

INDUSTRIAL DEMOCRACY: A STUDY OF THE BULLOCK REPORT AND ITS APPLICABILITY TO CANADA

SHELLEY M. WEISS*
RICHARD L. YAFFE*

Introduction

Much of the confusion and apprehension over the concept of industrial democracy arises from the absence of a precise and commonly accepted definition. In the most general terms, industrial democracy refers to a formal, de jure structure through which employees participate (directly or indirectly) in matters that materially affect them at the workplace and through which management is accountable to employees (as well as to shareholders).¹

Improving the quality of life by making work more meaningful appears to be a widely shared notion and is a major common element to the many thrusts in industrial relations in both Europe and North America. It appears relatively clear that to make work more meaningful workers must have a sense of esteem, recognition and achievement in and from their work. Increased worker participation is becoming a common theme in the many suggestions to improve the intrinsic quality of work life.

In the last two decades, the industrial world has increased monumentally. As the "corporate giant" has grown in size and complexity, it has become more and more remote from the community in which it operates, and from the people whom it employs. Major decisions made by corporations radically affect the future of communities and the jobs of employees. Social reform has begun to demand that large companies be more responsible to the needs of society and to the needs of its employees.

It becomes essential, however, to realize that the notion of worker participation is not the outcome of enlightened social policy alone. Although self-esteem, worth, and value of the worker are now more than ever important concepts to employers and the business industry, worker participation owes its continued relevance if not its inception to economic crises as well. Both England and North America have been beset by major economic problems, including increased labour strikes. These difficulties force the business world to re-assess its position.

Such responses on the part of companies may in part be a recognition of social responsibility or of democratic principles, but they are also evidence of the practical reality that if a company neglects to make provision for

* Students, Faculty of Law, University of Manitoba.

1. D. Nightingale, "The Concept and Application of Employee Participation in Canada" (1977), 77 *Lab. Gaz. Can.* 162, at 162-63.

such involvement (worker participation), employees are now in a position, through the strengthening of trade union organisation and power, to resist the implementation of changes that threaten their livelihood and security.²

Directors and senior management have become increasingly aware of the need to be more responsive to social and economic change, if they are to remain profitable. Surely if the worker is more satisfied in his job environment, he will aid in the efficient operation of the business enterprise. Studies have indicated that worker participation schemes have achieved positive results. Increased productivity, decline in absenteeism, decline in grievances, as well as increased loyalty, dedication and performance have been noted in some worker participation experiments.³ Successful implementation of industrial democracy would then benefit both the employee and the corporation. Job satisfaction for the employee could also contribute to the reversal in the decline in the Canadian and British industrial performance.

Various forms of industrial democracy are suggested, such as job enrichment, job design, "works councils" and worker control. These schemes run the gamut from increased influence over the employee's immediate work place to increased participation in managerial decisions. Job enrichment is designed to make the worker's job more interesting. Schemes have been designed to combine the mundane, menial tasks with those which require thought and creativity. "Everybody in a team learns all the job [sic] . . . Dull and routine jobs . . . are enriched by assigning the operator more mentally demanding tasks . . ." ⁴ Job design programs attempt to increase the worker's sense of autonomy, task identity and responsibility by allowing him to define or re-define the limits of his job. "Works councils" allow for a limited form of worker representation to communicate information to and from the management level of the corporation. Although various stages of success have been achieved through these programs, the worker is still very much limited by the decisions made for him at the corporate level. Those involved in the search for industrial democracy insist that the workers who are affected by the decisions must be involved in the decision making.⁵ Industrial democracy has very little meaning without actual board level representation, a concept known as co-determination.

Worker Representation Models

European Models

Employee representation in corporate board rooms has existed in Europe for over 25 years. Representation for employees currently is

-
2. Report of the Committee of Inquiry on Industrial Democracy, Chairman Lord Bullock (1977) 21 (hereinafter referred to as the Bullock Report).
 3. "Job Enrichment," *Canadian Dimension*, July, 1977, 30.
 4. *Id.*, at 31: a discussion of a scheme at General Foods Plant (Pet Food) in Topeka.
 5. *E.g.*, Commission of the European Communities, "Employee Participation and Company Structure," Bulletin of the European Communities, Supplement 8/75 as cited in the Bullock Report, *Supra* n. 2, at 25 (hereinafter referred to as the EEC Green Paper).

authorized or required by law in the Federal Republic of Germany, Sweden, Denmark, Norway, Austria and Luxembourg. Employee representatives in these countries are usually chosen from among the workers themselves, but in some models may be individuals who are full-time employees of the unions to which the workers belong.

Basic corporate structure varies considerably among the European countries which have implemented the doctrine of co-determination, and the specific models of employee participation in these countries reflect these structural variations, as well as the diversity of opinion that exists regarding the philosophy of industrial democracy itself.

No other country has developed the practice of co-determination to the same level as the Federal Republic of Germany. The West German approach, known as *mitbestimmung*, conforms to the two-tiered board system which is commonplace in German corporate structure. Corporations there generally include both a supervisory board and a management board. It is the supervisory board to which worker representatives are elected.

The division of function and responsibility established by the law is clear and establishes that the board of management directs and is responsible for the management of the company, while the supervisory council supervises the management. Thus, while the board of management is responsible for the management of the company and normally represents it in and out of court, it has specific and detailed obligations as regards reporting on the company's affairs to the supervisory council.⁶

The upper tier, the supervisory board, is roughly equivalent to the board of directors in Canadian corporate law. Generally, this board sets policy, but does not involve itself in the day-to-day decisions of the business. The German supervisory board meets four times per year. Aside from dealing with matters of major policy, such as company expansion or curtailment, and dividend levels, it is responsible for overseeing the finances of the corporation. To enable the supervisory board to exercise these powers, the West German model provides that the upper board is to receive regular reports from management regarding the state of the corporation, and gives the supervisory board the right to inspect the company's books and interrogate the management with respect to the affairs of the corporation. The supervisory board is also given a limited veto power over certain classes of transactions, although the upper board can be overruled if management can obtain the support of 75% of the shareholders voting at a shareholders' meeting. Further, the supervisory board holds the power to appoint members to the lower body, and it may dismiss a member of the management board if there is good cause for doing so.

6. EEC Green Paper, as cited in the Bullock Report, *Supra* n. 2, at 72.

The lower tier, the management board, is composed of senior company executives. As such, it resembles the executive officer structure of a typical Canadian corporation. The German management board is responsible to the supervisory board for long-range planning, and oversees the day-to-day operations of the corporation.⁷

The involvement of workers on the boards of directors in West Germany has evolved considerably since its introduction in 1922, when legislation was passed allowing the workers of large corporations to be represented by two members sitting on the supervisory board. It was Britain's Labour government in 1947 which ordered the establishment of worker participation at the supervisory board level in West German coal and steel corporations employing in excess of 1,000 workers. The boards were to be represented equally by employees and shareholders, and generally were to consist of five members from each side plus one neutral person acceptable to both sides who could break ties. The *Co-Determination Act of 1951*⁸ re-established these requirements and it is this law which is still in effect today with respect to the coal and steel industries and coal and steel holding companies in West Germany.

A second pattern of co-determination was developed for all other large German corporations in 1952, in response to severe labour turmoil. Until recently, the 1952 legislation⁹ applied to all publicly held corporations outside the coal and steel industries, as well as to limited liability corporations with over 500 employees. This newer version is somewhat less radical than the original, allowing for allocation of one-third of the seats on the supervisory board to workers. The 1952 *Act* also provides for the establishment of works councils, a form of employee participation at the plant level. These councils are mandatory in any company where at least five employees favour their establishment, and account for the well-developed sub-structure of industrial democracy in West Germany. The councils resemble Canadian union locals, but they are not part of the union structure. Representation in the German works councils is open to all workers, regardless of whether they are union members.

The functions of the works council . . . include policing the collective agreement, safety regulations and government laws; promoting the employment of the elderly; integrating foreign workers and rehabilitating disabled persons; recommending measures to the employer and negotiating their implementation The key point, however, is that the works

7. *Supra* n. 2, at 72.

8. Act on the Co-Determination of Employees on Supervisory Boards and Managing Boards of Enterprises in the Coal and Mining and Iron and Steel Industries, Law of May 21, 1951, [1951] *Bundesgesetzblatt* [BGBl] I 347 (W. Germ.); Act of Aug. 7, 1956 Extending the Act on the Co-determination of Employees on Supervisory Boards and Managing Boards of Enterprises in the Coal Mining and Iron and Steel Industries, Law of Aug. 7, 1956, [1956] *Bundesgesetzblatt* [BGBl] I 707 (W. Germ.). See R. Steuer, "Employee Representation on the Board: Industrial Democracy or Interlocking Directorate?" (1977), 16 *Colum. J. of Transnat'l L.* 255, at 259-60.

9. Works Constitution Act, Law of Oct. 11, 1952, [1952] *Bundesgesetzblatt* [BGBl] I 681 (W. Germ.). See Steuer, *Supra* n. 8.

council cannot conduct a strike. Where disagreements arise they are settled by government-appointed labour courts.¹⁰

In July 1976, a new co-determination law aimed at companies outside the coal and steel industries was enacted, extending equal representation to all corporations with more than 2,000 employees.¹¹ The statute calls for supervisory boards of corporations to be composed of 20 members, with half to be selected by the shareholders and half to be selected by the employees. While the new legislation purports to increase employee representation from one-third under the old model to a position of parity, the statute contains two restrictive provisions which have a negative effect on worker participation. First, the new law requires that one employee representative be nominated from among the class of junior executives. This class consists of employees with managerial functions, whose interests differ considerably from those of workers at the production level. Moreover, the supervisory board chairman is given, pursuant to the 1976 legislation, an extra and deciding vote in the case of a tie. The chairman is to be elected by the full supervisory board, but if no candidate achieves a two-thirds majority, the shareholders obtain the exclusive right to choose the chairman. Hence, although *de jure* there is parity between shareholders and employees on the supervisory board, the shareholders hold *de facto* majority control resulting from this right to select the chairman.¹²

When the 1976 Co-determination Act is fully implemented by 1978, German workers will have three levels of board representation: genuine parity with shareholders in the coal and steel industry; one third representation in companies of between 500 and 2,000 employees; and 'equal' representation in firms outside coal and steel with a work force of over 2,000.¹³

It might be added, at this point, that the general reaction in Germany to the corporate model has been positive. Although conflicting reports abound, the majority seem to be of the opinion that co-determination in West Germany has proved highly favorable to labour, with few reported notable clashes.¹⁴ Further, the economic stability of the country appears to have been maintained, if not strengthened, as the result of the implementation of industrial democracy.

[T]he heads of some of the largest steel companies indicated (at parliamentary hearings) that there has been no sacrifice of earnings or investment on the part of the companies as a result of co-determination. Indeed, company secrets appear to have been safe with worker board

10. C. Gonick, "The West German Model," *Supra* n. 3, at 34.

11. Act on the Co-Determination Rights of Employees, Law of May 4, 1976, [1976] *Bundesgesetzblatt* [BGBl] I 1153 (W. Germ.) See Steuer, *Supra* n. 8.

12. C. Connaghan, "Co-Determination — A Partial Answer to Good Labour Relations" (1976), 76 *Lab. Gaz. Can.* 405, at 405, 406.

13. R. Vollmer, "Industrial Democracy West German Style" (1976), 76 *Lab. Gaz. Can.* 421, at 422.

14. *Supra* n. 12, at 406-07.

members and it was difficult to establish instances of abuse of confidentiality.¹⁵

The practice of employee representation in other European countries has not attained the same level of implementation as in West Germany. Worker representation is provided for by statute in Austria, Luxembourg, Sweden, Denmark and Norway; but employees in these countries do not hold the same degree of power as do their West German counterparts.¹⁶ Austria, Luxembourg and Norway allocate one-third of the positions on the boards of their major corporations to employee representatives. Sweden and Denmark, in contrast, reserve only two seats for employee representation, although the Swedish model of co-determination will be expanded significantly as the result of 1977 legislation.¹⁷ Employee representation in Denmark is based on a modified two-tiered model, where the functions of the management board and the board of directors are allowed to overlap. In the Danish system, both the board and the management are active in setting major corporate policy. Thus, the employee representatives have an increased involvement in fundamental decision-making. Members of management are permitted to sit on the board, but they are not allowed to be in a majority.¹⁸

In France, employee representatives hold one-third of the seats on the boards of French nationalized industries. Further, the government of France has introduced legislation whereby the traditional system of a unitary board of directors could be replaced by an optional two-tiered model, with employee representation at the supervisory level.¹⁹ The system of co-determination in The Netherlands is rather restricted. There are no seats on the board allocated for employees so there is no direct employee representation. Rather, the appointment of any new board member is subject to the approval of both the workers and the shareholders. Thus, board members, in theory, are expected to represent the interests of both the employees and the shareholders.²⁰ Other European countries such as Switzerland, Italy and Belgium have experimented with co-determination, but it is not required by law in any of those places.²¹

The Bullock Report

The Report of the Committee of Inquiry on Industrial Democracy was commissioned by the Labour Government in 1975. Composed of unionists, industrialists, and one lawyer under the chairmanship of Lord Alan Bullock, master of St. Catherines College, Oxford

15. *Ibid.*

16. *Steuer, Supra n. 8, at 263-65.*

17. *Ibid.*

18. *Supra n. 2, at 75-76.*

19. *Supra n. 16, at 267-68.*

20. *Supra n. 12, at 406.*

21. *Steuer, Supra n. 8, at 267-68.*

University, the Committee was established to advise the Government on how to implement its electoral promise of introducing a greater degree of democracy into British industry. It was given the following terms of reference by the Government:

Accepting the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors, and accepting the essential role of trade union organisations in this process, to consider how such an extension can best be achieved, taking into account in particular the proposals of the Trades Union Congress report on industrial democracy as well as experience in Britain, the EEC and other countries. Having regard to the interests of the national economy, employees, investors and consumers, to analyse the implications of such representation for the efficient management of companies and for company law.²²

The Committee received three main proposals, one from the Trades Union Congress (TUC), one from the European Economic Community (EEC), and the third one from the Confederation of British Industry (CBI). The Bullock Committee concentrates on these three proposals as "they were the most detailed proposals before the Committee and because taken together they introduce many of the principal issues in the debate on methods of extending industrial democracy. . . ."²³

The TUC's policy in 1974 had favoured a two-tiered system similar to the German model with a supervisory board composed jointly of worker and shareholder representatives and a professional management board charged with conducting the day-to-day management of the firm.²⁴ Fundamental to the position adopted by the TUC in that report was the view that capital and labour should be equal partners in the modern industrial enterprise, and that this equality should be expressed by allotting 50% of the places on the board to worker representatives. Additionally, the TUC was insistent that if worker representation were to be effective and not simply an 'illusion of power and influence without the reality' then the board should hold genuine decision-making authority.

However, in its 1976 submission to the Bullock Committee, the TUC revised its position. It rejected the German two-tier model, indicating a strong preference for a single unitary board. Worker representation on the board would be a legal right which a recognized and independent trade union would be able to demand. The board would be composed of worker representatives and shareholder representatives with parity between them. The responsibility of the worker representatives would be analogous to rather than identical to that of the shareholder directors, and their accounting and reporting back to their constituents would be safeguarded.²⁵ This structure was

22. *Supra* n. 2, at v.

23. *Id.*, at 26.

24. Trades Union Congress, "Industrial Democracy" (TUC 1974), as cited in the Bullock Report, *Supra* n. 2, at 27.

25. *Supra* n. 2, at 27.

to be implemented with respect to all boards of companies which employed over 2,000 employees. The 1976 submission also advocated that the worker representatives, or worker directors, be appointed through trade union machinery. This submission contemplated corresponding changes in British company law, as well as new legislation on employee representation. The TUC indicated that present company law embodied a conception of management's responsibility to capital and labour that was outdated and inappropriate in the prevailing economic and social climate. The TUC report indicated that the law should be altered to "reflect the essentially joint interest of labour and capital in the enterprise by placing a statutory obligation on companies to have regard to the interests of employees as well as shareholders."²⁶ Additionally, it is important to note that the TUC did not feel that employee representation was a substitute for the extension of industrial democracy at other levels of the corporation. The function of worker representation must be to complement other forms of industrial democracy, and the success of worker directors would depend on an adequate substructure of industrial democracy.

In contrast to the TUC, the EEC policy advocated a two-tier system similar to the German model with worker representatives elected only to the supervisory board.²⁷ EEC Policy envisioned the election of worker directors as separate from trade union machinery. Employee representatives would be appointed through a uniform system of indirect elections with voting by all employees whether trade union or not. The workers would not hold 50% of the seats as advocated by TUC, but would hold only one-third of the seats available on the board. The remaining two-thirds would be divided equally between shareholder representatives and third members co-opted by the other two groups to represent the general interest. The EEC also favoured the establishment of a separate works council representing all workers which would operate independently from the established unions and exercise jurisdiction outside the normal sphere of collective bargaining. Although dissimilar from the TUC position, this scheme can be viewed as an alternative proposal for achieving a form of equal representation of labour and capital on boards of companies.

The CBI proposal must be contrasted to both the TUC and the EEC positions in that it deviated from the notion that board level representation of workers is a valuable concept.²⁸ The CBI position was strongly critical of employee representation on boards if forced upon the company in any form. The essence of the CBI submission was a "plea for flexibility in developing alternative forms of par-

26. *Ibid.*

27. EEC Green Paper, as cited in the Bullock Report, *Supra* n. 2, at 29.

28. Confederation of British Industry, Evidence to the Bullock Committee, as cited in the Bullock Report, *Supra* n. 2, at 26.

ticipation.”²⁹ “Alternative forms of participation” means increased communication and consultation below board level, *i.e.* a gradual organic development of industrial democracy from the shop floor upwards. The CBI did not envision changes in present company law or new legislation, as their view of industrial democracy harmonized with the present concept of the rights of ownership. Nevertheless, the CBI did not exclude the possibility of an agreement between capital and labour to institute worker representation on a board of directors within a particular company. Having acknowledged such a possibility, the CBI demanded legislation to cover such cases. Any agreement to implement board level representation would have to meet the following requirements: employees must not elect more than one-third of the directors; they must be elected by secret ballot; the legal rights of shareholders must be maintained; and the full responsibilities of all directors for the entire business enterprise must not be changed.³⁰

The Majority Report

Board Level Representation

Although the Bullock study includes consideration of employee participation below the board level, its primary focus is on board level representation. The vast majority of the evidence gathered by the Committee, however, supported the view that the ultimate goal of board level representation could only be enhanced by a healthy sub-structure of participation below board level. The Bullock Report points out that a broad range of worker participation below board level has already developed, particularly in larger corporations; and rejects the notion that further development below the board level is required before board level representation can be statutorily implemented.

To suggest that we have to make a choice between *either* legislation or evolution is . . . not true. There need not be any incompatibility between extensions to industrial democracy based on the natural development of existing forms of joint regulation below the board and a parallel extension of industrial democracy based on legislation providing for employee representation on boards. Indeed representation at board level may be the guarantee and catalyst for effective participation at lower levels.³¹

Thus, the Bullock Committee confirmed the premise with which the study was begun — that legislation providing for direct employee representation on the boards of directors was necessary. It is the most effective means of ensuring active employee participation at the board level; further, it would tend to encourage the development of industrial democracy below board level and extend worker involvement to include some decision-making power. Moreover, the committee recognized the possibility that management and labour in any particular corporation might oppose one another on the issue of industrial

29. *Supra* n. 2, at 30.

30. *Id.*, at 31.

31. *Id.*, at 44.

democracy, and stressed that the introduction of employee representation at the board level must be statutorily based, being mandatorily imposed on certain corporations at the option of the employees.

We believe that the crucial test which alone will carry conviction and create a willingness to share responsibility is an acknowledgement of the right of representatives of the employees, if they ask for it, to share in the strategic decisions taken by the board. Participation at other levels may prepare the way, as we believe it already has in many British companies, but we are convinced that only when this test has been faced and passed will the way be opened to develop a new relationship and a new confidence between employees and management.³²

Board Structure

The next issue confronting the Bullock Committee involved the nature of the model most suitable for introducing employees to the board rooms of British corporations. The Committee had before it the proposals submitted by the TUC, EEC, and CBI. Moreover, it had the opportunity to study the various European models of co-determination, and to scrutinize the effects each had on its homeland's economic and labour situation. The debate regarding the nature of the board on which employee representation would occur revolved around two basic alternatives: 1) a two-tiered board structure with worker participation on the upper tier or 2) employee representation on a restructured form of the existing unitary board system in Britain. The Bullock Report pointed out that the implementation of a two-tiered system in Britain was included as a possible alternative because "in practice many large British companies and company groups operate a system where the functions of supervision and management are roughly divided between different levels of the organisation."³³ The committee was, of course referring to the common phenomenon whereby main boards fulfill what is basically a supervisory role combined with the power to set major policy, "whilst detailed policy formulation and implementation is delegated either to individual executives or to various kinds of committees, sub-committees, and so on."³⁴

The Bullock Committee ruled out the idea of adopting an orthodox two-tiered system of employee participation into British corporations. The reasons for doing so were both practical and philosophical. First and foremost, British corporate law traditionally has assumed a single board structure, allowing for substantial flexibility between the roles and functions of management and directors. The implementation of a two-tiered model in Britain would require a complete and detailed revision of British corporate law.

32. *Id.*, at 160-61.

33. *Id.*, at 68.

34. W. Creighton, "The Bullock Report — The Coming of the Age of Democracy" (1977), 4 *Brit. J. of L & Soc'y* 1, at 4.

Furthermore, those corporations which were not subject to the industrial democracy legislation, or in which employees chose not to enforce their right to employee board representation, would remain under the present unitary board structure. Thus, two bodies of corporate law would be required. "This seems to us to be a formidable prospect both for companies and especially for those who have to deal with them, who would wish to ascertain the company law system under which a company was operating before doing business with its senior executives or board of directors."³⁵ The Report also pointed out that a two-tiered system is diametrically opposed to the traditional flexibility, characteristic of British corporate law. In addition, the Bullock Committee cited the position of several French corporations which had chosen to adopt that country's optional two-tiered model, as evidence of the potential tension and conflict which can arise between the two boards. The Report suggested that such friction is the result of imposing a formal and definite division of power on the board where none existed before.

The final criticism of the two-tiered model rested on the observation that such a system effectively would preclude employees from participating in day-to-day management decisions as a result of the specific powers assigned to the upper board. The Report envisioned that the supervisory board has the potential of becoming "a reactive and passive body, meeting three or four times a year to hear reports from management."³⁶ "[T]he decisions which affect the workforce most particularly are not within its [the supervisory board's] jurisdiction. Participation in it does not vouchsafe co-determination on the matters closest to the interest and aspiration of the workers. . . ."³⁷

The Bullock Report also rejected the idea of implementing a two-tiered system modified to complement British corporate structure. The Committee submitted that a modified two-tiered system such as that implemented in Denmark allows the supervisory board, which has employee representation, to enjoy a greater involvement in the setting of major company policy and in the actual control of the company's affairs, as the result of a considerable overlap between the functions and members of the two boards. This flexibility in the roles of the two boards in the Danish model also allows each particular corporation to define for itself, to an extent, the duties and powers of the two boards. It is this very flexibility characteristic of the Danish system, however, which attracted the criticism of the Bullock Committee.

[T]he allowance that . . . [supervisory and management] functions may overlap in such areas as the formulation of corporate policy, and that senior executives may be members of the board, is an admission that the

35. *Supra* n. 2, at 73.

36. *Id.*, at 75.

37. Sir Otto Kahn-Freund, "Industrial Democracy" (1977), 6 *Industrial L.J.* 65, at 79.

distinction [between the two levels] is difficult to define in law and even more difficult to maintain in practice. In our view it provides further confirmation of the problems in linking employee representation with the introduction of a two-tier board structure in a country where until recently companies have developed within a more flexible unitary board system.³⁸

The Bullock Committee's proposal for the implementation of industrial democracy in Britain called for a reconstituted unitary board of directors. The Report recommended, then, the introduction of employee representation onto existing corporate boards.

Parity

The Bullock Committee admitted that the most difficult issue to resolve involves the proportion of the board to be allocated to employee representatives. Although minority representation would afford the worker representatives some insight into the determination of major company policy,

[u]nequal representation imposes severe restrictions on the effectiveness of employee participation in decision-making. It leaves control of major decisions and of the decision-making process in the hands of the shareholder representatives and management, and therefore does not fundamentally change the way in which decisions are reached or the premises on which they are based.³⁹

Further, the severe limit on employee participation which would be the consequence of minority representation, might result in skepticism on the part of the workers and the trade unions toward the whole philosophy of board level representation.

The Bullock Committee thus recommended the principle of parity of shareholder and employee representation on the board, but rejected the notion of full parity, whereby the board would be comprised solely of an equal number of shareholders and employees. Rather, it was decided that there should be a co-opted third element on the board. The members of this third group need not be neutral, but instead, their presence would be based on experience and expertise. They would be co-opted by a majority of the shareholder and employee directors. The Report stipulated that there must always be an odd number (greater than one) of co-opted members, to avoid a tie situation. Further, this third element is to form less than one-third of the total board. The Report also provided for the situation where there is no agreement between the shareholders and employees as to the membership of the third element; a government body known as the "Industrial Democracy Commission" would in that case have the power to make a binding selection.

Thus emerges the Bullock Committee's " $2x + y$ " formula, where " x " represents the number of employee and shareholder members, and " y " the number of co-opted directors. The Committee expected that

38. *Supra* n. 2, at 76.

39. *Id.*, at 94.

the size of the "x" and "y" elements would vary with the size of the corporation involved. In the event of a deadlock as to the size of the three components, the Committee recommended the use of statutory formulae for determination of board size; again, the statutory provisions would relate board size to corporate size.

It should be noted at this point that the one solicitor on the Bullock Committee, although accepting the basic conclusions of the Majority Report, disagreed with the Majority in the areas of parity and proportions. He suggested that the board should be composed of a majority of shareholder representatives, and rejected the need for the co-opted third element.

Role of the Board

The Committee recognized that the board on which the employee representatives would sit must have powers and duties sufficient to afford the worker representatives the opportunity to influence corporate decisions, if employee representation is to result in 'industrial democracy' in the true sense. Present company law, the Bullock Committee found, is inadequate to effectively accommodate employee representation by means of the $2x + y$ formula. The focus of the Committee's proposals for the changes in corporate law was to maintain the flexibility of the present structure while endeavouring to be "more precise about the role of the company board and about its relationship both to the shareholders meeting and the management of the company."⁴⁰ Such flexibility and precision are important not only for ensuring a responsive board of directors, but would be of importance to management as well.

[I]f worker directors are to have a voice in company affairs, the role and functions of boards of directors will need to be clarified so that final decisions on major questions of policy are not taken outside of board rooms or overruled at shareholders' meetings. It would therefore be desirable to specify more precisely in law at what point corporate decision-making powers would rest with boards of directors, under what circumstances the latter would be allowed to delegate authority to top management and which kinds of boardroom proposals shareholders would be given the right to accept and reject.⁴¹

In order to achieve the influence desired for the employee representative, the Bullock Committee proposed that company law should specify certain areas where the right to take a final decision would rest with the board of directors. In these areas, which the Committee referred to as the "attributed functions of the board," the board would not be able to delegate authority to senior management. Thus the board would have, under the proposed company law, the exclusive right to submit a resolution for consideration at the shareholder's

40. *Id.*, at 69.

41. F. Anton, "Worker Directors and Company Law" (1977), 77 Lab. Gaz. Can. 495, at 499.

meeting. These functions are the following:

- (a) winding-up of the company
- (b) changes in memorandum and articles of association
- (c) recommendations to shareholders on payment of dividends;
- (d) changes in the capital structure of the company (e.g. as regards the relationship between the board and the shareholders, a reduction or increase in authorized share capital; as regards the relationship between the board and senior management, the issue of securities on a take-over or merger);
- (e) disposal of a substantial part of the undertaking.⁴²

As well, the Bullock Committee proposed two "attributed functions" to place the responsibility for decisions with the board of directors rather than with senior management. They are as follows:

- (f) the allocation or disposition of resources to the extent not covered in (c) to (e) above. . .
- (g) the appointment, removal, control and remuneration of management, whether members of the board or not, in their capacity as executives or employees.⁴³

These latter "attributed functions" were the Committee's attempt to make the board the effective locus of management power.

The Bullock Committee recognized that management has often denied the board their legal right to exercise control. As such the "attributed functions" in (f) and (g) are added to those in (a) through (e) in an attempt to ensure that the major corporate policy decisions are the direct responsibility of the board of directors. The reconstituted board would be responsible for major financial decisions, substantial asset sales, and the appointment and removal of corporate management. To accomplish the appointment and removal of management, the board would be required to monitor management's performance. As well, the Committee's proposals distinguished between day-to-day corporate management, and the responsibility of the board to supervise corporate management and set general policy guidelines. The Bullock Committee suggested that these proposed changes provide an ultimate safeguard for employee representatives against the extreme case in which senior executives might try to introduce a major new policy without consulting the board.

Although the position of senior management is not altered drastically by the Bullock proposals, the same cannot be said for the legal rights of the shareholder. The Bullock Committee insisted, however, that the radical changes were necessary to establish the new concept of a partnership between capital and labour in the control of companies, which employee representation is to achieve. Therefore with these changes the company and its shareholders would no longer be one and the same entity. The "attributed functions of the board" radically affect the present powers of the shareholders. At present, the

42. *Supra* n. 2, at 77-78.

43. *Id.*, at 78.

shareholders maintain the right to fix dividends, wind-up the company, change its constitution, alter its capital structure, direct its investments, and appoint senior management. These powers would be transferred to the board of directors. The Committee was adamant concerning the necessity of these changes as it maintained that employee representation on boards would be worthless if these powers remained in the ultimate control of the shareholder. The Committee reiterated, "we have acknowledged that it would be illogical and frustrating to the true objective of industrial democracy to put employees on the board and then allow the shareholder the power to retain control of all major decisions."⁴⁴ Although the board, according to the proposals, would have the ultimate right to bring about a meeting of the shareholders to discuss the issues within the "attributed functions," the shareholders would still maintain the right to decide whether to pass the resolution. Additionally, the shareholders would retain the right to sell their shares in the normal way should they dislike the policies of their company. They could also impose borrowing limits, appoint auditors, and demand an investigation by the Department of Trade into the company's affairs.

The Bullock Committee, having dealt with the relationships of the board to senior management and to the shareholder, turned its attention to the legal duties and liabilities of the directors under a new corporate law framework. The Committee was of the opinion that a clear statement of basic duties in statute law could not be anything but helpful to a director, particularly a new employee representative director. Additionally, the Committee indicated that all directors should have the same legal duties and liabilities.

[W]e are agreed in principle that all directors should have the same legal duties and liabilities. We believe that to create two standards of directors owing different or separate duties would not be conducive to the development of cooperation between employee and shareholder representatives on the board, nor ultimately to the efficient management of the company.⁴⁵

Thus to establish an environment of cooperation and efficient management, all duties and liabilities would be the same for employee directors and for shareholder representatives.

The most major change, and in the Committee's mind the most important one, concerned the fiduciary duty of all directors to act in the best interest of the corporation. Clearly, if employee representation were in part a result of the social concern for employees affected by the corporate decision-making process, then the interests of the corporation could no longer remain only the corporate shareholders', present and future. Bullock recommended that all directors should continue to be required to act in the best interest of the corporation,

44. *Id.*, at 83.

45. *Id.*, at 83-84.

but in carrying out this duty, the directors should "take into account the interests of the company's employees as well as its shareholders."⁴⁶

With respect to specific aspects of the director's fiduciary duty, the Bullock Committee focussed on outside interest, secret profit, insider trading, and disclosure of confidential information. The Committee felt that these fiduciary duties should be largely unaffected by employee representation on boards of directors.

There seems no reason to exempt any director from the duties concerning *secret profit* or any law which is likely to be enacted regulating *insider trading*. No director should be able to use information received in the boardroom for personal profits. We have already touched on the position concerning *outside interests* . . . and we have concluded that while we are opposed to mandating we think it possible for an employee representative to represent his constituents' views at board level at the same time as acting in the best interests of the company.⁴⁷

The Committee did concern itself with the important issue of disclosure of confidential information. The Committee's proposals on this area will be considered in the discussion of employee representatives' duty to report back to their constituents.

Role of Trade Unions

One of the major distinctions between the Bullock proposals and European approaches to industrial democracy is that the Report recommended that worker directors be selected through and not outside trade union channels. The European models attempt "to protect the position of the non-member by using the Works Council or an equivalent body, upon which all employees are represented, as a basis for selecting employee representatives."⁴⁸ The Bullock Committee rejected the model of the German work council for various reasons. Among the most important of these reasons was the Committee's concern not to weaken the collective bargaining structure already in effective operation.

Collective bargaining is in itself a powerful and efficient method of joint regulation. Its focus, however, is obviously below board representation. There had been much worry that in light of board level representation, all forms of below board level representation would be ignored by the Bullock Committee. Also the fear of conflict between employee representation on boards and the already functioning collective bargaining force was a real one initiated by the trade unionists. The Bullock Committee recognized that the most important development in industrial democracy below board level had been the extension of the scope of collective bargaining. The Committee was therefore, concerned with any fear of conflict stemming from board

46. *Id.*, at 84.

47. *Id.*, at 85.

48. *Supra* n. 34, at 6.

level representation. The TUC's position on this matter was accepted by the Bullock Committee:

The view taken by the TUC was that, as long as board representation was based on the single channel of trade union machinery, it was not only compatible with, but a natural extension of the role of trade unions in encouraging their members to be involved in all aspects of policy formulation and in the management of industrial change . . . [They indicated] that as long as any system of employee representation on boards made the employee directors truly representative and properly accountable, then there would be no reason for such a system to undermine existing joint machinery.⁴⁹

Besides avoiding conflict between collective bargaining and employee representation, and strengthening of the below board structure, the use of trade union machinery would provide another advantage. This would be that the trade unions could be expected to possess, "the necessary expertise and independent strength effectively to service a system of employee representation; [and] to provide a channel of communication from the shop floor upwards, and back down again."⁵⁰ The Bullock Committee, consequently, proposed a system of employee representation on the board which is based entirely on trade union machinery. The Committee found the arm of the trade union machinery most favoured by employees was the shop steward organization — an organization internal to the company. The shop stewards are seen as the key figures in a system of board level representation. "They are almost invariably elected by trade union members at the workplace, and because their constituencies are small . . . they are kept in close touch with those they represent."⁵¹ The Bullock Committee realized that its proposals for board level representation instituted through a single channel of trade union machinery by-passed to some extent the non-unionized worker. The Committee thus proposed some form of compromise for the non-unionized worker in its proposal to implement the system.

Triggering Mechanism

The Bullock Committee considered three main methods of implementing or triggering employee representation on boards: 1) it could be mandatory on all companies who come within the scope of the legislation, 2) it could be triggered by a request from one or more recognized trade unions representing a majority of employees in the company, and 3) it could be triggered by a ballot of all employees. The Committee rejected the first alternative as being too rigid. It imposes employee representation whether the work-force was in favour of it or not. The second alternative, although more practical, was also inappropriate as it denies the non-union worker any say at all on this important subject of employee representation. Thus the Bullock Com-

49. *Supra* n. 2, at 43.

50. *Supra* n. 34, at 7.

51. *Supra* n. 2, at 111.

mittee was most happy with the third alternative — a ballot of all employees.

The question on the ballot, unless otherwise agreed by all parties concerned, would simply ask for a decision on the principle of employee representation through trade union machinery. The Committee suggested a suitable question: "do you want employee representation on the company board through the trade unions recognised by your employer?"⁵² The right to request a ballot, the Bullock Committee indicated, ought to vest in independent unions recognized by the company, but only unions which represent at least 20% of the total workforce of the company. The Bullock Committee also held the opinion that the majority needed to carry the resolution on the ballot should represent at least one-third of eligible employees. Of the ballot in general, the Committee had the following to say:

The balloting process which we have recommended would give unions which were opposed to employee representation on boards an opportunity to campaign against it. It would also give all employees, whether unionized or not, the right to be involved in the decision. Where most of them were opposed to employee representation through trade union machinery, they could prevent it being introduced. We believe then that the secret ballot will be an important democratic check. We hope also that it will have the effect of involving everyone in the company in the debate about employee representation on the board.⁵³

The Committee went into detail on administering of the ballot — that it should be at the expense, time, and workplace of the employer. As well, any disputes over the request for the ballot or the administration of the ballot would be referred to the Industrial Democracy Commission.

Scope of Proposed Changes

Having introduced the manner in which the system is to be triggered, it is essential to detail the companies which the Bullock Committee intended to be affected. Some of the Bullock recommendations, *e.g.*, the proposed changes in the concept of the interest of the corporation, are intended to be of universal application. However, employee representation is not one of those recommendations. There is general agreement that it would not be appropriate to make any scheme of employee representation that might be decided upon applicable to all companies irrespective of size. As Creighton indicates, "[m]ost of the problems with which employee representation is meant to deal — alienation of the workforce, remoteness of decision-making, and lack of communication — are particularly acute with larger companies, and consequently that is where employee representation at board level could be expected to make most impact."⁵⁴ As well, it is

52. *Id.*, at 115.

53. *Id.*, at 116.

54. *Supra* n. 34, at 9.

large companies which are most likely to be unionized, and given the emphasis placed upon unions as the channel for implementation, this is where the legislation is likely to be most effective.

The Bullock Committee found it necessary to analyze the size and scope of Britain's private sector in order to come to an educated determination of which companies ought to be affected by this proposed legislation. Chapter 2 of the Report contains the following figures obtained by the analysis: 738 enterprises with over 2,000 employees employ more than 6 million people. A further 358 enterprises employ less than 2,000 employees which accounts for an additional 355,000 people. Therefore, the Committee concluded that for maximum effectiveness, their proposals should initially affect all firms employing over 2,000 employees. The Committee also indicated the possibility of lowering the figure after three or four years.

The Bullock Committee realized that problems would arise in implementing this system in groups of companies, multi-nationals, and foreign based multi-nationals. Most of the enterprises which employ over 2,000 workers are corporate groups composed of a holding company (parent) and a subsidiary. Consider the situation where a subsidiary employs over 2,000 workers and is consequently affected by the worker representation legislation, but the holding company employs less than 2,000 workers and as such is exempted from the legislation. As the parent corporation traditionally controls the subsidiary, what would be the purpose of putting employee representatives on the subsidiary board if the decisions were made by the parent board, a board without employee representation? The Bullock Committee, recognizing this essential problem, offered the following solution: Employee representatives would be placed on the parent board if the corporate group employs over 2,000 workers. Thus, if parent "x" employs 1,000 workers, but its subsidiaries "y" and "z" each employ over 2,000 workers, all three companies, (the two subsidiaries and the parent corporation) would have worker representatives on their boards. The legal consequences of this are fundamental. The viability of the corporate group would be threatened as the parent company would no longer have the right to elect all the directors of its subsidiary corporations. As well, the "attributed functions" of the directors would further eliminate the parent company's ability to control the subsidiary. In an effort to effect some form of compromise to enable efficient operation of corporate groups as well as effective employee representation, the Bullock Committee gave the parent (holding) company the final right to appoint the "y" members of the "2x + y" board when no agreement could be reached.⁵⁵

With respect to multi-national corporations whose parent is incorporated in Great Britain but whose subsidiaries are elsewhere,

55. *Supra* n. 2, at 130-41.

other problems become apparent. The Bullock Committee received arguments indicating that it would be unfair for representatives of British employees to sit on boards which make decisions affecting the unrepresented employees of companies not located in the United Kingdom. However, the Bullock Committee felt that it would be equally unjust, or perhaps even more so, to exclude British employees from the right to representation simply because they worked for companies with subsidiaries not located in Great Britain. As such, the Committee was in favour of employee representation in much the same form for multi-national corporations whose parent is incorporated in the United Kingdom.⁵⁶

With respect to foreign based multi-nationals — those corporations whose parent is located overseas but whose subsidiaries are located in Great Britain — the problems are crucial. How is effective employee representation to take place if the board which has the ultimate control is not located in Great Britain and as such is not subject to its laws? The following proposals were put forth by the Bullock Committee: Any subsidiary incorporated in the United Kingdom which employs over 2,000 employees would be subject to implementation of worker representation should the ballot be favourable. Any large enterprise (unincorporated) which operates as a branch of a foreign owned company, but which employs 2,000 workers would also be subject to worker representation provided a successful ballot had been advanced. Additionally, such a branch would be forced to incorporate or at least to organize itself in some fashion to allow for effective employee representation.⁵⁷

The difficult question concerns the relationship of the United Kingdom subsidiary with its overseas parent. The argument is raised that as ultimate control lies with the overseas parent, perhaps worker representation is not appropriate in this case. The problem presents itself most visibly in the area of the "residual power of the parent to appoint the third group of directors, in the event of failure by the two other groups on the board to agree on co-option"⁵⁸ Employees of foreign based multi-national corporations are at somewhat of a disadvantage, and the Bullock Committee understood the need to deal fairly with them. However, the Committee also recognized the need to maintain the corporate group structure and not disturb foreign interests in the United Kingdom. To achieve this balance of interests, the Bullock Committee advanced the following proposals: Where there was no agreement on appointment of the co-opted "y" directors, a distinction would be made with respect to 1) immediate United Kingdom subsidiaries of a foreign parent, and 2) United Kingdom subsidiaries. In the first situation, the proposals remain similar to

56. *Id.*, at 142-44.

57. *Id.*, at 145.

58. *Ibid.*

those already advanced. If the subsidiary employed 2,000 employees, the corporation would be subject to employee representation on the presumption of a successful ballot. If the group aggregate of the United Kingdom workforce employed 2,000 employees or more, the same would hold true. If problems arose as to the appointment of the "y" co-opted directors, the Industrial Democracy Commission would make the final decision. However, the Commission would be required to ascertain the wishes of the foreign parent and take these wishes into account. In the second situation, that of a sub-subsidiary, other proposals apply. The top subsidiary in the United Kingdom would have the exceptional residuary power to control the "y" seats on the boards of large United sub-subsidiaries below it. These provisions, the Bullock Committee suggested, would effect a balance of the two interests involved.⁵⁹

Selection of Employee Representatives

Once it is clear who is to be affected by this legislation, and that it is to be triggered by a ballot given to all employees, it is necessary to discuss the Bullock proposals with respect to the actual selection of employee representatives. Once the ballot is in favour of employee representation, the basic issue is seen to be "how far the law should specify the method of selection and how far it should leave the trade unions free to devise a system they think suitable."⁶⁰ The Majority Report rejected the rigid German procedure where the method of selection is carefully defined by the law, favouring a modified formula where the onus of devising a satisfactory method for selection is put on the trade union in each company. Thus the Committee answered its own question by indicating that the law should be entirely flexible and allow the trade union the freedom to devise whatever method it found most suitable. This decision necessitates the convergence of the various trade unions recognized by the company in order to agree upon the satisfactory system. Once a ballot is in favour of board level representation, the shop steward and other lay representatives of various unions would have to form a committee. This committee, the Joint Representation Committee (JRC) is recognized by the Bullock proposals as an important one. The Bullock Committee foresaw the responsibility of this committee to "provide the continuing support for board representation and its interface with collective bargaining."⁶¹ However, with implementation of employee board level representation, the JRC would play a major practical role in negotiating with existing boards on the size and structure of the reconstructed board, and deciding on the selection process of the employee representatives.

The proposals go into much detail with respect to the

59. *Id.*, at 145-50.

60. *Id.*, at 117.

61. *Id.*, at 118.

qualifications of employee representatives, their terms of office, their pay and their facilities. Of utmost importance is the practical aspect of the employee representatives' duty to report back to their constituents. The Bullock proposals are of limited use if the employee representatives do not maintain close contact with their constituents, as there would be no communication between the board of directors and the workers. The Bullock Committee in speaking of employee representatives claimed:

They must make it their regular job to report on what the board is doing or proposing to do and why. They must be able to take soundings before a matter comes up to the board so that they can accurately reflect the views and feelings of the employees to their fellow directors. If they are prevented from doing so, then they will become isolated from those they represent and may even be regarded with suspicion as the agents of management.⁶²

Consequently, it becomes essential for employee representatives and the recognized trade unions within each company to develop a system of reporting back by which board representatives could keep in touch with those they represent.

The Bullock Committee proposed that "an obvious starting point for any system of reporting back would be the [JRC]."⁶³ The employee representatives would be expected to report regularly to the JRC, and the JRC would be responsible for dissemination of the information to the other parts of the trade union structure down to the employees as a whole. Beyond this, the Bullock Committee felt that flexibility was in order, and that individual and particular circumstances of each company would determine the arrangements devised in each situation.

The concern with the adequate dissemination of information in order for accountable representation to take place invites the problem of disclosure of confidential information. As previously mentioned, the director of a corporation (and in the Bullock proposals — employee directors as well as shareholder representatives) owe a fiduciary duty not to disclose any confidential information which could possibly injure the corporation. Bullock pointed out that in most cases, this concern should not present the employee director with more of a problem than already exists. On most issues, the interests of the employees will coincide with the best interests of the corporation. Consequently, "[i]ndividual employee representatives are no more likely than existing directors deliberately to leak confidential information to competitors or price-sensitive information to speculators."⁶⁴ The Bullock Committee commented on their perception that this concern has caused little problem in the European experience and therefore the Committee recommended no additional legislation on this matter. It would be up to each and every board to decide what is

62. *Id.*, at 87.

63. *Id.*, at 124.

64. *Id.*, at 89.

confidential. It would remain a breach of duty to reveal confidential information, as it is now in company law.

Industrial Democracy Commission

Although each step towards implementation was meticulously detailed and repeated in the report, the Committee realized the need for an independent Industrial Democracy Commission in order to successfully implement employee representation. The Bullock Majority foresaw the role of this Commission to "provide advice and information on detailed matters of implementation which are inappropriate for treatment in statute, to conciliate where parties are in dispute about how board level representation should be introduced and, in the last resort, to impose a binding solution."⁶⁵

The Commission would play an important role. It would rule on contentious issues such as whether a company has in effect 2,000 employees, and whether a particular union is recognized by the employer. The Commission would advise on the conduct of the ballot and perhaps interpret the result of the ballot. It would provide conciliation on possible disagreements between management and trade unions with respect to board size as well as on the formulation of the JRC. Of essential importance would be the Commission's role in possible disagreement on the appointment of the co-opted third party. In the last resort, the Commission would be able to decide which specified persons should form the third group on the board of directors. Finally, the Commission would be charged with the crucial task of monitoring and evaluating the operation of the new legislation with the power to review it three years after coming into force.⁶⁶

Minority Report

The difference between the three signatories of the Minority Report and the seven members of the Majority is nothing short of 'fundamental.' The Minority refused to accept the limited terms of reference within which the Committee's enquiry was directed. They questioned whether board level representation of employees provides the solution to the economic and labour problems of Great Britain. As well, they did not wholly accept that a case for "a radical extension of industrial democracy" had already been made.

Beginning with this dissatisfaction, the Minority stressed the importance of developing a broad substructure or "effective structures of employee participation from the grass roots level."⁶⁷ If any legislation were enacted, the Minority urged that such legislation should:

- (a) improve the effectiveness of the companies in their task of generating

65. *Id.*, at 151.

66. *Id.*, at 152-54.

67. *Id.*, at 171.

- wealth for the community as a whole;
- (b) ensure that Boards of Directors are legally and demonstrably accountable for their actions to their employees as well as to their shareholders;
- (c) satisfy the aspirations of employees for involvement in the formulation of decisions which closely affect their work.⁶⁸

The proposals of the Minority were aimed to achieve these goals. The Minority was in favour of the establishment of a system of employee or company councils to represent the interests of all employees. In this sense, trade union machinery was completely rejected.

Additionally, the Minority rejected the unitary board model of the majority in favour of a two-tier managerial/supervisory board not unlike the West German model. The supervisory board would allot one-third of its seats to employees, one-third to shareholders, with the final one-third being composed of co-opted independents. The chairman of the supervisory board — always a shareholder representative — would have the casting vote. The employee directors would come from three specified sources: the shop floor, white collar staff, and management. They would be elected by a secret ballot of all employees having held one year's service. The board would "exercise general supervision over the conduct of the company's affairs by the Board of Management, but should not participate directly in the management of the company, nor be empowered to initiate policies."⁶⁹

Commentary

One critic concludes his critique of the Bullock report with the following statement: "The Bullock Report constitutes by far one of the most thorough and thoughtful examinations of the impact of employee participation on the customary rules of company law."⁷⁰ To this point, this paper has objectively detailed the proposals initiated by the Bullock Committee. Many of the Bullock theories need, however, further commentary if not further explanation.

Much criticism has been launched against the very narrow terms of reference which the Government chose to give the Committee at its inception. The Bullock Committee was appointed not to balance the advantages and disadvantages of industrial democracy, nor even to develop a workable definition of what industrial democracy is. Rather, the Committee was directed to advise on the implementation of a policy already assumed to be desirable and already largely defined. The Minority was critical of these terms of reference, as were others who felt that they "effectively tied the hands of the committee and largely pre-judged many of the most important issues."⁷¹ This

68. *Id.*, at 172.

69. *Id.*, at 179.

70. D. Prentice, "Employee Participation in Corporate Government — A Critique of the Bullock Report" (1978), 56 *Can. Bar Rev.* 277, at 304.

71. R. Davies, "The debate on industrial democracy: a perspective on Britain's Bullock Report" (1977), 77 *Lab Gaz. Can.* 266, at 269.

criticism is a strong one, and in fact

some critics have even gone so far as to suggest that the 'pro-union' tone simply confirms that the appointment of the Bullock Committee, along with the Labour government's promise of early legislation on industrial democracy, were merely part of a quid pro quo arrangement with the TUC for agreement on a voluntary incomes policy.⁷²

The Committee did recognize the criticism directed against the "terms of reference" and did attempt to meet it:

Many witnesses were concerned that our terms of reference would restrict the scope of our inquiry to the single issue of board level representation and would exclude consideration of the other forms of participation, seen as alternative or additional, particularly those at other levels in the enterprise. We agree that our terms of reference direct our attention to the issue of employee representation on company boards, on which we are particularly requested to report. To this extent, we believe that they were useful to us in providing a starting point for our studies; they have not, however, precluded us from considering the wider aspects of participation in decision-making Our report shows that we have interpreted our terms of reference *widely*.⁷³ (emphasis added)

Notwithstanding the Committee's insistence that it interpreted the terms of reference widely, it is impossible to avoid the large degree of inevitability of several of the Committee's proposals. One such example is the combination of the Committee's requirement to accept the need for a *radical* extension of industrial democracy with the conclusion that minority representation on supervisory boards is of little effect. Consequently, the Committee was virtually prohibited from reaching any conclusion other than that parity representation on unitary boards was essential.⁷⁴

This brings to light another concern. There is a marked similarity between the final majority proposals and the submissions made by the TUC.⁷⁵ The proposal to implement employee representation through existing trade union machinery elicits the criticism that the membership of the Committee was stacked in favour of the TUC's position. The Committee attempted to diminish this criticism by arguing that the success of employee representation would depend on the support of a representative body that is both independent of management and capable of providing a base within a system of representation. There is much to be said on both sides of this argument. The terms of reference are indeed narrow, and the Majority proposals do resemble strongly the TUC position. However, in support of the Committee's proposals, it must be stated that the power of the trade unions in Britain is a force which cannot be denied. Perhaps, therefore, the hands of the Committee were not so much tied by the terms of reference as by the very reality existent in Britain.

72. *Ibid.*

73. *Supra* n. 2, at 1-2.

74. *Supra* n. 71.

75. *See text, Supra* n. 24-26.

Another interesting observation is that the true basis for the Bullock Committee's rejection of the West German two-tiered model is inherently linked with the unequal development of below-board representation in that country and in Britain.⁷⁶ In West Germany, board level representation represents only the highest level of statutory industrial democracy; there exists in addition a relatively well-developed scheme of co-determination below the board level, particularly in the form of works councils. The Bullock Report's rejection of the two-tiered model, claims Sir Otto Kahn-Freund, results from its decision not to demand employee participation below the board level. "[T]he committee had to reject the two-tier system, because otherwise, its refusal to recommend any kind of legally organised 'substructure' would have reduced its proposals to a mere sham of 'participation'. This is the point of substance. . . ."⁷⁷ It should be noted that at least one subsequent article is critical of the Kahn-Freund analysis, declaring that the author over-emphasized the importance and necessity of a statutorily-based substructure of worker participation for the success of board level representation.⁷⁸

Much may be said with respect to the Bullock proposals expected effect on corporate practice and the powers of shareholders and directors. It has been claimed by both the Bullock Committee and critics that the changes proposed to the board and the shareholder powers would simply bring the legal theory into line with commercial practice.⁷⁹ In dealing with the changes to shareholder's powers the Bullock Committee stated:

In practice these changes will not be as great as they may seem. The law amended on the lines outlined above will more closely reflect current practice in large companies. We noted . . . that the shareholders' meeting was most commonly a reactive and passive body, rarely acting of its own accord without or against the advice of the board Essentially therefore our proposals will have the effect of bringing the law into line with reality, rather than reducing any real power of valuable rights that shareholders possess.⁸⁰

But as Mr. Prentice indicates in his article, "it is difficult to accept unreservedly the latter part of this statement, as there is a material difference between possessing rights which, for whatever reason, one does not exercise and being deprived of those rights."⁸¹ Therefore, one must conclude that the shareholders' rights would be strongly curtailed by the Bullock's proposals. As a result, it would be extremely unlikely, as the Bullock Committee desired, that the shareholders

76. See *Supra* n. 37, at 79-80.

77. *Ibid.*

78. P. Davies and Weddeburn of Charlton, "The Land of Industrial Democracy" (1977), 6 *Industrial L.J.* 197, at 209.

79. *Supra* n. 2, at 81; *Supra* n. 70, at 289.

80. *Supra* n. 2, at 81.

81. *Supra* n. 70, at 287-88.

meeting would ever become an influential force of control over the board of directors.

The concept of employee representation in general has been criticized by those who feel that it is impossible to expect employee directors to act in the best interests of the corporation. This, critics submit, evokes conflict because the best interest of the corporation is currently defined as the interests of the shareholders, present and future. However, the Bullock Committee attempted to resolve this conflict by broadening the definition to include the interests of employees as well as shareholders. This reform is not considered radical or even controversial.⁸² Nonetheless, there are those who are not satisfied that the conflict has been eradicated. Kahn-Freund insists that the "so-called 'interest of the company' is always identical with an interest of its shareholders. . . ."⁸³ It becomes clear that this approach is based on the theory that the basic goal of the corporation is to maximize profits. If this is presumed, then Kahn-Freund's problem is easily exemplified.

Assume . . . a typical clash of interest between a group of workers, represented by their trade union, and the dominating group of shareholders represented by the board about a decision to invest a considerable capital in labour-saving machinery which will quickly lead to widespread redundancies. The rationalizing measure is said to be in the interest of the company and the insistence on job maintenance by union and its members a selfish assertion of a particular interest against that of a higher entity.⁸⁴

Once the assumption — profit maximization as the only legitimate concern of the corporation — is refined, and it becomes acceptable for the company to pursue a wider range of goals, this problem is greatly reduced. When a company pursues a range of goals, attempting to hold a balance among "profit, growth, size, employment opportunities, etc., then no particular group interested in the company can claim permanent identification of the company's interests with its interests."⁸⁵ Thus, the crucial question becomes how the balance is to be struck. That decision could be handled by Bullock's proposed reconstructed board:

There will be cases where representatives of employees or shareholders argue for the predominance of their own interests. But no one will be in breach of his duty for arguing a specific case at board level The directors' job will indeed be the same as it is now: to weigh up the differing and conflicting interests in the company in order to reach decisions which they genuinely believe to be in the company's overall best interest.⁸⁶

The legal definition of the company's best interest would be wide

82. *Supra* n. 78, at 199; *Supra* n. 70, at 296.

83. *Supra* n. 37, at 76.

84. *Ibid.*

85. *Supra* n. 78, at 202.

86. *Supra* n. 2, at 85.

enough to allow the board to legitimately pursue a broad range of interests and goals.

Prentice insists that the Bullock Committee ignored the possible conflict area and is not satisfied with the attention given it in the report. He proposes that "it would have been preferable if Bullock had explicitly recognized that directors elected by a special class should be able to act in furtherance of the interest of that class,"⁸⁷ rather than to impose a unitary frame of reference on both employee directors and shareholder directors. However, Prentice's suggestion overlooks the importance of Bullock's attempt to close the gap between the interests of management and employees rather than to accommodate it by expanding the definition of the interests of the corporation.

Bullock, as previously mentioned, was of the impression that the director's duty of care and skill was largely unaffected by the proposal for employee representation. Traditionally these duties, although important, did not impose stringent standards and few if any directors have been held for negligence.⁸⁸ Critics regard the present law as badly needing reform. If the duty of care were to be made more stringent as advocated, problems could arise due to the lack of expertise and knowledge on the part of the employee representatives in the corporate field. One solution advocates the following: to limit the employee representatives' duty of care and skill to employee related matters. Prentice is aware that this proposal violate the Bullock principle that all directors should share the same duties and liabilities.⁸⁹ Perhaps, the Bullock Committee's requirement for education and training for the employee representative would to some extent alleviate this problem.

The problem of disclosure of confidential information is a concern of which the Bullock Committee was aware. However, the blanket statement that the European experience has indicated few problems in this area is certainly not an adequate treatment of the problem. There are many possible problems. Prentice indicates one example of confidential information involving plans for plant relocation which would directly affect the employee, most probably in a detrimental way.⁹⁰ Bullock dealt with this problem but somewhat simplistically. The problem is brought to light but quickly done away with. This issue must be resolved if employee representation is to be a viable form of industrial democracy.

The White Paper

The recommendations of the Bullock Inquiry, although having provided the groundwork for much discussion on the subject of in-

87. *Supra* n. 70, at 298.

88. See L.C.B. Gower, *Modern Company Law* (3rd ed. 1969) 549-52; cf. *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407 (C.A.)

89. *Supra* n. 70, at 301.

90. *Id.*, at 299.

dustrial democracy in Britain, were for the most part not accepted as a viable model for the implementation of employee representation at the board level. The radical Bullock proposals, calling for parity between employee and shareholder directors, received strong criticism in some circles. The fundamental notion of employee participation at the board level, however, remained the ultimate goal of the Labour Government in the area of industrial democracy

The advantages of industrial democracy will not be won unless employees in companies and nationalised industries alike have the opportunity to take part in the development of corporate strategy, to contribute to decisions before they are taken and equally important to share in responsibility for their implementation.⁹¹

Thus, in May 1978, the Labour Government released a White Paper on industrial democracy. Its recommendations can be characterized as a compromise to those outlined by the Bullock Committee. The White Paper proposals represent a more cautious and flexible approach to the issue of employee representation at the board level. The Government did not wish to impose a standard model of participation on all industries. Rather, its recommendations indicated a desire to avoid interfering with the process of collective bargaining, which it felt was better suited than statutory formulae to evolve and initiate participation models suitable to the conditions of each company. The White Paper adopted the Bullock principle that employees ought to have a right to board level representation, and included proposals for fall-back legislation which would become operative only if employers did not allow their workers to exercise this right. The White Paper also would require companies with more than 500 employees to consult workers' representatives before major decisions are taken.

The Government reiterated its desire for employers and employees to design voluntarily the form of board representation of workers most appropriate for their particular company. The White Paper, however, proposed legislation whereby a two-tiered board system, not unlike the Danish model, would be available as an option for any corporation. The Government believed such a model had advantages over a unitary board irrespective of the question of employee representation; these advantages are magnified when the issue of employee representation arises. It recognized the need for the distinction between the policy-setting and management functions of directors, and envisioned the clarification of these two major roles resulting from the introduction of a statutory two-tiered structure, where the powers and duties of each level would be designated by law.

The White Paper proposed that the policy board, at which level employee representation would occur, would play a fundamental role in setting company policy. It would fix the corporation's objectives, and all strategic plans would be subject to its approval. The policy

91. Government of the United Kingdom White Paper On Industrial Democracy (May 1978) 2.

board would set the policy of the company regarding takeovers and mergers. Further, it would establish guidelines for employment and personnel policies. In addition, the policy board would appoint the members of the management board, set their salaries, and supervise their performance.

The management board would be responsible for the day-to-day management of the corporation, but would be under the supervision and control of the policy board. The management board would have the basic duty of managing the business of the company, and would be given the statutory powers necessary to fulfill this responsibility. Its rights and duties at law basically would be those presently attributed to existing directors operating under a unitary board structure, with the exception of those duties expressly delegated to the policy board under new legislation. One novel duty of the management board would be to report regularly to the policy board so as to ensure that the latter is able to fulfill its role. The Government proposals allow for members of the management board to sit on the policy board, with the restriction that these dual members do not form a majority of the shareholder directors on the policy board.

The White Paper regarded the two-tiered model as an option to be considered by labour and management in reaching an agreement as to the most suitable model of employee representation for their particular corporation. The two-tiered structure would be mandatorily imposed, however, on any corporation where employees relied on the statutory fall-back provisions to enforce their right to representation, unless agreement were reached to the contrary. Unitary board structure would remain available in all other cases.

The White Paper's recommendations provided that the statutory right of employees to board level representation would be limited to corporations with more than 2,000 employees. Exercise of this right would be initiated by a Joint Representation Committee (JRC), identical to the type of JRC proposed by the Bullock Committee. The Government, however, stipulated a waiting period of three to four years from the establishment of the JRC before the statutory right to board level representation would become exercisable.

On the issue of proportions, the Government did not reach any definite conclusion. It recognized the advantages of parity between shareholder and employee representatives on the policy board, but was aware of several problems which might result from equal representation. These include the possibility of deadlock, as well as the negative effect which parity might have on collective bargaining.

Parity on the policy board can also be seen as upsetting the balance of collective bargaining which requires, for its effective functioning, true independence of the two parties involved, trade unions and the management board. On this view if employees have an equal say in the appointment and conduct of company boards this would result in their having an unequal and greater force at the bargaining table, and this

might affect the confidence of investors making it more difficult to raise capital.⁹²

The result is that although the Government "does not exclude parity as an ultimate outcome . . ."⁹³ it proposed to initiate employee representation by allotting to them up to one-third of the seats of the policy board.

The White Paper also discussed the problem related to the selection of employee representatives, focussing on the issue of whether it should be done through the unions, or whether non-union members ought to be involved as well. It cited the Bullock proposal of using the JRC to determine how the employee representatives should be selected, with the right of the trade unions to appeal any unfair results. The White Paper presented the further suggestion that this right of appeal "be extended to any substantial homogenous group of employees."⁹⁴

The White Paper de-emphasized the gravity of the problem of confidential information with respect to employee board members. It suggested that in the majority of cases, there could be agreement between management and the unions as to which information must remain confidential, and employee representatives would be instructed not to relay such privileged information to the workers.

With respect to corporate groups and multi-nationals, the White Paper recommended that employee representation at the board level be applicable "at whatever level decisions are taken and in all companies incorporated in the U.K. where the number employed meets the stated thresholds, irrespective of the location of their parent companies."⁹⁵ Although the mechanics remain to be resolved, the Government did not deem it proper for corporate groups or multinationals to be excluded from employee representation requirements.

Finally, the White Paper deviated from the Bullock proposals by extending board level representation to nationalized industries. Employee representatives in these corporations, however, would be introduced onto the existing unitary board structure of those industries. Because each board of a nationalized company is responsible to a minister, the introduction of the two-tiered model in these corporations would actually result in three levels of power, a situation not favoured by the Government.

*Board Level Representation:
Applicability in Canada*

Desirability

It is evident from the unattractive economic and labour

92. *Id.*, at 8.

93. *Ibid.*

94. *Id.*, at 9.

95. *Id.*, at 10.

situations which are prevalent in Canada today that some remedial action must be taken. Labour problems beset the country with an extremely high number of man days lost in the current year as a result of labour disputes. As the standard of living is relatively high in Canada, the average worker believes that he is entitled to a meaningful job, a rise in the standard of living, and as a matter of right, a voice in the decisions that affect his work. The economic/labour situation, as well as the voice of the better educated worker, beckon for change in the industrial world. Both seek industrial democracy.

The question must be asked: Can collective bargaining, or an expansion of present day collective bargaining, solve these problems in Canada today? In theory, collective bargaining may appear just as effective in promoting worker participation as board level representation. However, practically speaking, this does not appear to be the case in Canada. Collective bargaining cannot bear the sole responsibility for increased worker participation for the following reasons. First, the scope of collective bargaining has been widening quickly. Consequently, there is the concern that collective bargaining in this country is already over-burdened. If so, it certainly is not the vehicle to absorb the wider range of issues which are inherent in the further extension of worker participation in Canada. Second, collective bargaining is an adversary method of reaching an agreement. Its primary function is the extraction of concessions from the 'the other side.' This adversary nature makes collective bargaining unfavourable in an attempt to create a partnership between labour and capital. Through collective bargaining, no such cooperation can be achieved in the true sense of the word. To insist that collective bargaining remain the ultimate mode of worker participation is to negate the philosophy behind industrial democracy. Third, collective bargaining remains an inappropriate method of providing increased worker participation in a *direct* sense. If there is no *direct* worker involvement, then certainly the expectation of the worker for a closer identity with his workplace and a psychological stake in his company are foregone. If one is to forego this personal fulfillment of the worker, then industrial democracy has not in any sense been achieved.

Collective bargaining as such is not satisfactory to assume the entire burden of worker participation. Consequently, other forms of worker participation must be examined. Employee representation on boards is one such method which aims at promoting personal fulfillment and establishing *direct* worker involvement. But, does employee representation cure the ills of worker alienation, and provide this requisite fulfillment? This query has often been answered in the negative. "[I]f adverse employee reactions to the workplace arise from the absence of opportunities for self-expression, recognition and fulfillment which come from a meaningful role in the organization, then any strategy that ignores the rank-and-file employee cannot

work."⁹⁶ It is essential to add that worker representation does not alter the work experience of the average employee and consequently, cannot alone eliminate these feelings of alienation and powerlessness. The answer to such an allegation lies in the Bullock Report's recognition that a well developed substructure is a necessary complement to worker representation. It appears that together with job enrichment, job design, and human relation programs, employee representation would ultimately result in true industrial democracy.

Practicality

The introduction into Canada of any model of board level employee representation would undoubtedly have implications for Canadian corporate law. Canadian company law is based, for the most part, on the assumption of private ownership, with the shareholders having control of the corporation. It is the shareholders who traditionally have the right to elect directors and to delegate the management of the business to executive officers.

If there is one outstanding characteristic of Canadian corporate law, it is its flexibility. It is the articles of association and the by-laws — passed by directors and approved by shareholders — which form the fundamental framework within which the typical Canadian corporation operates. Corporate directors, however are subject to several provisions of federal and provincial company law statutes, which confer on them duties and responsibilities beyond those contained in the by-laws.

Directors are required to respect their fiduciary duties, which dictate that they act in what they believe to be the best interest of the corporation.⁹⁷ This requirement, as has already been noted, poses the problem of whether the company's "best interest" is to be interpreted to mean the best interests of the shareholders alone, or extended to encompass the interests of workers. It also gives rise to the issue of the priorities of the employee representative when the wider interests of the company and the shareholders conflict with those of the workers. If industrial democracy is to be the result of employee representation, then corporate law must allow the worker directors to have full regard to the interests of their worker constituents.

Also in relation to the duties of directors is the degree of care and skill required of them when exercising their decision-making power.⁹⁸ This level of diligence remains unclear even after substantial case law on point,⁹⁹ and a more definite explanation of the required degree of care and skill below which directors could be liable for negligence, is required for the protection of uninitiated worker directors. It would

96. *Supra* n. 1, at 166.

97. See *The Corporations Act*, S.M. 1976, c. 40, s. 117 (1) (a) (C225).

98. See *The Corporations Act*, S.M. 1976, c. 40, s. 117 (1) (b) (C225).

99. See Gower, *Supra* n. 88.

seem that all directors — employee and shareholders — should be subject to the same duty of care.

The very premise that board level representation will increase industrial democracy rests on the assumption that the board of directors of a corporation is an effective decision-making body. The degree to which directors are actively involved in major corporate strategy is highly variable, and revisions to present corporate law might prove necessary to ensure that directors — especially employee directors — become actively involved in corporate affairs. It seems, however, that present company law vests sufficient power in the directors of corporations for their roles to be meaningful and effective; diligence and persistence in exercising these rights would elevate the level of decision-making power emanating from the boardrooms of Canadian corporations.

Corporate law would obviously have to specify the level at which employee representation is to occur. There are advantages and disadvantages inherent in each of the board structures scrutinized by both the Bullock Report and the White Paper. Canadian company law has developed traditionally around a flexible unitary board structure, and there does not appear to be any consensus that an alternative model would better lend itself to employee representation than the present model. However, the boards of many Canadian corporations today are not dissimilar, in practice, to the flexible two-tiered model used in Denmark, and it is foreseeable that employee representatives could easily be introduced to such companies with no major policy changes. Whichever model is used, the law will require clarification of the role of the board and its relationship to shareholders, management, and employees. If worker representatives are to hold the power to influence corporate decisions, the role and functions of the board of directors must be defined sufficiently so that final decisions on major policy issues are not taken outside of boardrooms or overruled at shareholders meetings. Thus, the introduction of employee representation would require corporate law to specify precisely the decision-making powers to be held by the board of directors, the ability of the board to delegate authority to management, and those types of boardroom proposals which would be subject to shareholder approval. Although the specific codification of those functions for which the board is responsible would not call for any major substantive changes in the current procedures of most corporations, it would have the effect of protecting employee board members from over-zealous attempts by management to act unilaterally where ultimate responsibility resides with the board.

Worker representation alters the relationship between the board and the shareholders, demoting, in a sense, the position of the shareholder in the company. Because the interest of the corporation would include the interests of employees, there would have to be a

restriction imposed on the power of shareholders to overrule board decisions on those issues materially affecting the employees. Alterations to articles of association, capital structure, dividend distribution, sale of assets and dissolution are all matters affecting employees; present corporate law giving shareholders exclusive jurisdiction over these areas¹⁰⁰ would require alteration, so that the board of directors would have to be consulted on each of these matters.

Effective employee representation would require worker directors to report back to their constituents. A problem inherent in the duty to report back is that of confidentiality, a matter which has already been discussed. Although corporate law could be amended to include guidelines for, and restraints on, the rights of employee directors to disclose confidential information; the experience of European models of co-determination suggests that the problems relating to confidentiality are insignificant.

Dealing with the practicality of implementing a system of employee representation in Canada, a key concern is that it should not conflict with the already well established system of collective bargaining. As previously mentioned, collective bargaining is an adversary process. Recognition of substantial mutuality of interests and joint responsibility for organizational success are not the key concerns of collective bargaining. It is a business of confrontation. Can employee representation be successful in Canada without conflicting with collective bargaining?

Prior to the Bullock recommendations on the role of trade unions, worker directors in the British Steel Corporation's representative scheme were required to relinquish their trade union offices before appointment as directors.¹⁰¹ This was an attempt to avoid any role conflict between trade unions and worker representatives. However, this abandonment of trade union positions succeeded only in alienating employee representatives from unions and union membership. Today, no such requirement exists and at British Steel Corporation, twelve of the seventeen worker directors hold trade union positions.¹⁰² Only four of these twelve admit to experiencing any conflict as a trade union worker and an employee director. One director who experiences no conflict reiterates:

I have no divided loyalties. As an employee director I look after the interests of all employees, from the sweeper up to the chairman; as a trade union leader, I look after my members' interests. The knowledge and information I acquire from both positions I hold is used effectively to achieve the most efficient industry possible, for the benefit of the people who are employed in it. The steel industry after all belongs to the people who work in it, and the employee director or the trade union leader's job is

100. See *The Corporations Act*, S.M. 1976, c. 40, ss. 169, 170 (C225).

101. J. Bank, "The worker director and role conflict" (1977), 77 *Lab. Gaz. Can.* 501, at 501.

102. *Ibid.*

looking after people. To do this well, you must be involved in the running of the business.¹⁰³

It seems that industrial democracy, or to be more precise worker representatives on boards, is not in conflict with collective bargaining. Both are premised on the belief that there are several conflicting interest groups that must be heard and reconciled. Both seek to improve the workplace of the employee and provide for mechanisms to deal with grievances.

It would appear from this analysis that in order to avoid a conflict between trade union collective bargaining and employee representation, trade unions must be strongly involved. Consequently, the Bullock proposals on this matter seem to be logical and correct. It is clear, however, that the implementation of employee representation will not be successful without trade unionists and business leaders learning new skills and approaches to labour/management problems.

In Canada, there remains the view that worker directors do compromise the union at contract negotiating time and as such, employee representation does conflict with collective bargaining. The experience at Vancouver Plywood Division of MacMillan Bloedel is an interesting example.¹⁰⁴ Rather than impart employee representation, the union involved chose to remain with a system of collective bargaining suitably modified. The union in this situation felt that if any important decisions were made at the director level, there would be nothing left for the unions to negotiate at a later date. The Vancouver Plywood Division arrangement indicates that the union will be involved before any decisions are made. This arrangement is an example of a step towards remoulding collective bargaining to accommodate increased sharing of management's responsibility with the unions. However, the Vancouver Plywood Division affair is also an example of a union failing to recognize that it could have been the vehicle of worker representation, and very much involved in the highest level of decision-making. It is this lack of understanding that limited the Vancouver Plywood Division affair to collective bargaining methods only.

Feasibility

Irrespective of what mode of employee representation is to be introduced, the question of feasibility in Canada remains an issue. Conflict of interest within the role of the worker director is the main concern. The further question of the ultimate effectiveness of any mode of employee representation within corporate groups and Crown corporations presents itself for discussion as well.

103. *Id.*, at 502.

104. J. Clever, "The Van Ply affair: new directions in worker-management relations" (1978), 78 *Lab. Gaz. Can.* 296-98.

The problem of conflict of interest is by no means a slight concern. If such a conflict exists and cannot be resolved, employee representation will not be a viable solution in the search for industrial democracy. It has been argued that the worker director is forced into an unfavourable position. He must represent his employee constituents and yet continue to act on the best interests of the corporation. It is possible that the interests of the corporation will not coincide with the interests of the employees, and the employee director will have conflicting interests. Allegations have been made to the extent that worker directors can be the subject of pay-offs by shareholder directors and/or management.¹⁰⁵ This has been denied by supporters of employee representatives including actual worker directors.

It must be reiterated that these problems are the result of a narrow interpretation of both the goals and the best interests of the corporation. If the goals of the corporation can be extended beyond profit maximization, and its best interests broadened to include those of its employees, the conflict will be minimized. Directors in Canadian corporations are currently faced with and meet the task of recognizing and balancing diverging interests within the corporation. It is not unreasonable to expect worker directors to function in a similar way within the expanded goals and interests of the corporation. Their duty will be to recognize and balance a wide spectrum of interests including those of their worker constituents.

Theoretically, the conflict cannot be avoided. However, evidence indicates that in practice, conflict problems lose their significance. The role of the worker director can be rationalized by equating it to that of an ordinary director appointed on the basis of his expertise. The worker director's expertise, rather than being financial or technical in nature, is within the scope of employee interests and relations. Additionally, the worker director is not dissimilar to the shareholder director; the latter representing shareholder interests, the former the employee interests.¹⁰⁶ A further argument against the practical significance of conflict lies in the fact that the worker director is not mandated by his constituents. He is free to vote in what he feels is the best interest of the corporation (in the expanded interpretation).

Having come to terms with possible conflict and thereby confirming the view that employee representation remains a viable form of worker participation, the effectiveness of employee representation within corporate groups and multinational corporations is still in question. In the case of corporate groups, where both parent and subsidiary are Canadian, problems can occur. What is the effectiveness of worker directors on subsidiary boards if the balance of decision-making power is vested in the board of the parent company?

105. *The Winnipeg Free Press*, May 25, 1978, at 20 (Business Report).

106. *Supra* n. 101, at 503.

This is obviously a crucial issue. It is believed, however, that the value of industrial democracy will be diminished if it is not to be implemented by all corporations. Perhaps, additional legislation will be needed to provide necessary guidelines in establishing which board of the corporate groups will have ultimate responsibility for those matters affecting the interests of employees. With respect to multinational corporations, additional problems occur. It can be argued that it is unjust for employees at one level of the multinational group to have decision-making power which might affect unrepresented employees outside the country. However, of major concern is the case where a Canadian corporation is the subsidiary of an American holding corporation. In order for employees who sit on the boards of the subsidiary to be effective, strong legislation would be in order to restrict the power of the parent in taking decisions affecting interests of employees in the Canadian subsidiary. Such legislation, however, has to be consistent with the notion of parent control of subsidiaries. Anything else would inevitably result in Canada being relatively unattractive for foreign investment. There is no reason to assume that shareholders of foreign parents will be disposed towards Canada's concept of industrial democracy or prepared to accept it.

Crown corporations present further problems for the feasibility of employee representation on Canadian boards. Crown corporations constitute a substantial portion of Canadian corporations. Consequently, employee representation on boards must be extended to include boards in Crown corporations if there is to be a meaningful introduction of industrial democracy in Canada. A major problem results from the fact that all Crown corporations are responsible to a minister of the Crown. Therefore, it is certainly the case with Crown corporations that ultimate power does not rest with the board of directors, and consequently, the effectiveness of employee directors is questionable. Further, the presence of the minister representing the top level of authority would make it wholly unsuitable for a two-tiered board proposal. Such a structure would result in three rigid levels of authority — management, directors, and the minister. This model would not facilitate efficient decision-making in a practical sense. This lack of effectiveness would especially cripple the satisfactory implementation of employee representation.

As a result of the peculiar structure of Crown corporations, it seems that the only viable model through which employee representation might be implemented, is that of a unitary board. There remain problems inherent in such a solution, but those which would arise as a result of any two-tiered structure are eliminated. Any attempt to implement employee representation on boards would be meaningless without an extension to Crown corporations. The specific problems unique to Crown corporations will have to be resolved as they become evident.