

LABOUR LAW AND THE NEW INEQUALITY*

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The different sorts of equality are finally inseparable but up to a certain point they are sufficiently distinguishable, and one may speak of political equality, equality before the laws and economic equality. Without the last, the first and second exist only measurably, and they tend to disappear as it shrinks.

William Dean Howells

INTRODUCTION

Thank you very much for the invitation to deliver this year's Rand Memorial Lecture. This is both an honour and a special moment for me, not the least because of the ways in which I have found myself connected to Ivan Rand. I never met him, of course, but I sometimes feel that he hovers nearby. He and I were both born and raised in the Maritimes, sons of this salty soil. And, like many Maritimers, we both wound up working someplace else, far from our homes, which leads to my second connection. Ivan Rand was the founding Dean of the Faculty of Law at the University of Western Ontario, where I have taught for the past decade. Indeed, there is somewhat of a friendly rivalry between Western and UNB over our respective claims to him, but I think his legacy is rich enough to nurture both law schools. To add a further connection, Ivan Rand was Canada's representative on the 1947 United Nations Special Committee on Palestine (UNSCOP), which ultimately recommended the partition of that tormented land. I have worked for the United Nations in Jerusalem, and I am presently researching Rand's role in UNSCOP, with the intention of publishing this research in the near future. The literature on UNSCOP to date plainly shows that Ivan Rand was recognized at the time, and long afterwards, as one of the intellectual driving forces on that historic committee.¹

The fourth connection I can claim, and the one that is woven into tonight's

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¹ See generally: E. Tauber, *Personal Policy Making: Canada's Role in the Adoption of the Palestine Partition Resolution* (Westport: Greenwood Press, 2002); D. Horowitz, *State in the Making* (New York: Alfred Knopf, 1953); and J. Granados-Garcia, *The Birth of Israel: The Drama As I Saw It* (New York: Alfred Knopf, 1949).

Lecture, comes from my professional interest in Canadian labour law. Ivan Rand was, of course, the author of the famous Rand Formula, based on his arbitration decision that settled the protracted 1945 Ford auto strike in Windsor, Ontario.² This strike was one of the epic labour battles that forged our modern industrial relations system.³ The pre-war *laissez-faire* legal approach towards unions—where they were tolerated but unprotected—was in the process of being statutorily eclipsed at the time of the Windsor Ford strike by the more intensely regulated structure that was based upon the principles of the American *Wagner Act* (its statutory title is the *National Labour Relations Act*). This *nouvelle epoch* would positively affirm the collective voice of unions in the Canadian workplace, recognize the legal status of collective agreements, and replace the courts' jurisdiction to regulate the workplace with expert panels of labour relations boards and arbitration boards.⁴ In the wake of this legal transformation, unionization in Canada would jump from 18 percent of the non-agricultural workforce in 1941 to 28.4 percent by 1951, a gain of 63 percent.⁵ A brave new world of labour law and industrial relations was being born, but it needed sturdy intellectual and judicial foundations to stand up. Ivan Rand would provide some of these vital pillars.

Rand had been chosen to arbitrate the terms of the Windsor Ford collective agreement by the federal cabinet, with a big push from Paul Martin Sr., who was a new Liberal cabinet minister from Windsor (and the father of Paul Martin Jr., the future Prime Minister). At the time, Ivan Rand was sitting as a Justice on the Supreme Court of Canada, with his famous ruling on civil liberties and the abuse of executive power in the *Roncarelli v. Duplessis* case still ahead of him. Reflecting on the Ford strike and Ivan Rand, Paul Martin Sr. would later say:

I talked to him about these problems...I knew his views...he was a man who knew the evolution that was taking place in social thinking...he had been thinking about these questions for a long time... and it just happened I was in a position to help bring about his appointment.⁶

In his landmark arbitration award, released in January 1946, Ivan

2 *Ford Motor Co. v. U.A.W.-C.I.O.* (1944-48), 18,001 Canadian Wartime Labour Relations Board Decisions 159 (Rand) [*Ford Motor*]. The Rand Formula has become a standard feature found in thousands of Canadian collective agreements today, whereby an employer will deduct union dues from union members and an amount equal to union dues from non-union members in a certified bargaining unit within a unionized workplace. This is based on the principle, first endorsed by Ivan Rand in the *Ford Motor* decision, that the union represents all of the members of a bargaining unit, and the employees, whether they have joined the union or not, all benefit from the union's efforts to improve wages, benefits and working conditions.

3 See generally I. Abella, *On Strike: Six Key Labour Struggles in Canada 1919-1949* (Toronto: James Lorimer & Company Ltd, 1974) [Abella].

4 G. Adams, *Canadian Labour Law* (Aurora: Canada Law Books, loose-leaf), chap. 1; and J. Fudge & E. Tucker, *Labour Before The Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001).

5 R. Laxer, *Canada's Unions* (Toronto: James Lorimer & Company, 1976), at 37.

6 Abella, *supra*, note 3, at 147. Also see the remarks by Paul Martin Sr. on Ivan Rand in his memoir, *A Very Public Life* (Vol. 1) (Toronto: Deneau, 1983), at 395-6.

Rand was aware not only of the issues of this particular strike, but he understood clearly the larger context as well. In what is now regarded as one of the most influential Canadian labour law decisions ever written, he would state:

...labour unions should become strong in order to carry on the functions for which they are intended. This is machinery devised to adjust, toward an increasing harmony, the interests of capital, labour and public in the production of goods and services which our philosophy accepts as part of the good life; it is to secure industrial civilization within a framework of a labour-employer constitutional law on a rational economic and social doctrine.⁷

This was the objective. But Rand also recognized the gritty reality. In the industrial sphere, he maintained, the law must curb economic power in order to ensure, if for nothing else, a measure of social stability against the spectres of inequality and deprivation:

In industry, capital must in the long run be looked upon as occupying a dominant position. It is in some respects a greater risk than labour; but as industry becomes established, these risks change inversely. Certainly the predominance of capital against individual labour is unquestionable; and in mass relations, hunger is more imperious than passed dividends.⁸

The Windsor Ford strike—also known in some industrial relations circles as the Treaty of Windsor—and Rand’s intellectual ground work for the terms of the settlement would become emblematic of the new relationship between unions and employers in Canada that won labour its own seat at the post-war banquet table.

But, on a larger scale, the growth of unionization that the Treaty of Windsor and the new Canadian labour law regime ushered in became a central part of what Paul Krugman, the 2008 Nobel Laureate in Economics, and others have called, in the American context, the Great Compression.⁹ Labour law, unionization, and the new labour market institutions that emerged in these post-war years made an integral contribution during the period between the 1940s and the 1980s to the dramatic dampening of the wide income and wealth inequalities that had plagued Canada, the United States, and the rest of the industrialized world before 1940. This Great Compression brought an unlamented end to the prolonged Gilded Age, it made a post-war middle-class society possible in the industrial democracies, and it led to a host of political and social transformations in Canada—such as comprehensive public health care, a national public

⁷ *Ford Motor, supra*, note 2, at 160.

⁸ *Ibid.*

⁹ Paul Krugman, *The Conscience of a Liberal* (New York: W.W. Norton & Co., 2007), at 38-39. Krugman credits the coining of the term “The Great Compression” to the economic historians Claudia Goldin and Robert Margo, in their essay “The Great Compression: The Wage Structure in the United States at Mid-Century” (1992), 107(1) *Quarterly Journal of Economics* 1.

pension plan, a progressive taxation system, income transfers, regional equalization and an activist role for the state in the economy—which ensured sustained economic growth and, in turn, reinforced the achievements of this new era of social equity.

The Great Compression had an extraordinary run for approximately forty years in Canada, but over the past twenty-five years it has run out of steam. Today, there is a growing library of economic reports which point to the unmistakable trends toward rapidly rising economic inequality in Canada, the United States, Europe and, indeed, around the world.¹⁰ Even as the benefits of globalization since the early 1980s have brought hundreds of millions out of poverty and created unprecedented global wealth, the flip side of the coin has been a surging tide of inequality, resulting in the benefits of globalization, both nationally and internationally, being shared in an increasingly inequitable manner. Comprehensive reports issued over the past four years by the most respected of international institutions—the World Bank,¹¹ the Organization for Economic Cooperation and Development,¹² the International Labour Organization,¹³ the UN Human Settlements Program,¹⁴ the World Health Organization¹⁵, and the UN Development Programme¹⁶, among others—have all shown that economic inequality

10 See generally B. Milanovic, *Worlds Apart: Measuring International and Global Inequality* (Princeton: Princeton University Press, 2005) [Milanovic]. In Canada, see D. Green & J. Kesselman (eds.), *Dimensions of Inequality in Canada* (Vancouver: UBC Press, 2006) [Green & Kesselman (eds)].

11 *World Development Report 2006 – Equity and Development* (Oxford: Oxford University Press, 2005) [World Development Report 2006]. At 3: “The report documents the persistence of these inequality traps by highlighting the interaction between different forms of inequality. It presents evidence that the inequality of opportunity that arises is wasteful and inimical to sustainable development and poverty reduction.”

12 *Growing Unequal? Income Distribution and Poverty in OECD Countries* (Paris: OECD, 2008) [Growing Unequal?]. At 38: “...income inequality widened in the two decades since the mid-1980s. This widening is fairly widespread (affecting around two-thirds of all OECD countries), with a moderate but significant increase in most inequality measures.”

13 *World of Work 2008 – Income Inequalities in the Age of Financial Globalization* (Geneva: ILO, 2008) [World of Work 2008]. At 6: “An analysis of the data collected – for advanced economies, newly industrialized and developing nations alike – reveals that the wage (or labour) share of total income has declined in nearly three quarters of the countries considered.”

14 *State of the World's Cities 2008/2009* (London: Earthscan, 2008). At viii: “...the benefits of economic growth are not realized in societies experiencing extremely high levels of inequality and poverty. In fact, recent evidence shows that societies that have low levels of inequality are more effective in reducing poverty levels than those that are highly unequal...Inequalities also have a dampening effect on economic efficiency as they raise the cost of redistribution and affect the allocation of resources for investment.”

15 *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health* (Geneva: WHO, 2008). At 3: “The inequities in how society is organized mean that the freedom to lead a flourishing life and to enjoy good health is unequally distributed between and within societies. This inequity is seen in the conditions of early childhood and schooling, the nature of employment and working conditions, the physical form of the built environment, and the quality of the natural environment in which people reside.”

16 *International Development at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: UNDP, 2005). At 52: “...the real barriers to progress are social and political. They are rooted in unequal access to resources and distribution of power within and among countries. Unless these inequalities are corrected, the first principles of the Millennium Declaration – commitment to social justice, equity and human rights – from which the [Millennium Declaration Goals] are derived will not be translated into progress in human development at the required rate.”

has been steadily growing, with a host of consequential social tensions and economic fissures. The beneficiaries of this new global wealth have been overwhelmingly at the very top of the social ladder, with significant wage stagnation throughout the broad middle, and a declining share of wealth and income going to those occupying the lower social rungs.¹⁷ “The central economic issue related to globalization”, Amartya Sen, the 1998 Nobel Laureate in Economics, declared in 2002, “is that of inequality”.¹⁸

Paul Krugman has labelled our new era the Great Divergence and the Second Gilded Age. Richard Freeman, a Harvard labour economist, has called it the New Inequality.¹⁹ These terms apply aptly to Canada. Since the mid-1980s, we have also witnessed a steady widening of our income and wealth inequality levels, while at the same time our unionization levels in Canada have eroded, the redistributive effectiveness of labour market institutions have weakened, and our labour laws have waned in vitality. The thesis of my lecture this evening is that there is an important symmetry—here in Canada and throughout the world—between vibrant labour laws and healthy unionization rates, on the one hand, and relative economic equality levels and social well being on the other. Strong purposive labour laws are an integral part of what Andrew Sharpe, an economist and the Executive Director of the Centre for the Study of Living Standards in Ottawa, calls the virtuous circle.²⁰ This circle is made up of the combination of dynamic social programs, such as the progressive fairness in our taxation system, protective labour and employment standards, and effective levels of public spending on education, health, and infrastructure. These equalizing institutions help to produce and reinforce a vibrant democracy with high civic engagement, low relative levels of poverty, social mobility into a broad and stable middle class, and an upper class that has wealth, but not so much that the rich are gated off from the rest of society. This virtuous circle of public policies and legislative programs that Ivan Rand played a role in creating over sixty years ago, and which sustained the Great Compression for forty years, has been steadily fraying over the past quarter century in Canada.

There are three inter-related themes that I am going to be speaking about this evening.

First, the rising levels of inequality in both income and wealth have become an incontestable feature across the globe and here in Canada, resulting in a sharp reversal of the Great Compression. I will illustrate this New Inequality through some recent economic evidence.

17 Milanovic, *supra*, note 10. Also see J. Davies, S. Sandstrom, A. Shorrocks & E. Wolff, “The World Distribution of Household Wealth” in J. Davies (ed.), *Personal Wealth From a Global Perspective* (Oxford: Oxford University Press, 2009) [Davies] at 395-418.

18 Quoted in Milanovic, *supra*, note 10, at 149.

19 R. Freeman, *The New Inequality* (Boston: Beacon Press, 1999).

20 A. Sharpe, “Linkages between Economic Growth and Inequality: Introduction and Overview” (2003) 29 (Supplement) *Canadian Public Policy* at 51.

Second, the failing unionization levels in Canada—from 38 percent in the early 1980s to 29 percent today, its lowest rate since the mid 1950s—are both symptomatic of, and a contribution to, the end of the Great Compression, as well as a talisman for the rising levels of inequality in Canada today.

And third, our labour laws in Canada have either stood still over the past twenty years, or have been actively whittled back, in a manner that has contributed to the decline in unionization and the diminishment of labour law's contribution to sustaining the virtuous circle.

I. RISING ECONOMIC INEQUALITY

The world economy since the mid-1980s has been marked by rising prosperity and rising inequality, both within countries and between countries. Much coverage has been given to the economic successes of globalization, such as the reduction of absolute poverty in many parts of Asia, particularly in India and China; the steady transformation to knowledge industries and service economies; the growth in literacy and educational levels; the ascendancy of democratic institutions; and the decline of low-efficiency agriculture as a source of employment.²¹ These are significant achievements, and they deserve to be saluted. However, until recently, the more disturbing social and economic trends that have also accompanied globalization over the past twenty-five years have been underreported by comparison. The staggering growth in environmental degradation has lately captured our attention,²² and we are becoming more aware of the phenomena of child labour,²³ and forced labour,²⁴ but relatively little has been said in public discourse about the scope of economic and social inequality and its role in destabilizing the foundations of the global economy.

This growing inequality gap has had a significant impact on our economic well-being. Three of the most telling examples come from the United States, the single most powerful economy in the world, one of the most economically unequal of all the western industrial countries, and the western industrialized nation with one of the lowest union density rate at a mere 12 percent. All of the following examples lie at the heart of our current global economic crisis, and all are intertwined. First, the stagnant purchasing power of the American middle class and lower middle class over the past quarter century has contributed to the subprime mortgage debacle that began bubbling two years ago. The rise in risky mortgage strategies by American

21 J. Bhagwati, *In Defence of Globalization* (Oxford: Oxford University Press, 2004). For a popularized celebration of the fruits of globalization, see T. Friedman, *The World is Flat: A Brief History of the Twenty First Century* (New York: Farrar, Straus & Giroux, 2005).

22 See generally: Intergovernmental Panel on Climate Change, *Climate Change 2007 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Fourth Assessment* (Cambridge: Cambridge University Press, 2008); and N. Stern, *The Economics of Climate Change (The Stern Review)* (Cambridge: Cambridge University Press, 2007).

23 International Labour Organization, *The End of Child Labour: Within Reach* (Geneva: ILO, 2006).

24 International Labour Organization, *A Global Alliance Against Forced Labour* (Geneva: ILO, 2005).

banking and lending institutions to income stratum that, in a more equitable era, would have been financially capable of affording home ownership under conventional approaches is a telling symptom of a distorted economic stewardship.²⁵ Second, America's executive class has enjoyed an extraordinary accumulation of wealth and income in recent years, with the ratio of CEO compensation to average full-time employee wages rising from forty times in the early 1970s to 369 times in 2003 to 521 times by 2007, the most unequal ratio in the industrialized world.²⁶ The economic success of this executive class is both reflective of, and a contribution to, their accelerating political influence over recent American government policy, which is my third example. Political influence follows economic power. This influence has contributed to a disfigured policy climate that in recent years has encouraged the deregulation of the American financial markets, the lax oversight of the mortgage and housing industries, the decline in the progressive nature of the American taxation system, increased incidents of spectacular corporate corruption, the mounting trade imbalances and budget deficits, slumping union density, the intense corporate opposition to labour law reform, and, ultimately, the unapologetic spread of economic inequality.²⁷

These examples, while drawn from the United States, matter to the rest of us, particularly in Canada. They have had a significant impact upon economic decision-making and social consequences in other societies, primarily because of the commanding position of the United States in the global economy. Our levels of inequality in Canada are not nearly as stark as those in the United States—the ratio between the richest and poorest 10 percent in terms of income is 16:1 in the U.S., while Canada's ratio is 9:1²⁸—but the trend towards greater inequality in Canada is unmistakable.

Why is the issue of economic inequality so important? Simply put, because more unequal societies tend to produce greater levels of social dysfunction. They commonly exhibit more crime, higher levels of mental illness, more illiteracy, lower life expectancies, higher rates of incarceration, lower degrees of civic engagement, higher teenage pregnancy rates, diminished social mobility and opportunities, lower levels of interpersonal trust, lower levels of general health, and weaker social shock absorbers the poor.²⁹ The issue is not simply one of extremes in wealth and poverty. Higher levels of economic inequality create a continuous gradient of differential social out-

25 J. Madrick, "How We Were Ruined & What We Can Do" *The New York Review of Books* (2009), 56:2 15.

26 *World of Work 2008*, *supra* note 13, at 18; Krugman, *supra* note 9, at 142.

27 Krugman, *ibid*. Also see J.K. Galbraith & T. Hale, "The Evolution of Economic Inequality in the United States, 1967-2007" (2009) University of Texas Inequality Project Working Paper No. 57; F. Levy & P. Temin, "Inequality and Institutions in 20th Century America" (May 2007) National Bureau of Economic Research Working Paper 13106; and R. Frank, *Falling Behind: How Rising Inequality Harms the Middle Class* (Berkeley: University of California Press, 2007).

28 A. Gurria, "Remarks of the OECD Secretary-General on the Launch of *Growing Unequal?*" online: <http://www.oecd.org/document/14/0,3343,en_2649_33933_41533262_1_1_1_1,00.html> (21 October 2008).

29 R. Wilkinson & K. Pickett, *The Spirit Level* (London: Penguin, 2009); and *World of Work 2008*, *supra*, note 13; and *World Development Report 2006*, *supra* note 11.

comes throughout the separate income layers within a society, so that not only are poor people less healthy than people with middle-level incomes, but people in the middle are less healthy than those at the top. Nor does becoming a wealthier society guarantee proportionally better social outcomes simply because of its wealth. Among western industrialized societies, social progress in improving the health of its citizens flattens out once a certain level in living standards has been obtained; after reaching that level, differences in national health outcomes among wealthy countries can be explained not by comparative per capita income or wealth levels, but by domestic levels of economic egalitarianism.³⁰ There is also the issue of economic inefficiencies: widening inequalities create macro-economic impediments to growth by excluding certain groups from the benefits of an expanding economy, by diminishing the purchasing power of the middle and lower income strata that sustain economic growth, by increasing the social costs of policing low-income groups, and by having economic and social policy-making captured by wealthy groups with all of its resulting misallocations.³¹

Let me turn to providing some graphic illustrations of the recent trends in income and wealth inequality.

The Organization for Economic Cooperation and Development (OECD)—the institutional forum, made up of thirty of the world's wealthiest industrialized countries, that assesses economic and social policy issues of common concern—recently published a sobering review of the widening economic disparities within its member nations.³² As a snapshot of the state of income inequality in the OECD countries in 2005, reported by the Gini coefficient standard, the following graph from the OECD report illustrates the cross-country differences.³³ At the left end of the Gini spectrum are Denmark and Sweden, with Gini values of around 0.23, signifying the relatively low levels of income inequality. Next to them are a number of Western and Central European countries, along with Australia, with Gini coefficient values between 0.26 and 0.30, all below the OECD average of 0.31. Canada is found just above the OECD average at 0.32, with the United States at 0.37 and Turkey and Mexico, the two poorest and most unequal members of the OECD, at

30 The United States is among the very wealthiest of countries in the world, and spends more per capita on health care than any other nation. However, it also has a national life expectancy rate that is no better or even worse than western countries which rank lower or much lower on international per capita income scales, but have better levels of economic equality, such as Albania, Cyprus, France, Japan and the Scandinavian countries. Even within the United States and Canada, it is the most egalitarian states and provinces, rather than the richest, that are the healthiest measured by life expectancy. See R. Wilkinson, *The Impact of Inequality* (New York: The New Press, 2005), at chap. 4.

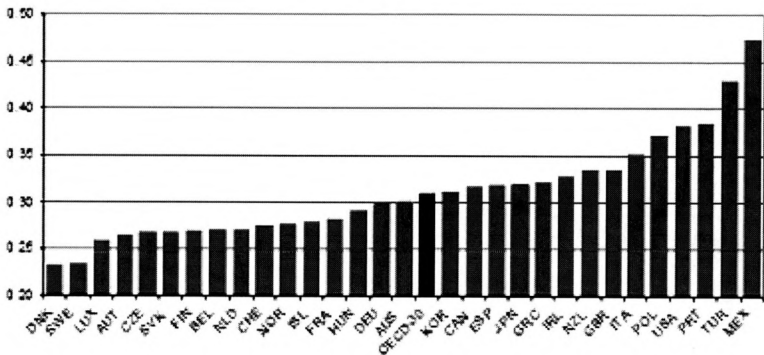
31 *World of Work 2008*, *supra* note 13; and *World Development Report 2006*, *supra* note 11.

32 *Growing Unequal?*, *supra* note 12.

33 The Gini coefficient is a commonly-used measure of the equitable spread of wealth or income through a ratio analysis in an economy. One of its great values is that it can be used to illustrating the dynamic changes in the spread of wealth and income over time, in a richer and more analytical manner than other measures. 0 is absolute equality—everyone has exactly the same amount of money; while 1 is absolute inequality, one person alone has all of the income or wealth in that society. A country would be considered to be relatively equitable if its Gini is in the .20s or low .30s. See Milanovic, *supra*, note 10.

0.43 and 0.47 respectively. Unsurprisingly, the countries with low Gini inequality coefficients happen to be those with strong investments in social programs, higher female participation in the labour force and more generous working conditions, while matching the American economy in such classic economic measurements as per capita productivity growth and unit-labour costs in manufacturing.³⁴

Figure 1: Gini coefficients of income inequality in OECD countries, mid-2000s



Source: *Growing Unequal? Income Distribution and Poverty in OECD Countries* (Paris: OECD, 2008), at 25.

The OECD has found that income equality between the mid-1980s and the mid-2000s rose by an average of two Gini points, or 7 percent, among its twenty-four member states. Inequality increased during this period in nineteen of the twenty-four reporting countries, falling only in France, Greece, Ireland, Spain, and Turkey.³⁵

Turning to Canada, the next figure is a table illustrating the share of aggregate incomes going to the entire spectrum of Canadian income earners, who are divided up into five income quintiles, from top to bottom, over the years between 1951 and 2005. You will notice that, between 1951 and 1981, the bottom quintile of income earners improved their share of aggregate income marginally, the share of the middle three quintiles grew slightly (with the highest of these quintiles receiving all of the increase), and the top income quintile's share declined by 1.2 percentage points. The fruits of the post-war economic boom in Canada were distributed in a fashion that primarily benefited the upper end of the Canadian middle class, but otherwise marginally compressed the differences in income between the top and bottom quintiles. This compression stayed relatively stable through these years.

³⁴ J. Pontusson, *Inequality and Prosperity: Social Europe v. Liberal America* (Ithaca, N.Y.: Cornell University Press, 2005) [J. Pontusson].

³⁵ *Growing Unequal?*, *supra* note 12, at 27.

After 1981, the trend begins to reverse the compression of the initial post-war years. The share of aggregate national income for the bottom 20 percent steadily declines between 1981 and 2000; the middle three quintiles lose almost 5 percentage points of their share from 1981, and the share claimed by the top income quintile jumps more than 5 percentage points. The OECD has said that, among its nation members, Canada has had the second fastest growth in income inequality since the 1990s.³⁶

Figure 2: Share of Aggregate Incomes Received by Each Quintile of Families

and Unattached Individuals (%)

	1951	1961	1971	1981	1991	1996	2001	2005
Bottom 20% (poorest)	4.4	4.2	3.6	4.6	4.5	4.2	4.1	4.1
Second 20%	11.2	11.9	10.6	11	10	9.6	9.7	9.6
Middle 20%	18.3	18.3	17.6	17.7	16.4	16	15.6	15.6
Fourth 20%	23.3	24.5	24.9	25.1	24.7	24.6	23.7	23.9
Top 20% (richest)	42.8	41.1	43.3	41.6	44.4	45.6	46.9	46.9

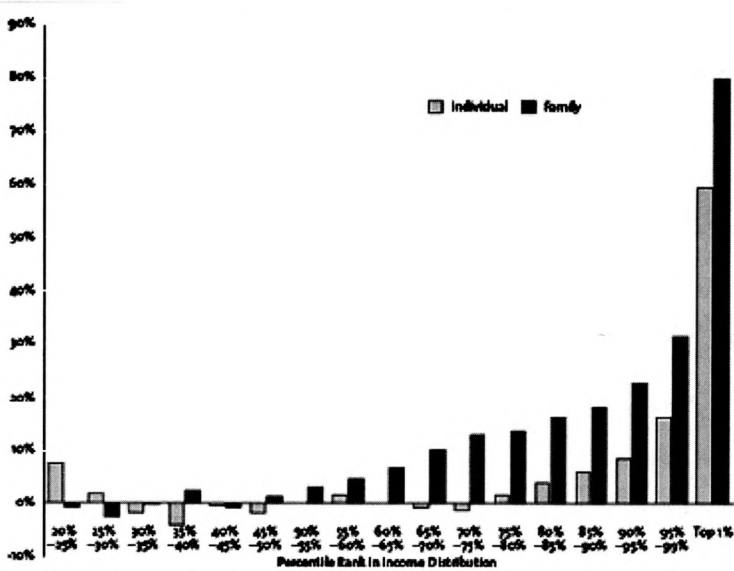
Source: L. Osberg, *A Quarter Century of Economic Inequality in Canada; 1981-2006* (Ottawa: Canadian Centre for Policy Alternatives, 2008), at 7.

The next graph, Figure 3, provides a more detailed breakdown of where the income shares have been going since the early 1980s, confirming the re-direction of aggregate income that we witnessed in Figure 2. The income groups are now broken down by 5 percent groupings, instead of the 20 percent groupings in the last graph. The income gains acquired by the richest quintile, which has been the biggest beneficiary of economic redistribution in the recent era, have been heavily weighted towards the very top of this quintile. While the top 20 percent on individual income earners enjoyed a 17 percent increase in real taxable income between 1982 and 2004, the top 10 percent received a 22 percent increase, the top 5 percent gathered a 31 percent increase, and the top 1 percent acquired an 80 percent increase. (Separate figures which examine the compensation of chief executive officers in Canada reinforce this observation. In 1998, Canada's top executives earned 106 times as much as the average annual employee wage; by 2005, this ratio had grown to 240 times.³⁷) In contrast, the bottom half of the individual income earners on the income spectrum, in terms of their share of the expanding pie, lost ground.

³⁶ *Ibid.*

³⁷ A. Yalnizyan, *The Rich and the Rest of Us: The Growing Face of Canada's Growing Gap* (Toronto: Canadian Centre for Policy Alternatives, 2007), at 28.

Figure 3: Percent Change in Real Taxable Income 1982–2004



Source: L. Osberg, *A Quarter Century of Economic Inequality in Canada; 1981-2006* (Ottawa: Canadian Centre for Policy Alternatives, 2008), at 9.

The following graph, Figure 4, provides us with an even clearer illustration of the re-direction of the recent benefits of our economic growth. This is an historical graph which illustrates the progression of a specific income group between 1920 and 2000 in both Canada and the United States. This graph shows the share of annual income going to the top half of 1 percent on income earners in both countries. Economists choose this particular group because its fortunes are illustrative of the pushes and pulls of economic inequality in the broader society. The historical fortunes of this top income-earning stratum, both upwards and downwards, are remarkably similar in both countries.

Figure 4 documents that, at the end of Krugman’s Gilded Age just before 1940, the share of national income going to the top 0.5 percent stood at around 13 percent in both countries, before declining precipitously. The Great Compression that followed lasted until the mid-1980s, with the share of income going to these groups falling to 5 percent. After the mid-1980s, it began to steadily move up again, the United States more dramatically than Canada. By 2000, the share captured by the richest 0.5 percent in Canada had reached 10 percent, while in the U.S., the share had climbed back to 13 percent.³⁸

38 For other studies supporting this trend, see B. Murphy, P. Roberts & M. Wolfson, “High Income Canadians” (2007), 8:9 *Perspectives on Labour and Income* (Statistics Canada) 5; A. Heisz, “Income Inequality and Redistribution in Canada; 1976 to 2004” (Ottawa: Statistics Canada, 2007); and E. Saez & M. Veall, “The Evolution of High Incomes in North America: Lessons from Canadian Evidence” (2005), 95:3 *American Economic Review* 831.

Figure 4: The Top 0.5% Income Share in Canada and the United States 1920–2000



Source: L. Osberg, *A Quarter Century of Economic Inequality in Canada; 1981-2006* (Ottawa: Canadian Centre for Policy Alternatives, 2008), at 26.

Figure 5 is from a 2006 Statistics Canada study, and focuses on wealth inequality, rather than income inequality.³⁹ This table tells a similar story to the income inequality trends: over the past quarter century, the levels of wealth inequality in Canada have widened. Figure 5 divides the population into groupings of ten, by income, from bottom to top. Between 1984 and 2005, the share of wealth owned by the bottom nine groupings all fell; the only group whose share rose was the highest grouping.⁴⁰

39 Where income inequality measures income in its various forms (before and after taxation, for example) and illustrates the immediate shifts in the social distribution of the outcomes in economic growth or contraction, wealth inequality measures the accumulation and retention of individual and household assets. The value of measuring wealth inequality is that it tracks the concentration and durability of economic inequality. Wealth is invariably much more unequally distributed than income: While the Gini coefficient for income inequality usually places most western industrialized countries between 0.25 and 0.40, the Gini coefficient for wealth inequality for these countries is often between 0.60 and 0.75. As an illustration in contrast between two highly industrialized countries, Japan's wealth Gini is around 0.55, while the same measurement for the United States is 0.80. Canada stands at 0.69. See: M. Jantti & E. Sierminska, "Survey Estimates of Wealth Holdings in OECD Countries: Evidence on the Level and Distribution across Selected Countries" in Davies, *supra* note 17, at 40.

40 Other recent studies have observed similar trends in wealth inequality. See: Statistics Canada, *The Wealth of Canadians: An Overview of the Results of the Survey of Financial Security 2005* (Ottawa: Statistics Canada, 2006), at 9; and R. Morissette, X. Zhang & M. Drolet, "The Evolution of Wealth Inequality in Canada, 1984-1999" (The Levy Economics Institute of Bard College, 2003).

Figure 5: Share of Total Wealth

	Share		
	1984	1999	2005
All families			%
Bottom 10%	-0.5	-0.6	-0.6
Second	0.1	0.0	0.0
Third	0.5	0.4	0.2
Fourth	1.7	1.3	1.1
Fifth	3.5	2.8	2.5
Sixth	5.6	4.7	4.4
Seventh	8.2	7.4	6.9
Eighth	11.5	11.0	10.5
Ninth	17.5	17.4	16.8
Top 10%	51.8	55.7	58.2

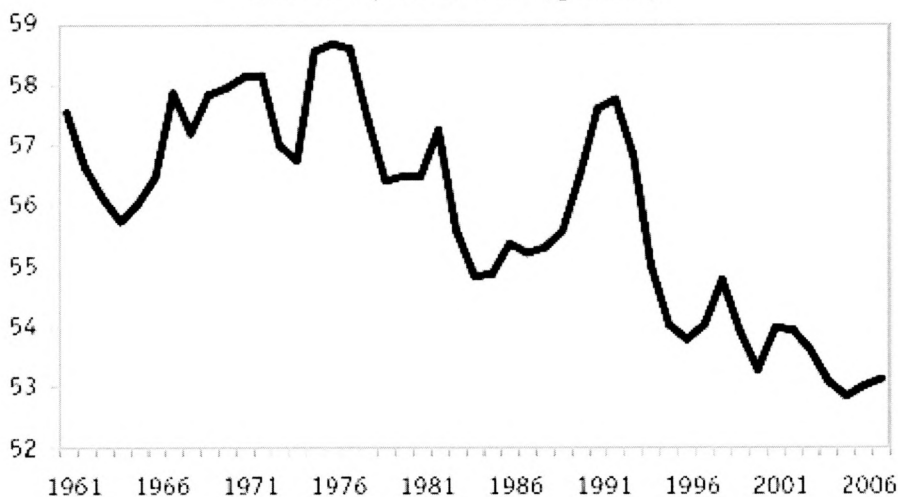
Source: R. Morissette & X. Zhang, "Revisiting Wealth Inequality" (2006), 7:12 *Perspectives on Labour and Income* (Statistics Canada) 7.

There is one last part of the statistical portrait that I wish to draw before leaving this theme. This has to do with the declining share of the Gross Domestic Product (GDP) that has been captured by wage earners since 1961. As Figure 6 shows, labour held almost 57 percent of the GDP in 1961. This rose to a peak of 59 percent in 1976, fluctuated between 57 percent to 54 percent in the 1980s and 1990s, before bottoming out at 53 percent in 2005, its lowest mark in a half century. This occurred in the midst of a growing Canadian economy with rising labour productivity. This is the sort of economic climate that orthodox economic theory would have average wages rising in real dollars to capture a greater share of the GDP.⁴¹ And, as labour's share has been declining, a recent study for the Institute for Competitiveness and Prosperity in Ontario has noted that corporate profits as a share of GDP are currently at a historical high.⁴²

41 The best-known exponent of this thesis has been Simon Kuznets, the 1971 winner of the Nobel Prize in Economics, who argued that as developed societies became richer, they tended to become more equal, and, in an economic boom, employees usually captured a higher income share of GDP because of tight labour markets and greater state spending. See: S. Kuznets, "Economic Growth and Income Inequality" (1955), 45:1 *American Economic Review* 1.

42 Institute for Competitiveness and Prosperity, *Prosperity, Inequality and Poverty* (Toronto: ICP, 2007, Working Paper No. 10), at 25.

Figure 6: Labour's Share, Canada, Total Compensation as a Share of GDP, 1961-2007 (current dollars, per cent)



Source: A. Sharpe, J-F. Arsenault & P. Harrison, "Why Have Real Wages Lagged behind Labour Productivity Growth in Canada?" (2008), 17 *International Productivity Monitor* 16, at 19.

Between 1980 and 2005, labour productivity (the increase in value produced by a unit of labour) rose 37 percent, while the growth in real average wage levels through this time period was virtually flat. In 2005 constant dollars, the average annual salary of a full-time year-round Canadian employee was \$41,348 in 1980, and it had risen by only \$53 in 2005 to \$41,403. Had medium wages of this worker increased at the same rate as labour productivity (37 percent), she or he would have been earning \$56,800 in 2005.⁴³ As our various charts have suggested, whether wages and income rise with productivity is not a natural consequence of a free market economy, but rather quite strongly tied to the relative bargaining strength of employees.

A variety of economic and social factors have been cited as an explanation for the rising levels in income and wealth inequality, and the declining share by labour of the GDP, in Canada. Some economists have stressed such economic and market factors as increased international trade, technological change, deindustrialization, the changing distribution of educational attainment, immigration, the ageing population, and increased rates of female participation in the labour force.⁴⁴ Other economists and a number of social policy analysts have argued that more explicit-

43 A. Sharpe, J-F. Arsenault & P. Harrison, "Why Have Real Wages Lagged behind Labour Productivity Growth in Canada?" (2008), 17 *International Productivity Monitor* 16 [Sharpe et al.]. For another study affirming this trend, see: E. Russell & M. Dufour, *Rising Profit Shares, Falling Wage Shares* (Toronto: Canadian Centre for Policy Alternatives, 2007).

44 For an overview of these factors, see S. Breau, "Income Inequality across Canadian Provinces in an Era of Globalization: Explaining Recent Trends" (2007) 51:1 *The Canadian Geographer* 72 [Breau].

ly political factors have been decisive in fermenting these rising inequality levels. The factors they emphasize include significant cutbacks on social program spending and transfer payments by governments,⁴⁵ declining personal tax rates on the highest incomes,⁴⁶ lower business taxation rates,⁴⁷ the diminishing effectiveness of the minimum wage,⁴⁸ the reduced role of the employment insurance program,⁴⁹ and the deteriorating conditions for atypical (part-time, temporary and casual) employment, which has become a growing feature of our labour force in recent years.⁵⁰ I will argue shortly that our somnolent labour laws also offer a partial explanation.

Economists and social scientists who think about these questions differ among themselves as to the relative weight to be attributed to any of these factors. But many of them have acknowledged that underlying the spreading rates of economic inequality has been the diminishing bargaining power of Canadian employees since the late 1980s.⁵¹ This leads us naturally to consider the declining rate of unionization in Canada and its role as a decisive push and pull factor in the rising inequality rates and labour's waning share of the economy.

45 M. Frenette, D. Green & G. Picot, *Rising Income Inequality Amid the Economic Recovery of the 1990s: An Exploration of Three Data Sources* (Ottawa: Statistics Canada, Business and Labour Market Analysis, Research Paper No. 219, 2004); and J. Stanford, "The Economic and Social Consequences of Fiscal Retrenchment in Canada in the 1990s" (2001), 1 *The Review of Economic Performance and Social Progress* 141.

46 Organization for Economic Co-operation and Development, *Taxing Wages 07* (Paris: OECD, 2008); and M. Lee, *Eroding Tax Fairness: Tax Incidence in Canada, 1990-2005* (Toronto: Canadian Centre for Policy Alternatives, 2007); Toronto Globe & Mail, "Global study finds Canadian business taxes among lowest in world" (29 July 2008) ("The findings challenge the notion of Canada as a high-tax country – at least for companies. Canada scored 78.8 on the KPMG's Total Tax Index, making it the only Group of Seven country with lower levies on businesses than the United States, which, as the benchmark, had a score of 100.").

47 Toronto Globe & Mail, "Global study finds Canadian business taxes among lowest in world" (29 July 2008) ("The findings challenge the notion of Canada as a high-tax country – at least for companies. Canada scored 78.8 on the KPMG's Total Tax Index, making it the only Group of Seven country with lower levies on businesses than the United States, which, as the benchmark, had a score of 100.")

48 "Minimum Wage" (2009), 10:1 *Perspectives on Labour and Income* (Statistics Canada) 12; H. Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Human Resources and Skills Development Canada, 2006); R. Saunders, *Does a Rising Tide Lift All Boats? Low-Paid Workers in Canada* (Ottawa: Canadian Policy Research Networks, 2005); and Caledon Institute, *Minimum Wages in Canada: A Statistical Portrait with Policy Implications* (Ottawa: Caledon Institute, 2003).

49 R. Finnie & I. Irvine, *Income Redistribution Impacts of the EI Program* (Ottawa: Human Resources and Social Development Canada, 2005).

50 A. Sharpe & A.-M. Shaker, *Indicators of Labour Market Conditions in Canada* (Ottawa: Centre for the Study of Living Conditions, 2007); D. Fleury & M. Fortin, *When Working is not enough to Escape Poverty: An Analysis of Canada's Working Poor* (Ottawa: Human Resources and Social Development Canada, 2006); R. Saunders, *Risk and Opportunity: Creating Options for Vulnerable Workers* (Ottawa: Canadian Policy Research Networks, 2006); and L. Vosko (ed.), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006).

51 See, for example, Sharpe *et al.*, *supra* note 43; Breau, *supra* note 44; and L. Osberg, "How Much Does Employment Matter for Inequality in Canada and Elsewhere?" in Green & Kesselman (eds.), *supra*, note 10.

II. DECLINING UNIONIZATION LEVELS

In its most recent report on the global workplace, the International Labour Organization postulated that a hydraulic relationship exists between unionization and inequality. Countries that have higher unionization rates tend to have lower economic inequality patterns. And as unionization rates decline, inequality levels tend to climb. The ILO stated that recent economic trends, as illustrated by Gini co-efficient measurements, show:

...a clear negative correlation between unionization and inequality: the countries in which income inequality is on average lower in the period 1989-2005 tend to be those in which a greater proportion of workers are affiliated to trade unions.⁵²

It is not simply that trade unions raise wages and benefits for their members over the prevailing labour market rates, although they do perform this task.⁵³ Rather, the prevailing social science literature tells us that unions have at least four significant effects on the labour market and the broader economy that contribute to more egalitarian social outcomes. One does not have to be a cheerleader for unions to acknowledge the institutional role they have historically played in democratizing the economy and stimulating the spread of social wealth and rising productivity through the middle and lower income strata.

First, beyond improving the economic return to their own members, unions raise the wages and benefits of non-unionized workers in related industries, in part because non-unionized employers seek to dampen the appeal of unionization.⁵⁴ The best example of this can be seen in the Canadian auto and auto-parts industries, where the non-unionized Japanese car manufacturers in Ontario pay salary rates to their employees that closely parallel those paid to the unionized North American auto companies located in Ontario, precisely to maintain their non-unionized status. Second, unions tend to raise the wages for their lower paid members and compress the overall wages scales within a unionized workplace, so that the lowest paid workers rise in relative terms and the wage differentials diminish.⁵⁵ This not only

⁵² *World of Work 2008*, *supra* note 13, at 83.

⁵³ Indeed, the "union premium" that labour economists frequently measure as the financial advantage that a union member enjoys over an employee in a directly comparative job employed in a non-unionized workplace is estimated to be between seven and 14 per cent in Canada: A. Fang & A. Verma, "The Union Wage Premium" (2002), 3:9 *Perspectives on Labour and Income* (Statistics Canada) 13 [Fang & Verma]. Also see E. Akyeamong, "Unionization and Fringe Benefits" (2002), 3:8 *Perspectives on Labour and Income* (Statistics Canada) 5, with respect to the benefits negotiated by unions in comparison to the non-unionized sector. For example, in 2002, 80 percent of unionized employees possessed a company pension plan, as opposed to 27 percent of non-unionized employees. The comparable figures for company-sponsored life and disability insurance plans were 78 percent and 41 percent, and for dental plans the figures were 76 percent and 43 percent.

⁵⁴ A. Jackson, *Work and Labour in Canada* (Toronto: Canadian Scholars' Press Inc., 2005) [Jackson], at Chap. 8.

⁵⁵ D. Card, T. Lemieux and W.C. Riddell, "Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K. and Canada" (2004), 25 *Journal of Labor Research* 519.

erodes low income levels in the unionized labour force—in 2002, a third of Canadian non-union workers were defined as low paid, but only 8 percent of unionized workers were so classified—but it also works to improve the economic well-being of historically disadvantaged groups such as women and visible minorities, who are disproportionately found at the lower end of the Canadian labour market.⁵⁶

A third significant contribution of unions towards greater economic egalitarianism has been to dampen the differential levels between executive pay and the wage rates in the mainstream labour force. A 2007 study has concluded that unionized firms generally pay lower levels of total CEO compensation than non-unionized firms, with an increasing impact upon the very highest executive levels.⁵⁷ And fourth, unions in a dense-enough clustering within a society increase the influence of other social forces—such as non-governmental organizations, liberal religious institutions, academics, policy forums and critical journalism—in favour of more egalitarian economic policies of redistribution. The recent ILO study that I quoted above has found that unionization levels are closely linked with broader virtuous social circles:

The countries where union density rates are higher are also the ones in which union benefits are more generous, the taxation system is more progressive, collective bargaining more centralized and labour law is closer to international norms and better implemented.⁵⁸

Thus, unions perform at the macro-social level what they also do at the workplace and sectoral level: compress overall wages and benefits, lift up the bottom, spread out the middle and dampen down the top.⁵⁹ In a recent study, the World Bank has said that this is accomplished without impairing national economic performance or social prosperity.⁶⁰

All of these features were certainly true during the halcyon days of the Great Compression. They remain true today, but in a distinctly more diminished fashion. In recent years, the unionization levels throughout most of the advanced industrialized world have been steadily eroding. In many of these countries, unions reached their apex in terms of density in the 1970s and 1980s and have been sliding down since. In Canada, declining unionization rates have been cited as a sig-

⁵⁶ Jackson, *supra* note 54.

⁵⁷ R. Gomez & K. Tzioumis, “What do Unions do to CEO Compensation?” (2007), Centre for Economic Performance Discussion Paper no. 720. Also see *World of Work 2008*, *supra* note 13, at Chap. 2.

⁵⁸ *World of Work 2008*, *supra* note 13, at 86.

⁵⁹ For recent economic evidence of this thesis, see the essays in J. Bennett & B. Kaufman (eds), *What do Unions do? A Twenty Year Perspective* (New Brunswick, NJ: Transaction Publishers, 2007).

⁶⁰ A 2003 study conducted by the World Bank has found no persuasive evidence that union density impairs the economic or employment performance of Western countries. See T. Aidi and Z. Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington: The World Bank, 2003). Also see Pontusson, *supra* note 34, who found a positive relationship between countries with strong union movements and social protection, on the one hand, and declining unit-labour costs on the other.

nificant contributing factor to falling average wages and shrinking pension benefit coverage among workers, which in turn contribute to widening inequality.⁶¹

The following table, Figure 7, displays the changes in the union density rates among a number of western industrialized nations.

Figure 7: Union Density Rate Changes 1970-2003

	1970	1990	1993	1998	2003	1970-2003	1993-1998	1998-2003
	<i>Percentage point changes</i>							
Australia	50	41	38	28	23	-27.3	-9.5	-5.2
Austria	63	47	43	38	35*	-27.4	-4.8	-3.0
Belgium	42	54	55	55	55*	+13.3	+0.4	0.0
Canada	32	33	33	29	28	-3.2	-4.3	-0.1
Denmark	60	75	77	76	70	+10.1	-1.7	-5.2
Finland	51	73	81	78	74	+22.8	-2.7	-3.9
France	22	10	10	8	8	-13.4	-1.6	+0.3
Germany	32	31	32	26	23	-9.4	-5.9	-3.3
Ireland	53	51	48	42	35	-17.9	-6.2	-6.2
Italy	37	39	39	36	34	-3.3	-3.5	-2.0
Japan	35	25	24	23	20	-15.4	-1.8	-2.8
Korea	13	18	15	12	11	-1.4	-2.4	-0.9
The Netherlands	37	24	26	25	22	-14.2	-1.4	-2.2
New Zealand	55	51	35	22	22*	-33.1	-12.2	-0.2
Norway	57	59	58	56	53	-3.5	-2.5	-2.2
Spain		13	18	16	16	n/a	-2.6	-3.3
Switzerland	29	24	23	22	18**	-11.1	-1.2	-3.9
United Kingdom	45	39	36	30	29	-15.5	-6.0	-0.8
United States	24	16	15	13	12	-11.1	-1.7	-1.0

Source: D. Blanchflower, "International Patterns of Union Membership" (2007), 45:1 *British Journal of Industrial Relations* 1.

In this table, you will see three countries—Denmark, Finland and Belgium—where union density rates actually rose during the period between 1970 and 2003. These three countries also happened to have the three highest rates of union density in 2003. All of the other nineteen countries listed in Figure 7 witnessed falling union density rates between 1970 and 2003. In the more recent period, between 1993 and 2003, as the levels of inequality were accelerating and the labour market institutions weakening in most of these countries, union density rates fell in every country except for Belgium, where they increased only marginally. Many of the OECD countries that scored well in Figure 1 respecting their national patterns of income egalitarianism—such as Denmark, Finland, Belgium, Norway and Austria—also produced relatively high levels of union density in Figure 7. Conversely, a number of countries that are found on the more inequitable side of the Gini co-efficient measurement in Figure 1—among others, the United States, the United Kingdom, New Zealand and Spain—had either low union density rates by 2003 or had their rates sharply reduced

61 R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 *Perspective on Labour and Income* (Statistics Canada) 5 [Morrisette et al.], at 8.

over the 1993-2003 measurement period. Even many of the countries that score well for relative egalitarianism in Figure 1 (under 0.35 on the Gini co-efficient)—such as the Netherlands, Japan, Canada, Korea and Australia—saw their Gini scores begin to worsen after the early 1990s as their union density rates dropped over this period.⁶²

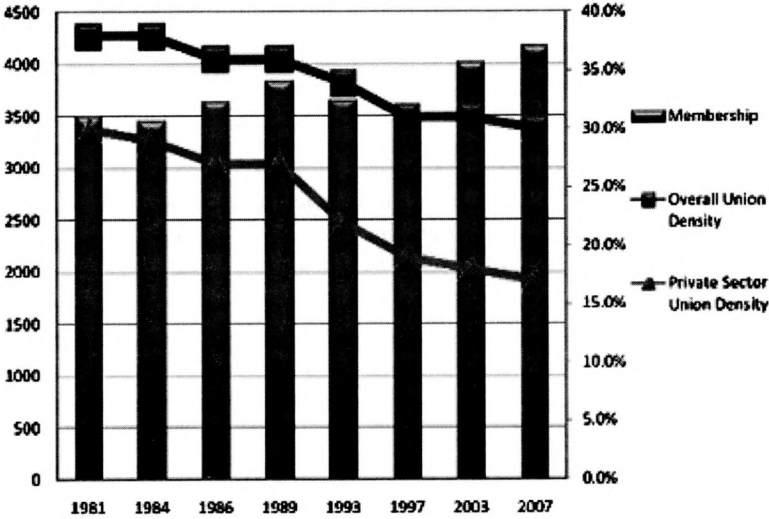
Setting our sights now on Canada, Figure 8 illustrates that the unionization rate has been falling steadily since the mid-1980s, just as the economic inequality levels in the country were beginning to rise. What the prior table on comparative union density rates did not tell us about Canada is that union membership (as a percentage of the total workforce) rose from 32 percent in 1970 to as high as 38 percent by 1981, before its steady decline to the 2007 figure of 29 percent. Private sector unionization in Canada has diminished even farther, sliding from 29 percent in 1981 to 17 percent today. If it had not been for the high and fairly stable unionization levels in the public sector—approximately 71 percent of public workers are union members—the decline would have much greater. Both the 29 percent overall unionization rate and the 17 percent rate in the private sector are the lowest figures since the 1950s.⁶³ Keep in mind that this decline has occurred even as Canadian unions were significantly increasing the number of new members in their ranks: between 1997 and 2007, union membership increased by almost 19 percent in absolute numbers, but with total employment rising by almost 25 percent, the density of unions slumped.⁶⁴

62 For measurements of growing Gini inequality among OECD countries between mid-1980s to mid-2000s, see *Growing Unequal?*, *supra* note 12, at 27.

63 For recent reports that document the historical and current Canadian unionization rate, see: P. Kumar, "Whither Unionism: Current State and Future Prospects of Union Renewal in Canada" (Kingston, Ont.: Industrial Relations Centre, 2008, Discussion Paper # 2008-04) [Kumar]; "Unionization" (2008), 9:8 *Perspectives on Labour and Income* (Statistics Canada) 17; Business Council of British Columbia, "Unionization Rates for 2007 and the first half of 2008" (2008), 40:09 *Industrial Relations Bulletin* 1; and Morissette *et al.*, *supra* note 61.

64 Kumar, *ibid.*, at 5.

Figure 8: Trends in Union Membership and Density



Source: P. Kumar, "Whither Unionism: Current State and Future Prospects of Union Renewal in Canada" (Kingston, Ont.: Industrial Relations Centre, 2008, Discussion Paper # 2008-04).

Another way to illustrate the relationship between declining unionization rates and rising economic inequality in Canada is to compare these rates at the provincial level. This is a helpful clue, as provinces have sufficient governmental jurisdiction within Confederation over social and, to a lesser degree, economic policy-making to be able to contribute, positively or negatively, to their economic inequality levels. Using 1998 statistics (the most recent useful comparative figures available), Figure 9 lists the ten provinces with their unionization levels on the left-hand column and their inequality ratios (based on their after-tax income upper and lower quintile ratios) on the right, with their respective rankings in brackets.

Figure 9: Comparative Provincial Unionization Levels and After-Tax Inequality Ratios

Province	Unionization Rate, and Rank – 1998	After Tax Inequality Ratio of Highest and Lowest Quintiles, and Rank – 1998
Newfoundland	39.7% (1)	4.90 (4)
Prince Edward Island	26.3% (9)	4.20 (1)
Nova Scotia	28.9% (6)	5.40 (8)
New Brunswick	26.6% (8)	4.90 (4)
Quebec	35.7% (2)	4.90 (4)
Ontario	28.0% (7)	5.50 (9)
Manitoba	4.9% (3)	4.70 (3)
Saskatchewan	33.6% (5)	4.60 (2)
Alberta	23.0% (10)	6.10 (10)

British Columbia
National Average

34.8% (4)
30.7%

5.10 (7)
5.40

Sources: R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 *Perspective on Labour and Income (Statistics Canada)* 5, Table 3, at 8; and D. Sanga, "Income Inequality within Provinces" (Winter 2000), 12:4 *Perspectives on Labour and Income (Statistics Canada)* 33, at 35.

Figure 9 tells us that, as a distinct trend, the provinces with the highest unionization rates have also been the most egalitarian as measured by their inequality levels. With the Canadian after-tax inequality ratio set at 5:40, the five provinces with the highest unionization levels (Newfoundland, Quebec, Manitoba, British Columbia and Saskatchewan) were all below the national inequality ratio, while three of the provinces with the lowest unionization rates (Alberta, Ontario and Nova Scotia) are at or above the national ratio for inequality. (Prince Edward Island and New Brunswick, the smallest and third smallest provinces by population, are statistical outliers.)

The consequences of declining union density levels in Canada are measurable and significant. The most visible impact has been the decline in the bargaining power of unions over the past twenty five years. As I noted earlier in Figure 6, labour's share of the GDP has been declining steadily since the 1980s, and the growth in real average wages has flat-lined even while labour productivity rates have steadily increased. The union wage premium—the amount of wages and benefits that unions are able to negotiate for their members over the amounts granted to non-unionized employees—has fallen from levels above 20 percent in the late 1970s in a respectable but smaller range of 8 to 14 percent at the beginning of this decade.⁶⁵ Politically, the influence of unions over government policy and law making has been evaporating over the past quarter century at both the federal and provincial levels. Through this period, the labour movement has been unable to mobilize much actual power towards creating stronger labour laws, let alone retaining a persuasive voice in other areas of social and labour market policy, such as government budgets, the levels of employment insurance benefits, monetary policy or industrial strategy.⁶⁶ And as their bargaining power has been dissipating, their share of economic growth declining, and their political influence waning, unions have also been abandoning their use of strikes as an industrial relations bargaining chip or as a political tool. In 1976, strikes by the Canadian labour force amounted to 0.42 percent of annual working time; this declined by half to 0.21 percent in 1986, to 0.08 percent in 1996, and 0.01 percent by 2006.⁶⁷

If the available social science evidence that we have looked at strongly suggests a relationship between rising inequality and falling unionization densities, then the question I now want to pose is whether our labour laws play a part in contributing

65 J. Godard, "Labour Unions, Workplace Rights and Canadian Public Policy" (2003), 39:4 *Canadian Public Policy* 449, at 451; Fang & Verma, *supra*, note 53.

66 Godard, *ibid.*

67 Human Resources and Social Development Canada, "Chronological Perspective on Work Stoppages in Canada: 1976-2009", accessed at: <http://srv131.services.gc.ca/wid-dimt/pcat-cpws/tirir-sort.aspx>

to this inverse relationship.

III. STAGNATING LABOUR LAWS

Legislatively, the past twenty-five years in Canada has been a period of labour law retrenchment. Since the mid-1980s, the provincial legislatures have enacted, more commonly than not, statutory provisions on union certification and the protection of collective bargaining that have made union organizing and negotiating more difficult.⁶⁸ Chief among these amendments have been the change in six jurisdictions, including three of the four largest provinces by population, from a card-count certification process to a mandatory election process when determining whether a union has the majority support of the employees in a workplace for representational purposes. Much less frequently over this time period have been the occasions when labour laws have been amended to protect or enhance the organizing capabilities of unions. And even when many of these enhancements occurred—British Columbia in 1992, Ontario in 1993 and Saskatchewan in 1994—they were rolled back by subsequent governments.⁶⁹ It may well be that some of the initial labour law reforms that strengthened unions were poorly thought out, or packaged in such a way as to unwittingly invite a fierce counter-reaction.⁷⁰ But with greater certainty, it can also be said that the conservative political trend which has been antithetical to unions at both the provincial and federal levels in Canada has shaped the recent legislature climate towards industrial relations. Whatever the preferred explanation, the unmistakable trend in recent years has been towards the statutory diminishment of the vitality of our labour laws.

This should concern us all. Labour and employment rights and the laws that buttress them are not the accumulation of privileges by a vigorous lobby of special interests, but the expression of core constitutional and human rights that benefit, directly and indirectly, the majority of citizens living in a modern democratic society. At the international level, the three foundational documents of the International Bill of Rights—the Universal Declaration of Human Rights,⁷¹ the International

68 I emphasize the provincial legislatures because approximately 89 percent of the Canadian labour force is under the labour law jurisdiction of the provinces. The last major reforms to the *Canada Labour Code*, in 1998, modestly enhanced the organizing capacity of unions in the federally-regulated workplace.

69 There has been statutory reform of labour laws that remains in place today – the federal level in 1998, in Manitoba earlier this decade, in Ontario in 2005 – but it would be a fair comment to say that these changes have been modest and incremental.

70 See in particular the debate between Kevin Burkett, a prominent Ontario arbitrator, and Judith McCormack, the former Chair of the Ontario Labour Relations Board during the early 1990s, over the lessons to be drawn from the Bill 40 labour law reforms introduced by the Bob Rae government in 1993 and the Bill 7 counter-reforms enacted by the Mike Harris government beginning in 1995: K. Burkett, “The Politicalization of the Ontario Labour Relations Framework in the 1990s” (1998), 5 *Canadian Labour and Employment Law Journal* 168; and J. McCormack, “Comment on the Politicalization of the Ontario Labour Relations Framework in the 1990s” (1999), 6 *Canadian Labour and Employment Law Journal* 343.

71 Article 23(4): “Everyone has the right to form and to join trade unions for the protection of his interests.”

Covenant of Economic, Social and Cultural Rights,⁷² and the International Covenant of Civil and Political Rights⁷³—all promote the right of employees to a collective voice at work as a fundamental human rights guarantee. At the national level, the Canadian Parliament has stated that collective bargaining is a positive social good which ensures that the benefits of economic growth are fairly distributed to all.⁷⁴ And constitutionally, the Supreme Court of Canada has recognized the importance of collective bargaining by sheltering it within our *Charter of Rights and Freedoms*.⁷⁵

Among labour law and industrial relations scholars in the United States and Canada, there is a broad consensus that labour laws play a significant role in shaping the levels of unionization. Certainly, the social science literature that has sought to account for the gaping differences in unionization density levels between the United States and Canada has consistently pointed to the particular differences within their labour laws as a leading explanation.⁷⁶ American scholars and commentators commonly single out the enfeebled state of the *National Labour Relations Act* as either the primary reason, or one of the principal reasons, for the embattled state of American unions.⁷⁷ In Canada, opinion from the Fraser Institute on the political right⁷⁸ to trade union researchers on the left⁷⁹ have stated that our labour laws are key to the determination

72 Article 8(1)(a): “The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.”

73 Article 22(1): “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

74 *Canada Labour Code*, R.S. 1985, c.L-2, Preamble: “Whereas the Parliament of Canada desires to continue and extend its support to labour and management in the co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all”

75 *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391, at para. 86: “Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.”

76 S. Johnson, “The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note” (2004), 43 *Industrial Relations* 356; J. Godard, “Do Labor Laws Matter? The Density Decline and Convergence Thesis Revisited” (2003), 42:3 *Industrial Relations* 458; D. Taras & A. Ponak, “Mandatory Agency Shop Laws as an Explanation of Canada-U.S. Union Density Differences” (2001), 22:3 *Journal of Labor Research* 541; C. Riddell, “Unionization in Canada and the United States: A Tale of Two Countries” in D. Card and R. Freeman (eds.), *Small Differences That Matter* (Chicago: University of Chicago Press, 1997); and P. Weiler, “Promises to Keep: Securing Workers Rights to Self-Organization under the NLRA” (1983), 96 *Harvard Law Review* 1769.

77 See generally Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States and International Human Rights Standards* (New York: Human Rights Watch, 2000); and Weiler, *ibid*.

78 J. Clemens, N. Veldhuis & A. Karabegovic, “Explaining Canada’s High Unionization Rates” *Fraser Alert*, (Vancouver: The Fraser Institute, August 2005).

79 D. Fudge, *Collective Bargaining in Canada: Human Right or Canadian Illusion?* (2nd ed.) (Black Point, N.S.: Fernwood Publishing, 2006) [Fudge].

of the country's unionization rates, a conclusion that academics have also adopted.⁸⁰

In this last part of the Lecture, I want to focus on one area of concern, respecting union certification, which I think is illustrative of the worrisome legislative trends in Canada in recent times respecting our labour laws. Because for our limited time, other patterns that could also have been usefully explored are not, such as the regular reliance by Parliament and the provincial legislatures on back-to-work legislation to end lawful strikes,⁸¹ or the dogged refusal by some Canadian governments to extend collective bargaining to specific occupational groups, such as police officers working for the Royal Canadian Mounted Police⁸² or Ontario agricultural workers.⁸³

When our modern labour law system, based on the American *Wagner Act*, was adopted in Canada through the mid and late 1940s, one common feature in all of the provincial and federal labour statutes was the card-check system. This system tested whether a union organizing drive had acquired the support of the majority of the employees in any particular workplace through signed membership cards. If a majority of the employees (usually set at a minimum of 55 percent) had signed individual union cards to signify their support, then the labour legislation permitted the labour relations board to certify the union as the bargaining representative of those employees without an election. If, however, the union was able to demonstrate a lesser degree of support (commonly established at between 40 and 55 percent) of the employees through the membership cards, then a certification election monitored by the labour relations board would invariably be ordered. The industrial relations rationale for the card-check system was that it lessened the opportunities for employer unfair labour practices during a certification campaign, while ensuring that a union would still be required to demonstrate majority employee support through a verifiable and reliable process. The documented examples of union abuse of the card-check system since its inception in the late 1940s have been negligible.

Prior to 1984, the federal jurisdiction and nine of the ten provinces utilized the card-check system in their labour legislation.⁸⁴ Since 1984, five provinces have set

80 See, for example, T. Bartkiw, "Manufacturing Descent? Labour Law and Union Organizing in the Province of Ontario" (2008), 39:1 *Canadian Public Policy* 111 [Bartkiw], at 120: "The results of this paper support the view that the precise configuration of domestic labour laws continues to matter a great deal, at least insofar as they are capable of altering union organizing and related dynamics over time." Bartkiw cites a number of other Canadian scholars who have made this same observation.

81 See generally Fudge, *supra* note 79; and L. Panitch and D. Swartz, *From Consent to Coercion* (3rd ed.) (Aurora, Ont.: Garamond Press, 2003).

82 See *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, where the Supreme Court of Canada upheld the constitutionality of federal legislation that excluded RCMP officers, who belong to the largest police force in the country, from a statutory collective bargaining regime, but see *Mounted Police Association of Ontario v. Canada (Attorney-General)* (Ont. S.C., 6 April 2009).

83 See the litigation surrounding *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 and *Fraser v. Ontario (Attorney-General)*, 2008 ONCA 760 (CanLII) (Leave to appeal to the Supreme Court of Canada granted, 2 April 2009).

84 Nova Scotia was the only jurisdiction up until that point to require a certification election for every bargaining unit certification application.

aside the card-check system and turned to the mandatory secret ballot process: British Columbia (which adopted the mandatory certification election process in 1984; reverted to the card-check process in 1992, and returned to mandatory elections in 2002); Alberta (1988); Newfoundland (1994); Ontario (1995); and Saskatchewan (2008).⁸⁵ In each case, the legislative changes were driven not by any evidence-based studies which found that the card-check system was functionally deficient in measuring majority employee support, nor by a rationale selection from among different rights-enhancing industrial relations models. Rather, the most likely explanation is that these changes were the ideological preference of provincial governments led by parties with an antipathy towards collective workplace rights and other equalizing institutions. The unspoken expectation of these governments was that a mandatory election process for union certification would result in lowered unionization rates. And these expectations have been borne out. In 2004, the five provinces that required mandatory certification elections at that time had a combined unionization rate of 30.5 percent, which was almost 14 percent lower than the 34.7 percent average unionization rate for the five provinces that did employ the card-check process.⁸⁶

The steadily shifting political preference by conservative provincial governments for the mandatory election process has prompted a number of Canadian industrial relations academics to investigate the impact of these changes on unionization levels. The two most common provincial laboratories for these social scientists have been Ontario and British Columbia. In recent times, both provinces have experienced political pendulum swings, with liberal or social democratic governments maintaining or enacting the card-check method, and conservative governments legislating mandatory certification elections. The advantage of these pendulum swings is that they have given social scientists a relatively rich amount of certification data to quantify and compare the contributions of both methods to relative unionization levels in the specific time periods.

Ontario has been frequently studied on this issue. The province's labour legislation had a card-check system since the late 1940s, through Progressive Conservative (1947-85), Liberal (1985-90) and New Democratic Party (1990-1995) governments. Significant labour law reforms were enacted by the NDP in 1993 which maintained the card-check approach, but enhanced other aspects of the certification process. The election of the Progressive Conservative government in 1995 saw major changes to the Ontario *Labour Relations Act*, including the introduction of mandatory certification elections for the first time in Ontario. The Liberal government that came to office in 2003 has maintained the mandatory election system, with the exception that the card-count process was restored for the construction industry.

⁸⁵ Manitoba enacted the mandatory election process in 1997, but reverted to the card-check system in 2000.

⁸⁶ R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 *Perspective on Labour and Income* (Statistics Canada) 5, Table 3, at 8.

There have been four leading academic investigations into the comparative impact of the two different certification-determination methods in Ontario's recent history. Each of them has found that the card-check process measurably enhanced the certification success and activity rates of unions, while the mandatory elections provisions stunted union representation efforts.

Felice Martinello, in research published in 2000, concluded that the combined effect of the NDP government in the early 1990s and its labour law reforms resulted in a significant increase in union certification activity and success rates, while the subsequent PC government and its labour legislation resulted in a marked decrease in certification activity and success rates.⁸⁷ Two years later, Susan Johnson's investigation focused expressly on the change from card-check to mandatory elections. Similar to Martinello, she found that the post-1995 legislative switch to elections had a substantial downward impact on union certification success rates. Johnson also extended her analysis to a cross-country review, and concluded that mandatory vote provisions among the various provinces reduced the union certification success rates by 9 percent.⁸⁸ Sara Slinn in 2004 found that the introduction of mandatory certification votes in 1995 had "a highly significant negative impact" upon the probability of certification success for unions in Ontario, amounting to a 21 percent lower likelihood of certification under the mandatory vote procedure.⁸⁹ And Timothy Bartkiw's 2008 published research supported these earlier findings, leading him to conclude that "labour laws continue to matter *despite* shifts in economic internationalization and industrial structure".⁹⁰

Similar results have been found in the British Columbia context. Chris Riddell has shown that in the late 1970s up until 1984, the union certification success rate under the card-check process was in the high 80 percent and low 90 percent range. Mandatory certification elections were introduced in 1984, and the success rate tumbled to the 70 percent range until 1993, when the card-check process was re-introduced through labour legislation reforms under a new provincial government. The certification success rate returned to the 90 percent level almost immediately and remained there until 2002, when another government re-introduced the mandatory election procedure and the rates fell back to the 70 percent level.⁹¹ Professor Riddell also found that employer tactics to suppress union certification efforts have been twice as effective

87 F. Martinello, "Mr. Harris, Mr. Rae and Union Activity in Ontario" (2000), 26 *Canadian Public Policy* 17.

88 S. Johnson, "Card Check or Mandatory Vote? How the Type of Union Recognition Procedure Affects Certification Success" (2002), 112 *The Economic Journal* 344.

89 S. Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004), 11 *Canadian Labour and Employment Law Journal* 259, at 299. Also see S. Slinn, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis" (2003), 10 *Canadian Labour and Employment Law Journal* 399.

90 Bartkiw, *supra*, at note 80, at 120.

91 C. Riddell, "Using Social Science Research Methods to Evaluate the Efficacy of Union Certification Procedures" (2005), 12 *Canadian Labour and Employment Law Journal* 313. Also see C. Riddell "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57 *Industrial and Labor Relations Review* 493; and C. Riddell "Union Suppression and Certification Success" (2001) 34 *Canadian Journal of Economics* 396.

tive under mandatory election laws as under the card-check process, suggesting that certification elections create an environment more conducive to anti-union tactics.⁹²

These findings are both worrisome and reassuring. On the one hand, they should cause us some concern, because the recent legislative trends to blunt the effectiveness of labour law demonstrates that Canada's decades-old international human rights commitments to protect and enhance the collective voice of employees in the workplace have not yet become broadly accepted among our political classes. But, on the other hand, these findings provide an odd reassurance. If labour laws do play a prominent role in increasing or decreasing the levels of unionization within a province or a country, then we retain the capability as political actors to respond meaningfully to the economic forces in front of us. We are not just the objects of invisible hands, but also the subjects of our own destiny.

CONCLUSION

Rising inequality, in its many forms, has re-emerged as one of the predominant economic and social issues of our times. That it remains largely unacknowledged in polite conversation is indicative of the degraded quality of our modern political language. Yet, much of the unnecessary grief suffered during the past century in Canada and around the world has come from forgetting about the consequences of unchecked inequality. Any political community that suffers from overt imbalances among the different strata of society is diminishing its democratic character, dampening its social capabilities and stifling its economic potential.

The important contribution of post-war Canadian labour law has been to assist in advancing the growing egalitarian character of our country while fulfilling our commitment to promoting social rights. This was most clearly visible in the years between 1945 and the mid-1980s. As labour laws do their job, the distribution of income, wealth and social opportunities becomes more equitable, and our society becomes more cohesive. Allow labour laws to fall into disrepair, or actively deconstruct them, and the virtuous circles that promotes egalitarianism becomes smaller, our economic life becomes more disfigured, and our sense of mutual reinforcement wanes.

Ivan Rand was alert to all this. In his 1946 Windsor arbitration award, he wrote:

The power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice: the just protection of all interests in an activity which the social order approves and encourage.⁹³

He inspires us still. Thank you.

⁹² Riddell, *ibid.* "Using Social Science Evidence..."

⁹³ *Ford Motor*, *supra* note 2.