, N., Jenkins, P. Thomas, Hudon, Isabelle and Levitt, Brian, Compete to Win (Ottawa: Competition Policy Review Panel, 2008) p. 22.

noteworthy. A Federal Labour-Management Relations Council would go a long way to re-establish focus on industrial relations issues.

This concept parallels somewhat the Strategic Partnership Initiative adopted by the Government of Newfoundland and Labrador to foster a collaborative consensus-building approach for advancing the social-economic interests of the province.⁸⁷

No Council Involvement in Matters Relating to the CIRB

The proposed Federal Labour-Management Relations Council should not have any role with the CIRB. There is already a CIRB Consultation Committee which should continue to represent all stakeholder interests at the CIRB. Suggestions for improvements or complaints about its procedures or decision-making processes should be channelled through that committee to the Board and Minister as necessary. The fact that the Council would not include CIRB issues in its mandate does not mean that they would not be considered in this study. They will be discussed in Option 10 later in this Section.

Staged Implementation of a Federal Labour-Management Relations Council

If consensus develops around an option to create a Council, careful consideration should be given to the best means to implement such a measure. Preliminary discussion with stakeholders suggests that the establishment of such a Council should proceed in stages. The stakeholders are reluctant to move without extensive discussions with the FMCS and amongst themselves. Nevertheless, movement on setting up the Council should begin forthwith as any delay will slow down momentum and the enthusiasm that should accompany the decision.

The first stage would involve getting the Council up and running with a limited mandate and an agreement to hold regular meetings. Terms of Reference and short term objectives are critical. Its mandate would have to emphasize its role, such as: providing leadership; building relationships; creating positive attitudes to finding solutions; helping to establish best practices; improving training; supporting the Minister in the fashion described earlier; and serving as a consultative body for the purposes of the *Code* and larger debates on the significant issues such as the role and quality of industrial relations in the federal sector. During its first term, the Council would focus on meeting its objectives in a timely fashion and generating credibility to build upon and perhaps expand its role. It should also build in accountability rules as a means to measure its success.

⁸⁷ News Release, Government of Newfoundland and Labrador, “Business, labour and government form a strategic partnership to advance the economy”, NLIS 3, January 17, 2002.

Council Structure and Process

There are a number of options for the structure and process of the Council. Issues relate to how it should be chaired and the respective roles of the stakeholders, industrial relations experts and key personnel from the Labour Program. Some have suggested that the CIRB Consultation Committee could serve as a model for consideration in this regard. It is comprised of representatives of labour and management, including their legal representatives. It functions by way of consensus and is chaired by an outsider, the former Senior Assistant Deputy Minister of Labour.

However, the Council would be unlike the Consultation Committee in that it would not function as an appendage to another organization, but rather would first and foremost belong to the stakeholders, with others participating for the purpose of supporting its objectives of relationship-building. It would be co-chaired by labour and management representatives. Since the mandate of the organization is to provide joint leadership on building relationships, it is important that the co-chairs be able to speak directly without someone else mediating. Stakeholders will have to appoint persons with the appropriate skill sets to co-chair. In start up mode, an outside facilitator, distinct from the FMCS representatives, would be helpful sitting at the table.

While the Council would consist primarily of the stakeholders, Labour Program personnel would be expected to play an important role in it. Key Labour Program personnel would participate in the meetings and act as its Secretariat to provide the necessary support to ensure that the Council functions effectively. Similarly, industrial relations experts would be invited to sit at the table as regular participants in the Council's meetings. Besides bringing their expertise to the Council, they would participate in specific tasks undertaken under the Council's direction such as described in the Joint Working Group Initiatives section above.

It would be reasonable to plan for two full Council meetings a year, at least in the initial period, with an executive committee meeting more regularly throughout the year. The first full Council meeting could be used to obtain agreement on the composition of the Council, its mandate, objectives and a three-year plan. An initial working group could work with the FMCS on its consultation process to expand its services, if agreement can be achieved to move in that direction. Objectives and budgets should be established and an accountability process put in place for the three-year review.

The Minister should be invited to attend the full Council meetings at least once a year. When a new Minister is appointed, a meeting could be scheduled as part of the Minister's introduction to the federal industrial relations sector. Discussions should include industrial relations experts to

assist the Minister in discharging his or her obligations under section 104.1 of the *Code*. Discussions would inform the Minister of the work of the Council and provide labour-management representatives an opportunity to discuss issues of mutual and related interest with the Minister informally.

The Council should conduct a review of its progress at the end of three years to determine whether it has met its objectives of contributing meaningfully to the amelioration of relations between the stakeholders and engaging in concrete activities to their benefit. At that time, the Council could decide whether it should modify its mandate and direction or make any other changes that its stakeholders judge appropriate.

Stakeholder Response to the FLMRC

Stakeholders were unanimous in their support of the creation of a Federal Labour-Management Review Council to provide a stable structure to the labour-management components of industrial relations in the federal private sector. The mandate, structure and process of such a Council need to be developed jointly by labour and management. The option as adopted by the stakeholders with their comments is found in Chapter 6.

Option 2 – Expand and Improve the Federal Mediation and Conciliation Service (FMCS)

Enhance the Federal Mediation and Conciliation Service presence at the federal level and expand the preventive mediation services currently available from the Program.

Summary

- *To work in conjunction with the Federal Labour-Management Relations Council (FLMRC);*
- *Better relationships reduce the risk, frequency and duration of work stoppages*
- *Productivity is improved in organizations where the overall labour-management relationship is more cooperative*
- *Important examples exist of the success of the FMCS in improving labour-management working relationships*
- *High degree of satisfaction among stakeholders who have used the FMCS preventive mediation programs*
- *The FMCS does not have the time or resources to respond to a large increase in demand for their Preventive Mediation Program services (reason for their lack of promotion of these services)*
- *FMCS staff have identified new areas for workshops to assist the stakeholders return to work and deal with relationship issues created by a strike*
- *The Organizational Change Management workshop would be expanded to gather best practices and establish a resource list of persons to respond to pending restructuring situations*
- *To be implemented after a national consultation exercise with the stakeholders involving industrial relations experts*
- *A strategic plan for the expansion and promotion of preventive mediation services tailored to the specific needs of each region and different sectors would be developed*
- *Implementation of this option should be accompanied by a review of FMCS operations and efforts to inculcate a pro-active culture to support these measures through the establishment of objectives and a host of other measures to systemize and improve FMCS interventions*
- *In addition, the FMCS should review means to replicate private sector services; review pay scales and consider implementing a charge for services*
- *Consideration should be given to recreating a Department of Labour or other rebranding exercises to support measures to transition into a new era of innovative industrial relations.*

Working with the FLMRC

Option 2 relating to the Federal Mediation and Conciliation Service represents the second half of a two-pronged approach to reducing work stoppages. The first prong, the Federal Labour-Management Relations Council, would serve the primary purpose of providing a forum for the stakeholders to discuss issues of common interest and generate attitudinal change for improving relationships in the sector, including initiating relationship-building initiatives among stakeholders to reduce work stoppages. The second prong, the FMCS, and particularly its Preventive Mediation Program, would be one of the principal avenues for giving relationship-building initiatives a concrete form, particularly where opportunities exist to promote a more collaborative workplace.

The FMCS was created to provide dispute resolution during collective bargaining (generally conciliation and mediation services) and dispute prevention assistance to trade unions and employers under the jurisdiction of the *Canada Labour Code*.⁸⁸ Dispute prevention assistance is intended to short-circuit disputes before they occur, primarily during the closed period. The main thrust of the FMCS' dispute prevention program is to help improve ongoing relationships and keep lines of communications open between employers and unions. It does so by offering a range of services in the form of workshops under the Preventive Mediation Program, in addition to facilitation and mediation services provided outside the closed period.

Relationship-building

As mentioned earlier, there was near unanimous consensus among stakeholders that better labour-management relationships reduce the risk, frequency and duration of work stoppages. One union stated: "Resources dedicated to the identification of potential problem areas, the open discussion and amicable resolution of disputes and enhancement of overall working relationships are the most effective investment of all and are bound to yield healthy dividends."⁸⁹ Stakeholders also indicated that if parties do not work on improving their relationships prior to collective bargaining, it is less likely to foster positive results. Many added that designing joint programs to develop leadership skills on both sides would be desirable. All of these comments point strongly to the need for improved and additional relationship-building measures at the pre-bargaining stage.

There appear to be no studies directly correlating union-management relationships with work stoppage outcomes. A significant body of research nonetheless supports the proposition that performance and product quality are improved in corporations where these relationships are

⁸⁸ *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 70.

⁸⁹ Submission by the Canadian Auto Workers Union (CAW), June 2008, p. 3.

cooperative.⁹⁰ Initiatives aimed at fostering collaborative work environments have often been received differently by unions and by management. Unions are not always supportive of integrative programs which do not offer recognition or enhance their participation in decision-making processes.⁹¹ There have also been instances where progress made in establishing collaborative work relationships was shattered by a major restructuring by the employer.

There appears to be a tendency towards collaborative labour-management working relationships in Canadian industry, at least as seen from the management perspective. On a scale of 1 to 6, where 1 was adversarial and 6 was cooperative, a large sample of Canadian employers rated the quality of their relationship at about 4, suggesting moderate cooperation. Slightly more than 28% of respondents indicated that their relationship with workers was adversarial (score of 3 or less) and only 5% reported a highly cooperative relationship (score of 6).⁹² Though their attitudes were not reflected in this study, it has been suggested that unions are noticeably less positive than their management counterparts about the quality of these relationships.⁹³

While there is some disagreement over what constitutes a satisfactory union-management relationship, there appears to be a fair degree of consensus that unions and management should work to improve their relationships. Acceptance of this principle is the foundation of the FMCS Preventive Mediation Program.

The Preventive Mediation Program (PMP or Prev Med Program)

The Preventive Mediation Program evolved as a secondary tool of the FMCS for the purpose of providing conciliation and mediation services to support collective bargaining. The initial success of the program encouraged further work, and additional workshop modules were developed. Training workshops have come to cover: Organizational Change Management; Committee Effectiveness; Supervisor-Steward Joint Training; Relationship by Objectives; Interest-Based Negotiation; and Grievance Administration. In addition, the FMCS offers grievance mediation as part of the grievance process, and facilitation services for joint union-management processes outside of the closed period.

There is a high degree of satisfaction among stakeholders who have used the Preventive Mediation Program. It appears to be extremely effective at improving and repairing relationships between parties. Unfortunately, there is no aggregated data measuring client satisfaction,

⁹⁰ Wagar, Terry H., "The Labour-Management Relationship and Organization Outcomes, Some Initial Findings", *Relations Industrielles* 52.2 (1997) p. 433.

⁹¹ *Ibid.*, p.435.

⁹² *Ibid.*, p. 439.

⁹³ *Ibid.*, p. 433.

reflecting the under-resourced nature of the program. The high regard for the program has nevertheless been confirmed by many stakeholders.

Some of the positive comments received from stakeholders on PMP include:

Labour

- CLC submits that FMCS services should be available at all times during the bargaining process and not only when parties are faced with an impasse. Conciliators should also play an active role. To achieve this, the FMCS needs to increase its resources and the salary of conciliators.
- CAW thinks that the FMCS should be better promoted and have its resources increased because its services are very effective.
- USW submits that the FMCS needs to better promote its services and should receive more funding.
- Teamsters states that FMCS services should be broadened and that its resources should be increased.
- The Grain Workers' Union submits that FMCS services should be made available earlier at the request of parties and that its resources should be expanded. Conciliators should play a more active role in the mediation process and their wages should be increased.
- The Confédération des syndicats nationaux (CSN) thinks that FMCS services should be better promoted and that its resources should be broadened.

Management

- FETCO submits that remuneration and selection of the FMCS staff should be reviewed. FMCS services should likewise be more publicized and expanded. FMCS should also have training programs to ensure the competence and skills of negotiators (essential to collective bargaining success).
- NAV Canada submits that voluntary mediation should be made available before parties enter into conciliation. FMCS staff should also be available after a work stoppage to help design action plans for improved relationships.
- CACE states that the PMP should be expanded and have its funding increased.
- CAC thinks that while access to FMCS services should be available throughout the bargaining process, conciliation should only be offered after meaningful bargaining has taken place.
- Bell Canada agrees that FMCS services need to be promoted more.
- Canadian Bankers Association submits that greater training should be made available to mediators.

PMP is successful because workshops are administered by staff that are highly regarded by the participants, having been involved in hundreds of negotiations, giving them a wealth of knowledge and experience. More importantly, the programs are joint exercises requiring both union and management attendance. Half the battle in building relationships is finding ways for parties to simply talk about their history of problems, key issues, and common interests. Parties need to develop a better understanding of one another's aims and grievances and the PMP clearly meets these objectives.

Undeveloped Potential of the Preventive Mediation Program

Despite its success, the PMP is not widely known. Staff at the FMCS are reluctant to market preventive mediation services too extensively for fear that they may not have the time or resources to respond to increased demands. The lack of promotion of the program was confirmed by stakeholders, some of whom were not even aware of the program or the extent of services offered.

Preventive mediation is also dependent upon the willingness of mediators to "sell" the program. Not all mediators wish to participate in the PMP. This should not be a matter of individual choice as it places too much responsibility on the PMP team. Moreover, given the importance of these services in the reduction of work stoppages, "prev-med" activities must be given an importance equal to that of providing mediation services.

There is also some reluctance to subscribe to the program. There are situations where relationships have deteriorated to such an extent that parties would not even consider participating in a joint workshop. This attitude was prevalent among parties that had experienced a difficult work stoppage or with a chronic history of adversarial relationships. These situations should not be a discouragement to options that would expand the Preventive Mediation Program. Instead, they should be the target for attitudinal change through consensus-building by the Council. They also highlight that having a desire to build good working relationships normally precedes recourse to FMCS services.

There will be cases where parties prefer to do their own training without the other side present. This may arise from a failure to recognize that the joint nature of FMCS services is what produces their benefits. As these services are more broadly promoted and understood, there should be expanded use, even where stakeholders have developed their own programs.

Reluctance to participate in joint initiatives should not apply to FMCS training workshops intended to improve the functioning of joint labour-management committees. These committees appear to be particularly successful. The 2004 Report of the Conference Board of Canada on the Canadian industrial relations system concluded that they work very well in enhancing union-

management relationships.⁹⁴ 94% of management representatives and 86% of labour representatives agreed that they have helped improve their work relations.⁹⁵ The Report concluded that, when used properly, joint labour-management committees can enhance communication and trust, create a better problem-solving environment, assist in fending-off grievances, and facilitate future collective bargaining.⁹⁶ This appears to be an area where the FMCS can work with industrial relations experts and stakeholders as a working group of the Council to expand and improve these workshops.

A final factor contributing to the reduced promotion of PMP services is the size limitation of workshops, where the minimum group is 12. As a result, smaller groups are not able to participate in many of the workshops. With an expanded FMCS resource base, the programs could be made available to smaller organizations. Extra monies could be directed to regional training programs where smaller groups could send one or two participants.

FMCS Suggestions for New Workshops

The FMCS has identified new areas where they believe their programs could help parties work through difficult relationship periods.

Post-Work Stoppage Workshop: A workshop to assist stakeholders to return to work and deal with relationship issues stemming from a strike or lockout could reduce the risk of future work stoppages. This appears to be sound in theory, but in practice it remains difficult to convince parties to consider the issue after having undergone a damaging work stoppage. Still, some stakeholders, such as CBC, have conducted these types of retrospective examinations. FLMRC support for this type of initiative would be the means to convince the industry that post-work stoppage measures must be taken in every case, regardless of the personal views of some staff.

Pre-negotiation workshop: A workshop to assist parties facing difficult negotiations or a first collective agreement in the pre-negotiation stage could help reduce the risk of work stoppages and be part of the FMCS preventive mediation toolbox. This would be particularly helpful if complemented by a relationship-monitoring process. Because of the excellent relations that it maintains with stakeholders, the FMCS would be able to assess the quality of union-management relationships and foresee high risk situations before parties engage in their next round of collective bargaining. The FMCS could

⁹⁴ Lendvay-Zwickl, Judy The Canadian Industrial Relations System: Current Challenges and Future Options (Canada: The Conference Board of Canada, 2004) p. 17.

⁹⁵ Ibid., p. 18.

⁹⁶ Ibid.

proactively invite parties in adversarial relationships to participate in their workshops in order to assist the negotiating process.

Workshop on Best Practices in Managing Organizational Change

FMCS already offers a workshop on managing organizational change. Given the significance of work stoppages in the federal sector involving these issues, this is an area where the FMCS could work with the FLMRC and stakeholders to gather best practices and share them with others.

Discussion with one experienced human resources manager endorsed FMCS as being part of an option to lessen the likelihood of work stoppages in re-structuring situations, and provided the following input on measures to manage organizational change.

“There is certainly some benefit that could come from improved access to information related to labour-management relations and bargaining unit structure associated with major corporate restructurings (e.g. mergers, acquisitions, divestitures).

A potential recommendation might be:

- *Have FMCS develop resource/informational kits - some basic information on the major types of corporate transactions (applicable Code sections, major relevant CIRB decisions),*
- *FMCS also to act as a bit of a “centre of excellence” in developing their internal capability to sit with the parties and review past cases to give the parties a sense of how these things have gone in the past.*
- *In addition, they could have a standing list of available industry resources (union and management) willing to talk to their counterparts in the affected organizations about their practical experiences. Again, these cannot be prescriptive because each transaction will have different factors influencing outcomes, but being able to talk to both neutrals and unions/employers that have relevant, practical experience would be helpful.*
- *FMCS could also consider designing their joint workshops around these experiences as the parties go into these transactions that at least get them thinking about the issues they will face, help point out pitfalls to avoid, etc.”⁹⁷*

⁹⁷ Human Resources manager who requested to remain anonymous.

Implementation of Option 2

FMCS has suggested that the best means to both promote and expand its Preventive Mediation Program would be to engage in a national consultation exercise with stakeholders, and perhaps industrial relations experts. Several advantages would appear to flow from such an exercise:

- This initiative could be undertaken through a working group of the FLMRC as one of its first initiatives. The involvement of the FLMRC could demonstrate leadership on an important project signalling its commitment to changing attitudes and encouraging relationship-building.
- The consultative exercise would enable FMCS clients to identify their specific needs for preventive mediation and address relationship issues in a proactive fashion.
- FMCS could explore some of the causes of stakeholders' reluctance to utilize its services and then redesign its program to better suit their purposes.
- Marketing of the program would be an indirect consequence of the consultative process.
- The involvement of industrial relations experts could provide valuable assistance to enhance the programs.
- The consultation process could be tailored to the specific needs of each region and the special needs of some stakeholders in different sectors.

Based on the consultation process, FMCS could develop a strategic plan for the improvement, expansion and promotion of its PMP. It could determine FMCS resource needs to ensure the capacity for PMP expansion.

Review of FMCS Operations

Diminishing Role of Conciliation

The role of the FMCS has changed considerably since amendments were carried out to the *Code* in 1999. The role of conciliation appears to have declined significantly in terms of collective agreements reached in the conciliation period. As shown in Table 4-1, settlements concluded during conciliation have dropped from approximately 64%, which was the case when the Minister had power to extend conciliation periods indefinitely, to approximately 36% now that conciliation is limited to 60 days. It has been suggested, however, that the statistics are misleading and it would be better to compare the contracts resolved prior to 81 days being the 60 days and "cooling off" period in the pre and post 2000 changes.

Table 4-1: Comparison of Settlement Stages since 1995-1996					
Fiscal Year	Total Cases Finalized	Total Settled at Conciliation Stage	% of Total Finalized	Total Settled at Post Conciliation Stage	% of Total Finalized
1995-96	199	128	64%	71	36%
1996-97	236	145	61%	91	39%
1997-98	171	125	73%	46	27%
1998-99*	183	123	67%	60	33%
1999-00	210	106	51%	94	49%
2000-01	172	78	45%	94	55%
2001-02	191	82	43%	99	57%
2002-03	221	77	35%	144	65%
2003-04	156	44	28%	112	72%
2004-05	170	59	35%	111	65%
2005-06	159	58	36%	101	64%
2006-07	161	66	41%	95	59%
2007-08	140	51	36%	89	64%

Source: FMCS Fiscal Year Review 2007-08

*Code amended in 1999 to limit conciliation period to 60 days

Perhaps savings can be achieved, if conciliation services are proving less useful. However, were the parties to move away from the process of deadline bargaining (a potential subject for an FLMRC working group to consider), settlement timing figures could well revert to what they were prior to the amendments. There is a consensus among those that have transitioned to collaborative work relationships that bargaining in the sense of dealing with contentious issues must occur throughout the life of an agreement.⁹⁸ If this is the case, conciliation could be used to wrap up bargaining, rather than running negotiations to a point of high drama that increases the risk of work stoppages.

Need for a New Proactive Culture at FMCS

The option to expand the PMP will not serve much purpose unless the FMCS takes a much more proactive role in promoting collaborative relationships in the federal private sector. In order to justify the investments being called for to expand and improve the PMP, the FMCS will have to modify its culture from one of responding to demands for its services, to becoming an active promoter of collaborative union-management relationships. This would best be achieved by

⁹⁸ Submission by NAV Canada, May 2008, p. 4.

working with stakeholders (through the Council) to set objectives, taking the pulse of the nature of the relationships of FMCS clientele and intervening in a timely and focused fashion to offer its services. The FMCS could take the following steps:

- Establish criteria to measure and rank relationships from adversarial to collaborative, along the lines used by Wagar.⁹⁹ This would include determinants like joint work councils, interest bargaining methods, arbitration backlogs and processing systems.
- Work with stakeholders and academics to assess outcomes, such as work stoppage data, grievances and grievance processing expenditures, productivity and flexibility measures.
- Work with stakeholders and mediators to survey and rank the degree of collaboration of relationships.
- Establish targets, perhaps using pilot programs, for improving relationships over a three to five year period to maintain accountability for funds invested. Review program outcomes at target dates.
- Develop draft strategies for building collaborative relationships, starting with key firms and their unions.
- Where necessary, use the FMRLC (which would be an integral part of these initiatives) and the offices of the Minister, to convince the stakeholders to participate in the implementation of plans.
- Work with the stakeholders to finalize strategies and set targets and timeframes for implementation, offering FMCS services where necessary.
- At pre-determined dates prior to the expiration of collective agreements, take the pulse of pending negotiations, help define major bargaining issues, develop strategies for conciliation and mediation based on best practices, (perhaps working with the Strategic Policy Analysis and Workplace Information Directorate), and offer FMCS services like those of assisting in interest bargaining sessions for portions of the bargaining.
- Work together with the Research and Data Development Division to develop work stoppage risk assessment tools.
- Conduct post-mortems with stakeholders after successful and unsuccessful bargaining of collective agreements (not shying away from tough issues or causes in reviewing what went wrong in the bargaining process.)
- Establish a relationship re-building program if necessary (many view what can be learned from the bad stories, more important than examining best practices¹⁰⁰).
- Obtain confidential feedback on the performance of conciliators and mediators. Have mediators keep logs and prepare reports of the major events and their strategies to help resolve disputes.

⁹⁹ Wagar, Terry H. "The Labour-Management Relationship and Organization Outcomes, Some Initial Findings", *Relations Industrielles* 52.2 (1997) p. 436.

¹⁰⁰ Chaykowski, Dr. Richard P. *State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie* (2-3 Nov. 2000 at Queen's University, Kingston, Ontario) p. 81.

- Have regular internal discussions on issues and strategies regarding PMP activities and collective bargaining.
- Establish an internal data bank of information to assist with services.
- Review internal policies for maintaining information on the causes of work stoppages and successful strategies to avoid them. (At this time, there does not appear to be a policy of reporting or maintaining relevant information, nor are mediators conducting internal post mortems, obtaining feedback or attempting to share experiences in a systematic manner.)

Other FMCS Issues

While carrying out its internal review, there are other issues that the FMCS might consider. For example, there have been many suggestions from the stakeholders that mediators are underpaid and that this will have a detrimental effect on the quality of services over the long run. This may be challenging in the context of government to set out special consideration for key players, but an effort should be made, perhaps in conjunction with some of the tasks outlined.

Questions have been raised regarding the decision to regionalize FMCS services as opposed to providing them along sectoral or industry lines. Given the national nature of many of the operations of the major stakeholders in the federal private sector, it would appear logical that relationships between FMCS staff and clients be similarly sectoral or industry-based. For example, stakeholders in the railway transportation industry follow a policy of carefully nurturing arbitrators and staff to become knowledgeable and experienced in their industry. If FMCS services in reducing work stoppages are to be effective this and other issues relating to the organization and assignment of mediators and conciliators should be discussed carefully with stakeholders and tailored to their needs and not to the administrative needs of the FMCS.

Replicating private sector services, unless there is some reason to deviate, should be the model to follow. Stakeholders should be consulted confidentially and permitted to indicate preferences jointly for personnel assigned to their files. This will assist the program in improving its services while maintaining the confidence of the stakeholders.

Finally, consideration should be given to following the practice instituted in Ontario of some degree of cost recovery from clients for preventive mediation services. Charging would eliminate frivolous abuse of the services confirm the value of the services based on the willingness of clients to pay for them. In conjunction, clients would have the choice of requesting personnel to provide these services, as a further means to maintain quality within the FMCS.

Justification for Expansion of FMCS

It is difficult to assign a monetary value to services administered by the FMCS in its role in reducing the risk, frequency and duration of work stoppages. Employer representatives, in strongly supporting an option to expand and improve its PMP, pointed out that the value of prevention of only one or two major work stoppages, in terms of loss of productivity, probably surpasses the FMCS annual budget. By promoting better relationships, expanding the program should pay dividends in increased productivity, a healthier workplace, and fewer work stoppages.

An attempt was recently made to evaluate FMCS effectiveness in the United States in reducing work stoppages.¹⁰¹ The study found that the American service generates enormous savings for the economy and that early FMCS intervention had been essential to reducing work stoppage duration.¹⁰² It concluded that expenditures on the FMCS in the U.S. were strongly justified. It should be noted that in the option scenarios proposed in this study, the Preventive Mediation Program role would go beyond the conciliation and mediation practices reviewed in the American study. Nor does the study take into consideration the tremendous possibilities of increased productivity from an environment of collaborative workplaces in the sector.

“Department of Labour”

Numerous stakeholders were critical of the decision taken many years ago to merge the former Labour Canada with what is today HRSDC. They were unanimous that it had a significant negative impact on both the labour services of the government and labour relations in the federal sector.¹⁰³ It was also suggested that the diminished importance and status accorded by the government to labour relations administrators was contributing to a declining interest in labour relations issues. This, in turn, was hindering both stakeholders and the government in attracting and keeping personnel dedicated to labour relations issues.

It was noted that the federal sector is among the very few in Canada without a Department of Labour. The CLC in its submissions suggested that the Department of Labour be re-established with a Minister and Deputy Minister. Alternatively, consideration could be given to creating a separate crown corporation or agency for the Labour Program, or as in United States, for the FMCS and related services.¹⁰⁴ This could better engender private sector replication of services

¹⁰¹ Employment Policy Foundation, Impact Measures of Federal Mediation and Conciliation Service Activities 1999-2004 (Washington, 2005).

¹⁰² *Ibid.*, p. 31.

¹⁰³ Submission by the Canadian Labour Congress (CLC), June 2008, p. 16.

¹⁰⁴ Labor-Management Relations Act, 1947, 29 USC

more congruent with the culture of its stakeholders. A less extensive suggestion would be to change the name of the Labour Program to Labour Canada or better yet “Innovative Industrial Relations Canada” and engage in a branding and marketing campaign to re-establish the program as an entity of change independent of HRSDC to the extent possible. The expansion of FMCS duties and the establishment of a Federal Labour-Management Relations Council could assist the process. Given the significance attached by stakeholders to FMCS activities in reducing work stoppages, it is important that the structure it operates in be conducive to attracting the best people and maintaining high morale.

The Labour Program is at an important crossroad with the loss, and pending loss, of valuable and experienced personnel. It is timely to consider structural changes consistent with the direction and momentum of the options considered herein. These foresee a “surge” in preventive mediation programs under an expanded and re-invigorated FMCS and supporting programs, as an optimal strategy to reduce work stoppages. This could also help unleash a new era of productivity gains in a more collaborative unionized workforce.

Stakeholder Response

Stakeholders have been receptive to the idea of a new FMCS joint program coordinated with the FLMRC and expanded preventive mediation services- to move industrial relations away from the traditional adversarial model to a more collaborative one-to reduce the risk, frequency and duration of work stoppages. Given that the PMP has already demonstrated its effectiveness and has only a limited capacity to expand, funding proposed options would be an excellent investment in improving industrial relations in the federal private sector and reducing work stoppages.

Option 3: Improve Grievance Handling Processes

Consider positive changes to the grievance handling process to assist in the improvement of union-management relationships and to reduce the backlog of lengthy and often damaging grievance arbitrations. Conduct policy review of impact of human rights on dispute resolution process and productivity in workplace and seek better accommodation to limit unnecessary effects of human rights' prescriptiveness.

Summary

- *The extremely adversarial nature of rights (as opposed to interest) arbitrations is a primary contributor to poor union-management relationships.*
- *The parties must be motivated to attack grievances seriously and not let grievances degenerate into power issues.*
- *Options include processes to clear grievance backlogs with the aid of FMCS or other mediators.*
- *Other options aimed at early resolution of complaints include mandatory mediation as part of the grievance process or mediation processes preliminary to the right to file grievances.*
- *The nomenclature surrounding “grievances” is archaic and not conducive to modern dispute resolution processes.*
- *Grievances involving human rights, which have overwhelmingly become employment rights, raise challenges to options being proposed to resolve grievance disputes by significantly eroding the value system of collective agreements and substantially encroaching on traditional managerial prerogatives.*
- *Conduct policy review of impact of human rights on dispute resolution process and productivity in workplace and seek better accommodation to limit unnecessary effects of human rights prescriptiveness.*

Options with respect to grievance or rights arbitrations relate both to effectiveness (relationship issues) and questions of efficiency of processes. Related to reducing the risk of work stoppages, grievance arbitration is of particular importance to relationships. Grievances have a toxic effect on the workplace when the underlying issues are not resolved by the parties, fester, and eventually are determined by arbitration. And fester they do! The Conference Board of Canada, citing 2002 figures, reported that the average time lapse between filing a grievance and issuing an award had grown from seven months in the 1970s, to 12 months in 1980s, to 17 months in the

1990s.¹⁰⁵ The same report indicated that 40% of employers have grievance backlogs, with more than 20% reporting a backlog of more than 100 active grievances and 10% of those with more than 500 active grievances.¹⁰⁶

Resistance to Grievance Processes

The extremely adversarial nature of rights arbitrations singles them out as a primary contributor to poor union-management relationships and has led to a call from experts, such as the Honourable George Adams, for the requirement of mandatory grievance mediation to avoid arbitrations.¹⁰⁷ Another commentator described arbitration as “the ultimate adversarial arena in labour relations.”¹⁰⁸ There are well-recognized problems with the arbitration process because of their “political” nature – trying to avoid offending both sides to be invited back again.¹⁰⁹

Processes can be put in place to effectively deal with most grievances and eliminate arbitrations. Several examples of managers and unions working together to overcome grievance backlogs were presented during the consultations. However, attitude is critical - the parties must be motivated to seriously attack the grievance problem. Given the expense of prosecuting grievances, which includes the costs of arbitrators and lawyers and the time of the staff of the stakeholders, and the damage the grievance-arbitration process causes to relationships, an effective grievance handling program can be justified on a cost basis. Nevertheless, perhaps because stakeholders do not believe that these systems work, they are often not interested in implementing these programs, even though using FMCS mediators is free of charge. For example, both labour and management stakeholders have rejected offers to implement grievance resolution programs because they were using the grievance-arbitration process as a tactic in their ongoing “power” struggle, accepting the price of inflicting damage on the other side, somewhat like a work stoppage.

A more veiled obstacle is the self-interest that persons administering the grievance handling systems take from their role in processing grievances. One V-P of human resources described the necessity of ensuring that the firm’s staff relations branch was providing true value in its dispute resolution activities.¹¹⁰ None is provided, in his view, by the “red-blooded” manager espousing anti-union tactics and engaged in adversarial relations with unions to show the boss that their

¹⁰⁵ Lendvay-Zwickl, Judy. The Canadian Industrial Relations System: Current Challenges and Future Options (Canada: The Conference Board of Canada, 2004) p. 23.

¹⁰⁶ Lendvay-Zwickl, Judy. The Canadian Industrial Relations System: Current Challenges and Future Options (Canada: The Conference Board of Canada, 2004) p. 23.

¹⁰⁷ Adams, The Honourable George W. State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie (2-3 Nov. 2000 at Queen’s University, Kingston, Ontario) p. 85.

¹⁰⁸ Lendvay-Zwickl, Judy. The Canadian Industrial Relations System: Current Challenges and Future Options (Canada: The Conference Board of Canada, 2004) p. 21

¹⁰⁹ *Ibid.* p. 18.

¹¹⁰ Discussed in Part III of Chapter 5 in the Best Practices Scenario.

division will not be pushed around by unions. Conversely, some unions take great stock in demonstrating to members that they are acting against unfair employers. Their staff too may have considerable self-interest in perpetuating the adversarial grievance processes. The involvement of lawyers in the process will only exacerbate those attitudes. It takes true leadership to move off adversarial habits, overcome self-interest in grievance processes and search for collaborative means to eliminate grievances by dealing with the underlying problems.

Options to Handle Grievances

One option to attenuate some of the negative aspects of rights arbitrations would be to make mandatory grievance mediation the third step in the grievance process and perhaps employ FMCS mediators to facilitate the mediation session. This would require the parties to seriously attack the underlying issues at an early stage before lawyers were involved. Most steps in the grievance process now serve little purpose.

A further option worth considering, but which may be controversial because it would resemble the grievance handling processes contained in the CAW-Magna agreement,¹¹¹ is to restructure the grievance process making the filing of the grievance the last step in the procedure, instead of the first. The procedure would require the employee, the union and the employer to work together through an escalating hierarchy of internal settlement meetings with managers and union leaders, perhaps ultimately involving FMCS mediators or other mediators, before a formal grievance could be filed and taken to arbitration. The advantage of this process would be to force the stakeholders to attempt to deal with the underlying problems before they reach the grievance stage. This takes the grievance process out of the hands of the employee alone and forces the dispute at its earliest stage into a resolution process. Staff relations personnel on both sides would apply their efforts to resolve the problem rather than to process the dispute.

Another approach would be to inject transparency into deteriorated labour relations relationships. FMCS could bring to the attention of the Minister situations involving hopelessly back-logged grievance processes. A Ministerial direction would be issued to the parties for remedial action and if not satisfied, the Minister could appoint an inquiry officer to investigate, report on the causes of the situation, including whether the grievance processes were being misused, in addition to providing recommendations for action. Drawing attention to situations of dysfunctional relationships could be sufficient to engender remedial action by the parties with the assistance of the FMCS.

¹¹¹ Canada, CAW Canada, “Framework of Fairness Agreement between Magna International Inc. and National Automobile, Aerospace, Transportation and General Workers of Canada (CAW Canada)”, October 15, 2007, http://www.caw.ca/campaigns&issues/ongoingcampaigns/magna/pdf/FF_Agreement.pdf.

A subtle but perhaps important “attitudinal” option could be to change the archaic nomenclature surrounding the “grievance process” to better reflect the substance of modern dispute resolution processes. The term “grievance” connotes the idea of oppression, injury or something that causes grief. It is a highly subjective term and does not generally describe issues arising in the modern workplace in the federal private sector. A healthier and more balanced designation would involve the “fair” resolution of problems, including the fair treatment of employees, based on objective standards applied by a neutral third-party. For any complaint or grievance, the question should be asked whether the person was treated fairly, measured by a standard of reasonableness as opposed to their own feelings. This issue becomes more important as legislatures introduce new forms of complaint based upon disrespectful conduct into the workplace (e.g. psychological harassment) with infinite situational circumstances and behavioural possibilities.

Another option, would involve a concerted joint process to eliminate grievance backlogs. Best practices can be found from some of the systems used by NAV Canada and the Canadian Railway Office of Arbitration (CROA) in the railway sector. Once again, FMCS support could be available for guidance and implementation of these systems. NAV Canada made very effective use of the FMCS, as have the railways and various other stakeholders, in eliminating thousands of grievances over the past three years. The procedures require clear, quick and informal processes, involving pre-selected arbitrators knowledgeable in med-arb and arb-med strategies, attending on fixed dates and providing their awards with a minimum delay. These measures, or others to limit the negative impact of grievances on union-management relationships, are important options that would improve union-management relationships and reduce the risk of work stoppages.

Unfortunately, there does not appear to be the means to implement these procedures, except on a voluntary basis. The Federal Labour-Management Relations Council, working with the FMCS, could promote these options as a means to reduce adversarial relationships caused by grievance arbitrations. But beyond that, the nature and complexity of disputes now subject to grievance arbitration make concerted action on these issues possible only on a firm-by-firm basis. The key ingredient for success is to have the two sides firmly committed to making an honest go at eliminating all but the truly intractable grievance arbitrations, such as for dismissals. Another point is that even with an increase in resources, the FMCS could not likely provide mediation services at the scale that a mandatory mediation program would require. Private mediation services would likely be necessary if there was a large increase in demand for grievance mediation services.

Grievance Resolution Measures and the Rights Paradigm

The recent advent of the “rights paradigm” has interceded in the traditional union-management relationship. Industrial relations experts, among others, have raised concerns about the challenges it poses to options being proposed to resolve grievance disputes.¹¹²

The rights paradigm has “not only significantly eroded the value system of collective agreements, but has also substantially encroached on traditional managerial prerogatives.”¹¹³ An increasing number of grievances are now based on human rights legislation and can override collective agreement terms and long-established workplace practices. New options to resolve grievances, including innovative ones being contemplated in this study, could be thwarted by human rights prerogatives.¹¹⁴

The rights paradigm has also introduced more complex and absolutist values into the workplace that engender more adversarial dispute resolution processes, particularly at the level of grievances. These values are less amenable to settlement, costly and time-consuming.¹¹⁵ Particularly challenging are threshold claims involving mental disability issues such as accommodating work-induced stress disabilities.

These rights have also added greatly to the degree of prescriptiveness in the workplace by acting as constraints on management and union powers, both in the capacity of managers to assign work and impose performance standards on employees and of the authority of unions with regard to the administration of collective agreements.

The rights paradigm has been a mixed blessing for unions. While their mission statements all support expanded employee rights and power, these rights have in some cases greatly complicated their internal administration. Individual-versus-individual complaints, such as in harassment matters, create internal dissension in the ranks. Unions also have to pay the legal costs and spend administrative time dealing with these complaints. Human rights complaints challenge the duty of fair representation and can undermine established labour relations institutions such as seniority. Unions also have procedural and substantive obligations imposed on them by the duty to accommodate. Rights disputes under collective agreements can become three cornered negotiations with individuals having their own power base by the exercise of the human rights complaints.

¹¹² Carter, Donald, State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie (2-3 Nov. 2000 at Queen’s University, Kingston, Ontario) p. 103.

¹¹³ Carter, Donald, State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie (2-3 Nov. 2000 at Queen’s University, Kingston, Ontario) p. 103.

¹¹⁴ Ibid. p. 103.

¹¹⁵ Ibid. pp.105-106

Of serious concern with respect to the objective of building better union-management relationships are the time and resources dealing with these complex rights that take away from efforts to establish collaborative work places. Relationship-building requires generous time commitments by the stakeholders.¹¹⁶

It is arguable that the inductive case-by-case process cannot fully encompass the overarching consequences of these rapidly evolving rights on the workplace, at least from the perspective of their impact on productivity. Only when the full prescriptive web of constraints from many cases (in conjunction with the requirement to avoid further ones) is brought to bear upon workplaces can one begin to come to terms with the effects of the rights paradigm on collective relationships and productivity because of the loss of flexibility and disruption to dispute resolution mechanisms.

It is not clear what options can be considered in the narrow context of the impact of human rights legislation on work stoppages. Consideration should perhaps be given to whether there may be better means to accommodate individual worker and collective rights along with meeting society's needs for less adversarial and less prescriptive workplaces.¹¹⁷ There never has been a broad policy debate on the impact of human rights on the employment sector, although human rights are overwhelmingly about these issues.¹¹⁸ This suggestion is not intended to subvert human rights which are essential in a civilized society. However, with the continuing expansion of human rights in the workplace, it may be time to engage in an open policy debate involving all interested stakeholders on the "rights paradigm."

Stakeholder Response

Stakeholders agreed that grievance arbitrations can poison the work environment between unions and management and that better means to reduce them would improve relationships and lessen the risks of work stoppages. Some of the suggested options, such as the concept of restructuring the grievance process to make grievances the last step in the process before arbitration, were not discussed. However, it is felt that responding to grievances is a situational option. The increased encouragement and even marketing of best practices to resolve grievances is the extent of any non-legislative policy option.

¹¹⁶ Lendvay-Zwickl, Judy *The Canadian Industrial Relations System: Current Challenges and Future Options* (Canada: The Conference Board of Canada, 2004) p. 21.

¹¹⁷ *Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security*, European Commission (Luxembourg: Directorate-General for Employment, Social Affairs and Equal Opportunities Unit D.2 2007).

¹¹⁸ Figures from the Canadian Human Rights Commission (CHRC) 2007 annual report consistently place employment issues, including harassment and union membership, at well over 80% of allegations of discrimination, which does not include complaints made in arbitrations conducted pursuant to the *Canada Labour Code*, Part I.

Option 4: Change the Open Period for Decertification of a Union

Explore the benefits of amending Part I of the Canada Labour Code to advance the Open Period of a collective agreement for changing union representation to separate it sufficiently from the collective bargaining negotiations and thereby, reduce the incidence of work stoppages.

Summary

- *Advantages of this option include: more time to heal wounds caused by a contest between unions, time to allow the union to dampen the expectations of members, and avoidance of overuse of union resources in contest representation issues when they are better applied to negotiations.*

There has been some suggestion that the distractions and instability caused by changing union representation (last three months of the agreement) during the overlapping period when collective bargaining is underway (last four months of the agreement) increases the risks of a work stoppage occurring. There appears to be no research on this issue, but it is noteworthy that British Columbia has stipulated that the open period should run during the period of eight to six months prior to the end of each year of the agreement.¹¹⁹

Accordingly, a measure to reduce the risk of a work stoppage would be to amend the *Code* to advance the open period further ahead in the term of the collective agreement. This should limit the possibilities that union transition issues negatively impinge upon collective bargaining.

From discussions with persons knowledgeable of the British Columbia situation, there appears to be a difference of opinion among labour representatives as to whether the open period and the negotiating period should occur at the same time. Apparently unions at risk of raids prefer to leave the open period coincide with the negotiating period because it is said to discourage the membership from changing unions. However, this rationale would appear to contradict the principles of union democracy, besides implicitly recognizing the problems that can arise from union leadership transitions during collective bargaining.

Concerns were also expressed over creating instability by changing union representatives in the middle of an agreement. This is presently the case, however, for terms exceeding three years under the *Code*.¹²⁰ Questions concerning this option include whether unions would be less or more deterred to bringing challenges in open periods at the same or different times as the

¹¹⁹ *British Columbia Labour Relations Code*, R.S.B.C. 1996, c-244, s. 19(1).

¹²⁰ *Canada Labour Code*, Part I, R.S., 1985, c. L-2, s. 24.

bargaining periods; and whether changes in union representation would be less acceptable to membership when occurring during negotiations as opposed to at other times.

There may be other advantages to moving the open period outside of the negotiation period. This might allow the representatives more time to heal the wounds caused by a contest of unions. Intra-organizational difficulties in unions can cause a division at the bargaining table or make ratifications by union members more difficult to achieve, both of which have been identified as contributing causes to work stoppages. More time might also allow the union to dampen the expectations of members caused by overly enthusiastic election promises. In addition, as one union stakeholder noted, separating the open and negotiating periods would have the further advantage of not dissipating union resources in contesting representation issues when they are required for negotiating purposes.

If the open period is to be changed, it appears to make the most sense to apply the rule to all agreements. The open period could be permitted during the first three months at the beginning of the last year of the term (i.e. during months 13 to 15 and 25 to 27 for two and three year terms) and in addition for terms exceeding three years, the first three months of every subsequent year. This would allow sufficient time to ensure that most disputes arising out of the transition would be resolved before negotiations began. There would be no need for an open period during the first year of the collective agreement.

Stakeholder Response

As a starting point, both union and management stakeholders indicated a reluctance to open up the *Code* to amendments in what they described as a “piecemeal” fashion. Accordingly, it is not completely clear what the stakeholder reaction to this suggestion would be if it were made in a more comprehensive review of the *Code*.

The employers were silent on the issue as were most of the union stakeholders in their written submissions. The United Steelworkers openly endorsed the concept in principle, acknowledging that collective bargaining was made more complex and potentially less successful if certification applications were filed or pending.¹²¹ The USW also pointed out that a decertification application distracts local union executives from their work at the bargaining table and makes it more difficult to reach a collective agreement with an employer.¹²²

¹²¹ Submission by the United Steelworkers (USW), 2008, p. 12.

¹²² Ibid., p. 12.

Several union representatives also indicated general concurrence with the idea. One union representative stated that it made no sense to have the open period occurring at the same time as bargaining. He suggested that it be placed “smack dead in the middle of the agreement term.”¹²³ Another union representative disagreed that the British Columbia open period created greater instability. He was favourable to moving the open date because it was challenging to resolve representation issues while negotiating, besides dividing resources that should have been expended on negotiations only. A mediator commented that it was “a great idea that may not happen until amendments are made to the *Code*. Now that the idea is out, it will take place.”¹²⁴

¹²³ Anonymity requested.

¹²⁴ Anonymity requested.

Option 5 - Changing the Timing and Requirements of Maintenance of Activities (MOA) Agreements

Examine the benefits of amending Part I of the Canada Labour Code to advance the time required for notice under the Maintenance of Activities provision in order to avoid interference with the collective bargaining process.

There have been complaints about proceedings involving Maintenance of Activities (MOA) agreements (agreements to ensure work stoppages do not cause an immediate and serious danger to the safety or health of the public) disrupting the negotiations process, particularly extending over too long a time. An option to address this issue would entail advancing the period during which MOA issues are considered to eliminate or reduce the risk of these procedures interfering with collective bargaining.

A requirement of notice specifying the supply of activities (Notice of MOA) no later than nine months prior to the end of an agreement term could allow sufficient time to deal with these issues.

To ensure that any dispute over MOA is quickly brought forward for resolution, a further condition could require parties to apply to the Board if no MOA agreement is reached within 30 days of the Notice's service. This would ensure that disputes reach the Board no later than seven months before the end of an agreement and provide what normally should be sufficient time to have the matter resolved in advance of collective bargaining.

A related option would be to permit the parties to use former MOA agreements without having to reapply.

Stakeholder Response

As most efforts were directed towards other options, the stakeholders did not make comments in the written submissions on this option, although many indicated interest in the idea because of the difficulties they encounter in these processes. Unions were less interested in dealing with this issue. One mediator familiar with all the problems that have arisen from the MOA provisions stated:

“Changing Times of the MOA: This has to be rewritten in the Code. It causes all sorts of difficulties and forces the parties on the Board where they die a slow, painful and

expensive death. And this decision only becomes valid for that set of talks and must be done all over again in a couple of years. It must be clarified and changed legislatively.”¹²⁵

Proposed Action

At such time as legislative changes may be considered to the *Code*, they should include a review of the Maintenance of Activities provisions.

¹²⁵ Anonymity requested.

Option 6 - Extending or delaying the Conciliation Period

Explore an increased role for the Minister of Labour on the advice of the FMCS to extend or delay the conciliation period in the resolution of labour disputes and the consequent reduction of work stoppages.

Summary

- *Intended to prevent misuse of conciliation period where no serious attempt has been made to resolve matters before conciliation contrary to the intention of the provisions in the Code.*
- *Delay or extend the conciliation period while appointing an outside mediator in an attempt to engage the parties in meaningful negotiations.*

Extending or Delaying the Conciliation Period

Concerns have been raised over bargaining situations that seem headed for a work stoppage because of an almost total absence of attempts to resolve matters before conciliation. Examples were cited of parties entering conciliation with 300 or more issues involving the most trivial of matters. Union and employer representatives generally condemn this tactic and perceive it as an indication of an intractable working relationship. Other examples were provided where a notice to bargain and notice of dispute setting in course the process to obtain conciliation were served simultaneously.

These situations were not what the authors of the Sims report intended. On this issue the report stated as follows:

“While the parties should be able to apply for conciliation, it should not be made available to them until they have demonstrated that they have engaged in serious collective bargaining on their own. Conciliation is not designed to be a handholding device or a substitute for meaningful collective bargaining and responsible decision-making.

Conciliation should not be available until 60 days following the giving of notice to bargain, and in that period the parties should have engaged in serious bargaining. The decision as to when, if and what type of assistance should be provided should be made by the head of FMCS. This decision should be based

*upon the knowledge gained through FMCS's monitoring of each dispute and the staff's knowledge of the public interest and the needs of the parties".*¹²⁶

In addition, the Sims Report commented on the involvement of the Minister in the decision to extend the conciliation process, which was one of the reforms brought about by the 1999 amendments to the *Code*. The comments are again worth repeating:

*"This also inhibits the important neutral role that the Minister can and should play ultimately in the resolution of difficult disputes when legislation needs to be contemplated. If there is a perception of Ministerial interference during conciliation, the parties will have difficulty perceiving the Minister as neutral in latter stages of the dispute. Therefore, the less Ministerial intervention or possibility of perceptions of intervention in conciliation, the better the process of collective bargaining."*¹²⁷

Possible Amendments to the Code

An option to amend the legislation to put these observations into effect would reduce the risk, duration and frequency of work stoppages.

The modifications would be best if they simplified the process, eliminating reference to notice to bargain and notices of dispute, and instead imposed a requirement to bargain commencing four months prior to the end of agreement and imposing a requirement to bargain in good faith and make every reasonable effort to enter into an agreement. These latter requirements would be a condition for conciliation which could occur 45 days later (two and a half months prior to the end of agreement) for a period not exceeding 60 days. The amendments would further require that the decision to appoint a conciliator would be made by the Minister, but based on the advice of the head of the FMCS in order to maintain the Minister's neutrality. If no effort was made to bargain collectively, on the advice of the head of the FMCS, the Minister could delay conciliation for a period up to 45 days and appoint a mediator or, alternatively, extend the conciliation period for a further period of up to 45 days.

Knowing that conciliation might be delayed or extended would hopefully encourage some serious attempts at bargaining before the conciliation processes and prevent parties from wasting FMCS resources.

¹²⁶ Sims, Andrew C.L. *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 114.

¹²⁷ *Ibid.*, p. 114.

The mediator called in at this stage might best be someone from outside the FMCS. That person could use more forceful directive and evaluative methods to have the parties engage in more meaningful bargaining. This issue will be discussed in greater detail later.

If this option is not acceptable, some consideration should be given to the issue of misuse of the conciliation period. As noted, since amendments to the *Code* in 1999, a declining number of agreements have been reached during the conciliation phase.¹²⁸ To squander FMCS resources when they could otherwise be employed for preventive mediation or other meaningful services makes little sense.

Stakeholder Response

Union representatives did not make any written submissions on the point, although one union leader did indicate in conversation that the practice of coming to conciliation with a great number of items is to be frowned upon and that in such circumstances delaying conciliation and sending in a mediator could make good sense.

FETCO on behalf of employers supported an option to encourage meaningful discussions prior to conciliation commencing.

“FMCS and Conciliation: We support the 60-day conciliation. In the Code that was put there in 1999 - it has brought discipline to the process. However, it has been subject to abuse. We do, for example, have cases of unions making applications under Section 71 even as they serve notice to bargain. Section 71 needs to be applied only where there is clear evidence that the parties have done everything possible to obtain a settlement themselves. Where, in the opinion of FMCS, the process is being abused, they should not act on a Section 71 notice of dispute.

FMCS should therefore create a threshold for applying for conciliation. This would prohibit either party from filing prematurely and when not necessary. This would force the parties to exhaust meaningful discussions prior to seeking assistance, and would make better use of FMCS resources.”¹²⁹

¹²⁸ See Table 4-1.

¹²⁹ Submission by FETCO, 2008, p. 5.

FETCO made two additional points worth noting: the first would require 72 hours' notice before applying for conciliation; the second would permit the parties to jointly request conciliation without triggering the timelines set out in the *Code*.¹³⁰ An appointment of a mediator pursuant to section 105 could serve the purposes of the second point.

However, it should be noted that FETCO's overall position is that the legislation should not be amended in "piecemeal" fashion, but should be looked at as a whole to determine what effects one amendment could have on the remainder of the legislation. FETCO added that the short timeframe of the study did not permit debate on options, which made the consensus process difficult.¹³¹ In its view, these issues, and others where legislative changes were contemplated, were matters that could be better considered in the context of the FLMRC with FMCS before arriving at any final conclusions.

¹³⁰ *Ibid.*, p. 6.

¹³¹ *Ibid.*, p. 13.

Option 7 - Recourse to External Mediation Services

Explore the possible benefits of employing external mediation services either working independently or in conjunction with FMCS mediators in situations requiring more proactive interventions.

Summary

- *External mediators may enjoy the advantage of being less concerned about maintaining relationships with stakeholders, something which is fundamental to FMCS mediators, and thus may be able to intervene more aggressively which is often useful in assisting the parties reach final agreement.*
- *The FLMRC could establish a list of acceptable external mediators who the Minister could call upon if the stakeholders so wished*

Background on Use of External Mediators

Some issues have arisen with the use of external mediators, particularly in “closer” situations, as an option to reduce work stoppages. The background to this option follows.

Eleventh hour mediation services are important because deadline bargaining, or at least eleventh hour bargaining on key issues, is the norm in traditional bargaining practices. Mediators can play a key role in avoiding work stoppages - to the point that many stakeholders consider their services among the most important in managing work stoppages successfully. Preventive mediation conducive to collaborative relationships and integrative bargaining processes are intended to reduce deadline bargaining to a large extent.

It had been the Minister’s custom to request that senior officials, invariably the head of FMCS, or the Assistant Deputy Minister, if he or she has long experience working with involved stakeholders, to head up a final round of mediation with the conciliators. Even this, however, was an exceptional process for fear of putting a chill into bargaining where a deal was not going to close until the senior Labour Program ADM or head of FMCS arrived.

There have been some suggestions in discussions with stakeholders that the Minister should make greater recourse to external mediators working with FMCS mediators in these last minute interventions.¹³² A somewhat similar issue was raised in the Sims report, where several parties asked that private mediators who knew their industry be allowed to perform the conciliation

¹³² Submission by the Canadian Labour Congress (CLC), June 2008, p. 6.

function where labour and management agree.¹³³ The report accepted this as an appropriate suggestion, subject to the approval of the head of FMCS. The Sims report also proposed that the head of FMCS might consider appointing private sector conciliators where consideration of availability or suitability made it desirable.¹³⁴ The Minister is not restricted from using outside mediators, although they have been used only in extraordinary circumstances where it was felt that extra bang was needed from someone from the outside.

Issues Concerning External Mediators

There are other issues in revisiting the role of “closer” mediators in the collective bargaining process, as it is sometimes difficult to be as determined (some would say aggressive) in mediation with parties with whom the mediator has a long-term on-going relationship. This point is seen perhaps somewhat obscurely in the stakeholder observations in a 2002 client satisfaction survey conducted by HRSDC.¹³⁵ In that survey, the FMCS received high marks for what are described as the low confrontational aspects of mediation (e.g., encouraging negotiations progress, organizing proceedings, providing a neutral avenue for offers, acting as a forum for compromise, improving information flows, allowing for face-saving and reducing hostility between parties). The evaluation was less favourable in areas involving what is commonly described as directive and evaluative mediation (e.g. tactics emphasizing the detrimental aspects of non-settlement and which take an aggressive stance with regard to settlements).¹³⁶ Directive and evaluative techniques play an important role in assisting parties achieve agreements. They also tend to be used after facilitative techniques are exhausted.

Directive and evaluative mediation, by its nature, tends to be more interventionist and raises greater risk of disapproval than that used in the more facilitative and integrative processes. Experienced mediators will possess the necessary skill sets to conduct both types. Circumstances may nevertheless sometimes prevent them from employing these techniques to their full advantage.

The results of the HRSDC client satisfaction survey are therefore not surprising and should not be interpreted as reflecting negatively on FMCS mediators who appear highly trained and devoted to negotiating successful agreements. As they cannot risk jeopardizing their carefully nurtured relationships with stakeholders, directive and evaluative techniques are nonetheless (and unavoidably) more problematic for these mediators. An external “closer” does not share these concerns.

¹³³ Sims, Andrew C.L. *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 115.

¹³⁴ *Ibid.*, 125

¹³⁵ COMPAS Inc. and Goss Gilroy, *Labour Program: Federal Mediation and Conciliation Service, HRDC Client Satisfaction Research* (Canada: Human Resources Development Canada, 2002).

¹³⁶ *Ibid.*, p. 12

Another approach would be for FMCS to identify its own “closer” mediators. A number of its current mediators, for example, have been noted to be particularly adept at resolving impasses. These mediators would undertake the role of employing more directive and evaluative techniques and would not take part in longer-term relationship-building strategies employed by FMCS in its conciliation and mediation.

A possible downside to the “closer” approach is the danger of the “cult of personality” and chill it may impose on negotiations that can develop - parties get the idea that they have not reached the end of the road until the “top gun” has appeared on the scene. This undermines the field mediators, and can actually lead to more work stoppages, as people think that they have not extracted every last penny until their dispute has attracted “Ottawa’s” (Minister or head of FMSC) attention. In an effort to overcome this, past senior personnel at the Labour Program made it a practice to involve the officer who had been working on the case earlier, which is consistent with the recommended “team” approach.

In order to implement a recommendation for using external mediators, the Federal Labour-Management Relations Council could play a role in establishing a list of acceptable external mediators whom the Minister could call upon to respond quickly if the stakeholders so wished. A similar though more formal concept applied to arbitrators has recently been implemented by the Newfoundland and Labrador Government in legislation creating a Labour Management Arbitration Committee involving stakeholders to select arbitrators to be used by the employer and labour community.¹³⁷ In addition, feedback mechanisms could assist in identifying an internal group of mediators in the FMCS who could be brought in to assist in the final throes of collective bargaining situations.

Stakeholder Response

Some concerns were expressed by stakeholders about the unevenness of the quality of mediators, although most concerns were similar to those expressed in the 2002 client survey about FMCS mediators being insufficiently aggressive in closing difficult negotiations. In the CLC brief filed on behalf of unions, the statement was made that “the conciliators should be strongly encouraged to play a more active role in their attempts to get the parties to reach a collective agreement when the parties are at an impasse.”¹³⁸ Somewhat differently, the USW stated: “We would also support the use of seasoned, high profile mediators who could be brought in at a late stage in negotiations to try and resolve particularly contentious or difficult labour disputes.”¹³⁹ These appear to be matters that could bear fruitful discussion at the FLMRC between stakeholders and the FMCS.

¹³⁷ *An Act to Amend the Newfoundland and Labrador Labour Relations Act*, 2008, c. 18.

¹³⁸ Submission by the Canadian Labour Congress (CLC), June 2008, p. 15.

¹³⁹ Submission by the United Steelworkers (USW), 2008, p. 10.

Option 8 - Deferring the Commencement of a Work Stoppage

Deferment of a work stoppage prior to its commencement and the establishment of a mechanism to assist the parties in the resolution of the issues in dispute.

Summary

- *A measure contained in Alberta legislation (with similarities in some American legislation) allows the Minister to establish a Dispute Inquiry Board to delay any work stoppage not yet commenced until its proceedings, report and possibly a vote on its recommendations are completed.*

There are provisions in Alberta¹⁴⁰ and the United States¹⁴¹ whereby work stoppages can be deferred or prevented before they start. In most cases, the provisions apply equally before and after a work stoppage has commenced. However, the *Alberta Labour Relations Code* contains a measure¹⁴² that operates only before the commencement of a work stoppage and which is discussed here. Comments on both types of provisions will be made later when dealing with options that affect the duration of work stoppages.

Alberta Dispute Inquiry Board

Prior to a strike or lockout, the Minister may choose to send the dispute to a Dispute Inquiry Board (DIB) pursuant to the *Alberta Labour Relations Code* of Alberta. A DIB is comprised of one or more members appointed by the Minister, similar to an Industrial Inquiry Commission (IIC) under the *Canada Labour Code*. The difference is that if the DIB is established before the commencement of a lawful work stoppage, then no strike or lockout can commence until: 10 days after the Minister serves a copy of the DIB recommendations on the parties; or if the Labour Relations Board conducts a vote by the parties on the DIB recommendations, 72 hours after the Board has notified the parties of the results of the vote. However, the establishment of the DIB after the commencement of a lawful work stoppage does not affect it or its continuation.

A DIB has 20 days, or longer if fixed by the Minister, to try to effect a settlement between the parties, failing which the DIB makes recommendations on each matter in dispute. The Labour Relations Board conducts a vote on the recommendations which if accepted by the union members constitute the agreement. If the union votes against the recommendations, the strike may commence 72 hours after the Board advises the union of the results of the vote.

¹⁴⁰ *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1, s. 105(1).

¹⁴¹ *Labor Management Relations Act*, 29 U.S.C. 141 2000, s. 206-210.

¹⁴² *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1, s. 105(3).

The Government of Alberta advised that the DIB procedure is used when there is some optimism that the parties can achieve agreement. There are no emergency, health and safety or other requirements for the Minister to appoint a DIB. The measure has only been used nine times since 1981 and not at all since 2000.

Stakeholder Response

Stakeholders are opposed to provisions allowing the Minister to intervene in pending or ongoing work stoppages. Unions oppose all interventions as a general rule. The employers similarly oppose giving the Minister unilateral powers to end or suspend work stoppages.

Option 9 - Improve the Efficiency of Interest Arbitration (Voluntary or Otherwise)

Improve interest arbitration, either through voluntary agreement of the parties as per Section 79(1) of the *Canada Labour Code* or through legislative means.

Summary

- *Measures to facilitate or improve voluntary interest arbitration agreed to by the parties in lieu of the right to strike, in particular a new process of conducting mediations after the arbitration before the decision is released (arb-med).*
- *Consideration of advantages and disadvantages of Final Offer Selection interest arbitration contained in legislation ordering the end to a work stoppage.*

Recourse to interest arbitration is an option that should reduce the frequency of work stoppages. This option refers to situations where the parties can agree to refer the whole negotiated agreement, or more likely specific portions of it, to an arbitrator in lieu of the right to strike (in accordance with section 79 of the *Code*). Improvements to interest arbitration could also be useful as a means to revise troublesome aspects at mid-term in a long collective agreement, thus reducing the risk of a future work stoppage. Finally, differentiating from voluntary uses of arbitration, Parliament would also prescribe arbitration if it enacts back-to-work legislation.

Two issues arise in connection to the reduction of work stoppages where interest arbitration is used. The first is whether there are measures to facilitate voluntary arbitration in lieu of the right to strike - this is mostly applicable to voluntary situations; the second is to consider options such as Final Offer Selection (FOS) arbitration to overcome some of the disadvantages of interest arbitration (“chill”, “narcotic effect”) or better yet, to encourage the parties to settle before an arbitrated decision is imposed on the parties.

Encouraging Voluntary Recourse to Arbitration

- Best practices could be developed to expedite the process (for example, the Minister could have a list of five to eight names which could be determined jointly by representatives of stakeholders through the Federal Labour-Management Relations Council). A similar though more formal concept applied to arbitrators has recently been implemented by the Newfoundland and Labrador Government in legislation creating a

Labour Management Arbitration Committee where stakeholders select arbitrators to be used by the employer and labour community.¹⁴³

- “Med-arb” could be used with an irrevocable option that once exercised, the procedure transforms into binding arbitration where the parties agree that it would be appropriate to do so.
- As an incentive to use arbitration, the Labour Program could contribute to the costs of the arbitrator’s fees, perhaps keeping it in their grab bag of inducements (suggesting that the Minister would like to offer something special to help the parties out). This has been done in the context of a med-arb process with a clause permitting the parties to convert the mediation into a binding arbitration. Also, small bargaining units do not have the resources to use arbitration unless assistance is provided.
- Encourage the conduct of mediation processes (med-arb) immediately prior to the arbitration; when mediations are conducted on dates in advance of the arbitration, they appear to add unnecessary costs and delays to the dispute resolutions process.¹⁴⁴
- Med-arb could serve the useful purpose of expediting fact determination to speed up the interest arbitration process.
- Greater use of arbitration could be made for single-issue disputes, such as wages, or complex disputes such as pension issues. Research indicates that there is no significant difference in outcomes in wage and benefit disputes between those achieved by work stoppages or arbitration.¹⁴⁵

Arbitration-mediation (“Arb-med”)

Can “arb-med” achieve settlements better than “med-arb”?

- “Arb-med” is a process that is receiving recent attention as a favourable means to encourage settlement.¹⁴⁶ The arbitration panel renders its decision but does not make it effective for a period of time, allowing the parties to negotiate something different from the arbitrator’s award. In some cases the arbitrator writes the decision, seals it in an envelope and then engages in mediation for the parties. The parties remain in control of the outcome until an impasse, when the arbitrator opens the envelope and releases the award. Study has concluded that as an alternative to the disadvantages acknowledged to arise in the “med-arb” process, disputes might better be resolved through a process of arbitration-mediation.

¹⁴³ *An Act to Amend the Newfoundland and Labrador Labour Relations Act*, 2008, c. 18

¹⁴⁴ Bill Cole, “The Seven-Year Itch: Assessing the Effectiveness of Mediation-Arbitration in Ontario Fire Fighter Collective Bargaining Disputes.” Master of Laws major paper. Osgoode Hall Law School, 2007, p. 104.

¹⁴⁵ Research and Data Development Division, Impact of Arbitration on Dispute Resolution and Wages (Canada: Human Resources and Social Development Canada, Labour Program, 2008), p. 15.

¹⁴⁶ Bill Cole, “The Seven-Year Itch: Assessing the Effectiveness of Mediation-Arbitration in Ontario Fire Fighter Collective Bargaining Disputes.” Master of Laws major paper. Osgoode Hall Law School, 2007, p. 103.

- The option of “arb-med” appears highly favourable to assist the parties to conclude agreements¹⁴⁷:
 - Research suggests that “arb-med” results in a higher frequency of voluntary settlements than “med-arb”, and that parties view such settlements as being of a higher value than those achieved under alternate forms of dispute resolution.
 - It enhances the effectiveness of communications and exchange of information, the key contributors to resolving the bargaining impasse.
 - It facilitates the use of evidence to encourage a party to reconsider priorities or expectations.
 - It has the ability of better replicating strike/lockout conditions by introducing time thresholds to party decision-making.
 - It maximizes the opportunity for parties to make their own decisions.
 - It provides opportunities for the parties to participate more fully in the decision-making that will define working relationships.
 - It can minimize cost and delay (where one party simply has no desire to mediate, the arbitrator can simply conclude the process after receiving arbitration submissions.)
 - It overcomes “substantive justice” issues that occur in “med-arb” where opportunities abound for the arbitrator who uses information gleaned in the mediation process when caucusing with one party in the absence of the other party.
 - It provides greater opportunity for creative settlements.
 - It better informs the arbitrator of bargaining trends in the sector to form the basis of the mediator’s strategy to move parties off unrealistic demands, while at the same time reinforcing the merits of strong arguments.
 - It presents the best learning opportunity for the parties which can translate into improved collective bargaining relationships in the future.

Final Offer Selection (FOS) Arbitration

Parliament ordered Final Offer Selection (FOS) arbitration when it recently adopted legislation ordering the United Transportation Union (UTU) conductors of CN back to work.¹⁴⁸ This process requires the arbitrator to choose between the final offer of the union or the employer. FOS has advantages and disadvantages.

¹⁴⁷ Ibid., pp. 103-104.

¹⁴⁸ *Maintenance of Railway Operations Act*, S.C. 1995, c.6.

FOS arbitration is sometimes described as “legislating uncertainty” because one of its purposes is to encourage parties to negotiate a collective agreement rather than go through with the arbitration. This is the preferred outcome given that negotiated settlements are more likely to produce a mutually agreeable outcome and foster sustainable labour peace. It is also supposed to discourage parties who are not engaging in meaningful negotiations (the “chill” factor) because they are holding back on the assumption that the matter will be sent to arbitration or have concluded that it is simpler and lower risk politically to have an arbitrator decide the agreement (the “narcotic” factor). Further, FOS arbitration limits the right of the arbitrator to “split the difference” and therefore reduces the inherently conservative and political nature of arbitration. FOS arbitration provides more scope for change where there is wide division over issues such as productivity measures. On the other hand, on issues such as disputes over wages, the process is designed to encourage each party to abandon extreme positions, supposedly narrowing their differences and encouraging settlements.

Research compiled for this study by the Research and Data Development Division of the Labour Program, HRSDC, from data in the United States where FOS arbitration is regularly used, confirms some of these outcomes. Negotiations under the right to strike are voluntarily settled without a work stoppage 95% of the time (actually presently approaching 97% in the federal private sector) and these drop to 75% settlement under compulsory conventional arbitration without an award.¹⁴⁹ FOS arbitration, where the arbitrator is constrained to choose one of the two parties’ final offers as the award, improves the rate of voluntary settlement to about 85% of negotiations, thus increasing the propensity for parties to voluntarily settle by roughly 10 percent.¹⁵⁰ It is possible that “arb-med” techniques could increase the results for both conventional and FOS arbitration.

On the negative side, there are legitimate concerns about whether FOS arbitration awards may impair labour peace. Research tends to demonstrate that extreme or unsatisfactory positions are not necessarily prevented by FOS arbitration, for example when the parties are fundamentally far apart on matters of principle.¹⁵¹ The wide divergence in offers is compounded by the apparent optimism of the parties that their positions will be accepted.¹⁵² The use of fact-finders or experts appears to have a strong moderating impact on offers.¹⁵³ It is not clear how “arb-med” could play a role in dealing with this issue.

¹⁴⁹ Research and Data Development Division, Impact of Arbitration on Dispute Resolution and Wages (Canada: Human Resources and Social Development Canada, Labour Program, 2008), p. 8.

¹⁵⁰ *Ibid.*, p. 8.

¹⁵¹ *Ibid.*, p. 18.

¹⁵² *Ibid.*, p. 18.

¹⁵³ *Ibid.*, p.19.

There is also research suggesting that FOS arbitration awards may result in lower productivity and higher risk of future work stoppages.¹⁵⁴ Issue by issue FOS arbitration may avoid these results, but it is criticized for not raising the same degree of uncertainty to encourage the parties to negotiate their own agreement.¹⁵⁵

Apparently unions are more risk-averse to the process than employers as their final offers succeed in 55% of the cases, which may be either a good thing or a bad thing depending upon their perspective.¹⁵⁶ There are theoretical conclusions that FOS arbitration outcomes will produce lower wage awards than conventional arbitration outcomes which may be supported by the higher success rate of unions.¹⁵⁷ There is no evidence to date to support these predictions as the amount of empirical research that has been done on the subject is limited.

In speaking with arbitrators, they did not like FOS arbitration, although very rarely used to date in Canada, indicating that it produced bad bargains. In the recent *Review of the Colleges Collective Bargaining Act*, Kevin Whitaker, Chair of the Ontario Labour Relations Board, recommended that the never-used FOS provision contained in the *Act*, be removed, stating only that it had not been used and was not a feature of the *Ontario Labour Relations Board Act*.¹⁵⁸

Stakeholder Response

Canada has limited experience with FOS arbitration awards. Although available under some provincial legislation, it was never used in Ontario.

The submissions on behalf of labour did not deal with the issue. The United Steel Workers (USW) indicated only that once return-to-work legislation had been adopted by Parliament the matter should be resolved by an interest arbitrator agreed to by the parties.¹⁵⁹

Employers on the other hand generally were supportive of FOS. FETCO submitted that back-to-work legislation should provide for mechanisms to make the resolution process more efficient, such as the requirement for FOS arbitration in the *Railway Continuation Act, 2007*.¹⁶⁰ NAV Canada also recommended recourse to FOS arbitration in order to reduce the “chill” effect on bargaining.¹⁶¹ Employers probably prefer FOS because it overcomes the inherently political and

¹⁵⁴ Ibid., p. 20.

¹⁵⁵ Ibid., p. 19.

¹⁵⁶ Ibid., p. 4.

¹⁵⁷ Ibid., p. 4.

¹⁵⁸ Kevin Whitaker, *A Review of the Colleges Collective Bargaining Act* (Canada: Minister of Training, Colleges and Universities, 2008) p. 84.

¹⁵⁹ USW Submission, 2008, p. 14

¹⁶⁰ Submission by FETCO, 2008, p. 10.

¹⁶¹ Submission by NAV Canada, May 2008, p. 4.

thereby conservative nature of interest arbitrations. (These characteristics of interest and grievance arbitration could be attenuated if **all** arbitrators were imposed on the parties from a list of arbitrators such as is used for expedited grievance arbitration. However, as long as the majority of arbitrators are selected on consent, the political and conservative problem of arbitration will prevail.) In the employer's current preferred bargaining mode of demanding productivity concessions from unions, the possibility of "winning" on these issues of "principle" would appear greater using FOS.

It would be worthwhile for the FLMRC to consider the following: improving interest arbitrations by expediting them or using "arb-med" techniques for example; voluntarily applying "arb-med" to selected industries or situations such as wage or complicated issue disputes; or determining whether FOS arbitration techniques can be improved to overcome acknowledged shortcomings of traditional interest arbitration. These techniques have the advantage of avoiding "routinizing" procedures and, if available, would appear to hold the prospect of different circumstances serving different needs to reduce the risk, frequency and duration of work stoppages.

Option 10 - Improve the Timeliness and Quality of Decisions by the Canadian Industrial Relations Board

Improve the timeliness and quality of CIRB decisions. While consensus was reached with the stakeholders on this option, there was not much detail on how this would be accomplished. This option reviews some of the possible initiatives to achieve the goals of the stakeholders.

Summary

- *Problems involving CIRB procedures have been found to be important contributing causes to major work stoppages over the last decade.*
- *The CIRB Consultation Committee has primary responsibility for these issues and its recommendations should form the basis for options to reduce the risk of work stoppages that may arise from Board procedures.*
- *Measures to improve the timeliness of the decision-making process and implement a formal consultative process involving the stakeholders in the selection process for Vice-Chairs should moderate problems in relation to the Board.*
- *Attracting recognized private arbitrators for appointment as part-time Vice-Chairs, by establishing reasonable remuneration scales comparable to those paid other skilled professionals engaged by the federal government, would possibly assist in resolving many of the concerns relating to the CIRB.*

Stakeholder Problems with the CIRB

There is considerable consensus among the labour and management representatives that past proceedings before the CIRB have been inefficient and, in some cases, greatly increased the risk of a work stoppage. In one case, the procedures and decisions of the CIRB were cited as the actual cause of a major work stoppage. The work stoppage was viewed as the only means to avoid the effect of one of the CIRB orders.¹⁶²

The extent and gravity of these complaints was probably best brought out in the FMCS mediators' analysis of contributing causes of the 32 major work stoppages between 2001 and 2007.¹⁶³ Issues with the CIRB were considered to have caused or contributed to more than one third of the major work stoppages during the period. Therefore, it is of the highest importance that CIRB procedures be improved if it is to contribute to efficient labour relations practices..

¹⁶² Request that source remain anonymous.

¹⁶³ Table 3-1.

The complaints are threefold: that the CIRB took much too long to hear cases and to render its decisions (in contravention of the *Code*), thereby frustrating and complicating the collective bargaining process; that the procedures before the CIRB were too legalistic and dominated by lawyers, with the result that the Board ended up defining the issues too narrowly without taking into consideration the collective bargaining processes that were impacted by its decisions; and that the Board's decisions were inconsistent and were viewed by the stakeholders as reflecting, in some cases, the quality of appointments. In the past, some of the persons appointed were said to be insufficiently familiar with industrial relations issues or lacking experience on conducting hearings. Some were thought to be averse to making decisions.

Recent Changes at the CIRB

Changes have been made at the CIRB that have helped contend with some of these problems. The previous highly respected Chair, the former Assistant Deputy Minister of Labour, initiated a series of reforms, including the creation of the CIRB Consultation Committee involving the stakeholders and labour lawyers. The Committee has made some significant proposals for reform. Despite his well-meaning efforts, he had serious understaffing problems and some of the complaints persisted. Recently, the former Director General of FMCS, also highly respected by the stakeholders, has been appointed Chair and she is continuing the work of her predecessor to resolve some of the concerns. The current and previous Chairs have brought a renewed commitment to the practical side of labour relations and have helped restore confidence in the CIRB on the part of the stakeholders.

Chronic Problems at the CIRB Persist

The chronic nature of these criticisms, despite the excellent initiatives of the past Chair, suggests the intractability of some of these problems. Delay and the complexity of issues facing decision-makers are probably the most prevalent themes that erode confidence - themes common to most judicial and quasi-judicial systems. Criticism can also be driven by decisions favouring opponents or a lack of understanding of all the variables that go into decisions.

These issues were discussed with the Chair and her Board members who recognize past difficulties and are committed to avoiding them in the future. They nevertheless emphasized that there are well-established judicial requirements to which they must adhere and which limit their flexibility and the "de-legalizing" of their functions. They also pointed out that in an adversarial system, clients and their lawyers play a large role in controlling the process. There is the continuing issue of the Board having sufficient Vice-Chairs to hear matters and write decisions.

A meeting was also arranged with the Board's senior managers. They share a wealth of experience and competence and were impressive in their commitment and desire to improve the Board's procedures and timeliness of decisions. They expressed concern about the over-legalization of the Board and the manner in which lawyers have come to dominate processes, in contrast with earlier times when it functioned in a much more expeditious and informal manner.

As mentioned, the former Chair established a CIRB Consultation Committee comprised of stakeholders (FETCO, Canadian Labour Congress and Confédération des syndicats nationaux), representatives of associations of lawyers for unions and management appearing before the Board (Canadian Association of Labour Lawyers and Canadian Association of Counsel to Employers), and the Chair and other designated members and staff, with the former Senior Assistant Deputy Minister of the Labour Program at Human Resources Development Canada, chairing the committee. The Consultation Committee clearly has primary responsibility for improvements at CIRB which appear to some extent to be happening. However, they advise that there has not been a response to all of the recommendations that the Committee has made. It is important that this Committee continue to function and that its input be sought by CIRB and the Labour Program if the necessary reforms are to be carried out.

Recognizing the primary responsibility of the CIRB Consultation Committee, the following are offered as options for consideration by the Committee and the Labour Program as measures to reduce the risk, frequency and duration of work stoppages attributed in the past to CIRB procedures.

Timeliness

- **Introducing case management at the discretion of the Chair.**

Procedures were discussed with the Chair about options to centralize case management responsibilities with the Chair or one Vice-Chair as second-in-command. These suggested measures were based upon "best practices" initiated in the Ottawa Superior Court some years back when it transformed itself in a matter of two to three years from the court with probably the longest backlog of cases in the province to the one having the shortest. It was also the local Ottawa court that pioneered the introduction of mandatory mediation in the Ontario Superior Court system and with respect to the use of mediation in the civil court system, it remains the leader in successful implementation of this program in Ontario and probably anywhere in Canada.

The key to the success of these measures is having a Chair with quasi-dictatorial powers, supported by a dynamic second-in-command and a compliant group of Vice-Chairs, diligent staff and engaged lawyers and their clients who will be requested to participate in “blitzes” to retake command of timely procedures before the Board.

To the extent necessary, the Regulations should be amended to introduce complete flexibility into the process.

The CIRB could adopt more informal procedures such as those described in the report of the Saskatchewan Ombudsman: *Hearing Back: Piecing Together Timeliness in Saskatchewan’s Administrative Tribunals*.¹⁶⁴

- **Implementing administrative measures to expedite decisions**

These were reviewed with the Chair and measures were already introduced to respond to this issue. Others are to be considered by the Consultation Committee.

- **Implementing formal labour relations processes to deal specifically with restructuring situations involving bankruptcy, insolvency, mergers and acquisitions**

This suggestion originates from Andrew Sims, specifically in relation to situations involving bankruptcy and insolvency.¹⁶⁵ Given that complaints concerning CIRB procedures, particularly with respect to timeliness, often originate from restructuring processes, consideration should be given to adopting new procedures that might expedite and provide consistency of decisions for applications arising out of these situations.

- **Giving the Chair (and case managers) the power to order mediation**

At present the parties must consent to mediation at the request of the Chair. This is rarely refused. Nevertheless, there is no reason why the Board should not have the power to order mediation when it deems it necessary. This, however, would require an amendment to the *Code*.

¹⁶⁴ *Hearing Back: Piecing Together Timeliness in Saskatchewan’s Administrative Tribunals*, Ombudsman Saskatchewan, Report to the Speaker of the Legislative Assembly, December 2007.

¹⁶⁵ Andrew C.L. Sims, “Reflections on Administering Labour Law,” *Canadian Labour & Employment Law Journal* 12: 128.

- **Provide additional resources to the Board**

The Board should conduct an analysis its resource needs and increase its number of Vice-Chairs and staff where required. There appears to be insufficient resources at this time to complete all of the cases before the Board, which is a continuing problem from past Boards.

As an alternative to appointing further Vice-Chairs, additional resources at perhaps a lower cost to the CIRB could be provided through the appointment of highly-respected as arbitrators part-time Vice-Chairs. Part-time Vice-Chairs have at least two advantages over the appointment of full-time Vice-Chairs. They can be used with greater flexibility to respond to increased demands; persons may be attracted who would make excellent Vice-Chairs but will not accept a full-time position because of the requirement to move to Ottawa. (See the later option about removing this requirement) or because they wish to maintain their more lucrative private practices.

There should be increased remuneration for part-time Vice-Chairs. There is no reasonable explanation for the under-payment of part-time Vice-Chairs. Senior lawyers are paid up to \$275 an hour working for the federal government, while mediators can earn up to \$1800 a day in various federal agencies. In comparison, part-time Vice-Chairs receive \$850 a day for their valued services. The solution to many of the Board's problems may be found in adequate compensation to attract competent people to the jobs.

Quality and Consistency of Decisions

The foundation of our adversarial system of decision-making is that the best and the brightest, usually with the most experience and knowledge, will sit in judgment of others. To the extent that this premise is not followed, poor quality decision-making can result. This ends up undermining the processes that parties rely upon to resolve their disputes, while damaging the reputation of the institution.

Cases that come before the CIRB are often of comparable complexity and challenge to the decisions that courts must make. Additionally, the very serious consequences of poor quality decisions are evident from the comments of stakeholders and the FMCS on their impact on work stoppages. A work stoppage is a major event that often impacts upon thousands of workers, their families and their communities, not to mention third parties and employers whose operations are curtailed and whose losses may generate future problems that will linger long after the work stoppage ends. The importance of the decisions of the Board supports the case for assuring the highest quality appointments.

Options for the Appointment of Vice-Chairs

It serves little purpose to present a series of options intended to reduce the risk, frequency and duration of work stoppages, if dispute resolution processes administered by the government's tribunals are faulty. The quality and consistency of appointments will affect the quality and consistency of decisions. Several options are proposed:

- **Implement a consultative process for appointments to the Board.**

Union and management representatives strongly share the view that their input should be considered in the appointment process for Vice-Chairs. In 2005, the CIRB Client Consultation Committee prepared a process for the identification of qualified candidates for appointments to the Board. It followed a process used by the Public Service Labour Relations Board and set out in the *Manitoba Labour Act* for the appointment of members to their respective boards. The process requires appointments to be made from a list prepared by the Chair of the Board after consultation with representatives from labour and management. Apparently the recommendations of the CIRB Consultation Committee have not yet been adopted. It was noted that there are other formats for appointment than having the Chair and stakeholders direct the process.

The Chair and the Committee may wish to consider some of these points in determining how best to proceed in improving the appointments process.

If there are concerns with the suggested appointment process, these could be addressed in further discussions and any necessary modifications made. It is important that a consultative process, involving the stakeholders and lawyers appearing regularly before the Board, be adopted to help attract and make high quality appointments.

- **Reinstate classifications that applied to members of the Canada Labour Relations Board (CLRB)**

At the time of its creation to replace the CLRB, job classifications of the CIRB's members were lowered with a significant decrease in pay. As discussed earlier, CIRB decisions may have enormous consequences for stakeholders. Many highly qualified arbitrators and other practitioners in the field indicated that they would consider a position on the Board if the remuneration was raised to a more competitive level. By reinstating classifications that formerly applied to the CLRB, experienced candidates would be encouraged to apply.

- **Introduce more flexibility into the residency requirements and provide timely renewal of appointments**

Two other recommendations were made by the CIRB Consultation Committee to improve the chances of attracting better candidates to the Board. The first is to remove the requirement of residency of full-time members in the National Capital Region. The recommendation must however, be approached with caution to ensure that the cohesiveness of the Board is not lost.

The second recommendation was to provide more timely notice of re-appointment for another term. This is a long-standing complaint which reflects poorly on the Board's administration and makes it less attractive to candidates.

Section II: Options (Neutral) Affecting Duration of Work Stoppages

Option 11 - Return-to-work “Cooling off” Order in Stalelated Work Stoppages

Consider the use of a return-to-work “cooling off” period to give parties an additional opportunity to resolve their differences with the assistance of a mediator. Other options which may impact on the duration of work stoppages, pertaining to the use of replacement workers or mandatory votes on the employer’s final offer, will be considered in the non-neutral section of this chapter.

Summary

- *This option differs from a measure involving a Ministerial order permanently ending the work stoppage; the concept here is to defer an ongoing work stoppage for a short period of time as a means of encouraging the parties to reach settlement.*
- *The measure would be intended to be used very sporadically in stalelated work stoppages where there may be some opportunity for settlement which a temporary return to work order could catalyze.*

Ending Stalelates

Reducing the duration of work stoppages once underway seems to be a much more difficult task than limiting their frequency. The common phrase in labour relations is “going on strike is easy, getting them back to work is the hard part”, which seems truer in recent years. Many of the neutral options already offered to reduce the risk and frequency of a work stoppage, particularly those around building better relationships, should positively affect the duration in an indirect manner.

Work stoppages that exceed 30 days are generally seriously stalelated and usually not considered “successful” by most large unions and many employers. The difficulty is that being in an impasse that may not make economic sense, the parties, or one of them, may have limited alternatives that can be initiated as a graceful exit strategy without losing face or causing irreparable damage to its position in doing so. Stalelated work stoppages of larger bargaining units also generate the statistics that reflect poorly on Canada’s ability to manage industrial conflict.

The option to contend with the situation involves an amendment to the *Code* to provide the Minister with the discretion to order a “cooling off” period during a work stoppage to act as a

catalyst to overcome a bargaining deadlock. The Minister's order would defer or suspend the strike or lockout, in a fashion somewhat similar to an order of the Governor-in-Council pursuant to section 90 of the *Code* deferring a work stoppage while Parliament is dissolved. The employees would be required to return to work for 30 to 60 days. During this time, the Minister could appoint a high profile mediator to work with the parties to settle the work stoppage. The Minister would have to exercise the option very sparingly as it should be considered an exceptional option. Its main advantage could rest with the element of risk that threatening its use would introduce into the process. While the order would be made by the Minister, he or she would rely upon the FMCS to a large extent to read the situation and determine whether the order would have some degree of consensus by the parties involved.

Alternatively, the determination to order the "cooling off" period could be referred by the Minister to the CIRB with the task of determining by way of an expeditious procedure whether a work stoppage was stalemated and no longer serving any valid industrial relations purpose. This idea is somewhat similar to legislation adopted in Manitoba recently whereby its labour relations board decides whether to order interest arbitration in a stalemated strike (discussed later under Option 17).¹⁶⁶ In this event, the Board would order a return to work for a fixed term and direct the parties to return to the bargaining table to attempt to settle the matter by negotiation. A procedure before the Board would permit the parties a limited right to make submissions to ensure that the "cooling off" period did not cause undue prejudice to a party. Simply being required to appear before the Board could prove to be a sufficient incentive for the parties to get back to serious negotiations. During the "cooling off" period, the Minister would appoint an outside mediator to assist the parties in their attempt to conclude a collective agreement. If in either case, the stalemate persisted, at the end of the "cooling off" period, the work stoppage would continue.

Advantages and Disadvantages of a "Cooling Off" Period

The "cooling off" option may have some attributes that could contribute to ending a work stoppage successfully. As indicated, just threatening to order a "cooling off" period could produce the same sort of salutary effects on the parties as "back to work" legislation produces without the "chill" because the work stoppage may not end as a result. In addition, having already been through the work stoppage and having experienced the relative power of the opposing party, the previously indeterminate consequences of a work stoppage should be fairly evident. Thus, if the work stoppage were a mistake or caused by unrealistic expectations, frustrations, the need to vent, ulterior motives, internal union issues or personality clashes, the "cooling off" period could help bring it to an end. Human nature suggests that having been through the process of a work stoppage once, there should be some natural antipathy on both

¹⁶⁶ *Manitoba Labour Relations Act*, C.C.S.M. c. L10, s. 87.1(1).

sides against starting all over again. Neither party would of course lose face if the matter were settled or the strike continued, as the implementation of the measure would be initiated by the Minister alone and not at any party's request. The situation somewhat resembles circumstances where mediators accept the blame for something as a means to achieve settlement.

There are also disadvantages to the concept. Both parties would have to deal with the effects of stopping and starting the work stoppage if settlement did not occur, whether they be financial costs, concerns over sabotage or loss of union solidarity. It is also not clear how a "cooling off" period would affect the power balance, for example by increasing work stoppage disruption costs unduly for the employer, or weakening solidarity of the union members. Moreover, it is also not clear what the effect of a "cooling off" period would have on the decision to engage in a work stoppage in the first place, if the parties thought that the Minister might bail them out. Nevertheless, a "cooling off" period is not like ordering an end to a work stoppage. It would remain in essence a quasi-mandatory measure that could not force an end to the work stoppage, only defer it to encourage the parties to reach an agreement.

Stakeholder Response

There was a clear consensus of unions and management against any concept of a "cooling off" period being ordered during a work stoppage. FETCO's submissions rejected giving the Minister unilateral power to end or suspend work stoppages on the basis that "this would open the process to political abuse".¹⁶⁷ As originally described, the option did not entail the Minister relying upon the FMCS for guidance in its application, although the option did contemplate as an alternative, a reference to the Board.

Labour's position was that any amendments that would limit or eliminate the right to strike could not be justified by the current trend in work stoppages in Canada. CLC's position on behalf of labour was that:

*"Any attempt to reduce, limit, constrain or eliminate the right to strike in the federal private sector is, in our opinion, contrary to the underlying values in the Charter of Rights and Freedoms in our society."*¹⁶⁸

Without getting into the legal arguments over the scope of the right to strike under the *Charter of Rights and Freedoms*, it is clear that both stakeholders conclude that any form of "cooling off" period ordered by the Minister or otherwise, would not present an acceptable option to reduce the risk, frequency or duration of work stoppages. There is the additional issue of whether an

¹⁶⁷ FETCO Submission (2008), p. 9.

¹⁶⁸ CLC Submission (2008), p. 6.

amendment to the *Code* is necessary or if the Minister has sufficient powers under section 107 of the *Code*.¹⁶⁹

Nevertheless, accepting that the option would not be exercised for political reasons but upon the advice of FMCS, and the opinion that such a provision is not contrary to the *Charter of Rights and Freedoms*, based upon the strategy of keeping the stakeholders guessing and not routinizing options to reduce work stoppages, it is possible that having a “cooling off” option available could produce a salutary effect without ever being exercised.

It is also noteworthy that apart from improving union-management relationships, parties consulted could not offer anything else in the way of neutral options to reduce the duration of work stoppages, even though this appears to have been the major contributor to person days not worked in the federal private sector.

¹⁶⁹ See the comments made in Appendix 5-A regarding section 107 to the effect that an amendment appears necessary to support a provision of this nature.

Option 12 - Ministerial Ordered “Cooling Off” Period Prior to the Introduction of Back-to-Work Legislation

Ministerial ordered “cooling off” option in those cases where emergency back-to-work legislation is pending because of the significance or magnitude of the work stoppage.

The difference between this “cooling off” option and the “cooling off” measure in Option 11 for stalemated work stoppages, is that this option would be exercised only in circumstances where the failure to arrive at a negotiated agreement during the “cooling off” period would likely result in back-to-work legislation. The option therefore has two purposes: first, as with the general “cooling off” period option, to encourage the parties to make one last attempt at arriving at an agreement; and second, to limit recourse to Parliament and perhaps provide it with time to prepare the necessary legislation, if the parties cannot conclude an agreement.

Back-to-work legislation would appear to be the least desirable of all possible outcomes in the negotiation of a collective agreement. If this assumption is accurate, a preferred alternative to legislation would be for the Minister to have the power to order the parties to return to work for a “cooling off” period of 30 days in the same fashion as described in Option 11.

The stakeholders could consider the possible mechanics of Ministerial discretion invoking a “cooling off” period. Criteria could be developed to circumscribe the scope of the Minister’s discretion to ensure that it was only used in the most narrow of circumstances to justify back-to-work legislation. The exercise of this discretion could be made conditional, for example, on a declaration by the Minister of his or her intention to request that Parliament forthwith adopt legislation bringing a work stoppage to an end. In lieu of requesting Parliament to intervene, the Minister could order the work stoppage to be suspended for a period of 30 days and the parties could be required to return to the negotiating table with a mediator appointed by the Minister.

There are somewhat comparable measures in the United States that can be used both to enjoin a pending work stoppage, as well as to apply a “cooling off” period for work stoppages underway that create national emergencies or that would deprive the country of essential transportation services. The following excerpts give more details:

“National Emergency Strikes: The Labor-Management Relations Act, provides for an injunction when the President finds that a strike or threatened strike or lockout or threatened lockout will imperil the national health and safety. The strike may be enjoined and a board of inquiry appointed. If the dispute has not been settled in 60 days, the board of inquiry releases its report; 15 days later, the

*employees vote on the employer's final offer. Once the NLRB certifies the results of the vote, the injunction is dissolved.*¹⁷⁰

*Railway Labour Act: (which covers railroads and airlines) provides for the President to appoint an emergency board upon a finding that a dispute threatens to deprive any section of the country of essential transportation services. The Presidential Emergency Board holds hearings and issues its report during which time the parties have a duty to maintain the status quo. Once the report is issued, there is a 30 day "cooling off" period during which the parties must continue to maintain the status quo. After expiration of the "cooling off" period they may proceed with the strike, lockout, make unilateral changes, etc."*¹⁷¹

National emergency strikes, referred to above in the American legislation that "imperil the national health and safety", would be largely prohibited in effect in the federal private sector in Canada by section 87.4 of the *Code*. While not barring a work stoppage, it requires the continuation of services during a work stoppage to the extent necessary to prevent an immediate and serious danger to the safety and health of the public. The American option defers the work stoppage by injunction, orders a formal inquiry for 60 days and requires the union members to vote on the employer's final offer within another 15 days, before ultimately permitting the work stoppage to proceed (unless further legislation ensues).

The United States *Railway Labor Act* provisions are also somewhat comparable except that the "cooling off" period is not designated as a first step in back-to-work legislation. The American legislation forces the parties through a series of hoops, deferring the work stoppage, using a public conciliation process comparable to a conciliation board under our section 72, (without however ordering a vote on the employer's final offer), but ultimately releasing the parties to continue the work stoppage if the situation is not resolved in the course of those procedures.

Stakeholder Response

The position of the stakeholders on this option is similar to that described for the "cooling off" period in a stalemated work stoppage. Generally, labour and management representatives share the position that to the extent possible, interventions by the government should be limited to extraordinary circumstances. FETCO's position was: "Back-to-work legislation must only take place in extreme circumstances."¹⁷² It similarly opposed unilateral interventions by the Minister to end or suspend work stoppages.

¹⁷⁰ *Labor Management Relations Act*, 29 U.S.C. 176-80, s. 206-210.

¹⁷¹ *The Railway Labor Act*, 45 U.S.C. c. 8, 1996, s. 160.

¹⁷² Submission by FETCO, 2008, p. 10.

Section III: Non-Neutral Options

In this section, measures are reviewed that impact on the power balance between the parties, whether intended or not. Power, it will be recalled, relates to the effectiveness of the work stoppage to cause or not cause one party to comply with the demands of the other.

Five non-related options are considered. The first two are considered to favour the employer: the first one requires a union to conduct a vote on the last offer of the employer before a work stoppage can commence; the second, imposes an end to a work stoppage that creates an emergency due to its impact on third parties. The union's power is attenuated by the imposition of interest arbitration to resolve the dispute.

Three options favouring unions are presented: first, expanding recourse to first agreement arbitration to determine the terms of a collective agreement (favouring the union which otherwise may not end up with a collective agreement or may be decertified); second, a ban on temporary replacement workers which would affect the power balance by making a work stoppage more effective; and third, a Board-ordered return to work and interest arbitration in stalemated work stoppage situations.

Options Favouring Employers

Option 13 - Last Offer Votes and Ratification Votes

Requirement that a membership vote be made on the employer's last offer and the impact that it would have on union-management relations. In addition, consider best practices that might be applied to the conducting of ratification votes.

Summary

- *Communication of an employer's offer does not appear to be a problem in the sector, nor would an option to require an automatic vote on the employer's last offer appear to reduce work stoppages, but could undermine the stability of union-member relationships.*
- *Failure to ratify a tentative agreement by union membership appears to correlate with strikes; options are limited to support best practices involving Internet or other widespread consultation processes to avoid failed votes.*

Union democracy can affect the issue of work stoppages in a number of ways. Two are considered here, both involving circumstances where union members may choose not to follow the recommendations of their leaders. In the first instance, that of the last offer vote, the members would be required to vote on the employer's last offer before being permitted to go on strike. In the second, the union would have negotiated a tentative agreement with the employer but it is rejected by the union members with the implicit instructions to go back to the table and do better.

Require a Vote on the Employer's Last Offer Prior to a Strike

The *Code* already contains two provisions requiring a vote by union members with respect to strike actions. Section 87.3 requires a secret ballot strike vote within 60 days of initiating the strike as a precondition to going on strike. This provision was added to the *Code* on the recommendation of the Sims report in 1999 and was not intended to be a final offer vote.¹⁷³ Unions do not appear to oppose this provision as they can use an early strike vote as a strategy to demonstrate solidarity of union membership normally long before final offers are generated.

Section 108.1 is a final offer vote provision which allows the Minister to order a vote on the employer's last offer when of the opinion that it is in the public interest to do so. It preceded the

¹⁷³ Sims, Andrew C.L., *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 104.

1999 amendments and was enacted without labour-management consultation but over labour's objections. Section 108.1 has not been used to date and there are no criteria known at this time to guide the exercise of the Minister's discretion. In 1999, during the Sims consultation process, employers sought an amendment eliminating the Ministerial discretion and making the last offer vote requirement a general right for employers, or a precondition to strike action. The Sims report found that there was no convincing evidence that unions in the federal sector were failing to take offers to their members, or misrepresenting their members' views.¹⁷⁴ The report also expressed concerns over the expense to conduct votes the timing needed to conduct votes, particularly in Canada-wide federal sector¹⁷⁵

Kevin Whitaker recommended an amendment to the *Colleges Collective Bargaining Act*, adding a provision that would require a vote on the college's last offer, at its option, within 15 days of the expiry of the collective agreement.¹⁷⁶ It is understood that this measure would extend beyond the term of a collective agreement for it to be effective, but this is not clear. Whitaker indicated that the purpose behind an option of this nature would be to permit the employer to test the attractiveness of its bargaining proposal directly with employees.¹⁷⁷ The purpose was said to be frustrated if the package when put to a vote did not represent the actual employer position at the most critical phase of bargaining just prior to a strike being called by the union.¹⁷⁸

If the rationale for the last offer vote is said to be based on poor communications of the contents of the vote, one would presume that if established and brought to the attention of the Minister, this would be the type of situation where it would be in the public interest to direct a vote, or require that the terms of the employer's offer to be communicated to the members as an alternative to ordering a vote.

Unions maintain close communications with their members, including using the Internet to improve the accuracy and timeliness of information. In addition, depending upon the union-management relationship, many unions accept the request of employers to present their last offers to their membership. In some cases, they will oppose the employer's offer or in others they will take no position, in effect leaving it to the membership to decide, as a quasi-ratification vote.

However, it is not always possible to keep members fully up-to-date on the details of the bargaining. In some cases the unions purposely do not keep their members fully apprised, such as when they are attempting to manage expectations in one direction or the other for purposes

¹⁷⁴ Sims, Andrew C.L., *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 108.

¹⁷⁵ *Ibid.*, p. 108.

¹⁷⁶ Kevin Whitaker, *A Review of the Colleges Collective Bargaining Act* (Canada: Minister of Training, Colleges and Universities, 2008) p. 85.

¹⁷⁷ *Ibid.*, p. 85.

¹⁷⁸ *Ibid.*, p. 85.

that they consider appropriate, acting at all times in what is thought to be in the best interests of its members.

But more substantively, the more troublesome issue with respect to the last offer vote is its possible impact on the effectiveness and stability of the union leadership when the members reject the recommendation to go out on strike. A problem also arises when union members fail to ratify a tentative agreement. A close vote may also undermine the solidarity of support and with it the strength of the union's bargaining position. It may augment the pressure on unions to settle rather than put their leadership to the test or risk dividing their membership. This option could well shift the power balance in favour of the employer. This could be the underlying basis for employer support of this option which unions vigorously oppose.

There is empirical analysis suggesting that a mandatory strike vote has a significant effect on reducing both the incidence and duration of work stoppages.¹⁷⁹ This analysis does not, however, distinguish between the type of provision already in the *Code* calling for a strike vote within 60 days of the strike, and the option being proposed herein requiring the employer's last offer to be placed before the membership. In the Sims report, it was indicated that where employers can require such votes, the percentage resulting in a settlement has been low.¹⁸⁰ There is no reason to suspect that the situation has changed since 1995. Moreover, when an employer forces a vote on a union, this cannot assist in the union-management relationship.

Stakeholder Response

FETCO's position on behalf of employers was that:

“Prior to a strike taking place the union should be required to hold a vote on the employer's last offer. This creates transparency in the system and ensures that the membership endorses (or rejects) a strike knowing what they have been offered.”¹⁸¹

However, employers were also of the view that no reforms should be considered without extensive union-management consultation, nor should they be made in a piecemeal fashion without determining their overall impact on the labour relations situation.¹⁸² The employers also noted that changes that have the potential to alter the balance of power at the bargaining table

¹⁷⁹ Cramton, Peter; Gunderson, Morley and Tracy, Joseph. “The Effect of Collective Bargaining Legislation on Strikes and Wages,” *Review of Economics and Statistics* (1999) p. 16.

¹⁸⁰ Sims, Andrew C.L., *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. 107.

¹⁸¹ Submission by FETCO, 2008, p. 5.

¹⁸² *Ibid.*, p. 12.

can create unintended consequences. Accordingly, such changes must be carefully thought through and a cautious approach taken.¹⁸³

The discussion paper circulated for comment did not contain any reference to an option concerning final offer votes (nor to replacement worker and first contract arbitration options to which there have been extensive replies) and the unions did not provide comments on the issue. But their opposition to such a provision is well documented, particularly because of the potential it may add to delaying a work stoppage.

There is no evidence that final offer vote provisions would impact on the frequency or duration of work stoppages, beyond anecdotal remarks made by some employer representatives on specific work stoppages.

In addition, improved union-management relationships could provide solutions to issues concerning the communication of employer offers to union members. Unions do not wish to enter into agreements not supported by their members, and, once a degree of trust and credibility is established between the stakeholders, it should become a much diminished issue of concern.

Best Practices for the Conduct of Ratification Votes

There may be some correlation between failed ratification votes and work stoppages. From information available from the FMCS, which may not be complete, it would appear that of the 32 major work stoppages (many of which were lockouts) since 2001, seven or 20% involved failed ratification votes.¹⁸⁴

There is no legislative option that could be adopted in response to this problem, assuming it is one. Moreover, ratification votes are entirely a union matter, although employers share an interest with union leaders in having the tentative collective agreements ratified by union members.

The issue was discussed with several union representatives during the consultation process. Like work stoppages, the situations of failed ratifications are very idiosyncratic and arise for a number

¹⁸³ Ibid., p. 13.

¹⁸⁴ The FMCS prepared a list of the 7 largest strikes caused by a failure to ratify. These included: 1) Canadian National Railways Limited, Montréal, Québec and the United Transportation Union; 2) Greyhound Canada Transportation Corporation, Calgary, Alberta and Local 1374 of the Amalgamated Transit Union; 3) BHP Billiton Diamonds Inc. (Ekati Diamond Mine), Yellowknife, Northwest Territories and the Public Service Alliance of Canada; 4) Telus Communications Inc. Burnaby, BC and Edmonton, Alberta, and the Telecommunications Workers Union; 5) Canadian-National Railway Company, Montreal, Quebec and the CAW-Canada, Local 100 and Council 4000; 6) United Parcel Service Canada Limited, Concord, Ontario and the Canada Council of Teamsters (Local Union nos. 31, 69, 91, 362, 855, 879, 880, 927, 931, 938 and 979); 7) Canadian Pacific Railway, Calgary, Alberta and the Brotherhood of Locomotive Engineers/Rail Canada Traffic Controllers.

of reasons. Some relate to internal difficulties, others to squaring members' expectations with reality, and others with mistakes and breakdowns in communications.

Nevertheless, some best practices appear evident. CUPE uses extensive polling and the Internet to stay in close contact with its members. The CAW carries out wide-ranging personal consultations with all levels of the leadership hierarchy to review the proposed agreement before seeking the vote. Timing of the vote can be an issue. Generally, the sooner the vote is taken after a tentative agreement is reached the better. In addition, agreements reached too early in the negotiation cycle can be rejected by members thinking that there must be more there, justifying somewhat the deadline bargaining tactics adopted by many unions.

As an option for reducing the incidence of failed ratification votes, the FMCS could explore these issues with unions to consider best practices. Assistance could be provided by the FMCS and the Labour Program in developing optimal strategies for ratification votes, including new technologies and consultation procedures.

Option 14 - Ending Work Stoppages by Governor-in-Council Declarations of Public Emergency

Recourse to a Governor-in-Council declaration of a public emergency to end work stoppages. This option looks at yet another method of terminating a work stoppage in what might be deemed an emergency situation, i.e. impacting a major infrastructure or threatening the health of the public or services, or the dispute is causing, or likely to cause, unreasonable hardship to persons not a party to the dispute.

Summary

- *Intended to facilitate termination of a work stoppage without the necessity of adopting back-to-work legislation.*
- *A provincial government may end a strike or lockout by declaring an emergency and referring the matter to a Public Emergency Tribunal. If the matter is not settled, it will make a binding award that is included in the terms of a collective agreement.*
- *The decision declaring an emergency is subject to judicial review and may now be subject to a Charter challenge.*

Somewhat akin to the federal Governor-in-Council ordering the deferral of a work stoppage during the period between Parliaments, the *Alberta Labour Relations Code* contains provisions permitting the provincial government to end a strike or lockout by declaring an emergency and referring the matter to a Public Emergency Tribunal (PET) which would render the strike or lockout illegal.¹⁸⁵

The Alberta Governor-in-Council can only declare an emergency situation where there is a disruption to major infrastructure or health services, or the dispute is causing, or likely to cause, unreasonable hardship to persons not a party to the dispute. This decision is subject to judicial review. An application was made to review a decision made under these provisions ending a work stoppage involving teachers.¹⁸⁶ The Court ruled in favour of the union, concluding that an order could not be made under these provisions without some substantial foundation to demonstrate that unreasonable hardship had occurred, or unless the situation was one of apparent immediate danger.

Under the Alberta provisions, a form of “med-arb” is conducted, and if no settlement is achieved, the chair of the PET will make an award that is binding on the parties and included in the terms of a collective agreement.

¹⁸⁵ *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1, s. 113(1).

¹⁸⁶ *Alberta Teachers’ Association v. Alberta*, 2002 ABQB 240.

Public Emergency Tribunals have been used only in very limited situations in Alberta. In light of the court ruling, a PET is not effective in phased or rotating strikes or lockout actions, where the degree of hardship at a particular time varies among locations.

This type of option is intended to facilitate terminating a work stoppage without the necessity of adopting back-to-work legislation. Its terms would be applicable to many of the major infrastructure cases, e.g. work stoppages in the railways or airlines. It would be subject to court challenge, but so would back-to-work legislation under the *Charter of Rights and Freedoms*.

Stakeholder Response

As indicated earlier, the stakeholders are generally not interested in options which increase the powers of the Minister or the Cabinet to intervene in work stoppages. The position of labour is that the right to enjoin strikes is constitutionally constrained, although this view has yet to be confirmed to extend to legislation dealing with emergencies.

The employers accept that work stoppages must be prevented and interest arbitration substituted for collective bargaining in exceptional circumstances. NAV Canada and the Chamber of Shipping, representing 63 companies engaged in international shipping on the west coast of Canada through BC ports, have both argued that the right to strike should be constrained when they affect aeronautical and port activities.¹⁸⁷ Presumably, they would support an option of this nature which facilitates declarations of emergency based on unreasonable hardship caused to third parties by work stoppages.

In addition, FETCO, on behalf of the employers, indicated that where legislation is introduced to terminate a work stoppage and impose interest arbitration, it should be done with clear guiding principles for the arbitration that are relevant to the parties, in addition to an efficient resolution process, like final offer selection arbitration.¹⁸⁸

¹⁸⁷ Submissions by Nav Canada, 2008, p. 3 and Chamber of Shipping, 2008, p. 3.

¹⁸⁸ Submission by FETCO, 2008, p. 10.

Options Favouring Unions

Option 15 - Expand Access to First Contract Arbitration

Expand first contract arbitration by providing a more liberal interpretation of the legislative provisions to order such action.

Summary

- *Work stoppages related to first collective agreements represented 13% of the total number in the last eight years, although the person days not worked they caused were less than 1% of the total for that period.*
- *Legislation providing more latitude to impose a first collective agreement on an employer that could not otherwise be obtained by bargaining would constitute a significant alteration in the union-management power balance.*
- *It is not clear whether any reduction in work stoppages over first agreements would not simply be postponed to the next round of collective bargaining as some mediators have suggested.*

The United Steelworkers submitted that an option to expand access to first contract arbitration would reduce work stoppages.¹⁸⁹ During the private consultations with union stakeholders, others referred to the need to expand the provisions contained in the *Code* allowing for first contract arbitration to be ordered by the CIRB. No employer submissions were made with respect to this issue, which was not included as part of the discussion paper circulated to generate comments.

Section 80 of the *Code* sets out a two-step process that must be followed in order for a union to obtain first contract arbitration. The Minister must first consider if it is advisable to direct the CIRB to inquire into the dispute and, if the Board deems it advisable, to settle the terms and conditions of the collective agreement. There are no published criteria guiding the exercise of the Minister's discretion, but it is generally understood that unless the union is well enough established to be able to mobilize its members to engage in a work stoppage, the matter will not be referred to the Board.

The Board, in turn, has exercised its power under this section very sparingly. Its fundamental premise is that it will not give a party something it could not win itself at the bargaining table. The only exception arises in situations where the Board exercises its remedial powers where it concludes that there have been unfair labour practices.

¹⁸⁹ Submission by the United Steelworkers (USW), 2008, p. 11.

The Steelworkers referred to legislation in Saskatchewan and Manitoba as a best practice. It is more liberal in ordering first contract arbitration without having to demonstrate that the employer was failing to bargain in good faith before obtaining a Board order settling the contract.¹⁹⁰

Data obtained from the FMCS indicate that first agreements are not an insignificant cause of work stoppages. They represented 13% of all work stoppages in the last eight years, although the total person days not worked caused by these work stoppages was less than 1% of the total for that period.¹⁹¹

With respect to the duration of these work stoppages, no data is available, although authors have referred to the long duration of first contract work stoppages.¹⁹² Cases of lengthy duration were raised during the consultations, such as that concerning the failure to negotiate a first agreement with a chartered bank.¹⁹³

The fundamental issue with respect to an expansion of first contract arbitration of collective agreements reflects upon the reasoning underlying the Board's decisions to demur from giving a party something it could not win itself at the bargaining table. Legislation providing more latitude to impose a first collective agreement on an employer that could not otherwise be obtained by bargaining would constitute a significant alteration in the union-management power balance. For the purpose of this study however, it is not clear that any reduction in work stoppages over first agreements would not simply be postponed to the next round of collective bargaining, as some mediators have suggested.

The employers have not commented on this issue but it is known that they vigorously oppose it. There is insufficient data to conclude whether the long-term impact of this option would reduce the incidence and duration of work stoppages.

¹⁹⁰ Submission by the United Steelworkers (USW), 2008, p. 11.

¹⁹¹ See Table 2-3.

¹⁹² Briskin, Linda. "From Person-Days Lost to Labour Militancy: A New Look at the Canadian Work Stoppage Data," *Industrial Relations* 62:1 (2007) p. 57.

¹⁹³ For example, the United Steelworkers (USW) strike against CIBC in Sudbury, ON.

Option 16 - Ban the Use of Temporary Replacement Workers

Legislative ban on the use of temporary replacement workers. This option needs little or no introduction as it has been the object of several representations to government and the subject matter of several Private Members' Bills in Parliament. The *Canada Labour Code* currently provides only limited restriction on the use of replacement workers when the employer acts in bad faith to undermine a union.

Summary

- *The unions seek a general ban on the use of temporary replacement workers in addition to provisions already in the Code providing reinstatement rights for striking union members in priority to replacement workers and preventing the use of replacement workers for improper motives to undermine unions.*
- *Most arguments advanced by stakeholders on the issue of replacement workers do not relate to managing work stoppages and therefore are beyond the mandate of this study.*
- *Empirical research is inconclusive concerning the impact of legislation banning the use of temporary replacement workers on the incidence and duration of work stoppages.*
- *Although introducing replacement workers into work stoppages aggravates union-management relationships, recourse to them tends to occur when relationships are already adversarial. Ironically in a context of adversarial relationships, extremely contentious work stoppages can be an impetus to improve union-management relationships.*
- *A significant shift towards positive union-management relations will diminish the likelihood of replacement workers being used. The dissipation of energies and the confrontation around replacement worker policies only serve to distract from achieving these objectives.*

Policy Options on Replacement Workers Limited in Relation to Work Stoppages

Both union and management representatives presented extensive submissions arguing on behalf of and against a policy option banning replacement workers as a means to reduce the frequency and duration of work stoppages. Many of the submissions were reminiscent of those made when this issue was carefully analyzed in the Sims report, (economic impact of banning replacement workers, violation of freedom of association, etc.) resulting in the present legislation.¹⁹⁴

¹⁹⁴ Sims, Andrew C.L. *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), pp. 122-128.

In examining this issue in its broadest scope, and without denigrating other social and relationship issues, it is submitted that the fundamental bargaining and economic issues revolve around where to place the fulcrum for the balance of relative power that make work stoppages effective in achieving their ends. For example, the employers claim that for competitive purposes, unions must not be too powerful, and that banning replacement workers would cause the balance to be unduly tipped in their favour, impeding progress as much of the federal private sector moves to a more competitive environment. Meanwhile, unions are claiming that they need a ban on replacement workers to support their collective bargaining rights as a means to achieve fair wages and better security. They contend employers are introducing instabilities into the system and demanding concessions without employees having the means to protect themselves because replacement workers make work stoppages less effective.

Both claims are compelling and their resolution challenging. But these arguments go beyond issues that relate to the frequency and duration of work stoppages. The purpose of this study is to reduce the negative effects of work stoppages on the productivity and competitiveness of Canada, and thus does not permit consideration of general social and economic issues. Relationship issues, however, do fall within the mandate of the study because they relate directly to the consensus options.

Legislative Options

There are various measures that would affect the use of replacement workers. Legislation could be adopted banning any form of activity that replaces the work of employees involved in a work stoppage. This would prevent any temporary use of employees, including management, from carrying out the duties of the employees off work. It could be less restrictive and allow management workers, or additionally, permit non-management employees working in the same establishment, to replace workers of the bargaining unit involved in the work stoppage. Still less restrictive, the ban could permit management and other employees of the same employer from other establishments to do replacement work.

Legislation could extend to preventing the work of off-work employees from being contracted out to another employer. Similarly, the legislation could prevent the work from being done at other establishments of the same employer.

Replacement worker legislation could be less restrictive and prevent its use to undermine unions. It could also be limited to preventing the use of permanent replacement workers, thus affording striking (or even locked out) workers the right to be re-instated into their positions after the strike. Finally, there could be no replacement worker legislation, leaving issues of security of

employees and use of permanent replacement workers to be decided under good faith bargaining provisions.

The legislative provisions regarding replacement workers vary across the country. Québec since 1978¹⁹⁵ and British Columbia since 1993¹⁹⁶ have banned the use of all temporary replacement workers, with the exception of management, and in British Columbia, employees in the same establishment who consent to do the work. Subcontracting is not allowed, including the work being carried out in other establishments of the employer. Ontario had legislation similar to that of British Columbia in 1993, but most of it was repealed in 1995.¹⁹⁷ The models of replacement work legislation placed before Parliament in various bills are generally similar to that found in the Québec legislation.¹⁹⁸

Present federal legislation has no general ban on the use of temporary replacement workers. The provisions in the *Code* provide reinstatement rights in preference to any persons hired during the strike or lockout.¹⁹⁹ They also prevent the bad faith use of replacement workers for improper motives to undermine a union's representative capacity rather than the pursuit of legitimate bargaining objectives.²⁰⁰

Alberta, Nova Scotia and New Brunswick do not prevent the use of permanent replacement workers. Employers are permitted to hire replacement workers for essentially as long as they want, subject to usual good faith concerns.

The effectiveness of replacement worker legislation depends very much on the replaceability of workers. It works best when a job does not require considerable education and training for satisfactory performance.²⁰¹ It is also less useful when dealing with large bargaining units covering various skills and spread across different facilities.²⁰² Replacement workers are more effective when their work falls under the realm of "precarious employment".²⁰³ Technology may also permit operations to be continued with limited need of employees until, for example, repair situations overwhelm management.

¹⁹⁵ *Quebec Labour Code*, R.S.Q. c. C-27, s. 109.1.

¹⁹⁶ *British Columbia Labour Relations Code*, R.S.B.C. 1996, c-244, s. 68.

¹⁹⁷ *Ontario Labour Relations Act*, S.O. 1995, c. 1.

¹⁹⁸ Bills C-236, C-257, C-263 and most recently Bill C-415.

¹⁹⁹ *Canada Labour Code Part I*, R.S., 1985, c. L-2 June 29, 2000., s. 87.6.

²⁰⁰ *Ibid.* s. 94(2.1).

²⁰¹ Singh, Parbudyal, Zinni, Deborah M. and Jain, Harish C., "The Effects of the Use of Striker Replacement Workers in Canada: An Analysis of Four Cases," *Labor Studies Journal* 30:2 (2005), p. 75.

²⁰² *Ibid.*, p. 74.

²⁰³ *Ibid.*, p. 76.

Reducing Work Stoppages by Banning Replacement Workers

In Chapter 3 the empirical research and other analysis was inconclusive on the impact of legislation imposing a ban on the temporary use of replacement workers on the incidence and duration of work stoppages.

Concerns relating to the impact of the use of replacement workers on the union-management relationship are significant to this study. They would tend to favour preventing their use because of valid arguments that introducing replacement workers into the work stoppage poisons relationships. The problem with this argument is that it would appear that replacement workers tend to be used where relationships are already adversarial.²⁰⁴ It has also been noted by all stakeholders that extremely contentious work stoppages appear to be the turning point for reforms to the relationship.

Arguments supporting the ban on replacement workers over relationship concerns are also not abated much because of the very political manner in which replacement worker legislation tends to be enacted. The fact that only two provinces presently have replacement worker legislation, in addition to the controversy surrounding the Bills that have been placed before Parliament, suggest that the debate would not necessarily end if replacement worker legislation was enacted at this time. The present situation is reminiscent of the early 1990s in Ontario, when back-to-back administrations politicized industrial relations legislation, including enacting and repealing replacement worker legislation. The Sims report noted: “We see the too frequent swinging of the political pendulum as being counterproductive to sound labour relations.”²⁰⁵

Replacement Worker Policies versus Policy Options to Change Union-Management Relationships

More importantly for a study that is proposing new policy initiatives and investments by the federal government to effect major change in the adversarial nature of union-management relations, the continuing dissipation of energies and confrontation around replacement worker policies would only serve to distract from the purpose of achieving these goals. The irony is that if a significant shift in the nature of union-management relations could be achieved by hard work by the stakeholders on the proposed options, the likelihood of replacement workers being used would greatly diminish. Good relationships and collaborative workplaces should have the effect of attenuating power and its misuse. Unions and employers who succeed in converting adversarial relationships into collaborative ones would not only do everything possible to avoid

²⁰⁴ Singh, Parbudyal, Zinni, Deborah M. and Jain, Harish C., “The Effects of the Use of Striker Replacement Workers in Canada: An Analysis of Four Cases,” *Labor Studies Journal* 30:2 (2005), p. 79.

²⁰⁵ Sims, Andrew C.L., *Seeking a Balance* (Hull: Minister of Public Works and Government Services Canada, 1995), p. ix.

work stoppages, but if they were to occur would also avoid resort to replacement workers to limit harm to the relationships they have worked so hard to nurture.

The stakeholders have shown a remarkable unanimity in their opposition to governments intervening in industrial relations, except where a consensus can be developed. Together they disparaged government interventions involving: back-to-work legislation; Ministerial interventions; and policies imposing solutions by third-party interest arbitrators. They agreed that these options are less effective than resolutions arrived at by the stakeholders, even if requiring a work stoppage to achieve that end. Imposing a global solution intended to resolve the stakeholder power balance shares some of the shortcomings of imposed interest arbitrations. It may be a mistaken belief that the prescription of global solutions will resolve issues that are local in nature and only the stakeholders can achieve themselves. To do so, they would have to work in a collaborative and respectful environment to find a reasonable accommodation that best meets the interests of both sides. This would allow them to confront together the new and challenging circumstances created by global transformations that underly the increasing pressures on their relationships.

The bottom line is that attention should be directed away from divisive “political” interventions, and instead should be focused on supporting innovative government policies that enhance self-help remedies by stakeholders. By engaging in relationship-building activities, they will render controversies over the use of replacement workers moot. This approach is in line with the future environment that many stakeholders and other experts in industrial relations have described, and which exists in an undeveloped form in the consensus options that foresee expanding efforts to convert traditional adversarial relationships into more positive collaborative approaches.

Option 17 - Board Ordered Return to Work and Interest Arbitration in Stalemate Situations

Examine the option in stalemated work stoppages of the Minister of Labour or the CIRB ordering a return to work in a labour dispute and imposing interest arbitration on the parties to resolve the issues in dispute.(Manitoba legislation currently exists.)

Summary

- *It is argued that when a union is on strike, if it does not get a deal inside of one month, it is in trouble, and that after a certain duration therefore, compulsory arbitration should be instituted to terminate the work stoppage.*
- *Union stakeholders were not interested in any provision whereby the Minister could terminate a work stoppage and order compulsory arbitration.*

In the consultation process, an option was included that would have provided a means to end a stalemated work stoppage by imposing interest arbitration, though not clearly stated, probably at the option of the Minister of Labour. This was thought to be a neutral option. The option had been included because a similar concept had been suggested in the 1980s by an experienced industrial relations expert, Alexander Dubensky, a former Deputy Minister of Labour and Chairman of the Labour Relations Board of Alberta at a conference held in Calgary in November 1986. In “The Future of Alberta Labour Relations” he said:

“I am sure the trade unionists will agree, publicly or privately, that when a union is on strike, if it does not get a deal inside of one month, they are in trouble. Dissatisfied membership, loss of membership, and bitterness towards the employer began to occur. It is my suggestion that the legislation should contain a limitation. Employees should be given the right to strike, but a limitation period should be placed (it could be a month, three months, or six months, but there should be some limitation on the length of the strike, because beyond that it is non-productive), after which compulsory arbitration should be instituted. If the parties cannot resolve the dispute themselves, or if they are at an impasse, then somebody ought to give them a hand.”²⁰⁶

²⁰⁶ Dubensky, Alexander cited in Allen Ponak, The Future of Alberta Labour Relations (Alberta: Industrial Relations Research Group, 1988), p. 96.

The reaction of the stakeholders during consultations was unanimous in rejecting the option of the Minister having a power to terminate a stalemated work stoppage and order interest arbitration to settle the terms of the collective agreement. Both union and management representatives agreed that it was preferable to allow the parties to resolve their issues by a work stoppage rather than have the Minister intervene.

Manitoba Legislation

Noteworthy here are amendments made to the *Manitoba Labour Relations Act* in 2000, allowing any party after 60 days of a work stoppage to initiate proceedings before the Manitoba Labour Relations Board for an order terminating the work stoppage and directing the collective agreement to be settled by an interest arbitrator.²⁰⁷ These provisions were strongly opposed by employers.²⁰⁸ It should be noted that this provision, in combination with the first agreement arbitration provision under Manitoba legislation, would add to the power of small unions both to obtain a first agreement and to resist subsequent de-certification. This should have the impact of reducing the frequency and duration of work stoppages involving small bargaining units, but does so by eliminating the employer's right to use its power advantage in a strike or lockout.

In order for the provision to operate, besides the work stoppage having run for at least 60 days, the parties must also have attempted unsuccessfully during the work stoppage to conclude a new collective agreement with the assistance of a mediator or a conciliator for at least 30 days. The Board has 21 days after notifying the parties of the application to render its decision, unless the applicant was found to have not bargained sufficiently and seriously in which case the application would be denied. The Board is required to "inquire into the negotiations" to determine whether the parties bargained in good faith and had made every reasonable effort to conclude a collective agreement. In addition, the Board must decide whether or not the parties are likely to conclude a collective agreement within the next 30 days if they continue bargaining.²⁰⁹

If the Board concludes that the parties are bargaining in good faith but unlikely to conclude an agreement within the next 30 days, the work stoppage is terminated, the employees reinstated and the collective agreement must be settled by an arbitrator chosen by the parties or, failing agreement, by the Board.²¹⁰ If the Board concludes that an agreement is likely to be reached within 30 days if they continue bargaining, it will decline to settle the collective agreement, but may also appoint a Board representative or request a conciliator be appointed by the Minister.²¹¹

²⁰⁷ *Manitoba Labour Relations Act*, C.C.S.M. c. L10, s. 87.1(1).

²⁰⁸ Committee Debates of the First Session of the 37th legislature from August 14-16, 2000.

²⁰⁹ *Manitoba Labour Relations Act*, C.C.S.M. c. L10, s. 87.1(3).

²¹⁰ *Ibid.* 87.3(1).

²¹¹ *Ibid.* 87.2(1).

That is not the end of the proceedings however, because the parties may apply again once 30 days have elapsed from the date of notice of the first application.²¹² Presumably the chances of satisfying the Board that the matter will be settled in the next 30 days declines, in which case the work stoppage would be terminated with interest arbitration to follow as described earlier.

If bad faith is found on the part of the applicant, the respondent may reapply to have the work stoppage terminated (both scenarios seem unlikely). The provision is silent on the remedy if the respondent is found to be bargaining in bad faith. But presumably an immediate order terminating the work stoppage would be made with interest arbitration ordered to settle the collective agreement.

Analysis

It is understood that these provisions have only been used once since the legislation was adopted - a successful application that found the employer had not bargained in good faith. In any event, a noticeable difficulty with these provisions is that because the stalemate period is fixed at 60 days, the union could strategize to make use of the Board order to obtain arbitration to avoid the consequences of being unsuccessful in the work stoppage. FOS arbitration that reduces the “political” nature of arbitration could, however, mitigate the union’s advantage in this regard.

If a provision of this nature were to be adopted, in order to avoid the provision creating a “chill” in bargaining during the work stoppage awaiting the running of the 60 day period, it would be preferable to introduce more uncertainty as to when the parties may apply and whether the application should advance. An alternative could be to follow the two-step process set out in section 80 of the *Code* whereby the Minister could exercise discretionary power to refer the matter to the Board, while permitting the parties to request that the Minister do so only after 30 days.

Despite the stakeholders’ aversion to imposed interest arbitration as an alternative to bargaining concluded as the result of a work stoppage, having a provision to terminate a stalemated work stoppage in the Minister’s toolbox could provide the sort of incentive to bring a work stoppage to an end.

In addition, the Manitoba model has an interesting side feature with the added inducement to keep the parties at the bargaining table with a conciliator for fear of losing the possibility to apply, or conversely being found not to have complied with the duty of bargaining in good faith. The duty to bargain under the Manitoba provisions includes the duty to make every reasonable effort to conclude a collective agreement.

²¹² Ibid. 87.2(2).

Addendum 4-1: Existing Provisions in the *Canada Labour Code* and Non-legislative measures to Reduce Work Stoppages

In order to better understand the options being considered to reduce work stoppages, it is necessary to have some knowledge of the procedures set out in the *Canada Labour Code* that guide collective bargaining, or other measures to assist resolving disputes to avoid work stoppages. Accordingly, as a primer on the subject matter, this Addendum presents the statutory bargaining procedures and measures that may lend themselves to reducing the risk, frequency and duration of work stoppages.

Canada Labour Code Provisions

No Work Stoppages during the Term of the Agreement

No work stoppages are allowed during the term of a collective agreement, or after the term until a list of prescribed steps in the *Code* has been followed. Disputes between the parties that arise out of the agreement during its term, including its interpretation, are required to be resolved by grievance arbitration.

Notice to Bargain Within the Last Four Months of the Term of the Agreement (Sections 48 & 49)

Unless the collective agreement states otherwise or bargaining is initiated under the rarely used “technological change” provisions, the first formal step towards a work stoppage is when one of the parties provides the other with notice to bargain. Except where no collective agreement yet exists, notice can only be given within the period of four months before the expiration of the agreement or at any time thereafter, unless the parties have agreed otherwise.

Duty to Bargain in Good Faith and Make Every Reasonable Effort to Settle (Section 50)

The parties are required within 20 days of the notice to commence bargaining. This must be carried out in good faith and, theoretically at least, made with every reasonable effort to enter into a collective agreement.

Notice of Dispute (Section 71)

When collective bargaining has not commenced within this time, or the parties have bargained but have been unable to reach agreement, either party may send the Minister a notice of dispute which is used to initiate the conciliation process.

It should be pointed out that in some cases parties give notice to bargain and provide the Minister with a notice of dispute at the same time. This practice is sometimes described as forming part of the “deadline” negotiating tactic. This strategy, along with the fact that parties have on occasion come to the conciliation stage with 200 to 300 issues, has given rise to submissions by a number of stakeholders that an option be considered that provides the Minister with the authority to delay entering the conciliation process until other attempts have been made to move the parties into a more serious negotiating platform.

Federal Mediation and Conciliation Service (Section 70.1)

The FMCS is mandated to advise the Minister of Labour with respect to industrial relations matters and is responsible for fostering harmonious relations between trade unions and employers by assisting them in the negotiation of collective agreements, and in the renewal and the management of the relations resulting from implementation of the agreement. By virtue of subsection 70.1 (2), the head of FMCS reports directly to the Minister with respect to responsibilities relating to the resolution of disputes.

The Conciliation Process (Section 72 et seq.)

Pursuant to Section 72, within 15 days of receiving the notice of dispute the Minister is required to exercise one of the following options with respect to conciliation:

1. The Minister may notify the parties that no conciliation appointment will be made, in which case, the union and employer will be in a position to engage in a work stoppage within 21 days after receiving a notification, subject to compliance with other procedural conditions described below. The 21 day “cooling off” period and other conditions apply to all of the conciliation options if not successful.
2. The Minister may appoint a conciliation officer from the FMCS which is what normally occurs in just about every case. Unless the time is extended by the parties, the conciliation officer has 60 days within which to attempt to settle the dispute. The conciliation officer’s role is that of a mediator with no special powers. If not settled, the conciliation officer will provide the Minister with a “no board” report. The

- Minister is required to immediately give notice of the conciliation officer's report, after which the parties may engage in a work stoppage as described earlier.
3. A third and rarely used option is for the Minister to appoint a conciliation commissioner. The conciliation commissioner is subject to the same time limitations as a conciliation officer in reporting. The conciliation commissioner acts as a mediator, but in addition the person appointed is required to conduct a fact-finding process and may hold an inquiry summoning parties, examining records etc. The conciliation commissioner is required to provide a report to the Minister containing his or her findings and recommendations. The Minister may make the report available to the public. A conciliation commissioner fulfills the same function as what is often called a fact-finder in other jurisdictions.
 4. The final, and even less used option, is for the Minister to establish a conciliation board. By this process, parties appoint nominees who in turn appoint a third person. If either step fails, the Minister appoints the board members who sit as a kind of formal board hearing evidence etc. regarding the dispute. However, the board has only 60 days after being established to report to the Minister, which includes making findings and recommendations similar to the duties of a conciliation commissioner.

The 21 Day “cooling off” (Subparagraph 89(1) (d))

As indicated, the parties may initiate a work stoppage only 21 days after the Minister has notified them of the report generated in the conciliation process.

Strike Vote (Section 87.3)

If a union wishes to go on strike, it must have the approval of its members by a secret ballot vote within 60 days of it being initiated.

72 Hour Notice (Section 87.2)

Both a union and employer, prior to engaging in a work stoppage, must give 72 hours advance warning of when a strike or lockout will occur.

Maintenance of Activities (Section 87.4 et seq.)

No work stoppages are permitted to affect employers' activities which, if curtailed by a work stoppage, would pose “an immediate and serious danger to the safety or health of the public”. Either party may give notice no later than 15 days after notice to bargain collectively has been

given specifying the services, employees etc. required to maintain the employer's activities with respect to the safety or health of the public. If no agreement is reached, the parties apply to the CIRB, or the Minister may refer a question regarding maintenance of activities to the Board and a hearing usually ensues, including a decision by the Board to refer the matter to an arbitrator for determination.

These proceedings may take considerable time in order to obtain a decision from the Board or arbitrator. Until they are resolved, no work stoppage is permitted (subparagraph 89(1) (e)), although a work stoppage that is already underway is not interrupted by an application regarding essential services (subsection 87.5 (3)). Options pertaining to the timing of these procedures and the necessity to renew the agreement are considered below.

Certification of Bargaining Units - Union Raids (Section 24 et seq.)

Changes in bargaining agents may be made in the last three months of the term of a collective agreement, unless the term is longer than three years, in which case changes may be made during the last three months of the third year and during the last three months of every year thereafter until the final three months of the term of the agreement.

To change bargaining unit representation or to restructure them or to vary their composition, the parties must apply to the Board. Votes may be ordered as well as other proceedings to determine the representation and composition of bargaining units. If these activities are taking place because of a merger or acquisition, other procedures can be expected before the Board. While there is no specific legislative provision preventing a work stoppage while union transition issues are being determined, in reality it is impossible to bargain collectively until all of these issues are sorted out. No work stoppage can take place until these issues are resolved.

In addition, similar to the maintenance of activities process, changes in bargaining agents occur at the same time as the parties are supposed to be negotiating a new collective agreement. The fact that these proceedings are occurring simultaneously with collective bargaining has given rise to options to change their timing to reduce the risks of work stoppages.

Vote on an Employer's Last Offer (Section 108.1)

At any time after notice to bargain collectively has been given, where the Minister considers it to be in the public interest, the Minister may direct that a vote be held on the employer's last offer. If the offer is accepted, the terms of the collective agreement are those contained in the offer. This provision originated as a means for the Minister to order a vote after a failed ratification vote, usually with the implicit consent of the parties. It has never been used since added to the

Code in 1999. Some employers requested that employees be required to vote on the employer's last offer before going out on strike as a measure to reduce work stoppages, in effect amending section 87.3 requiring a vote 60 days prior to initiating a strike referred to above.

Deferring a Work Stoppage during the Period between Parliaments (section 90)

The Governor-in-Council may order that a work stoppage, before or after it has commenced, be deferred if it occurs during the time after Parliament has been dissolved up to 21 days after being recalled. This provision provides for a sort of "cooling off" period in between sessions of Parliament. One of the options discussed refers to the Minister ordering a "cooling off" period after a work stoppage has commenced.

Work Stoppages Not Affecting Grain Handling Activities (section 87.7)

Longshoremen unions and their members are required to continue to provide the services to keep the grain moving during a strike or lockout. Grain handling is considered a form of essential economic service, as it has no impact on the safety and health of persons which would be covered under the maintenance of activities provisions. Other employer stakeholders recommended an option preventing work stoppages affecting their activities regarding the moving of all cargo in and out of ports and air controller activities. This provision has some relevance to those requests.

First Collective Agreements (section 80)

The Minister and the Board, in a two step process, may prevent a work stoppage from occurring or continuing by ordering the first agreement to be settled by way of interest arbitration. Many unions sought an option which would see the exercise of the discretion of the Minister and the Board being directed towards allowing more interest arbitrations as a means to prevent work stoppages involving newly certified unions.

Mediation Services (Section 105)

The Minister may appoint a mediator at any time, both before and after a work stoppage commences. Section 105(2) provides for a mediator, at the request of the Minister or the parties, to make recommendations for settlement of the dispute. The Minister has requested the mediator to make recommendations on one or two occasions, while the parties have requested recommendations on several occasions, most often in Quebec.

The appointment of a mediator can be made before conciliation, but it usually occurs after conciliation and before a strike deadline. Mediators are normally the FMCS officer who was the conciliation officer in the same dispute, or a high profile private sector mediator in exceptional cases. There is no limit to the number of mediators that can be appointed in one dispute and often a second mediator is appointed to assist the mediator who conducted the conciliation process.

The preventive mediation work of the FMCS, which includes grievance mediation and numerous workshops to build relationships, provide instruction on bargaining, operation of joint councils etc., are conducted pursuant to section 105. All mediation and conciliation services are provided to the parties without charge.

Labour-Management Partnerships Program (LMPP)

The LMPP is a contribution program that serves unions and management, enabling them to undertake a wide range of joint projects aimed at improving labour relations. At present, the budget is limited to \$1.6 million per year.

Funding from this program has been used to conduct a number of successful workshops and projects and can be used to fund labour relations training programs in conjunction with the preventive mediation program.

Ministerial Inquiries and Commissions (Sections 106 and 108)

Inquiries regarding any matters that may affect industrial relations may be made pursuant to section 106. This section has been used to make inquiries concerning the Code (the Sims Report and this study on work stoppages). It was used to inquire into the trucking industry at the Port of Montreal. The Minister may, in addition, appoint an Industrial Inquiry Commission pursuant to section 108 on issues arising out of section 106 or otherwise. Where settlement is not achieved during the inquiry, the Commission is required to report and make recommendations to the Minister. It has the full powers of a person appointed as a Commissioner under Part I of the *Inquiries Act*. An Industrial Inquiry Commission was established to help resolve the Royal Oak Mine dispute.

Minister's Prerogative to Maintain Industrial Peace and Settle Disputes (Section 107)

The Minister may do such things as seem likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of disputes. To this end, the Minister may refer questions to the CIRB or direct the CIRB to do such things as the Minister deems necessary. As

it is worded, the provision would appear to bestow wide discretionary powers upon the Minister with respect to almost anything concerning industrial relations and work stoppages.

This provision apparently has been used twice – once to order the CIRB to determine whether a collective agreement existed between a union and an employer (the matter was resolved before the Board determined the issue), and the second time, to order the Board to hold a vote of the union membership of the CAW on a business reorganization plan at Canadian Airlines International (union held vote voluntarily).

An option to reduce the duration of a work stoppage has been raised that would entail the Minister ordering the parties to defer an ongoing work stoppage - a mid-work stoppage “cooling off” period for a period of, say, 30 days, in order to allow them to reconsider their positions, or as a prelude to legislation permanently ordering the parties back to work. One issue is whether the Minister already possesses the power to do this using section 107, or whether specific legislation would be necessary. Legal officers at HRSDC are of the view that specific legislation would be necessary for a ministerial ordered “cooling off” period.

Voluntary Ministerial Interventions

From time to time, depending upon the circumstances, whether an imminent work stoppage or one already commenced, the Minister may wish to meet with the parties to encourage them to resume settlement talks using mediators etc., or to warn them about the possibility of return-to-work legislation if the matter is not resolved. These interventions are usually made with the advice of the FMCS.

Such interventions are important in the process of reducing work stoppages. Several stakeholders said that a request from the Minister to defer a work stoppage and to go back to the bargaining table one last time, sometimes with the involvement of a high profile outside mediator, is treated very seriously by the stakeholders, almost like an order, and that it often results in a settlement. Options to strengthen the Minister’s effectiveness in these interventions would reduce the likelihood and duration of work stoppages.

Chapter 5: Challenges and Best Practices -Transforming the Adversarial Relationship to a Collaborative One

This chapter is about transforming the nature of union-management relationships based on the implementation of options proposed by the stakeholders. It is divided into three parts. Section I presents some of the challenges that the stakeholders face in overcoming past adversarial relationships. Section II describes some techniques to overcome past history to negotiate new relationships, following the ideas of one of the experts in the field, Dr. Christopher Moore. Section III describes some of the features of a “good news” scenario, where an employer and its unions transform one of the most adversarial relationships into one of the most successfully collaborative ones. It is based primarily on information provided by a key player in these events, and described in the DVD, *Beyond Collision - High Integrity Labour Relationships*.²¹³

Section I: Challenges to Transforming Union-Management Relationships

Transforming union-management relationships is not easy. It requires both parties to commit to the task and work hard to achieve the shared goal of building what Dr. Allen Ponak has described as “high integrity relationships”. Taking the first step on that path, however, is the hardest to accomplish. Some of the challenges to setting off on that path are discussed here.

Most of the remarkable transformations in union-management relationships have come about either after an extremely hard-fought work stoppage or as the result of a “survival impetus” to keep the business operating or to remain based in Canada. Sometimes both factors happen together, reinforcing each other. This appears to have been the case in the scenario reviewed in Section III. They appear to always be accompanied by strong leadership.

The requirement for a work stoppage to transform relationships clearly goes against the objectives of this study. To the extent that stakeholders can learn from the mistakes of others, the desire to avoid a debilitating work stoppage is a benefit that will encourage transformation of other union-management relationships. But each stakeholder should not have to undergo the rite of passage of a devastating work stoppage. In any case, the work stoppage experience is probably too idiosyncratic to provide lessons learned to other relationships or sufficient motivation for a general movement towards better relationships.

²¹³ Ponak, Dr. Allan and Painter, Bert, Producers, *Beyond Collision – High Integrity Labour Relations*, Modern Times Productions, University of Calgary, 2005.

The “Survival Impetus” Model

A better model for observation and learning is the “survival impetus” situation. It is structured around a shared common interest that is larger than merely avoiding a work stoppage. Such situations give rise to joint efforts leading to a collaborative workplace, usually with the institution of highly flexible work practices intended to maximize the employer’s returns with minimum impact on the security of the worker. If implemented with skill, the parties can create a veritable win-win situation, where the union and employer each gain value from their joint efforts and in so doing reduce to a minimum the possibility of a work stoppage.

Survival situations arise primarily in provincial manufacturing industries that face the full force of global competition, either from having operations transferred out of the jurisdiction to lower cost territories, or by simply not being able to compete and going out of business. Few federal private sector employers, at least the major ones, face concerns about survival. A good part of the federal private sector is devoted to producing non-tradable services where there are substantial barriers to entry for foreign firms (e.g., banking, airlines, and railways). Thus the challenge is to convince unions, and to some extent employers, that they have to work together when the survival of the enterprise is not an overriding consideration. Indeed, during a meeting of industrial relations experts at Queen’s University to discuss issues relating to this study, the participants concluded that the most likely hurdle to collaboration and the institution of flexible work practices would come from unions operating in a safe and secure monopolistic infrastructure, with no reason to abandon past habits.²¹⁴

Additionally, it has been observed that parties with less power are not usually in a position to bring about integrative processes because parties with greater power tend to pay little heed to their needs.²¹⁵ Therefore the challenge of instituting broader recourse to collaborative processes is greatest when there is a power imbalance between the union and the employer. Some argue that in an environment where management drives the agenda and holds the balance of power in the workplace, there is unlikely to be cooperation from their side.²¹⁶ This may be less accurate in the federal private sector. Nevertheless, there may be some employers whose power vis-à-vis their unions is such that they will pay little heed to suggestions of implementing collaborative work places. The recompense of increased productivity may nevertheless change this perspective.

²¹⁴ Roundtable meeting, Queen’s University, June 16, 2008

²¹⁵ Dr. Christopher Moore, *State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie* (2-3 Nov. 2000 at Queen’s University, Kingston, Ontario), p. 71

²¹⁶ Chaykowski, Dr. Richard P., *State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie* (2-3 Nov. 2000 at Queen’s University, Kingston, Ontario) p. 73.

It should be noted that neither the unions nor management have committed to instituting collaborative work places, or said much about creating more flexible work practices, although these questions were debated in some of the consultation meetings. Improving relationships is the only shared commitment which has been obtained to support the consensus options. The parties agree that better relationships, whether or not they are accompanied by changes in the workplace, will greatly reduce the risk of work stoppages and their duration.

However, it is not clear that better relationships alone, without some type of evolution, can achieve their full potential for reducing work stoppages. Initiating better relationships is not analogous to becoming pregnant in the sense that once initiated growth will continue to term. This must be continuously nurtured. There are enough examples of unions and management taking steps to improve relationships, or introducing tools like integrative bargaining, that foundered without the trust and integrity necessary to succeed. Moreover, as noted earlier, the current stakeholder relationships are long-standing and mature, and while not immutable, exhibit a degree of comfort in their traditional format. This suggests that any attempt at a real improvement in relationships will not come about unless motivated by a greater force.

Technology will continue to play havoc with workplaces. Government policy will continue to make the sector more competitive and more driven to achieve maximum value for consumers and users of the services. The most likely scenario therefore is that competitive forces will motivate stakeholders to improve relationships, to create collaborative work places, to provide flexibility, to achieve productivity gains and to meet the challenges of competition. “Flexicurity” is a term developed in Europe to respond to these issues. It can be defined as a policy strategy to enhance the flexibility of labour markets, work organizations and labour relations while maintaining or enhancing employment and income security.²¹⁷ It noted that “Overall, globalisation is beneficial for growth and employment, but the change it brings requires rapid responses from enterprises and workers.”²¹⁸ Flexibility of the workplace is driven by innovation, global markets, and the rapid transformation or development of new products and services to take advantage of new economic opportunities. A flexible workplace would appear to be one of the cornerstones for any strategy to give Canada a competitive edge.

HRSDC carried out an important review of innovative workplaces and described the imperative for flexibility as being “competitiveness-driven and primarily in response to changing markets and new technological opportunities.”²¹⁹ Some of its conclusions are similar to those arrived at in this study - for example, the need for leadership, mutual recognition and trade-offs of differing interests, for information sharing, as well as the application of new techniques and the involvement of third party expertise to assist in catalyzing change.²²⁰ The HRSDC report described some of the requirements for unions to make workplace flexibility work for their

²¹⁷ *Towards Common Principles of Flexicurity*, European Commission, June 27, 2007.

²¹⁸ *Ibid.* p.3.

²¹⁹ HRSDC, *Innovative Workplaces, Lessons Learned Final Report*, June 1999, p. 3.

²²⁰ *Ibid.* pages 13-22.

members: the first being to develop their own agenda on workplace change, identifying the ingredients that will be necessary for the change to benefit membership.²²¹ But more importantly the report stressed the common interest of management and unions in the challenges of competitiveness to their core values which it expressed as follows:

“The second key, which involves not only unions but management as well, is for the parties to take a long-run view of both core issues involved in most change initiatives: competitiveness and security. In the long-run and in many organizational situations notions of security, job quality, and income distribution become closely linked with competitiveness. But if the parties cannot get beyond a short-term time horizon and identify a community of interests, the tradeoffs may be too stark to forge a satisfactory and sustainable agreement.”²²²

From the point of view of self-interest, supporting flexibility of operations is the simplest and least painful option for the union members to accept of the three cost-restraining measures available (the other two being reducing personnel or reducing wages and benefits.) Moreover, as one union representative remarked to the author, “flexibility is a great bargaining chip.”

But flexibility in the workplace is not achievable in a unionized environment without a collaborative workplace. This requires not just good relationships, but high integrity ones, centered on commitment, trust and respect.

Collaborative workplaces also appear to hold out the advantage of greater democratization of the workplace by unions. These workplaces motivate employers towards engaging in “productivity” or “commitment” bargaining. In this process, management describes its needs and the union commits to work with the employer in meeting those objectives by the measures that it thinks are best. The scenario described in Section III demonstrates an example of this form of bargaining used successfully by the employer, but also resulting in more control over the workplace being given to the union and its members.

Ultimately, stakeholders are going to have to make “real leadership” decisions of the type described in the scenario in Section III. These decisions commit their firms and their members to “high integrity industrial relationships”. The options being proposed by the stakeholders in this study should assist in motivating leaders to move in the direction of true relationship-building while providing the tools that will help achieve those ends. This leadership would be enhanced by a more proactive culture at the Labour Program to “spread the word”, supported by new government investments to achieve these goals. It requires a “surge” of commitment by all concerned to generate momentum on a scale to radically change the work environment in the federal industrial relations sector. There could never be a better time than right now for doing so!

²²¹ Ibid. p.18.

²²² HRSDC, Innovative Workplaces, Lessons Learned Final Report, June 1999, p. 18..

Section II: Overcoming Past History to Negotiate New Relationships: A Proposed Framework

In the fall of 2001, Dr. Christopher Moore, an internationally recognized author in the field of negotiation, problem solving and dispute resolution spoke at a symposium hosted by the Queen's University Industrial Relations Center.²²³ His subject was how to overcome past history to negotiate new relationships. His comments could serve as the framework for achieving the objectives established by the stakeholders for finding options to improve union-management relations. Breaking old habits is all about applying the knowledge gained from recently developed dispute resolution techniques to the everyday practice of industrial relations. These are the modern solutions.

Dr. Moore described the four important characteristics of a positive working relationship as follows:

- People must have the opportunity to develop their potential - both parties are able to meet as many of their individual needs as possible, but not at the expense of others;
- The relationship needs to be characterized by both perceived and actual justice - there must be fair treatment;
- There must be respect for the person, not necessarily the views that person holds - separating the person from the problem and respect for the democracy of the parties;
- The relationship must be moving towards a condition of trust - people will follow through on agreements in good faith and execute them in the same positive spirit in which they were made, or in situations where people are willing to take significant risks, each party is looking out for the interests and needs of the other.

Dr. Moore also described what the parties can change in a relationship (usually in a multi-faceted approach) to build positive relationships and transform negative past histories.

He noted that the parties can change:

- **Beliefs and attitudes** that they hold towards each other and the various aspects of the conflict. This involves changing negative beliefs and attitudes and promoting positive ones. He adds that changing beliefs and attitudes can be the motivating factor for changes in all of the other aspects of the relationship.

²²³ Moore, Dr. Christopher, Overcoming Past History to Negotiate New Relationships, State of the Art and Practice in Dispute Resolution: A Symposium in Honour of Bryan M. Downie (2-3 Nov. 2000 at Queen's University, Kingston, Ontario) p. 33.

- **Behaviours and skills** they use to resolve differences. The issue is how to stop negative behaviour, promote positive interactions, and teach new skills, so that the parties can be more effective problem-solvers.
- **Procedures and steps** to avoid defeat or achieve resolution, for example, moving to interest-based negotiations that change individual activities and steps in the problem-solving process, as well as changing the overall approach and strategy for addressing contentious issues.
- **Structure of the relationships.** This relates to the roles, rules, resources and broader interaction patterns of the parties, (i.e. inadequate involvement in decision-making, the way work is organized or assigned etc.).

To initiate change where the situation is highly polarized, Dr. Moore noted that one side may have to unilaterally take the risk to contact the other party to:

- Make proposals that will result in small confidence-building steps;
- Acknowledge that there are serious problems in the relationship and advocate bold or innovative measures; or
- Communicate to the other side what they see as the positive advantages from the change in relationships. The party must identify a tangible short-term benefit as the primary motivator, (for example, no concessions will be demanded in the next round of bargaining if we start bargaining early.)

Making these contacts is often easier either through informal channels or through a third party, such as the FMCS. Third-party catalysts can be helpful when early direct talks are not feasible.

Section III: An Actual Turn-Around Scenario

What follows is the description of an actual relationship improvement scenario that was provided by one of the key players involved who has asked to remain anonymous. As mentioned, these events were first portrayed by Professor Allen Ponak in the DVD, *Beyond Collision - High Integrity Labour Relationships*, although using the advantage of the print media, more detail and explanation have been provided here on the scenario.

Historical Background of the Relationship

- Prior to participating in these events, the human resources officer had worked many years in what he described as traditional adversarial union-management relationships. He considered his experience and the radical change that occurred in his firm's union-management relationship as a transformative learning experience in the art and practice of industrial relations.
- The firm had a long prior history of entrenched adversarial labour relations, including a previous eight month work stoppage. There were past attempts by the employer at union-busting and further deterioration in relations caused by a series of ownership changes, including a foreign employer engaged in a strategy to sell off portions of the business.

Recognition by Management of the Need for Change

- The new owners, on the advice of the new CEO and a highly-experienced vice-president of human resources, agreed to attempt a fundamental reform of the firm's union-management relationship. The plan was premised on the employer meeting its business objectives, including the need to re-acquire important clients lost as a result of the work stoppage. How it would meet those objectives was something it agreed would be worked out with the employees.

Engaging the Union

- The first step was to engage the union in a project of common interest. The company had one of the worst records in safety. It was agreed with the union to set about creating a world-class work environment, particularly in matters of worker safety. A plan was

agreed upon and they gave themselves one year to implement it. Once the employer engaged in the process, it acted quickly; actions build credibility and trust.

- The employer invited the union to commence collective bargaining well in advance of the formal bargaining period. As an incentive it indicated that it would not be seeking concessions.

Commencing a “High Integrity” Relationship

- It began the process of entering into what Dr. Ponak described in the video as a “high integrity relationship”. The parties acknowledged their interdependence - the legitimacy and purposes of the other - and committed to core values to establish a long-term relationship by which they could live together.
- The employer promised the union that if its members would return value to the company by improving quality and productivity, it would re-invest in new plant to ensure long-term production of operations.
- Prior to formal negotiations, the parties engaged in extensive preparatory bargaining that was conducted in a collaborative environment described as “productivity bargaining.” In accordance with the employer’s proposed methodology, the parties examined measures to permit the employer to meet its productivity objectives in a fashion that best met the union’s needs. When the time came for formal bargaining, only nine days were needed to reach a five-year agreement.
- To accommodate the union, the employer acceded to its request to permit a large contingent of observers from other locals of the union to observe the negotiation process.

Maintaining the Relationship

- Thereafter, the union and employer engaged in a continuing joint process to work on bite-sized issues affecting their working relationship. A key element in the process was the implementation of the President’s Council consisting of senior management personnel and union representatives. They met regularly and every quarter company results were presented for joint review of the parties. Labour relations issues were brought forward and adjustments made where necessary on an ongoing basis. These discussions were part of a process to transform the union-management relationship beyond the collective agreement, to a functional arrangement that evolved to better meet each side’s needs.
- A further key element to building a high integrity relationship was senior management’s public statements recognizing the legitimacy of the union and its importance to the company and to the community. To that end, the firm maintained good communications with the community which was kept abreast of developments as they occurred.

Impacts of a “High Integrity” Relationship

- In the process, management developed a sincere respect for union leaders while recognizing the need to be sensitive to the challenges they faced. This included:
 - Understanding that the union leaders tried their hardest to avoid work stoppages or even to be in adversarial relationships with employers. Their attitudes and actions were usually reactive to employer conduct.
 - Recognizing that union leaders had the hardest job in industrial relations. This included mobilizing their members yet managing expectations to arrive at agreements, while all the time being an elected official. They were under continual stress, often suffering from ulcers, personal setbacks, and burnout.
 - Avoiding placing union leaders in difficult situations in the process of working out better relationships. It was particularly essential to avoid even the appearance of co-opting union leadership, because improper motives would be attributed to the employer, even if not true.
 - Recognizing the meaning and importance of true union leadership. The easiest role for either side to play was that of the tough guy. Leadership required recognizing and taking risks and facing down the day-to-day challenges. It was not a popularity contest; leaders were not allowed to let friendship affect their decisions. They were professionals dedicated to acting in their members’ best interests and could not let themselves be distracted from achieving those ends.

The employer also developed an appreciation for the strong communication skills of union leaders. They had a facility for clear communications that employers often lacked. Union leaders could act as better advocates than management for the employer’s interests. When common interests were involved, the union leaders came to be an important asset in achieving their shared goals.

The Importance of Shared Values

- A joint commitment to core shared values was also an important step in the process of developing a collaborative relationship. With the assistance of facilitators, management and union members developed “power leadership values” consisting of:
 - Safety - the over-riding value,

- Relentlessness in the pursuit of ambitious goals - persistence in being a world-class operation,
- Involvement in the business and partnership - meeting each other's needs,
- Two-way accountability - holding each other and themselves accountable,
- Timely decision-making and implementation of decisions - doing the right thing at the right time.

Strategies for Building Successful Relationships

- The parties made extensive use of facilitators on many occasions during the relationship-building process. The advice provided was to employ the best people possible; that they can play an important role and make an important difference in the final outcome.
- It was quickly realized by the parties that turning around entrenched adversarial labour relations attitudes requires hard work and a long-term commitment. The employer had to win back the trust of the union and its members. Employer leadership required intestinal fortitude, commitment and persistence.
- A number of different strategies and processes contributed to the turnaround:
 - It was essential that the employer understood and was able to respond to the union's issues from the union's perspective which included:
 - The inherent nature of the conflict that existed between employees and employer;
 - The frustration of employees having to follow orders, often without their views being considered and sometimes with a sense of unfair treatment and a lack of respect from the employer;
 - Working in a world of issues that impacted on them directly such as working conditions, safety and their relations with other employees and their supervisors;
 - Concerns over credibility and relationships where cynicism was the natural fallback when employees were not listened to or where a sense of unfairness developed;
 - Communications breakdown where the traditional default mode was complaint or the filing of a grievance.
 - The employer expanded the participation of unions in the firm's decision-making processes by means of the President's Council and other vehicles including:

- An employer commitment to transparency, “particularly on the bad stuff” (if engaging in a downsizing exercise, the employer had to explain, to consult and to provide an opportunity for the union and its members to make suggestions and bargain over issues);
- Unions were invited to participate on the management team;
- The employer invested heavily in business literacy of the unions by exposing employees to the business in order to help them understand aspects of business. They were also provided with financial and other training by third parties to enable them to understand all of the information supplied by the employer in order to make informed decisions.
- Brainstorming exercises with up to 120 union participants were organized. This had the dual advantage of hearing the employees out on their core themes, as well as educating and explaining the employer’s perspective to employees.

The Challenge of Creating a Flexible Workplace

- The most difficult challenge was to achieve flexibility in the workplace. There was consensus by the union and management that the key to remaining competitive, particularly against a competitor with lower wages and other inputs was by working smarter. This could only be achieved by adapting new technologies, new processes and developing new products and new markets. The firm and employees had to adopt a strategy dedicated to relentless innovation and flexibility. Workplace flexibility could provide enormous returns to the employer.
 - The challenge for the union was to move off traditional collective agreement protection attitudes and processes, to make the relationship more than a contract. That meant refocusing fundamental processes such as changing the grievance process to the “fair treatment” process.
 - Most problems were not over wages, but over workplace issues and matters such as security. Inflexible labour practices tended to be the sacred cows of unions and often the real issues of bargaining in the competitive industries. The employer was looking for ways for employees to work beyond job descriptions: using multi-tasking work teams, flexible scheduling, variable-rate pay scales, avoiding seniority traps and unnecessary increases in manpower, in some cases using less personnel.
 - In terms of educating union members to the challenges of establishing a flexible work operation and the means to achieve these ends, union leaders were taken to operations which had made flexibility their hallmark in the United States and even

as far as Europe. American businesses with their unions have tended to adopt a more entrepreneurial approach, meaning more flexibility and focus on getting the job done in new and innovative ways.

- The employer repeatedly delivered the message of the benefits of flexibility as the means to attain objectives and provide security of employment.

Other Lessons Learned

- There was a need to employ integrative bargaining techniques wherever possible. Although very challenging and requiring considerable time and effort, they pay off. Examples existed of the parties using “collaborative bargaining” as a step on the road to integrative bargaining. This involved the parties problem solving together on the issues without the processes of brainstorming, joint solution sessions, etc. that interest-based bargaining usually involves, when led by third parties.
- Collective bargaining should be an on-going continuous process with the formal bargaining lasting only a few days. The bargaining was really an extension of the efforts to build relationships through the previous years.
- Both employers and unions should look for value in the human resources system. Human resource officers who are part of the dispute resolution process, may have self-interest in perpetuating adversarial systems. Poor relationships will keep them very busy. They will buy into the doctrinaire, “pure red-blooded” capitalist approach, supporting anti-unionism and adding little real value to the business.

Conclusion

It is possible to change the fundamental nature of union-management relations. Much new knowledge has been gained about conflict and its management over the last couple of decades and our understanding of improved dispute resolution mechanisms has grown. We have seen in them a degree of sophistication that suggests that solutions may exist to even the most intractable conflicts. The challenge is to learn and apply these techniques to overcome old habits. Motivation is important. Change must come not as a response to a painful event, but because of a better understanding of the nature of conflict and the contribution everyone can make to solutions. With the application of new techniques for dispute resolution and the recognition of the mutual gains that can be achieved, stakeholders will fundamentally alter their long-standing adversarial relationships.

Chapter 6: Consensus Options

Section I: The Consultation Process

Research and Planning

This study was launched during the second week of March, 2008, and after setting up facilities and retaining staff work began immediately. Because of the dearth of academic literature focused on work stoppages in the federal private sector, and the requirement that any options developed be acceptable to both labour and management, a consultative, stakeholder-driven, information-gathering strategy was adopted. Following informal conversations with union and employer representatives, a decision was made to request submissions to identify possible options for a preliminary discussion paper. This paper would be distributed to stakeholders and discussed during a cross-country series of consultations. This process would not have been possible within the study's restrictive timetable without the assistance of CLC Secretary-Treasurer, Hassan Yussuff, and FETCO Executive Director, Don Brazier. In addition to providing input on working papers and preliminary drafts, they coordinated numerous meetings and, more broadly, served as a conduit for communications with labour and management representatives.

Written Submissions

On March 31, 2008, a letter was distributed to stakeholder representatives via the CLC and FETCO. In addition to outlining the study's objectives, it set forth a provisional schedule for consultations. For purposes of consistency, parties were asked to provide submissions around the life cycle stages of collective bargaining and to respond directly to the study's Terms of Reference which were provided. While invited to comment on any aspect of the topic, stakeholders were asked to maintain their principal focus on options that could generate consensus while reducing the risk, frequency and duration of work stoppages. Whenever possible, stakeholders were encouraged to link their proposals to the causes that they attributed to work stoppages. General information on the country's current industrial relations situation and particular sectors and regions that were at greatest risk of increased work stoppages, was also broadly requested. Though the date would later be extended, May 23rd was set as the final deadline for receipt of submissions.

Informal Meetings with Industrial Relations Experts and Practitioners

While awaiting the stakeholder position paper, various meetings and conference calls were conducted with senior representatives of the stakeholders. They gave generously of their time and ideas on various issues under review in the study. Meetings were also held with senior

personnel and past mediation officers from the FMCS and the CIRB. Work commenced on the preparation of a discussion paper for information on possible neutral options. It was to be distributed to the stakeholders prior to submission of their answers. A form of questionnaire was prepared for response from the FMCS conciliators and preventive mediators. A meeting was arranged with them and their views were obtained on options to better manage work stoppages. A similar meeting with CIRB members and a further meeting with CIRB staff were held to obtain their views on issues pertinent to work stoppages. Invaluable assistance was provided by the Data Development and Research Division, Strategic Policy, Analysis and Workplace Information Directorate, Labour Program, HRSDC which produced papers on interest arbitration outcomes, work stoppages impacts, some causes of work stoppages, as well as generating much of the data and charts referred to earlier.

Requests for input were made to the Canadian Association of Administrators of Labour Legislation (CAALL) which is made up of senior representatives of the Labour Program of HRSDC and provincial departments of Labour in Canada. A meeting of CAALL deputy heads in Ottawa was attended, and in answer to requests for submissions much interesting comment was provided on best practices to manage work stoppages.

Interviews were arranged with various industrial relations experts on diverse topics of interest to the study. The Annual Meeting of The National Academy of Arbitrators was held in Ottawa in May 2008. This provided an opportunity to meet with many interest arbitrators and obtain their views on issues pertaining to interest arbitration and other relevant subjects. Michel Picher, President of the Academy, arranged for an open round table session. It was attended by stakeholder representatives and arbitrators and gave rise to a lively and informative debate on various issues relating to work stoppages. Among the participants were Andrew Sims and Professor Innes Christie.

Dr. Richard Chaykowski, Professor and Program Director of the Queen's University School of Policy Studies, organized a round table of industrial relations experts at Queen's to discuss measures to manage work stoppages, and areas where academics could assist in developing some of the options under consideration in this study. A complete list of persons who contributed their ideas and time to this study is set out at Appendix B.

The information obtained from these various organizations was wide-ranging and touched many issues, including various causes of work stoppages and measures to manage them. Topics included expansion of negotiator training, improvements to preventive mediation and conciliation strategies, the streamlining of dispute resolution and other judicial processes, the standardization of best practices, and the encouragement of relationship-building and information-sharing.

Distribution of Discussion Paper

Much of the input and proposals generated through these interviews, along with research conducted by study staff, were used in the composition of a preliminary discussion paper on 12 options to reduce the incidence and duration of work stoppages. Through the good offices of the Canadian Labour Congress and FETCO, it was distributed widely to stakeholder representatives and the Confédération des syndicats nationaux. Submissions were also exchanged informally between parties. These documents were provided to clarify the preferences of employers and unions to facilitate discussion and expedite achieving consensus on options reached at the consultations.

Consultations with Stakeholders and Experts in Industrial Relations

A meeting to consider the discussion paper was held with management representatives in Toronto on June 2, 2008 and in Vancouver and Calgary on June 9 and 10, 2008. Consultation meetings with unions were held in Vancouver, Calgary, Toronto, Montreal and Halifax through the week of June 9, 2008. Meetings with participating employers who did not have headquarters in Central Canada, such as the Vancouver Port Authority and the Halifax Employers' Association, were also held at this time.

The consultations were informal and conducted according to the wishes of the participants. Following a brief introduction reviewing the study's purpose and Terms of Reference, the floor was opened for discussion of options. The process allowed stakeholders to debate and amend proposals featured in their submissions or developed with industrial relations experts, or to advance entirely new ones. Both stakeholders largely agreed, for example, to avoid recommendations requiring amendments to the *Canada Labour Code* without conducting a broader consultation process based on the notion, at least in principle, that union-management power relations should not be altered. Despite this affirmation, parties did raise competing arguments on the desirability of legislation to prohibit the use of replacement workers in strike and lockout situations.

Stakeholders were promised an interim report that elaborated on these options and incorporated amendments discussed prior to a final meeting. This report was prepared and distributed along with other materials for a round table meeting in Ottawa.

Round Table Meeting with Union and Employer Representatives

Union and employer representatives assembled in Ottawa on June 26, 2008 for a final round table discussion, moderated by Michael McDermott, a former Senior Assistant to the Deputy Minister of the Labour Program and current Chair of the CIRB Client Consultation Committee.

The session resulted in minor changes and an agreement in principle to the interim report's proposed "consensus" options which had been identified during the consultation process. A final copy of these consensus options and comments was distributed for stakeholder approval through the CLC and FETCO on July 18, 2008. These options are presented in the next section of this chapter.

The stakeholders chose to limit the breadth of the consensus options as compared to the details set out in those drafted for the purpose of the study. Further changes had been added based on the receipt of additional information which came in during the course of the study.

Throughout, many stakeholders questioned the necessity of a study into work stoppages. The data on relative jurisdictional success in managing work stoppages, or lack thereof in the federal private sector, was not available from the Labour Program which placed emphasis on the frequency of work stoppages as opposed to the relative number of person days not worked in each jurisdiction. Some expressed the view that work stoppages were inevitable and, referring to the falling frequency of work stoppages, were satisfied that they were not a problem in the federal private sector.

The stakeholders also were reluctant to consider many aspects of the option formulation process because they concluded that these matters could not be appropriately addressed within the time frame allotted to conduct the study. For comparative purposes, they evoked praise for the manner in which past reform was conducted, despite attempts by the author to impress upon them the distinction between the level of commitment necessary to permit future discussions on options only, as opposed to recommendations for legislative change (as was the broader mandate of the Sims study.) Some concerns were expressed about the present political circumstances in which the study was being conducted. This led to the apparent consensus that legislative reform should not occur with respect to any of the provisions of the *Code*. This limited the scope of the discussion of options.

Despite their reservations regarding the study, the stakeholders nevertheless participated fully and generously in the process and provided important information and advice that forms the basis of much of the study.

Section II: Consensus Options and Comment

Three consensus options were developed. Each is presented with comments in this section.

The Establishment of a Federal Labour-Management Relations Council

Consensus Option 1 - To establish a Tri-partite Council consisting of representatives of labour, management and the Federal Mediation and Conciliation Service (FMCS) with a mandate and structure to be determined after further consultations among the representatives.

Comment

The stakeholders agreed that a Council consisting of representatives from labour, management and the FMCS would benefit all parties in the federal private sector. They were nonetheless reluctant to define its structure and mandate except in the most general terms. To be practical, efficient and responsive to their needs, all affirmed that the Council's design would require further reflection and discussion with the FMCS.

It was, at the very least, understood that the Council's functions would include dialoguing and discussing policy options with the Minister of Labour, and could include providing joint leadership, promoting and assisting in the building of positive attitudes, and improving relationships between stakeholders. All of these actions could contribute to reducing the risk, frequency and duration of work stoppages. It was also agreed that the Council would support the efforts and objectives of the FMCS in a fashion to be worked out in consultation with its key staff.

Consensus Option 2 - Expand and Improve the Federal Mediation and Conciliation Service (FMCS)

There was consensus among the stakeholders on the following option concerning expanding and improving the FMCS and its Preventative Mediation Program.

The FMCS should engage in a national consultation exercise with stakeholders and industrial relations experts to develop a strategic plan for the expansion, improvement and promotion of the FMCS Preventive Mediation Program.

The program would be expanded by developing new programs and workshops, including:

- **a Post-Work Stoppage workshop to help stakeholders return to work and deal with relationship issues stemming from a strike or lockout;**
- **a Pre-negotiation workshop to assist parties in the pre-negotiation stage or through difficult negotiations, including first collective agreements;**
- **others identified by stakeholders and experts in industrial relations.**

The Program would be improved by:

- **conducting a review of workshops and other FMCS services with the assistance of industrial relations experts and input from stakeholders to enhance program effectiveness;**
- **attracting and retaining highly qualified mediators and conciliators by improving remuneration, expanding training and apprenticeship programs, and implementing a succession plan.**

The expanded Preventive Mediation Program would be promoted by:

STAKEHOLDER WORDING

- **a national consultation exercise to promote FMCS services;**
- **a Federal Labour-Management Relations Council assisting the FMCS by engaging in projects and promoting attitudes that are conducive to relationship-building; and**
- **the Labour Program developing a plan and undertaking measures to promote and encourage broader use of preventive mediation services.**

Comment

Options to expand the funding and accessibility of the FMCS services had strong support.

In addition to recommendations set out in the discussion paper, representatives pointed to the importance of preparing for the pending retirement of FMCS employees. Recruiting talented mediators would require that the FMCS compensation rates rival those of the private sector. Stakeholders shared the view that increased expenditures on the Preventive Mediation Program would provide good value and contribute to the reduction of the risk, frequency and duration of work stoppages.

A number of representatives recalled their past experiences with the FMCS. While it was consistently viewed positively, some spoke of disruptions caused by the Department's reluctance to finance FMCS programs. Participants spoke of past mediation sessions that had to be postponed as a result of such considerations. Financing, in one case, was not approved until senior labour and management representatives wrote personally to the Minister.

Others expressed concern about how funding shortages may be preventing the FMCS from more broadly promoting its services. Many were concerned about the difficulties faced by stakeholders who need but are unaware of the Preventive Mediation Program.

Labour participants also expressed their desire for the FMCS to become more proactive in reconstructing relationships following work stoppages. Several said that the FMCS should seek to assist even when its advice was not wanted.

Employer representatives agreed with these remarks and suggested that these were the types of issues that a joint-council could review and make recommendations upon.

Consensus Option 3 - Improve the Timeliness and Integrity of the Canada Industrial Relations Board's Decisions

There was consensus among the stakeholders on the following option to improve the timeliness, credibility, integrity and neutrality of the Canada Industrial Relations Board.

- **Enhance the transparency of Board appointment processes by implementing the recommendations of the CIRB Client Consultation Committee.**
- **Provide additional resources by appointing additional Vice-Chairs or making better use of part-time Vice-Chairs. Attracting qualified candidates will require remuneration increases.**
- **Review Board member remuneration and consider re-classifying positions to correspond with those that applied at the time of the Canadian Labour Relations Board.**
- **Consider more flexibility, where required, for residency requirements of full-time Board members.**
- **Provide timely renewal notices for Board members.**
- **Provide increased support to the work of the CIRB Client Consultation Committee.**

Comment

A resounding consensus emerged around the need to improve the timeliness and consistency of CIRB decisions. While some believed that the discussion paper's proposed administrative reforms might infringe upon the jurisdiction of another review committee, others believed that every opportunity should be taken to bring problematic issues and consensus-driven options forward.

Some participants asserted that, according to FMCS data, only four of the 90 major work stoppages that Canada had experienced in the past three years occurred in the federal private sector. Poor and delayed decisions by the CIRB contributed significantly to the two lengthiest of these incidents. Others reiterated that simple decisions could take months, which only served to exacerbate disputes.

Other participants added that Board member salaries should be increased to attract better candidates. Remuneration should correspond with the requisite skills set. The process for appointing Vice-Chairs should also include a consultative phase. Stakeholders who are in a

position to contribute constructively on the suitability of applicants should be invited to participate in this process.

Stakeholders also supported the idea of reviewing the Board's wage classification system to better reflect the highly challenging and complex nature of its decisions and the impact that they have on important economic and social issues.

Conclusion

In the final analysis, given some of the views expressed by the stakeholders at the commencement of the study, the results surpass expectations. It is hoped in the confines of tri-lateral discussions involving the stakeholders and the Labour Program that more headway can be made on agreement on options.

The opportunity and timing appear propitious for the stakeholders to embark upon a course that could significantly change and improve how industrial relations are practised in the federal private sector to their mutual benefit and that of the country.

Without more buy-in from the stakeholders on the details of the options and agreement to use this opportunity to address relationship improvement aggressively, the level of investment and commitment to new programs and cultures that underlie the options for the Council and FMCS described in detail in Chapter 4 may be difficult to justify.

Chapter 7: Conclusions

There are some obvious conclusions which can be taken from this study. First, the federal private sector under Part I of the *Canada Labour Code* does, in relative terms, contribute in a significant manner to the person days not worked in Canada due to work stoppages. A closer analysis of the data pertaining to the federal private sector reveals that a sizeable amount of the person days lost to work stoppages has occurred in the telecommunications sector, where deregulation and competitive forces have resulted in substantial restructuring through mergers and acquisitions. In turn, this reorganization within the industry has given rise to protracted and difficult labour negotiations dealing with critical issues such as job security and seniority.

Second, the optimal policy initiative that can be undertaken at this time to reduce the risk, frequency and duration of work stoppages is investment in measures that will provide wholesale improvement in the labour-management relationships across the federal private sector. Improving relationships will ameliorate the nature of the interactions between the stakeholders. This will result in more collaborative workplace relations and collective bargaining leading to the conviction that work stoppages are not inevitable and the commitment to find solutions to conflicts.

Two consensus options to improve relationships have been identified by the stakeholders. The first, at the level of providing leadership to the sector, is to establish a Council consisting of the stakeholders and the FMCS, along with support from other Labour Program areas, such as analytical and data support from the Research and Data Development Division of Strategic Policy, Analysis and Workplace Information Directorate. The second option is to greatly expand the Preventive Mediation Program of the FMCS - to make more available and widely used across the sector its workshops on grievance mediations joint work councils, managing organizational change, running common interest forums and other joint services that have demonstrated success in improving relationships and developing collaborative workplaces.

Much work needs to be done to provide form and substance to the consensus options described in Chapter 6 with respect to the creation of a Federal Labour-Management Relations Council and the expansion of the FMCS preventive mediation services. This study has attempted to provide some guidance as to the potential of these options to achieve results if strongly backed by all parties and implemented with enthusiasm and commitment. If the stakeholders are supported in these initiatives, there is every reason to be confident that they will be able to carry out a wholesale improvement of relationships in the sector. These should reduce work stoppages and provide other outcomes to enhance the ability of management and labour to adjust and thrive in an increasingly global workplace.

**FOCUSED STUDY ON THE CAUSES AND IMPACT OF WORK STOPPAGES IN THE
FEDERAL PRIVATE SECTOR**

Terms of Reference

WHEREAS the statistics of the Organisation for Economic Co-operation and Development (OECD) suggest that Canada has a high rate of work stoppages compared to other industrialized nations;

AND WHEREAS work stoppages affect productivity and the national economy;

AND WHEREAS the *Canada Labour Code* regulates the conduct of collective bargaining in critical national infrastructure industries;

AND WHEREAS Section 106 of the *Canada Labour Code* (Part I – Industrial Relations) provides that the Minister of Labour may, where the Minister deems it expedient, make any inquiries the Minister considers advisable regarding matters that may affect industrial relations;

AND WHEREAS the Minister of Labour deems it expedient, in the interest of fostering a competitive Canadian economy, that an inquiry be undertaken to:

- 1) Analyze the causes that influence the risk, frequency and duration of work stoppages in the federal private sector and their incidence and impact;
- 2) Examine best practices, both in Canada and internationally, on legislative and non-legislative approaches to manage work stoppages;
- 3) Examine the current industrial relations situation in Canada and the likely developments in the foreseeable future, and identify the sectors and regions at greatest risk of increased work stoppages; and
- 4) Identify options acceptable to both labour and management that would reduce the risk, frequency and duration of work stoppages, including the examination of sector

specific options.

NOW THEREFORE, The Minister of Labour appoints Mr. Peter Annis to conduct a focused study on the causes and impacts of work stoppages with a view to identifying options to reduce the risk, frequency and duration of work stoppages in the federal private sector. The expert is to consult with labour and management representatives, and is to submit a final report to the Minister of Labour within 180 days after the appointment is effective, subject to extension by the Minister of Labour for a period of not more than 60 days.

ÉTUDE CIBLÉE SUR LES CAUSES ET LES EFFETS DES ARRÊTS DE TRAVAIL DANS LE SECTEUR PRIVÉ FÉDÉRAL

Mandat

ATTENDU QUE les données statistiques de l'Organisation de coopération et de développement économiques (OCDE) indiquent que le taux d'arrêts de travail est élevé au Canada comparativement à d'autres pays industrialisés;

ATTENDU QUE les arrêts de travail ont une incidence sur la productivité et sur l'économie nationale;

ATTENDU QUE le *Code canadien du travail* régit le déroulement des négociations collectives dans des secteurs de l'infrastructure nationale;

ATTENDU QUE l'article 106 du *Code canadien du travail* (partie I – Relations du travail) prévoit que le ministre du Travail peut procéder aux enquêtes qu'il juge utiles sur toute question susceptible d'influer sur les relations de travail;

ET ATTENDU QUE le ministre du Travail juge utile, dans le but de favoriser une économie canadienne concurrentielle, qu'une enquête soit menée pour :

- 1) Analyser les facteurs qui influent sur le risque, la fréquence et la durée des arrêts de travail dans le secteur privé fédéral ainsi que leurs conséquences;
- 2) Examiner les pratiques exemplaires, au Canada et à l'étranger, des approches législatives et non législatives pour gérer les arrêts de travail;
- 3) Examiner la situation actuelle des relations industrielles au Canada et les développements à prévoir dans un avenir rapproché, et identifier les secteurs et les régions les plus à risque en ce qui concerne les arrêts de travail;
- 4) Déterminer les options acceptables pour les parties patronale et syndicale afin de réduire le risque, la fréquence et la durée des arrêts de travail, ce qui inclut l'examen d'options sectorielles.

EN FOI DE QUOI, le ministre du Travail nomme M. Peter Annis pour effectuer une étude ciblée sur les causes et les répercussions des arrêts de travail, afin de déterminer les options qui permettraient de réduire le risque, la fréquence et la durée de ces arrêts de travail dans le secteur privé fédéral. Cet expert organisera des consultations auprès des représentants patronaux et syndicaux et présentera un rapport final au ministre du Travail dans les 180 jours suivant l'entrée en vigueur de sa nomination, ce délai pouvant être prolongé par le ministre du Travail pour une période n'excédant pas 60 jours.

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Abbreviations

ADM – Assistant Deputy Minister
 BATNA – Best Alternative to a Negotiated Agreement
 BLS – Bureau of Labour Statistics
 CAALL – Canadian Association of Administrators of Labour Legislation
 CAC – Canadian Airports Council
 CACE – Canadian Association of Counsel to Employers
 CAW – Canadian Auto Workers Union
 CIRB – Canada Industrial Relations Board
CLC – Canada Labour Code
 CLC – Canadian Labour Congress
 CLRB – Canada Labour Relations Board
 COLA – Cost of Living Adjustment
 CROA – Canadian Railway Office of Arbitration
 CSN – Confédération des syndicats nationaux
 CUPE – Canadian Union of Public Employees
 DIB – Dispute Inquiry Board
 FETCO – Federally Regulated Employers –Transportation and Communications
 FJWS – Federal Jurisdiction Workplace Survey
 FLMRC – Federal Labour-Management Relations Council
 FMCS – Federal Mediation and Conciliation Service
 FOS – Final Offer Selection
 GIC – Governor-in-Council
 GM – General Motors of Canada
 HRSDC – Human Resources and Social Development Canada
 IIC – Industrial Inquiry Commission
 ILO – International Labour Organization
 IR – Industrial Relations
 LMPP – Labour-Management Partnerships Program
 LR – Labour Relations
 MOA – Maintenance of Activities
 OECD – Organization for Economic Cooperation and Development
 OLRA – *Ontario Labour Relations Act*
 PDNW – Person Days Not Worked
 PET – Public Emergency Tribunal

PMP – Preventive Mediation Program

PSSRA – *Public Service Staff Relations Act*

SPAWID – Strategic Policy Analysis and Workplace Information Directorate

USW – United Steelworkers

WS – Work stoppage

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