› March 2007

In Praise of the Arthurs Report on Canadian Federal Labour Standards

By Brian B. McArthur

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

Please make a donation... Help us continue to offer our publications free online.

We make most of our publications available free on our website. Making a donation or taking out a membership will help us continue to provide people with access to our ideas and research free of charge. You can make a donation or become a member on-line at www.policyalternatives.ca. Or you can contact the National office at 613-563-1341 for more information. Suggested donation for this publication: $10 or what you can afford.

ISBN 978-0-88627-542-6

This report is available free of charge from the CCPA website at **www.policyalternatives.ca**. Printed copies may be ordered through the National Office for a $10 fee.

410-75 Albert Street, Ottawa, ON K1P 5E7

TEL 613-563-1341 FAX 613-233-1458
EMAIL ccpa@policyalternatives.ca
www.policyalternatives.ca

CAW 567 OTTAWA

About the Author

Brian McArthur is Special Assistant to the National Director of UFCW Canada and a former Employment Standards Officer with the Ontario Ministry of Labour.

Abstract

In 2004 the Liberal government of Paul Martin established a Commission to review the Canada Labour Code, Part III. Harry Arthurs, a former Law Professor and University President, was entrusted to give the government recommendations on the future of the Code after wide consultation. This paper examines some of the more important recommendations and makes an argument for the adoption of these reforms. It is argued that the Arthur recommendations more closely follow the labour standards trends of Europe as opposed to those of the United States. Despite tremendous pressures to conform to a U.S.-style laissez-fare approach to labour law reform, Arthurs elects to recommend a number of sweeping changes based on the proposition that all workers are entitled to "dignity" at work. Arthurs' reforms are perhaps the most progressive package of labour standards ever submitted to a Canadian government for consideration. So radical are the recommendations, in terms of traditional labour law reform, that many unions, including the Canadian Labour Congress, have almost unreservedly endorsed the final report.

In Praise of the Arthurs Report on Canadian Federal Labour Standards

Introduction

It has been over 40 years since Part III of the Canada Labour Code (the "Code") became law. Since that time, the legislation has never seen a major revision, nor has there ever been a Commission established to review what, if any, substantive changes might be needed, given the changing world of work.

With the appointment of Harry Arthurs (the "Commissioner") to make recommendations on the future of Employment Standards Law, a better choice could not have been made. Dr. Arthurs is a seasoned employment law expert with solid credentials. The Commissioner's appointment is a signal that the then government of Paul Martin was serious about Labour Standards reform and was prepared to implement his recommendations. Whether or not these recommendations will now be enacted into law by the new Conservative government is another matter. Although not perfect, the recommendations are a significant leap forward in establishing needed and progressive minimal labour standards. They would go a long way toward redressing the Code's many problems that have been identified by scholars, business leaders, union officials, and workers alike. In his own words, the Commissioner offers a "sensible and practical" balance between the competing interests — and often polarized positions — of business and labour.

The intention of this short paper is to review some of the more important recommendations that Commissioner Arthurs has put forward. It is not the objective here to go into the kind of detail that the report truly deserves, but rather to briefly discuss the report's most important recommendations.

The Theoretical Underpinning

If the Commissioner's recommendations were enacted into law, labour standards would take on an entirely different and much improved character. The Code, as it stands, is defective and unresponsive in a number of fundamental ways. For example, whole categories of workers are excluded from the legislation; the hours of work section(s) on overtime, *et al*, are confusing, inconsistent and open to abuse; there is overlap between employment standards and human rights protections; leaves of absences are truly deficient; compliance/enforcement procedures

are antiquated and lacking; many standards fall behind in comparison with other jurisdictions;[1] and, the Code, more generally, fails in providing workers, *inter alia,* with a platform of workplace decency and security.

The Code, in short, is terribly out of date and only a radical change in thinking about its purpose will make it better for workers and employers. Clearly, Commissioner Arthurs had his fingers on the pulse of what Canadians workers needed by way of meaningful and comprehensive reform to protect their basic labour rights. These reforms would help enable workers to become full participants in a more modern, fair, and equitable labour market.

The report, first and foremost, speaks to the issue of "decency" at work. According to the Commissioner, this is the fundamental principle guiding his deliberations. As he explains[2]:

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

This platform becomes the catalyst for a number a key recommendations that would, without exaggeration, radically improve the protection afforded workers in this country. That notwithstanding, in a report of this nature, with all the complexities and competing interests, the Commissioner also considers the following additional 11 points which underpin his conclusions and guide his final recommendations. They are: 1) the market economy, 2) "flexicurity,"[3] 3) the level playing field, 4) the workplace bargain, 5) inclusion and integration, 6) respect for international obligations, 7) effective and efficient use of public resources, 8) high levels of compliance, 9) regulated flexibility, 10) clarity, and 11) circumspection.

Many, if not all, of these variables are fairly straightforward, but for a complete review of their importance see the actual report. That said, all of these elements tend to steer the ship in a certain direction. That direction is decidedly down the middle, with both management and labour having many of their substantial interests addressed. To that end, the Commissioner's recommendations provide a satisfactory balance between the competing interests of business and labour. In a deliberate and thoughtful manner, the Commissioner took a decidedly European approach to labour law reform, with a collectivist but flexible perspective on problem-solving. This is in stark contrast to many of the employers' recommendations that tended to advocate an American style or *laissez faire*[4] approach to regulating the labour market. Joint problem-solving has become almost exclusively a European method of governing labour/management relations. The Commissioner attempts to follow the European approach to problem-solving in his recommendations, in ways that will be new for Canadians but well worn ground for Europeans.

To that end, as the key recommendations demonstrate, the Commissioner makes a considerable effort to strike a balance between employer and worker interests. He does this by providing options for dialogue and decision-making based on the collective and collaborative model rather than one that is individualistic, arbitrary, or based on *laissez faire* principles.

Labour Standards Are for All Workers

Operating under the assumption that all workers in Canadian society need fairness, decency, and clarity in their places of work, the Com-

missioner argues that labour standards coverage needs to be expanded not restricted. In his own words: [5]

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

Consequently, it is recommended that the Minister of Labour, through regulation, define more specifically, and unambiguously, the term(s) "employee," "employer," and "employment." This is to avoid mischief by creative lawyers and unscrupulous employers bent on excluding vulnerable workers from protections afforded by the Code. It is clear that many workers who need coverage by the Code are being excluded by inconsistent and complex common-law definitions of these terms. Such inconsistent or ambiguous definitions are neither relevant nor appropriate in the context of a decent Canadian society (i.e., one that attempts to bring to all its citizens the benefits of an employer's — and a country's — economic success). Unfortunately, over the years, more and more workers have been excluded from basic legal protections, whether under the Code or in other labour relations statutes. Dr. Arthurs takes the position that it should be firm public policy that no worker should be denied basic labour protection(s) when performing services for any employer. As a result, he grapples with the long-running debate over the validity of contractual arrangements of persons deemed or designated as "independent contractors." But even here, lessons have been learned from the European example.[6]

Many workers have been excluded from basic protections under the Code because of contractual arrangements dictated by employers who claim that their employees are independent contractors when, in fact, they are employees. Many thousands of Canadian workers have been denied overtime wages, public holidays, reasonable hours of work, and termination protection only because they have been so classified as "independent." More often that not, however, these workers are indeed employees who are denied their workplace entitlements by being excluded from coverage by the Code.

The Commissioner intends to remedy this problem. Acknowledging that there are circumstances where *bona-fide* independent contractors exist, he recommends that a hybrid category of worker be included, by definition, in the Code. The name given to that classification is "autonomous worker." These autonomous workers will be comprised of those individuals who perform the same services or work as other workers in similar jobs, but whose "contractual arrangements" distinguish them from other employees. Such workers shall have access to certain entitlements under the Code, but not all. In addition, the Commissioner argues that the term "independent contractor" should also be given a clear and unambiguous definition. The days of uncertainty about employment status due to antiquated legal tests (that are neither relevant nor appropriate to today's world of work) should be over. In any event, having given these terms new and unambiguous definitions, Dr. Arthurs has ensured greater clarity and consistency in the application of the Code.

In addition to the significant changes above is a welcome recommendation for the indirect inclusion of "agricultural workers" in the employment standards regime. In Canada, for example, the United Food and Commercial Workers Union (UFCW Canada) has been advocating for the rights of these workers for years and has been quite successful in raising awareness of their plight.[7] Recently, UFCW Canada was able to convince the Ontario government of the need for these workers to be covered by Ontario's *Workplace Safety and Insurance Act.* The union has continued to

challenge the Supreme Court of Canada's decision in *Dunmore*[8] wherein agricultural workers were allowed to form "associations" to make representations to their employers but prohibited from joining *bona fide* unions as recognized under the *Ontario Labour Relations Act*.[9]

Canada, in fact, treats its "guest" workers with contempt when it bars them from coverage by minimum employment standards and even from the basic right to bargain collectively. As the Commissioner puts it:[10]

> "The federal government has a clear responsibility to ensure that these workers are decently treated, not exploited or abused."

Denying agricultural workers the right to join unions and the right to be protected by employment standards legislation is abusive, exploitative, and callous. Of particular concern is the inability of these workers to ensure their employers' compliance with their individual contracts of employment without fear of reprisal. As a result, the Commissioner recommends that the federal government negotiate with and put pressure on the provinces to ensure that all migrant workers coming into Canada have: a) wages equal to those of locally recruited workers; b) rest and meal breaks, and weekly rest periods: c) protection from unauthorized deductions from their pay; and d) in the case of dismissal or repatriation, access to prompt labour inspectors' decisions on whether such dismissal was justified.[11] In addition, the Commissioner recommends that foreign workers should have information about their rights provided to them in their own languages, and that provincial labour inspectors should be able to enquire into their working conditions and respond to their complaints or enquiries. Just as important, employers who repeatedly and/or systematically violate provincial labour standards or these workers' individual contracts will lose the privilege of being allowed to employ them in the future. Nothing short of this, unfortunately, will get the message through to these employers that it is a privilege to employ such workers and that abuse will bring severe penalties.

On the subject of unions, although no specific recommendation is given to allow agricultural workers to join trade unions, the Commissioner does stress the need for Canada to live up to its "international commitments," which include Convention 87 (Freedom of Association) and, more importantly, the 1998 Convention on Fundamental Principles and Rights at Work.[12] These commitments to the basic principles of the International Labour Organization (ILO) obligate Canada to "protect' and "promote" collective bargaining as the preferred method of regulating employment relations, and to treat it as a fundamental human right.

There is no legitimate reason why Canada's foreign "guest" workers should be denied the protection of minimum labour standards. Such an exclusion is tantamount to exploitation. The time has come for these workers to share in Canada's prosperity. They must be treated equally and with the same protections applied to Canadian workers. Indeed, the uncaring way we treat foreign workers besmirches our reputation as a compassionate and "decent" society. All Canadians should therefore welcome the Commissioner's call for foreign workers to be recognized and treated as equal participants in the Canadian labour market.

The Basics: Towards an Unambiguous Contract of Employment and a Fair Exit Strategy

It is not uncommon for both workers and employers to be uncertain about the particulars of the employment bargain. Yes, "offer," "acceptance," and "consideration" are no doubt present, but what about the details? As they say, the devil is in the details. It seems just good employment relations practice for both worker and employer

to have a clear understanding of what it is that they have bargained for. As the Commissioner points out: [13]

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

Workers often have no idea what their "employment" status is, or even the "term," if any, of their employment. The Commissioner, cognizant of this problem, has come up with a solution that is well established law in Britain, Ireland, New Zealand, and the progressive Scandinavian countries. The solution is as simple as it is elegant: Employers should give their workers "written notice" of their status — whether that be as "autonomous worker," "independent contractor," "dependent contractor," "employee," or "temporary worker." Under this proposal, employers are also required to provide in writing the length of the term of employment, whether for a month, a year, or indefinitely. This is significant if for no other reason than to ensure that contract workers don't work in a perpetual state of uncertainty with little prospect of permanent, long-term employment. To that end, the Commissioner also recommends that any contract worker whose employment exceeds a period of one year must be considered for permanent employment and, as important, that all contract periods are deemed to be periods of contiguous employment that may be combined to attain the one-year threshold. Thus, in recommendation 10.4, the Commissioner indicates:[14]

> "Temporary employees who have worked for an employer for continuous or non-continuous periods that cumulatively total one year — or longer if that is the normal probation period fixed by the employer for permanent employment in similar work — should be deemed to have completed the probation period and should be entitled to be considered for permanent employment on the same basis as probationers. The burden of proof of compliance with these requirements should rest on the employer."

This is a huge benefit for precarious workers and certainly adds to their employment security, given that they will be guaranteed many significant protections under the Code once they achieve permanent status.

In addition, the Commissioner recommends that written notices should also include what wages, benefits, holidays, *et al,* workers will receive. As the terms and conditions of employment change from time to time, so too should the notices be amended to reflect those changes. This is a significant gain for both workers and employers, since, the clearer the terms and conditions of employment, the easier such contracts become to enforce, and the more quickly disputes arising out of individual contracts can be resolved.

The Commissioner also recommends that workers who have been wrongly denied wages or benefits should receive better assistance from the Labour Program in collecting what is owed to them. Considering that nearly 25% of wage claims are never recovered,[15] the Commissioner recommends expanding the powers of Hearing Officers; engaging public or private sector col-

lection agencies; and, quite significantly, making all assets of Directors (including personal) part of the resources that may be used to satisfy claims for unpaid wages. This is a groundbreaking proposal. Short of the former Unpaid Wage Fund that the Ontario government put into effect during the early 1990s, it is one of the most progressive wage recovery suggestions in provincial or federal history.

Finally, the Commissioner recommends better severance pay for long-service employees and speedier decision-making for unjust termination claims going to tribunal. He proposes that both claimants and employers receive "assistance" when involved in formal litigation over unjust dismissal hearings. Presumably, this would come from "advisors" similar to those provided under *the Ontario Workplace Safety and Insurance Act.* Needless to say, this would contribute significantly toward achieving the principles of natural justice and fairness during the hearing process.

All of these recommendations are long overdue and would start to correct the current imbalance of power in labour relations that is now tilted so decisively in the employers' favour.

Labour Rights are Indeed Human Rights

For the first time, a sitting Commissioner, in a report of this magnitude, has recognized labour rights as human rights. Underpinning this position, the Commissioner states: [16]

> "It is widely understood that people who are poor and insecure tend to suffer more violations of their rights than those who are not, and that such people are at a disadvantage when they have to claim or defend their legal rights in general, and their human rights in particular. Because Part III has to do with improving material conditions and reducing insecurity in the workplace, in a sense the overall effect of Part III is to enhance the human rights of workers.
>
> "However, the human rights of workers are not simply those enumerated in Part III. Because everyone has an even more fundamental claim to be treated with due regard for their "dignity and self-respect," all Canadian jurisdictions have enacted human rights legislation to ensure that no one suffers discrimination at work based on race, gender, sexual orientation, religion, ethnicity, disability or other invidious grounds. They have also enacted collective bargaining, privacy, health and safety and other legislation designed to protect workers' "dignity and self-respect" in the broadest sense."

This key linkage is a monumental leap forward in thinking. Historically, in Canada, labour standards have never been though of as "human rights" — although they most certainly are. A key recommendation by Commissioner Arthurs is Recommendation 6.6:[17]

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

As a result, the Human Rights Code (the HRC) should be understood to have either a direct or implied reference to legal and judicial principles that advance and protect the labour rights of all workers. Arguably, this also includes the right to be free from coercion, discrimination, harassment, threats, and intimidation in exercising other fundamental constitutional and human rights.[18] At the very least, the Code's provisions must now be recognized as falling under the "human rights" category of importance. No longer should the basic rights of workers be considered as subordinate rights, but rather as human rights

equal in importance to the right to be free from all forms of discrimination.

To this end, the Commissioner makes a series of recommendations for future collaboration between the federal Labour Program and the Canadian Human Rights Commission. This includes the right of employment standards auditors to carry out inspections over possible human rights violations. It also includes making it a requirement that employers treat employees with fairness, respect and dignity when disciplining them, and that such treatment be "corrective" rather than "punitive." It includes the expansion of protections to workers subject to harassment on sexual grounds and the obligation of employers to educate employees more effectively on what this means as well as the possible consequences of violations. Also, as part of his recommendations, the bullying of workers has now been added to the list of employment-related misconduct that would be prohibited and the freedom from which would therefore be regarded as a fundamental human right. Lastly, it is recommended that Labour Inspectors should be able to report evidence of potential violations to the Canadian Human Rights Commission. Such an important collaborative effort between the two programs would improve the enforcement of fundamental rights under both statutes.

The Commissioner also recommends that the federal government reinstate a legal minimum wage system, deploring Ottawa's abandonment of a leadership role in this area to the provinces. Many business and political leaders claim that workers would be hurt, not helped, by an increase in the minimum wage—that it would reduce employment opportunities and hours of available work. But the Commissioner points out that there is simply no creditable evidence to support the claim that a decent minimal wage will somehow do harm to workers, to business, and the economy.[19] He boils down the debate to a very simple proposition:

> "In the end, however, the argument over a national minimum wage is not about politics or economics. It is about decency. Just as we reject most forms of child labour on ethical grounds, whatever their economic attractions, we recoil from the notion that in an affluent society like ours good, hard-working people should have to live in abject poverty."[20]

He acknowledges the human rights connection and links his proposed minimum wage structure to Statistics Canada's Low Income Cut-Off (LICO), commonly regarded as the poverty line. He recognizes the strong case that can be made to raise the minimum wage at least to the level needed to reach the poverty line. As the Commissioner points out:

> "I am attracted by the formulation that no worker should be paid so little that, after working full-time at a regular job for a full year, they will still find themselves with less money than they need to live at or just above the poverty line."[21]

The provinces, no less than the federal government, should be swayed by this reasoning and amend their minimum wage levels accordingly, as well.

New Leaves for Personal Circumstances

Modelled on the practices of other advanced economic jurisdictions as well as those in the unionized sector of the Canadian economy, the Commissioner has recommended extensive leaves of absence provisions under Part III of the Labour Code. These include leaves for "family responsibilities," "medical issues," "bereavement," "education," and "court" leaves—all of which are necessary for all working Canadians. It is appropriate that the Commissioner recognizes the need of Canadian workers to attend to their personal affairs without having to make the hard choice of

putting food on the table or looking after their sick children. This recommendation is entirely consistent with good public policy in supporting individuals when they are most vulnerable and in need. It complements the "decent society" principle underpinning the Commissioner's entire report. As he says:

> "Charlie Chaplin's famous film, *Modern Times*, portrays a man so overwhelmed by the demands of his job that he is, in effect, turned into a machine. Even when he stops working, his hands continue to perform the functions they performed while he was tightening bolts on an auto assembly line. Technology has changed since Chaplin made his film in the 1930s — indeed, since the *Canada Labour Code* was enacted in 1965. But if anything, the message of *Modern Times* has become even more relevant today: the requirements and rhythms of the workplace threaten to organize the rest of our lives."[22]

Consistent with this reasoning, the Commissioner has also recommended that Employment Insurance eligibility rules be widened to include consideration for workers taking time off for family and other personal reasons. He also recommends that all workers receive adequate rest and meal periods. Organized labour, most notably through the Canadian Labour Congress, has been in the forefront of advocating for better leave provisions under federal Employment Insurance (EI) and provincial employment standards legislation. Dr. Arthurs' recommendations go a long way toward redressing the appalling lack of compassion for workers when faced with unexpected and sometimes grave circumstances. His recommendations give workers dignity and respect. Other economic jurisdictions, such as Europe, have had many of these provisions enacted for a long time. It is time for Canada to provide these urgently needed leaves as well, and to reject the opposition to them emanating from the business community. The Commissioner dismissed the employer's objections and focused instead on what was right for workers and the Canadian economy, based on his fundamental "decency" principle.[23]

In a not so unsurprising but still important move, the Commissioner recommends that workers and employers may substitute public holidays under the Code, either by majority decision, or individually. Not only does this provide workers with the flexibility to attend to their own cultural, religious, and /or personal preferences, but it also assists employers in meeting their obligations under human rights legislation. Clearly, this is a win/win for both workers and employers.

Working Time and Work-Life Balance

Without a doubt, the most complex and controversial section of Commissioner Arthurs' report is "working time." He devotes a great deal of effort to this issue, cognizant that this part of the Labour Code is fraught with difficulties. In the end, he opts for compromise in several fundamental areas, and proposes a model of "regulated flexibility" through workplace and sectoral undertakings. As he explains:[24]

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

And, moreover —

> "my principal recommendation is to provide as alternatives to the ministerial model two other models — the sectoral model and the

> workplace model. Under these two models, responsibilities for achieving flexibility are more appropriately divided between the Minister on the one hand, and unions, workers and employers on the other".

In a nutshell, what has been recommended as a remedy for the competing interests of workers (family and personal responsibility pressures) and employers (competitive and operational pressures) is a "made-to-measure" system of workplace flexibility that takes a direct, non-bureaucratic approach. This approach allows "industry conferences" of worker and employer representatives to give advice to the Minister on their special sectoral needs. From that consultation, presumably, regulations would be put into effect which, subject to specifically agreed-upon workplace arrangements, would become the industry standard. Thus, at the workplace level, and notwithstanding the sectoral recommendations mentioned above, employers would be entitled to exempt their workers from existing standards.[25] Where a trade union is present, consultations must be with the union. Where no trade union is present, the Commissioner recommends the establishment of "workplace committees" presumably modelled after European "Works Councils."

It is not anticipated that organized labour in Canada would be opposed to Works Councils. On the contrary, in several briefs to the Commissioner during the hearing process, labour organizations did recommend the establishment of Works Councils for unrepresented workplaces as the next best thing to trade unions. However, it was the position of some in the labour movement that, due to the strong possibility of employer interference in the autonomy and legitimacy of such Councils, unrepresented workers should be allowed the right to have a trade union of their choosing representing them on such Councils.[26]This recommendation has not been adopted by the Commissioner, which may turn out to be a serious defect in his strategy. Even though he insists that procedures will be put into effect to minimize employer interference, it may simply be too tempting for employers to resist trying to influence the outcome if there are no checks and balances in the system. Without *bona fide* union representation, there is a danger that such joint committees will become employer-dominated and dysfunctional.

One of the more constructive and practical recommendations having to do with working time is that workers have the right to refuse overtime work to attend to family obligations and educational opportunities. This only makes sense. Organized labour has constantly struggled with employers over workers' right to refuse overtime work to attend to family and education needs. At the bargaining table, unions have succeeded in crafting solutions to these problems in large corporations, proving that any employer, with a bit of ingenuity and willingness, can accommodate employees in this respect. It is gratifying that the Commissioner of the Federal Labour Standards Review Program takes the same position.

The Commissioner also recommends that employees have limited rights to be accommodated in the hours and locations of their work. It is argued that, while employers have an unfettered right to determine the location and hours of work, so also should employees have the right to request a change in their work schedule and location. It may well be that such changes will benefit and meet the needs of both the employer and employee. The Commissioner argues that employers should be obliged to listen to the proposals of employees and, if possible, to accommodate them — or, at the very least, to provide sound reasons why such arrangements are not feasible.

The report recommends that employees should be able to take time off in the form of "banked" overtime. The Commissioner sees this as a mutually beneficial arrangement, one that could help employers reduce labour costs while enabling

employees to enjoy more leisure time. Along the same lines, the Commissioner recommends that "time swaps" be permitted: allowing an employee to work more hours one day and then take equal time off with pay at another time.

Finally, in an effort to improve the quality of life of all workers, the Commissioner recommends that employees be given reasonable notice of shift changes. This has long been a thorny issue for workers, especially those in the retail sector where employment tends to be precarious with many workers being in extremely vulnerable positions. Predictably, workers need to arrange their personal lives and they should not have to be instantly on call when summoned by an employer for work. As the Commissioner says:[27]

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

This is especially true when workers are in other employment arrangements and need to complete work and/or make other arrangements when conflicts arise. Many unions have established an excellent record in collective bargaining (particularity in the retail food sector) by negotiating minimum notice periods for call-ins. This recommendation validates these collective bargaining terms and should be welcomed exceptionally progressive labour standards reforms.

Compliance with the Code

In his opening comments on the Compliance section of his report, the Commissioner rightfully suggests that compliance is perhaps the most difficult single issue facing the enquiry since, without compliance, reforms would be meaningless. No one, of course, should be so naive as to think that that there are endless staff and resources that the government might commit to ensure 100% compliance rates. However, an effective, expeditious, and simple compliance system is not out of the realm of the reasonable. Indeed, it is absolutely necessary if labour standards are to be taken seriously. According to the Commissioner:[28]

> "…compliance is not simply a matter of interest to employers and workers. Historically, Canadians have accepted the moral imperative of ensuring that workers enjoy decent minimum working conditions. More recently, as we have come to understand that high labour standards are associated with high-performance economies, we have also come to expect that many employers will not only meet, but exceed minimum standards — as most major federal employers do most of the time. Both objectives would be thwarted if any significant degree of non-compliance were allowed to persist. Non-compliance is contagious. If a small minority of firms secures a significant competitive advantage by operating with substandard labour conditions, it may ultimately drive the majority of law-abiding firms to follow suit."

The problem with a system that is lax on compliance is that it tends to be a slippery slope. As the Commissioner rightfully points out, non-com-

pliance becomes "contagious." This is particularly true when large corporations don't comply, thus sending a message to the rest of the business community that somehow non-compliance is a legitimate part of doing business. To forestall this mindset, staff and resources can surely be made available for an incremental system of inspection and enforcement in which progressive and increasingly severe sanctions are imposed on employers who repeatedly violate the Code.

Compliance is critical for all workers. The fact is that employers, unfortunately, have the upper hand in frustrating workers' legitimate claims because of systemic defects in the existing compliance protocol. The system can be manipulated, and workers can be frustrated by the lack of enforcement and the snail's-pace of justice in the workplace. The government can do better and, indeed, workers deserve better. To that end, the Commissioner has made some very progressive recommendations on compliance that will go a long way towards fixing a tired, over-stressed system. He recommends that Part III provide an enhanced and modernized array of sanctions to deter and punish employers who have committed repeated and serious offences, such as discharging whistle-blowers. Only serious consequences, up to and including criminal prosecution, will deter the persistent offenders. The courts seem more willing than ever to become tough with delinquent employers and, in certain circumstances, they have even ordered jail time[29] for contempt in labour cases.

Also to be hailed is the Commissioner's recommendation that, as part of the solution, the Labour Program should allocate significant resources to education and information so as to increase the probability of compliance in the first place. He also recommends that the Labour Program enter into partnerships with stakeholders, including unions, to improve the dissemination of information respecting entitlements and responsibilities under the Code. To that end, the Commissioner's recommendations on: 1) the establishment of a Chief Compliance Officer; 2) increased remedial powers for Labour Inspectors; and 3) random audits, are particularity welcome. A Chief Compliance Officer with accountability over enforcement of Part III makes perfect sense. The ultimate responsibility over enforcement and adjudication would thus fall on the shoulders of one individual whose single function is to ensure maximum compliance of the Code.

The second and third recommendations above go hand in hand. Labour Inspectors must have wide powers to write orders-to-pay[30] and to demand production records from employers as a bare minimum. That notwithstanding, inspectors must be able to perform routine and other investigatory audits. Random, surprise audits are an effective tool to combat systemic non-compliance. The Commissioner's recommendations will therefore significantly enhance Code compliance.

Recommendations on the adjudication of claims are also worthy of merit. The Commissioner has, to that extent, advocated for a completely new adjudication system overseen by a new "Director of Adjudication." Accordingly, the new Director would:[31]

> "…be responsible for ensuring the fairness, independence and efficiency of the adjudication system; recruiting, training and deploying Hearing Officers; and ensuring that Hearing Officers are readily available in all regions of the country and are sensitive to the special needs of particular clienteles. The DAS would also be responsible for developing and implementing triage, pre-trial and expedited procedures to ensure that the adjudicative process is not encumbered by cases that ought to be settled, dismissed or heard elsewhere.

This is necessary if the new system will have resources strong enough to be able to tackle the influx of claims in an efficient and cost-effective

manner. Quick, informal methods of adjudication of simple labour standards cases must be the wave of the future. The current system of adjudication is simply too slow, too bureaucratic, and too legalistic. A simplified system of expedited dispute resolution is badly needed. This, coupled with the Commissioner's recommendations that a new cadre of full-time Hearing Officers be appointed, will enable the system to become more responsive to the needs of the stakeholders.

Investing in Human Capital

In addition to specific recommendations on the operation and administration of the Labour Code, the Commissioner also recommends some interesting options for government and business to adopt to make Canada's economy stronger. There is a nexus between the health of the overall economy and labour standards. (At least that's what classical economists would say — though they wouldn't necessarily say that's a good thing. They would argue that labour standards that are "too high" are bad for employers, which in turn makes them uncompetitive, which in turn makes it bad for the economy. On the other hand, labour standards that are too weak, dysfunctional, or non-existent are tantamount to worker exploitation and, in a caring and civilized society, are simply unacceptable. As for labour standards making Canadian enterprise uncompetitive, the Commissioner takes the position that:[32]

> "My conclusion is, then, that while the cumulative cost of present and proposed Part III standards may have some impact on federally regulated enterprises, they do not represent a clear or present danger to the efficiency, competitiveness or profitability of most enterprises in the federal domain."

And, moreover:[33]

> "appropriately designed labour standards can make a modest but positive contribution not only to the well-being of workers but to the success of the enterprises that employ them."

Considering that the vast majority of federally regulated enterprises provide greater rights and benefits than the federal Labour Code now requires, it is a stretch (in fact a huge leap) to suggest that decent labour standards are a drag on the economy leading to uncompetitive businesses. In reality, there is significant evidence to the contrary: that high labour standards lead to high-performance workplaces.[34] When private enterprise does well, so will the economy. That seems simple enough! Why, then, would employers not want to have in place measures that would fuel human capital, which in turn would be good for their enterprises and the economy as a whole? Is it because labour standards are too costly? Not according to the Commissioner.

Is it because, in order to contribute to the development of human capital, Canadian business must take on some slight costs and share in the responsibility of human development in this country? Conservative economists would predictably argue that this responsibility lies with the individuals themselves, and perhaps with the state to some extent. What the Commissioner is suggesting here is that it is in the interests of business (if only for self-serving reasons) to contribute, ever so slightly, to the development of worker capital. This in turn will ultimately assist them and the economy.

So how is it possible to strengthen the Canadian economy by introducing decent labour standards? The Commissioner is suggesting that four things happen. These things not only assist in the development of the human capital of workers but also reinforce the recommendations previously discussed in this paper. In effect, these recommendations are both tools that justify the suggested changes to the Code and

also tools for employers to maximize their operational efficiencies while boosting the Canadian economy. The Commissioner suggests that the Code and the federal government should not impede, but should preferably promote:[35]

- a reduction in work–life conflict and related stress and absenteeism;
- "flexicurity" — a coherent balance between security and flexibility[36];
- high levels of human capital formation through training programs and opportunities; and
- an atmosphere of trust and cooperation in the workplace that leads to the adoption of best practices, including high-performance workplace systems.

It is not the place here to go into the exact details of how these measures will assist in making employers, workers, and the economy better off in the long run. Please refer to Dr. Arthurs' Report itself for that. It is, however, sufficient to say that, by promoting these reinforcing initiatives, a high-performance workplace will be created that, quite logically, will lead to a more stable and productive economy.

Implementing a strategy to promote these measures just makes sense. Take, for example, the measure having to do with better work-life balance: It seems clear that, when workers have sufficient time to attend to their own personal, spiritual, and family needs, absenteeism rates fall and productive rates rise. Again, there is significant evidence that points to that result. In addition, it seems straightforward that, by fostering an atmosphere of trust, confidence and cooperation in the workplace, it will be easier to put into effect best practices, thus making the workplace more productive notwithstanding the added benefit of minimizing inter-personal and intra-organizational conflicts. All of this makes perfect sense, and why some in the employer community resist such practical and beneficial measures are beyond us.

That being said, we are confident that many employers will eventually see the light and move towards volunteerism in this area even if the Commissioner's recommendations in this area of the report are not codified.

Looking at the big picture means that employers must accept the legitimacy of reasonably high labour standards as a trade-off for more productive enterprises that ultimately produce more profitable businesses, a stronger economy, and a better workforce. Everyone is a winner if the right approach is taken here, and we suggest that Commissioner Arthurs is on the right path.

Conclusion

In this paper I have attempted to outline and provide a rationale for some of the Commissioner's most important recommendations stemming from his review of Part III of the Canada Labour Code. Dr. Arthurs is to be commended for his significant efforts in formulating such a comprehensive and well-thought-out series of recommendations, and for looking to the more progressive labour relations systems of Europe to provide a template for best practice as opposed to the American model. That approach should signal to the government, if not the business community, that Canada's traditions and values are more in line with a European "collectivist" approach than with the "individualized" American approach. This is a welcome set of recommendations — not just for workers in this country, but for all Canadians who value stability, fairness, and compassion.

In a nutshell, the Commissioner has recommended that all workers, including foreign "guest" workers, be entitled to basic labour standards protection. He has advocated for contract clarity and better protections for workers who have been made redundant. He has remarkably

perceived basic employment rights as human rights. He has marked the need for better leave provisions for workers. He has argued for better work-life balance as being in the best interests of workers, employers, and Canadian society. He has pointed to the defects in the current state of enforcement and has recommended a series of constructive reforms to remedy these defects. Finally, he has looked at the larger economic picture and has forcefully argued that both employers and the broader society, as well as workers, would be better off if these reforms were enacted into law.

The federal government should be strongly encouraged to adopt and implement Commissioner Arthurs' recommendations as part of a modernization strategy for Canadian employment relations. The time is right to move forward and fix the problems that have plagued federal labour standards for many years. It would be deeply distressing for these recommendations to be shelved because of partisan political considerations. The Canadian labour Congress (the voice of labour in the country) has strongly endorsed the recommendations, with only minor criticisms.[37] The Commissioner has made out a clear case for the report's recommendations to be adopted, no matter what party is in power in Ottawa.

Finally, organized labour — and, indeed, unrepresented workers — should acknowledge the role of the Canadian Labour Congress throughout the review process. CLC President Ken Georgetti, Secretary-Treasurer Hassan Yusuff, and chief economist Andrew Jackson had much to contribute to this project and represented Canadian labour exceptionally well throughout Commissioner Arthurs' long consultation process.

Notes

1 Provincially and Internationally.

2 Arthurs, Harry, "Fairness at Work: Federal Labour Standards for the 21st Century", Publication Services, Human Resources Development Canada, 2006. See: http://www.fls-ntf.gc.ca/en/fin-rpt.asp

3 "Flexicurity" means simultaneously providing more flexibility for employers to adapt to changing technologies and competitive conditions, while ensuring that workers are made more secure by being provided with retraining opportunities as well as other resources needed to adjust to new labour market requirements.

4 Minimal government intervention and regulation

5 Note 3 above (Arthurs) at pp. 59.

6 In Britain, for example, the term 'worker' has a broad definition and includes persons such as dependent contractors.

7 It is a matter of public record that agricultural workers, many who are from Mexico, Central America and the Caribbean, work in deplorable conditions and make a fraction of what Canadian nationals earn doing the same work.

8 Dunmore v. Ontario (Attorney General), 2001 SCC 94, [2001] 3 S.C.R. 1016.

9 Arguably in contravention of International law.

10 Note 3 above (Arthurs) at pp. 243.

11 Note 3 above (Arthurs) at pp. 244.

12 All ILO members (including Canada), regardless of whether they have ratified fundamental Conventions, "have an obligation arising from the very fact of membership in the Organization to respect, to promote and protect those Fundamental principles.

13 Note 3 above (Arthurs) at pp. 81.

14 Note 3 above (Arthurs) at pp. 237.

15 Note 3 above (Arthurs) at pp. 88.

16 Note 3 above (Arthurs) at pp. 95.

17 Note 3 above (Arthurs) at pp. 101.

18 For Example: ILO C 87—Freedom of Association and Protection of the Right to Organize Convention, 1948, and, The Canadian Constitution, Freedom of Association.

19 Note 3 above (Arthurs) at pp. 246/7.

20 Note 3 above (Arthurs) at pp. 247.

21 Note 3 above (Arthurs) at pp. 248.

22 Note 3 above (Arthurs) at pp. 109.

23 Please see page 17 (below) under the heading "INVESTING IN HUMAN CAPITAL: IT'S A MULTIPLE WIN" for a more detailed discussion on this point.

24 Note 3 above (Arthurs) at pp. 116.

25 Insofar as criticisms are concerned, this has been on of the biggest by the CLC. See: http://canadianlabour.ca/index.php/emplois_conomie_et_l/CLC_Response_to_Fair. Arguably, such direct agreements are open to employer abuse with workers having little recourse to challenge arbitrary decisions made by management concerning their hours of work.

26 http://www.fls-ntf.gc.ca/en/sub_fb_26.asp

27 Note 3 above (Arthurs) at pp. 151.

28 Note 3 above (Arthurs) at pp. 190/1.

29 See: UFCW Local 175 and Rainy River Hotel (unreported).

30 Subject to appeal.

31 Note 3 above (Arthurs) at pp. 207.

32 Note 3 above (Arthurs) at pp. 253.

33 Note 3 above (Arthurs) at pp. 253.

34 Note 3 above (Arthurs) at pp. 263.

35 Note 3 above (Arthurs) at pp. 253.

36 See note 4 above for a definition.

37 See: http://canadianlabour.ca/index.php/October_2006/1028 for a full report on the CLC's position on the report.

> ABOUT THE CENTRE

The Canadian Centre for Policy Alternatives is an independent, non-profit research institute funded primarily through organizational and individual membership. It was founded in 1980 to promote research on economic and social issues from a progressive point of view. The Centre produces reports, books and other publications, including a monthly magazine. It also sponsors lectures and conferences.

> AU SUJET DU CENTRE

Le Centre canadien de politiques alternatives est un institut de recherche indépendant et sans but lucratif, financé en majeure partie par ses membres individuels et institutionnels. Fondé en 1980, son objectif est de promouvoir les recherches progressistes dans le domaine de la politique économique et sociale. Le Centre publie des rapports et des livres, ainsi qu'une revue mensuelle. Il organise aussi des conférences et des colloques.

CCPA
CANADIAN CENTRE for POLICY ALTERNATIVES
CENTRE CANADIEN de POLITIQUES ALTERNATIVES

www.policyalternatives.ca

> NATIONAL OFFICE

410-75 Albert Street, Ottawa, ON K1P 5E7
TEL 613-563-1341 FAX 613-233-1458
ccpa@policyalternatives.ca

BC OFFICE

1400-207 West Hastings Street, Vancouver, BC V6B 1H7
TEL 604-801-5121 FAX 604-801-5122
ccpabc@policyalternatives.ca

MANITOBA OFFICE

309-323 Portage Avenue, Winnipeg, MB R3B 2C1
TEL 204-927-3200 FAX 204-927-3201
ccpamb@policyalternatives.ca

NOVA SCOTIA OFFICE

P.O. Box 8355, Halifax, NS B3K 5M1
TEL 902-477-1252 FAX 902-484-6344
ccpans@policyalternatives.ca

SASKATCHEWAN OFFICE

105-2505 11th Avenue, Regina, SK S4P 0K6
TEL 306-924-3372 FAX 306-586-5177
ccpasask@sasktel.net

> BUREAU NATIONAL

410-75 rue Albert, Ottawa, ON K1P 5E7
TÉLÉPHONE 613-563-1341 TÉLÉCOPIER 613-233-1458
ccpa@policyalternatives.ca

BUREAU DE LA C.-B.

1400-207 rue West Hastings, Vancouver, C.-B. V6B 1H7
TÉLÉPHONE 604-801-5121 TÉLÉCOPIER 604-801-5122
ccpabc@policyalternatives.ca

BUREAU DE MANITOBA

309-323 avenue Portage, Winnipeg, MB R3B 2C1
TÉLÉPHONE 204-927-3200 TÉLÉCOPIER 204-927-3201
ccpamb@policyalternatives.ca

BUREAU DE NOUVELLE-ÉCOSSE

P.O. Box 8355, Halifax, NS B3K 5M1
TÉLÉPHONE 902-477-1252 TÉLÉCOPIER 902-484-6344
ccpans@policyalternatives.ca

BUREAU DE SASKATCHEWAN

105-2505 11e avenue, Regina, SK S4P 0K6
TÉLÉPHONE 306-924-3372 TÉLÉCOPIER 306-586-5177
ccpasask@sasktel.net