RECENT DEVELOPMENTS IN CANADIAN LAW

LABOUR LAW *

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I. INTRODUCTION

"I am not a Marxist," said Karl Marx when some radicals justified their idiocies on Marxist thought. If he were alive today, he would repeat this remark. Many premises of his theses have been proven wrong and the injustices toward labour that he justly complained about are now largely corrected. When he insisted in *The Manifesto of the Communist Party*, "The history of all societies is the history of class struggles," he had not foreseen the increasing identity—not only in interest but also in person—of labour and capital in the modern industrial states of Western Europe and North America. Capital today is gradually shifting from the hands of a limited few to those of the many; the labourer is slowly becoming a capitalist himself, and those who control corporate business are assuming the status of employees. Although some unfairness is still evident, wages and dividends today belie the contention that capital exclusively appropriates the product of total social labour. More significant, Marx had gravely underestimated the willingness of democratic society to recognize the injustices and to remedy them, not by a political upheaval, but by accommodation. Labour is no longer the serf of capital, neither is it the ward of a welfare state.

There are, of course, numerous areas of conflict today. For instance, automation appears to labour as a threat to its existence; on the other hand, labour has failed all too often to exercise the correlate of its power: responsibility. But in the main, labour relation problems no longer involve struggles for basic principles; rather, they are bilateral experiments to realize accepted principles in a relationship that, by its very nature, requires timely and constant adjustment. These kinds of problems will always be with us for changing events dictate fresh assessment of relations. What is necessary today is imaginative leadership in capital, labour and government to avoid disputes that are bound to benefit no one but likely to hurt the public and

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the economy. Unfortunately, the many problems that we encounter in Canada in recent years fall into this mould.

Industrial unrest has become an increasingly serious concern for both the public and the government. The increasing number of strikes and threats of work stoppages, particularly in the so-called essential services such as transportation, has led to a backlash of public sentiment against the activities of labour groups. Violation of court orders has especially received much publicity adverse to the union movement. Along with this notoriety has come the actuality of government interference, so basically repugnant to the theory of collective bargaining. This study deals both with the public face of labour relations and with the less publicized work of the tribunals whose task is to aid the functioning of the labour-management relationship—the courts and the labour relations and arbitration boards. The studies now in progress to ameliorate the entire framework by new legislation and recent legislation now in effect are discussed. [1]

II. Government Intervention

The federal government and those of three provinces—Saskatchewan, Newfoundland and Quebec—have seen fit to enter upon the labour scene with emergency legislation designed to effect both temporary settlements in particular disputes and permanent declarations of rights for certain workers.

A. *Canada*

In the federal sphere, [2] postal workers have created concern for the government during each of the last three years. In no case, however, has the government had to resort to legislation. In 1965, 17,000 of 22,000 letter carriers and mail sorters in Quebec, Ontario and British Columbia went on strike in July and August. [3] The dispute was settled after a week [4] when the workers accepted the recommendations of the single commissioner appointed prior to the strike. A near strike was averted in November, 1966, by a wage agreement announced by the mediator a few hours prior to the strike deadline. [5] Again this past summer, the postal workers threatened action as a result of a grievance

[1] For a discussion of factors underlying recent unrest, see Industrial Unrest in Canada: A Diagnosis of Recent Experience, Unpublished Address by J. Crispo and H.W. Arthurs, Joint Meeting of the Canadian Political Science Association and the Canadian Law Teachers Association, June 8, 1967.

[2] The jurisdiction of Parliament in labour matters is defined in § 53 of the Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c. 152 (1952), along the lines laid down in the British North America Act. In addition, the Public Service Staff Relations Act, Can. Stat. 1967 c. 72, describes the jurisdiction of Parliament over federal public servants with respect to collective bargaining.

[3] Labour Gazette, Sept., 1965, at 789, col. 2.

[4] The Montreal employees remained out for seventeen days.

[5] Labour Gazette, Jan., 1967, at 5, col. 1.

that arose when workers were not compensated by additional pay or a holiday where their regular day-off fell on the July 3 statutory holiday. Some 12,000 postal clerks and mail sorters working inside post offices, for whom no bargaining agent had been certified, threatened a one-day walk-out scheduled for August 25. Several days earlier the new Public Service Staff Relations Board [6] had declared the walkout illegal in the absence of a certified bargaining agent. This ruling and lack of support from some of the major locals led to the threatened walkout being called off. [7] And so, notwithstanding that postal employees have recently been extended the right to bargain collectively, and also to strike, this essential service seems ripe for some more stringent form of control. It is interesting to note that this latest flare-up is not concerned with wages, these being healthy at the present time.

In the railway industry, government intervention has not been confined to mediation services. A nationwide strike of railway employees in August, 1966 was ended by a forced settlement after one week. [8] The Maintenance of Railway Operation Act [9] required employees to return to work and to accept an immediate eighteen per cent wage increase to be spread from January 1, 1966 until July 1, 1967, with further increases to be left as a matter for negotiation. [10] The act provided for mediation [11] and also for arbitration [12] should the latter prove necessary, as it did, in the negotiation by the parties of new collective agreements, to expire at the earliest on December 31, 1967. Thus, the railway employees' right to strike has been suspended until that date, but not beyond the final date in collective agreements ensuing as a result of negotiations pursuant to the act. Mediation resulted in a settlement between the eleven railway companies and two of the three employee groups involved. [13] An arbitration board was required to reach a collective agreement between the companies and the final group. [14] At the time that the Maintenance of Railway Operation Act was passed, the government introduced its National Transportation Act, "to define and implement a national transportation policy for Canada." [15] This act received royal assent in February, 1967. The provisions of the act relevant to this comment are those designed to place the railway in a more competitive

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[6] *Infra* note 50.

[7] The Ottawa Citizen, Aug. 24, 1967, at 1, col. 5.

[8] Labour Gazette, Nov., 1966, at 630, col. 1.

[9] Can. Stat. 1966 c. 50.

[10] *Id.* at § 6.

[11] *Id.* at § 9.

[12] *Id.* at § 10.

[13] 55,000 non-operating employees—Labour Gazette, Feb., 1967, at 86, col. 2; 20,000 members of the Canadian Brotherhood of Railway, Transport and General Workers—Labour Gazette, June, 1967, at 350, col. 3.

[14] In an award announced on July 18, 1967, the 23,000 shopcraft union members received the same terms as the other two groups, The Toronto Globe & Mail, July 19, 1967, at B1, col. 1.

[15] Can. Stat. 1967 c. 69, at Preamble.

earning position in the transportation industry.[16] In this way, it is sought to render the companies more capable of meeting wage demands.

A situation comparable to last summer's Canadian railway strike arose in the United States in July, 1967, and was temporarily remedied in summary fashion. The machinists' union began the legal walkout over contract demands on Sunday, July 16. The honouring of picket lines by the remaining shopcraft unions and by the operating brotherhoods made the strike almost one hundred per cent effective. The President signed a bill on July 17, ordering the strikers back to work; the following day they returned. The long-range solution consisted of the appointment of a five-member conciliation board for a ninety-day "cooling-off period." If no agreement were to be reached, then a government devised settlement was to be imposed.[17] This remedy parallels the Canadian approach.

Again in the sphere of transportation, the shipping industry witnessed work stoppages twice on the St. Lawrence River (the most recent extending to the Great Lakes) and once on the west coast. The recent St. Lawrence and Great Lakes dispute was a legal strike of 5,400 seamen which began on August 18, 1967, after contract negotiations between the Seafarers' International Union and the Canadian Lake Carriers' Association broke off.[18] Work was resumed on September 25, 1967. The 1966 dispute over wages and job security between the shipping companies and the longshoremen at Montreal, Quebec and Trois-Rivières resulted in a month-long strike in May and June of 1966, when negotiations for new collective agreements failed. The work stoppage in British Columbia, unlike that on the St. Lawrence, was an illegal one, the result of the refusal by the Canada Labour Relations Board to certify the bargaining agent for a group of longshore foremen.[19] The strike occurred in November and December of 1966, and was brought to an end when the federal government appointed an Industrial Inquiry Commission to investigate the causes of the strike.[20] On the eastern scene, a wage settlement had been reached after intervention by the federal cabinet. A similar Industrial Inquiry Commission, as recommended by the mediator, was set up. However, as a further measure, the St. Lawrence Ports Working Conditions Act was passed in July, 1966,

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[16] Business Week, June 24, 1967, at 96, col. 1. Part V of the new act contains a number of amendments to the Railway Act, CAN. REV. STAT. c. 234 (1952).

[17] The Toronto Globe & Mail, July 16-18.

[18] The Toronto Globe & Mail, Sept. 26, 1967, at B1, col. 6.

[19] The board rejected the application by the foremen's representative on the ground that the foremen were supervisory personnel and not "employees" as defined in § 2(1) of the Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c. 152 (1952), and so, the unit was not eligible for representation by a certified agent. International Longshoremen, Local 514 v. Western Stevedoring Co.; International Longshoremen, Local 514 v. Louis Wolfe & Sons (Vancouver) Ltd., CAN. LAB. SERV. 6-1168 (1964).

[20] The commission reported to the Minister of Labour on March 23, 1967, and suggested the establishment of a grievance procedure for the longshore foremen, at the same time affirming the powers of the Canada Labour Relations Board to decide the question of who is an "employee," Labour Gazette, June, 1967, at 354, col. 1.

to implement the conclusions that the commission would recommend. These were automatically to become part of the collective agreements between the parties.[21] The difference in approaches seen here is explained by the fact that the St. Lawrence Ports Commission was to undertake a much more sweeping inquiry into the industry, and its suggestions were both suitable and needed in the collective agreements, whereas the British Columbia longshoremen had, of course, no such agreements, and it was not seen fit to give the commission's recommendations any before-the-fact legislative recognition.

B. *Newfoundland*

A provision[22] in the Newfoundland Labour Relations Act,[23] by which the government might declare a state of emergency in a dispute involving hospital workers, was invoked with no success to halt a strike by 135 non-professional hospital workers of a Grand Falls hospital. The workers went on strike in January, 1967, in defiance of the declaration.[24] The government solution was to enact a statute[25] threatening decertification of the strikers' bargaining agent[26] if they refused to return to their jobs. At the same time, the emergency provision of the Labour Relations Act, section 39A, was repealed.[27] The most notable feature of the legislation is a prohibition of strikes against hospitals in the province.[28] By way of comparison, a similar walkout of 32,500 non-professional hospital workers in Quebec in the summer of 1966 which lasted twenty days in defiance of a court injunction was ended by the bare threat of special legislation.[29]

C. *Quebec*

The Quebec legislature revoked the teachers' right to strike until July, 1968. This action came as a result of a strike in February, 1967, of some 60,000 to 70,000 teachers. As its title reflects—An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement[30]—the act imposed extensions of existing collective agreements, but did not abolish permanently the right to strike. Only two provinces, British Columbia[31] and Manitoba,[32] seem to have revoked the right of teachers to strike by providing for compulsory arbitration. In

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[21] Labour Gazette, Sept., 1966, at 497, col. 1.
[22] Nfld. Stat. 1963, c. 82, § 3.
[23] NFLD. REV. STAT. c. 258 (1952).
[24] Labour Gazette, April, 1967, at 228, col. 2.
[25] An Act Respecting the Employment of Persons in Hospitals, Nfld. Stat. 1967, passed January 27, 1967.
[26] The Canadian Union of Public Employees (C.U.P.E.).
[27] An Act to amend the Labour Relations Act, Nfld. Stat. 1967 c. 12, § 1.
[28] Ontario enacted legislation with a similar effect in 1965, although there was no emergency situation at the time, Ont. Stat. 1965 c. 48, § 8(1).
[29] Labour Gazette, Oct., 1966, at 560, col. 1.
[30] Que. Stat. 1967. The act is commonly referred to as Bill 25.
[31] The Public School Act, B.C. REV. STAT. c. 319, §§ 137-42 (1960), especially § 140.
[32] An Act to amend the Public Schools Act, Man. Stat. 1965 c. 53, § 1, adding §§ 379, 390(2).

Ontario,[33] New Brunswick[34] and Prince Edward Island,[35] teachers are impliedly denied this right by their exclusion from the definition of "employee" in their provinces' labour relations acts. None of the remaining provinces have chosen to exclude teachers from their respective acts, although Saskatchewan has provided for collective bargaining and conciliation, binding only by agreement under The Teachers' Salary Negotiation Act.[36]

A strike by employees of the Montreal Transit Commission was similarly ended by an act of the Quebec legislature.[37] The legislation required the workers, who had been out for one month, to return to work within 48 hours and it was complied with. Coming as it did during the world fair, Expo '67, the strike did more than inconvenience the populace of Canada's largest city. It had the added effect of limiting attendance at the world fair and as a consequence cast an even more unfavourable light on the labour movement.

In addition to its intervention in the hospital workers' strike,[38] the Quebec government also used with success the threat of legislation in disputes involving hydro workers in June, 1967, and radiologists in October of the same year.

D. *Saskatchewan*

In Saskatchewan, a strike by members of the Oil, Chemical and Atomic Workers' International Union against the provincially owned Saskatchewan Power Corporation was ended by legislation in September, 1966. The act[39] provides for compulsory arbitration of labour disputes involving workers furnishing essential services, namely, utilities and hospital workers, and is operative upon a declaration that it is to apply to a particular dispute. The effect of a declaration is to return the struck or about to be struck industry to its position before the dispute arose. Thus the Saskatchewan government has equipped itself with the power to act quickly in any dispute which it deems to concern the public interest, involving the above-mentioned workers.

III. Recent Legislation

In addition to the above emergency legislation, Canadian legislatures have been active in the area of labour relations in a less precipitous way. The creation and current functioning of study groups are indicative of

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[33] The Labour Relations Act, Ont. Rev. Stat. c. 202, § 2(f) (1960).
[34] The Labour Relations Act, N.B. Stat. 1960-61 c. 52, § 1.
[35] The Industrial Relations Act, P.E.I. Stat. 1962 c. 18, § 1(i), (ii).
[36] *See* Sask. Rev. Stat. c. 287, § 27 (1965).
[37] The Montreal Gazette, Oct. 21, 1967, at 1, cols. 5-6.
[38] *Supra* note 29.
[39] The Essential Services Emergency Act, Sask. Stat. 1966 (2d sess.) c. 2.

further changes to come. Among these are the federal government's Task Force on Labour Law, and the Rand Commission, a one-man Royal Commission appointed by the Ontario government. A committee has been active in New Brunswick since 1965, and one has been promised in Quebec. Retrospectively, the major revisions made in 1966 to the labour acts of Manitoba,[40] Ontario[41] and Saskatchewan[42] were primarily the work of legislative review committees.

The federal Task Force was officially appointed by order-in-council in November of 1966, at a time when it had already been active for some two months.[43] Headed by Dean H. D. Woods of McGill, its members include Dean Carrothers and Professors Crispo and Dion.[44] Its task, as described by the Minister of Labour, is to look into the question of labour disputes, and the procedures and provisions of the current laws that have to be dealt with and to recommend to the government changes that may be required. The Rand Royal Commission was first announced by the Ontario government in August, 1966.[45] It is chaired by the Honourable Ivan C. Rand, the former Supreme Court judge who retired in 1959. With wide terms of reference, the commission is to give particular study to the use of injunctions in labour disputes.[46]

Only in British Columbia has there been no legislative activity in the labour relations sphere since 1965.[47] All of the provinces, save British Columbia, Alberta and Quebec, have amended their labour relations acts, three of these revisions being on a major scale,[48] and that of Prince Edward Island being substantial.[49] The remaining legislation has involved what may be described as the extension, confinement and refinement of collective bargaining.

A. *Extending Collective Bargaining*

1. *Public Servants*

The right to bargain collectively has since 1965 been extended to the public servants of five jurisdictions—Canada,[50] Quebec,[51] Alberta,[52]

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[40] The Labour Relations Amendment Act, Man. Stat. 1966 c. 33.

[41] The Labour Relations Amendment Act, Ont. Stat. 1966 c. 76.

[42] An Act to amend the Trade Union Act, Sask. Stat. 1966 c. 83.

[43] Labour Gazette, Nov., 1966, at 631, col. 2.

[44] *Ibid.*; Labour Gazette, March, 1967, at 169, col. 1.

[45] Labour Gazette, Nov., 1966, at 664, col. 3.

[46] This problem is discussed with reference to recent cases in part III, D, *infra*.

[47] The British Columbia Labour Relations Act underwent a major revision in 1961, B.C. Stat. 1961 c. 31; and some changes were also enacted in 1963, B.C. Stat. 1963 c. 20.

[48] *Supra* notes 40-42.

[49] P.E.I. Stat. 1966 c. 19.

[50] The Public Service Staff Relations Act, Can. Stat. 1967 c. 72. Two complementary acts were also passed about the same time: the Public Service Employment Act, Can. Stat. 1967 c. 71, replaces the Civil Service Act, Can. Stat. 1960-61 c. 57, and also brings some 30,000 prevailing rate employees within the ambit of the new legislation; an Act to amend the Financial Administration Act, Can. Stat. 1967 c. 74, designates the Treasury Board as the employer's bargaining agent.

[51] The Civil Service Act, Que. Stat. 1965 c. 14.

[52] An Act to amend the Public Service Act, Alta. Stat. 1965 c. 75.

Manitoba,[53] and most recently Nova Scotia.[54] Only Parliament and the Quebec legislature have included a right to strike in this extension, and this right is not unqualified. Of the remaining six provinces, Saskatchewan alone has included public servants within the definition of "employee" in its Trade Union Act,[55] whereas New Brunswick[56] and Ontario[57] had previously provided by other legislation for collective bargaining by public servants, with no right to strike.[58] The situation is unclear in British Columbia, Newfoundland and Prince Edward Island[59] where public servants are expressly excluded from the labour relations acts, but there are no alternative provisions for collective bargaining.

(a) Canada

The Public Service Staff Relations Act[60] extends collective bargaining rights to almost all employees of the Canadian public service except those in managerial and confidential positions. The Public Service Staff Relations Board has been established to define and certify bargaining units, an activity which is presently being carried on. The most interesting feature of the legislation, apart from its very enactment, is the option given to each unit to choose between compulsory arbitration[61] in concluding collective agreements and mere conciliation services[62] accompanied by a right to strike.[63] Grievance procedures are also provided, although any grievance must be processed by the bargaining agent and not by the employee independently. Also of interest is the removal of hiring policy from the scope of any collective agreement, as well as any changes in terms or conditions of employment calling for legislative implementation.

(b) Quebec

As noted, the Quebec public servant has the right both to bargain collectively and to strike.[64] The qualification on this last privilege is that

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[53] An Act to amend the Civil Service Act (1962), Man. Stat. 1965 c. 11.

[54] An Act Respecting the Civil Service Joint Council, N.S. Stat. 1967 c. 6.

[55] All other labour relations statutes, save that of Quebec, expressly *exclude* public servants from the definition of "employee"; the Quebec Labour Code is silent on this point, but Quebec has alternative legislation, *supra* note 51.

[56] The Civil Service Act, N.B. REV. STAT. c. 29 (1952), as amended by N.B. Stat. 1964 c. 17.

[57] The Public Service Act, Ont. Stat. 1961-62 c. 121, as amended by Ont. Stat. 1962-63 c. 118, provides for the creation of a Joint Council, with compulsory arbitration to ensue failing an agreement being reached by this Council. In 1966, mediation services were added as a possible intermediate step, Ont. Stat. 1966 c. 130.

[58] Section 52(3) of the New Brunswick Act, *supra* note 56, expressly states this and it is inherent in the compulsory arbitration provisions of the Ontario act.

[59] The 1966 amendment to the Prince Edward Island Industrial Relations Act, *infra* note 75, provides for compulsory arbitration for policemen, firemen and hospital workers, who may be either provincial or municipal employees.

[60] *Supra* note 50.

[61] A function of the Public Service Arbitration Tribunal.

[62] A further task for the Public Service Staff Relations Board.

[63] This latter approach is unavailable to units representing workers in services essential to the safety or security of the public.

[64] *Supra* note 51.

there must be a prior agreement with the government regarding the maintenance of essential services. [65]

(c) Alberta, Manitoba and Nova Scotia

While all of these provinces now allow public servants to bargain collectively, none of them has given the right to strike: some form of compulsory settlement is provided by each. In Manitoba, negotiation and mediation if unsuccessful are followed by a settlement imposed by the Lieutenant-Governor-in-Council, that is, the provincial cabinet. [66] The Alberta statute is somewhat unique in that it provides for no direct third-party settlement, even by the government as in Manitoba. Indeed, the parties are bound to begin negotiating anew after the mediation report is rejected: "Where either the board or agency of the Crown or the Association rejects the recommendations of a mediation board in whole or in part, the board or agency of the Crown and the representatives of the Association shall meet with a view to concluding an agreement." [67] If the parties continue to disagree as to certain proposals, then an agreement is concluded to the extent that the parties are in concert, and the decisions of the board or agency of the Crown on the points in dispute become binding during the term of the agreement. [68] In essence, the employer has the coercive authority in both Manitoba and Alberta, though technically on different levels, cabinet and departmental respectively. In Nova Scotia, the final resort is to the Civil Service Arbitration Board, where settlement is not achieved by the seven member Joint Council, or by mediation. [69] During its passage, the Nova Scotia bill experienced amendment in the wording of its "no strike" provision. The direction is not express, reading: "The Association [Civil Service] shall not sanction, encourage or support, financially or otherwise, a strike by its members or any of them." [70] Manitoba and Alberta included no mention whatsoever of strikes, but this omission can readily be construed as denying any such right. On the other hand, the Nova Scotia approach seems almost to have implied a right to strike on the part of the public servants, provided their association can present clean hands, by representing no appearance of having induced a work stoppage.

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[65] *Id.* at § 75. The Quebec Labour Relations Board is the arbiter of any dispute as to what constitutes an essential service. This point is dealt with in an article by a leading civil-law authority in a paper given at the 4th International Symposium on Comparative Law, Lachapelle, *Le contrôle de l'exercice du droit de grève au Québec*, 4 PROCEEDINGS FOURTH INT'L SYMPOSIUM ON COMP. L. 208, at 213 (1966). The article also describes the manner in which labour relations are governed in Quebec by common and statute law, the latter comprising le Code du Travail (1964) and la loi de la fonction publique (1965).

[66] *Supra* note 53, at § 3, adding §§ 45 H ,I.

[67] *Supra* note 52, at § 66(3).

[68] *Id.* at § 66(5).

[69] *Supra* note 54.

[70] *Id.* at § 10.

2. *Other Employees*

In Ontario, the major revision of the Labour Relations Act included the repeal of section 89 which had given to a municipality, school board or other local authority the right to declare that the act did not apply to it and to its employees. By denying this "opting-out" privilege, the Ontario legislature extended to more employees the rights under the act. [71] Prince Edward Island effected an extension of the scope of its Industrial Relations Act by bringing more employers within its ambit. Where formerly an "employer" within section 1(j) was required to employ at least three persons, one employee now suffices to render his patron an "employer." [72] Also, the exempt seasonal employee was formerly allowed to operate outside the act for up to six successive months annually; now, he is restricted to periods of four months or less. [73]

B. *Confining Collective Bargaining*

In contrast to these extensions, certain employees have had their bargaining positions weakened by the abrogation of their right to strike. This was the case with Ontario hospital workers who had not been previously excluded from the Ontario Labour Relations Act. The Hospital Labour Disputes Arbitration Act achieves an exclusionary effect by providing for compulsory arbitration and prohibiting strikes and lockouts. [74] In Prince Edward Island, hospital, fire, and police workers lost the right to strike last year. [75] The provision in Saskatchewan for ad hoc termination of the right to strike in certain industries has been noted. [76]

C. *Refining Collective Bargaining*

Eight amending acts are discussed herein, those of Manitoba, Newfoundland, Nova Scotia, Ontario, Prince Edward Island (three) and Saskatchewan. [77] An attempt is made to compare recent changes in one jurisdiction with the situation in the remaining Canadian jurisdictions. The

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[71] A recent attempt by a municipality to have the Ontario Labour Relations Board declare the amendment non-retroactive was unsuccessful; *see* Canadian Union of Public Employees v. Board of Educ., CAN. LAB. SERV. 76-1166 (1966). Thus, the fact that a municipality availed itself of the former provision is of no consequence since the amendment.

[72] An Act to amend the Industrial Relations Act, P.E.I. Stat. 1966 c. 19, § 1. Only in Saskatchewan does an employer continue to be defined in terms of the number of his employees and there the number is three, SASK. REV. STAT. c. 287, § 2(f) (1965).

[73] P.E.I. Stat. 1966 c. 19, § 2. No other act exempts seasonal employees. Prince Edward Island is also unique in defining and excluding "temporary employees" such as students employed during summer vacation, Industrial Relations Act, P.E.I. Stat. 1962 c. 18, § 1(i), (iv).

[74] Ont. Stat. 1965 c. 48, §§ 4(1), 8(1).

[75] P.E.I. Stat. 1966 c. 19, § 6.

[76] *Supra* text accompanying note 39.

[77] An Act to amend The Labour Relations Act, Man. Stat. 1966 c. 33; The Labour Relations (Amendment) Act, 1966, Nfld. Stat. 1966 No. 39; An Act to Amend ... The Trade Union Act, N.S. Stat. 1967 c. 75; An Act to amend The Labour Relations Act, Ont. Stat. 1966 c. 76; An Act to amend the Industrial Relations Act, P.E.I. Stat. 1966 c. 19, P.E.I. Stat. 1966 (2d sess.), and P.E.I. Stat. 1967, Bill 54, assented to May 19, 1967; An Act to amend The Trade Union Act, Sask. Stat. 1966 c. 83.

Newfoundland [78] and Nova Scotia [79] amending acts deal with certification only, while the revisions by the other provincial legislatures are more extensive and concern, in addition to certification, unfair labour practices, dispute settlement procedures and union security.

1. *Certification*

Only Manitoba of the six provinces listed did not alter its certification provisions. The Nova Scotia Labour Relations Board has been empowered to refuse separate certification for a craft or technical unit, where such unit is already included in another bargaining unit for which a bargaining agent has been certified. Craft units are recognized by all eleven labour relations acts, with the respective boards having discretion in the matter of certification of bargaining agents for these units.

In Newfoundland, two changes can be discerned. The terms and conditions of employment can not be disturbed upon notice to the employer of an application for certification. Consent of the employees will not enable changes in the status quo; the consent of the board or the creation of a collective agreement is necessary. [80] The Newfoundland board formerly had no discretion to refuse to hear a decertification application. It now may suspend applications for a period of six months from the date of certification, of the previous application, or of notice to the employer to bargain. [81] This is an improvement in the protection given to a certified union, but it constitutes the minimum protection afforded in all of the labour relations acts.

Professional employees may be certified as a separate unit in Saskatchewan. [82] Quebec is the only other jurisdiction where this is possible, and this is by reason of the absence of any provision in the Quebec Labour Code to exclude such persons from the definition of "employee." [83] To obtain certification, a bargaining unit must be deemed appropriate and the applicant agent must have the support of the majority of the employees in the unit. The Saskatchewan legislature has recently made the interpretation of "majority support" more stringent in that province. [84] Majority support is now evidenced by proof of support by sixty per cent of the employees, or by a majority vote of the employees where forty per cent have been proven to support the applicant. Formerly, a vote would be called upon a representation of support by twenty-five per cent of the

[78] In fact, the Newfoundland Labour Relations Act was further amended in 1967, but the sole effect was to revoke § 39A as stated in the text accompanying note 27.

[79] N.S. Stat. 1967 c. 75, § 1, adding § 8(2) to N.S. REV. STAT. c. 295 (1954).

[80] Nfld. Stat. 1966 No. 39, § 2, replacing § 9(6) of Nfld. Stat. 1960 No. 58.

[81] *Id.* at § 3, adding § 11(1A) to Nfld. Stat. 1960 No. 58.

[82] Sask. Stat. 1966 c. 83, § 2, adding §§ 2(i-A), (i-B), (i-C) and § 3, amending § 5(a) of SASK. REV. STAT. c. 287 (1965).

[83] QUE. REV. STAT. c. 141, § 1(n) (1964).

[84] Sask. Stat. 1966 c. 83, § 4, re-enacting § 7(2) and adding § 7(3) to SASK. REV. STAT. c. 287 (1965).

employees. Where, however, there is an existing certified bargaining agent, a vote can be called for by an applicant with proof of only twenty-five per cent support. Finally, all such votes are required to be by secret ballot. [85]

Among the amendments to the Ontario Labour Relations Act was one intended to put bargaining on a wider scale, thus increasing uniformity and coherence. The change empowers the Ontario board to certify a council of trade unions upon being satisfied that each of its constituent unions has vested appropriate authority in the council to enable it to discharge the responsibilities of a bargaining agent. [86] Certified unions have been given extended protection from a challenge to their right of representation in three respects, by the remaining Ontario amendments in respect of certification. A certified union now has a guaranteed existence of at least one year, even though it fails to conclude a collective agreement. [87] No such protection was formerly provided. A certified union that has entered into a collective agreement may now be protected until the end of the 34th month of such agreement, instead of the previous maximum of 22-month security. [88] And no challenge can be made to a certified union engaged in a legal strike or lockout until the passage of six months from the commencement of the work stoppage. [89]

The most important change in the Industrial Relations Act of Prince Edward Island transfers the actual power of certification from the Minister of Labour to the Labour Relations Board; this brings Prince Edward Island into line with the other jurisdictions. [90] As a result, the correspondingly unique provision allowing appeals from the board to the Supreme Court *in banco* on questions of law has been repealed: [91] the board's decisions remain reviewable by means of the prerogative writs. The board has also been granted further discretion in that any hearing upon an application for certification is now optional, [92] and the directing of a representation vote prior to certification is no longer compulsory where the board is satisfied that the union has majority support. [93] If a vote is held, the applicant requires only fifty per cent support of the voters, and not sixty per cent as previously. [94] To be an eligible voter an employee need have been in the unit only thirty days prior to the date of the vote, half of the former required number of days. [95]

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[85] *Id.* at § 5, adding § 7a to SASK. REV. STAT. c. 287 (1965).
[86] Ont. Stat. 1966 c. 76, § 1(1), adding § 1(1)(ba) to ONT. REV. STAT. c. 202 (1960).
[87] *Id.* at § 2(1), adding § 5(1*a*) to ONT. REV. STAT. c. 202 (1960).
[88] *Id.* at § 2(2), (3), re-enacting § 46(3) to ONT. REV. STAT. c. 202 (1960).
[89] *Id.* at § 17(2), adding § 46(3) to ONT. REV. STAT. c. 202 (1960).
[90] Bill 54, 1967, § 2, adding § 16(6) to P.E.I. Stat. 1962 c. 18.
[91] Bill 54, 1967, § 1, repealing § 12(1a) added by P.E.I. Stat. 1966 (2d sess.) c. 3.
[92] Bill 54, 1967, § 2, amending § 16(1) of P.E.I. Stat. 1962 c. 18.
[93] P.E.I. Stat. 1966, c. 19, § 3, amending § 16(4) of P.E.I. Stat. 1962, c. 18.
[94] Bill 54, 1967, § 2, re-enacting § 16(6)(iii) of P.E.I. Stat. 1962 c. 18.
[95] P.E.I. Stat. 1966 c. 19, § 4, amending § 16(4) of P.E.I. Stat. 1962 c. 18.

2. *Unfair Labour Practices*

Newfoundland and Ontario enacted minor amendments to the unfair practices sections of their respective acts; Saskatchewan and Manitoba made major changes.

Until 1960, the Newfoundland Labour Relations Act [96] contained no provisions governing the conduct of the employer with respect to working conditions in the period between the application for certification and the date the application is either accepted or refused. An amendment provided the usual prohibition against alteration of wages and terms of employment during such time without the consent of the employees upon whose behalf the application was made. [97] The most recent amendment requires that any such consent emanate from the board, not the employees, or that a collective agreement be in operation before changes may be made. [98] Variations of this prohibition appear also in the labour acts of Alberta, British Columbia, Prince Edward Island, Quebec and Saskatchewan. [99]

On the recommendation of the 1965 Woods Committee, Manitoba has changed the nomenclature of its unfair practices to "Permitted and Prohibited Acts," [100] the legislation now being positive and establishing guide lines, whereas it had been negative, defining wrongs. The new provisions under this head add two further exceptions to the general prohibition against employer interference with trade unions: the employer may appear on an application for certification [101] and on an application for decertification. [102] The most notable addition to section 4 is the "free speech" provision, [103] also a recent addition to the Saskatchewan Trade Union Act. [104] Only four provincial acts contain such a declaration. [105] Finally, a new method of enforcing the unfair practices provisions has been introduced into Manitoba. Complaints are now dealt with by the Labour Relations Board, [106] which authorizes a field officer to investigate a complaint, and then, relying on his report, either discontinues its inquiry

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[96] NFLD. REV. STAT. c. 258 (1958).

[97] Nfld. Stat. 1960 No. 58, § 6, adding § 9(6).

[98] Nfld. Stat. 1966 No. 39, § 2, amending § 9(6).

[99] Alta. Stat. 1960 c. 54, § 22, amending § 79; B.C. REV. STAT. c 205, § 12(9), (1960); P.E.I. Stat. 1962 c. 18, § 15 (2); QUE. REV. STAT. c. 141, §§ 33, 47, 48 (1964); SASK. REV. STAT. c. 287, § 9(1)(j) (1965).

[100] Man. Stat. 1966, c. 33, § 1, re-enacting § 4 of MAN. REV. STAT. c. 132 (1954).

[101] Man. Stat. 1966 c. 33, § 1, adding § 4(1)(d).

[102] *Id.*, adding § 4(1)(e).

[103] *Id.*, adding § 4(4).

[104] Sask. Stat. 1966 c. 83, § 7(2), amending § 9(1)(a).

[105] The remaining two are Nova Scotia, N.S. Stat. 1964 c. 48, § 1 adding § 4(5), and Ontario, ONT. REV. STAT. c. 202, § 48 (1960).

[106] Man. Stat. 1966 c. 33, § 3, adding § 6A. This is also the situation in British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan; in other jurisdictions, prosecutions by way of summary conviction procedure and complaints to the minister seem to be the resort of the aggrieved party.

or makes an order against the employer, trade union or other person. Such order is registrable and enforcable like a court judgment.

The Saskatchewan legislature was by far the most active in the field of unfair labour practices legislation. The Trade Union Act enunciates unfair practices separately for employer and for employee. Two new offences are created for the employer, three for employees. The employer is in breach of the provisions where he unilaterally changes rates of pay, hours of work, or conditions of employment during the period between certification and the coming into force of a collective agreement. [107] It is also an offence to discharge an employee who has been discriminated against in the terms of his union membership or who has been refused membership for some reason other than non-payment of dues or activities prejudicial to the trade union. [108] Employees are prohibited from promoting such discharge of a fellow employee. [109] The remaining two additions to unfair employee practices are the failure or refusal by employees to bargain collectively, [110] and the engaging in a strike without a majority strike vote having been concluded. [111]

In addition to the new "free speech" provision, [112] two other Saskatchewan changes in this area are worthy of mention. The unique "reverse onus" clause which operates where there is a complaint that an employee has been dismissed for union activity and not for proper cause, has undergone a shifting of presumption. This is embodied in the imposition of an initial burden on the employee to show to the satisfaction of the board that he was exercising a right under the act. [113] Upon such proof it is presumed that he was not discharged for good and sufficient reason, and the burden rests on the employer to exonerate himself. Only Quebec has a similar provision. [114] Finally, in Saskatchewan, some additional protection is given to the employer, who cannot now be found guilty of the unfair practices of refusal to bargain, and refusal to negotiate concerning grievances on company time, or of the new offence of making unilateral changes in terms of employment during prohibited periods, unless the union has been certified or the employer knew that it represented a majority at the time of the complained-of acts. [115]

The only substantive change in Ontario has been the articulation of an offence by the union against an employee. It shall be an unfair practice for the trade union to "suspend, expel or penalize in any way a member

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[107] Sask. Stat. 1966 c. 83, § 7(4), adding § 9(1)(m).
[108] *Id.*, adding § 9(1)(n.).
[109] Sask. Stat. 1966 c. 83, § 7(6), adding § 9(2)(e).
[110] *Id.*, adding § 9(2)(c).
[111] *Id.*, adding § 9(2)(d).
[112] *Supra* note 104.
[113] Sask. Stat. 1966 c. 83, § 7(3), amending § 9(1)(e).
[114] QUE. REV. STAT. c. 141, § 16 (1964).
[115] Sask. Stat. 1966 c. 83, § 7(7), adding § 9(4).

because he has refused to engage in a strike that is unlawful under this act." [116] Two sections were reworded to facilitate their understanding: that section enumerating the prerequisites to a lawful strike or lockout, [117] and that providing for a freeze of working conditions for specified periods where no collective agreement is in operation but notice to bargain either initially or for renewal has been given. [118] Finally, the intimidation and coercion provision has been broadened to make it an offence to interfere with the exercise by any person of his rights and duties under the act. [119] The former section spoke only of intimidation and coercion with respect to union membership or membership in an employers' organization.

3. *Union Security*

It is fundamental that union membership may be agreed upon by the employer as a prerequisite to employment, the agreement ensuing from collective bargaining. This condition connotes a high point in a union's bargaining achievements since the result is to render the union a hiring hall for the employer, who loses all control over who are to be his employees. This situation, however, is rare and the more common form of union security is some variation of the union shop whereby union membership is a condition subsequent, not precedent, to employment.

In Saskatchewan and Ontario the statutory provisions dealing with union security were amended slightly during the survey period.

Under the Trade Union Act of Saskatchewan certain union security provisions are available to a union upon request and need not be won in collective bargaining. A combined maintenance of membership and union shop declaration, covering present and prospective employees respectively, can be secured by a certified union as a term of collective agreement and it is binding on the employer and employees as long as the employer is obliged to bargain with that union, even upon the expiry of the collective agreement. [120] An amendment was made to this provision in 1966 to furnish protection to an employee who is subjected to discrimination in the terms of his union membership by a union, which has invoked the above section so that membership therein is a condition of employment. [121] A second Saskatchewan amendment has the effect of excluding an employee from the bargaining unit, and so from the terms of the collective agreement, notwithstanding that it is axiomatic that a union, certified or voluntarily recognized, represents all employees in the bargaining unit. Where an

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[116] Ont. Stat. 1966 c. 76, § 21, adding § 58a.

[117] *Id.* at § 20(2), replacing § 54(2) as amended by Ont. Stat. 1964, c. 53, § 7.

[118] *Id.* at § 22, replacing § 59(1)(a).

[119] *Id.* at § 19, re-enacting § 52.

[120] SASK. REV. STAT. c. 287, § 32(1) (1965). Section 32(2) makes it an unfair practice for the employer to fail to abide by this clause.

[121] This protection is outlined in the text accompanying note 108.

employee objects on religious grounds to belong to or to pay dues to a union, he may alternatively pay the equivalent of the union fees to a charity and the board will exclude him from the unit. [122] This provision is unique to Saskatchewan.

In Ontario, the Labour Relations Act formulates certain permissive provisions which may be included in a collective agreement—union shop, preferential hiring, compulsory check-off, and the right to conduct union business on the employer's time and premises. [123] Where any of these provisions have been agreed upon, the parties may further agree to continue them in effect after the expiry of the collective agreement, during bargaining for renewal, [124] and during the period of negotiation with the new employer following sale of the business. [125] This amendment is an attempt to extend the preservation of the status quo during collective bargaining.

4. *Dispute Settlement*

The legislation discussed hereunder includes the provisions for settlement of disputes arising both in the negotiation and in the eventual functioning of the collective agreement. An amendment in Nova Scotia in 1965 covers in effect both periods, dealing as it does with the effects of the sale of the business on the rights of the bargaining representative. Where no substantial change in the business ensues as a result of the sale, then any collective agreement, certificate or application for certification is binding on the purchaser-employer. [126] This is the situation also in all jurisdictions except Canada, Prince Edward Island and New Brunswick which have no legislation on this matter; [127] but in Ontario the collective agreement is not binding. [128] Where the purchaser is already party to a collective agreement, the Nova Scotia Trade Union Act allows the board to decide which collective agreement and which certification shall cover the combined employees. [129] In any case where the board finds that the sale or transfer was made to avoid certification or an existing agreement, or both, the certification and agreement are binding on the purchaser. [130]

(a) Bargaining Disputes

Two forms of third-party aid to collective bargaining are recognized —conciliation and mediation. The distinguishing feature is that in the

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[122] Sask. Stat. 1966 c. 83, § 3(4), adding § 5(1).

[123] ONT. REV. STAT. c. 202, § 35(1) (1960).

[124] Ont. Stat. 1966 c. 76, § 11, adding § 35(5).

[125] *Id.*, adding § 35(6).

[126] N.S. Stat. 1965 c. 53, § 1, adding § 20A.

[127] *See* ALTA. REV. STAT. c. 167, § 74(a)(b) (1955) as amended by Alta. Stat. 1964 c 41, § 13, renumbering § 74(a), (b) as § 74(1) and adding § 74(2); B.C. REV. STAT. c. 205, § 12(11) (1960); MAN. REV. STAT. c. 132, §§ 10 (1)(d), 18(1)(c) (1954), as amended by Man. Stat. 1962, c. 35, § 8; Nfld. Stat. 1960 No. 58, § 16, adding § 21A; Ont. Stat. 1962-63 c. 70, § 1, adding § 47a; QUE. REV. STAT. c. 141, §§ 36, 37 (1964); SASK. REV. STAT. c. 287, §§ 33, 34 (1965); for Nova Scotia, *see supra* note 126.

[128] Ont. Stat. 1962-63 c. 70, § 1, enacting § 47a(2).

[129] N.S. Stat. 1965 c. 53 § 20A(6).

[130] *Id.* at § 20A(5).

former the appropriate government agency appoints the third party, whereas in the latter, he is selected by agreement of the parties themselves, an agreement indicating that the likelihood of final settlement is enhanced where resort is had to mediation. Three provinces have been active of late in the legislation governing mediation: Manitoba, Ontario and Prince Edward Island have added mediation services paid for by the government and not, as formerly, by the parties. [131] The intention is to encourage the parties' use of mediation services and the inherent joint selection of a mediator. The only other province providing for a mediator jointly designated by the parties is British Columbia. [132] The Ontario amendment also enables the minister at the request of the parties to appoint a mediator selected by them jointly to replace a conciliation officer and to obviate any need for a conciliation board. [133] Formerly, the mediator had to be appointed before a conciliation officer had undertaken his duties. [134] Generally, the role of the mediator has been an insignificant one in the Canadian experience.

The legislature of Prince Edward Island provided in 1967 for the appointment by the minister of an industrial inquiry commission to inquire into conditions in any industry, or to investigate a particular dispute; [135] Prince Edward Island becomes one of six provinces that, along with the federal jurisdiction, have such ministerial inquiries. [136] Two such commissions on the federal scene have been discussed—the British Columbia Longshoremen Inquiry, and the St. Lawrence Ports Inquiry. [137] Probably the most publicized of recent commissions has been what is commonly known as the Norris Commission, the report of which was published in 1963, one year after its appointment. [138] The result of the inquiry was the placing of five unions under trusteeship in order to end the threat of a strike and, more lastingly, to restore democratic control of their unions to the seamen. [139]

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[131] Man. Stat. 1966 c. 33, § 7, replacing 38A(5); Ont. Stat. 1966 c. 76, § 9 repealing § 30(5); P.E.I. Stat. 1967 Bill 54, adding § 57A.

[132] B.C. Rev. Stat. c. 205, § 43 (1960).

[133] Ont. Stat. 1966 c. 76, § 4, re-enacting § 14.

[134] Ont. Stat. 1964 c. 53, § 2.

[135] P.E.I. Stat. 1967 Bill 54, § 4, adding §§ 51(2) to 51(6).

[136] B.C. Rev. Stat. c. 205, §§ 44, 74 (1960); Man. Rev. Stat. c. 132, § 39 (1954); N.B. Rev. Stat. c. 124, § 51 (1952); Nfld. Rev. Stat. c. 258, § 54 (1958); N.S. Rev. Stat. c. 295, §§ 53, 60 (1954); Can. Rev. Stat. c. 152, § 56 (1952).

[137] See text accompanying notes 20 and 21.

[138] T. Norris, Report of the Industrial Inquiry Commission on The Disruption of Shipping on the Great Lakes, the St. Lawrence River System and Connecting Waters (1963).

[139] Maritime Transportation Unions Trustees Act, Can. Stat. 1965 c. 17. A private bill, C-175, introduced into the House of Commons by Frank Howard, N.D.P.—Skeena, on May 2, 1966, received only first reading: the bill had sought to end the trusteeship. In fact, the government extended the trusteeship to the end of 1967 upon a report by the chairman of the board of trustees, Judge René Lippé. Labour Gazette, March, 1967, at 165, col. 3. By § 3 of the act the board holds office during pleasure.

The constitutional validity of the act was upheld by the Appeal Side of the Quebec Queen's Bench on July 5, 1966, affirming the decision of the court below in an unreported case, Swait v. Board of Trustees of Maritime Trade Unions, 66 Can. Lab. L. Cas. 579, ¶ 14,152 (Que. 1966).

Ontario has recently amended its conciliation procedure. The moratorium on a strike or lockout has been extended from seven to fourteen days where the minister has declined to appoint a conciliation board.[140] This same extension has been imposed in the provision governing timeliness of changes in working conditions.[141] All eleven acts provide for some such delay upon the breakdown of bargaining, although they are by no means uniform. Further Ontario amendments deal with the procedure of the conciliation board itself and are designed to expedite the board's work.[142]

Until 1966, Ontario was the home of unique jurisdictional disputes commissions, appointed by the provincial government to settle work assignment disputes. The powers of these commissions have now been transferred to the Labour Relations Board.[143] Where, for instance, one union claims that work assigned to members of another union is more properly to be assigned to its own members, and both unions have entered into collective agreements, the board has the power to alter the bargaining units and the respective agreements where it considers that such is appropriate.[144] The Alberta act also deals with such disputes but the law does not provide for ad hoc settlement as in Ontario, merely making it unlawful for an employee and a union to refuse work because of a dispute as to assignment.[145]

Where the free bargaining of the parties, aided by conciliation or mediation has failed to generate a collective agreement, then, provided the statutory time delays have been conformed with, either side may engage in a work stoppage. A union will usually call a strike vote in order to have publicized approval of its order to its employees to strike. In some instances such a vote is a compulsory prerequisite. However, an important amendment in Manitoba frees the union from complying with the results of the compulsory Manitoba strike vote.[146] This enactment is the direct result of a decision to the contrary based on the ambiguity of the former provision made by Mr. Justice Wilson of the Queen's Bench,[147] and affirmed by the Manitoba Court of Appeal in *Contractors Equipment & Supply (1965) Ltd. v. Teamsters Local 914.*[148] In that case, the trial judge furnished a partial summary of existing legislation in Canada as of 1965 on the effect of a strike vote;[149] an updated summary is furnished herein. Five provinces provide for compulsory strike votes—Alberta,

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[140] Ont. Stat. 1966, c 76, § 20, amending § 54(2) to include § 54(2)(b).
[141] *Id.* at § 22, amending § 59(1)(a) to include § 59(1)(a)(ii).
[142] Ont. Stat. 1966 c. 76, §§ 6, 7, 8, amending ONT. REV. STAT. c. 202, §§ 21, 26, 29 (1960).
[143] Ont. Stat. 1966 c. 76, § 25, replacing § 66.
[144] *Id.* at § 66(1), (9).
[145] Alta. Stat. 1960 c. 54, § 23(c), re-enacting § 80(4).
[146] Man. Stat. 1966 c. 33, § 6, adding § 21(6).
[147] 53 W.W.R. (n.s.) 495 (Man. Q.B. 1965).
[148] 54 D.L.R.2d 726 (Man. 1965).
[149] 53 W.W.R. (n.s.) at 502, 54 D.L.R.2d at 733.

British Columbia, Nova Scotia, Prince Edward Island, and Saskatchewan —the results of which are binding on the union.[150] In the remaining jurisdictions—Manitoba, Quebec, New Brunswick, Newfoundland, Ontario and Canada—a strike vote is not required, although such votes are mentioned in the acts of all save Quebec.[151] With the exception of Manitoba, the binding effect of a voluntary strike vote taken in these jurisdictions remains unsettled.

(b) Grievances

In the event that the parties to the collective bargaining process do reach an agreement, disputes may then arise on the meaning and operation of its terms. In all jurisdictions except Saskatchewan, the agreement effectively precludes strikes and lockouts during its life, and the disputes that arise under it are usually settled by some form of arbitration, with no work stoppage. In Saskatchewan, there is no bar to a strike or lockout at any time, even during the life of an agreement. However, a recent amendment to the Saskatchewan Trade Union Act, while not calling for final settlement of grievances, does provide that any term voluntarily included by the parties in the agreement and calling for arbitration, shall be binding.[152] Further, the mechanics of arbitration are outlined to be followed where the parties include a substantive term but no procedure for final settlement.[153] All other acts, as stated, provide for final settlement by arbitration or otherwise.[154]

A new and unique provision was added in the Manitoba act to extend the final settlement of grievances provisions of a collective agreement beyond the expiry of the agreement up to the date when a strike or lockout may legally begin.[155]

IV. Recent Decisions

The administration of labour-management relations in Canada is the function of the eleven labour relations boards.[156] Each board has

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[150] Alta. Rev. Stat. c. 167, § 94(4) (1955); B.C. Rev. Stat. c. 205, § 50(1) (1960); N.S. Rev. Stat. c. 295, § 24(3) (1954); P.E.I. Stat. 1962 c. 18, § 40(3); Sask. Stat. 1966, c. 83, § 7(6), adding § 9(2)(d).

[151] Man. Stat. 1966, c. 33, § 5, amending § 21; N.B. Rev. Stat. c. 124, § 20 (1952); Nfld. Rev. Stat. c. 258, § 22 (1958); Ont. Rev. Stat. c. 202, § 54(3) (1960); Can. Rev. Stat. c. 152, § 21 (1952).

[152] Sask. Stat. 1966 c. 83, § 12, adding § 23A.

[153] *Id.*, adding § 23B.

[154] The inclusion of the phrase "or otherwise" is deemed to render the arbitration or other procedure to which the parties resort a non-statutory one, and so the decisions of such private tribunals are not reviewable in the courts by the use of prerogative writs. This question is discussed *infra* in the text accompanying note 164, with reference to most recent and past cases.

[155] Man. Stat. 1966 c. 33, § 4, adding § 19(5).

[156] The board is usually so labelled, although there are variations: in Alberta, it is the Board of Industrial Relations as created by the Alberta Labour Relations Act, Alta. Rev. Stat. c. 167, § 6(1) (1955); in Manitoba, the Labour Board, Manitoba Department of Labour Act, Man. Rev. Stat. c. 131, § 11(1) (1954).

jurisdiction over the certification process, including the determination of appropriateness of the bargaining unit and the selection of the representative of that unit. In addition the board polices labour practices, jurisdictional disputes, and changes in certification as provided by the particular labour relations act of which it is a creature. The overriding theory is that the decisions of such boards are final and non-reviewable, there being no statutory rights of appeal.

Review to ensure against abuse of power is, however, possible by means of the prerogative writs in accordance with the principles applicable to administrative tribunals generally. Notwithstanding the existence of privative clauses in the various labour relations acts purporting to restrict the grounds of review, these grounds include want or excess of jurisdiction,[157] error of law on the face of the record[158] and want of natural justice.[159] There can be no review on the merits alone as such are within the sole and exclusive jurisdiction of the board which, as has been said of other quasi-judicial tribunals, has a right to be wrong. It would seem that the privative clauses do no more than preserve this right.[160] The board itself has, of course, a right to review its own decisions. The Supreme Court of Canada in *Bakery & Confectionery Workers, Local 468 v. White Lunch Ltd.*[161] has pointed out that the effect of the review is

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[157] This may result from an error in deciding a collateral question of fact, such decision being itself reviewable, even though one of fact. However, in certain of the statutes, the board is given jurisdiction to decide questions of fact and law upon the outcome of which depends the board's very jurisdiction in the greater question before it. Such preliminary decisions would seem to be non-reviewable.

[158] What constitutes the "record" was discussed in a recent Alberta Supreme Court decision, *Re* Alberta Labour Act ITT Canada Ltd. v. Board of Indus. Rels. (Alta.), 60 W.W.R. (n.s.) 172 (1967). The application was to quash the certification of a rival union on the grounds that the Alberta board had erred in interpreting the term "initiation fee" in the Alberta Labour Act by deeming it to include an application fee as provided for in the certified union's constitution. In denying the application, Mr. Justice Kirby looked to the constitution and by-laws of the certified union to ascertain what the application fee represented, even though such constitution and by-laws were not part of the evidence returned. The court pointed to a number of recent cases as authorities that a broader view should be taken of what constitutes the "record" in certiorari proceedings. Kirby said that the court was entitled to consider the grounds on which the board below satisfied itself that a majority of the employees in the unit had selected the applicant as their bargaining agent. As a result, the court looked to the meaning of the application fee required by the union constitution and by-laws and concluded that it was an initiation fee.

[159] Mr. Justice Laskin of the Ontario Court of Appeal has recently stated in effect that the rules of natural justice may be proscribed by legislation. In Regina v. Can. L.R.B., *ex parte* Martin, [1966] 2 Ont. 684, 58 D.L.R.2d 134 (Ont. 1966), the rule of *audi alteram partem* and the rules of procedure of the Canada Labour Relations Board came under consideration. Laskin said that it is for the board itself to decide, pursuant to its rules, who is an interested party, and such decision cannot be reviewed as it is "not for the Court to say that the Rules of Procedure... should have been more solicitous about individuals like the *certiorari* applicants here" (those employees who had not been deemed interested parties), [1966] 2 Ont. at 701, 58 D.L.R.2d at 151.

[160] This was recently restated by Mr. Justice Riley of the Alberta Supreme Court in *Re* Can. L.R.B. Brewster Transport Co. v. Amalgamated Transit Union, 57 W.W.R. (n.s.) 415, at 421-23 (1966) in holding that decisions of the Canada Labour Relations Board are reviewable by provincial courts notwithstanding the provision in § 61(2) of the Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c. 152 (1952) providing: "A decision or order of the Board is final and conclusive and not open to question, or review...."

[161] [1966] Sup. Ct. 282, 55 W.W.R. (n.s.) 129.

retroactive to the date of the original order.[162] The British Columbia Court of Appeal had denied any such power of retroactive review, stating that the order reviewed could have only an *in futuro* effect.[163]

The proposed end of any collective bargaining is a collective agreement between an employer and a unit of his employees. To facilitate the operation of such an agreement by isolating and solving disputes arising under it, without a wholesale breakdown in relations, the legislatures have prescribed arbitration, either compulsory or quasi-voluntary. Where there is any element of voluntariness in resorting to arbitration, an important distinction arises in that the tribunal which may be voluntarily employed is not deemed to be a statutory one. That is to say, where the parties to a collective agreement may by statute refer their dispute to an arbitration tribunal or to some *other* form of settlement, then the decisions of any such arbitration board are not reviewable in the courts by means of the prerogative writs.[164] But this apparently does not eliminate review. The Manitoba Court of Appeal, affirming the decision of Mr. Justice Dickson of the Queen's Bench, recently held in *Hudson Bay Mining & Smelting Co. v. Flin Flon Base Metal Workers', Local 172*, that the decision of such a non-statutory arbitration board is reviewable by originating notice of motion.[165] Dickson had said: "[W]here injustice is done by a non-statutory arbitration board, there must be some means whereby an aggrieved party can reach the courts and obtain redress. The power of the court to intervene in a proper case is founded on its jurisdiction to protect property and civil rights."[166] An originating notice of motion was considered the appropriate vehicle in that the rights of the parties depended upon the construction of a written agreement.

The statutory arbitration board[167] was the subject of inquiry in the Ontario High Court in another recent case, *Regina v. Fuller*.[168] Mr. Justice Jessup raised the question whether the principles of law applicable to arbitrators generally would apply with equal force to a statutory arbitration board[169] such as is provided for under the Ontario Labour Relations Act.[170] The principle discussed was that where a question of law is specifically referred to an arbitrator and does not merely arise collaterally,

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[162] A case note *in* 5 OSGOODE HALL L.J. 37 (1967) approves of this part of the Court's decision while at the same time questioning the failure of the Court to deal with a misrepresentation of one of the parties amounting, it was suggested, to contempt.

[163] Regina v. B.C.L.R.B., *ex parte* White Lunch Ltd., 51 D.L.R.2d 72 (B.C. 1965).

[164] Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663, [1962] Sup. Ct. 318, 33 D.L.R.2d 1.

[165] 59 W.W.R. (n.s.) 472 (Man. 1967) *aff'g* 58 W.W.R. (n.s.) 165 (Man. Q.B. 1966) on this point.

[166] 58 W.W.R. (n.s.) at 171.

[167] Reviewability of such a board's decision was asserted by the Ontario Court of Appeal in *Re* The Int'l Nickel Co. of Canada v. Rivando, [1956] Ont. 379, 2 D.L.R.2d 700.

[168] [1967] 1 Ont. 701, 62 D.L.R.2d 156 (High Ct.).

[169] [1967] 1 Ont. at 707-08, 62 D.L.R.2d at 162-63.

[170] ONT. REV. STAT. c. 202 (1960).

the decision of the arbitrator is not reviewable. No answer to the question of the applicability of this principle to a statutory arbitrator was given as the court found that "the contested matter of law arose only collaterally in the general issue as to whether, on the facts, the employees affected were entitled to the rights and benefits claimed [under a collective agreement]." [171] The particular finding of law in the case was that members of the union, by honouring picket lines set up by other employees of their employer, had breached an implied duty in their collective agreement to serve with good faith and so had relieved their employer of such duties as the payment of their hospitalization premiums and of the requirement that it continue to employ them. In affirming this view, Jessup pointed out that the result of the employees' conduct was to affect only their individual rights, and it did not put an end to the collective agreement.

While the question raised was not answered in the *Fuller* case, it was in a recent decision of Mr. Justice Macdonald of the British Columbia Supreme Court in Chambers, in *Re Ben Ginter Constr. Co. v. International Union of Operating Engineers, Local 115*, a case which unlike *Fuller* involved a non-statutory board. [172] The principle that an arbitration board's decision on a question of law specifically referred to it is not reviewable was in dicta said to apply equally to a labour arbitration board. [173]

The third tribunal active in labour matters is the court, whose role is quantitatively a limited one. In addition to its powers of review of the other tribunals, the court acts to prevent and to remedy wrongs. There is a feeling of distrust, heightened by the use of injunctions against picketing, which is felt by the labour force towards judges. The latter on their part seek to confine as much dispute settlement as possible to the lower tribunals, with the result that their several acts of intervention receive more notoriety.

The decisions of all of these tribunals are surveyed hereunder.

A. *Selection of the Bargaining Agent*

The representative for collective bargaining may arise in either of two ways. First, the employees may choose a representative, and if that individual or organization meets with the approval of the employer then a collective agreement may be established. Second, an organization created to represent the employees in a defined unit may obtain recognition

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[171] [1967] 1 Ont. at 707, 62 D.L.R.2d at 162.

[172] 62 D.L.R.2d 485 (B.C. Sup. Ct. Chamb. 1967).

[173] It is not apparent from the report of the *Ginter* case whether the application for review was by way of certiorari or not. If the prerogative writ was indeed relied upon, then the court did not consider it to be of consequence that the arbitration board was non-statutory by reason of the wording of § 22(1) of the British Columbia Labour Relations Act, B.C. REV. STAT. c. 205 (1960).

from an appropriate labour relations board. This approach is certification, and there is no requirement that the employer voluntarily accept the bargaining unit, being obliged by law to do so. The certified union can expect the rights to exclusive representation and to limited protection from rival certification proceedings in addition to the benefits of compulsory bargaining on the part of the employer. The object here is to examine by what means the various boards determine the appropriateness of a proposed bargaining unit.

1. *Defining the Employee*

A major consideration is whether the members of an applicant unit can be called employees at all.[174] The Canada Labour Relations Board has considered a special policeman to be first an employee and then a police officer. In *C.U.P.E. v. Hamilton Harbour Comm'r*,[175] the board certified a unit of harbour police. Employees were sworn in as special constables under section 58 of the Police Act.[176] The objection by the respondent harbour commissioners was that section 26 of the same act precluded the constables from being members of a trade union. The board followed its own decision[177] of the same year with respect to members of the Canadian National Railways police force[178] in declaring these constables to be employees. Section 26 of the Police Act was deemed not to apply as this group of employees did not constitute "a police force."

"Employee" has also been designated to include an independent trucker hired by a transport company. This was the conclusion of the Canada Labour Relations Board in two 1966 certification hearings: *Truckers, Local 362 v. Midland Superior Express Ltd.*;[179] and *General Drivers, Local 979 v. Arrow Transit Lines Ltd.*[180] In the *Midland* case, which was affirmed by Mr. Justice Riley of the Alberta Supreme Court,[181] the drivers were hired by the company under hire agreements which brought both driver and tractor under the control of the company. The drivers had sought certification as an appropriate unit, and the company argued against the application, claiming that the drivers were not employees but independent contractors under a hire agreement. The board held that

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[174] In all jurisdictions, the board has the final say as to who is an employee, and recent cases affirm that certiorari does not lie to correct the board's finding: *Re* I.R.D.I.A. Midland Superior Express Ltd. v. Truckers, Local 362, 60 W.W.R. (n.s.) 255 (Alta. Sup. Ct. 1967); *Re* L.R.A. Bakery & Confectionery Workers, Local 389 v. Paulin Chambers Co., 59 W.W.R. (n.s.) 747 (Man. Q.B. 1967).

[175] 65 Can. Lab. L. Cas. 794, ¶ 16,054, CAN. LAB. SERV. 6-1184 (1965) (Can. L.R.B. 1965).

[176] ONT. REV. STAT. c. 298 (1960).

[177] C.N.R. Co. v. C.N.R. Police Ass'n, 65 Can. Lab. L. Cas. 760, ¶ 16,048, CAN. LAB. SERV. 6-1180 (1965) (Can. L.R.B. 1965).

[178] Members of this force are made constables under § 456 of the Railway Act, CAN. REV. STAT. c. 234 (1952).

[179] 66 Can. Lab. L. Cas. 908, ¶ 16,085, CAN. LAB SERV. 6-1212 (1966) (Can. L.R.B. 1966).

[180] 66 Can. Lab. L. Cas. 909, ¶ 16,086, CAN. LAB. SERV. 6-1216 (1966) (Can. L.R.B. 1966).

[181] 60 W.W.R. (n.s.) 255 (Alta. Sup. Ct. 1967).

the drivers were employees within the meaning of the act and the company was the employer. Riley was of an opposite opinion,[182] but denied certiorari on the ground that the question was one of fact, not of law, and so not reviewable. The board in a later hearing[183] continued to consider owner-operators to be employees, while at the same time noting that the *Midland* decision was under appeal to the Alberta Court of Appeal. The board had based its decision on the substantial control which the company had both over the owner-operators and over their vehicles. The Supreme Court of Canada in the 1960 case, *Teamsters Local 213 v. Therien*,[184] reached an opposite conclusion in finding that an owner of a number of trucks who furnished his trucks, and his own as well as his employees' services, to a contracting company was an independent contractor. The question of control was not entered into in that case, it appearing at once to the Court at each level that there was no issue on the point. The principles of control as found in agency law then will govern the "employee" issue in each particular case.[185]

2. *Jurisdiction—Federal v. Provincial*

A question which will arise from time to time and before any issue as to who is an employee, is that of the board's jurisdiction. The objection sometimes raised by opponents to certification, either the employer or an intervening union, is that the provincial and not the federal board has jurisdiction over the unit or vice-versa. In five reported hearings over the past two years, the federal board has accepted the objection only once. In an application[186] by a union seeking to represent the employees of a ferry operating wholly within the province of Quebec, the board rejected the applicant's contention that the undertaking was within the federal sphere as being "in connection with navigation and shipping" under section 53(a) of the Industrial Relations and Disputes Investigation Act.[187] The board preferred to rely on the more restricted definition in section 53(d) whereby only interprovincial or international ferry services come within the board's jurisdiction. The implication is that local ferries are excluded from the federal act.

In the cases where the board did accept jurisdiction, a number of different fact situations were involved. Where less than five percent of a

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[182] *Ibid.*

[183] General Truck Drivers, Local 31 v. Midland Superior Express Ltd., 67 Can. Lab. L. Cas. 13,025, ¶ 16,009, CAN. LAB. SERV. 6-1244 (1967) (Can. L.R.B. 1967).

[184] [1960] Sup. Ct. 265.

[185] The federal board in the *Midland* hearing adopted the tests laid down by Lord Wright in Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161, at 169 (P.C.), to determine whether an individual is an independent contractor or an employee. Dean Carrothers notes that the Ontario board has used the same tests, A. CARROTHERS, COLLECTIVE BARGAINING LAW IN CANADA 97, n.66 (1965).

[186] Canadian Marine Officers' Union v. Levis Ferry Ltd., 66 Can. Lab. L. Cas. 869, ¶ 16,073, CAN. LAB. SERV. 6-1198 (1965) (Can. L.R.B. 1965).

[187] CAN. REV. STAT. c. 152 (1952).

transport company's operations was constituted by interprovincial trucking, the board nonetheless deemed the undertaking a federal one.[188] On the other hand, the fact that a company providing transport for pilots in the St. Lawrence River also transported other individuals to and from ships was not considered sufficient to render the respondent's primary business other than that of pilotage and so within the jurisdiction of the Parliament of Canada.[189] Shipping unlike ferrying is completely within the federal sphere and not provincial even though it be wholly or substantially carried on within one province.[190] This decision by the board seems to concur with the Supreme Court decision in *Reference as to the Validity of the Industrial Relations and Disputes Investigation Act.*[191] Stevedoring is governed by the federal act, and the board has held that essential services connected with such operations are also under the federal act notwithstanding that none of the employees providing such services engages in work having to do directly with the physical loading or unloading of a ship's cargo.[192]

3. *Appropriateness of the Bargaining Unit*

Before a board will grant certification, it must conclude that the sum of employees sought to be represented by the applicant constitutes a suitable unit. What this implies in the way of competing forces is well described by Professor Woods:

> A union to be certified must achieve a certain legally required support from the employees in the unit. This support may be demonstrated through evidence of membership, or by a representation vote. It follows that the constituency decided upon as the bargaining unit may affect the chances of success or failure in the voting or whatever other method is used to determine the degree of worker support for the applicant union. A union knowing or suspecting that a certain segment of the work force would show a majority against its application might be inclined to seek a definition of the appropriate bargaining unit which would exclude this dangerous segment. For the opposite objective, the employer, if he is opposed to the union's being certified, would prefer the inclusion of this

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[188] Teamsters Local 106 v. St. Hyacinthe Express Inc., 65 Can. Lab. L. Cas. 814, ¶ 16,063, CAN. LAB. SERV. 6-1192 (1965) (Can. L.R.B. 1965). The Alberta board, however, has recently held that interprovincial activity which is merely incidental to the major provincial undertaking is not sufficient to preclude provincial certification, International Woodworkers, Local 1-207 v. Nelson Lumber Co., 67 Can. Lab. L. Cas. 13,021, ¶ 16,006 (Alta. Bd. of Indus. Rel. 1967).

[189] Seafarers' Int'l Union v. Three Rivers Boatman Ltd., 66 Can. Lab. L. Cas. 920, ¶ 16,101, CAN. LAB. SERV. 6-1226 (1966) (Can. L.R.B. 1966).

[190] Seafarers' Int'l Union v. Agence Maritime Inc., CAN. LAB. SERV. 6-1224 (1966) (Can. L.R.B. 1966).

[191] [1955] Sup. Ct. 529, [1955] 3 D.L.R. 721. In fact, a close analysis of the judgments of the full bench reveals a less than obvious majority on this point. Four of the justices, Rand, Locke, Fauteux and Abbott, said that a purely provincial shipping operation would not be within federal jurisdiction, whereas ony three, Kellock, Estey and Cartwright, are expressly contrary in opinion. The decisions of Mr. Chief Justice Kerwin and Mr. Justice Taschereau appear to furnish only implication.

[192] International Longshoremen's Ass'n, Local 1925 v. Brown & Ryan Ltd., 66 Can. Lab. L. Cas. 901, ¶ 16-082, CAN. LAB. SERV. 6-1200 (1966) (Can. L.R.B. 1966).

> group. In general, each will be inclined to jockey for a unit appropriate to their respective goals, rather than one inherently appropriate for bargaining. This is so because, until certification or recognition has been achieved, the conflict between the parties revolves around the question of whether there shall or shall not be a bargaining relationship. [193]

As a matter of principle, the Manitoba board has stated that in its opinion a bargaining unit is appropriate if the interests of the employees are capable of being adequately represented by a common group of bargaining representatives. [194] The Alberta board has indicated, applying its interpretation of this principle, that it will refuse to include office employees in a unit consisting of outside employees. [195] This is the result to be seen in attempts to have any of the Canadian boards amend such a unit.

An interesting development has been revealed in a number of applications by unions affiliated with the Quebec-based Confederation of National Trade Unions. [196] These unions have attempted of late to be substituted as bargaining representatives for Quebec divisions of nation-wide units. The most recent applications have been on behalf of Quebec employees of the Canadian Broadcasting Corporation [197] and of a group of Montreal employees of Canadian Pacific Railway Company. [198] In both instances, the federal board has denied the application favouring the national to the local as the appropriate unit. One of the board's members, G. Picard, dissented each time, contending that this approach by the board "establishes a kind of jurisprudence the result of which would be, using strong words, to put in jail behind iron-barred union structures, thousands of workers coming under federal jurisdiction." [199] Picard feared that in future applications every national bargaining unit would be required to be replaced by another union of the same type. In the case of the C.B.C. employees, he considered the Quebec unit to be appropriate, especially in view of the fact that it had majority support among the Quebec employees. [200] While agreeing with the majority of the board that a Montreal unit of C.P.R. employees should not be granted separate certification, Picard suggested that the solution in that case lay in a regional unit, and not in the existing nation-wide one. [201]

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[193] H. Woods & S. Ostry, Labour Policy and Labour Economics in Canada 140 (1962).

[194] Operating Engineers, Local 827 v. Manitoba Sugar Co., Can. Lab. Serv. 60-1011 (Man. L.R.B. 1966).

[195] Amalgamated Transit Union, Local 583 v. City of Calgary, 65 Can. Lab. L. Cas. 701, ¶ 16,021 (Alta. Bd. of Indus. Rel. 1964).

[196] This organization appears to be the French-speaking equivalent to the Canadian Labour Congress, although its influence does not extend beyond the Quebec borders.

[197] Le Syndicat Général du Cinéma et de la Télévision (CNTU) v. C.B.C., 66 Can. Lab. L. Cas. 896, ¶ 16,081, Can. Lab. Serv. 6-1204 (1966) (Can. L.R.B. 1966).

[198] Syndicat National des Employés des Usines des Chemins de Fer (CNTU) v. C.P.R. Co., Can. Lab Serv. 6-1229 (1966) (Can. L.R.B. 1966).

[199] *Id.* at 6-1235.

[200] 66 Can. Lab. L. Cas. at 900, Can. Lab. Serv. at 6-1210.

[201] *Supra* note 198, at 6-1237.

But the board cannot err in law in giving to the word "proper" in the phrase "proper bargaining agent" a meaning which it will not bear. The Appellate Division of the Alberta Supreme Court in *Regina v. Alberta Bd. of Indus. Rel. ex parte Stedelbauer Chevrolet Oldsmobile Ltd.* recently quashed a certification order of the Alberta board on this ground.[202] The court held that the board erred in law by accepting as valid an act of the applicant union's president which was ultra vires.[203] The act consisted in the president's extending the union's jurisdiction to include in its membership others than those encompassed in its constitution. What the president had done was to declare that auto mechanics were eligible to be members of a sheet metal workers' union. The court felt that such a union could not adequately represent auto mechanics.

4. *Conduct of the Parties*

The success of an application for certification will very often turn upon the conduct of the parties. The British Columbia Court of Appeal in an earlier case stated that an applicant for certification must come before the board with clean hands.[204] A fraudulent representation by the applicant, for example as to memberships, is sufficient cause for the board to reject an application. Evidence that a majority of the employees in the unit support the union must be produced in seven jurisdictions as a condition for making an application, while the Alberta, Ontario, Quebec and Saskatchewan acts require evidence of support and representation which in practice amounts to the same condition. To establish the needed support, union canvassers may commit discrepancies such as in *Sudbury Mine, Mill and Smelter Workers, Local 598 v. International Nickel Co.*[205] where dues were paid by the canvassers as loans and employees no longer with the company were listed as members. In this case, the Ontario board recognized the canvassers as rank and file members who had simply committed errors, and a vote was ordered on the basis of the support required being shown. The board cautioned: "However, in some circumstances, even the acts of rank and file canvassers may affect the weight to be given to evidence of membership apart from the evidence for which they were responsible and despite the fact that the irregularities were not known to responsible union officers or officials."[206]

So, in *Regina v. B.C.L.R.B., ex parte Elgert Spruce Mills Ltd.*,[207] the British Columbia Court of Appeal affirmed a trial judgment[208] ordering

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[202] 61 D.L.R.2d 401 (Alta. 1967).

[203] The Alberta Supreme Court had denied certiorari in the belief that the error was only one of fact, 56 W.W.R. (n.s.) 747 (Alta. Sup. Ct. 1966).

[204] Cock v. L.R.B., 33 W.W.R. (n.s.) 429, 26 D.L.R.2d 127 (B.C. 1960).

[205] 65 Can. Lab. L. Cas. 826, ¶ 16,066, CAN. LAB. SERV. 76-1109 (1966) (Ont. L.R.B. 1965).

[206] CAN. LAB. SERV. at 76-1135 (1966).

[207] 55 D.L.R.2d 548 (B.C. 1965).

[208] 49 D.L.R.2d 55 (B.C. Sup. Ct. 1964).

a writ of prohibition to prevent the British Columbia board from certifying a union where irregularity in a representation vote was shown. The irregularity lay in the fact that six votes were cast by persons who were not employees at the time the poll was conducted.[209] Of the total of forty-six votes cast, twenty-five were for the applicant union, and the court held that as it could not be said how the six improper voters had voted, their votes may have affected the outcome; the vote was ordered set aside.

The employer for his part is prohibited in six jurisdictions[210] from altering conditions of employment from the date when an application for certification is filed with the board. In *Zeballos Dist. Mine & Mill Workers, Local 851 v. L.R.B. (B.C.)*,[211] the company granted a retroactive pay increase after negotiations to reach a new collective agreement with the certified union, at a time when another union had applied to be substituted as the certified bargaining agent of the employees. The board held that this was a breach of section 12(9) of the British Columbia act, and as a result it certified the applicant union without a vote. The board also relied on its conclusion that the true wishes of the employees in the unit were not likely to be disclosed by a representation vote because of the wage increase. In fact, a vote had been ordered and taken when the board learned of the wage increase. In certifying the applicant union without a vote, the board relied on its power under section 65(3) to reconsider any decision or order made by it and to vary or cancel such decision or order. The Supreme Court of Canada upheld the board which had cancelled the vote on the grounds that the employees' true wishes would not be learned, a question of fact for the board. This left the board free to certify the applicant without a vote if it was satisfied that a majority of the employees were members in good standing of the applicant.[212] Thus, while the Supreme Court did not decide the question of whether an illegal change in working conditions had been effected, it did support the board's view that the conduct of the employer was improper and thus fatal to the continued existence of the certified union as bargaining agent.[213]

An example of what the British Columbia Supreme Court deems to be an illegal change in working conditions is the dismissal of any employee, notwithstanding good cause.[214] In Ontario, there is no such prohibition

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[209] The board had passed a regulation pursuant to § 14(3) of the Labour Relations Act, B.C. REV. STAT. c. 205 (1960), defining those eligible to participate in a representation vote under § 12(3) as the "employees" of the unit at the date of the application for certification.

[210] ALTA. REV. STAT. c. 167, § 79 (1965); B.C. REV. STAT. c. 205, § 12(9) (1960); NFLD. REV. STAT. c. 258, § 9(6) (1958); P.E.I. Stat. 1966 c. 19, § 15(2); QUE. REV. STAT. c. 141, §§ 33, 47, 48 (1964); SASK. REV. STAT. c. 287, § 9(1)(j) (1965).

[211] [1966] Sup. Ct. 465, 57 D.L.R.2d 295.

[212] The Labour Relations Act, B.C. REV. STAT. c. 205, § 12(4) (1960).

[213] The existing certified union was of course a party to such conduct.

[214] Office & Technical Employees, Local 15 v. Uniroyal (1966) Ltd., 67 Can. Lab. L. Cas. 11,145, ¶ 14,011 (B.C. Sup. Ct. 1966).

against altering conditions of employment during an application for certification. Nonetheless, the conduct of the parties is a factor for the board's consideration. Where several companies merged, the Ontario board ordered a representation vote to be taken to determine which of the two existing unions should represent the new unit of employees.[215] The employer continued to deduct union dues pursuant to a collective agreement existing between itself as the purchasing company and one of the unions. Dues were collected and held in trust for this union from *all* of the new company's employees. When the results of the vote showed majority support for this union, the second union applied to the board to have the conduct of the employer and the opposing union declared an offence and to have a new vote ordered. In a divided decision, the board concluded that while the conduct in question may have influenced the employees in their voting, such conduct was not improper as the purchasing company was bound by its existing agreement. The dissenting member was of the opinion that the rights of the applicant union should be no less than those of any other union involved in a representation vote pursuant to such a merger, and as a result the conduct of the company, creating in the minds of the voters, as it did, the impression that management favoured the respondent union, was improper. What is evident from the decision of the majority is that there must be a violation of the act upon which the board may found its ruling before questionable conduct will prove crucial.[216]

B. *The Collective Bargaining Process*

The collective bargaining process is perhaps the most important aspect of labour relation.[217] To the employee, the bargaining process is eminently legislative in nature for it legislates the law of the plant that determines the essential terms and conditions of his employment. To the union and the employer, it is a forum where, within the framework of legislation, their powers in the process of production are utilized to attain apparently opposing economic objectives. Prior union activities, from organization to certification, are purely preparatory: they are intended to vest upon the union a legal and economic capacity to bargain. Economic pressures available to the union and the employer are essentially incentive pressures: they are designed to motivate speedy and fair bargaining. Inescapably, bargaining is a forum to test intentions and strength; its success is depen-

[215] International Union of Elec., Radio & Machine Workers, Local 581 v. Premier Automotive Units Ltd., 66 Can. Lab. L. Cas. 860, ¶ 16,070; CAN. LAB. SERV. 76-1146 (1966) (ONT. L.R.B. 1965).

[216] CAN. LAB. SERV. at 76-1148 (1966): "While it may be that part of the applicant's claim is correct that the company's action of deducting the respondent unions' monthly dues from the pay of all employees, including the former employees of Premier Automotive Units Limited, did in fact influence the employees so as to affect the outcome of the vote, the question before the Board is whether such action is improper within the meaning of the Labour Relations Act."

[217] *See* Thunder Bay General Workers, Local 314 v. New Method Laundry & Dry Cleaners, 57 Can. Lab. L. Cas. 1622, ¶ 18,059 (Ont. L.R.B. 1957).

dent upon good faith. Although it is in itself a peaceful legislative machinery, the law of the economic jungle plays prominently in the background; the economic warfare has merely moved from the open field to the bargaining table. The recent cases on bargaining seem, unfortunately, to establish the desire of employers to avoid the bargaining table and to apply the rules of labour relations, not as aids but as barriers in the formulation of agreements.

1. *The Duty to Bargain in Good Faith*

The duty of the employer and the union to bargain toward the conclusion of a collective agreement is imposed by labour legislation in Canada. Statutory sanctions exist to assure that the labour relations partners will discharge this duty along legally established procedures; refusal to bargain is generally defined as an unfair labour practice.[218] Such a charge was made against the employer in *Regina ex rel. Saskatoon Printing Pressmen, Local 206 v. LRB (Sask.).*[219] The union alleged that, following notice from the union, the employer entered into negotiation, but thereafter refused to execute the collective agreement negotiated, an unfair labour practice under the Saskatchewan Trade Union Act.[220]

The Saskatchewan Labour Relations Board affirmed the rule that the employer had an obligation to bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement. However, it refused to find the employer liable for any unfair labour practice because the notice to bargain given by the union was "well in advance of the 60-30 day period" provided by section 30(4) of the act.[221] The negotiation that took place following an untimely notice was not obligatory, hence could not make the employer guilty of an unfair labour practice when it refused to execute the agreement negotiated. To the board, for the employer to be held guilty of an unfair labour practice, the employer must have the duty to bargain and, in defiance of this duty, have failed to do so.

The Saskatchewan Queen's Bench refused to disturb the board's ruling. Without expressing any opinion on the board's reasoning, the court ruled that the application for mandamus and certiorari in aid made to the court amounts to an appeal to the court. Since the Trade Union

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[218] For an exhaustive review, consult A. CARROTHERS, COLLECTIVE BARGAINING LAW IN CANADA 285-92 (1965).

[219] 61 W.W.R. (n.s.) 149, 67 Can. Lab. L. Cas. 11,321, ¶ 14,048 (Sask. Q.B. 1967).

[220] SASK. REV. STAT. c. 287, § 9(1)(c) (1965).

[221] Either party to a collective bargaining agreement may, not less thanthirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision of the agreement, and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement. SASK. REV. STAT. c. 287, § 30(4) (1965).

Act excludes appeal from the board's decision,[222] the court cannot entertain the application.

2. *Challenges to Unions' Right to Bargain*

The collective bargaining process is initiated by a notice of a desire to negotiate an agreement. The union or the employer can compel each other to meet at a bargaining table by serving this notice to the opposite party. The content of the union's notice and to whom it should be served were at issue in *United Bhd. of Carpenters, Local 18 v. Pigott Constr. Co.*,[223] considered by the Ontario Labour Relations Board. Pigott was a party to two collective agreements, one with the provincial council of unions to which Local 18 belonged, the other as a result of its membership in a contractors' association which had an agreement with Local 18. The Local gave notice to the contractors' association to re-open the agreement. Ten days thereafter, the Local wrote to Pigott as follows:

> This is to inform you, as per *Ontario Labour Relations Act*, that Local 18 is entering into negotiations with . . . [the contractors' association], for changes and adendum [*sic*] to the present Trade Agreement which terminates April 30th, 1965.
>
> Local 18 is desirous in learning if your Company will accept and abide with the conditions which will be contained in the new agreement when officially signed by both parties, namely, . . . [Local 18] and . . . [the contractors' association].[224]

On the date of this letter, Pigott was no longer a member of the contractors' association, but it failed to give written notice to Local 18 that it had ceased to be a member. Pigott argued that the letter was not a notice to negotiate but a mere inquiry about the company's position on the agreement being negotiated by Local 18 with the association. Besides, Pigott could not be said to have received a notice (through the association) to negotiate since it was no longer a member of the association on the date of the letter.

The board ruled that since Pigott failed to notify the union in writing that it was no longer a member of the association, section 40(3) of the Ontario Labour Relations Act[225] applied. The notice to the association was deemed to be notice to Pigott to satisfy section 40 of the act.

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[222] *Id.* at § 20.

[223] 65 Can. Lab. L. Cas. 789, ¶ 16,053 (Ont. L.R.B. 1965).

[224] *Id.* at 791.

[225] Where a notice is given by or to an employers' organization that has a collective agreement with a trade union or council of trade unions, it shall be deemed to be a notice given by or to each member of the employers' organization who is bound by the agreement or who has ceased to be a member of the employers' organization but has not notified the trade union or council of trade unions in writing that he has ceased to be a member.

ONT. REV. STAT. c. 202, § 40(3) (1960).

(a) The Employer's Challenge

Generally, the union has greater interest than the employer that negotiation toward a collective agreement should be initiated since the beneficial adjustment of terms and conditions of employment can only be achieved by the conclusion of an agreement. The employer naturally views the agreement as a set of concessions that limits his margin of profit and prerogatives of management in the business. Thus, employers often react to the union's notice to negotiate with a challenge to the union's right to bargain. In the *Pigott Constr. Co.* case, for instance, the employer attempted to block the bargaining requested by Local 18, contending that it was not bound by the Local's agreement with the contractors' association. Pigott claimed that it was bound by the agreement with the provincial council of unions, and the provincial council, not Local 18, had bargaining rights. The board replied that Local 18 was not bound by Pigott's agreement with the provincial council of unions since Local 18 did not ratify the agreement. The ratification by the United Brotherhood of Carpenters, parent of Local 18, did not bind the Local since the parent union had no explicit authority to ratify the agreement on behalf of Local 18: "Under *The Labour Relations Act* the Board recognizes that a parent union and its local are separate entities." [226] On the other hand, Pigott was bound to the contractors' association agreement since it was a member of the association when the agreement was negotiated.

In the recent cases, the ground repeatedly advanced by the employer in challenging the union's bargaining rights is the union's inactivity to initiate negotiation or to conclude an agreement for an appreciable length of time. In an Ontario case, [227] the employer, a second purchaser in a successive transfer, attacked the union's right to bargain because of its failure to negotiate a collective agreement. The union failed to give notice to the present employer or to the first purchaser within sixty days [228] from date of the first sale. The employer further argued that the union

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[226] 65 Can. Lab. L. Cas. at 793.

[227] Gunter v. Milk & Bread Drivers, Local 647, 64 Can. Lab. L. Cas. 658, ¶ 16,010 (Ont. L.R.B. 1964).

[228] (1) If a trade union fails to give the employer notice under section 11 within sixty days following certification or if it fails to give notice under section 40 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 11 or section 40 or that has received notice under section 40 fails to commence to bargain within sixty days from the giving of the notice, or after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

ONT. REV. STAT. c. 202, § 45 (1960).

cannot continue its bargaining rights under section 47a(2) [229] of the Ontario Labour Relations Act because the first purchaser was not an employer on behalf of whose employees the union is entitled to give notice under section 11 or 40 of the act; rather, it was an employer on behalf of whose employees the union is entitled to give notice to bargain under section 47a(2).

The Ontario Labour Relations Board ruled that decertification of the union cannot be urged by direct application of section 45 since this section refers to termination of bargaining rights of a union which derives its bargaining rights, not from the sale of a business within the ambit of section 47a(2), but from a certificate or collective agreement. This interpretation, however, means that a union whose bargaining rights with the employer arise by virtue of a transfer under section 47a(2) cannot be attacked for inactivity since no provision of the act explicitly deals with this situation. [230] The board, in order to avoid the invulnerability of the union to decertification attack for inactivity, opined that section 45 applies by analogy. The sixty-day period shall be computed, not from the date of the first sale, but from the date of the sale to the present employer. The board answered the second contention of the employer by holding that, for purposes of section 47a(2), the giving of notice to bargain or the right to do so under section 47a(2) is the same as the giving of notice or right to do so under section 11. The board concluded that the union continues its bargaining rights with the present employer; if the union remains inactive for sixty days from the date of sale of the business to the present employer, its bargaining rights may be terminated.

In *Barrie Tanning Ltd. v. International Union of Operating Engineers, Local 796*, [231] the union sought to avoid the thrust of the employer's allegation of inactivity by urging the Ontario Labour Relations Board to recognize the automatic renewal clause in the collective agreement. The collective agreement, concluded in 1959, was still in effect in 1966, but the union had failed to initiate bargaining to improve it or to enforce its check-off provision. The board conceded that the automatic renewal clause may preserve a collective agreement in a state of suspended anima-

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[229] (1) in this section,
(a) 'business' includes a part or parts thereof;
(b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.
(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or on behalf of whose employees a trade union has been certified as bargaining agent or has given or is entitled to give notice under section 11 or 40 sells his business, the trade union continues, until the Board otherwise directs, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 11.
ONT. REV. STAT. c. 202, § 47a(1),(2) (1960).

[230] See now the amendment to § 47a(9) introduced by Ont. Stat. 1966 c. 76, § 18(1).

[231] 66 Can. Lab. L. Cas. 912, ¶ 16,092 (Ont. L.R.B. 1966).

tion in perpetuity. However, the agreement, because of its stagnancy, may also furnish evidence of the union's abandonment of the bargaining rights on which it was based. The union's inactivity for six years, said the board, is fatal; any attempt to give notice to bargain at this time is merely a unilateral attempt to restore bargaining rights long since lost due to inactivity.

The detailed provisions of the Ontario Labour Relations Act on the method of terminating the union's bargaining rights [232] are not exclusive; other methods of termination may be included in a collective agreement. For instance, the collective agreement in *Operative Plasterers' & Cement Masons' Int'l Ass'n v. Di Vuono & Galluci* [233] provided that if the union, voluntarily recognized in the agreement, failed to sign a collective agreement with seventy-five per cent of the members of a contractors' association on December 31, 1964, the union would relinquish its bargaining rights. The board ruled that the agreement was valid. The only limitation that the board required was that an agreed method of termination should not infringe the minimum life of one year of a collective agreement as provided in section 39 of the act. Since the method adopted did not involve relinquishment of bargaining rights prior to the expiration of the first year of the agreement and the agreement had run for more than one year, the union's right to bargain was ordered revoked. [234]

(b) The Employees' Challenge

The employees, like the employer, have a right to question the bargaining rights of a union that represents them. In Ontario, section 45 of the Labour Relations Act gives to any of the employees of a bargaining unit the right to apply for revocation of the union's bargaining rights if the union has been inactive. [235] Since the employees can only advance their interest through the machinery of collective bargaining, they have more legitimate reasons to complain of union inactivity. The rationale of section 45 has been stated as follows:

> The purpose of section... [45] of the Act is to protect the employees... against a union which stakes out a claim to represent certain employees and then takes no steps within a reasonable time to forward the interests of those employees. However, the section is to be used as a shield, not as a sword. Section... [45] should not be used to

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[232] ONT. REV. STAT. c. 202, §§ 42-45a (1960).

[233] 65 Can. Lab. L. Cas. 734, ¶ 16,035 (Ont. L.R.B. 1965).

[234] Another case that should be mentioned in this discussion is Tanner Bldg. Supplies Ltd. v. United Bhd. of Carpenters, Local 846, 65 Can. Lab. L. Cas. 714, ¶ 16,039 (Alta. Bd. of Indus. Rel. 1965). The employer's appeal of its conviction for unfair labour practice based on refusal to bargain and the existing dispute of whether an employer's counter-proposal, accepted by the union but subsequently repudiated by the employer, was a perfected collective agreement or not led the board to deny an application to revoke the union's bargaining rights.

[235] *See* § 45 of the Ontario Labour Relations Act, ONT. REV. STAT. c. 202 (1960), *quoted* in note 228 *supra*.

> penalize a union which has failed to give notice under section ... [11] of the Act, but rather to afford an opportunity for an interested party to bring that fact to the attention of the Board so that the Board may call upon the union to give an explanation for the delay in commencing or continuing negotiations as the case may be. If no satisfactory explanation is forthcoming, the Board will no doubt in many cases terminate the foregoing rights of the union instantaneously .... However, when the tardiness of the union is excusable and especially where it still commands the allegiance of a majority of the employees, the application should be dismissed. [236]

The issue in *Saunders v. Canadian Transp. Workers, Local 197*, [237] before the Ontario board, was whether, within the compass of this rationale, the union's failure to bargain sixty days following certification would result in revocation of its bargaining rights. Although there was no dispute over the union's inactivity, the union, after the decertification hearing, sent to the board a collective agreement made with the employer dated after the date of the application to decertify. The board refused to accept the agreement in evidence because it was submitted after the hearing. [238] According to the board, the material date in the determination of the union's inactivity is the date of the application to decertify. It felt itself, therefore, bound to declare that the union no longer represents the employees in the unit for whom it has been the bargaining agent.

The mere fact, however, that the union had given notice to bargain is not a sufficient shield to the charge that the union failed to forward the interest of the employees. In Ontario, inactivity to pursue bargaining after notice is just as fatal. [239] The union is obliged, on pain of being decertified, to make a collective agreement within one year after its certification. [240] In this instance, however, an application to divest the union of its bargaining rights cannot be made if the Minister of Labour has appointed a conciliation officer or mediator, until after the lapse of some statutory period following certain action by the minister. [241]

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[236] Dominion Stores Ltd. v. General Workers, Local 800, 56 Can. Lab. L. Cas. 1604, ¶ 18,047, at 1604-05 (Ont. L.R.B. 1956).

[237] 67 Can. Lab. L. Cas. 13,036, ¶ 16,013 (Ont. L.R.B. 1967).

[238] ONT. LAB. RELS. ACT R. PROC. § 47, *in* CCH CAN. LAB. L. REP. ¶ 60,597 (1967).

[239] ONT. REV. STAT. c. 202, § 45(2) (1960).

[240] (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 46, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

ONT. REV. STAT. c. 202, § 43(1) (1960).

[241] (1) Subject to subsection 3, where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents the employees in the bargaining unit determined in the certificate shall be made until,

(a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or

(b) thirty days have elapsed after the Minister has released to the parties a notice that he does not deem it advisable to appoint a conciliation board; or

The right of the employees to seek decertification for failure of the union to conclude an agreement was clarified in *Goard v. Teamsters Local 230.*[242] The conciliation, initiated in April, 1965, was still pending when the employees applied to the board for termination of the union's bargaining rights. The board asserted that the time provisions that limit the right of the employees to seek certification should be respected. The time provisions in section 46(1)(a), (b), said the board, reflect the realization that meaningful collective bargaining cannot commence or endure when there is an outstanding issue which may affect the union's right of representation. No serious collective bargaining at the conciliation stage would likely occur or be maintained if the conciliation proceedings and the bargaining rights of the union were open to attack by dissentient employees. "The aim of the time provision is to insure that the conciliation process, once instituted, would proceed to completion and that the parties would have an additional period thereafter to assert their rights to strike or lockout and to resolve their differences in further collective bargaining without the interference of an application for termination of bargaining rights."[243]

Employees who question the union's command of majority loyalty may assail the union's bargaining rights for the employees. As a practical matter, the employees' desire to test the majority support of the union precedes the negotiation for a collective agreement or for the renewal of an agreement already in force. The employees want to avoid being governed by an agreement negotiated by a union that does not faithfully reflect their common interest and sentiment. The collective bargaining process is a policy-making process, hence the employees want their conception of employment policies at least to reach the bargaining table and be discussed with the employer, although they realize that not all their demands will ultimately find expression in the collective agreement.

The longer the time lapse from certification, the greater is the probability of real change of employee loyalty. One can justly assume that the union, obliged to negotiate within a relatively short statutory period from certification, commands majority support if negotiation is undertaken within the statutory period provided by labour relations laws. Thus, it is during the protracted negotiation of a collective agreement or during

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(c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.

ONT. REV. STAT. c. 202, § 46(1) (1960).

[242] 65 Can. Lab. L. Cas. 819, ¶ 16,065 (Ont. L.R.B. 1965). The application was made under § 96(1) of the Ontario Labour Relations Act because the employees were engaged in the construction industry. The conflict, resolved in this case, between § 46(1)(a),(b) and § 96 now has only an historical significance because § 91 was amended in 1966. Ont. Stat. 1966 c. 76, § 38.

[243] *Id.* at 821.

the term of a negotiated agreement that attack on the union's enjoyment of majority loyalty may arise. In *Barkwell v. Liquid Cargo Lines Ltd.*,[244] the Canada Labour Relations Board was asked to decertify the union under section 11 of the Industrial Relations and Disputes Investigation Act[245] while the union was still negotiating after the lapse of six months from certification. The board opined that the grant of decertification under section 11 of the act is not mandatory on the board; the section is simply a grant of discretion. Following its decision in *Tapp v. Taggart Service Ltd.*,[246] the board reiterated that decertification before the expiration of twelve months from date of certification should be refused; exceptions to this rule can only be made in extraordinary circumstances.[247] No such circumstance had been shown in this case; on the contrary, the evidence supported the exercise of discretion to refuse decertification. The employer vigorously opposed the certification of the union; a considerable number of employees had been laid off for indeterminate duration in the proposed bargaining unit, and, although some of the laid-off employees had been subsequently rehired, others had been replaced by new employees. Moreover, the union had not been inactive; it had taken prompt and appropriate action to negotiate with the employer after certification and had not failed to discharge its responsibilities to the employees from certification to the date of application for decertification.

The Saskatchewan Labour Relations Board had chosen to order a vote to determine the majority sentiment when, in *Herrem v. Burns & Co.*,[248] an employee urged decertification while negotiation for a collective agreement was in progress. The board disregarded circumstances that were material in this case and emphasized only the number of months that had elapsed from the date of certification. The negotiation between the union and the employer had already been concluded; at the time of the application, the bargaining agreement remained only to be signed. Besides, as the dissent points out, negotiation delays were primarily caused by the employer's filibustering, and the employer had exerted unlawful pressure in obtaining supporters for the decertification application.[249]

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[244] 65 Can. Lab. L. Cas. 704, ¶ 16,623 (Can. L.R.B. 1965).

[245] Where in the opinion of the Board a bargaining agent no longer represents a majority of employees in the unit for which it was certified, the Board may revoke such certification and thereupon, notwithstanding sections 14 and 15, the employer shall not be required to bargain collectively with the bargaining agent, but nothing in this section prevents the bargaining agent from making an application under section 7.
CAN. REV. STAT. c. 152, § 11 (1952).

[246] 64 Can. Lab. L. Cas. 675, ¶ 16,012 (Can. L.R.B. 1964).

[247] *See* Jarraud v. CJMS Radio Montreal Ltd., 63 Can. Lab. L. Cas. 1166, ¶ 16,279 (Can. L.R.B. 1963).

[248] 65 Can. Lab. L. Cas. 738, ¶ 16,037 (Sask. L.R.B. 1965).

[249] *Id.* at 739-40.
The problem of decertification during the term of a collective agreement in Saskatchewan was considered in two recent cases. Siegel v. Lanigan Union Hospital Bd., 65 Can. Lab. L. Cas. 811, ¶ 16,061 (Sask. L.R.B. 1965) and Cook v. Empire Oil Ltd., 66 Can. Lab. L. Cas. 910, ¶ 16,088 (Sask. L.R.B. 1966). More than a month after *Cook* was decided, an amendment to § 5 of the

3. *Change of Parties: The Union's Bargaining Rights and the Employer's Duty to Bargain*

A formal or substantial change in the union's or employer's identity after certification of the union unsettles some basic assumptions of the certification or of the collective agreement in effect. It may enlarge, diminish or even obliterate the union's jurisdictional claim and command of employee loyalty; it may alter the economic and legal standing of the original bargaining partners defined or implicit in the certification or agreement. To modify the parties' basic relations, rights and obligations at every turn of change in their identity might disrupt the stability of labour relations; not to do so might spark disputes on matters overtaken by the change. A distortion of the democratic basis of the collective agreement might result, and the interest of the parties actually involved in the relation after the change might be effectively suppressed by an arrangement that no longer has foundation on facts. The problem concerns the determination of changes that require an adjustment of relations. It requires a value judgment in which statutory guidelines are seldom of great assistance. Much depends on the board's ability to assess the significance of a change.

The decision of the Canada Labour Relations Board in *General Drivers, Local 979 v. Arrow Transit Lines Ltd.*[250] shows a perceptive understanding of the problem. At the time of the application for certification Arrow Transit had plans to transfer its operations, employees and route franchises to Kingsway Freight, an affiliated company. Arrow Transit failed to inform the board of the plans, and the union was certified. After completion of the transfer, Arrow Transit applied for revocation of the union's certification, alleging that because of the transfer no person was employed in the unit to which the union was certified as bargaining agent. The union countered with a request to vary the certificate by substituting Kingsway Freight in the description of the bargaining unit.

The board granted the request for substitution and scolded Arrow Transit for lack of candour and frankness. It pointed out that, in view of the board's function of establishing the state of affairs to govern the future

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Trade Union Act, SASK. REV. STAT. c. 259 (1953), was introduced to cover the problem, and these two cases are now matters of legal history. The board has now the power to make orders:

> (k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:
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> (i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary of the effective date of the agreement; or
>
> (ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than thirty days nor more than sixty days before the anniversary date of the order to be rescinded or amended;
>
> notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court; ....

Sask. Stat. 1966 c. 83, § 3.

[250] 67 Can. Lab. L. Cas. 13,050, ¶ 16,018 (Can. L.R.B. 1967).

conduct of the parties rather than that of making a finding as to the rights of the parties in relation to past events, the parties must show utmost good faith in informing the board of all relevant facts. It advised the parties that any failure to reveal facts that might affect the form or substance of its decision indicates lack of good faith on the part of the party guilty of such failure.

The British Columbia Labour Relations Board also ordered a substitution of the controlling company in *White Lunch Ltd. v. Labour Rels. Bd.*[251] The controlling company acquired the operation of an affiliated company which effected voluntary liquidation following some dispute with the union. The Court of Appeal, however, in sustaining the trial court's decision,[252] quashed the board's order of substitution. It argued that the board's power to vary its orders under section 65(3) of the Labour Relations Act[253] does not cover this situation because the act provides definite procedures for certification. Substitution, said the court, "is in substance the certification of a union" and should be governed by rules on certification.[254] In spite of the act's mandate that the board's decision is "final and conclusive,"[255] the court assumed power to review the order. The board's action was not sanctioned by the statute, hence its finding was not conclusive and was therefore subject to judicial review.

On appeal, the Supreme Court of Canada[256] overturned the appellate decision and affirmed the board's action. The Court rejected the Court of Appeal's narrow interpretation of the board's power. Mr. Justice Hall said:

> [I]t seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to the employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of the legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.[257]

In an Alberta case,[258] the employer contracted out the work in his plant and arranged for the contractor to rehire all employees in the plant. Since the employer had ceased as employer of the plant employees, the board

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[251] 51 D.L.R.2d 72, 65 Can. Lab. L. Cas. 190, ¶ 14,064 (B.C. 1965).
[252] *See* 42 D.L.R.2d 364 (B.C. Sup. Ct. 1965).
[253] B.C. REV. STAT. c. 205 (1960).
[254] *Id.* at §§ 10, 12.
[255] *Id.* at § 65(1)(a).
[256] *Sub nom.* Bakery & Confectionery Workers, Local 468 v. White Lunch Ltd., [1966] Sup. Ct. 282, 55 W.W.R. (n.s.) 129, 66 Can. Lab. L. Cas. 342, ¶ 14,110, 56 D.L.R.2d 193.
[257] 66 Can. Lab. L. Cas. at 347.
[258] Chemcell (1963) Ltd. v. United Ass'n of Journeymen, Local 488, 67 Can. Lab. L. Cas. 13,023, ¶ 16,007 (Alta. Bd. of Indus. Rel. 1967).

was urged to decertify the union as bargaining agent. The board reiterated the principles it laid down in *W. L. Garvin & Co. v. International Ass'n of Heat & Frost Insulators, Local 110* [259] that under section 63(3) of the Alberta Labour Act [260] a union can only be decertified if it has ceased to be the proper bargaining agent or when the majority of the employees in the unit no longer desire the union as bargaining agent. That the employer at some specific time does not have employees falling within the classification set out in the certification does not vitiate the union's status as proper bargaining agent. On the other hand, no decertification can be claimed on the ground that the majority of the employees repudiated the union since there were no employees in the unit. The union, therefore, cannot be decertified.

The same argument was advanced by the employer in Manitoba when it urged decertification of the union. [261] The employer dismissed the employees when they refused to report to work following a dispute on wages. In reversing the board's decertification order, the Manitoba Queen's Bench emphasized that the board has no power to determine whether the strike is or is not illegal, or whether the employees have or have not been validly dismissed. The board's power to decertify under the Manitoba act is limited to cases where the union no longer represents the majority of employees in the unit. [262] Decertification can, therefore, be made only if the board finds that the employees have repudiated the union. The act's grant of general power to the board to "reconsider any decision or order made by it under the Act, and... vary or revoke any decision or order made by it under this Act" [263] is not a valid statutory basis to grant decertification in this case. To recognize the existence of such power would grant the board a power to revoke a certification notwithstanding contrary wishes of a majority of the employees in the unit.

Section 47a of the Ontario Labour Relations Act, [264] which regulates the problem, was considered in *United Steelworkers v. Thorco Mfg. Ltd.* [265] A group of senior management employees of Thor Industries organized Thorco Manufacturing to take over the metal fabrication operation of Thor Industries then proposed to be eliminated according to a pattern of company reorganization. After the transfer, the metal operation of Thorco remained in Thor's compound, and there was no change of employees and supervisors in the plant. Thorco contended that the union had no bargaining rights since the transaction, a sale of assets rather than of business,

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[259] 61 Can. Lab. L. Cas. 897, ¶ 16,187 (Alta. Bd. of Indus. Rel. 1960).

[260] ALTA. REV. STAT. c. 167 (1955).

[261] Bakery & Confectionery Workers, Local 389 v. Manitoba Lab. Bd., 67 Can. Lab. L. Cas. 11,298, ¶ 14,042 (Man. Q.B. 1967).

[262] MAN. REV. STAT. c. 132, § 11 (1954).

[263] *Id.* at § 59(2).

[264] The relevant part of § 47a is quoted in note 229 *supra*.

[265] 65 Can. Lab. L. Cas. 780, ¶ 16,094 (Ont. L.R.B. 1965).

did not come within the ambit of section 47a. The board disagreed and defined the scope and objective of the section:

> [T]he object sought to be attained by section 47a of the Act is to maintain and continue the bargaining rights of a union for the employees in the bargaining unit..., when the business or part or parts thereof... is sold... to another employer.... [S]ection 47a does not operate to bind the successor of the business with the collective agreement which may have been made between the union and the predecessor employer but only with the obligation to recognize the union's bargaining rights for his employees in a like bargaining unit. The new employer is, therefore, left free to bargain for and negotiate his own agreement with the union.[266]

The board further held that section 47a is an omnibus provision that could catch all modes of disposition regardless of their legal character, gratuitous or otherwise. The significant fact is not the nature of the transaction but whether the transaction operates to dispose of the employer's business or parts thereof.

Unfortunately, the board failed to meet the contention of the employer. The issue raised by the employer was not whether there was a sale or transfer, but whether what was transferred was "business or parts thereof" or not. Had it done so, it would have realized that the solution of the problem is not a matter of legalistic verbalization of the terms "transfer" and "business." A satisfactory solution can only be articulated if the analysis is directed to the economic impact of the change, that is, whether the transaction brought about an economic change that would justify the termination of the original labour relation of the employees with the transferor and the establishment of the labour relation of the employees with the transferee. On the facts of the case, however, the board's decision is just since the ownership of the metal fabrication operation has undisputably changed.

The inadequacy of purely legalistic analysis of the law emerges clearly when the transfer is accompanied by a change in the employees engaged in the business or operation transferred. This situation exposes new dimensions of the problem because not only the nature of the transaction is at issue but also the union's continuing majority support in the successor-employer's business. Thus, a readjustment of relations might be required.

The purchase by Kitchener Food Market Ltd. of Steinberg's business in *Amalgamated Meat Cutters, Local 633 v. Dutch Boy Food Markets*[267] is a case in point. The dispute arose because none of the employees in the unit employed by Steinberg, whom it dismissed on the cessation of

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[266] *Id.* at 787. *Cf.* the rule in British Columbia and Manitoba which binds the successor to the existing collective agreement. B.C. REV. STAT. c. 205, § 12(11) (1960); MAN. REV. STAT. c. 132, § 18 (1954).

[267] 65 Can. Lab. L. Cas. 775, ¶ 16,051 (Ont. L.R.B. 1965).

its operation, was rehired by Kitchener Food. The union, with a collective agreement with Steinberg, claimed, based on section 47a, representation rights for the thirty-five new meatcutter employees employed by Kitchener Food. The board's legalistic analysis of the terms "transfer" and "business" led to the conclusion that the union "continued" as bargaining agent of these new employees. Thus, it neglected to consider the material facts that the union had not previously represented any employees of Kitchener Food and that the thirty-five employees were not members of the union in Steinberg. The decision can result, at least for a period of time before the employees have a chance to choose or repudiate the union, in the deprivation of the new employees' free choice of bargaining agent. Board member Hay said in his dissent:

> The *Labour Relations Act* is founded on a very fundamental principle, namely, that employees are free to choose a trade union to represent them in their bargaining with the employer. None of the employees who were covered by the agreement between Steinberg's and the applicant union and represented by the applicant union are employees of Kitchener Food. There is no evidence... that any of these employees sought or desired employment with Kitchener Food. There is no evidence... that even one of the present employees of Kitchener Food has the slightest wish or desire to be represented by the applicant union. Nevertheless, the majority decision will impose upon these employees the applicant union as their bargaining agent with complete disregard for the basic principle of the Act and the wishes of the employees.[268]

Another case that effected an increase of employees within the union's claim of representation as a result of a transfer of business is *Local 641, UAW v. Lawson-McMullen-Victoria Ltd.*[269] Local 641 claimed bargaining rights for all employees in a new company formed by three companies and to whom their business was sold and their employees transferred. At the time of the transfer, the union represented the employees in only one of the three companies. The board reasoned that because the three companies led the union to believe that it was the recognized bargaining agent for all employees in the new company, there was a sale of business within the meaning of the act. It is difficult to understand how a misrepresentation, if the conduct of the three companies can be so called, could affect the existence of a business transfer within the compass of section 47a.

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[268] *Id.* at 780.

In the Ontario High Court, Mr. Justice Grant quashed the board's decision. *Sub nom.* Regina v. LRB (Ont.), *ex parte* Kitchener Food Market Ltd., [1966] 1 Ont. 482, 66 Can. Lab. Cas. 323, ¶ 14,100 (High Ct. 1965). Grant held that the Minister of Labour exceeded his authority in making the reference to the board, and the board exceeded its frame of reference in finding the union a bargaining agent for the Kitchener Food employees. In spite of §§ 79 and 80 of the act, the board's finding that a sale of business occurred under § 47a was reviewed by Grant, and he held that no such sale of business exists in this case. The Ontario Court of Appeal, *sub nom.* Regina *ex rel.* Amalgamated Meatcutters, Local 633 v. Kitchener Food Market Ltd., [1966] 2 Ont. 513, 66 Can. Lab. L. Cas. 495, ¶ 14,136 (per Laskin, J.) reversed Grant on procedural grounds.

[269] 66 Can. Lab. L. Cas. 913, ¶ 16,094 (Ont. L.R.B. 1965).

The difficulty becomes more magnified if, as a result of the transfer, conflicting representation claims of two unions are asserted. The legalistic approach to the problem could easily obscure the realities of the extent of support of the employees to the competing unions. If the board or court decides to grant the bargaining rights to the union of the transferee-employer, it would be compelled to impose upon the transfer provision an awkward interpretation to reach a conclusion that there is no "transfer" of "business." The British Columbia Supreme Court had to resort to such interpretation of section 12(11) of the Labour Relations Act[270] in *Retail, Wholesale & Dep't Store Union, Local 580 v. Reitmier Truck Lines Ltd.*[271] Reitmier had a collective agreement with Local 580; Scott Transport had a collective agreement with Teamsters Union, Local 31, which provided that all permanent employees of Scott Transport, as a condition of employment, must become members of the Teamsters union. Scott acquired all the shares and hired all twenty-six employees of Reitmier. The court rejected Local 580's claim for continuing bargaining rights for the transferred employees. Mr. Justice Munroe said that sale of shares of a business is not sale of business within the meaning of section 12(11). This reasoning is extremely esoteric, for it is hard to imagine a more effective means of transferring the company and its business than through a sale of all the company's shares.

The reasoning of Mr. Justice Riley of the Alberta Supreme Court in *Regina v. BIR (Alta.) ex parte Westeel Rosco Ltd.*[272] is no less unconvincing. The International Brotherhood of Boilermakers, Local 146, was the bargaining agent of the employees in Prairie Metal Products. Westeel Rosco employees were represented by the United Steelworkers, Local 5013. After Westeel Rosco purchased the operations of Prairie Metal, both the Boilermakers and the Steelworkers claimed bargaining rights for the transferred employees. The board's certification of the Boilermakers was quashed by Mr. Justice Riley, arguing that the new employees are bound by an antedated agreement, negotiated while the board was considering the case, between Westeel Rosco and the Steelworkers.

C. *Interpretation of the Collective Agreement*

The collective bargaining systems in operation throughout Canada today owe their origins to P.C. 1003.[273] It was this order in council which led

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[270] Notwithstanding the provisions of subsection (10), where a business or part thereof is sold, leased, or transferred, the purchaser, lessee, or transferee is bound by all the proceedings under this Act before the date of the sale, lease, or transfer, and the proceedings shall continue as if no change had occurred; and if a collective agreement was in force, that agreement continues to bind the purchaser, lessee, or transferee to the same extent as if it had been signed by him.
B.C. REV. STAT. c. 205 (1960).

[271] 66 Can. Lab. L. Cas. 355, ¶ 14,112 (B.C. Sup. Ct. 1965) (per Macdonald, J.); 57 W.W.R. (n.s.) 104, 66 Can. Lab. L. Cas. 532, ¶ 14,141 (B.C. Sup. Ct. 1966) (per Munroe, J.).

[272] 59 W.W.R. (n.s.) 428, 67 Can. Lab. L. Cas. 11,187, ¶ 14,018 (Alta. Sup. Ct. 1967).

[273] P.C. 1003 was a 1944 Order-in-Council.

to the enactment of strikingly similar provisions, in all the provinces, to govern labour relations. In general, these enactments provide for the definition and certification or bargaining units and authorities respectively. It is as a result of negotiations between management and the certified bargaining authority that the collective agreement is formed. Throughout Canada these agreements are binding and enforceable on both employees and employers as well as their unions and organizations.

Ontario and Quebec have made such agreements subject to compulsory arbitration.[274] The Dominion and the rest of the provinces, excluding Saskatchewan, have enacted legislation which requires either a legally imposed binding settlement of disputes or arbitration.[275] In all jurisdictions, again excluding Saskatchewan, the industrial dispute may no longer legally give rise to a work stoppage for illegitimate purposes.[276]

As a result of this position, final settlement of grievances is generally assured. However, the method of reaching settlement varies from province to province. Not all grievances need go to arbitration.

Although Ontario and Quebec require final settlement by arbitration, other jurisdictions make provision for settlement "by arbitration or otherwise." The words "or otherwise," as has been seen, play a very important role in the judicial interpretation of collective agreements.[277] How the agreements are actually interpreted by the boards, courts and appointed arbitrators can best be seen in some of their decisions.

1. *Interpretation by Comparison*

The type of evidence which arbitrators take into account when reaching a decision is made clear in several recent cases.

In 1965, the Ontario legislature passed the Hospital Labour Disputes Arbitration Act which made reference to the settling of disputes by arbitration.[278] *Re Building Service Employees, Local 240 v. Welland County Gen. Hospital* was one of the first cases brought to arbitration under this act.[279] The dispute concerned the quantum of wages to be paid to employees. The board queried the method to be used in reaching its decision. Should it be adjustment or adjudication? Adjustment meant finding a solution agreeable to both parties; adjudication involved the application to the

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[274] Labour Relations Act, ONT. REV. STAT. c. 202, § 34(1) (1960); Quebec Labour Code, QUE. REV. STAT. c. 141, § 88 (1964).

[275] *Supra* note 193, at 209-13.

[276] The Saskatchewan legislation makes no provision for the compulsory binding settlement of disputes, whether they concern the interpretation or the application of the collective agreement. However, a study of a sample fifty Saskatchewan agreements revealed that only two made no provision for arbitration. Thirty-three of them provided for final and binding arbitration, *Id.* at 229.

[277] *Supra* note 164.

[278] Ont. Stat. 1965 c. 48.

[279] 16 Lab. Arb. Cas. 1. (1965).

evidence of predetermined and rational standards. The board decided to adjudicate since it was required by section 6(1) of the act to "decide" matters in dispute. [280]

In deciding the dispute, the board gave great weight to the following factors:

1. Wages paid and trends set in comparable hospitals, that is, those of a similar type in communities enjoying a similar cost of living and average wage schedule.

2. Trends in cost of living and average wages in the locality where the hospital was situate.

3. Trends in comparable hospitals.

And, although they were not of great weight, the board considered several other factors to be relevant:

> 1. Difficulties encountered by the hospital in recruiting and holding staff (indirect evidence of the hospital's failure to pay a level of wages high enough to attract workers on local labour market).
>
> 2. Trends in non-comparable hospitals and in non-hospital occupations, where deserving of special consideration.
>
> 3. Trends in hospital wages generally. [281]

In *Re Canadian Union of Operating Engineers, Local 101 v. St. Joseph's Hospital*, [282] a dispute was brought to arbitration under the same Hospital Disputes Act. The arbitration board followed the method initiated in the *Welland* case [283] and in "adjudicating" looked to relevant wage comparisons. It found comparisons to other hospitals in the area to be an "appropriate yardstick." [284]

In *Re Hamilton Firefighters' Ass'n v. City of Hamilton*, [285] the association requested a new salary schedule ranging from an 8½ per cent increase for the lowest classification of fire fighters to a 15½ per cent increase for first class firemen. The association adduced as evidence a documented study of the salary scale of Hamilton firemen prepared by a university professor. [286] The study indicated that the wages of Hamilton firemen had not kept pace in a percentage comparison with: (1) the average earned income per employed person in Canada, (2) average wages and salaries in Canada, Ontario or Hamilton, (3) average weekly wages in manufacturing in Hamilton, and (4) the weekly salary of a first class

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[280] Ont. Stat. 1965 c. 48, § 6(1).
[281] *Supra* note 279, at 6.
[282] 16 Lab. Arb. Cas. 352 (1965).
[283] *Supra* note 279.
[284] *Supra* note 282, at 355.
[285] 16 Lab. Arb. Cas. 249 (1965).
[286] Dr. J. Graham, Professor of Economics, McMaster University.

police constable in Hamilton. The report of the study was based on three assumptions. First, it was assumed that in the base year, 1946, the fireman's salary was adequate in relation to the income structure of the economy. The second assumption was that, relative to other occupations, the fireman's role had become no less onerous since 1946. And finally, it was assumed that the fireman should not suffer because of inflation but that he should have increased compensation to counterbalance the rising cost of living.

The board, in reaching its decision to increase the salary scale by six per cent, took the report into account. However, it felt that it was within its rights in questioning the assumptions upon which the report was based. The report indicated that the firemen had suffered "short falls"; that is, their wages had not increased proportionately with other average incomes. The board, while not denying this possibility, thought that the preserved right of the firemen to bargain collectively and to go to arbitration forestalled the "short falls" which were indicated by the report. In dissent, J. J. Robinette recommended that the report be accepted *in toto* as he felt that the salary level in Hamilton did not approach that of the nearby Townships of North York and Etobicoke and that the job requirements in the highly industrialized city of Hamilton were more onerous.

The foregoing cases indicate what evidence the boards consider useful for the interpretation of a collective agreement. They show that arbitration boards are not limited to intrinsic evidence in their search for the intentions of the parties but that they are also willing to look at extrinsic evidence.[287] Another point which can be extracted from the cases is that although intrinsic evidence of the intent is very weighty, evidence of the results of comparable situations and standards is almost as important; for it is from the results of like agreements that the boards seem to find the intent of the parties to the present one.[288] This is in marked contrast to a court of law which would seldom determine the intent of parties to an agreement by looking to the results of the agreements of others.

2. *Effects of an Imposed Settlement on the Collective Agreement*

The preceding review of some of the evidentiary principles used by tribunals to settle grievances under collective agreements does not illuminate what effect their awards have on these agreements. Until recently, it was generally conceded that the arbitration board would not rewrite the agreement under consideration.[289] The law was well explained in *Re Ottawa Newspaper Guild, Local 205 v. The Ottawa Citizen.*[290]

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[287] *Supra* note 279.
[288] *Ibid.*
[289] *Infra* note 290.
[290] 16 Lab. Arb. Cas. 338 (1965).

In this case the grievors maintained they were entitled to night pay which was set out in the collective agreement as applying from 6:00 p.m. to 6:00 a.m. The grievors worked from 1:00 p.m. to 9:00 p.m. and so worked three hours into the night shift. The management claimed the grievors fell within the exception of section (ii) of the agreement which read, "the working day shall consist of 7½ hours falling within 9 consecutive hours, the length of the lunch period being determined by the Publisher." [291] It is not clear whether, from the mere reading of the section, it was intended that the night pay be extended only to those beginning work at 6:00 p.m. or was to include those beginning work at some time earlier and working past the noted beginning time of the night shift. Since it was not abundantly clear, the arbitration board held that it would be proper to hear extrinsic evidence to determine the intentions of the parties.

The importance of the case, however, rests on the finding by the board that alteration, modification or amendment of the agreement was outside its jurisdiction but that rectification was within it.

In *Hudson Bay Mining & Smelting Co. v. Flin Flon Base Metal Workers', Local 172*, [292] the Manitoba Court of Appeal allowed an application to quash an arbitration award. The court reasoned that the board had exceeded its jurisdiction by rewriting the collective agreement.

The general rule, expressed in the two preceding cases, that the task of the board is to interpret the agreement rather than to alter it appears to have been disregarded in a recent Ontario case. [293] It was in *Regina v. Arthurs, ex parte Port Arthur Shipbuilding Co.*, [294] that the Court of Appeal upheld a board's decision to substitute "just cause" for the words "proper cause" which were found in the collective agreement. This decision would seem to ratify the board's action which was more in the nature of rewriting than interpreting the agreement. However, in a strong dissent Mr. Justice Schroeder has opened the door for review by the Supreme Court where he states that the court, and therefore the board, must have a more compelling reason to imply a term not expressed by the parties to a collective agreement than to simply state that it would be reasonable to imply such a term.

3. *Illustrative Grievances and Settlements*

One particular grievance which often calls for arbitration concerns the disciplinary actions taken by employers under a collective agreement. The following recent cases exhibit the present policy of settlement tribunals in regard to this grievance.

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[291] *Id.* at 338.
[292] 59 W.W.R. (n.s.) 472 (Man. 1967).
[293] *Infra* note 294.
[294] [1967] 2 Ont. 49. This matter is under appeal to the Supreme Court of Canada.

In *Re United Elec. Workers, Local 521 v. Canada Wire & Cable Co.*,[295] the grievor was arrested in the plant and charged with theft of a copper rod from the company. On the same day, he received a letter from the company notifying him that he had been suspended from employment until the determination of the charge. The charge was subsequently withdrawn and the grievor sought to recover his back pay because of unjust suspension. The board found that the company had the right to suspend, in the circumstances of this case, and that the grievor has no right to reimbursement for loss of wages during the period of rightful dismissal.

In reaching this decision, the board adopted the reasoning of two earlier cases. In the first case it was held that where a criminal charge is laid by or with the approval of the Crown, suspension of the accused without pay pending trial is justified, regardless of the eventual verdict.[296] The second case agreed with this general principle but would limit its application if there was direct evidence that the suspension was based on malice or mere suspicion.[297]

This decision would, therefore, appear to cast doubt on *Re General Truck Drivers, Local 938 v. McAnally Freightways*,[298] in which it was decided that a suspension was improper because no conviction resulted, in spite of the fact that the suspension was not based on malice, lack of good faith or mere suspicion and, that the company had acted reasonably.

In *Re International Chemical Workers, Local 721 v. Brockville Chemicals Ltd.*,[299] the grievor was suspended for refusing to carry out a proper order. The grievor contended that he did not refuse to do the job but rather asked to be relieved. He also maintained that he was justified in the circumstances in refusing to do the job in that it involved serious physical danger to himself. The grievor worked in an area where a potassium carbonate solution was transmitted through a series of valves and pipes which contracted the flow of the alkaline substance. On the particular night in question, the main control valve was not in operation, and the solution was passing through a secondary system. Because of the pressure of the flow, the secondary control valve began to vibrate badly and the grievor was unable to control it. The foreman was phoned and, when he saw the situation, he told the grievor to return to his job. The grievor asked to be relieved and got no response. To control the valve now required the grievor to stand astride it. This greatly increased the possibility of being burnt by the corrosive solution. The grievor told the chief foreman he was going home if the system was not shut down. He was told he would have to remain on the job until someone relieved him. He refused.

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[295] 16 Lab. Arb. Cas. 240 (1965).
[296] *Re* U.A.W.—C.I.O. v. Ford Motor Co., 3 Lab. Arb. Cas. 892 (1951).
[297] *Re* United Steel Workers, Local 3129, v. Moffats Ltd., 6 Lab. Arb. Cas. 327 (1955).
[298] 14 Lab. Arb. Cas. 234 (1963).
[299] 16 Lab. Arb. Cas. 261 (1965).

The board decided in favour of the grievor. His evidence was corroborated, and the board felt there was no attempt to mislead it. It felt the foreman's evidence was not accurate or clear and that the grievor was justified in these circumstances in refusing to continue on the job. But the board went on to say that this decision did not detract from the right of management to determine whether or not its operations were to continue. The board said the grievor could refuse to do any job out of a fear for his own safety or the safety of others but he runs the risk of being disciplined if it is determined that the refusal was not justified in the circumstances.

In another case, *Re United Steelworkers, Local 6200 v. International Nickel Co. of Canada*, [300] also concerning dismissal, the chairman of the board pointed out that the factor which would justify the company in discharging the grievor was proof of the wrongful act on the balance of probabilities. Since the man's liberty was not at stake, the criminal test of proof beyond a reasonable doubt was not the proper one to use.

From these cases, some views of settlement tribunals concerning a disciplinary grievance may be extracted. The company may dismiss an employee who has an injurious effect on the order or the efficiency of the operation. [301] In determining whether the company has exercised its right to dismiss in accordance with the agreement the civil test of the balance of probabilities is used, [302] and the onus is on the employee to prove that the company was not justified in dismissing him in the circumstances. [303] This is similar to the onus placed on the plaintiff in a civil action where the plaintiff must prove the alleged wrong. If, however, the employee adduces direct evidence of bad faith, unreasonableness or malice, there is some indication that the onus might shift to the employer. [304]

Discrimination is another grievance which the tribunals are often asked to consider. If a grievor has failed to receive a promotion which he believes is due him, discrimination is the normal plaint. In *Re Textile Workers, Local 1305 v. Fiberglass Canada Ltd.*, [305] the grievor's application for promotion was rejected by the company. The grievor asserted that he should have been promoted as of right because he had the proper qualifications and the ability to perform the job. On the other hand the company stated that he may have had the skill but he did not have the necessary initiative, energy or ability to command the cooperation of fellow employees. The arbitrator, in deciding for the company, followed the case of *Sudbury Mine, Mill & Smelter Worker's Union, Local 598, in re*

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[300] 16 Lab. Arb. Cas. 315 (1965).
[301] *Supra* note 295.
[302] *Supra* note 300.
[303] *Supra* note 299.
[304] *Supra* notes 295, 297.
[305] 16 Lab. Arb. Cas. 210 (1965).

Falconbridge Nickel Mines Ltd.,[306] in which Mr. Justice Roach stated that the board does not attempt to substitute its opinion for that of management unless it is shown that management acted in an arbitrary manner and as a result discriminated against the applicant. In the instant case there was no evidence that the company discriminated against the grievor, that it was prejudiced against him or that it was attempting to grant a favour to the successful applicant. The arbitrator explicitly stated that he would not substitute his opinion for that of management in these circumstances.

Discrimination was again in issue in *Re United Steelworkers, Local 6350 v. Canadian Industries Ltd.*[307] In this case the position which the grievor applied for was given to a junior employee who, from the evidence, did not have the qualifications of the grievor. In considering the grievor's application for the job of equipment helper, the company considered a demotion on the grievor's record which had taken place two and a half years previously. Because of the circumstances of the demotion, the company felt that, while the applicant might be able to handle the job of equipment helper, he would not be able to cope with the position that another promotion would lead to. The board, however, looked to clear evidence of the grievor's ability to perform the job of equipment helper and decided that the collective mind of the company had been misdirected. It felt the company should have looked to the grievor's qualifications in relation to the vacant post rather than the next higher position.

It can be seen from the two previous cases that in cases dealing with promotion, where a value judgment is required, the settlement tribunal will not substitute its own opinion for that of management.[308] However, there is little doubt that it will rule on matters having to do with the reasonableness or the arbitrariness of the decisions of management and that it will rule against such decisions that are unreasonable or arbitrary.[309]

As is evident, the signing of a collective agreement does not begin to solve all the problems of an employer-employee relationship. The agreement could be described as the framework within which the relationship can be sympathetically developed. There are, however, many instances when the required sympathy is lacking. It is at this point that the agreement must be relied upon to show the way, and when in its turn the agreement is questioned the parties may have resort to the arbitration board.

D. *Judicial Intervention*

The court furnishes a forum for initial dispute settlement; it is also a supervisory tribunal by way of its power to review the decisions of both

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[306] 4 Lab. Arb. Cas. 1562 (1953).
[307] 17 Lab. Arb. Cas. 3 (1966).
[308] *Supra* note 306.
[309] *Supra* notes 306, 307.

labour relations and arbitration boards. Briefly, the court may entertain damage suits brought by the employer, union or employee; it most often hears applications for injunctive relief. On occasion it is called upon to declare illegal certain acts of the parties as defined by the various labour relations acts and to impose suitable penalties therefor. The increasing disenchantment of labour with this judicial intervention has been noted, but it must be pointed out that the recent cases witness the sentiment of the judges that, while they will be most careful of the rights of both sides, they will not be intimidated by either. In *Re Tilco Plastics Ltd. v. Skurjat*, which involved convictions for contempt by reason of picketing in breach of an injunction, Chief Justice Gale of the Ontario High Court, after citing the increasingly important status of trade unions, warned: "With this enhanced role must come, of necessity, an increased social responsibility which, of course, includes the responsibility to recognize and promote respect for law and order. Any programme, no matter how worthy the ultimate goal, which prescribes wilful defiance of the law can only be regarded as an exercise in irresponsibility." [310] That the coin is not one-sided is to be seen in such judicial utterings as that of Mr. Justice Munroe of the British Columbia Supreme Court:

> I should like to say that the legislature of this provinces [*sic*] has given to employees in this province the right to join a trade union of their choice and to participate in its lawful activities free from obstruction and hindrance by employers. The courts must and will enforce those rights, and employers who persist in acting in breach of the Act can expect to be dealt with as any other law breaker. [311]

But the overriding sentiment is that "labour-management disputes are much better dealt with around the conference table than in the courts." [312]

1. *The Action for Damages*

The character of actions for damages is as diversified as the number of parties involved in labour-management conflicts. An employer suing a union then may recover for damages ensuing from illegal union conduct. [313] An illustration, striking by reason of the quantum awarded, is the decision of the Quebec Superior Court in *Gaspé Copper Mines Ltd. v. United Steelworkers*. [314] The defendant union had sponsored an illegal strike for the results of which the court held it liable and damages were awarded against the union in the amount of $1,747,645, the largest such award

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[310] [1966] 2 Ont. 547, at 577, 57 D.L.R.2d 596, at 626 (High Ct.).

[311] *Re* Seven-Up Vancouver Ltd., 65 Can. Lab. L. Cas. 215, at 216, ¶ 14,069 (B.C. Sup Ct. 1965). The employer substantially disobeyed an order of the British Columbia Labour Relations Board calling for the reinstatement of an employee whom the board held had been unlawfully dismissed for union activities. The union's action for contempt was allowed.

[312] *Ibid.*

[313] In Ontario, an award of damages by an arbitration board has been sustained by the Court of Appeal in *Re* Polymer Corp. v. Oil, Chemical & Atomic Workers, [1961] Ont. 438, *aff'd*, *sub nom.* Imbeau v. Laskin, [1962] Sup. Ct. 338, 33 D.L.R.2d 124.

[314] Can. Lab. L. Cas. 116, ¶ 14,042 (Que. Super. Ct. 1964).

in Canadian labour history. An action brought by the employer against an individual employee will, by reason of the ability of a single person to do only so much harm, bring lesser damages. In *Nelsons Laundries Ltd. v. Manning*,[315] the employer succeeded in an application for an interim injunction to restrain one of its former route salesmen from soliciting customers on his old route in breach of a term of the collective agreement. The court concluded that a covenant in the collective agreement providing that each employee would refrain from patronizing the employer's customers for six months from the time of the termination of his employment was a term to be implied into the individual contract of employment. It is suggested that the award of damages if any in the final determination of the issue would necessarily have been minimal.

The decision is important for the reliance placed by the court on the terms of the collective agreement. The law up to this time was thought to be that the collective agreement could not be made the basis of a civil action. This was the principle enunciated in *Young v. Canadian No. Ry.* by Mr. Justice Fullerton of the Manitoba Court of Appeal: "I am satisfied that so called wage agreements entered into between workmen's unions and employers are never intended by the parties to be legally enforceable agreements .... [T]hey cannot enforce the terms of such agreements through the courts."[316] A number of recent cases in Ontario proceeded to erode this principle until finally the decision in *Close v. Globe & Mail Ltd.*[317] clarified the law. The first of these cases was *Grottoli v. Lock & Son Ltd.*,[318] where Mr. Chief Justice McRuer allowed a claim by an employee for vacation pay owing to him under a collective agreement. The argument raised by the employer was that the matter was required by section 34(1) of the Labour Relations Act[319] to be submitted to arbitration. McRuer found no merit in the point, believing that to require an employee to rely upon the union to assert his claim might lead to discrimination by the union against non-member employees. Subsequently, the Supreme Court of Canada in *Hamilton Street Ry. Co. v. Northcott*[320] explained the *Grottoli* case. The plaintiff employee had sued successfully to enforce an arbitration award declaring his entitlement to certain minimum wages. The defendant's appeal was dismissed throughout, and Mr. Justice Judson pointed out that the plaintiff's action was based not on the collective agreement but on a right declared by an arbitration board thereunder. Thus, said Judson, where a right is required to be determined by an arbitration board, it must be so determined before an action can be brought

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[315] 51 W.W.R. (n.s.) 493, 51 D.L.R.2d 537 (B.C. Sup. Ct. Chamb. 1965).

[316] [1930] 1 W.W.R. 446, at 451, [1930] 3 D.L.R. 352, at 357 (Man.) *aff'd*, [1931] 1 W.W.R. 49, [1931] A.C. 3 (P.C. 1930).

[317] [1967] 1 Ont. 235, 60 D.L.R.2d 105 (1966).

[318] [1963] 2 Ont. 254, 39 D.L.R.2d 128 (High Ct.).

[319] ONT. REV. STAT. c. 202 (1960).

[320] [1967] Sup. Ct. 3, 58 D.L.R.2d 708 (1966).

in the courts. In the *Grottoli* case, the right to vacation pay was presumably apparent without need to resort to arbitration. In both cases then, section 3(3) of the Rights of Labour Act [321] barring actions on a collective agreement was not a defence since, in fact, the employees were not relying on the collective agreement but on a right apart from it. While both of these Ontario actions involved claims for wages, the reasoning of Mr. Chief Justice McRuer was extended by the New Brunswick Court of Appeal to an action by an employee for wrongful dismissal allegedly because of union activities. In *Woods v. Miramichi Hospital*, [322] the employee did not submit her claim to the grievance procedure provided, but again the court considered this to be no bar to an action even though the New Brunswick Labour Relations Act contained a provision [323] for final settlement by arbitration similar to that of the Ontario statute. Mr. Chief Justice Ritchie did not confine himself to the interpretation later placed on the *Grottoli* case by the Supreme Court of Canada. Rather, he left it to the employee to choose as between the court and the arbitration board for determination of her rights. Echoing what was said by McRuer, he stated:

> I do not think this provision [section 18(1) of the Labour Relations Act] should be interpreted as restricting the plaintiff to only the remedy of having her dismissal processed as a grievance under the collective agreement and an arbitration held. To hold that it should be so interpreted would mean that an employee, who has been wrongfully dismissed, would be without remedy unless his dismissal was taken up by the union and carried by it to arbitration. I cannot believe it was the intention of the Legislature to vest such powers in a union or to prevent an employee on his dismissal from bringing an action as the plaintiff has. [324]

But the Ontario Court of Appeal has seen fit not to extend this principle as far as the New Brunswick court did. The ratio in *Shank v. The KVP Co.*, [325] a recent decision in the Ontario High Court, is that where the rights of the parties depend upon an interpretation of the collective agreement then the matter is within the jurisdiction of an arbitration board, and the court has no jurisdiction whatsoever. Mr. Justice Brooke distinguished the *Grottoli* case on the ground that the claim for wages there was not such a matter as was required to be processed through arbitration. He went on to rely on section 3(3) of the Rights of Labour Act [326] which, as mentioned, prohibits making a collective agreement the subject of any action in the courts. But there is no such legislative provision in New Brunswick and it must then be concluded either that the *Woods* case is in direct conflict with the *Shank* case, or that an action for unjust dismissal

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[321] ONT. REV. STAT. c. 354 (1960).
[322] 52 Mar. Prov. 282, 59 D.L.R.2d 290 (N.B. 1966).
[323] N.B. REV. STAT. c. 124, § 18(1) (1952).
[324] 52 Mar. Prov. at 287, 59 D.L.R.2d at 295.
[325] [1966] 2 Ont. 847, 58 D.L.R.2d 693 (High Ct.).
[326] *Supra* note 321.

is likewise not a matter for arbitration, which Mr. Chief Justice Bridges in the *Woods* case surely suggested it was. [327]

This approach by the Ontario High Court was adopted by the province's Court of Appeal in *Close v. Globe & Mail Ltd.*, [328] which distinguishes the *Grottoli* and *Northcott* cases without mentioning the *Shank* case. The facts were that the employee who had left his job pursuant to a lawful strike sought to recover vacation pay owed to him. The employer, while not disputing that such pay had been earned, was in disagreement as to the interpretation to be given to the terms of the collective agreement providing for the computation of such pay. The action by the employee was dismissed in the county court, and, on appeal, Mr. Justice Kelly noted that before any award could be made the court would be required to interpret for itself the collective agreement. This it was precluded from doing by the arbitration provisions in the agreement and by the Rights of Labour Act. The sum of all of the cases is that in Ontario the employee may sue in the courts only where his right is apparent at common law [329] or it has been established in an arbitration award. [330]

The union may resort to the courts as readily as the employer where it cannot obtain redress before the other labour tribunals. The problem will arise as to whether the union may sue in its own name, or be required to bring a representative action, or even be barred from suing in either form, an action lying only by the individual employees in their own names. *Senkiw v. Utility Glove (1961) Ltd.* [331] was an unsuccessful action by a union against an employer. The officers of the local sued in a representative action for an accounting of union dues from the employer, alleging that the latter had breached the collective agreement in failing to deduct dues. The Manitoba Queen's Bench, in dismissing the claim, accepted the preliminary objection of the defendant employer that the union is a legal entity capable of suing in its own name and as such any representative action is improper. The court pointed out that the Supreme Court of Canada had enunciated this doctrine of separate legal entity in its 1960 decision, *Teamsters Local 213 v. Therien.* [332] This was subsequently embodied in the Labour Relations Act [333] by the Manitoba legislature.

The answer to this last fact-situation is not so readily stated in Ontario where section 3(2) of the Rights of Labour Act [334] provides that a trade union shall not be made party to an action unless it could have been so

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[327] 52 Mar. Prov. at 287, 59 D.L.R.2d at 296.
[328] *Supra* note 317.
[329] Grottoli v. Lock & Son Ltd., *supra* note 318.
[330] Hamilton Street Ry. Co. v. Northcott, *supra* note 320.
[331] 59 W.W.R. (n.s.) 350 (Man. 1967), *aff'g*, 57 W.W.R. (n.s.) 637, 58 D.L.R.2d 754 (Man. Q.B. 1966).
[332] [1960] Sup. Ct. 265, 22 D.L.R.2d 1.
[333] Man. Stat. 1962 c. 35, § 15, adding § 46A(3).
[334] *Supra* note 321.

made a party at common law. The question arising then is the status of a union at common law. Until recently, a union was considered to have no status whatsoever and, in Canada, could be sued only if it were registered under the federal Trade Unions Act,[335] the provisions of which very few unions have resorted to. However, such decisions as *Therien* have eroded this theory, and, except in the face of legislation such as the Rights of Labour Act, a union is generally deemed to be a legal entity. In Ontario, the court has gone so far as to recognize that the Labour Relations Act creates a union a juridical person,[336] but the only recourse appears to be by way of representative action,[337] at least until such time as the Rights of Labour Act is amended by the legislature or reinterpreted by the court.

In other recent cases, a union has in one instance been sued by one of its own members, and in another by another union. *Hornak v. Paterson*[338] was a decision of the British Columbia Court of Appeal in which an employee was awarded damages in an action which he brought against his union for its discrimination in failing to advise him that employment was available on the Peace River Power project. The terms of the plaintiff's contract with his union were derived by the court from the constitution and by-laws of the union. Mr. Justice McFarlane implied a further provision that "the union shall not discriminate between members in applying any policy it might adopt with respect to job opportunities or the assignment of men to available employment."[339] The motive for the discrimination was the plaintiff member's contemporaneous membership in a rival union.

The British Columbia Supreme Court recently entertained an action for contempt brought by a Canadian union against an international union which had been earlier enjoined from engaging in acts designed to dissuade members of an employers' association from doing business with any other member which employed members of the plaintiff union.[340] The international union submitted to the association a collective agreement providing that any of its members might refuse to work alongside of members of the plaintiff union. The court found the conduct of the international union to be in breach of the restraining order. Such injunctive relief and subsequent contempt proceedings are common judicial occurrences.

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[335] CAN. REV. STAT. c. 267 (1952).

[336] Nipissing Hotel Ltd. v. Hotel & Restaurant Employees, Local 176, [1963] 2 Ont. 169, at 176 (High Ct.).

[337] Cummings v. Hydro-Electric Power Comm'n, [1966] 1 Ont. 605 (High Ct. 1965), was a representative action brought by the president of a local union on his own behalf and on behalf of the union members for an order restraining the defendant commission from amending its pension plan.

[338] 66 Can. Lab. L. Cas. 623, ¶ 14,165 (B.C. 1966).

[339] *Id.* at 625.

[340] Canadian Ironworkers, Local 1 v. International Ass'n of Bridge Ironworkers, Local 97, 65 Can. Lab. L. Cas. 187, ¶ 14,063 (B.C. Sup. Ct. 1965).

2. *The Injunction*

The efforts of the Rand Commission in Ontario will be focused on the use of injunctions in labour disputes. Growing objection to this form of relief emanates exclusively from labour, notwithstanding that "the use of injunctions is not limited to employers. Unions or individuals have equal right to avail themselves of the law, where employers or others create the necessary grounds." [341] But it remains that the great bulk of injunctions have been granted to employers and not to unions. The explanation according to one Judge is that "unions hardly ever apply for injunctions but prefer the more direct and forceful method of the picket line." [342]

The labour camp itself is divided into two factions—that calling for declarations of open defiance of injunctions and the moderates pressing for legislative reform. [343] One of the issues of particular concern is the granting of *ex parte* injunctions, where the party or parties sought to be enjoined receive no notice of the application and only affidavit evidence is required. Another objection raised by labour is that there should be no restriction on the number of pickets which a union may deploy about struck premises. [344] It has been the view of labour that picket lines are employed not merely to convey information but also as a symbol of union solidarity and as a vital method of retaining membership until conflicts are resolved. The forecast appears to be for further defiance as described in the cases hereunder, until such time as the legislation can be intelligently remodelled.

The principles of law governing injunctions generally apply with equal force to labour injunctions. The applicant must establish a right accruing to him and the inevitability of irreparable injury if such right is not preserved forthwith. Mr. Justice Wilson of the Manitoba Queen's Bench reviewed the principles upon which the court should act in *Contractors Equipment & Supply (1965) Ltd. v. Building Material Drivers, Local 914*: "[T]he applicant must satisfy the court that there is a serious question to be tried at the hearing, and must show a *prima facie* case for its claim. The applicant must also satisfy the court that the *status quo* ought to be

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[341] *Re* Tilco Plastics Ltd. v. Skurjat, [1966] 2 Ont. at 578, 57 D.L.R.2d at 627.

[342] Wilson, C.J.B.C., in Regina *ex rel.* Nissko (Canada) Ltd. v. International Longshoremen, 66 Can. Lab. L. Cas. 359, ¶ 14,113 (B.C. Sup. Ct. 1965).

[343] A tangible illustration of the efforts of the lattter group was the private bill introduced in the Ontario legislature on February 3, 1966 by the New Democratic Party member for Toronto—Riverdale, James Renwick. The bill, which received only first reading, sought to amend the Judicature Act to set out the conditions prerequisite to the granting of an injunction.

[344] The arbitrary number appears to be two for each entrance to the employer's premises. This was the formula which the Ontario High Court was recently asked to apply in SCM (Canada) Ltd. v. Motley, [1967] 2 Ont. 323, 63 D.L.R.2d 388 (High Ct.). The motion failed in that the evidence did not show that suppliers, customers and other employees were being denied access to the applicant's premises. Mr. Justice King said: "The presence of a number of pickets on the picket line imparts information as to the employee support behind the strike. It does not follow that violence or intimidation come about because of the number of pickets on the picket line."

preserved until the question can be determined judicially." [345] On the facts of the case, the court found the strike called by the union to be illegal. Notwithstanding, the union contended that it was entitled to picket and it relied on *Mogul Steamship Co. v. McGregor Gow & Co.*, [346] and *Crofter Hand Woven Harris Tweed Co. v. Veitch.* [347] These cases are authority for the proposition that *concerted* action by employees does not constitute the tort of civil conspiracy where the predominant purpose of the combination is the legitimate protection of the interests of the employees, rather than any injury to the employer, and where such action is neither criminal nor tortious in itself. The court found that, in fact, the intent of the union was to inflict injury on the employer by influencing both customers and other employees. The injunction which had been granted *ex parte* was ordered continued until the trial of the action.

The facts in *Gadicke Constr. Co. v. C.U.P.E., Local 389* [348] illustrate the first onus upon the applicant for injunctive relief. The plaintiff was a contractor employed by a school board to extend and modify the premises owned by the school board and occupied by the school. There was only one access road to the construction site. The employees of the school board pursuant to a legal strike picketed the entrance to this access road with the result that various of the contractor's and subcontractor's employees refused to cross the picket line. Mr. Justice Kirke Smith of the British Columbia Supreme Court dismissed the contractor's action, holding:

> The plaintiff's status to maintain this application is irretrievably lost by the finding that he has no proprietary interest in the lands and premises in question. These are all owned by and under the control of the school board, and the plaintiff's right as a contractor to go on the land gives him no interest which would enable me to say that his business is affected. [349]

An opposite conclusion might have been reached if the court had found that there was malice in the sense of a designed and intentional interference with the plaintiff's business. [350]

The degree at which injury becomes irreparable is difficult to define. It may even be suggested that where the conduct of one party is blatantly illegal, the injury is almost always construed as irreparable. This seems

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[345] 53 W.W.R. (n.s.) 495, at 499 (Man. Q.B. 1965). A similar, more recent review can be found in Canadian Ironworkers, Local 1 v. Perini Pacific Ltd., 67 Can. Lab. L. Cas. 11,190, ¶ 14,019 (B.C. Sup. Ct. 1967).

[346] [1892] A.C. 25 (1891). This case is one of the so-called "great trilogy" of cases upon which is founded the doctrine of civil conspiracy, the remaining two cases being Allen v. Flood [1898] A.C. 1 (1897); and Quinn v. Leathem [1901] A.C. 495; see SALMOND, TORTS 542-51 (14th ed. R. Heuston 1965).

[347] [1942] A.C. 435 (1941).

[348] 56 W.W.R. (n.s.) 701 (B.C. Sup. Ct. 1966).

[349] *Id.* at 704.

[350] The plaintiff then would have a prima facie cause of action for the tort of civil conspiracy or even inducing breach of contract.

to have been the approach taken in a Manitoba decision, *Winnipeg Builders' Exchange v. Operative Plasterers' Ass'n*, [351] where the union struck during collective bargaining negotiations, and the injury complained of was the consequent disruption of the plaintiff's business relationships. In treating the element of irreparable injury in such an unconfined manner, the court permits itself to take into consideration the balance of convenience. This was done expressly in *Canada Steamships Lines Ltd. v. Seafarers' Int'l Union.* [352] The union had won an injunction restraining the employer from reclassifying employees in a manner which it alleged to be contrary to the collective agreement. The employer applied to have the injunction suspended pending the outcome of an appeal against the order. Mr. Justice Owen of the Quebec Queen's Bench, Appeal Side, noted that a suspension of the injunction would result in a reduction in salary for less than one-tenth of the employees. On the other hand, the continuance of the injunction would hamper the employer in the manning of its ships from the opening of navigation until an arbitration award was rendered at some unpredictable future date. On the balance of convenience the interlocutory injunction was suspended. In any event, the applicant will be required to demonstrate some harm; the mere allegation of such harm will not suffice. [353]

Most of the injunctions granted are directed either to confining picketing or to completely prohibiting it. Where the latter is the case, the issue arises whether the court is using the injunction to halt an otherwise legal strike. Further, where the accompanying strike is illegal, the question is whether the court in ordering the employees to return to their jobs is enforcing contracts of employment, something which the courts have long professed they will not do. [354] In *Winnipeg Builders' Exchange*, where the employees were ordered back to work after going out on strike legally, Mr. Justice Bastin answered the objection with the short statement: "I do not consider that the power of the court to prevent irreparable injury should be impaired by the fact that compliance with the injunction will require employees to return to their former employment." [355]

On the question of picketing generally, a number of recent decisions in Ontario courts have established the principle that secondary picketing is per se illegal. The first of these cases was *Hersees of Woodstock Ltd. v. Goldstein*, [356] where the Ontario Court of Appeal recognized the effectiveness of picket lines in interfering with the contractual relations of the party picketed. Mr. Justice Stewart of the Ontario High Court applied

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[351] 49 W.W.R. (n.s.) 500 (Man. Q.B. 1964).

[352] 66 Can. Lab. L. Cas. 596, ¶ 14,155 (Que. 1966).

[353] Cummings v. Hydro-Electric Power Comm'n, *supra* note 337.

[354] Lumley v. Wagner, 1 De G.M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852); Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209 (1936).

[355] *Supra* note 351, at 503.

[356] [1963] 2 Ont. 81, 38 D.L.R.2d 449.

the rule in *Heather Hill Appliances Ltd. v. McCormack* [357] where he gave a cryptic treatment of the history of picketing. The courts seem willing, however, to circumvent the strictness of the rule. In *Tenen Inv. Ltd. v. Wueller*, [358] the employees of one subcontractor on a building project went on strike. When the employees of all other subcontractors in a show of sympathy refused to work, the contractor sought an injunction to restrain the alleged secondary picketing. Mr. Justice McDermott of the Ontario High Court distinguished *Hersees* and *Heather Hill* by finding that the close connection between the parties took the activity out of the category of secondary picketing. And in a Manitoba decision, *Brown's Bread Ltd. v. Bakery & Confectionery Workers', Local 389*, [359] the court refused to go further than merely limiting the number of secondary pickets.

Where an injunction is granted restraining or limiting picketing, the violation of such an order of the court is dealt with as contempt. Such approach has also been taken with respect to an order of an arbitration board in that the labour relations act will usually declare such an order to be enforceable as a judgment or order of the court. [360] There is a distinction recognized between civil and criminal contempt, with consequent variation in the degree of proof required to establish a contempt. [361] The distinction was first laid down by the Supreme Court of Canada in *Poje v. Attorney General for British Columbia*, where Mr. Justice Kellock stated:

> The context in which these incidents occurred, the large numbers of men involved and the *public* nature of the defiance of the order of the court transfer the conduct here in question from the realm of mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trade mark, for example, into the realm of a public depreciation of the authority of the court, tending to bring the administration of justice into scorn.... [T]he character of the conduct involved a public injury amounting to criminal contempt. [362]

This was the law applied by Mr. Chief Justice Gale of the Ontario High Court in the *Tilco Plastics* case. [363] The much publicized incidents giving rise to the action were part of a planned demonstration to protest generally the granting of injunctions in labour disputes. Some three hundred individuals participated in open defiance of the court's injunction limiting the number of pickets to twelve. The outcome was jail sentences for twenty-six of the demonstrators none of whom were employees at the Tilco plant. [364] This last fact raises the point that the individuals convicted

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[357] [1966] 1 Ont. 12, 52 D.L.R.2d 292 (High Ct. 1965).

[358] 66 Can. Lab. L. Cas. 576, ¶ 14,151 (Ont. High Ct. 1966).

[359] 67 Can. Lab. L. Cas. 11,272, ¶ 14,037 (Man. Q.B. 1967).

[360] *Re* Seven-Up Vancouver Ltd., *supra* note 311.

[361] The burden of proof of criminal contempt is that called for in any criminal prosecution, General Printers Ltd. v. Thomson, [1965] 1 Ont. 81 (High Ct. 1964).

[362] [1953] 1 Sup. Ct. 516, at 527, [1953] 2 D.L.R. 785, at 795.

[363] *Supra* note 310.

[364] Five of the accused were sentenced to two months, and another twenty-one to fifteen days in jail; one other accused was given a suspended sentence.

had not been named in the injunction. The court explained that it was only necessary that the Attorney General prove beyond a reasonable doubt that they *knew* of the substance of the order. Mr. Justice Dickson cited this knowledge test in a recent Manitoba decision where he stated, "the order of the court is not to be defeated by the simple ruse of bringing in an endless number of substitutes." [365]

The maximum penalty imposed in *Tilco Plastics* was two months in prison. The British Columbia Court of Appeal, prior to the *Tilco* decision, in *Regina v. Neale*, dismissed appeals from sentences of six and four months imposed for similar conduct. [366] Unfortunate though it appears, what was said in the *Neale* case seems to be the sentiment prevailing in Canada today: "It has appeared in comparatively recent times that the attitude of some elements of organized labour has been such that the courts across the country have recognized the necessity for some more serious approach to the imposition of penalties in such matters." [367] But it is for the legislatures to cure what is causing this attitude attributed to labour.

[365] Brown's Bread Ltd. v. Bakery & Confectionery Workers', Local 389, *supra* note 359, at 11,274.

[366] 60 D.L.R.2d 619 (B.C. 1966).

[367] *Id.* at 626.