ILGWU
ONTARIO
DISTRICT
COUNCIL
of
INTERNATIONAL
LADIES' GARMENT
WORKERS' UNION

33 Cecil St
TORONTO
ONT. M5T 1N1
Tel. 977-1384
Fax 977-6999

Alexandra Dagg
MANAGER

Wilfred Kronqvist
PRESIDENT

MEETING THE NEEDS OF VULNERABLE WORKERS:

PROPOSALS FOR IMPROVED EMPLOYMENT LEGISLATION AND ACCESS TO COLLECTIVE BARGAINING FOR DOMESTIC WORKERS AND INDUSTRIAL HOMEWORKERS

SUBMITTED BY:

ONTARIO DISTRICT COUNCIL OF THE
INTERNATIONAL LADIES' GARMENT WORKERS' UNION

AND

INTERCEDE

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INTERCEDE

Toronto Organization for Domestic Workers' Rights

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Preface and Acknowledgements

Immigrant women in Ontario predominate in occupations where the household is the workplace. Women workers whose main place of employment is the home often escape public notice and government regulation.

Over the past year the Ontario District of the International Ladies' Garment Workers' Union and INTERCEDE: Toronto Organization for the Rights of Domestic Workers jointly organized an education and research project on the employment rights of vulnerable immigrant women workers: domestic workers and homeworkers in the garment industry. The main objectives of the project are:

- *to educate domestic workers and homeworkers about their rights under legislation in Ontario,*
- *to provide educational forums which enable workers to overcome the isolation of their work environment - the home - and share their experiences,*
- *to identify and promote new forms of association so that these workers can begin to improve their wages and working conditions and have access to collective bargaining in a meaningful way.*

This report is the result of an eight month research project. The research was conducted by a special research group focusing on new forms of association for domestic workers and homeworkers. It was a collaborative effort. The researchers in this group included: Jan Borowy, Barbara Cameron, Alexandra Dagg, Fay Faraday, Judy Fudge, Elizabeth Grace, Cathy Laurier, Rebecca Murdock, Fely Villasin, and Lee Waldorf. The project co-ordinators were Professor Judy Fudge, of Osgoode Hall, York University, and Jan Borowy, Research Co-ordinator, for the International Ladies Garment Workers Union, Ontario District Council.

This report identifies the ways in which domestic workers and garment homeworkers could have access through legislative change to improved employment rights and collective bargaining - basic rights that are often taken for granted.

Special thanks go to the many union representatives, labour lawyers, and community legal workers who agreed to be interviewed and who participated in the many long discussions about new forms of association for domestic workers and homeworkers in the garment industry. In particular we would like to thank: Ron Davis, John Cartwright, David Sobel, Carla Lipsig-Mumme, Alfred Magerman, Gerry Roy, Catherine Evans, Harry Glasbeek, Shelly Gordon, and Gayle Lebans.

The International Ladies Garment Workers Union provided the administrative resources for the completion of this project. Special thanks go to Lee Waldorf for her editorial work and to Rose Cho and Christine Behan for their work in the final stages of production.

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ACRONYMS USED IN THIS REPORT

ACTWU	Amalgamated Clothing and Textile Workers Union
CADA	Collective Agreement Decrees Act, Quebec
ESA	Employment Standards Act, Ontario
FDM	Foreign Domestic Movement Program, Canada
ICI	Industrial-Commercial-Institutional Sector, Construction Industry
ILGWU	International Ladies Garment Workers' Union - Ontario District
INTERCEDE	the Toronto Organization for the Rights of Domestic Workers
ISA	Industrial Standards Act
LCP	Live-in Caregiver Program, Canada
OLRA	Ontario Labour Relations Act

A. INTRODUCTION

I Purpose and Structure of this Report

The purpose of this report is to bring to the attention of the members of the Ontario Legislature and the Ontario Government the urgent need for changes in the manner in which labour standards are regulated and collective bargaining is governed, in order to secure access to collective bargaining, decent wages, working conditions, and dignity for homeworkers and domestic workers. The proposals in this report are submitted on behalf of the Ontario District of the International Ladies' Garment Workers Union (ILGWU) and INTERCEDE. The project was funded by a grant from the Ontario Women's Directorate.

The report presents an assessment of the functioning and relevance of existing legislative and associational models relating to domestic workers and homeworkers in the garment industry. It also proposes new legislative and associational models designed to facilitate the unionization of both sectors and to improve the working and living conditions of domestic workers and industrial homeworkers.

The report is organized into the following parts:

1) Overview of the working conditions and status of homeworkers and domestic workers;

2) Assessment of the two prime statutory regimes for regulating labour conditions, the *Employment Standards Act* (ESA) and the *Ontario Labour Relations Act* (OLRA), and the limitations of these regimes for securing better wages and working conditions for homeworkers and domestic workers;

3) Proposal for a new approach to labour regulation to provide decent wages, working conditions and dignity for homeworkers and domestic workers;

4) Assessment of other regimes in Canada which provide a sectoral basis for regulating labour standards and/or collective bargaining; and

5) Proposals for a new model of sectoral regulation of labour standards and of collective bargaining for homeworkers and domestic workers.

II Groups Sponsoring this Report

Intercede

INTERCEDE, a community-based non-profit organization founded in Toronto in 1979, provides counselling and advocacy services for domestic workers. It has approximately 1,800 members. INTERCEDE has lobbied actively for improvements in the working conditions and immigration status of domestic workers and has submitted numerous briefs to both the Ontario and federal governments, recommending changes to labour and immigration laws respectively. In May 1991, INTERCEDE conducted a detailed needs assessment of foreign domestic workers in Ontario.

ILGWU - Ontario District

The International Ladies' Garment Workers' Union (ILGWU) was established in Canada in 1911 and is one of the oldest unions in the manufacturing sector. The union represents workers involved in all aspects of ladies' garment manufacturing. The Ontario Chapter of the ILGWU has been actively involved in advocating for improved protection and working conditions for all garment workers including homeworkers. Approximately 85% of the union's members are immigrant women, many of whom have worked in the industry for several years. The Ontario branch of the union has taken a lead in advocating for homeworkers and was instrumental in setting up a Homeworkers' Association. It is an active participant in the Coalition for Fair Wages and Working Conditions for Homeworkers.

III Community Consultation

The recommendations in this report are a product of community consultation with groups of domestic workers, homeworkers and advocates of homeworkers. Three major focus groups with domestic workers were held. The groups reviewed the changes to the OLRA, the introduction of the right to organize, and reviewed how a central registry would function.

The Homeworkers Association met with members on two separate occasions to discuss the position of homeworkers in labour law. The majority of homeworkers face the obstacle of being considered independent contractors, when they are in fact functionally dependent on contractors.

The research group met with members of the Coalition for Fair Wages and Working Conditions for Homeworkers and advocates for domestic workers and homeworkers with experience in employment standards law. This focus group examined possible new mechanisms for broader-based bargaining.

B. OVERVIEW OF THE WORKING CONDITIONS AND STATUS OF DOMESTIC WORKERS AND HOMEWORKERS

I GLOBALIZATION AND THE RISE OF NON-STANDARD EMPLOYMENT

a) Re-organization of Work

The global economic restructuring over the last 20 years has brought fundamental changes to wages and working conditions. In Canada, as other western industrialized nations, this has included rounds of de-industrialization, re-organization of manufacturing and the rise of the service sector. The corporate management strategy of the current round emphasizes the production of goods and services internationally rather than within the confines of a nation. Larger multinational, internationally-oriented firms control and dominate sectors internationally using a chain of small workplaces. Competition has intensified and it is global. Economic policy, once focused on the development of a nation's economy, now sees development through dropping trade barriers, greater trade liberalization and the need to orient production by export-led industrialization.

Flexibility is central to this restructuring and has become the buzz word of the 1990's. The new "flexible" economic agenda emphasizes the need to restructure the way work is organized. The indicators of the flexible strategy include: the re-organization of work within a factory, the adoption of flexible new technologies, the use of just-in-time production and inventory, a shift to economies of scope, a reorganization of corporate structures to sub-contracting and the growth of clustering or network firms. [1]

There are many ways in which business is pursuing a new competitive agenda. One method is through increased fragmentation and decentralization of the production process. This may be done through the sub-contracting out of work, or the detachment of units into independent firms tied to a parent firm. One indicator of this process is the rise of small workplaces. In 1986, nearly 32 per cent of all Ontario registered businesses had fewer than 50 employees. The proportion of workers employed in establishments with fewer than twenty workers increased from 16.28 percent in 1978 to 24.01 per cent in 1986. These workplaces are largely non-union and pose a difficult problem for organizing. [2]

The main emphasis, however, is on ways to cut costs which, in effect, means ways to reduce unit labour costs. For business, a new type of worker is needed - a new flexible worker. Enterprises everywhere are pursuing a flexible low-cost labour strategy by,

> reducing their fixed labour force, making payment systems more flexible and using more contract workers, temporary labour and out-sourcing through the use of homeworkers, or sub-contracting to small informal enterprises that are not covered by labour or other

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1. For an overview of the literature on flexible specialisation see M. Macdonald " Post-Fordism and the Flexibility Debate" in Studies in Political Economy 36 Autumn, 1991 p. 177 - 201.

2. J. O'Grady, "Beyond the Wagner Act, What Then?" in Getting on Track., D. Drache (ed). Montreal: McGill-Queen's Press p. 158.

regulations and that bear the risks and uncertainties of fluctuating business.[3]

This flexibility strategy involves at least three tactics: (i) the redeployment of workers in new ways within a firm, often intensifying work through multi-skilling, (ii) altering the size of the workforce with part-time work, subcontracting and homework, and (iii) the push for wage concessions and introduction of piece-rates.[4]

The search for the flexible worker has also been called the casualisation of work. For a firm, labour costs are not longer fixed, but they are variable. Firms are reducing, as much as possible, the number of full-time, permanent, salaried or waged workers who are entitled to full benefits. Labour is purchased only as and when needed. Payment is for work done rather than a negotiated hourly, weekly or annual rate. Benefits such as holiday pay, overtime, CPP, severance pay and the Employee Health Tax are thereby avoided by employers.

While a firm gains total flexibility in its use of labour, it is gained at a significant cost to the worker. There may remain a group of "core" workers who have access to traditional collective bargaining supported by the existing labour legislation. This group faces on-going pressure for wage concessions. Surrounding the core workers are the "periphery " - the fragmented sector, of predominantly women workers, who are part-time, temporary or casual workers, who have few benefits and are not entitled to basic protection under employment law. The casualisation of work leaves a labour market polarized between a group of workers with higher wage, decent benefits and greater security and another group of workers with extremely low wages, few benefits and a precarious position.

Work in the peripheral sector, which has previously been viewed as atypical employment, precarious or non-standard employment is now one of the most rapidly expanding sectors of the economy. Non-standard employment refers to part-time, temporary or contract work, part year and own-account self-employed work. The trend is well documented especially in the Economic Council of Canada report, Good Jobs, Bad Jobs.[5]

The evidence is startling and has far reaching implications for evaluating a new system of collective bargaining. In 1989, 33% of Canadians are employed in non-standard employment and 16% of manufacturing sector now employs non-standard workers.[6] Between 1975 and 1990, Canada's full-time employment increased by only 30%, yet part-time employment increased by 50%. In Metro Toronto alone,

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[3] G. Standing, "Global Feminization through Flexible Labour", 17 World Development 1077 (1989), p. 1079.

[4] For an overview of the literature on flexible specialization and economic restructuring please see: Wood, S. "The transformation of work?" in The Transformation of Work, S. Wood (ed.) (London: UnWin Hyman, 1989.), Walby, S., " Flexibility and the sexual division of Labour" in The Transformation of Work, Drache, D., "The systematic search for flexibility: National Competitiveness and New Work Relations", in The New Era of Global Competitiveness, D.Drache and H. Gertler (ed.) (Montreal: McGill-Queen's Press, 1991.)

[5] Economic Council of Canada, Good Jobs, Bad Jobs: Employment in the Service Economy, (Ottawa: Minister of Supplies and Services), 1991. See especially, Chapter 5.

[6] H. Krahn, "Non-standard work arrangements" in Perspectives on Labour and Income, (Statistic Canada Cat: 75-001E, Winter 1991).

part-time employment grew by 99% between 1983 and 1989. [7] In July 1992, Statistics Canada reported that 129,000 full-time jobs were lost while 100,000 part-time jobs were created. In 1989, over 70 per cent of part-time workers in Canada are women.

Some view the current emphasis on flexibility with enormous optimism. It is often argued that by virtue of this new found flexibility, people will gain the ability to alter their work commitments as their income needs and family needs change, and paid labour will occupy a smaller proportion of their lives. Such arguments serve to misrepresent the changes currently taking place in the labour market, characterising them as being in the best interests of workers when in fact for many workers they pose a serious threat.

For workers, and especially for immigrant women workers, being a participant in the peripheral, flexible labour market has meant relegation to precarious non-unionized jobs, with concomitant low wages and poor working conditions. Workers have little access to an employment contract. The flexible worker is really a worker employed in an uncertain and insecure job environment. The proportion of women among the working poor has dramatically increased since the 1970s.[8] In 1971, women were 29.9 per cent of the working poor; by 1986 they had become 46.4 per cent of the working poor. During that same period there was an increase of 67.8 per cent in working poverty; in 1971, a total of 770,000 people were working and poor. By 1986 this had risen to 1,292,000, and increase of 67.8 per cent.

Domestic workers and homeworkers represent the ultimate form of flexible labour. They are women who perform this work, not out of choice, but as a result of economic necessity. They are located at the extreme end of this growing marginal or peripheral workforce. Both homework and domestic work are notoriously low paying, lack status, violate basic employment standards and lack access to unionization.
The changes brought about by economic restructuring are also having an impact on collective bargaining. The existing system of collective bargaining - one based on single-unit employers - that has served as the standard form of labour market regulation, has now lost much of its impact and relevance with the rise of precarious employment. A fundamental revamping of collective bargaining legislation is required to properly regulate the new and transformed labour market. Reform initiatives are needed which directly address the realities of the workers who make up the flexible labour force in the 1990's.

b) Public Policy and the Labour Market - Matching Labour Legislation to Ontario's Industrial Policy

Existing collective bargaining legislation is based on a notion of regulating a labour market made up of large factories and single employer bargaining units. Presently, the government of Ontario is pursuing a new industrail policy that moves away from the single-employer, large factory structure.

The government of Ontario's Industrial Policy, introduced in 1992, explicitly supports a sectoral development approach. At the heart of this new policy is the development of 'clusters' of firms rather than isolated industries. One office or one factory is no longer the comerstone of the industrial policy. The government is working with sectors to increase cost effectiveness and to ensure networks of firms benefit from spill over effects. Part of this policy seeks to develop new sectoral partnerships between government, labour and business.

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[7] A. Yalnizyan, "Full Employment - Still a Viable Goal" in Getting on Track: Social Democratic Strategies for Ontario. (Montreal: McGill-Queen's Press, 1991.)

[8] G. Guderson and L. Huszynaski, with Keck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990)

The impact of the industrial policy on women and the labour market has not been analyzed. How will immigrant women benefit from this policy? To date, there is no sectoral adjustment or partnership for industries or sectors dominated by immigrant women and workers within the most vulnerable sections of the labour market. Does such this industrial framework encourage "flexibility"? What form would this new flexibility take? Will this policy encourage the rise of precarious, non-standard employment? Does the emphasis on "clusters" or "networks" of firms enhance or diminish the creation of smaller non-unionized workplaces? These question go beyond the scope of this report, but require attention if the full impact of the industrial policy on the labour market is to be understood.

The government of Ontario is actively encouraging the development of an industrial formation built upon sectors. While the government is active with a policy that will influence the design of the labour market, it must also be active in the regulation of that labour market.

It is crucial that the government investigate and implement new forms of regulation in the new emerging sectors. It is important that the government of Ontario recognize that if it is actively pursuing an industrial strategy based on sectoral development, it must equally pursue new forms of labour market regulation that match the new emerging labour market.

Sectoral or broader-based bargaining is an important method by which the government of Ontario can regulate the new emerging sectoral configuration of the Ontario labour market.

II - DOMESTIC WORKERS

a) Immigration Law and Policy and Foreign Domestic Workers

History of the Various Immigration Programs

Domestic work in Canada has largely been the work of immigrant women and, more recently, migrant women workers. There has been a chronic shortage of workers in Canada who are willing to take paid domestic employment because of low pay, lack of status, and a denial of major employment related benefits. The demand for domestic workers has exceeded supply especially for live-in domestic workers who are available to their employers 24 hours a day.[9]

To provide a stable stream of live-in domestic workers Immigration Canada has developed schemes to bring women to Canada to work exclusively as domestics.[10] The first such program was the West Indian Domestic Scheme which allowed single women with no dependents from the Caribbean to enter Canada to work as domestics. Women had to work for one year as domestics to qualify for permanent residence. Many left domestic work after their required service as a result of the intolerable working conditions.

Rather than address the working conditions which compelled women to leave domestic work, the Department of Immigration's response was to impose even more restrictive conditions on foreign domestic workers. Starting in 1973, foreign domestic workers were only allowed to enter Canada on restrictive temporary work permits and they were absolutely barred from applying to settle in Canada. Once their authorization was not extended, they were forced to leave.

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[9] K. Serwonka, "The Bare Essentials: A Needs Assessment of Foreign Domestic Workers in Ontario" prepared for INTERCEDE (May 1991) at 3-4.

[10] These programs are described by Serwonka at 3-5.

Foreign Domestic Movement Program - FDM

As a result of intensive lobbying and organizing by domestic workers, the temporary work authorization program was amended in 1981 with the introduction of the Foreign Domestic Movement Program (FDM). This program, although it alleviated the worst aspect of temporary employment authorizations (that domestic workers would be forced to return to their country of origin once they no longer performed domestic employment), did not completely eliminate the discrimination against foreign domestic workers.

Under the FDM Program, domestic workers were allowed entry into Canada on a two year temporary employment authorization. During this period they were confined to domestic work. The one year employment authorizations which were issued required them to work for the employer named on the authorization. To change employers, the domestic worker was required to obtain permission from Immigration by convincing immigration officials that she had a valid reason for leaving and that she had not violated the FDM Program. Furthermore, domestic workers were compelled to live in their employers' homes for the two-year duration of the FDM Program. Their eligibility to become permanent residents in Canada was contingent not only upon completing their two years of domestic service, but also upon demonstrating their ability to meet additional rather arduous criteria which included upgrading of skills, volunteer work in the community, financial management, personal suitability, in addition to proving his/her "potential for self-sufficiency."

Groups like INTERCEDE, which represent foreign domestic workers, were extremely dissatisfied with several features of the FDM program, particularly the requirements to live-in and the postponement of landed status until the completion of two years of domestic service. INTERCEDE has consistently argued that these requirements discriminate against foreign domestic workers and that the supply of live-in workers could be maintained not by burdening the foreign workers, but, rather, by improving the conditions of domestic service.

The discriminatory effects of the FDM program were widely recognized. In a letter to the federal Minister of Employment and Immigration, the then Chief Commissioner of the Ontario Human Rights Commission, Catherine Frasee, expressed the Commission's opinion that the live-in rule constituted a form of adverse-effects discrimination by severely limiting the ability of foreign domestic workers, the vast majority of whom are women, to establish a private, independent lifestyle and by exposing them to various forms of exploitation.

Live-in Caregiver Program - LCP

Effective April 27, 1992, the federal government implemented a new program, the Live-in Caregiver program (LCP), to replace the FDM. Like its immediate precursor, the LCP is designed to bring workers to Canada on a temporary basis for certain kinds of live-in work. In order to qualify for this program, caregivers (which is the term used to replace 'domestics') must satisfy the following three requirements:

1. successful completion of the equivalent of Canadian grade twelve;

2. six months full-time training in a field or occupation related to the employment for which the employment authorization is sought; and

3. ability to speak, read and understand either the English or French language at a level sufficient to communicate effectively in an unsupervised situation.

Upon the completion of two years employment under the LCP, the care-giver or domestic worker is entitled to landed immigrant status. In effect, what the LCP does is implement a pre-screening device, rather than requiring workers to meet a special assessment test at the end of their domestic service, to establish suitability for landed status.

The LCP has been severely criticized by a number of groups, including the all-party Commons subcommittee on immigration which held public hearings on the program.[11] Chief amongst the defects of the new program is its potential discriminatory impact against women from developing countries who in the past have constituted the vast majority of foreign domestic workers. The fear is that the new qualifications will render inadmissible a large percentage of those women previously admitted under the FDM. In fact, the government's own statistics, used to justify the LCP, bear this out. For example, in 1991, women from the Philippines accounted for 68 per cent of FDM participants. Of those who became permanent residents before 1987 (the most recent year for which reliable statistics became available), 54 per cent met or exceeded the new requirement. This means, of course, that 46 per cent, would not meet the LCP qualifications. Figures for 1991 show that European workers represented approximately 15 per cent of the program while workers form the Caribbean represented only 4.7 per cent.[12]

Not only is the LCP likely to exclude many women who previously had the opportunity to come to Canada and attempt to upgrade their skills in order to obtain landed status, the new program retains the two most problematic features of the old program, namely the live-in requirement and the two year temporary immigration status. Thus, the federal government has done nothing to reduce the vulnerability of domestic workers to employer abuse.

b) Vulnerability of Domestic Workers

Insecure Immigration Status

Unlike other workers from abroad whose skills are in demand, domestic workers are denied landed immigrant status upon entry into Canada. Instead they are only granted temporary visas and may be deported at any time. During those two years, they are issued temporary work permits which restrict them to domestic work and to work for the employer listed on the permit.

If a worker under the LCP wishes to change employers for personal or economic reasons, she must apply for and obtain a new employment authorization at the Canada Immigration Centre before beginning work with the new employer. Failure to do so exposes the worker to deportation. This operational factor of the LCP has adversely affected domestic workers. In particular, LCP participants who are terminated from or leave their employment are being forced to do "trial work".[13] In several instances recounted to INTERCEDE, before an employer agrees to hire and process an offer of employment through the Canada Employment Centre, domestic workers are being required to work at reduced pay. Since the worker is not entitled to work without an employment authorization, she is extremely vulnerable to this form of exploitation, since any attempt to report this form of abuse jeopardizes the worker's immigration status.

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11 "Nannies deserve better, Commons committee says," The Globe and Mail 7 August 1992, A3.

12 Letter from Bernard Valcourt, Minister of Employment and Immigration, to Judy Fudge, July 2, 1992.

13 Letter from Fely Villasin, Coordinator of INTERCEDE, to Laura Chapman, Director of Policy and Program Development, Ministry of Employment and immigration, December 9, 1992.

There is nothing in the LCP which is designed to protect domestic workers from employer abuse. In fact, the federal government has made it very clear in its informational package on the LCP that it is the participant's responsibility to find out what employment protection is offered in the province or territory where she is working.[14]

c) Profile of Domestic Workers

How Many are There?

It is difficult to get a clear picture of total number of domestic workers in Ontario or what proportion are on the foreign domestic program (FDM). According to the 1986 census there were 117, 530 domestic workers in Canada but these statistics do not provide an accurate picture as they include child-care workers and exclude workers on the FDM.[15]

Foreign Domestic Workers

There are, however, reliable statistics on the FDM. About 60,000 domestic workers have entered Canada on the FDM.[16] In 1990, new arrivals on the FDM totalled 11,000.[17] The majority settle in Ontario. 64% of new entrants in 1989 came to Ontario, up from 58% the year before. About 60% settled in the Metro Toronto area.[18]

Nearly 72% of domestic workers on the FDM come from developing countries (Philippines, Caribbean, Asia, Africa and Latin America) and are non-white.[19] Over half of 1990 new arrivals came from the Philippines.[20]

Reasons for Coming to Canada on FDM Program

Many workers who enter Canada under the foreign domestic program do so because of unemployment and poverty in their home countries. Their meagre earnings from domestic work are often a vital source of family income. It is not uncommon for a domestic worker to remit a substantial portion of her income to support children and relatives in her homeland.[21]

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14 Immigration Canada, "The Live-in Caregiver Program," Employment and Immigration Canada, IM-197/4/92.

15 Figures cited in Intercede OLRA brief at 6.

16 Canada, Dept. of Employment and Immigration, Foreign Domestic Workers' Preliminary Statistical Highlight Report 1988/89 (Ottawa: Dept. of Employment and Immigration, January 1990) cited in Serwonka at 9; Villasin, Report to 1991 Intercede AGM.

17 Villasin, Report to 1991 Intercede AGM

18 Immigration Canada, Foreign Domestic Workers' Preliminary Statistical Highlights cited in Serwonka at 9. Statistics based on January to September, 1991.

19 Ibid (Immigration Report)

20 Villasin, Report to 1991 INTERCEDE AGM.

21 Serwonka at 8.

d) Working Conditions of Domestic Workers

Historical Resistance to Labour Regulation

Although the employment relationship turns the household into a workplace, the ideology of familial privacy, and the separation between home and work, have produced extreme reluctance to regulate domestic workers' conditions of work. For the longest time, domestic workers were not protected by any kind of labour legislation. It was only after INTERCEDE launched a court challenge to secure overtime protection that domestic workers were granted their first statutory protection under the Employment Standards Act.[22]

The dominance of an ideology hinged on the separation between home and work, public and private, has contributed to the low status and value placed on domestic work and the women who do this work. The expectation that women should do this work for free, and the lack of recognition accorded to the skills involved in such work contributes to the invisibility and devaluation of women's work within the home and contributes to the low status, and low pay accorded to workers who perform this labour for pay. Moreover, the fact that foreign domestic workers are often members of visible minorities relative to Canada exacerbates the tendency to devalue their work.

Part of the low occupational status stems from the fact that domestic work is not seen as either real work or as productive labour. Addressing the abysmal employment status of domestic workers requires a legislative approach which recognizes household labour and child care as valuable and productive labour and which is founded on respect for the women who do this work.

The Role of Employment Agencies

Many employers who seek the services of foreign domestic workers rely on the services of employment agencies to supplement the services of the Canadian Immigration Centres. The former are operated on a for-profit basis, and the agency typically charges a fee of one month's salary (approximately $500) to place a foreign domestic worker, which is backed by a three to six month guarantee to replace the domestic worker if the employer is not completely satisfied.[23]

While there is no precise data concerning the number of foreign domestic workers who are placed through employment agencies, on-going research suggests that many employers rely on such services.[24] According to this research, the domestic placement agency industry is extremely volatile. As small, often single family or one-person businesses, agencies open and close frequently, and this turnover is exacerbated by the current recessionary climate. In Ontario, all employment agencies are required to be licensed and must adhere to the Human Rights Code. However, a review of daily newspapers across Canada indicates that there are numerous unlicensed agencies operating even in those provinces which require licences.

The agencies simply match domestic workers with prospective employers, and do not enter into contractual arrangements with the domestic workers. While their primary role is to screen domestic workers for suitability, the most commercially successful agencies also screen prospective client employers. They

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22 Ontario Reg 308/87.

23 A. Bakan and D. Stasiulis, "Making the Match: Domestic Placement Agencies and the Racialization of Women's Household Work," paper presented to the 16th annual CRIAW Conference, Making the Links: Anti-Racism and Feminism, November 13-15, 1992, Toronto, p.6

24 Ibid.

operate as the classic "middle-man", or, more precisely, "middle-women," since the available evidence suggest that most of these businesses are owned and operated by women.

Because it is prospective employers who pay the agency's fee, the agency identifies with the needs and desires of the employer. According to research based upon in-depth qualitative interviews with ten of the leading placement agencies in Toronto, the agencies interviewed indicated that their economic success was based on carefully meeting a highly racially and ethnically-sensitive, and stereotyped, demand market. In fact, one agency owner admitted to meeting race-specific requests made by employers despite knowledge of the fact that such demands violated the Human Rights Code.

While racially discriminatory practices of employment agencies in general in Ontario have received attention in the media in the past couple of years, little has been done by state agencies to uncover and prevent such illegal activities. Since the Ontario Human Rights Code is complaint-driven, the onus is on individual employees, including domestic workers, to initiate an investigation. However, it is very difficult for one individual to establish that her or his failure to obtain a particular position was a result of discrimination.

e) Regulation Under the Employment Standards Act

The working conditions of domestic workers are regulated under the ESA. Domestic workers are covered by the statutory minimum wage and are entitled to overtime pay if they work over 44 hours in a week. Domestic workers are still excluded from the maximum hours of work provisions. This means they have no right to refuse overtime and there is no limit on the number of hours in day or a week that they can be asked to work.[25] For workers covered by the Act, the working day is limited to 8 hours and the workweek to 48 hours. The only protection domestic workers have is that the employer is obliged to provide them with 2 periods of free time each week; one of 36 consecutive hours (1 1/2 days) and one of 12 consecutive hours (1/2 day).[26]

Long Hours/Lack of Compensation

Overwork and undercompensation is rated as one of the biggest employment problems experienced by domestic workers.[27] The live-in requirement puts domestic workers in the position of being constantly on-call. It also gives rise to ambiguity about what constitutes work and what does not, with workers being compelled to do extra work that is not recognized by their employers as such.

Long hours are the norm but few domestic workers ever receive their legal due. A 1989 INTERCEDE study showed that an alarming number of domestic workers were denied their basic legal rights under the ESA. 65 per cent of the 576 live-in domestics workers surveyed by INTERCEDE reported that they were regularly required to work overtime.[28] Only 33 per cent of live-in domestics who routinely performed overtime work received the legal compensation of time-and-a-half pay or lieu time. An overwhelming 43.7 per cent received no compensation whatsoever.

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25 Ontario Regulation 308/87.

26 These can be combined into one 2 day period.

27 Serwonka study, Arat-Koc study.

28 Sedef Arat-Koc and Fely Villasin, Report and Recommendations on the Foreign Domestic Movement Program, (prepared for Intercede, Oct. 1990) at 5-7.

The present overtime compensation provisions that apply to domestic workers are different from those applying to other workers. Employers can decide whether to compensate overtime in pay or time off. A 1990 INTERCEDE survey showed that 75% of 453 surveyed, stated that it was their employer who made the decision even though the Act states that it must be mutual. Domestic workers are not in any position to argue. But these workers are the lucky ones. Another group of workers noted that there was no issue of choice for them as their employers did not give them any kind of compensation.[29]

Quality of Accommodation

The ESA contains no enforcement mechanism to ensure lodging is acceptable. Regulation in that area is still perceived as an invasion of privacy and violation of the sanctity of the home.[30] If the program is to make living-in mandatory then Ontario employment law must recognize the home as a work place and that must extend to living conditions. The working conditions of domestic workers, including health and safety and minimum employment standards, must be regulated and enforced on a par with other workplaces.

Enforcement of Standards

Enforcement of employment regulations in Ontario is dependent upon the domestic worker filing a complaint with the Employment Standards Branch of the Ministry of Labour. Essentially it is the worker who really has the onus of enforcing the standards. Not only do many domestic workers lack knowledge of their basic employment rights, out of fear of jeopardizing their jobs and, more importantly, their chances of becoming landed immigrants, many domestic workers are afraid to make any formal complaint.[31]

On the basis of INTERCEDE's thirteen year's of experience working with domestic workers, it appears that violations of legal standards for vacation pay, unpaid wages, termination pay overtime, wage statements, public holidays, record keeping, minimum wage and hours worked are common. The claims submitted to the Ontario Ministry of Labour would only represent the tip of an iceberg of actual abuses perpetrated against domestic workers.

Because of the live-in requirement, job loss carries more drastic consequences for domestic workers than for any other category of worker. When a domestic worker loses her job, she loses the roof over her head. An INTERCEDE special study reported that it is not uncommon for domestic workers to be fired without notice. "Several recounted experiences of being thrown out on the street, some at night and in the middle of winter."[32]

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29 Arat-Koc, endnotes 6 and 8.

30 Domestic workers are still excluded from the *Occupational Health and Safety Act*.

31 Ontario Ministry of Labour, Employment Standards Branch, "Domestics - Claims by Employment Standard; Fiscal April 1989 - March 1990," (Toronto: Ontario Ministry of Labour, June 1990).

32 Serwonka at 20.

f) Collective Bargaining Law

Until the recent wide-ranging amendments to the Ontario Labour Relations Act,[33] domestic workers in the province were specifically denied the right to use the private sector collective bargaining law to organize for the purpose of collective bargaining. While it is an important symbolic gesture that domestic workers are no longer explicitly excluded from the protections and benefits of collective bargaining legislation, the government's amendments will have little real impact on domestic workers' ability to unionize.

As the government acknowledged in its discussion paper regarding the proposed labour relations law reform, simply removing the exclusion of domestic workers will not result in effective access to collective bargaining arrangements because domestic workers often work alone or in very small groups.[34] Where employees work alone, they are not eligible to organize and bargain because, under the *Labour Relations Act*, there must be more than one employee for collective bargaining to be viable. In effect, this would limit organizing and collective bargaining to those small numbers of domestic workers who are either employed directly by an employment agency or work for the same employer in larger groups. However, in situations where a domestic worker is employed by an employment agency to work in a particular home, unless the government clearly identified the employer for the purpose of collective bargaining, there would likely be a legal dispute over whether the employment agency or householder constituted the employer. This would have the effect of delaying, if not completely negating, organizing and collective bargaining for domestic workers.

Even if the government were to amend the *Labour Relations Act* to allow the Labour Relations Board to certify single-employee bargaining units, this would likely not result in effective access to collective bargaining for domestic workers. The policy of the Labour Relations Board has been to certify single employer units.[35] Not only is it prohibitively expensive for unions to organize and administer single employee units, such small units simply do not have the bargaining power to secure significant improvements in the terms and conditions of employment. This is particularly true for domestic workers. Collective bargaining law in Canada is premised on the belief that it is best to let the parties work out the terms and conditions of collective agreements. In the event of an impasse, and after negotiations, mediation and conciliation procedures have been exhausted, the parties are entitled to have recourse to economic sanctions (the strike and lock-out) to reach an agreement. Since foreign domestic workers, whether they entered Canada under the FDM or LCP, are required to reside at their place of employment, it would be virtually impossible for them to engage in effective strike action. Moreover, given that employers are entitled to lockout employees to back up their demands, domestic workers could well lose their residence in the event of a collective bargaining dispute.

It is obvious that the basic structural features of Ontario's collective bargaining law (single employer units and the resort to economic sanctions to resolve bargaining impasses) do not address the employment situations of domestic workers. For these reasons, abolishing the exclusion of domestic workers from the *Labour Relations Act*, while a step in the right direction, does not result in concrete improvements in the working conditions of domestic workers. What is needed is a creative solution designed to address the specific needs of domestic workers.

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[33] S.O. 1992, c.21.

[34] Ontario Ministry of Labour, Proposed reform of the Ontario Labour Relations Act, November 1991, p.14.

[35] J. Sack and C. Michael Mitchel, Ontario Labour Relations Board Law and Practice (Toronto: Butterworths, 1985).

g) What Domestic Workers Want

Since immigration is a matter of federal jurisdiction, there is little that the Ontario government can do to redress the unequal power of domestic workers which flows both from their tenuous immigration status and the requirement to live in the employer's house. However, the provincial government can ensure that domestic workers both receive and enjoy the same employment rights as other workers in Ontario.

The major problem confronting domestic workers is the failure to enforce basic employment standards. The fact that domestic workers are isolated in individual employer's homes means that they have neither the knowledge nor the power to enforce existing legal standards. This basic problem must be addressed by the government if domestic workers are to enjoy the same basic legal rights as other workers in Ontario.

Since the Second World War, trade unions have become an important vehicle for employee participation and for establishing wages and other employment conditions. Equally as important is the role of trade unions in ensuring the effective enforcement of minimum standards for the workers they represent. If domestic workers were organized into independent trade unions this would help to ensure the enforcement of minimum employment standards. The problem is, however, that the existing structure of collective bargaining law, with its emphasis on the certification of bargaining units on the basis of a single employer or workplace, would undermine the ability of domestic workers to unionize even if domestic workers were no longer excluded from the *Labour Relations Act*.

One solution to the problem of improving the working conditions of domestic workers is not to regard employment standards legislation and collective bargaining as alternative mechanisms, but rather as integrated and mutually dependent. What we are proposing is a mechanism which would immediately help to ensure that domestic workers are able to enjoy existing employment rights, but which could, in the longer term, be a basis for establishing effective collective bargaining for them.

Key to our recommendations, as will be discussed in detail later in the Report, is a central registry where employers are required to register and domestic workers may choose to do so. The agency which operated the registry would not only have access to who employs domestic workers, but would also be entitled to act as an agent for the workers both in resolving disputes and negotiating terms. A mandatory central registry and agency would go a long way towards overcoming the isolation of domestic workers in their dealings with their employers. The central registry would be then used as a building block for mandatory broader-based bargaining.

On November 1, 1992 a small needs assessment survey was administered at one of INTERCEDE's monthly meetings. There were 66 respondents in this survey, which is provided in an appendix to this report. Generally there was overwhelming support to the idea of establishing a central registry to negotiate and enforce domestic workers' employment contracts.

III. HOMEWORKERS IN THE GARMENT INDUSTRY

a) Working Conditions of Homeworkers

In the spring of 1991, the ILGWU-Ontario District, as part of a larger research project, conducted a study involving in-depth two hour interviews with thirty homeworkers in the Metropolitan Toronto area. The homeworkers were all Chinese-speaking and the interviews were conducted in Chinese. Follow-up interviews have been conducted with an additional 30 Chinese-speaking homeworkers and have confirmed the results of the original study. These interviews revealed the extreme exploitation experienced by the women who make up this part of the garment industry workforce.

The following are taken from the results of the first study and reveal the exploitation experienced by women homeworkers:

(i) The wages of most homeworkers are well below minimum wage:

> • 21 of the 30 homeworkers interviewed were not being paid minimum wage. One was earning as little as $1 per hour. The average wage was $4.64 per hour. The minimum wage in Ontario is now $6.35. Two workers earned an exceptionally high average of $7.00, but they were highly skilled. One worker was earning $1.00 an hour, two were earning $2.50 an hour, and three were earning $3.50 an hour. Only nine were earning more than minimum wage.

(ii) Few employers pay the vacation pay to which homeworkers are entitled:

> • Only one homeworker was being paid the vacation pay to which she was entitled.

(iii) Contributions are not being made by employers on behalf of homeworkers into either Unemployment Insurance or Canada Pension Plan. As a result, homeworkers are not made eligible for benefits under these programmes. In such situations the burden of establishing employment status is on the homeworker.

> • None of their employers were making unemployment insurance or pension contributions. Only one employer had a permit to employer homeworkers as required under the Employment Standards Act.

(iv) Most homeworkers work much longer than the 35 hours per week permitted in the garment industry under regulations to the *Industrial Standards Act* (ISA):

> • The interviews revealed that on average homeworkers worked 46 hours a week. The minimum number of hours a week was 16, the maximum was 82.
>
> • During their busiest periods, homeworkers worked an average of seventy hours a week. The number of hours worked at such times ranged from a low of 36 hours per week to a high of 100 hours per week.
>
> • None of the overtime hours was remunerated at overtime rates of pay.

(v) Homeworkers have little control over their wages or working conditions:

> • When asked how their rates of pay were determined, the majority reported that the rate of pay they received is unilaterally determined by their employer. Several reported that they are not even told what they will be paid until after the work is completed.
>
> • The homeworkers have no control over the scheduling of their work or of their rate of pay. 12 reported problems in getting paid for the work they had done. 21 worked for sub-contractors, 9 for factories and all but four worked for more than one employer.

(vi) Homeworkers face serious health and safety problems:

> 27 of the 30 homeworkers interviewed experienced health problems related to their work, including allergies to dust from fabric, stress resulting from time pressures, and ergonomic problems with the work.

(v) Homeworkers must absorb the overhead costs of their work:

> • Homeworkers have to pay for their own equipment, as well as covering the costs of their operating expenses, out of their meagre wages. The industrial sewing machines often cost more than $3,500. Those who had purchased equipment in the last few years reported expenditures of $2,500 to $3,500.

b) Who Are the Homeworkers?

While women workers make up 29 per cent of the labour force in the goods producing manufacturing sector, women constitute 85 per cent of the garment industry workforce. [35] The ILGWU study found that homeworkers are women involved in the assembly stages of production. The majority of women doing homework lack English language skills and are often characterized as "immigrant women". The category of "immigrant", however, often connotes a culture and a relationship to the labour market as much as the length of time in Canada. The survey of Chinese-speaking homeworkers found that 13 of the 30 women had been in Canada for more than 15 years, and 16 had lived in Canada for more than 10 years. All but 6 were Canadian citizens, and of these six, 5 had been in the country for a shorter period than is required to qualify for citizenship.

The single most important factor leading to women's employment as homeworkers in the garment industry is the lack of child care:

> • Of the thirty women interviewed, 28 had children; one was disabled (deaf) with no children; and 1 was a grandmother caring for grandchildren;
>
> • 27 of the 28 women with children said that the reason they worked inside the home was the lack of affordable child care,
>
> • With very few exceptions, the last job outside the home for the homeworkers interviewed was in a garment factory, and their reason for leaving that job was pregnancy.

In addition to supporting children, 15 of the homeworkers interviewed were also supporting dependents other than children. Usually these dependants were parents who lived outside of Canada. In all but three cases, there was at least one other income earner in the family, usually a husband.

<u>How many Homeworkers are there?</u>

In 1991, there were 75 homeworkers registered by permits in the province of Ontario. The ILGWU estimates between 2,000 to 4,000 homeworkers work in Metro Toronto. This is based on the number of plant closures and rise in the number of contracting shops.

It is often argued that prior to legislative change, it is critical to account for the number of homeworkers in the province. Attempting, however, to collect reliable statistics, if at all possible, will only focus scrutiny on the bottom of the chain of production, ie. on the homeworkers. Assessing the number of homeworkers

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35. Statistics Canada, Cat# 71-001. 1992 estimates show that 514,000 were employed in the manufacturing sector with at total employment of 1,779,000.

may only continue to describe their characteristics. Often homework data collection contains the underlying assumption that there is something about the characteristics of homeworkers themselves that explains homeworking. It becomes the statistical equivalent of blaming-the-victim. Such data collection describes homework out of the context of the chain of production. Homework is an international form of organization of work in many sectors. It would be more beneficial to find out which firms and sectors use homeworkers and to analyze how homework is used as a strategy of work re-organization across a variety of sectors.

c) Homeworkers and the Pyramid of Production in the Garment Industry

Restructuring in the Garment Industry

Over the last twenty years policy-makers and economists have argued that the garment industry is a sunset industry. A tracking of employment figures reveals a different story and one linked directly to trade liberalization. Between 1971 and 1988, the period during which the industry was supposedly on the decline, employment in the garment industry actually rose by 11,000. It was not until the late 1980's, with the emergence of trade liberalization and the signing of the Free Trade Agreement, that the garment industry began to face massive job losses. Employment dropped a full third from 95,600 in 1988 to an estimated 62,800 in 1992.[37] In Metropolitan Toronto alone, the number of workers fell from 24,711 in 1988 to 14,328 in 1991.

This 30% decline experienced by the garment industry is comparable to that experienced by the manufacturing or goods-producing sector in general. In fact, other sectors within Metro Toronto have declined at an even faster rate. For example, between 1983 and 1990, employment in the furniture, chemicals, and machinery industries declined by over 50 per cent. The garment industry remains a key employer in the province of Ontario, and it is the largest manufacturing sector employer in the City of Toronto. It is a mistake to single out the garment industry, characterising it as a sunset industry. It would be more accurate to understand changes the garment industry is undergoing as part of broader economic restructuring and work re-organization as described in the introduction to this report.

Homework has taken place historically within the garment industry. The manufacture of clothing was not based in very large factories typical of other manufacturing industries. Throughout the post war period, most clothing production did occur in relatively larger factories which employed 50 or more workers. Contracting out and homework was used at the busiest times. Contractors would be used in the assembly of a garment. The production process was organized by a larger manufacturer or jobber who would negotiate sales with the retailer, order the fabric, and cut and sew the fabric in factory. When the factory was at full capacity, the manufacturer would use a contractor who was sent fabric directly and then would sew and press the pieces.

By the late 1980's in the midst of trade liberalization and the shift to find the cheapest labour possible, the garment industry began to restructure in Canada. The manufacture of clothing now occurs within a hollow production process. Retailers producing private label goods and large manufacturers who control well-known labels no longer produce garments in large factories but have split apart the organization of work into networks of contractors, sub-contractors and homeworkers.

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[37] Employment estimates from Statistics Canada Cat. 72-002, Employment,Earnings and Hours.

Chains of Production

As a result of trade liberalization, competition with imports, and the entrance of new technologies, retailers and manufacturers sought to lower all costs, especially labour, through a more centrally-controlled, hierarchical chain or pyramid of production. This chain of production is part of the global economic restructuring described above - the creation of the just-in-time production system and the flexible, just-in-time worker. Despite the apparent fragmentation, centralized corporate control is actually increasing through the development of specific chains of production with retailers or large manufacturers at the top. A typical chain of production is structured as follows:

Retailers:

At the top of the pyramid are retailers who control both access to the consumer market and production of private label items.[38] Garment retail is dominated by a few large retailers, particularly department store chains, which actually control access to over 40% of the clothing market. Competition in retail is particularly fierce, competing on price and access to a specific fashion niche markets.

New technologies, like Electoronic Data Interchange (EDI) is transforming the relationship between retailers and the manufacturers and jobbers which supply them. When a garment is sold, an electronic message is sent directly to the manufacturer or jobber to create a new one.

EDI technology permits retailers to set up "just-in-time" relationships with their suppliers. This allows the supplier to replenish the retailers inventories on fast moving items of apparel immediately, without a special order being made by the retailers. Retailers are cutting inventory costs and attempting to provide fashionable clothes to the market fastest. Retailers now expect a 'quick response' from suppliers. Manufacturers, as a result, have shifted production back to Canada to provide the necessary quick response for retailers.

Retailers now are ordering fewer quantities, want garments on a quick turnaround time and no responsibility for inventory. Other retailers are demanding that suppliers provide garments at the previous years' price and often on consignment. Retailers create tighter and more direct links with fewer suppliers in Canada.

Jobbers and Manufacturers:

A relatively small number of jobbers and manufacturers control and dominant the chain of production of garments with recognizable labels . In contrast to the large retailers, these are often smaller, Canadian-owned, family-run businesses. The jobbers design garments and buy the textiles for them and often directly employ workers who cut the garments. Most jobbers actually control the production of high-end designer labels from a position on top of a vast network of contractors and homeworkers. Manufacturers function like jobbers but run their own "inside shops" where they employ a few "core" workers who cut and assemble garments. The trend is toward pure jobbing and the creation of what has been described as the "hollow corporation", where no actual production is done on the premises of the manufacturer.

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[38] Private label production refers to the retailers own name or line of products. Retailers are generally expanding this line of products.

Contractors:

Both jobbers and manufacturers subcontract cutting and assembly operations to contractors. Often contracting shops employ as few as two and up to 30 workers. The larger contractors often subcontract work out to still smaller contractors and to homeworkers. In 1991, contractors now make up over 53 per cent of the total garment industry in Ontario. Over 50 per cent of the contractors only employ between 1 to 4 workers.

Contractors are often technically sophisticated, using CAD, other forms of CAM like spreaders, markers and laser cutters. These new technologies offer speed to the cutting process. Most importantly, the new technology minimizes direct labour costs. Labour reductions range from 20 to 60 per cent. If available second-hand they are relatively inexpensive. As part of the just-in-time production process, designs and patterns can easily be stored, cut quickly and sent out for assembly. [39]

Homeworkers:

At the bottom of the chain of production are the homeworkers. They deal either with a contractor, who may run a fly-by-night operation, or a manufacturer who has much greater bargaining power than she does. Often homeworkers will may deal with a number of different contractors.

The impact of just-time-production and quick response means that production, particularly of fashion items, has shifted back to Canada and will continue to do so. Some argue that if homeworking is regulated, production will automatically shift off-shore. However, with the production schedule and quick response now demanded by retailers, production must, to a large extent, stay in Canada. Refusing to regulate homework because of a fear of capital flight ignores how production is controlled by the retailers' demand for quick response. Regulation of homework, therefore, is critical in this expanding sector of the garment industry.

d) Subcontracting and the Enforcement of Employment Standards.

The restructuring in the garment industry is most apparent in the rise of both smaller workplaces and the emergence of a greater number of contracting shops. In 1971 only 22% of the industry was made up of shops with less than 20 workers. By 1991 this picture had reversed itself so that 76% of clothing production was in shops with less than 20 workers. The number of contracting shops in Ontario grew from only 4 in 1971 to over 116 in 1991. (In fact, we would argue, available statistics woefully underestimate the number of contractors in the province.) Contractors often run a fly-by-night operation, opening and closing with great rapidity.

The pyramid subcontracting structure of the industries in which homeworkers are employed contributes to driving homework underground. The small contractors attempt to avoid minimum standards legislation because they are in a highly competitive cost position. This results in extremely poor working conditions and wages for homeworkers. Thus, any enforcement mechanism for minimum labour standards for homeworkers must address the pyramid subcontracting structure in the garment and other industries.

For the most part, businesses are permitted to organize their affairs as they see fit and corporations are

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[39] J. Zeitlin, "Reconfiguration of the Market and the Use of Computerised Technology" in Computer-Aided Manufacturing and Women's Employment. S. Mitter (ed.) Germany: S-V, 1992. p. 31.

treated as independent entities for most purposes under Canadian laws. The rationale for this is to provide entrepreneurs with the greatest degree of freedom to organize their business activities. However, this freedom is not absolute. Business are not permitted to organize their activities solely for the purpose of avoiding statutory or regulatory obligations.

Such forms of organization may well be found to be sham transactions by courts or adjudicative tribunals. In these cases, the adjudicator may ignore the corporate form or organization and impose liability as if such legal forms did not exist. Thus, legislation which imposes liability on business activity may provide the adjudicative body with the explicit statutory authority to disregard the form of specific transactions or organizational forms if the purpose or effect of the transaction or organization is to avoid liability.

One notable example is section 245 of the *Income Tax Act* which is a general anti- sham provision. The effect of this section is to ignore for the purposes of income taxation any corporate forms, business transactions or business organizations the sole purpose of which is to avoid the incidence of taxation.

The related employer provision currently contained in the Employment Standards Act serves a similar purpose. Basically, section 12 is an anti-sham devise which attempts to prevent employers from manipulating corporate form and the organization of their operations "if the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent or purpose of this Act." This provision treats "associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings which are or were carried on by or through more than one corporation, individual, firm, syndicate or association" as one employer if the intent or effect of the arrangements is to defeat the purpose of the legislation which is to impose minimum standards upon employers. Moreover, it imposes joint liability on related employers for any contravention of the Employment Standards Act.

If homeworkers are to have access to improving their wages and working conditions, new related employer and joint liability regulations to address the changing structure of work are key and fundamental. We will explore these specific changes below.

e) The Current Framework for Regulating Homework

Industrial homeworkers are treated as employees under the Employment Standards Act. Section 1 of the Act defines homework as follows:

> the doing of any work in the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article or thing or any part thereof in premises occupied primarily as living accommodation.

This definition does not explicitly cover the production of services in the home and so leaves out recent forms of homework such as telecommuting, which involves data and word processing out of the worker's home.

Another difficulty in regulating homework is the problem of characterizing homeworkers as employees. Although homeworkers are defined as employees in the Employment Standards Act, referees have not developed a consistent approach in determining whether or not a particular homeworker is an employee. In at least one instance a referee has found a homeworker in the garment industry to be an independent contractor, and thus not entitled to the protection offered in the Employment Standards Act (see, Sparta Mercantile Ltd. (Re), June 21, 1984 (Brown) E.S.C. 1657.) This result followed from the referee's invocation of the common law test of employment. Clearly this test is inadequate to deal with the economic realities of homeworking.

For homeworkers engaged in the production of goods in the home, there are a number of serious problems with the existing regulatory framework:

(1) Homeworkers are denied the protection of significant sections of the Employment Standards Act under regulations to that Act.

Under Regulation 285, homeworkers are excluded from minimum standards protection with respect to the following:

- maximum hours of work (under clause 4(f));
- overtime pay (under clause 6(e))
- statutory holidays (under clause 7)

(2) There is inadequate enforcement of the few provisions in the Employment Standards Act which do cover homeworkers:

Homeworkers are entitled to minimum wages and to vacation pay under the Act. As the survey results quoted above reveal, very few homeworkers have actually benefitted from these provisions.

Under the Employment Standards Act, employers are required to obtain a permit from the Director of Employment Standards before hiring homeworkers. They are also required to keep a registry of homeworkers and the wages they are paid.

- As of January 1, 1990, the records of the Employment Standards branch indicated that only seventy-five homeworkers in the province of Ontario were covered by permits. In 1969, 525 homework permits were issued. By 1988, this number had fallen dramatically to 93. At a time when homework is exploding in the industry, permit registration has dropped.
- None of the homeworkers interviewed were registered as homeworkers with Employment Standards. In instances where the name of the employer was known, a check with Employment Standards revealed that the employer did not have a permit.

The Employment Standards Branch relies on voluntary compliance of employers to enforce this provision. Action is taken only when violations are brought to the attention of the branch, and the branch's response is simply to send a letter to the employer pointing out the requirement and asking him to register.

In the garment industry, regulation of homeworkers is further complicated by the fact that minimum standards for other workers are set by Advisory Committees under the Industrial Standards Act, while homeworkers are covered by the different (and lower) minimum standards in the Employment Standards Act.

Neither the Employment Standards Act nor the Industrial Standards Act empower inspectors to enter a home to investigate the conditions of work.

As pointed out in the previous section, the pyramid structure of production taking hold in the garment industry, and also surfacing in other industries, makes establishing liability for the purposes of minimum standards very difficult.

(3) Employment Standards legislation is based on a model which makes benefits dependent on continuous employment with a single employer. This framework is not only inappropriate for regulating homework, it is inadequate for addressing the growing problems of other forms of non-standard or "precarious" employment, such as part-time, contract and casual work.

f) The Reforms Homeworkers Want

Many of the reforms homeworkers want were presented to the Mnistry of Labour in the Coalition for Fair Wages and Working Conditions brief. First, as with domestic workers, the abysmal failure to enforce the existing permit system and basic employment standards has meant that homeworkers do not enjoy the same basic rights of other workers. Secondly, access to collective bargaining has been effectively denied through the weak related employer and continuance of service regulations, combined with the existing regulations for certification based on the single employer. Comparable to domestic workers, homeworkers require a mechanism that closely links basic employment standards and access to collective bargaining. We detail the specific recommendations after a review of existing possible legislative options.

IV - HOMEWORKERS IN THE GARMENT INDUSTRY AND FOREIGN DOMESTIC WORKERS COMPARED

Domestics workers and homeworkers in the garment industry share several characteristics. First, both work out of homes. This is important, because the image of the home evokes an emotional response which is at odds with seeing it as a place of employment. Homes are considered private places into which the law ought not to intrude. It is precisely these kinds of notions which have left domestic work virtually unregulated until recently.

The difference between homeworkers and domestic workers is that the latter work out of someone else's home, performing domestic tasks that the vast majority of women perform without pay. This fact influences the treatment of domestic workers; their work is not seen as real productive activity and rather than viewing them as employees, with legal rights, they are seen as "part of the family." The result is that their work is devalued and they experience low pay and often poor working conditions.

Homeworkers in the garment industry are, by contrast, perceived as performing real work - the same work as is performed primarily by women in factories. However, the location of their work diminishes its value; homeworkers are perceived as having control their own schedules, happily and easily blending paid work with domestic chores. Nothing could be further from the truth. For these workers the double day, the juggling of unpaid domestic and paid work, becomes the endless day.

The same is also true for domestic workers. Like homeworkers they cannot return to a home which demarcates the sphere of paid employment.

A second characteristic shared by domestic workers and homeworkers is that the overwhelming majority of them are women. Again, this is very significant. Women's work historically has been undervalued and women have been relegated to paid work which resembles the unpaid work they perform. As a result, women's work, such as sewing, cleaning, taking care of children, cooking etc., is perceived as unskilled - women are naturally inclined to perform these tasks, they do not have to learn them. These notions contribute to the devaluation of productive activities of domestic workers and homeworkers.

Domestic workers and homeworkers in the garment industry share a third characteristic - many of them are women of colour. Most live-in domestic workers are immigrants, the majority of whom come from the developing world. Similarly, the garment industry in Canada has historically drawn upon recent immigrants to the country, taking advantage of the ethnically and racially divided labour market to ensure that wages and working conditions are depressed. While many homeworkers in the garment industry are second generation Canadians, because they are women they often do not have language skills in the two official languages. Since both domestic workers and garment homeworkers are seen as coming from poorer and "less-advanced" countries, the fact of their low wages and poor working conditions in Canada is not seen as particularly troublesome; they are seen as better off here than where they came from.

A pernicious consequence of these common characteristics is that the regulation of domestic work and homework has not been given a high priority by policy makers and legislators.

Both domestic work and homework are now regulated by law in Ontario. However, neither of these categories of workers receive the same legal entitlements as the vast majority of workers in the province. Moreover, because these workers are isolated in individual homes, employment standards have not been effectively enforced. Moreover, their isolation and dispersion makes it very difficult to organize domestic workers and homeworkers. Traditional labour law mechanisms simply are not effective when it comes to domicile-based work. Thus, domestic workers and homeworkers are left to the travails of the unregulated market.

However, by focusing on the shared characteristics of domestic workers and homeworkers we should not be seen as "explaining" their employment situation by reference to their personal characteristics. This type of explanation individualises what are in fact broader social relations. It also lets policy makers and employers off the hook.

A range of other broader questions needs to be addressed to understand why there is a demand for live-in domestic workers and homeworkers in the garment industry. For example: Why do women from developing countries come to Canada to perform work that Canadians refuse to do? How do garment manufacturers use subcontracting arrangements to exploit a racially and sexually divided labour market? How is the threat of low wage competition from developing countries being used to depress wages and working conditions? What would the effect of a national childcare policy be on the demand for live-in domestic workers and the supply of homeworkers? Do the federal and provincial governments see homework as a viable strategy for the Canadian garment industry?

This report does not attempt to answer these broader questions. Its focus is on a common reality of domestic workers and homeworkers: that domicile-based work is invisible and, consequently, very difficult to regulate using the prevailing legislative models in Ontario. It is this reality we want to change.

PART C: ASSESSMENT OF PREVAILING LABOUR STANDARDS REGIMES

I. OVERVIEW

The two prevailing models in Ontario for regulating the conditions of employment for workers in the private sector are direct statutory regulation via the *Employment Standards Act* (ESA) and collective bargaining under the *Ontario Labour Relations Act* (OLRA). To date, these regimes have proven singularly unsuccessful in improving the wages, working conditions of workers in the most vulnerable sectors of the economy, who are overwhelmingly women and frequently women of colour and women who have immigrated to Canada. The limitations of these regulatory regimes are exacerbated when it comes to domicile-based employment.

Moreover, the need for reform is made even more urgent as structural changes in the economy and work organization sweep even more workers into vulnerable, insecure employment.

Inequality of Economic Power

The fundamental problem with Ontario's employment standards and collective bargaining laws is that they do not speak to the reality these workers find themselves in. At the root of the problem is that they fail utterly to address the structural factors which lead to these workers being so vulnerable in the first place. This is due in large part to the way work is organized in these sectors. The sectors where employment standards regulation and collective bargaining have been least effective are those with small workplace, particularly those where casualized insecure jobs predominate. Workers in these settings who want to enforce their employment rights or unionize are up against incredible odds because of an overwhelming imbalance in economic power.

A legislative strategy that seeks to promote decent wages and working conditions for workers in these sectors can only succeed if it addresses the structural basis for this profound inequality in bargaining power. If it does not do that, it is guaranteed to fail and the workers most in need of labour regulation and collective bargaining will continue to be the most ill served by Ontario's labour laws.

II. EMPLOYMENT STANDARDS ACT

Exclusion, both tacit and explicit, in the scope of employment standards in Ontario, affect a range of different kinds of workers, usually on the basis of the sector in which the worker is employed, from a variety of the standards.[40] Moreover, the implementation of minimum service requirements in order to be eligible for statutory benefits, such as maternity leave for example, exclude the growing number of temporary and casual workers from protection.

Not only are the exclusions too wide, employment standards legislation is not effectively enforced. In his analysis of the dispute resolution procedures and compliance performance under the Ontario *Employment Standards Act*, Adams found that the great majority of complaints are filed by workers who have left the employer against whom the complaint is filed.[41] In fact, he characterizes the bureaucracy, the

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[40] Agricultural workers are excluded from overtime and statutory holiday pay as are homeworkers and domestic workers receive different treatment than the majority of workers covered by the ESA.

[41] Roy Adams, "Employment Standards in Ontario: An Industrial Relations Systems Analysis," 42 Relations Industrielles 46-43 (1987)

Employment Standards Branch (ESB), which enforces the legislation as primarily a collection agency. Moreover, he concludes that it is not very effective at collecting wages owed from defaulting or bankrupt employers.[42] In part, this is attributable to the fact that the ESB is profoundly overworked and underfunded.

Employment standards legislation is also profoundly flawed when it comes to ensuring compliance.[43] Not only is there a low monetary cost to violating the *Act*, the probability of detecting a violation is likely to be small given the small number of routine investigations. This is because the ESB relies almost exclusively on an individualized complaint model to detect violations. In fact, the Branch has virtually stopped conducting spot audits.

Without the backing of either a strong government agency or a union, the burden of enforcing standards falls on the individual workers, who, precisely because of their vulnerability, are in the least favourable position to do so. Lacking the collective power of a union and fearful for their jobs, most workers have no choice but to put up with intolerable conditions or quit.

Homeworker and domestic workers, who are at the bottom of the labour market in terms of power resources, are particularly ill-served by the ESA.

III. COLLECTIVE BARGAINING - ONTARIO LABOUR RELATIONS ACT

a) Workplace Structure

Ontario's collective bargaining laws are based on the model of a large industrial workplace with a relatively permanent and stable workforce. The reality for most workers is otherwise. The reality labour law must address is small workplace and a workforce characterized increasingly by casualized employment with only marginal attachment to an individual employer. In 1985, nearly 84% of all of Ontario's registered businesses employed fewer than 10 workers.[44]

Although overall trade union membership increased during the seventies and eighties, this growth masked a substantial erosion of bargaining rights in the private sector. The growth in public sector unionization was paralleled by a significant decline in private sector unionization.[45] As manufacturing jobs are lost, large plants close down and new structures of work organization take predominance, this decline will only

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[42] One out of 7 employees (15%) who validly complain to the Employment Standards Branch do not receive what is due to them; Ibid., 53. Note, however, that this figure ignores those cases where the Branch has facilitated collection by the employee without having to use its enforcement powers.

[43] Ibid., 57-60.

[44] Urban Dimensions Group, Inc., Growth of the Contingent Workforce in Ontario: Structural Trends, Statistical Dimensions and Policy Implications. A Report Prepared for the Ontario Women's Directorate. February 1989.

[45] John O'Grady, "The Labour Movement, Wage Polarization and the Wagner Act Model of Collective Bargaining". Paper presented to the Centre for Research on Work and Society Conference on Broadening the Bargaining Structures in the New Social Order. York University. May 1992, at 3-5.

accelerate unless collective bargaining legislation is structurally reformed to make it possible to extend collective bargaining to the growing number of workers whose location in the workforce has left them on the margins of Ontario labour law.

b). Collective Bargaining and Homeworkers and Domestic Workers

Single Employees Barred from Certification

Although the OLRA now extends the right to organize to domestic workers, most domestic workers, including foreign domestic workers entering Canada under the FDM or LCP, are barred from enjoying the benefits of the OLRA because that Act requires there to be at least 2 workers in an bargaining unit for it to be certified. The only workers who could be organized would be those working through agencies, assuming the agency were defined as the employer. Homeworkers working alone in their homes face a similar problem.

Inequality of Bargaining Power

Even if such a single worker unit could be certified, it would be virtually ineffective as a means of improving workers' employment conditions. Individual workers in economically vulnerable positions are in no positions are in no position to bargain. Homeworkers and domestic workers are isolated in the home and thus lack contact with other workers or a collective to back them up.

The problems confronting domestic workers are compounded by their inequitable immigration status. The requirement that domestic workers live-in, their precarious immigration status, their intense isolation, and the obstacles they face in changing employers, create overwhelming inequality in bargaining power. Striking would be virtually impossible with the live-in requirement. A lock-out would be disastrous for a domestic worker, whose workplace is also her home.

In addition to insecure immigration status, domestic workers also confront racial, cultural and linguistic barriers which contribute to their vulnerability in the workplace. Many homeworkers, especially those in the garment industry, also confront similar barriers.

Problems of Small Locals

Small locals also present unions with a number of practical difficulties. It takes an incredible amount of resources for a union to organize and provide effective support (bargaining, processing grievances, collective agreement administration, membership development, strike support) for a myriad of small locals.

PART D : NEW DIRECTIONS

I. THE NEED FOR AN INTEGRATED APPROACH

It is necessary to rethink the traditional approach to labour standards regulation and collective bargaining and stop seeing employment standards regulation as simply a fall-back mechanism to cover inadequacies in collective bargaining.

Collective representation- unionization - is the only really effective way to provide workers with minimum standards. However, strong statutory regulation around labour standards may be a necessary condition for the extension of collective bargaining.[46] Collective bargaining is being threatened precisely because employers can exploit cheap flexible labour.[47]

As long as low standards prevail in an industry, employers will always have an incentive to avoid unionization and restructure their operations to avoid the effects of unionization. Collective bargaining in highly competitive sectors, like the garment industry, will always be under seige because of a readily available supply of cheap labour.

Employment standards regulation and collective bargaining need to be seen as integrated mutually self-reinforcing mechanisms. Only through a combined strategy can the goals of improved working conditions and access to collective bargaining be advanced.

a) Strategy

Our goal is to develop a mechanism that would guarantee homeworkers and domestic workers decent minimum standards which are enforced. To that end, it is necessary to develop the following:

1) A system that could be immediately implemented to ensure negotiation and enforcement of decent standards for the vast number of workers who do not have access to collective bargaining.

2) A system that would open the door to mandatory, broader-based and province- wide collective bargaining.

The first prong of the strategy, and the necessary starting point, is that a system of effective and extensive labour regulation needs to be put in place. This is necessary to address the situation confronting the vast number of workers who are presently outside the scope of collective bargaining. An approach based on the hope that the benefits of collective bargaining will trickle down to non-unionized employees will not work. It is necessary to directly address how to improve the wages and working conditions of workers at the bottom. It is also the necessary ground on which to promote the extension time, implement a new model of collective bargaining that will promote unionization and effective collective bargaining.

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[46] J. Fudge, Labour Law's Little Sister : The Employment Standards Act and The Feminization of Labour (Ottawa: Canadian Centre for Policy Alternative, 1990) 19.

[47] Ibid.

II. SECTORAL REGULATION OF EMPLOYMENT STANDARDS

Without standardization in terms and conditions across a sector there is a general downward pressure on wages. This is especially so in highly competitive sectors like the garment industry. As long as unionization will put an employer at a significant competitive disadvantage in relation to its non-unionized competitors, unions which do exist will be constantly on the defensive.[48]

A regime providing for sectoral regulation of employment standards and sectoral bargaining would benefit small employers in highly competitive sectors, putting them on a more even footing with their Ontario competitors. It would provide a degree of stability enabling employers to compete on the basis of efficiency and service rather than cheap labour.

To be effective, and avoid the pitfalls of an individualized system like the ESA, such a system of labour standards regulation must, as much as possible, involve the use of collective forms to advance and protect employee interests.

III. SECTORAL OR BROADER BASED COLLECTIVE BARGAINING

a) Bargaining Units and Bargaining Power

The bargaining unit is the basic structural feature in Ontario labour relations law. The Labour Relations Board has the sole authority to determine the appropriate bargaining unit. With the exception of the construction industry, the single-employer, single workplace structure is the cornerstone of Ontario's bargaining unit structure. Moreover, the fragmentation of bargaining structure in Ontario extends beyond the single-employer, single-location unit to reflect some broader occupational distinctions . Since the board defines a bargaining unit in terms of occupational classes rather than individuals, standard units have emerged. The Ontario board's policy regarding standard units reflects its understanding of employees' community of interest. Although a factual determination of the appropriate bargaining unit must be made in each case, the board is loath to depart from its previous determinations of appropriate bargaining units.

Standard units defined by the Ontario board include a standard production unit and a standard office unit. The separation of office employees from production employees, except where the office employees are located in or next to the plant, is a well-entrenched policy. Moreover, until the recent labour relations law amendments, the Ontario board had a policy of separating part-time and students workers from full-time workers at the request of either the employer or the union. Inside and outside municipal employees will generally be separated into separate units by the board. Homeworkers have been excluded from a unit of production workers employed in a factory in the garment industry. These are just a few of the Ontario board's standard units.

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[48] Ontario Federation of Labour, "The Unequal Bargain", Document prepared for 1989 OFL Convention.

The board's policy regarding standard units entrenches an artificially narrow conception of workers' common interests which is based upon the employer's initial production decisions. While it is true that there are many interest which may conflict within a workplace, there are also many commonalities. Wages are a powerful unifying force. From the employee's point of view, the elimination of wage differentials between locations or between full- and part- time workers may be more than equitable, it is a practical means of combatting employer whipsawing. Sources of tension within a workforce are many and are not limited to those institutionalized by the board's practices. Office workers may have demands unique to their situation, but so do women, immigrant, skilled, and senior groups, though none is recognized as a distinguishable bargaining constituency by the board.

In any workplace there are numerous dimensions through which possible conflicts of interest between workers may arise. However, it is the democratically elected representative of the workers, the trade union, which is best able to mediate these potential conflicts. If the union is unable to do so it will either be extremely weak or it will not service. Thus, its strength and survival depend upon its ability both to resolve any conflicts between its members and to create the conditions for solidarity. The employers' primary goal is to have a tractable workforce, not to mediate possible conflicts between workers for their collective empowerment. Moreover, the board's bargaining unit policy simply reinforces the interest which have been shaped by the employer's production decisions, it does not resolve these conflicts. When interests collide, the responsibility for sorting out the competing demands and priorities belongs to the chosen representative of the workers, the union, not to the board or to the employer.

Moreover, the criteria the board employs for determining workers' community of interest which is the basis for determining the appropriate bargaining unit, are gender-biased. The nature of work performed by men and women differs, as do the skills they are required to exercise in their jobs. Since men and women generally are employed to perform dissimilar jobs, their conditions of employment differ. Thus, it is not surprising that standard occupational units reflect and reinforce the gendered occupational structure of the labour market. Office workers, most of whom are women, will in the vast majority of cases be separated into different bargaining units than manufacturing, construction, and non-agricultural primary workers, most of whom are men, employed by the same employer. Moreover, since women are often employed in female-dominated establishments, the policy of defining the appropriate bargaining unit in terms of a single-location and a single-employer reflects existing gender biases in the labour market. The gendered segregation of bargaining units, in turn, reinforces the perception that male-dominated and female-dominated units have different communities of interest. Thus, the result of the Board's standard unit policy has been a bargaining structure which is deeply fragmented along gender lines.

Another result of the Ontario board's standard bargaining unit policy is a pronounced tendency towards certifying very small bargaining units. According to the 1989-90 Annual Report of the Ontario Labour Relations Board: small units continue to be the predominant pattern of unionizing efforts through the certification process in 1989-90. The average size of the bargaining units in the 573 applications that were certified was 30 employees, the same as in 1988-89. Units in construction certification averaged 7 employees, the same as in 1988-89; and in non-construction certifications they averaged 41 employees, compared with 40 in 1988-89. Eighty-two percent of the total certifications involved units of fewer than 40 employees, and 42 percent applied to units of fewer than 10 employees.

In general, the board policy of small units favours the employer's interest in limiting the scope and impact of collective bargaining to small groups of employees.

Undoubtedly the trend towards certifying smaller units has been undertaken with the laudable goal of facilitating organizing. However, while a small bargaining unit may facilitate certification, it is this very structure which makes it almost impossible to bargain decent contract. Under Ontario labour law the bargaining unit for purposes of certification is the same bargaining unit for purposes of bargaining.

The problem is that there is no necessary correlation between a unit that facilitates organizing and one which facilitates meaningful bargaining and, indeed, the two objectives often conflict. Small units of employees do not have much bargaining power unless the sector is highly unionized or workers in the unit hold a monopoly over necessary skills, as for example, in construction.

Recently the OLRA was amended to allow the Labour Relations Board to amalgamate bargaining units in very limited circumstances. The employees must be represented by the same trade union and employed by the same employer. Even then, in exercising its discretion to combine two or more units, the Board must consider a range of labour relations factors. And finally, in the manufacturing sector the Board is specifically prohibited from combining units where such combination could interfere unduly with the employer's ability to continue significantly different methods of production or operate the two locations as independent businesses.[49] These limited amendments serve to confirm the fact that compulsory bargaining unit structure in Ontario is not designed to overcome forms of fragmentation imposed by employers.

As long as Ontario collective bargaining law clings to the idea that the unit that is certified must be the same unit that bargains, then collective bargaining rights in small workplace can never be advanced. The twin goals of organizing and meaningful collective bargaining in the small workplace sector require a recognition that they require different structural forms. The unit for certification might be on an employer basis, but the structure of bargaining must be on a sectoral or regional level.

b) The OLRA and Sectoral Bargaining

The OLRA does allow for broader based bargaining but, except for the construction industry, it is purely voluntary.[50] Employers can withdraw from such negotiations at any time, by informing a union before the signing of a multi-employer collective agreement that it does not intend to be bound by it.

Another problem with the current system of voluntary multi-employer bargaining is that it is fragmented and need not cover an entire sector. A third problem is that a union has no right to enforce broader-based bargaining structures.[51] This voluntaristic approach leaves it to employers to engage in broader based bargaining when it suits them and withdraw from it when it does not.

It is changes to the voluntaristic nature of sectoral bargaining combined with new meaningful defintions of bargaining units that will begin to extend the rights of collective bargaining to domestic workers and homeworkers in the garment industry.

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[49] See S.O. 191, c.21, s.8 amending s.7 of the *Ontario Labour Relations Act*.

[50] ibid. s.52

[51] Burns Meats Ltd. OLRB. Case is described in O'Grady paper at pp. 7-8. Board found UFCW had bargained in bad faith when it pushed to the point of a strike the demand that the company return to sector-wide bargaining.

PART E ASSESSMENT OF MODELS OF SECTORAL REGULATION AND SECTORAL BARGAINING

This part provides an overview of some of the models of sectoral regulation and manadatory sectoral bargaining which currently exist in Canada. In fact, two of the regimes which will be examined in detail are from Ontario - the *Industrial Standards Act (ISA)* , which provides a mechanism for sectoral regulation of the garment industry, and the construction industry provisions of the *Labour Relations Act* (OLRA), which provides mandatory broader based bargaining in that sector. In addition, the Quebec *Collective Agreement Decrees Act* (CADA), which extends some of the provisions in a collective agreement across an entire non-unionized sector, and proposals which were recently considered, but ultimately rejected, in British Columbia which would have provided for broader-based bargaining for small establishments in sectors historically underrepresented by trade unions, will be examined in detail. The main provisions of each of these legislative schemes and the actual practices under them will be described and the suitability of each for adaption to the garment industry and domestic workers will be evaluated.

I. INDUSTRIAL STANDARDS ACT

a) Introduction

Ontario's *Industrial Standards Act* (ISA)[52] provides a model for how industrial standards can be regulated on a sectoral basis. The Act provides a mechanism for establishing a schedule of wages and working conditions which binds all employers and employees in a given industry across a given geographical zone. In the case of the garment industry, the zone is defined as the whole of Ontario.

For a variety of reasons, the Act as presently written is sorely out of date and inadequate both for the garment industry or any other sector. Some of these problems are touched upon below. However, the scheme for sectoral negotiation of standards contained in the ISA provides not only a model of sectoral regulation, but may provide a basis for broader based collective bargaining bargaining.

b) History and Purpose

The *Industrial Standards Act*, introduced in 1935, established a procedure whereby employers or employees in an industry could apply to be governed by a regime of uniform standards binding across the industry. The impetus for bringing in the Act arose out of developments in the garment industry, which is the main industry regulated under it. During the 1930's, labour relations in the garment industry were characterized by massive unrest, frequent strikes, flagrant abuses around piecework rates, fierce competition and undercutting. Uniform standards offered manufacturers stability and protection from undercutting. For workers, such standards offered the possibility of using the collective strength of unions to negotiate decent standards for all workers. Minimum standards applicable to all workers would also inhibit employers' ability to bid wages down.

c) How Standards were Originally Set

Employers or workers in an industry who wanted to be governed by a system of uniform standards would petition the Ministry of Labour to call a conference of employers and employees in the industry that was sought to be covered. Negotiation would take place at this conference to try to get agreement from a majority of employers and employees on a schedule of minimum standards, including wages, hours of work, holiday pay and overtime. This proposed schedule would be submitted to the Minister, who could decide

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[52] R.S.O. 1990, c. I.6

to approve it if it had been agreed to by a "proper and sufficient representation of employers and employees". If the Minister approved a schedule it would be enacted as a regulation and it would be binding across the entire industrial sector. It is through this mechanism that the garment industry, divided into six sectors, came to be covered by Schedules setting wages and working conditions. A conference does not have to be held to amend existing standards; however, one must be held to expand the scope of the Act's coverage.

d) Standards Regulated by the Act

Schedules can set minimum wages, maximum hours of work, actual working times, holidays, overtime etc (s.9).

e) Coverage of Garment Industry

The Act was designed in the 1930s as a mechanism for controlling the rise of sweatshops, homeworkers and price cutting. Some garment production was by and large carried out in large factories and the employers of these factories argued that standarized wages and hours of work would stop the price gauging. Production was fragmented along different lines. These product lines fit with fashion of the time. Men and Women's wear was clearly defined. Consequently, the Act fractures the industry into 6 different sectors with different sectors for men's and women's clothing and for certain types of clothing. Significant sectors of garment production are excluded, for example, bathing suits, lingerie, bathrobes, ski suits, children's wear, sleepwear, a whole category of blouses and all athletic wear such as sweat pants. The result of this fragmentation is that a factory could be producing different types of garments and workers would all be covered by different standards.

f) Homeworkers

The Act does not explicitly exclude homeworkers from coverage. Employee is defined broadly in the ISA as "a person who is receipt of or entitled to wages (s.1)" and wages are defined to include piecerate work. The schedules issued under the ISA do not limit coverage to work done on the premises of the employer. Thus, a strong argument could be made that homeworkers are entitled to the benefit of the ISA, which provides higher standards for garment workers than the ESA. As well, unlike the ESA, which exempts homeworkers from a range of statutory protections, the ISA does not specifically exclude homeworkers from any benefits.

It is possible that an advisory committee could set different standards for homeworkers, although it is unlikely that it would have the power to exclude homeworkers altogether. Advisory committees and inspectors would have the jurisdiction to enforce standards for homeworkers since they have the authority to enforce and administer the schedule with respect to all workers covered under it. However, the enforcement provisions for homeworker permits are under the ESA and Advisory Committees and inspectors have no power to enforce or prosecute violations in this area. All the advisory committee can do is seek to persuade the employment Standards branch to pursue permit violations.

In practice, the bifurcated jurisdiction over the garment industry between the ISA advisory committees and the ESA Employment Standards Branch results in delay. Upon receiving complaints regarding the violation of the requirement for homeworker permits in the garment industry, officials in the Employment Standards Branch contact the appropriate advisory committee to determine whether the alleged offender is covered by an ISA schedule. If the employer falls under the jurisdiction of an advisory committee, the advisory committee provides the employer with a permit. If not, the Employment Standards Branch follows up the complaint and eventually provides the employer with a permit. This takes approximately six month, and the final result is that, generally, employers who employ homeworkers wiothout permits, are simply

requested to comply with the legislation.[53]

g) Bi-Partite Advisory Committees

Each industrial sector has an Advisory Committee comprised of union and employer representatives. The Act does not spell out the number and proportion of representatives. At present only two advisory committees are functioning: the Committees for the Ladies' Dress and Sportswear Industry and the Ladies' Suit and Cloak Industry. These committees have three industry representatives and two union representatives.

The Advisory Committees are responsible for administering and enforcing the schedules, for hearing complaints from employers or employees about violations, for hiring inspectors to enforce the Act, and for making recommendations to the Minister on revisions to the schedules.[54] Amendments to schedules are enacted in the form of regulations.

The Act does not provide a mechanism to break deadlocks on the Advisory Committees with regard to developing revised schedules. As well, committees have run into inordinate delays in getting schedules approved by the Ministry. By the time a schedule is approved, it is out of date. There has also been a history of the Ministry imposing, without any consultation, lower standards than those recommended by the Committee.

h) Enforcement

Employers are required to keep records of employees' names, wage rates, hours worked, vacations, amount of work done by an employee who is paid on piece-work and the piece-work rate used to calculate wages, number of hours worked during regular workday, and the number of hours worked outside the regular workday.

The powers of inspectors are extremely weak compared to those of inpsectors under the Employment Standards Act. Employment Standards officers can enter premises at any reasonable time to carry out an inspection, audit or examination. They may require production of all documents that may be relevant, including ledgers, payrolls, director's minutes, etc. Industrial Standards inspectors have the right to demand production of the employment record but they have no right to do so unless they provide the employer with notice. They do not have the right to demand other documents which may be relevant. They also do not have a right to enter the shop floor without the employer's permission.

As in the ESA, prosecutions require the consent of the Director. Unlike the ESA, which has a two year limitation period, the limitation period under the ISA is 6 months.

The Act is financed by a levy on employers and employees.

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[53] Barry Cook, Provincial Specialist, Employment Practices Branch, Industrial Standards, to Alexandra Dagg, Coalition for Fair Wages and Working Conditions for Homeworkers, November 18, 1992.

[54] The Act does not actually spell out this last function but that is the regular practice and it appears to falls within the Committee's general mandate to assist in carrying out the Act.

i) Strengths of the Act

Unlike the ESA which involves government imposed minimums, the ISA provides a mechanism for workers to get involved in setting standards. Such a mechanism could potentially facilitate a measure of worker empowerment in a way that would be impossible under the ESA and which normally would be denied to workers who lack the benefits of collective bargaining. It also provides a mechanism for non-unionized workers to benefit from collective structures by having the union play an integral role in negotiating standards. The union is also involved in the body responsible for enforcement. This is in marked contrast to the ESA, where there is no forum for any kind of collective worker input into the setting of standards or for any kind of collective to back up a worker.

The Act's focus is on maintaining and enforcing standards and not just on reacting to complaints. The role of the Advisory Committees is not just to respond to complaints but also to monitor compliance. This means playing a pro-active role through spot checks on employers (although resources have not really allowed for this on as large a scale as desirable).

The concept of having uniform and enforceable standards across an industrial sector can benefit workers by reducing the incredible incentive employers in a highly competitive sector have to drive wages down and deny basic worker rights. It would also benefit employers by ensuring that all employers in a region and sector are operating on a similar footing. Otherwise employers who wish to provide decent standards are put at a competitive disadvantage by other employers who operate, in part, by depressing wages.

j) Weakness of Present Act

Coverage of the garment industry is highly fragmented. It is also very incomplete given towards fashion trends. This fragmentation and incompleteness has meant that there is a downward pressure to lower standards in the regulated sector. Essentially, the schedules pertaining to the garment industry have been frozen to relect the structure which pertained in the 1930s. Large factories are now an extreme rarity. Most production is carried out by small enterprises employing few workers. Garment production is characterized by massive a subcontracting structure with stages of production being contracted out to a series of small contractors, who, increasingly, contract work to homeworkers.

The Act is not equipped to deal with the subcontracting structure of the garment industry. Employer is defined as the party that is immediately responsible for employing a worker. This means the contractor is the employer, and this is obviously inadequate for addressing the pyramid structure of the industry. The Act has no provisions whatsoever for imposing joint liability or for recognizing the integrated nature of production. As a result, the parties with most control over conditions of work utterly evade regulation.

Inspectors' powers are weak, especially in relation to those granted to officials under the ESA. The denial of jurisdiction to Advisory Committees to enforce the homeworker permit system makes enforcement more difficult. Advisory Committees and their specialized inspectors are well placed to detect violations and monitor compliance in this sector. Right now, when an Advisory Committee finds out about a violation its only option is to request the intervention of the overworked and understaffed ES branch. Lack of vigorous enforcement sends employers the message they can flout the law with impunity.

The six month limitation period combined with the requirement for Director's consent, has meant, in practice, that the limitation period has usually expired by the time all the paper work is done.

II. THE QUEBEC COLLECTIVE AGREEMENT DECREES ACT

Quebec's labour relations model of juridical extension is increasingly being held up as a solution to the present crisis in the labour movement. Inspired by a European model for regulating labour relations and standards, the decree system in Quebec was introduced in 1934 and has survived very much intact to this day.[55] Corporatist in nature, it operates by ministerial fiat to extend the terms of a collective agreement across a sector so that unionized and non-unionized workers alike share the same basic employment standards. It is widely believed that this system may be able to do what existing collective bargaining and labour relations laws and institutions cannot do - that is, regulate the private sector labour market and achieve broader-based bargaining. [56]

The purpose of this section is to determine what the strengths and weaknesses of Quebec's decree system are with respect to regulating homework in Ontario's garment industry. Would the introduction of a decree system in Ontario provide an effective statutory framework by which to improve the working conditions of homeworkers? Would juridical extension serve as a useful basis on which to organize homeworkers? Would Quebec's system of decrees necessarily provide structures for representation which would operate above the level of the workplace in order to bring about broader-based bargaining in the garment industry? These are all questions which will be addressed as the various components of Quebec's decree system are examined in light of how they have and could be applied to homeworking.

a) Introducing the Decree System

Besides offering a model for the improvement of labour standards and the introduction of broader-based bargaining, Quebec's decree system is also of direct historical significance insofar as its origins and application directly mirror the labour market and economic conditions of the 1990s.

The predecessor to today's *Collective Agreement Decrees Act*, R.S.Q. 1977 (the "CADA") came into force in the 1930s on the heels of the Great Depression and in the context of high unemployment and intense competition over wages. It was introduced to establish certain minimum standards for workers, and to eliminate "unfair" competition amongst employers who sought to undercut one another by pushing down wages [57]. Once conditions were standardized, it was thought that the basis of competition would be shifted away from labour costs and towards areas such as efficiency and service. Although competition is

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[55] This may not, however, be the case for very much longer. Just in the past few months, the Quebec government has embarked on a wholesale revision of the Act underlying the decree system. This follows on the heels of a great deal of discussion and debate in Quebec about the regime's future through the late 1970s and the 1980s.

[56] Please see OFL Brief, op cit, O'Grady, 1991 op cit., and P. McDermott, "Broader-Based Bargaining and Closing the Wage Gap" prepared for the Ontario Ministry of Labour, March 1991.

[57] J. Bernier, "Modernizing Juridical Extension" 1992, J. Dube, "Decrets et comites paritaires: L'Extension juridiques des conventions collectives" (Sherbrooke: Editions Revue de Droit, 1990)

intensely global today, circumstances in the garment industry are otherwise very similar to those which prevailed in the 1930s when the decree system was first introduced. As a result, the decree system's rationale is one which could equally apply today - namely, to standardize labour standards across sectors of the economy in order to reduce the downward pressure on wages and lessen the incentive on employers to avoid unions.

A second feature of Quebec's decree system which is of note is that, after Quebec's *Labour Relations Act* (now the *Labour Code*) was introduced in 1944, juridical extension increasingly came to predominate in that part of the economy dominated by small and medium-sized firms and characterized by high competition and instability, low wages and labour intensive kinds of production [58]. Today, as these same conditions become more and more prevalent, existing North American style collective bargaining laws and labour relations institutions are proving increasingly unable to respond. To the extent that the decree system has been successfully adapted and applied to small workplaces in competitive sectors of the economy over the past fifty years, it provides an alternative model with which to confront the circumstances now prevailing in the economy at large, and in the garment industry in particular.

The CADA empowers the government of Quebec to proclaim by decree or order-in-council that a collective agreement in a particular "trade, industry, commerce or occupation" shall bind all employees and employers doing the same kind of work, either in Quebec as a whole or in a particular region of the province (s.2 CADA). This process, referred to as "juridical extension", can only be initiated by one or more of the parties to the original collective agreement. Once in effect, the decree has the effect of establishing minimum standards in a sector, including wages, hours of work, work days, vacation pay and social security benefits, thereby extending the benefits of collective bargaining to non-unionized workers in a sector. The forty or so decrees which exist today cover the following broad areas of Quebec's economy: clothing, hairdressing, garages, services,[59] and "various industries."[60] The system has proven extremely resilient: since 1970 the average number of employees covered by decrees has remained remarkably constant at 140,000, representing 6 per cent of wage-earners or 12 per cent of hourly paid workers [61].

Quebec's Decree Model: Strengths and Weaknesses

The next section will be devoted to analyzing the strengths and weaknesses of Quebec's decree system[62]

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[58] Bernier op cit. 1986 and 1992; Dube, ibid.

[59] E.g. security guarding, building maintenance.

[60] E.g. furniture, flat glass and petroleum equipment.

[61] J. Bernier, ibid., 1992

[62] When the term "decree system" is used in this section, it shall refer to the CADA and to certain regulations (i.e. decrees) under the Act which relate to the garment industry in Quebec. In particular, the following four Decrees shall be referred to: (i) Decree Respecting the Men's Clothing Industry, R.R.Q. 1981, D-2, r.27; (ii) Decree Respecting the Women's Clothing Industry, R.R.Q. 1981, D-2, r.26 (and amendments to 1992); (iii) Regulation Respecting the Monthly Report of the Ladies Clothing Joint Commission (Decree 2722-80, G.O.Q. 1980 09 17); and (iv) Regulation Respecting the System of Registration of the Ladies Clothing Joint Commission (Decree 2722-80, G.O.Q. 1980 09 17).
Because it is one of the very few attempts to regulate homeworking,

and assessing its applicability to the garment industry and to homeworkers in Ontario. The discussion will proceed in four stages. First, the extent to which the model of juridical extension is capable of addressing the current structural realities of the garment industry will be evaluated. Second, the potential for collective worker representation and participation offered by the decree system will be assessed. Third, the enforcement provisions of the CADA will be examined. And fourthly, the extent to which the existing decree system in Quebec succeeds in law and in practice to regulate homeworking will be considered.

b) Addressing the Structure of the Garment Industry

One of the most compelling aspects to Quebec's decree system as a model for the legal regulation of homeworking is its capacity to confront and respond effectively to the structure of the garment industry. This sub-section will examine how juridical extension, as it has developed in Quebec, is suited to regulating the pyramid subcontracting structures and dealing with the non-standard forms of employment and the small workplaces which prevail in clothing production. Four specific areas will be examined - first, the liability provisions under the CADA, second, the ways in which contractors are targeted by the decree system, third, the lack of a certification requirement under the Act, and fourth, ways in which parity committees' existing administrative roles might be adapted so as to better respond to the precarious and interrupted forms of employment which predominate amongst homeworkers.

Joint and Several Liability

By providing for joint and several liability, the CADA provides a legal enforcement mechanism which is able to directly confront the pyramid subcontracting structure of the garment industry. This is crucial given that it is this subcontracting structure which provides much of the impetus for the downward pressure on labour standards and wages, the growth in homeworking and the decline in unionization rates in the garment industry. The Act provides for the joint and several liability for "the payment of the wage fixed by the decree" of all members in a subcontracting chain (s.14 CADA).[83] Apparently, where a contractor fails to pay its employees, the practice followed by the Joint Commission (or parity committee) for Ladies Clothing in Quebec is first to try and collect the moneys owed from the contractor. If this proves impossible because the contractor has disappeared or gone bankrupt, it then goes after the manufacturer, even though it may already have paid the contractor for the transaction for which the latter is in default[84].

A weakness with the liability provision is that it is limited to wages and does not cover the many other kinds of violations which would involve payment to an employee or a parity committee. Of course, there is no reason why, if the Ontario government were to introduce joint and several liability in cases of subcontracting, liability would have to be restricted to wages.

In Ontario, the related employer provisions in the ESA which are aimed at preventing employers from organizing their firms in ways which defeat the purpose of the legislation have failed to capture subcontracting relations. This failure creates a legal incentive for manufacturers and jobbers to enter a

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the Ladies Clothing Decree will be examined in the most detail.

[83] Section 14 reads as follows: "Every professional employer contracting with a sub-entrepreneur or a subcontractor, directly or through an intermediary, shall be jointly and severally responsible with such sub-entrepreneur or sub-contractor and any intermediary, for the payment of the wage fixed by the decree."

[84] Gerry Roy, Canadian Director, ILGWU Interview October 1992.

chain of subcontracting relations in order to shift the burden of complying with minimum standards legislation to subcontractors. However, even if the related employer provisions did cover subcontracting relations, imposing joint and several liability is probably a more direct, and ultimately, more effective means by which to enforce compliance with labour standards.

Joint and several liability allows one to get at the manufacturers and the jobbers who, after retailers, are the most economically stable parties in the pyramid. They are also the ones who set the terms for contractors and sub-contractors. Indeed, in the case of Ladies Clothing in Quebec, it is the manufacturers who negotiate the master agreement with the ILGWU which is then extended throughout the Ladies Clothing sub-sector. Because it recognizes the integrated nature of production based on sub-contracting, joint and several liability reduces the incentive to create contractual relations simply to avoid legal regulation and shift the burden of compliance with minimum standards legislation to subordinate parties. And, to the extent that contracting occurs in any event, joint and several liability encourages manufacturers to deal with reputable and reliable contractors.[65]

A related liability provision of the CADA which also takes into account the volatile nature of the garment industry is the successor rights provision introduced in 1984 (s.14.1 CADA). It provides that former and new employers are jointly and severally responsible for any debt incurred and owing to a parity committee or to employees.[66] While this provision is limited to debts and does not provide for continuity of all procedures and violations under the Act, it does serve as an important mechanism by which to deal with the highly unstable nature of the garment industry, especially among contractors for whom the attrition rate is very high.

Contractors

The presence of these liability provisions and their appropriateness to the structure of the garment industry raises a further question about the extent to which contractors in the garment industry are incorporated into Quebec's model of juridical extension. Although they are by no means as integrated and involved as manufacturers and jobbers, contractors are involved at several points in the decree system. For instance, in the case of the Men's Clothing Decree, the Montreal Clothing Contractors Association is listed as one of the employer-side signatories to the original collective agreement, along with four manufacturers' and one employers' association. In the case of Ladies Clothing, contractors are not parties to the original agreement; however, they are represented on the Joint Commission by virtue of having been appointed by the Minister of Labour[67].

To the extent that contractors hire homeworkers, they will be treated at law as "professional employers" under the Act and will accordingly be required to comply with the terms and conditions stipulated by the Ladies Clothing Decree, as well as fulfilling all registration and reporting requirements.

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[65] Apparently, this is the argument which the Montreal ILGWU makes to manufacturers who complain when they are caught by the joint and several clauses and are forced to pay twice because of an absconding contractor (Roy).

[66] Section 14.1 reads as follows: "In the case of the alienation or concession of the whole or part of an undertaking, otherwise than by judicial sale, the former and the new employers are jointly and severally responsible for any debt incurred before the alienation or concession or resulting from the application of this Act, a regulation or a decree."

[67] Roy op. cit.

In addition, manufacturers and contractors in the industry are required to provide the parity committees with certain kinds of information about their contractual relationship. For instance, under the Men's Clothing Decree, there is a clause devoted to "Registration of Contractors" which stipulates that employers governed by the decree must provide to the parity committee the names and addresses of contractors to whom they have sent work. Likewise, in the Ladies Clothing sub-sector the contracting parties are required to register information concerning the nature of their contractual relationship.[68]

In sum, contractors in Quebec's garment industry are targeted on several fronts in the decree system - through the joint and several liability clauses, through their status as employers, through the registration requirements, and through their representation on parity committees, whether it be as parties to the original agreement or as Ministerial appointees.

The Absence of a Certification Requirement

Another important way in which the decree system offers some potential for responding to the structural characteristics of the garment industry is its silence with respect to the representational character of the bargaining agents. The CADA stands out from other labour relations laws because it does not require that "employee associations" which negotiate and petition the Minister for extension be certified.[69] In this way, the model of juridical extension avoids some of the pitfalls of existing labour relations laws and institutions based on the Wagner Act model. The certified bargaining unit is the cornerstone of Canada's collective bargaining system. It presupposes a single employer and a single workplace - ideally one which is large and industrial with a relatively permanent, full-time and visible white male workforce. Homeworking, however, defies all such presuppositions. If the existing notion of the certification bargaining unit were applied to homeworkers in the garment industry, the result would make no sense, either from an organizational or a bargaining perspective.

In addition to not requiring certified bargaining agents, the CADA does not impose any formal representational requirements on the parties to the original agreement. Partly, this is the result of historical accident - i.e., the CADA was enacted ten years before the *Labour Relations Act* (now the *Labour Code*) which was the statute which introduced the peculiarly North American fixation with bargaining units, certification and exclusive representation into Quebec.[70] Another reason for the lack of any formal requirement that a union be certified or that a specific proportion of workers in a sector be covered by a collective agreement has to do with the very different purposes of the CADA and the Labour Code. Unlike

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[68] They must provide the parity committee with the model, description, quantity, price paid and any trade mark used.

[69] The definition of "association" found in s.1 of the CADA refers to a union being "bona fide" and "having as object the study, defence and development of the economic, social and moral interests of its members, with respect for law and authority". Similarly, "collective agreement" is defined as "any arrangement respecting working conditions entered into between persons acting for one or more associations of employees, and an employer or several employers or persons acting for an association or several associations of employers".

[70] Despite pressure on various fronts to amend the CADA and bring it into line with the Labour Code's certification requirements, this has not happened. The 1985 Beaudry Commission report recommended against requiring certification under the CADA, preferring instead to leave representational matters to the Minister's discretion.

the Code, the CADA is concerned with establishing and maintaining consistent standards across sectors and geographic regions. Accordingly, it presumes the prior existence of a union and a collective agreement and does not provide any mechanism for recognizing the parties to a collective agreement or facilitating the negotiation of an agreement.

Although in practice the employee associations which negotiate the extended collective agreements are almost invariably certified[71], the lack of any formal certification requirement in the CADA is extremely useful in the case of the highly disaggregated and unstable structure of the garment industry where the workplace is, in the case of homeworkers, reduced to the smallest unit possible - that of the individual. Because it does not require unions to be certified before they negotiate an agreement with an employer, Quebec's decree system could serve as a very useful precedent in law reform efforts when seeking to overcome the increasingly outdated and constraining certification model which is at the heart of existing labour relations laws and institutions.

However, at the same time that the CADA opens the way to escaping the technical-legal requirements imposed by certification, it raises another problem to do with the de facto representational requirements brought in through the back door. The Minister has the power to determine whether the terms of a collective agreement are of "preponderant significance and importance" (s.6 CADA). Although not mandated to do so, the Minister may use this discretionary power to consider the rate of unionization in a sector. Normally, the Minister will prefer that the employees covered by the original agreement represent a majority of those who will ultimately be subject to the decree[72]. In the garment industry which is experiencing a rapid and progressive decline in unionization such a requirement could serve as a significant impediment to using the decree system[73].

So long as the system remains wedded to the notion that standards are to be extended from a majority of unionized workers to a minority of unorganized workers, problems will inevitably arise (Dube). The Minister does, however, have the power to reverse this normative assumption and permit the terms and conditions of collective agreements to be extended from a minority of organized workers to the majority of non-unionized workers.[74] In fact, to reverse the traditional assumption in this way would not only be consistent with the Act's underlying purpose of establishing minimum standards across a sector, but would also be compatible with current labour market realities which have seen a decline in unionization, especially in the private sector[75].

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71 Dube, op. cit.

72 J.Dube, ibid.

73 J.Bernier, op cit, 1987., C. Lipsig-Mumme, op cit, 1987.

74 Indeed, it appears that this may be what has happened with Ladies Clothing in Quebec. Although only 25% of the workforce belongs to the ILGWU (as opposed to 65% of the workforce covered by the ACTWU), a decree nevertheless remains in place (Roy). This situation, however, raises the problem of the union's bargaining power, especially in the present context as employers are lobbying the Quebec government to repeal the stipulated increase in wages laid out in the decree (Roy).

75 J. O'Grady., 1991, op cit.

Continuity of Service Requirements and the Role of Parity Committees

Like most labour relations laws, the decree system relies heavily on the notion of attachment to a single employer. As a result, it makes continuity of service a prerequisite for receiving many benefits.[76] Because homeworkers generally do not work for a single employer, and are often unable to work continuously, they are deprived of employment benefits. As it presently exists, the decree system does not provide for a sectoral employer so that the numbers of hours worked by homeworkers could be combined for the purposes of calculating eligibility to benefits. Similarly, there is no mechanism requiring employers to remit pro-rated amounts for overtime premiums, severance and other benefits depending on the number of hours worked by an employee.

And yet, the decree system has the potential, through its parity committees, to accommodate the precarious nature of homeworkers' employment relationships. For example, all employers in a defined sector could be designated as "the employer" for the purposes of benefits, and in this way, homeworkers could accumulate the seniority they would need to receive benefits like overtime and vacation pay. Parity committees could, in turn, administer the system, providing pro-rated benefits to homeworkers who were registered with them. To a limited extent, parity committees already play this kind of a role. The CADA stipulates that if a decree provides for social security benefits or a vacation pay fund, the parity committee will be responsible for collecting the contributions, administering the fund and making the payments (s.22 CADA). In practice, the parity committees in Quebec's garment industry do this. For instance, the committee in Men's Clothing has a social benefits and severance pay fund, while the committee in Ladies Clothing administers a vacation fund.

In a sector of the economy where employees switch employers frequently and experience interruptions in their employment continuity, the existence of an overseeing administrative body could prove very useful in ensuring that homeworkers receive the pro-rated benefits they have earned.

d) The Capacity for Worker Representation and Participation

The decree system is often described as falling somewhere between a "pure" contractual model and a state-run minimum standards system [77]. Although set against a backdrop of potentially overriding state power, the system offers greater opportunities for collective worker representation and participation than does an employment standards system which is administered exclusively by the state. For this reason, and presuming that a representative for the workers does indeed have sufficient bargaining power to be effective, the corporatist model of juridical extension is to be preferred on principle to a simple reliance on minimum standards.

One of the greatest drawbacks to the decree system as it presently exists in Quebec, however, is the enormous power it gives to the Minister of Labour. In effect, the Minister can legally repeal a decree tomorrow without even consulting any of the parties to the original agreement. This power creates a sense

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[76] For example, under the new 1989 lay off provisions in the Ladies Clothing Decree, it is only workers with "at least three months of continuous service with the same employer" who are entitled to written notice. Similarly, under the Men's Clothing Decree, different periods of continuous service are required before an employee is eligible for holiday pay, vacations and severance pay.

[77] J. Dube op cit., R. Gagnon et. al. Droit du Travail 2eme ed. (Quebec: presse de L'Universite Laval, 1991)

of vulnerability and uncertainty amongst unions, especially in times of high unemployment and recession.[78] The Minister has the independent legal power to unilaterally amend, cancel, or renew a decree at any time, the only restriction being that, in cases of amendment, s/he must consult with the parties (ss.6-8 CADA). The Minister, however, is not required to take the advice or gain the consent of the parties before s/he amends a decree. In addition, the CADA does not contain any guidelines as to how the Minister's power to amend, repeal or extend should be exercised.

Another problematic feature to the Minister's power is that, when a party or parties initially petition him or her for extension and there are objections to the request, it is up to the Minister to decide whether to hold an "inquiry" (ss.5-6 CADA). Where one is held, it is a closed-door, administrative affair. Moreover, the Minister is under no obligation to provide reasons for his or her decision as to whether the collective agreement will actually be extended [79].

A further example of the state's unfettered discretionary power is the Minister's ability to determine whether the terms of an agreement are of "preponderant significance and importance" and do not cause "serious inconvenience resulting from the competition of outside countries or the other provinces" (s.6 CADA). While this open-ended and undefined power to consider the provisions of a collective agreement may be preferable to an absolute representational requirement on the parties to an agreement or a requirement that a union be certified before it can negotiate an agreement, it again introduces a great deal of uncertainty into the regime. Not only does the Act not provide any definition for what "preponderant significance and importance" means, but also there are no guidelines prescribing how the Minister should exercise his or her discretion under this provision.[80] The lack of any clear standards or guidelines for what are the critical criteria for determining whether an agreement will be extended may mean that a union in a sector with a low overall rate of unionization and a high degree of competition may not even try to have its collective agreement extended.

When considering the applicability of the decree system to Ontario's garment industry, it is important to remember that, while the system relies on the state to the extent that it is Cabinet which extends a collective agreement by order-in-council, there is no need for Minister to be invested with such unfettered discretion and undefined power as is the case under Quebec's CADA.

In any event, the model of juridical extension does allow for a fairly significant amount of collective worker representation and participation. By providing for worker involvement at the negotiating, monitoring and enforcement stages, the decree system is clearly more decentralized than an employment standards system. Obviously, the collective agreement at the basis of the decree is the product of negotiations between an employer and an employee association (s.1 CADA). By allowing non-unionized workers to benefit directly from the gains achieved through collective bargaining, the system directly implicates unions in setting standards and conditions for unorganized workers. In this way, it provides an important opening

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[78] Such apprehension exists today in the Ladies Clothing sub-sector in Quebec where employers are actively lobbying the government to deregulate the industry and repeal the decree. Employers are threatening to shut down their plants, claiming they cannot compete under the decree system and pay the wage increases stipulated by the decree (Roy).

[79] R. Gagnon, op. cit.

[80] In practice, it is understood that, in making the "PS & I" assessment, the Minister will consider the numbers of employers and employees who are linked by a collective agreement and the economic importance of the enterprises to which a decree, if passed, would apply (Dube).

for unions to reach and affect non-unionized workers.

With respect to the administration of the decree, the union which is a party to the original collective agreement is represented equally with the employer on the parity committee's Board of trustees. This representation provides workers with an overview of conditions in the industry as well as access to valuable information, such as the registries and reports submitted by employers, which could prove critical in organizing drives by the union.

Importantly, the decree system is also capable of being modified so as to provide for even greater worker participation. The Beaudry Commission, for instance, recommended in its 1985 report that the parties to an agreement be given the option of choosing whether to have inspectors hired by the parity committee enforce a decree, or alternatively, to give the unions responsibility for its enforcement. The Commission recommended that union delegates should be given the same powers as parity committee inspectors, and that they should be charged with carrying out inspections of plants in which they are not employees. By giving unions a direct stake in the enforcement of a decree, unions would have an added incentive to make sure the terms and conditions of decrees were respected. Such an enforcement role might also provide unions with additional means by which to organize workers. Lastly, having unions enforce decrees might encourage greater union democracy insofar as it would make the union more visible and thus, accountable to its membership.

e) Enforcement

With the exception of fines which are too low, the decree system appears, on paper at least, to offer a very promising model for enforcing labour standards across a sector. Two areas of enforcement stand out in particular - the registration and reporting requirements imposed on employers in the garment industry, and, more generally, the inspection-driven nature of the decree system.

Registration and Reporting

The Ladies Clothing sub-sector provides an interesting case study on the registration and reporting requirements with which employers, by law, must comply. For instance, employers are required to keep a register for homeworkers which is to be submitted to the parity committee. This is to include the name and address of each homeworker, the date of delivery of work, a description of the kind of work and the quantity of garments to be made, and the piece rate to be paid. In addition, employers having homework carried out must register, among other things, their name and address, their main business place and the name and address of the homeworker. They must also provide the parity committee with a sample of each model of clothing and a work form indicating the model, quantity and price to be paid. Each piece of clothing produced by the homeworker is required to bear the homeworker's label.

Insofar as monthly reporting to the parity committee is concerned, employers governed by the Ladies Clothing Decree must submit for each employee information which includes the number of regular and overtime hours worked per week, total weekly and monthly earnings, the hourly rate of pay, the monthly amount of an increase in hourly wages given to an employee paid for piecework, and other amounts paid, such as vacation pay.

Inspections and Complaints

The fact that the decree system is apparently more inspection-driven than complaint-driven suggests that it may be a potentially more effective and proactive enforcement model than the individualistic, complaints-based approach used by Ontario's Employment Standards Branch. Charged with monitoring compliance with the terms of the decrees, the parity committees both hear complaints and hire inspectors. While there

is a great deal of variation between sectors and sub-sectors, in 1983 the average number of inspectors per employee in Quebec's decree sectors was 1:1000. At this time, it was also found that the number of inspections substantially outweighed the number of complaints [81]

The reason why the inspection rate is generally higher than the rate of complaints is almost undoubtedly attributable to the fact that inspectors under Quebec's decree system are actually given some substantive investigation and enforcement powers. For example, under the CADA there is no restriction on the time or place at which an inspection can be carried out.[82] In addition, no notice is required before carrying out an inspection and an inspector can, unlike in Ontario, carry out an audit and require the production of documents even where the inspection is in response to a complaint by an individual. [83]

Before one becomes too optimistic about inspections under the decree system, it is important to note that in 1983, the only year for which the data is available, Ladies Clothing was one of the few sub-sectors for which complaints exceeded inspections. This continues to be the case today. According to the manager of Montreal's ILGWU, the Ladies Clothing sub-sector has only eleven inspectors on staff to police 14,000 workers in 3,000 plants. While the inspectors try to visit each plant at least once per year, they often become bogged down dealing with problems at a particular workplace. Consequently, enforcement in Quebec's Ladies Clothing sub-sector is highly dependent on complaints to the parity committee [84].

Fines

Ranging from $200 to $500 for a first conviction and $500 to $3,000 for second and subsequent convictions, the fines available under CADA can hardly be said to be effective deterrents. Moreover, given that parity committees only succeed in collecting a very small proportion of the money they are owed - an average of 25 per cent in 1983 - offending employers are likely to escape having to pay even the paltry fines under the Act[85]. Of course, problems concerning inadequacy of fines and poor recovery rates are not intrinsic to the decree system. With the appropriate political will on the part of government and a greater commitment by the parties to the original agreement to enforce the decree, perhaps with unions playing a more direct role as recommended by the Beaudry Commission, compliance with decrees would no doubt be improved.

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[81] J. Bernier, 1986 op cit.

[82] Although according to Roy, private homes cannot be entered and inspected.

[83] Coalition for Fair Wages and Working Conditions Brief. Section 22(e) states that inspectors have the right at "any reasonable time" to "examine the registration system, the compulsory register and the paylist of any employer, take copies or extracts therefrom, verify as regards any employer and any employee the rate of wage, duration of work, apprenticeship system and observance of the other provisions of the decree; require... all information deemed necessary, and,..., exact the signature of the person concerned".

[84] G. Roy op. cit.

[85] J. Bernier., 1986, op.cit.

f) Coverage of Homeworkers

It appears that, for now anyway, the battle over whether homeworkers in Quebec are employees or independent contractors has been settled in favour of the former. Confection Coger Inc. c. Comite paritaire du vetement pour dames (1986) R.J.Q. 153 (C.A.), the 1986 Quebec Court of Appeal decision on the issue suggests that employers of homeworkers have been willing to go to great lengths to avoid having to comply with the terms and conditions of decrees. The Court ruled that, on the facts of the case, the homeworkers were indeed employees because they did not assume the risk of profit or loss. The Court also found that the homeworkers in question lacked effective control over their work because their employers provided them with patterns and work orders, fixed delivery and pick up times, and determined their rates of pay. Nevertheless, the Court observed that the link between the homeworkers and employers was "weak" because the former worked independently without supervision, thereby maintaining (nominal) control over their hours of work.

In the final analysis, however, courts have taken advantage of the broad and rather anachronistic definition of "employee" found in the CADA in order to find that homeworkers are employees.[86] The status of "employee" under the Act has nothing really to do with the nature of the employment contract, the form of remuneration or the location of the work. Instead it comes from doing the kind of work covered by the decree in question [87]. Moreover, because the term "artisan" is included in the definition of "employee", courts have been able to characterize homeworkers as "artisans", thus avoiding the more fundamental issue of subordination and control.

Because the employment relationship is so easily manipulated and subverted, a better solution to having the courts decide on the status of homeworkers would be to see the CADA itself amended to say that homeworkers are employees for the purposes of the Act. While this has yet to happen, the next best thing has - that is, in 1989 the Ladies Clothing Decree was amended so as to state explicitly that a homeworker is an employee within the meaning of the Act. At the same time, the definition of homework, which is very simple and straightforward under the Decree, was expanded a little from its earlier form to include: "[t]he manufacture of garments done in a home, a residence, a dwelling and all outbuildings".[88] In law, the situation for garment homeworkers in Quebec is clearly more favourable than it is in the rest of the country where their employment status is contingent on the particular facts and circumstances of their case.

Homeworkers in Quebec also receive far greater legal protections than their counterparts in Ontario, who must rely on the ESA and indeed are exempted from certain of its provisions [89]. The CADA provides that

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[86] The Act defines "employee" as "any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk or employee, working individually or in a crew or in a partnership". See, for example, Commission conjointe de l'industrie de la robe de la Province de Quebec v. Jonathan of California Co. [1962] B.R. 858. (C.A.); Perrin c. Miller [1944] R.L. 473.

[87] R. Gagnon., op cit.

[88] The Men's Clothing Decree which prohibits homework defines it as "all work performed in whole or in part on garments covered by this Decree in premises occupied mainly as living quarters or in any part, annex or appurtenance thereof".

[89] Coalition for Fair Wages and Working Conditions.,1991., op.cit.

wages, hours of work, working days, vacation with pay, social security benefits, classification of operations, definition of classes of employer and employee and "provisions in conformity with the spirit of the Act" will be extended by decree. While this means that other provisions of a collective agreement, such as those dealing with seniority, promotions, transfers, lay-off, sick leave and grievance procedures, will not be extended, homeworkers in Quebec are nonetheless far better protected in law than their Ontario counterparts. Under the Ladies Clothing Decree, homeworkers in Quebec are covered by maximum hours of work, overtime pay and statutory holiday provisions, as well as by the terms and conditions which apply generally across the sector. They are not entitled to social benefits (or pay in lieu of) such as health and dental insurance or severance pay, but this is only because they are regulated by the Ladies Clothing Decree as opposed to, say, the Men's Clothing Decree.

With respect to protections directed specifically at homeworkers, the Ladies Clothing Decree provides a set of formulae for determining piece rates. For example, homeworkers are supposed to receive a 10% premium over the general minimum piece work rate mandated by the decree. This ensures that the women receive some compensation for overhead costs, including utilities. The Decree further provides that homeworkers are to be paid when the merchandise is delivered - originally this was to be in cash, but as of 1992, they can be paid either in cash or by cheque. Employers are also supposed to pay for the cost of thread and transportation and to deliver and pick up all goods from the homeworkers' dwelling place. Lastly, there are some restrictions on set off - while the homeworker is mandated to redo work which is not done to the employer's satisfaction, the employer is prohibited from charging the cost of having the work redone by someone else to the homeworker who did the original work.

On paper, the legal protections provided homeworkers in Quebec appear unprecedented. Their pay and benefits are strictly regulated, they are to be paid an overhead premium, their employers are required to register them with the parity committee, and they can make use of joint and several liability to sue anyone in the subcontracting chain who owes them wages. But how effective in practice is the decree system in protecting homeworkers? Unfortunately, the consensus is that decrees have proven largely ineffective, whether they are seeking to prohibit or to regulate homework [90]. Most homeworking is simply not declared. For instance, out of an estimated total of 25,000 to 30,000 homeworkers in the Montreal region today, only 1000 are actually registered with the Joint Commission for Ladies Clothing [91]. In the early 1980s, the Joint Commission estimated that 90% of homeworking escaped the control of its inspectors. [92] Moreover, in the early 1980s, even in cases where homeworkers had been registered, contraventions of decrees and violations of minimum standards and other labour legislation were discovered.

g) The Organizing and Bargaining Potential of the Decree System

The most suitable way to conclude this discussion of the applicability of Quebec's decree system to Ontario's garment industry is to consider its impact on organizing and bargaining. By now it should be clear that, in terms of establishing and maintaining labour standards across a sector, the model of juridical extension is quite promising. It provides some interesting and, in certain cases, quite compelling examples of how to proceed with the regulation of homeworking, even if, in practice, these have not proven very effective. But what impact does the decree system have on unionization - does it in fact provide a way in which to reach unorganized workers, and thereby reverse the trajectory of decline in private sector unionization? And, because the decree system involves extending the terms of a collective agreement

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90 H.Grant and R. Rose; G.Roy

91 G. Roy, ibid

92 H.Grant and R. Rose., op cit.

beyond a workplace and across a sector, does this make it a model for broader-based bargaining?

With respect to the impact of the decree system on unionization, the consensus seems to be, based on statistical data, that it has served neither to promote nor to impede union organizing. Similarly, decrees appear to have done little to stop what is a more generalized de-unionization trend. [93] To the extent that certain unions have been able to use juridical extension to facilitate union organization and collective bargaining, as in the case of the United Steel Workers of America who apparently organized 12,000 new members amongst security guards, their success appears to have had little to do with the decree system per se and a great deal to do with the characteristics and structure of the particular industry, the resourcefulness and creativeness of the union, and the cooperation of employers. [94]

Part of the reason why the model of juridical extension has no necessary impact on unionization is that the promotion of unionization has never been among its objectives. Rather than addressing organizational factors, such as the need for a mechanism by which to recognize parties to a collective agreement or to accomplish the negotiation of an agreement, the CADA simply presupposes the existence of effective employee and employer associations and a collective agreement. In other words, the Act does nothing to ensure that such preconditions exist. Furthermore, the success of the decree system is actually premised, implicitly, on the existence of relatively strong unions with sufficient bargaining power to negotiate standards which surpass those in Quebec's Labour Standards Act, and/or on the voluntary cooperation of employers acting out of self-interest. Whether one is dealing with Ontario or Quebec, neither of these two preconditions exist in the garment industry today.

This is not to say, however, that there are not aspects of the decree system which could be exploited in order to organize workers. Indeed, when one combines the element of worker representation and participation on the parity committees with the system of enforcement which includes registries and inspections, there is a great deal of potential for developing of effective organizing tactics. For example, if unions used their positions on the parity committees to gain access to the registries, and these registries were accurate and well-maintained, their organizing drives could be extremely focused and well-directed as a result. At the same time, the registry could be used as the basis for hiring, very much in the way that a hiring hall operates.

Nevertheless, there remains a fundamental problem in Quebec's decree system. While it provides a very compelling model for the enforcement of labour standards across a sector, aspects of which might be used by an enterprising and creative union to assist it in its organizing efforts, the decree system implicitly presumes what can no longer be presumed - that is, that at least a core of workers are organized into effective and strong trade unions, or alternatively, that employers will cooperate voluntarily with unions in order to eliminate "unfair competition".

With respect to the question of broader-based bargaining, while it exists as a potential element in the model of juridical extension, there is no necessary relationship between decrees and broader-based bargaining. To the extent that bargaining does actually take place at a sectoral level, it is a voluntary, informal and wholly unenforceable process which is always subject to the overriding interests and concerns of the state. Although it usually does, a decree need not have involved multi-employer bargaining. The basis of the decree system is the originating collective agreement, and this can be entered into by any number of parties, including one employee association and a single employer. In its 1985 report, the Beaudry Commission was at pains to stress that a decree does not and should not amount to multi-employer

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[93] J. Bernier, 1986, op cit

[94] G.Roy, Beaudry Commission op cit.

certification.

The extent to which the decree system has reproduced fragmentation instead of mediating it also bodes poorly for its broader-based bargaining potential. In the garment industry, decrees have simply reflected and perpetuated the sectoral fragmentation which exists within the industry, within the labour market, and within the union movement.

For example, in 1983 nine out of a total of 53 decrees in Quebec applied to the garment industry. [95] The decrees were divided according to the kinds of clothing being produced: hence, there were decrees for Ladies Clothing, Men's Clothing, Handbags, Shirts, Leather Gloves, Ladies Hats, Men's Hats, Retail Fur and Wholesale Fur. As well, whole areas of the garment industry remained completely outside the decree system.[96] With the decline in employment and unionization in the industry as a whole throughout the 1980s and into the 1990s, [97] the number of decrees has also dropped - first, to six and, more recently, to four [98]. Instead of representing a consolidation of decrees, this decline is primarily the result of smaller unions gradually giving in to the pressures imposed on them by employers to deregulate and abandoning the decree system[99].

The decrees also reproduce the gender and racial/ethnic segmentation of the labour market - this is clear from the detailed manner, which is particularly pronounced in the Men's Clothing decree, in which different wage structures and conditions apply to different groups of workers depending on their skills and classifications. Inevitably, the cutters and pressers, who are predominantly male and members of more privileged ethnic groups, come out ahead of the operators and homeworkers, who are generally female and members of less privileged ethnic groups. [100]

Lastly, the decree system has in no way mediated inter-jurisdictional rivalries between unions in the garment industry. In 1982, there were six unions in the garment industry whose affiliations were split between three of Quebec's four union centrals [101]. Today the ILGWU, the ACTWU, and the Federation nationale des travailleurs de l'industrie du vetement dominate the industry, although smaller and weaker unions continue to exist. [102] Despite declining employment and de-unionization in the industry, these unions have not been prepared to consolidate or amalgamate, not even in a limited way to avoid

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95 H.Grant and R.Rose, op cit

96 In 1983 Children's Clothing, Ski Clothing, Knit Sweaters and Underclothing were not covered by decrees (Grant and Rose).

97 M.Cohen, 1991 ; C. Lipsig-Mumme, 1987.

98 G.Roy op.cit.

99 G. Roy, ibid.

100 C. Lipseg-Mumme, 1987., op cit.

101 C. Lipseg-Mumme, 1982.

102 G.Roy, op cit.

administrative duplication and reduce overhead costs. [103] Indeed, the unions will not even agree to form a council of unions in order to engage in consolidated bargaining with employers in the garment industry as a whole.

Contrary to what many might like to believe, the decree system does not present a straightforward solution to the crisis in the labour movement. By itself the statutory framework of juridical extension cannot reverse the decline in unionization nor introduce broader-based bargaining. However, it does provide a worthwhile and instructive model for establishing and maintaining labour standards across a sector and, in this light, should be seriously taken into account in any law reform project seeking to protect and empower homeworkers in the garment industry.

It is important to note that the Quebec government has recently announced its intention to revise CADA.

III. PROPOSALS FOR BROADER-BASED BARGAINING IN BRITISH COLUMBIA

a) Overview

British Columbia has a history of providing legislative support for broader-based bargaining, although that support has been substantially weakened since the mid-1980s. From 1974 to 1984, the B.C. *Labour Relations Code* provided for a relatively strong form of multi-employer certification. The legislation permitted unions to sweep employees of a particular employer into a multi-employer bargaining unit as long as the overall majority of the employees of all the employers supported the union. In 1984 the legislation was amended such that multi-employer certification requires the consent of majority of the employees of each employer, in addition to an overall majority of the employees, before a multi-employer unit can be certified.

Bill 84, a new Labour Labour Relations Code, was introduced into the British Columbia legislature on October 27, 1992. The Bill's introduction was preceded by eight months of public hearings and study conducted by a team of special advisors. A sub-committee composed of three of these advisors[104] prepared a report for the Minister of Labour , containing proposed labour law reforms which were formulated on the basis of the consultation and study. The report included a Draft Labour Relations Code. One of the central recommendations of the majority of the sub-committee which was included in the Draft Code was that a sectoral certification procedure be created to deal with the problem posed by sectors have been "historically underrepresented" by trade unions. This was one of the few recommendations in the sub-committees report on which consensus was not achieved; the employer representative's opposition to sectoral certification was attached in an appendix to the report. Because of the failure to achieve unanimity, the sectoral certification procedure was not contained in Bill 84. Despite this, the Draft Code provides a useful model of broader based bargaining which bears examination.

b) Sub-Committee Recommendations

The sectoral certification provisions recommended by the majority of the sub-committee would only be

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[103] G. Roy, op.cit.

[104] A Report to the Honourable Moe Sihota, Minister of Labour, Recommendations for Labour Law Reform, John Baigent (labour representative), Vince Ready (from the Ministry of Labour)and Tom Roper (employer representative), September 1992.

available in sectors which are determined by the Labour Relations Board to be historically underrepresented by trade unions and where the average number of employees at work locations within the sector is less than 50. To determine this, the Labour Relations Board would be required to hold public hearings and accept submissions not only from the parties, but other employers and unions within the sector. A sector would have two characteristics: a defined geographical area (e.g., Burnaby, the Lower Mainland or the entire province) and similar enterprises within the area where employees perform similar tasks (e.g. preparing fast food, child care, picking fruit, or pumping gas). For example, a sector could consist of employees working in the fast food outlets in British Columbia.

The amendments also proposed that to be certified a union would have to establish sufficient support at each of the locations it wished to represent, as will as winning a vote conducted amongst all of the employees from all of the locations. These amendements would eliminate the possibility, which existed between 1973 and 1984, that employees at one location could be swept into a bargaining unit against their wishes.

Bargaining would take place between the union and the employers of the employees who have become certified - thus, obliging these employers to bargain together. Bargaining certificates might be varied by the Board to include additional workplaces only where sufficient support at the new location was demonstrated. Once included, the existing collective agreement would apply to the new workplace (until all of the prties next met for renegotiation of the agreement). The Labour Relations Board would have the power to alter the general collective agreement to fit the needs of a specific workplace.

Somewhat surprisingly, the Draft provided no indication of what was supposed to satisfy a board that a proposed unit was appropriate for certification. It appears that this determination was meant to be made on the basis of whatever submissions were received during public hearings,

c) Comments

While this proposal, if enacted, would have been a step in the direction of facilitating the organization of historically underrepresented small workplace sectors, it would have been a very modest step. Increasingly workplaces are very small. Thus, to avoid having a multiemployer certificate apply to a particular small workplace all that would be needed would be a handful of employees at a couple of workplaces voting against representation to ensure that a union or a coalition of unions did not represent all of the workplaces in a particular sector. This would place a premium on organizing to defeat unionization in a couple of small workplaces, despite the fact that the overwhelming majority of workers in the sector wanted to be unionized. Thus, there would be real problems in adapting this model to the garment industry or to domestic workers.

In addition, the failure of the B.C. government to legislate such modest reforms suggests that business concerns to keep the single workplace as the centre of labour relations are given overwhelming preference over the majority of employees' choices of how to organize and bargain.

IV. BARGAINING IN THE CONSTRUCTION INDUSTRY IN ONTARIO

The construction industry provides a useful model for broader based bargaining because it is structurally similar to the garment industry. A purchaser of construction hires a general contractor to coordinate the entire project. The general contractor subcontracts to specialised contractors who obtain materials and equipment and who direct employees from one or two trades in the completion of a particular phase of a project (excavation, structure, mechanics, finishing). As jobs are of short duration, employees are not strongly affiliated with a single employer or a single worksite. Their primary connection is to the practice of their trade. A high degree of coordination between trades is necessary for the production to proceed smoothly.[105]

Collective bargaining in the industry accommodates this structure. The construction industry is divided into seven sectors. The industrial, commercial and institutional sector (ICI sector) is governed by mandatory single trade, multi-employer, province-wide bargaining. The six non-ICI sectors are governed by regional bargaining between one or more trades and one or more employers.[106]

Certification reflects labour mobility and flexibility by including in a certificate all operations of a single employer, in a single sector, everywhere in the province or designated region. Off-site employees may be included in the bargaining unit with on-site employees where they have a community of interest.[107]

Expedited certification procedures set an early terminal date, do not require a hearing, and allow the Board to dispose of the application without further notice to the employer if the employer fails to file a reply by the terminal date. A build-up or decrease in the workforce after the application date is irrelevant to the success of the application. There is no statutory "cooling off" period in the event of an unsuccessful certification attempt. And voluntary recognition is permitted.[108]

To facilitate province-wide bargaining in the ICI sector, after consultation with the employers and unions affected, the Minister designated one employer bargaining agency and one employee bargaining agency to hold exclusive bargaining rights in each trade. The employer bargaining agency represents all unionised employers in a single trade. Employer associations may voluntarily seek accreditation in the non-ICI sector.

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105 See Patricia Hughes, "Province-Wide Bargaining in the Construction Industry: The Legal Framework" in Construction Relations Law, Alan Minsky, Warren Winkler and Harry Freedman, eds. (Toronto: Law Society of Upper Canada, Continuing Legal Education, February 1989) A-1 at A-4.

106 OLRA, s. 119(f): The non-ICI sectors are: residential, roads, sewers and watermains, heavy engineering, pipelines and electrical power systems. For certification see, ss. 121 and 146.

107 OLRA, s. 119(b).

108 See OLRA, ss. 104(14), 5(3), and 146(4); R.R.O. 1990, Reg. 686, ss. 90-99; Sack and Mitchell, Labour Board Practice at 601-603; Harold Caley, "Certification in the Construction Industry" in Construction Relations Law at B-1-3 to B-1-5, B-1-9 to B-1-10.

These broader-based bargaining agencies negotiate provincial (ICI) or regional (non-ICI) agreements. Strikes and lockouts must occur on a province-wide basis. And because members may not negotiate or form agreements outside of the master agreement, replacement workers are prohibited. Provincial agreements expire every second year on 30 April.[109]

The provincial or regional agreements bind the employer bargaining agency, all member employers, the employee bargaining agency and all member union locals. Any newly unionised employer will automatically be bound by the provincial agreement. Employees are referred to projects through hiring halls administered by union locals. Locals also handle grievances. The *OLRA* provides an expedited grievance procedure.[110]

a) Is the Model Transferable to the Garment Industry?

On its face, this legal framework for bargaining appears readily transferable to the garment industry. But, while they are structurally similar, the garment industry may lack the visibility and economic power which underpin construction's ability to use the system effectively. While not immediately transferable, this model does provide useful precedents from which to design a system of broader-based bargaining. Certification, bargaining and contract enforcement are analysed separately.

b) Certification

The *Industrial Standards Act* designates six garment industry sectors.[111] At present, homeworking is confined primarily to the women's dresses and sportswear sector, where materials are light and collections are diverse but on short production runs.[112] Perpetuating the present sector designation would reflect both the fact that different unions have organised in different sectors, and the fact that individual subcontractors tend to work exclusively in one sector. However, the dominant retailers like Hudson Bay Co., Eatons and Dylex control 40% of the retail market and operate in all sectors. While designating the entire industry everywhere in the province as a single sector would reduce worker fragmentation, present no additional barriers to organising because of homeworkers' current sectoral concentration, and ensure that future homeworkers in other sectors would be covered by any certificates that are won now, it would not be possible to impose such a structure at this time. Neither the unions involved in the garment industry nor the employers have seriously contemplated this form of consolidation. Thus, for the time being, certification would have to reflect the existing chains or production or sectors in the industry, although each sector could be certified on a province-wide basis.

Construction unions have found province-wide certification valuable because it permits worker mobility while restricting employers' ability and incentive to relocate to avoid certification. In order for certification to be meaningful, however, the employer must be relatively large and stable. Construction unions often organise

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[109] OLRA, ss. 124, 127-129, 133, 141, 148 and 150.

[110] OLRA, ss. 126, 131, 144 and 149; R.R.O. 1990, Reg. 686, ss. 124-129.

[111] R.S.O. 1990, c. I-6; R.R.O. 1980, Reg. 510, s. 4. The sectors are: fur, ladies' cloak and suit, ladies' dress and sportswear, mens' and boys' clothing, mens' and boys' hats, and millinery.

[112] A. Dagg interview, 20 November 1992.

only the subcontractors.[113] The Carpenters have successfully organised general contractors. But, with 85% of their ICI workers unionised, they can pressure purchasers and general contractors to recognise the union by guaranteeing that, without union work, large projects would not get built.[114] The garment industry does not have the high union density needed to force top-down certification. Instead, it faces the same obstacles to bottom-up organising that many construction unions do because it is difficult to legally recognise subcontractors and contractors as related employers.

Two companies will be declared legally related employers if they have common ownership and financial control, common management, and interrelated operations, if they represent themselves to the public as a single enterprise, and if they exercise centralised control in labour relations.[115] In practice, the employer is the company which pays the employee. This is usually the subcontractor.[116] To exact meaningful certification in the garment industry, the related employer definition must be extended so that functionally dependent subcontractors are deemed related employers of jobbers and manufacturers. A useful definition was endorsed by the California State Legislature in 1990 to encompass "every person engaged in the business of garment manufacturing who contracts to have garment manufacturing operations performed by another person". A less industry-specific definition could provide that,

> an employer who contracts with a subcontractor or subcontractors to hire employees to work in their homes at the manufacture, preparation, improvement, repair, alteration, assembly or completion of any article or thing which is integral to the operations of the employer's business will be deemed to be the employer of those homeworkers.

Without such an extended definition, in practice, homeworkers will be left to organise the highly unstable subcontractors.

Construction unions have found organising on a province-wide scale difficult because most employers operate several sites. However, many industry-specific features minimize this inconvenience. The hurdle faced when organising large numbers of workers is overcome by timing applications for periods of low employment which are common to the industry (winter, weekends). Meanwhile, the obstacle presented by dispersed workplaces is mitigated because both the physical visibility of construction sites, and the semi-public bids that determine which contractor will work on a project, allow construction unions to identify where particular employers are working and what kind work they engage in. Because skilled trades workers must register and hold a renewable certificate of qualification in order to work in the province, unions can identify potential union members.[117] Moreover, subcontractors are often former trades workers and many voluntarily recognise the union out of loyalty. Alternatively, because provincial agreements prohibit

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[113] Interviews with Graeme Aitken, formerly with IBEW (24 November 1992) and Ron Davis, formerly with the Labourers, (19 November 1992).

[114] Interview with John Cartwright, UB Carpenters (27 November 1992).

[115] OLRA, s. 1(4); Century Store Fixtures Ltd., [1990] OLRB Rep. November 1119.

[116] Aitken and Davis interviews; Century Store Fixtures.

[117] Trades Qualification Act, R.S.O. 1990, c. T-17, s. 10; Aitken interview.

non-union subcontracting, subcontractors will recognise the union to qualify for a project.[118] Finally, potential members are easily persuaded to join a union because the wages, benefits and conditions of the provincial agreement can be guaranteed without a strike.[119] None of these advantages is present in the garment industry. Homework is highly dispersed, but the workplaces are invisible. There is no provincial agreement. And unless permits are strictly enforced, it is virtually impossible to monitor when and by whom homeworkers are employed.

In construction, off-site employees are rarely included in a bargaining unit with on-site employees. Community of interest has been defined narrowly so only employees who regularly spend time on-site, or who are engaged solely in bringing work to the site are included.[120] But the off-site provision need not be construed so narrowly in the garment industry. The legislated definition could be expanded to encompass off-site employees engaged in substantially the same processes as on-site employees. The homeworker permits establish a precedent on this point. They provide that homeworkers shall not be remunerated at rates below those which prevail in the shop of the owner of the goods.[121] A broad inclusion provision would reduce worker fragmentation and reduce employers' incentive to increase homework at the expense of stable factory jobs.

Sectoral designation, province-wide certification and off-site employee provisions, then, hold promise for investigating homeworker access to collective bargaining.

c.) Bargaining

Province-wide broader-based bargaining in the garment industry would be most profitably organised on the basis of ministerially designated employer and employee bargaining agencies. Ideally there would be a single bargaining agency for employers and unions, and government consultation with affected parties would precede designation. Encouraging voluntary accreditation would be a less valuable option. This is substantiated by the fact that accreditation in the non-ICI sector occurs only haphazardly. While multi-employer bargaining is frequent in the carpentry trade, single trade-single employer-single region bargaining dominates in the electrical trade.[122] Accreditation is less stable than designation because when economic conditions favour employers, they may move for de-accreditation in order to pursue individual agreements.[123] Most importantly, though, garment industry employers do not have the same historical incentive to bargain collectively that construction employers did.

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118 Roy Filion and Maureen Fitzgerald, "Voluntary Recognition in the Construction Industry" in Construction Relations Law, B-2-1; Aitken interview.

119 Aitken, Davis and Cartwright interviews.

120 Sack and Mitchell, Labour Board Practice at 595; Aitken interview.

121 Robert M. Parry, Employment Standards Handbook, 2d ed. (Aurora, Ontario: Canada Law Book, 1992) at 4-2.

122 Aitken, Cartwright and Davis interviews.

123 OLRA, s. 132; Davis interview.

Because close coordination between trades is crucial to complete a project, prior to the 1977 imposition of broader based bargaining, many construction employers had voluntarily formed employer associations both within and across trades. Mandatory broader based bargaining was imposed on the industry at the request of employers to combat union strength after unions engaged in a series of disruptive strikes in the 1960s, whipsawing and leapfrogging employers for better settlements. The present legislation merely codified the informal system which employers had developed voluntarily.[124] The garment industry is not interdependent in the same manner. Small manufacturers and subcontractors may have an interest in stabilising competition. But it is profitable for large manufacturers and retailers to keep wages in competition because, with low unionisation rates, and high levels of competition between subcontractors, they can pit subcontractors and groups of workers against each other to suppress wages.

Province-wide strikes have proven to be a powerful tool in construction industry bargaining. Although the number of strikes has decreased since the introduction of mandatory broader based bargaining, the number of workers involved and the number of work days lost to strikes has increased. Increased strike strength has won construction workers annual wage and benefit increases higher than the average in all other industries.[125] Maintaining province-wide solidarity has not been a problem for unions. Union solidarity is reinforced by the fact that the employers' association can bring unfair labour practice grievances against any employer who breaches the provincial agreement by negotiating a replacement worker contract.[126] The high visibility of construction sites enables both unions and employers to monitor compliance with provincial strikes and lockouts.

Although province-wide strikes may be valuable for garment workers, they would be harder to enforce and may not have the same impact. It would be difficult to monitor whether homeworkers were working and the isolation of homeworkers would leave them vulnerable to employer pressure to work through a strike. Similarly, it would be virtually impossible to discover whether employers hired replacement workers during either a lockout or strike. At a more general level, low union density renders a province-wide strike less debilitating to the industry. Ultimately, province-wide construction strikes are extremely powerful because production in that industry cannot be transferred out of province or off-shore. By contrast, garment production can be transferred very easily, either from factory to home production, between homeworkers, to Quebec, or, in the end, off-shore.

Finally, province-wide negotiating raises important issues of union democracy. When wages, benefits and conditions are set on such a broad scale, they become dissociated from the demands of regional markets.

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[124] George Adams, Canadian Labour Law: A Comprehensive Text (Aurora, Ontario: Canada Law Book 1985) at 895-905; Adams, Review of Province-Wide Single-Trade Bargaining Process in the Industrial, Commercial and Institutional Sector of Ontario's Construction Industry (Study submitted to Hon. Robert Mackenzie, Ontario Minister of Labour, 18 July 1991) at 3-13.

[125] Joseph B. Rose, "Legislative Support for Multi-Employer Bargaining" (1986) 40 Industrial and Labor Relations Review 3 at 8-9; Rose, "Construction Labour Relations" in Union-Management Relations in Canada, John C. Anderson and Morley Gunderson, eds. (Don Mills, Ontario: Addison-Wesley, 1982) 398 at 412-416.

[126] OLRA, s. 148(2); Davis interview.

At one level, this may lead to the union "pricing itself out of the market" and losing jobs to non-union shops.[127] At another, union stewards become less accountable to their local membership.[128] These problems could be addressed by legislating regional representation in bargaining and ratification. Bill 80 attempts to address these issues in the construction field.[129]

d.) Contract Enforcement

Construction's legal framework which identifies who is bound by the agreement, grants locals carriage of grievances and provides an expedited arbitration procedure can be transferred intact to the garment industry. Yet, even with these provisions, construction unions find it difficult to monitor contract compliance. Without additional legislative enactments, the relative invisibility of garment production would render enforcement even more difficult in this industry.

Widely dispersed worksites and short duration jobs hinder construction unions' ability to monitor compliance with provincial agreements. Unions do not have the resources to undertake effective on-site regulation. Instead they rely on individual employees to call the union local with complaints.[130] Alternatively, hiring halls grant "super-seniority" to union stewards (keeping them permanently at the top of hiring hall lists) in an effort to send a steward to each worksite.[131] Still, the irregularity with which many subcontractors operate in the field enables them to avoid contract compliance. A contractor may direct one project and get unionised, but not operate another project for three years. Unless a union member stumbles across the site or someone reports it, it is impossible to ensure the contractor does not take on non-union jobs.[132]

Inspections of homeworkers' job-sites would be an onerous task given the multitude and dispersal of homes. Moreover, such inspections would raise concerns about domestic privacy. Where workers operate in a common setting, they see how their co-workers are treated, view their conditions, and compare notes on remuneration. Their collective presence and ready access to a co-worker/steward provides the support that is critical to launching a grievance.[133] Homeworkers are isolated from these advantages. As a substitute, homeworkers could be provided with phone-trees of geographically proximate co-workers. More

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127 Adams, ICI Review at 14-16; Cartwright and Sobel interviews.

128 Aitken, Cartwright and Davis interviews.

129 Bill 30, An Act to amend the Labour Relations Act, 2d Sess., 35th Leg. Ont., 1992.

130 Cartwright and Davis interviews.

131 Davis interview.

132 Cartwright interview.

133 Cindy Sinclair, P.S.A.C., A Conference on Homeworking, Toronto, 13 November 1992.

valuable would be a legislative enactment requiring employers to send remittance slips to the union,[134] or granting business managers the right to inspect all books, payrolls and records related to homeworkers' wages, hours of labour or conditions of employment.[135]

Finally, construction unions are able to control the supply of labour through hiring halls and through contract clauses which require that off-site production be done by union workers and bear a union label.[136] The garment industry could require that production by homeworkers bear a union label. Ultimately, though, a hiring hall must be instituted which can limit employers' access to homeworkers. This could be achieved by granting the hiring hall, or a joint employer-union subcommittee, exclusive power to issue homeworker permits and so to control the spread of home-based production. Hiring halls could also play active roles in shaping the nature of homework. Pro-rated priority systems could be instituted to ensure an equitable distribution of work between homeworkers.[137] And the hiring hall could draft statements, similar to the *Industrial Standards Act* sectoral schedules,[138] outlining the work which is within the jurisdiction of homesewers. This would allow the union to make visible and remunerated those aspects of homeworking (hand finishing, learning new patterns) which are currently unpaid.[139]

e.) Comments

The success of broader based bargaining depends on all employers being part of it whether it be on a province-wide or a regionally-wide basis. With mandatory province-wide bargaining all unionized employers are automatically brought into the system. Accreditation in the non-ICI sector provides for the possibility of having all employers covered but the decision on whether to go the accreditation route is left to the employers. Leaving it to the employers would be problematic in a sector where employers are not inclined to come together on their own. In the garment industry today, employer bargaining structures have become quite fractured. The experience in the construction industry shows that employers will support broader based bargaining when they see it as being in their interests to do so. Employers who do not want to be at a competitive disadvantage in relation to competitors who pay less benefit from this form of bargaining. The certification procedure does not address subcontracting. In the construction industry that is handled by collective agreement clauses barring employers governed by the agreement from engaging non-union subcontractors.

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134 Some unions have negotiated this requirement: Aitken, interview.

135 The Trades Qualification Act, s. 7 grants this right to the Director of Apprentices.

136 Aitken interview.

137 See Dorothy Sue Cobble, "Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism" (1991) 44 Industrial and Labor Relations Review 419 at 424. The IBEW's hiring hall attempts to distribute jobs equally to its members: Aitken, interview.

138 See for example, R.R.O. 1980, Regs. 518-520, 522.

139 See Cobble, "Waitress Unionism" at 422-423.

PART F PROPOSALS FOR SECTORAL REGULATION AND BROADER BASED BARGAINING FOR DOMESTIC WORKERS AND HOMEWORKERS IN THE GARMENT INDUSTRY

I INTRODUCTION

As was noted in the discussion in Part D, it is absolutely essential to develop and implement an integrated approach to the regulation of terms and conditions of employment for live-in domestic workers and homeworkers in the garment industry. Sectoral regulation is the first step to such an approach, as it would by-pass individualized bargaining and establish the conditions necessary for true collective bargaining. Sectoral regulation must not only be designed to provide for effective regulation of the live-in domestic and garment sectors, but it should lead to effective self-organization and collective bargaining. After effective sectoral standards are introduced, it is then necessary to move towards mandatory broader-based bargaining.

The threshold issues are where to place the legislative sectoral regulation scheme and how to approach sectoral regulation. While, as discussed in Part E, the *Industrial Standards Act* currently provides for sectoral regulation in the garmenty industry, its provisions are clearly inadequate. In part, this is because the regulatory scheme provided in the ISA has been overtaken by the scheme of "universal" regulation provided in the *Employment Standards Act*. Moreover, because the ISA is confined to the garment industry which is perceived as a sunset sector there is little political attention on the legislation. For these reasons, the ESA should be amended to provide for sectoral regulation of specific sectors.

For a long time it has been obvious that the ESA is in need of major revision.[140] We are proposing that the ESA be amended to provide for regulation of specfic sectors. General definitions and an over-arching framework would be provided in central sections of the ESA. As well, a mechanism would be implemented which would trigger specific regulation of a sector. In this report we will be confining ourselves to the live-in domestic and garment sectors. In addition, we will separate out the recommendations relating to sectoral regulation and mandatory broader-based bargaining. While we believe that the two regimes are essentially linked, we recognize that for reasons of political feasibility it may be necessary to begin with sectoral regulation before moving to the second stage of the agenda.

In developing our recommendations, we have drawn both upon the models described in Part D and foreign examples where relevant. While legislation is not sufficient to ensure decent and fair wages and working conditions for domestic workers and homeworkers in the garment industry, we believe it is a necessary first step. Moreover, the legislation must be clear in its intent since "[l]egislative ambiguity results in litigation which is costly and a burden on the worker."[141]

While there are many similarities between the situation of domestic workers and homeworkers, there are also significant differences.[142] Isolation and dispersion intensify the weak bargaining position of both of these workers. However, for foreign domestic workers the main problems which they confront are

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[140] In 1976 the Minister of Labour announced that thee would be a wholesale review of the Employment Standards Act. Since that time there have been a number of ad hoc changes, but no thoroughgoing review, despite the fact that since 1976 each of the three main parties have been in government.

[141] Luz Vega Ruiz, "Home work; Towards a new regulatory framework? 131 International Labour Review 197 (1992) 197.

[142] See Part A, Section V.

attributable to the requirement that they live in their employers' home and their tenuous immigration status. While employment agencies do exist in this sector, they do not play the same role in depressing wages and working conditions as do retailers and jobbers in the garment industry. For homeworkers in the garment industry, on the other hand, it is the vertical chain of production and the competition between subcontractors which results in the steady deterioration of these workers' wages and conditions. Thus, while it is possible to identify and design common elements of a regulatory model which are attributable to both kinds of workers, it is important to develop sector specific recommendations.

According to the International Labour Organization (ILO) meeting of Experts on Homeworkers, there are three essential elements for the effective regulation of domicile-based production: registration, legislation, and enforcement.[143] This is equally true for domestic workers. Both of these kinds of workers need to be made visible as a pre-condition for effective legislative regulation and self-organization.

Recognizing this, the ILO meeting of experts recommended the following:

> (12) All necessary measures should be taken to ensure the effective enforcement of national laws and regulations. The registration of homeworkers and of those who employ them is desirable both for effective enforcement and the provision of protective and support services.
>
> (13) In view of the special difficulties encountered in the enforcement of legislation on home-based workers, effort should be made to reinforce traditional inspection and enforcement instruments through various measures. These could include: access to legal services and inspection at the national and local level; encouraging and involving trade unions, employers' organizations and other non-governmental organizations; dissemination of information among homeworkers of their legal rights, including through such methods as brochures prepared in accessible language of the relevant laws and regulations; and, establishment where appropriate of an office of industrial ombudsman which can monitor conditions and serve as an arbiter of complaints.[144]

These recommendations apply with equal force to homeworkers and domestic workers. Moreover, making domicile-based employment visible will not only benefit the workers involved, it will also benefit those employers who already adhere to the law and will ensure that the state can better achieve its own fiscal policies. It is also a step towards identifying and valuing women's traditional work.

The ILO meeting of experts identified clandestine homework as a major problem:
The economy had to abide by the rules and the employers and workers had to respect the law. Not only was there illegal competition between employers but there was also competition between workers in enterprises and homeworkers. Clandestine homework was also damaging to the State in that it undermined fiscal policies and could have a negative effect on the national and international economy.[145]

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143 Report adopted by the Meeting of Experts on October 1-5, 1990 at its 244th Session (November 1989) the Governing Body of the ILO authorized the Director-General to prepare and convene a Meeting of Experts, 74.

144 Ibid, 90.

145 Ibid., 81.

Clandestine work results in the avoidance of a range of important federal taxes, such as income tax, Canada Pension Plan and Unemployment Insurance contributions, and provincial taxes, including the health tax, as well as reliance on schemes like the Wage Protection Fund, which attempt to compensate workers for wages owing.

Unlike domestic workers, homeworkers in the garment industry confront a range of problems which result from the structure of production in the sector. Not only is an inclusive and clear definition of a "homeworker" needed, the problem of intermediaries must be addressed. For this reason, contractors, as well as homeworkers, must be registered. Moreover, since contractors are in the main simply responding to competitive pressures created by jobbers, manufacturers and retailers, there must be a system of joint and several liability which imposes legal responsibility on those who are higher up in the chain of production who benefit from the conditions which lead to the exploitation of homeworkers.

In what follows, specific proposals for sectoral regulation and mandatory broader based bargaining for live-in domestic workers and garment homeworkers will be offered.

II. EFFECTIVE SECTORAL REGULATION

a.) Designation of Sectors

Sectors should be designated for the garment industry and for domestic service. Designations would cover all employers and employees in a sector.

Domestic Sector

There would be two sub-sectors within the domestic service sector - one for live-in and the other for live-out. These sub-sectors would comprise all householders and employment agencies who employ or contract with domestic workers and their zones of regulation would be province-wide.

Garment Industry

The garment industry has historically been divided into a number of sub-sectors, marked by different forms of production, with different unions representing the workers in the various sectors. For the purposes of establishing effective sectoral standards regulations, the Minster of Labour should establish a Council of Unions and a Council of Employers. A representative meeting of the various unions and employer associations should be convened by the government to negotiate the basic standards in the industry.

b.) Standards to be Regulated

The standards to be regulated for both domestic workers and homeworkers would include wages, hours of work, overtime, paid holidays and statutory holidays. It should also be permissable to negotiate benefits like pensions, insurance, medical and dental plans.

c.) How Standards Would Be Set

(i) Tri-Partite Committee

A tri–partite committee would be set up in each sector with responsibility for setting labour standards. The

committee would have equal employer and employee representation and be chaired by a neutral government official.

The Committees would also be responsible for enforcing and maintaining standards, assisting in administering the Act and regulations, dealing with complaints, administering a central registry, hiring inspectors, initiating prosecutions under the Act, and administering any sectoral benefit plans.

(ii) Setting up the Tri-Partite Committees

Employee Representation

Domestic Sector

As the key advocacy organization for domestic workers, INTERCEDE should play a prominent role on the committee. As INTERCEDE primarily represents live-in workers on the foreign domestic or live-in caregiver programs, it would be good, if possible, to also have representation from domestic workers who live out. Once a union is organized, it would also be represented on the committee. Legislation should simply specify the total number of employee representatives and leave the composition of that representation and the nomination process open.

Garment Industry

The Committee in the garment industry would be made up of nominees from the three unions which operate in that sector. The union nominees could be union representatives but it would be open for a union to nominate a non-unionized worker, for example a homeworker from the Homeworkers' Association or a member of the Homeworkers Coalition.

Employer Representation

In order to ensure that a system of sectoral regulation works, that it enjoys legitimacy among employers, and that it can be said that the standards negotiated are representative, it is important to have some kind of organized mechanism and organizational base from which to nominate employer representatives. Manufacturing guilds used to play a key role in nominating employer representatives to the garment industry Advisory Committees. However the guild structure has largely broken down and it has become harder to find employer representatives to replace retiring members.

Given the fact that employer organizations are breaking down in the garment industry and the fact that there has been no history of employer organizations in the domestic sector, a legislative push would be required to promote the formation of such organizations. The fact that a serious attempt is to be made to regulate and enforce standards on a sectoral scale might impel employers to see it as being in their interests to get organized. However, this process is unlikely to occur spontaneously without some kind of push.

One option is to require employers to form appropriate organizations within a specified time frame and offer assistance to facilitate this process. Another option is to keep it voluntary but make it clear that employers will all be bound by what's negotiated so it's in their interests to get involved in an organized way. Again assistance could be made available and consultations with employers should be conducted to determine the best method of proceeding.

The associations would be responsible for nominating representatives to negotiate on behalf of all employers the schedules of wages and standards. All employers would have the right to join but would not

be required to. Associations would develop internal mechanisms to ensure accountability, inner democracy, and consultation around standards issues.

d) Negotiation and Enactment of Standards

Negotiating Standards

Within six months after the tri-partite standards committees are set up they would be responsible for entering into a process of negotiation around a schedule of labour standards. With regard to the frequency of subsequent negotiations, two options are available. Legislation could either specify that such negotiations are to take place at specified intervals (e.g., annual or bi-annual) or it could simply be left to either party to initiate the process. In either case, deadlines would be set for the different stages of the process to ensure matters proceed expeditiously.

A binding dispute resolution system should be provided as a back-up in the event that a deadlock cannot be broken within a certain period of time.

In order to ensure a link between labour standards and collective bargaining, it should be specified that negotiations around labour standards are to take account of wages and conditions achieved for unionized workplaces in the sector.

Enactment of Standards in Law

Since the product of all this will be statutory standards governing the entire sector, the government must give final approval to the schedules and enact them as regulations. Ministerial discretion to alter a schedule that's been agreed upon (or settled by arbitration) should be limited. In particular, there is a concern to avoid a situation where the Ministry comes back with lower standards than those the employers have agreed to as has been the case in the past under the ISA. Guidelines to structure the exercise of discretion might be considered. Time limits should be set on approval in order to avoid a situation where the schedules are outdated by the time they're approved. Proposed schedules should not be altered without consultation with the committee. Similarly, existing schedules should not be altered without the committee's concurrence.

e) Definitions

The definitions discussed below should be placed in the general definition section of the ESA. In this way, even if the provisons for sectoral regulation are not triggered, domestic workers and homeworkers would be entitled to the general standards applicable to all workers. Moreover, some of the definitions which we propose would clear up existing ambiguities and facilitate more effective enforcement of the legislation.

(i) Domestic Service Sector

Domestic Worker

The definition of "domestic worker" should be taken out of the regulations and placed in the main definition section of the ESA. The definition should be inclusive and drafted to dovetail with the federal governments definition of a live-in caregiver under the LCP.

Employer

The definition of "employer" as is presently provided in the ESA is suitable for employers of domestic workers.

(ii) Garment Industry - Homeworker

Homeworker

One of the most complex tasks is to characterize the nature of the employment relationship. This is because the traditional concept used to define it - "control" - is ambiguous; it can mean either direct supervision, which is its historical origin, or economic control. The problem with each meaning is that they are under- and over- inclusive. Although domestic workers are not directly supervised by their employers, the latter exercise a great deal of control by setting the piece-rate, establishing the deadlines for completion of work and determining patterns and fabrics. Moreover, it is clear that contractors economically control the homeworkers; but, similarly, retailers ultimately control the contractors. This notion of economic control is very wide-ranging.

In order to avoid the inherent problems which occur when "control" is used as the test of employee status, various legal systems have moved away from control to emphasize the situation of the parties with respect to the market.[146] From this perspective, homeworkers are viewed as having no direct contact with the market - even though the outcome of their labour is a finished product - since the relationship is not that of client and supplier but, rather, an employment relationship between the worker and one or more employers. The service provided is not in fact the finished product, but the work that goes into making it. In other words, the worker's obligation is essentially a personal one; it is an obligation "to act" (i.e. to perform a task) in return for a wage, rather than a simple "payment".

While there may be some injustice or difficulty at the margins in developing and/or implementing a definition of "homeworker", this is no reason for not legislating.[147] The ESA should be amended to include a list of definitional criteria such as the freedom to accept work, the degree of autonomy and control over the timing of work, control over the quality of work, etc. in order to distinguish an employment relationship from that of an independent contractor. Moreover, to prevent employers from attempting to characterize homeworkers as independent contractors in order to avoid legal standards, the onus should be on the employer to prove that the homeworker is not an employee.

It is important to provide an inclusive definition of homework and homeworkers within the Employment Standards Act. The following definition originates with a Private Members Bill, the Homeworkers (Protection) Bill, which was unsuccessfully introduced in the British House of Commons in 1979 and 1981.

This definition would not only include the variety of different forms of homework currently in existence but would also cover any new forms of homework. It specifically excludes professionals and small entrepreneurs who hire other workers.

> "homeworker" means an individual who contracts with a person, not being a professional client of hers, for the purposes of that person's business, for the execution of any work (other than the production or creation of any literary, dramatic, artistic or musical work) to be done in domestic premises not under the control or management of the person with whom she contracts, and who does not normally make use of the services of two or more individuals in the carrying out of that work, and in this Act work contracted to be executed by a homeworker is referred to as "homework".

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146 Ruiz, 201-2.

147 Keith Ewing, "Homeworking: A Framework for Reform," (1982) Industrial Law Journal 94, 102.

This definition would exclude a number of workers who work out of their homes. The main types of workers which it excludes are as follows:

1. Childminders, who, though a numerically large group, provide a personal service to another individual (the parent) in their own home, rather than "for the purpose of that person's business." While this work is extremely important, the regulation of this type of relationship requires a different approach.

2. Those working in their homes where the premises are owned or managed by the employer, such as domestic workers.

3. Those working on their own account who produce literary, dramatic or artistic work. Though frequently home-based, such people have greater control over the nature of the product and the marketing of their skills. This is not typical of the homeworker. Those excluded would include freelance journalists, artists and craftspeople.

4. Those working from home, including insurance agents and those involved in sales promotion, agency selling or market research. Their conditions of work vary widely and need to be seen in the context of the organization of commission selling, freelance work, self-employment and enterpreneurial activity. All these may warrant additional attention; however, they should not be confused with homeworkers as defined above.[148]

(III) Dependent Employer

To ensure the effective enforcement of minimum standards for homeworkers it is necessary to cut through the subcontracting pyramid and impose liability upon the dominant firms at the top. This can be done by defining a "dependent employer" as a firm, enterprise, individual etc, which is functionally dependent upon another firm, etc. and adding dependent employers to the related employer provision. In this way, joint liability for minimum standards could be imposed throughout the subcontracting pyramid. Moreover, a new provision should be added to the Employment Standards Act requiring firms to ensure that dependent employers are meeting their statutory obligations.

The Employment Standards Act should be amended to cover clearly the situation of "dependent employer". This would require that amendments be made to sections 1 and 12 of the Act.

Section 1 of the Act should be amended to read as follows [new material is underlined]:

s.1(d) "employer" includes,

(i) any owner, proprietor, manager etc
(ii) any associated or related corporations, individuals, sole prioprietorship, firms, syndicates or associations treated as one employer under section 12, where any one has control or direction of, or is directly or indirectly responsible for the employment of a person therein,
(iii) any dependent employer,

and includes a person who was an employer;

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[148] This defintion and discussion were adapted from Sheila Allen and Carol Wolkowitz, Homeworking Myths and Realities (London: Macmillan Educational, 1987) 49-50.

(da) dependent employer includes a corporation, individual, sole proprietorship, firm, syndicate or association that is functionally dependent upon another corporation, individual, firm, syndicate or association.

Section 12 of the Act should be amended to read:

s.12 related employer

(1) Where before or after this Act comes into force, associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings which are or were carried on by or through more than one corporations, individual, sole proprietorship, firm, syndicate or association, or any combination thereof, and a person is or was an employee of any of such corporations, individuals, sole proprietorships, firms, syndicates or associations,or any combination thereof, such corporations, individuals, sole proprietorships, firms, syndicates or associations, or any combination thereof, shall be treated as one employer for the purposes of this Act, if the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent and purposes of this Act.

(1a) dependent employers and the corporations, individuals, sole proprietorships, firms, syndicates or associations that are functionally dependent upon shall be treated as related activities under subsection (1).

(2) The corporations, individuals, sole proprietorships, firms, syndicates or associations treated as one employer shall be jointly and severally liable for any contravention of this Act and the regulations.

f) Employment Standards Benefits which Depend on Continuity of Service

In order to ensure workers are not deprived of employment standards benefits because they do not work long enough for one single employer, a worker would be deemed to have been continuously employed for the purposes of ESA benefits as long as she had worked in the sector. This would apply as long as her employment had not been interrupted for more than a specified length of time. The number of hours worked for various employers should be combined for purposes of overtime. Employers would pay a pro-rated levy into an employment standards benefit fund covering overtime premiums, severance benefits etc. Costs would be pro-rated to employers on the basis of number of hours worked. This information would be filed with the appropriate central registry.

g) Registration of Workers

(i) Central Registries

Central registries should be set up for homeworkers and domestic workers. Registration of all homeworkers and domestic workers would be mandatory. To ensure completeness, workers should be permitted to register. The legal standards which prevail in the sector under which the worker is registered should be sent to each worker on the registry. The registries would be under the supervision of the Tri-partite Standards Committees and the Ministry of Labour. Moreover, as was recommended by the ILO Committee of Experts, unions and/or advocacy groups should be given access to the registries to further ensure that minimum standards are adhered to.

These registries would not be employment agencies. Rather their purpose would be to provide a centralized list of workers in order to monitor and enforce standards.

Stiff penalties should be stipulated for non-compliance. This is especially important in the garment sector to give employers the message that they can no longer get away with illegal hiring and exploitation of homeworkers.

Domestic Workers Central Registry

The government should immediately establish a central registry for domestic workers as a specific part of the ESA. Employers of domestic workers would be under a legal obligation to register with the central registry. Upon registration, employers of domestic workers, whether they are employment agencies or individual householders, would be required both to provide the names and addresses of the domestic workers employed by them and to file a copy of their contracts of domestic employment with the registry. Failure to comply with the registration requirement would be sanctioned by the imposition of fines designed to deter avoidance on the part of employers. Moreover, to ensure that employers of domestic workers do not simply ignore the requirement to register, Canada Immigration and the Ontario Ministry of Labour should work out an agreement whereby the names of employers of domestic workers under the LCP are submitted on a regular basis to the central registry. Similarly, the two levels of government should enter into an agreement whereby the domestic workers and their employers are provided with information concerning the central registry at the earliest possible opportunity. Since Canada Immigration has the first contact with the vast majority of domestic workers and their employers, it is essential that immigration officers involved in administering the LCP transmit this information to the parties.

One possible concern with this proposal could be that a mandatory registration requirement would violate the privacy rights of both employers and domestic workers by providing a third party with their names and addresses. This concern does not constitute a compelling case against mandatory registration. Once an employer decides to hire a domestic worker, the employer's household becomes the workplace for the domestic worker and the employer should be under a legal obligation to register that fact with the appropriate agencies. Currently, employers relying on the LCP for domestic workers are required to register with Canada Immigration. The potential for abuse of employer privacy is not greatly increased by providing this information to a non-governmental agency which is required to operate within a specific mandate and a structure of democratic accountability. Moreover, there is a compelling public policy reason for mandatory registration. Domestic workers are extremely vulnerable to employer abuse unless they are provided with the information and means to enforce their legal rights. Unless a third party is provided both with the names and addresses of domestic workers and a legal entitlement to contact them, there is no way of ensuring that either that domestic workers are informed of their employment rights or assisted in enforcing these rights. Since any on-going contact between the central registry and a domestic worker would be at the choice of the domestic worker, any possible violation of the privacy rights of domestic workers would be minimal.

The agency operating the central registry should be entitled by law to contact the domestic workers registered with it for the purpose of explaining the registry's role and relevant employment-related legislation. This is absolutely essential if domestic workers are to be provided with adequate information of their legal rights. Currently, domestic workers tend to find out about INTERCEDE by word of mouth and it is likely that some domestic workers simply have no knowledge of INTERCEDE's existence. Compulsory registration of domestic workers names and addresses as well as a legal entitlement to contact domestic workers would solve this problem.

The central registry should be operated by the tri-partite committee appointed with respect to the live-in domestic service sector. It should be accountable to domestic workers and function as an agent for domestic workers both in enforcing terms and conditions of employment and employment-related rights.

As a first step, domestic workers should be legally entitled, though not compelled, to rely on the registry as an agent in dealing with any employment-related disputes with their employers. If a domestic worker chooses to be represented by the registry, her employer would then be under a legal obligation to deal with the registry, rather than directly with the domestic worker, to resolve a dispute.

In addition to acting as the agent of domestic workers, the central registry should provide counselling services for domestic workers much in the same way as INTERCEDE does now. Moreover, it could also establish group dental, life and accident insurance plans - benefits which domestic workers have already expressed an interest in obtaining. By establishing group plans funded by the voluntary contributions of domestic workers, the cost to individual domestic workers would be reduced since group plans typically are cheaper to administer and finance than individual plans.

Homeworkers' Central Registry

Any employer who hires a homeworker would be required to apply to the registry to obtain a permit. Jurisdiction over permits would be in the hands of the Tri-partite committee appointed for the sector and sub-sectors. The permit would be similar to that which already exists under the ESA, and would provide the terms and conditions which are required in the sector or sub-sector. Copies of the permit should be sent to the homeworkers who are registered.

Until mandatory broader-based bargaining for the garment industry is in place, the central registry could act as an agent for homeworkers. The registry would be operated by the tri-partite committee established for the specific sub-sector.

As is proposed for the domestic service sector, the central registry could act as an agent on behalf of workers who have disputes with their employers. The registry would also keep track of the homeworkers' service with different employers in order to ensure both that employers make their appropriate pro-rated benefit contributions and that homeworkers receive appropriate overtime pay and entitlement to benefits which require continuous service.

Currently, in Quebec, the Ladies' Garment Decree under the CADA requires that manufacturers and contractors register homeworkers in their employ. As well, the Decree requires that the merchandise that homeworkers work on bear the label which will ultimately appear on the garment. This is an important requirement, because it enables homeworkers and the registry to trace which entity is ultimately in control of the chain of production. Moreover, it dovetails with the following recommendations regarding the registration of contractors and joint and several liability.

Other Functions of a Registry

Registries could provide information on employment rights in different languages, provide counselling and advice, information and referrals to social services and advocacy services, and operate a drop-in centre.

In the event that minimum benefits packages were negotiated, the registry in a particular sector would administer that system. Employers would remit pro-rated amounts for each employee depending on how many hours they worked. Even if no benefit package is agreed upon, the central registry could be empowered to administer a group plan for employees who wish to become part of it. Employee reps on the advisory committee would consult with workers and be part of process of getting such a plan in place. The registry could also be a place where employers could advertise for workers. There could be a job board that people looking for work could consult.

h) Registration of Employers

Registration of workers, while an important start, is not sufficient to eradicate the abuse of vulnerable workers. It is also important to register the employers of domestic workers and homeworkers. The names and addresses of all employers, widely construed to include jobbers and employment agencies, must be provided to a central agency operated by the appropriate Tri-partite Committee. Not only would this help to keep track of problem employers and identify patterns of abuse, it would also provide essential information concerning the nature of the relationship between the various parties.

Domestic Workers

In the domestic service sector, both individual employers who employ domestic workers in their household and employment agencies would be required to register with a central agency. The purpose of this would be to keep track of employers to determine whether there are repeat problems. Employment agencies are already required to be licenced; however, as the discussion in Part A, Section III indicated, some employment agenices are involved in questionable, and possibly illegal, practices. Specific registration of agencies in this sector would improve the quality of monitoring and enforcement .

Garment

Because of the nature of production in the garment industry, it is absolutely essential to keep track of contractors, both for organizing purposes and for imposing liability for unpaid wages. All entities involved in the chain of production, from retailers and manufacturers, through jobbers, to contractors, should be required to register. The Men's Clothing Decree, issued under CADA, requires that employers must provide information concerning any contractors used to the Joint Committee. Such information consists of the name and addresses of contractors to whom they have sent work. Manufacturers have accepted this registration requirment since they are jointly and severally liable for wages owed to workers by contractors.

In Ontario, contractors and jobbers in the garment industry should be required to self-register. As a way of ensuring compliance, manufacturers should also be required to register any jobbers and contractors to whom they send work. Manufacturers could be provided with a two-fold incentive to comply with the registration requireents: the imposition of joint and several liability upon them for the wages, etc. owed by contractors (see the discussion below) and onerous fines. Jobbers and contractors who violate the registration requirement should also be subject to substantial penalties.

Manufacturers, jobbers and contractors should submit the following information to the appropriate tri-partite committee upon registration: business address, the type of production the particular firm is involved in and the CA labels of the garments it produces. This information should be updated on a regular basis.

To ensure that jobbers do not attempt to avoid the registration requirment, there should be a standard contract term implied into any contract for the supply of garments which requires jobbers to send work only to contractors who are registered. This provision would help to prevent the growth of clandestine contractors who seek to evade minimum labour standards.

A variation of this approach already operates in New York and New Jersey as a result of collective bargaining in the garment industry. Under the National Labour Relations Act in the United States, unions are allowed to picket jobbers in the garment industry so as to persuade them to sign the Hazantown agreement. This agreement, among other things, fixes piece rates, requires jobbers to pay disability benefits established by the state and pay contractors an amount sufficient to enable contractors to pay union rates, makes jobbers liable, to a limited extent, for contractors who default on wages, obligates

jobbers to deal only with unionized contractors and provides prior approval of contractors by the ILGWU.[149] The legality of this form of action and agreement was specifically upheld by the United States Court of Appeal in recognition of the special nature of production in the garment industry.

By contrast, in Ontario this form of picketing would be characterized as secondary, and thus not permitted. Rather than opening up secondary picketing, requiring jobbers and manufacturers to use only registered contractors would be a way of ensuring that more of the garment industry is not driven underground.

To further ensure that the registration requirements are not avoided, the Business Names Act[150] should be amended. This Act requires all businesses, broadly defined, which conduct business in Ontario, to register with the Ministry of Consumer and Commercial Relations as a requirement for being able to sue in the province. Individuals and corporations are required to register their business names and ensure that the information is up-to-date and accurate. In addition to this information, the Act should be amended to require each business to indicate its major field of activity. Thus, for example, individuals or corporations operating businesses in the garment industry would be required to indicate such. A standard list of business fields could be developed and subsequently entered on a computerized data base. Once that was done, the Ministry of Labour could search the data bank to determine which businesses were operating in the garment industry and cross-check that information against the sub-sector registries. Failure to register would lead to the imposition of fines.

l) Joint and Several Liability

Homeworkers

The imposition of joint and several liability through the chain of production in the garment industry is absolutely crucial to ensure that the wages and conditions of work of garment workers are not continuously undercut. As was described in Part A, Section IV, the risks of production are shifted down the pyramid from retailers to manufacturers to jobbers to contractors and, lastly to homeworkers, while control resides at the top.

Homeworkers are particularly vulnerable because contractors, who need little capital to begin business, operate in a highly competitive environment. Unable to make a profit, many go out of business without paying the wages and benefits owed to homeworkers. Moreover, it is important to recognize that entities higher up the pyramid or chain create the conditions which ultimately result in contractors defaulting on homeworkers. Imposing liability on those entities which control production is the only way to ensure that homeworkers receive what they are legally entitled to.

Joint and several liability within the garment industry is not new. In New York and New Jersey many jobbers have agreed to a limited form of joint liability for wages owed by defaulting contractors. This is one of the clauses of the Hazantown agreement. In California, Guess? Inc., a major multi-national clothing manufacturer, entered into a voluntary contract compliance with the Department of Labour to ensure that its numerous contractors did not violate legislated labour standards. Guess? Inc. collects weekly employment reports from its 100 contractors in the Los Angeles area to make sure that all goods were

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[149] See Joint board of Coat, Suit and Allied Garment Workers' Union, ILGWU and Hazantown Inc. (1974) 212 NLRB No.106, 735; Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, ILGWU (1974) 494 Fed. Rep. (2d) 1230 (2nd. Cir).

[150] S.O. 1990, c.5, in force May 1, 1991.

produced in compliance with the Fair Labor Standards Act.

In 1990 the California State Legislature passed a bill imposing joint and several liability on manufacturers for contractors who violated minimum standards law. Unfortunately, the bill was vetoed by the California State Governor. Guess? Inc. was prompted to take the action it did to avoid having the same bill retabled.

There are, moreover, various legislated examples of joint and several liability in the garment industry. Closest to home, such liability exists between manufacturers and contractors under CADA in Quebec. In the Philippines the following provision operates to ensure that homeworkers are not simply left without recourse because of absconding or bankrupt contractors:

> Whenever an employer shall contract with another person for the performance of the employer's work, it shall be the duty of such employer to provide in such contract that the employees or homeworkers of the contractor and the latter's contractor shall be paid in accordance with the provisions of this Rule. In the event that such a contractor or subcontractor fails to pay the wages or earnings of his employees or homeworkers as specified in this Rule, such employer shall be jointly and severally liable with the contractor or subcontractor to the workers of the latter, to the extent that such work is performed under contract, in the same manner as if the employees or homeworkers were directly engaged by the employer.[151]

The Netherlands goes even further than the Philippines in legislating joint and several liability. It does not stop with the manufacturer and jobbers, but imposes liability on the retailers for any violations of legal standards. This legislation is explicity premised on the understanding that retailers are responsible for the conditions under which garments are produced and should be made to account for this. Major retailers set prices, check quality, colour and delivery speed. If they can do this, they can also check on the working conditions and wages manufacturers and contractors are paying to homeworkers.

The definition of "dependent employer" proposed above goes some way towards imposing joint and several liability at each step in the hierarchy of the chain of production. Retailers who manufacture private label product lines are recognized as manufacturers. There is a case to be made that garment manufacturers could be found to be functionally dependent on retailers and thus liable to homeworkers for wages and benefits owed to them. However, to ensure that there is no ambiguity, liability could explicity be placed upon retailers. The best model for this is what is happening in the Netherlands under the "Charter of Fair Trade."

The Charter is a code of conduct under which retailers pledge to ensure that homeworkers receive basic legal rights and entitlements provided in minimum standards, collective bargaining, health and safety, and non-discrimination statutes which are available to other workers. The Charter is reinforced by a monitoring agency which has the power to sanction. Upon signing the Charter, retailers are entitled to display the clean clothes trademark. An agency, comprised of a coalition of worker representatives, investigates complaints and checks on information supplied by the retailer. The trademark is revoked if violations of the Charter are discoverd. Retailers are obliged to support the controlling institution financially by remitting a certain percentage of their turnover annually.

While it may be too early to adapt the "Charter of Fair Trade" and the Clean Clothes Trademark to Ontario's garment industry, there is no reason to delay imposing joint and several liability on manufacturers, jobbers and contractors in the province. Too many employers in too many sectors are failing to pay wages outstanding to employees. The brief experience of the Wage Protection Fund demonstrates that there is a grave problem with the failure of employers to pay wages owing. The Wage Protection Fund, although

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[151] Section 8, Rule XIII of Employment of Homeworkers.

important from the perspective of compensating workers, socializes liability on all the taxpayers in Ontario, rather than confining it to those who are in the business of profitting from employing workers. For these reasons, the government of Ontario should immediately introduce the dependent employer provision discussed above and compliment it with a joint and several liability provision modeled upon those which exist in the Philippines and the Netherlands.

j) Enforcement

The tri-partite committees which would be established for each sector and subsector would have a primary responsibility to investigate and prosecute standards and registry violations. Inspectors who have a knowledge of the particular sector or sub-sector should be appointed by the committees and they should have the powers available to officers under the ESA. As is the case both under the ISA and CADA, small employer and employee payroll contributions could be levied to provide sufficient funding to ensure aggressive inspection and investigation. However, since it is primarily the state's obligation to ensure legislative compliance, the levies should be kept quite small and the joint employer and employee contributions should be matched by the Ministry of Labour. In additions, all fines and penalties collected should be used to finance the tri-partite committees. Moreover, these fines should be substantial enough to deter avoidance.

As was recommended by the ILO Meeting of Experts on Homework, unions and advocacy groups should be entitled to investigate and prosecute registry and complaints of minimum standards violations. Agents should be entitled to lodge complaints in order to preserve the anonymity of vulnerable workers. All complaints should trigger audits of the employer's entire employment practices.

The Hazantown agreement, discussed above, entitles unions to inspect jobbers books to ensure that the agreement is adhered to. Similarly, the Beaudry Committee recommended that the CADA be amended to permit unions to inspect the books of employers registered under one of the decrees. A similar provision should be included within the ESA.

III. PROVINCE-WIDE MANDATORY BROADER-BASED BARGAINING

Province-wide mandatory broader-based bargaining is a necessary requirement if the women employed in precarious, non-standard jobs are to benefit from collective bargaining. A move to a system of collective bargaining that encompasses sectoral or broader-based bargaining acknowledges that the single employer bargaining unit structure no longer matches the organization of work in the 1990's.

The introduction of joint liability, the development of homeworkers and domestic workers central registries with permit enforcement, and the establishment of Tri-Partite Councils to set and enforce basic standards will go a long way to improving the basic employment conditions for both domestic workers and homeworkers. This is an important first step and will lay the foundation for province-wide broader-based bargaining. However, these changes represent only the minimum necessary improvements, and address only part of the picture. The next step, and the most important one, is the establishment of province-wide mandatory broader-based bargaining extending the benefits of collective bargaining to domestic workers and homeworkers in the garment industry. Broader-based bargaining would not be limited to setting wage standards, as proposed in the first set of recommendations listed above, rather it would ensure that the full benefits of collective bargaining, including wages, working conditions, just cause protection, and all other benefits would become available.

Many of the recommendations that follow are premised on the prior establishment of joint liability and a Central Registry. In fact, these recommendations will not be able to be effective without these two minimum changes being introduced to the Employment Standards Act. It is our recommendation that this

new process of broader-based bargaining be instituted through an addition or amendment to the Ontario Labour Relations Act (superceding the ESA provisions proposed above) which focusses on garment homeworkers and domestic workers.

a) Mandatory Broader-Based Bargaining for Domestic Workers

As outlined above, domestic workers have been granted the right to unionize under the recent amendments to the OLRA. This right is a hollow one, given both the precarious nature of domestic workers employment and the OLRA stipulation that a bargaining unit must have at least 2 members. In order to ensure the right to organize is fully available, a system of mandatory broader-based bargaining must be instituted.

This model builds on the regulatory base established through the central registries fro live-in and live-out domestic workers. For purposed of orgnainzing domestic workers in either sector (live-in or live-out) would be defined within a geographical or regional designation. Once a preponderance of regional representation is reached for each sector, collective agreements would be extended to mandatory province-wide bargaining. For certification purposes, domestic workers would be organized into two separate units: live-in workers and live-out workers. If the step towards organizing is to have meaning, it must be premised upon the creation of a central registry of domestic workers.

(i) Geographic or Regional Definition for Organizing and Collective Agreements

Unlike homeworkers in the garment industry who are organized through a vertical chain of production, domestic workers face an employer directly. For purposes of organizing domestic workers, it is necessary to divide the province into specific geographical regions. Each region would have two sectors of domestic workers: live-in and live-out. This from of regional identification is not unprecedented and follows the Labour Law Reform report for British Columbia on a geographical definition. Most domestic work is centralized in large urban areas. Geographic designation would therefore follow major urban centres (ie.Greater Toronto Area, Greater Ottawa Area, Greater London Area, etc.).

(ii) Certification Process - From Regional to Province-Wide Bargaining.

The certification process would begin through signing a majority (50 plus one) of the domestic workers for a specific geographic designation. Once this is reached a collective agreement would be negotiated for all domestic workers in the specific region.

Once a preponderance of regions (ie. 2 large urban areas) is reached, then the Minister of Labour would be compelled to call a conference of employer representatives and the union representatives to extend the collective agreements to all domestic workers province-wide.

(iii) Domestic Workers Hiring Hall - Mandatory Closed Shop Provisions

Once an agreement is reached for the specific region, it is critical to secure a mandatory closed shop with enforcement through the OLRB. This is a mere extension of provisions for a central registry. The supply of domestic workers would be regulated through a union hiring hall. All unionized domestic workers would be registered at the central registry.

The union representatives would control access to permits for domestic workers and then provide the list of available unionized workers through the central registry.

(iv) Enforcement of the Collective Agreement

Enforcing the terms of employment negotiated in a collective agreement are very difficult in a situation where home is the actual site of work. This is the case for domestic workers. The onus should be on the employer to demonstrate compliance with requirements of the collective agreement. Employers would be required to provide complete and adequate monthly records that indicate the negotiated conditions of the collective agreement are being met. Through the contract negotiations and monthly record inspections, union representatives would have access to the employers records of wages, hours and working conditions

b) Mandatory Broader-Based Bargaining in the Garment Industry

There are two main precedents for the development of province-wide mandatory broader-based bargaining. First, in the mid 1930's, the Industrial Standards Act was introduced as a sectoral strategy within the garment industry at a time that larger garment factories were consistently being under-cut by the continual emergence of sweatshops and the rise of homeworking. Sector standards stabilized an industry fraught with declining employment standards. Sector standards were viewed as the one way to ensure the women workers had some form of protection and basic standards could be established. Larger factories supported the standardization of wages on economic grounds to guarantee that their work would not be under-cut. Secondly, as we have outlined above, the Ontario construction industry, faced with a comparable organization of work also negotiates on a province-wide basis. Employers supported this form of bargaining in the 1970's as a way to overcome on-going labour unrest. Many of the recommendations listed below follow the legal framework put in place for the Ontario Construction - ICI Sector, as per sections 135, and 138 to 151 of the OLRA.

Mandatory broader-based bargaining could occur in two possible ways. First, it could allow for the extension of representation of workers througout a single chain of production, based on joint-liability of the retailer or jobber. Second, when a preponderance (45 per cent) is reached in any sub-sector of the garment industry (such as women's wear or bridal wear), collective bargaining be extended to the rest of that specific sector.

(i) The Certification Process - Bargaining by Chain of Production

Broader-based bargaining focused on a chain of production would occur through organizing homeworkers and workers in contract shops. Given the precarious nature of employment for homeworkers and workers in contracting shops, mandatory extension for both groups of workers is required. If the on-going erosion of wages and working conditions is truly to be controlled, both homeworkers and contract workers must be counted towards an extension of mandatory broader-based bargaining.

<u>Organizing Homeworkers</u>

A union or the Homeworkers Association would be required to organize a majority (50% plus 1) of homeworkers employed within a particular chain of production. The pyramid or chain of production would be tracked through joint liability provisions and the homeworkers central registry of the ESA.

At times, a homeworker may be working for more than one contractor and may be part of the chain of production for more than one jobber or retailer. Signing of the one homeworker will also count towards reaching a majority in all chains of production of which the homeworker is involved. The bargaining unit would be considered all homeworkers who work for contractors working for one manufacturer or jobber at the top of a specific pyramid or chain of production. In other words, the union would have to organize a majority of homeworkers at the bottom of a chain's pyramid of production. As with the construction sector, there would have to be at least one employee in the bargaining unit on the application date.

Although the framework for this form of organization would be outlined through the joint liability provisions of the ESA, the final determination of the "count" for certification purposes would be made through the OLRB.

Organizing Inside Workers of Contractor

Similarly, the union which organizes a majority of workers in one contracting shop within one chain of production, would have the option of applying for a negotiated collective agreement for this same contractor in another chain of production. Contractors, similar to homeworkers, most often work for more than one top employer. Contractors can contract work from up to 20 different chains of production. One organized contractor contributes to the "count" in all chains of production where they do work. In cases where there is a preponderance or majority of workers showing their support for unionization then within a particular chain, that top employer becomes certified. This employer would then remain certified regardless, if they subsequently change the particular contractors that they use. As a certified employer, all of its work would be unionized, which resembles the approach embodied under the Hazantown Agreement in the United States.

A collective agreement would then be extended to all inside workers of all contractors within a chain of production that is certified. If the contractor is working for more than one chain of production, the signed workers will be counted for certification in the other chains as well.

This designation of a bargaining unit and the corresponding certification process is an extension of the designation of a bargaining unit resembling both ICI and non-ICI construction sectors under S. 144(1) of the OLRA.

All former unionized employers would be automatically counted as certified in the process for sectoral bargaining and would contribute to the "count" for extension purposes beyond the individual bargaining unit. As with the construction sector, the certification process would be shortened and expedited. These mechanisms also allow homeworkers if they choose to form a union. Current law as indicated above, does not allow them to otherwise do so.

(ii) The Certification Process - Sector-wide bargaining.

Identification of a Sector

In addition to the proposals above for extensions of collective bargaining through a mechanism of a chain of production, it is necessary to also outline a framework for extensions within particular sectors. As we outlined under the ISA, the notion of a sector, however, needs to be revised and re-evaluated to meet the emerging conditions of the industry. As the sectoral definitions now stand in the ISA they are very out-dated and make little practical sense.

In order to define a sector, the Minister of Labour would call a special public meeting of the Council of Employers and Council of Unions to redefine specific sectors such as bridal, cloaks, children's wear, and women's sportswear. Defining sectors is critical because the production process often differs between sectors. A sector may also be defined along geographic terms, for example, women's sportswear in Metro Toronto, in contrast to the entire province.

Sector-Wide Bargaining

At the point that a preponderance of workers[152], including both homeworkers and contract workers, within a sector are organized, the union(s) could then apply for an extension of the collective agreement to a province-wide agreement for all workers within the particular sector. For example, a union might organize a preponderance of workers in the chains of production within the Metro Toronto Women's Sportswear industry. At some point an application may be made to extend that to the Province once that preponderance has been reached.

The certification system and "count" could work as outlined above under the methods proposed for extension to the chain of production, but it would be for a specific sector. For purposes of illustration, assume that three key chains of production become certified in the Ladies Sportswear sector, an application could then be made to extend this certification to the entire Ladies Sportswear sector, if the numbers reached in the three chains actually form a preponderance of the entire sector.

(iii) Designation of Bargaining Agents - Consolidated Union Bargaining

As there are currently three unions organizing within the garment industry, there would be a necessity to ensure consolidated union bargaining agents once preponderance is reached in sectors or at the province-wide level. In the construction sector, different unions form a Council for bargaining purposes and establish bargaining proposals through a cooperative process. This would be similar to the necessity of employers forming their own council for bargaining purposes as well. Garment unions if they operate within the same sector or in bargaining for a province-wide agreement would be required to bargain in a Council. This process would mirror the construction bargaining process.

(iv) Homeworkers Hiring Hall - Mandatory Closed Shop Provisions

Once an agreement is reached for the chain of production, it is critical to secure mandatory closed shop with enforcement through the OLRB. This is merely an extension of the provisions for a central registry. The supply of homeworkers would be regulated through a union hiring hall. All unionized homeworkers would be registered at the central registry.

The union representation would control access to permits for homeworkers and then provide the list of available unionized workers through the central registry. All production by unionized homeworkers would be required to show the union label and CA number.

(v) Enforcement of the Collective Agreement

Enforcing the wages, hours of work and working conditions set out in a collective agreement are very difficult in a situation where home is the actual site of work. We are not advocating home inspections. The onus should be on the employer. Employers would be required to provide complete and adequate monthly records that indicate the negotiated conditions of the collective agreement are being met, similar to proposals made for domestic workers. Through the collective agreement negotiations and monthly record inspections, the employee representatives, either a union representative or an HWA representative, would have access to the employers records of wages, hours and working conditions.

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[152] Preponderance could be defined as two main chains of production, identified by label and Consumer Affairs Number which have control of a large niche market, for example women's ready-to-wear.

IV. Concluding Comments

In October 1992, the Minister of Labour announced that changes to the Employment Standards Act and a Task Force on Broader-based Bargaining would be forthcoming to address the employment standards of domestic workers and homeworkers.

This report recommends what those specific changes should be. The proposed reforms address the specific conditions and terms of employment of two of the most vulnerable groups of women workers in the province of Ontario. The labour market of the province is undergoing a fundamental restructuring. In order to regulate the emerging labour market, significant changes to basic employment legislation is urgently needed.

This report seeks reform in two ways. First, through changes to the Employment Standards Act, on the basis of the introduction of joint liability provisions and the creation of a central registry, tripartite committees may begin to negotiate industry wide standards. Moreover, through an addition or amendment to the OLRA that supercedes the ESA, homeworkers in the garment industry and domestic workers could have access to a new form of labour market regulation - mandatory borader-based bargaining - giving them real access to collective bargaining.

With these changes, equal and meaningful basic standards could be introduced and the right to unionize with access to collective bargaining would no longer be a hollow one for these workers. By implementing these recommendations, the government of Ontario will demonstrate a genuine commitment to equal standards for Ontario's most vulnerable workers.

G. SUMMARY OF PROPOSALS

I - SECTORAL REGULATION THROUGH THE EMPLOYMENT STANDARDS ACT

1. Sectors should be designated for the garment industry and for domestic service, encompassing all employers and employees in each area.

2. The standards to be regulated would include wages, hours of work, overtime, paid holidays, and statutory holidays, with further benefits being negotiable.

3. Labour standards for each sector would be set by a tri-partite committee, chaired by a governmental official and with equal employer and employee participation. This committee would also be responsible for such matters as the administration of the relevant portions of the Act and regulations, and the enforcement of standards.

4. Labour standards would be set by the tri-partite committee through a negotiation process. These negotiations could either take place at specified intervals (ie. annually or bi-annually) or at the initiative of either party. Negotiations would take account of wages and conditions achieved for unionized workplaces in the sector.

5. Sectoral labour standards would be enacted by the government as regulations. Ministerial discretion to alter standards which have been agreed upon would be limited.

6. Inclusive definitions of "domestic worker" and "home worker" would be provided in the ESA.

7. The ESA would incorporate a definition of "dependent employer" which would give rise to joint liability for employment standards extending throughout a sub-contracting pyramid.

8. Workers would be deemed continuously employed for the purposes of ESA benefits, so long as they continued working within the sector. Employers would pay a levy into an employment standards benefit fund, with costs pro-rated on the basis of numbers of hours worked. The central registry would ensure that workers received appropriate overtime pay and entitlement to benefits.

9. Central Registries would be established for homeworkers and domestic workers. Registration would be mandatory for all homeworkers and domestic workers. The registry's list of workers for each sector would be used to monitor and enforce standards. Furthermore, each worker on the registry would be provided with a copy of the legal standards in effect for her sector. Unions and/or advocacy groups would be given access to the registries, to further ensure that minimum standards are being adhered to.

10. The employer of a domestic worker would be equally obliged to register her employment with the central registry. Canada Immigration and the Ministry of Labour would also submit the names of employers of domestic workers under the LCP to the central registry. The central registry would be entitled to contact domestic workers to inform them of the registry's purpose and the relevant laws. Domestic workers would be entitled to be represented by the registry in disputes with their employers. The central registry would also provide counselling services to domestic workers and establish group insurance plans.

11. Employers hiring homeworkers would be required to apply to the central registry to obtain a permit. The permit would be similar to that which already exists under the ESA and would provide the terms and conditions required in the sector. The central registry could act as an agent for the homeworkers, until broader-based bargaining is in place for the garment industry.

12. The central registry would perform a variety of additional functions, including the provision of information on employment rights in different languages, counselling, advice and referral, and the administration of any negotiated benefit packages and group insurance plans.

13. Employers of domestic workers and homeworkers would be registered.

In the domestic service sector, both individual employers and employment agencies would be required to register.

In the garment industry, all entities involved in the chain of production, from manufacturers, through jobbers, to contractors, should be required to register. Contractors and jobbers would be required to self-register, and in order to ensure compliance manufacturers would also be required to register any jobbers and contractors to whom they send work. Substantial fines would accompany the failure to register. A standard contract term would be implied into all jobbers' contracts requiring work to be sent exclusively to registered contractors. Also, the Business Names Act would be amended, requiring businesses registering under the Act to indicate their major field of activity. The list of businesses generated under the Business Names Act would be cross-referenced with the central registry's list to ensure compliance.

14. Joint and several liability would be imposed throughout the chain of production in the garment industry.

15. The tri-partite committees established for each sector would be responsible for the investigation and prosecution of standards and registry violations. Inspectors would be appointed with the same powers as those available to officers under the ESA.

16. Unions and advocacy groups would be entitled to prosecute registry and standards violation complaints. They would also be entitled to inspect employers' books to ensure standards and registration requirements are being respected.

II. Mandatory Broader-Based Bargaining

A. Domestic Workers

1. For the purposes of certification, domestic workers would be organized into two separate sectors, of live-in and live-out workers.

2. Domestic workers would be then classified on the basis of geographic or regional designation (ie. the Greater London area or some other region that makes sense).

3. The certification process would be initiated by the signing of a majority of domestic workers registered in a specific geographical region.

4. Once a preponderance of a region have been certified, a conference would be called by the Ministry of Labour between the employers and Union representatives regarding the extension of the collective agreement to all domestic workers working within the province.

5. In any region which has been certified, a mandatory closed shop would be enforced, through the use of a Union hiring hall to regulate the supply of domestic workers.

6. Collective agreements would be enforced through monthly reports submitted by the employer, the Union's inspection of the employer's records, and collective agreement negotiations.

B. Homeworkers in the Garment Industry

1. Two routes for establishing broader-based bargaining would be made available. First, Union representation could be extended throughout a chain of production, based on the joint liability principle. Second, once a preponderance had been obtained, collective bargaining could be extended across a specific sub-sector or sector of the garment industry by application to the OLRB, similar to mechanism for construction sector.

2. A chain of production would be certified where a majority of its workers have been organized. The final determination of the group of business entities constituting any individual chain would be made by the OLRB. There would have to be at least one employee remaining in the bargaining unit on the certification application date.

3. Because contractors and homeworkers typically work for more than one employer, the organizing of one contractor or one homeworker, would contribute to the "count" in each chain of production or sector where they operate.

4. A mechanism to allow a Council of unions to bargain in a particular sector where an agreement has been extended or for a province-wide agreement, similar to the Council of unions in the Construction sector. This recognizes that there is currently more than one union organizing in this sector.

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