The Development and Enforcement of the Collective Agreement

C.H. Curtis
FOREWORD

The collective agreement is the basic corner-stone of collective bargaining in North America. From its beginning the problem of making the provisions of collective agreements binding on the parties who entered into them has been a major concern of unions, employers, employees and increasingly of public authorities. This volume, one of the Centre’s Research Series, traces in depth the historical development of procedures in Canada for the enforcement of collective agreement provisions. The main emphasis is upon those methods developed by Canadian legislatures to provide orderly means of enforcement and thus contribute to a greater stability of union-management relations.

The title of this volume reflects the continuing interest of the Centre in major public policy issues in the field of industrial relations, The author, Professor C. H. Curtis, is Professor of Industrial Relations in the School of Business, and Faculty Associate in the Industrial Relations Centre, at Queen’s University. This book reflects some twenty years experience of the author in the field of industrial relations, as a teacher, as a researcher and author, and as a well-known and respected chairman of arbitration and conciliation boards in Canada.

The Director wishes to express his appreciation to Professor Curtis, to Mrs. M. Walker and Miss S. O’Donnell for secretarial services, to the Centre’s research assistants, to Mrs. C. Williams for her editorial work, and to the many persons from industry, government and unions who co-operated in various phases of the research.

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PREFACE

The problem of making the provisions of collective agreements binding on the parties who entered into them is; of course, as old as collective agreements themselves. From the beginning of the practice of making such agreements, unions entering into them have been concerned that employers observe the wages, hours and working conditions they agreed to, and employers have been concerned that the employees represented by the union be on hand to work under the terms and on the conditions set out in the agreement.

The problem of enforcing a collective agreement was long regarded as a private matter between the parties concerned. Thus the parties were left to their own devices to discover solutions. There were attempts on the part of both employers and unions to promote the idea that it was good business to observe the agreement made and so establish a good, predictable relationship between the parties. But for the union the strike was the ultimate instrument of enforcement, called into play when the employer did not observe the agreement as the union read it. For the employer, application of the agreement, as he saw it, might ultimately be accomplished by implementing his reading and forcing the union to agree or strike. The employer might then fight the strike by sitting it out, or by replacing the strikers, or by attacking it as illegal and wrongful.

Since collective bargaining has been sanctioned by the state and promoted and regulated by statute, the collective agreement has achieved a new status and the numbers of employers and employed persons governed by collective agreements have increased very much. The result is that collective agreements are no longer private documents in the sense that they were. Their observance becomes a matter of public concern and the procedure for their enforcement must function in the public interest.

This study will trace the development of the idea that collective agreements are binding contracts. In the first place the study will show how the early collective agreements that dealt only with the basic conditions of employment have been succeeded by the detailed and complex documents that now govern the many aspects of union-management relations. Then it will examine the legal status of the early collective agreement and the reluctance of legislatures and courts to change that status.

The study will then proceed to explain how legislatures in this country adopted the collective agreement as a device for stabilizing union-management relations; how, after so doing,
legislatures found it necessary to provide some orderly method of enforcing undertakings which had previously been without legal status and unenforceable in the courts.

The main purpose of this study is to describe the procedures which Canadian legislatures have provided for the enforcement of collective agreements and to explain what is involved in establishing procedures that will prove to be appropriate and effective substitutes for the traditional method of enforcing collective agreements by resort to strikes and lock-outs.

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CHAPTER I
THE DEVELOPMENT OF THE COLLECTIVE BARGAINING AGREEMENT

1. The Form and Content of the Collective Agreement

The modern collective bargaining agreement has developed from the union contract of the earlier craft union era. Craft unions in America, in their pure form, were essentially business enterprises. They undertook to advance the interests of their craftsmen-members in return for the payment of fees and the observance of the craft’s rules. In their relations with employers, bona fide craft unions were contractors in the sense that they were prepared to contract with an employer to provide the services of their members on certain specified terms and conditions. So the local of a craft union might undertake to provide an employer with ten craftsmen to meet his normal requirements and certain additional craftsmen at such times as he might need them. Craftsmen were to be employed at their trade for certain hours each day, certain days each week, and they were to be paid according to a specified scale of wages. Less rigid agreements left the employer to do his own hiring, provided he hired only union members when such were available.

Craft unions dealt with employers individually and separately in most industries, but in some cases a craft or several crafts together might deal with a group of employers in a given area or industry. Thus in certain branches of the construction industry building contractors in an area might join together to deal with a group of craft unions. This practice continues in some areas.

Whether the crafts dealt individually with employers or dealt with groups of employers, they were concerned to establish uniform wages, hours and conditions of employment, sometimes on a national basis, sometimes industry wide and sometimes only over the local area in which employers sold their products or did business.

The craft union originally had little interest in bargaining with the employer for what we call "fringe benefits", particularly those that provide hospitalization, medical care, pensions, etc.

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1 But some early craft unions were also fraternal societies providing sick benefits and death benefits for the members. Some are still fraternal societies. See The Labour Gazette, Vol. I, 1900-01, p. 181
2 Similar agreements were made in the printing industry. For example, in February, 1901, The Employing Printers' Association and The Allied Printing Trades of Toronto signed such an agreement to remain in force until June, 1904.
According to the crafts' free enterprise philosophy, a union's primary function was to secure the best possible wages and hours for its members. Then the well-paid craftsman should look after himself, providing for his own welfare on an individual basis or with his fellow craftsmen through the union.

The effectiveness of craft unions as contractors selling the services of their members depended on their ability to control the quantity and the quality of the services of their craftsmen and on their ability to compel their members to obey the rules of the craft. The more completely a craft union could monopolize the services of those in its own particular craft, the more successful it would be in imposing its scale of wages, hours and conditions of employment on employers.

Crafts usually regulated the quantity of their services available by controlling and regulating entrance into the trade. If the craft were one requiring skill that was difficult to acquire, the flow of men into the craft might be regulated naturally by that difficulty. Otherwise admissions could be regulated by artificial barriers such as arbitrary apprenticeship requirements and appropriately high initiation fees. The employer's recognition of the union usually included, implicitly, his recognition of the rules of admission to union membership. But sometimes the agreement between the employer and the union included the apprenticeship rules whereby the union sought to control the numbers of its members. An agreement between the Canadian Pacific Railway Company and the International Association of Machinists signed in August, 1900, is a case in point.3

In addition to the possibility that outsiders beyond the control of the union might add to the services of craftsmen available to employers, there was the possibility that craftsmen in the union might do so too. For as the number of the craftsman's hours of work per day and per week was reduced the temptation to work outside union hours pressed more and more heavily on him. Consequently it was important to the union to impose rules of conduct on him to prevent his undermining the craft's policies and programmes by selling his services privately in the market or by working on terms more favourable than the craft sought to maintain.

The principles on which the craft unions operated are quite familiar to business men. In fact, the term "trade union" was originally applied in England to associations of business people as well as to associations of craftsmen. And in the modern business world certain professional groups have applied these principles to the operation of their associations, perhaps even more effectively than the craft unions.

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3 The Labour Gazette, Vol. I, p. 73
Our special concern here is with the sort of agreement the union and the employer reached under the craft union system. If the craft union really had control of its craftsmen, there was not a great deal to be discussed by the parties contemplating an agreement. The employer would usually find that the union would modify its work-rules, hours and wage rates very little, if at all, to accommodate him. The employer might have to decide only whether or not he would deal with the union and for how long he would contract with it for craftsmen.

Of course, at the other extreme, a craft union with an uncertain hold on its craftsmen would probably be compelled to make concessions to keep itself in business. But in any case the number of items to be discussed and decided would be small and the completed agreement would be set out in a few short paragraphs. The details would be the customs of the trade and the rules of the union, both understood by the contracting parties.

Numerous examples of early agreements between craft unions and employers appear in the "Reports from Local Correspondents", in the early volumes of *The Labour Gazette*. The agreement between Local No. 713 of the Carpenters’ Union and a group of contractors in Niagara Falls is typical:

1. The rate of wages for journeymen carpenters and joiners shall be 25 cents per hour.
2. The hours of work shall be nine (9) hours per day.
3. The rate of pay for legal holidays and overtime shall be time and one-half, except for mill hands.
4. No union man shall take any kind of lump work or subcontract from a carpenter-contractor.
5. If a contractor applies to the union for men and the union cannot supply them, the contractor may hire any men he likes at any rate of wages, but these men must be discharged before any union man is laid off.
6. Planning mill proprietors shall be bound by these promises only as far as they apply to carpenters and bench hands.
7. Pay days shall be on Saturdays, and the contractor shall pay the men their wages on the job where they are working.
8. The agreement shall go into effect on May 1, 1901, and continue for one year.4

The early agreements that contain more than a bare statement of hours of work and wage rates usually made some provision for the handling of grievances. Frequently these early agreements stated merely that the employer would hear the employees' grievances.5 Sometimes they provided that the employer would discuss grievances with

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a committee of employees. Occasionally, an agreement provided that grievances would be submitted to a joint committee whose decision would be binding on all concerned.”

Thus, in the period when collective bargaining was purely voluntary, the collective agreement served mainly to establish the wages and hours of employment.

Nevertheless, the collective agreement was recognized by both parties as an important device for stabilizing union-management relations.

A report on the settlement of a dispute in 1901 between the Employing Printers’ Association and the Allied Printing Trades of Toronto puts the matter this way:

Frequent demands for a revision of terms of employment from one branch or another resulted in unsettling business, and it was agreed by both parties that it was advisable to come to a general settlement, including all departments to hold good for a term of years.

Craft union contracts have changed and developed under the same influences that affected the collective agreements of the new industrial unions and in many cases they are indistinguishable from the latter in form and content. Both, of course, are governed by the same statutes. Thus the agreements that the International Association of Machinists signs as the bargaining agent for all the employees in a manufacturing plant are much like one that the United Automobile Workers would sign in a similar situation. Even in the printing industry where unions retain a good many of their craft characteristics, collective agreements now govern terms and conditions of employment much more fully than they did in the days when craft unionism was the dominant form.

Industrial unionism is a protest movement, protesting on behalf of a much larger constituency than the craft unions represented, and protesting over a much wider area of community activity. In general the crafts were content with the existing political, social and economic system. They wanted simply the larger place in the system that money income and the prestige of craft would give their members. The industrial unions in their early exuberance were anxious to make the world over in the interests of the man who works for wages, regardless of his craft or skill. The main body of industrial unions continues to cherish political, social and economic ideals as guides to their activities, ideals that envisage changes of the sort that reform movements in Anglo-Saxon communities have commonly advocated.

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In Canada, the substantial body of industrial unions is socialistic in its outlook. But most unions would achieve their socialistic goal by evolution. Very few of them have ambitions to pack the business entrepreneur off and put management under the control of the employees themselves. They recognize the importance of the function of management and regard it as something separate and distinct from their own function. They are prepared to let someone else assume the responsibilities and duties of running the business. However, in some areas, some of them favour public ownership and management.

So, at the bargaining table, the industrial union, although in some state of revolt against some things as they are, is as hardheaded a business enterprise as any craft union. Like the craft union, the industrial union is out to make a business deal with the employer.

The nature of the industrial union requires that the details of its bargain with the employer be spelled out in much greater detail than the bargain made by a craft union. For, unlike the craft union, the industrial union has a heterogeneous membership that has had no uniform work-experience to establish customary rules and conditions of employment. True, some of its members may be skilled tradesmen who have gone through an apprenticeship and who do work according to the practices of their trade. But the bulk of an industrial union’s members have usually been unskilled and semiskilled people who can be assigned to a variety of operations and who are accustomed to working as the varying conditions of their employment dictate. These members have no customary entitlement to a particular job, or to a particular kind of work, or to promotion, or transfer, or retention in case of work-shortage. Consequently, they look to a union to define their rights, to make the rules that will govern their employment and to enforce the arrangements made.

Furthermore, in response to the demands of their members for greater security in every sense of the word, industrial unions have extended bargaining into areas which did not concern the crafts, hospitalization benefits, medical care, accident benefits, lay-off allowances, pensions, etc.

As a consequence, the modern collective agreement is an extensive and complicated document which often tends to grow from term to term as the parties concerned add to its provisions in their attempts to meet new situations and problems.

The provisions of a modern collective bargaining agreement fall readily into certain classifications. An agreement in its early sections identifies the parties bound by it. The company is identified by name and by the location of the operation governed by the agreement. Its rights to function as management are usually set out. The union is identified by its international title and usually, too, by local number. The extent of its recognition is described by defining the group of employees whom it represents, and by setting out the
form of union security, if any, that is to apply. These provisions, together with the
undertaking of the union not to strike, and the employer's undertaking not to lock out his
employees during the term of the agreement, and the undertakings of both parties not to
discriminate against employees for union activity or for lack of it, constitute the basis of
agreement. The rest of the agreement cannot be effective unless each party is assured by the
other that its existence to carry out its functions is recognized and respected and each assures
the other that resort will be had neither to force nor to discrimination.

The rest of the collective agreement may be classified into three sections: the wage bargain,
the rules bargain and the administrative bargain. All the provisions dealing with remuneration
constitute the wage bargain, wage schedules, hours of work, overtime, vacations, statutory
holidays, welfare plans, etc. These provisions indicate what time the employees will give the
employer and what the employer will give by way of remuneration.

A collective agreement also contains provisions governing promotions, transfers, lay-offs,
recalls — usually based on the merit, the ability and the length of service of employees. It
frequently contains provisions, too, dealing with the granting of leave of absence, the making
of plant rules, foremen engaging in non-supervisory work, etc. Such provisions make up the
rules bargain.

Finally, there are clauses in a collective agreement that make provision for its
administration. This task, on the employer's side, falls to foremen, general foremen,
superintendents, advised and assisted by personnel officers. But their assignment does not
arise out of the provisions of the agreement. The parties understand, apart from the agreement,
that it is in the employer's discretion to employ whatever administrative force he sees fit. The
agreement usually specifies, however, what part these administrative officers are to play in the
handling of the complaints and grievances employees file when they protest that the employer
has violated the agreement.

But employees have no traditional place in the administration of their own work-
activities. Consequently, their participation through a union must be a matter of agreement
with their employer. Many agreements make specific provision for the appointment by the
union of officers to participate in the administration of the collective agreement. For this
purpose a plant is usually divided into areas, sometimes geographic, sometimes
occupational, and a certain number of stewards is provided for each area. The union usually
prescribes the method of selection, but sometimes the agreement will set out certain
qualifications that the persons selected must possess, usually a qualification regarding age
and one regarding length of service in the plant.
The matter of the selection of the union’s administrative officers is necessarily one requiring agreement because these officers must be employees in the bargaining unit who are actually at work and who have an opportunity to see what is going on. They must also be readily available to those who have complaints. Since these people are employees on the employer’s payroll, with duties to perform as employees, it is only logical to have the employer’s agreement regarding their appointment and his agreement regarding their functions and the time they should take to discharge their duties. So collective agreements generally set out rules governing the activities of these stewards.

Most agreements recognize, in addition to the general body of stewards assigned to different areas, a committee of stewards or a grievance committee whose function is to carry complaints and grievances from the lower levels of supervision through to top management. This procedure is outlined in the form of various steps to be taken from the foreman who gets the complaint originally to top management where the company’s final decision is made. Then collective agreements contain too, among these administrative rules, provision for resort to arbitration by either party in cases where agreement is not reached through the discussions that take place at the various steps of the grievance procedure.

In summary, the collective bargaining agreement between an employer and an industrial union consists of the basic agreement, the wage bargain, the rules bargain and the administrative bargain. The fact that a collective agreement is the product of negotiations between two groups of the sort described above is an important determinant of its nature. The terms of the agreement are obtained by a process in which each of the parties first establishes bargaining positions on the matters in issue and then each gradually modifies and changes its views, until, by compromise, the parties find common ground on which they can reach a settlement.

The agreement resulting from such negotiations is likely to be one that is not quite satisfactory to all shades of opinion on either side. Some dissidents on each side will be pushed into reluctant acceptance by their colleagues, often for no other reason than their recognition of the fact that failure to agree on something can bring serious results, for the union that is worth its salt will strike when agreement is impossible. However, this strike, because it is likely to be disadvantageous in some measure to each side, may be the means by which the parties will ultimately reach agreement. The shadow of an impending strike will point up the issues of the dispute, reveal the relative strength of the parties, and so indicate the settlement that both must accept.

The concessions and compromises that finally produce an agreement are usually accomplished by each side dropping certain of its demands entirely, each conceding some to
the other, and each modifying its views on some issues to produce a certain division of the
goal each anticipates. Some of these points can be set out clearly and concisely in language
that leaves very little room for misunderstanding. Thus, rates of wages, length of vacations
and overtime rates can usually be set out precisely. But it is difficult to draft a precise
provision dealing with contracting out that will give the employer a measure of the freedom
of action which he feels he must have and the union a measure of the protection it feels it must
have. Consequently the parties may find it impossible to agree on anything except rather
vague and ambiguous language that really leaves the question unsettled and leaves plenty of
room for misunderstanding.

The problem of drafting a collective agreement is further complicated by the fact that
the subject matter of the agreement is the whole of the activity in the employer’s
establishment as it affects the work force. But it is impossible for the agreement to embrace
the whole work situation. Consequently, it emerges as an understanding on the essential
matters, an understanding set in the context of the whole range of activities in the
employer’s establishment.

Finally, an agreement is drawn up at a particular time, under particular circumstances, yet
its terms are to govern the relations of the Parties over a considerable period of time, time in
which substantial changes in methods of production, machines, tools and the organization of
the work-force may occur. Thus an agreement may contain provisions that cannot be
satisfactorily applied to a new unforeseen situation. Or the agreement may be silent on matters
that have emerged since it was negotiated.

The characteristics of the collective agreement just set out account for the fact that
disputes regarding its observance are common. It has been said that a collective agreement is
made to be broken and that controversies over its breach are a normal and necessary part of
the life of the parties who have made the agreement. The dissident groups in each of the
parties to the agreement are disposed to try to accomplish their purposes by reading into the
agreement wherever possible their own interpretations. The overly concise clauses, the
purposely vague clauses, to say nothing of those that seemed at the time of drafting perfectly
clear, frequently leave room for disputes over interpretation. Furthermore, much of what is
in a collective agreement describes how things will be done, sets out procedures to be
followed, rather than setting out agreement on what precisely will be done. The business of
fitting procedures to situations, often situations unforeseen when the procedures were set up,
gives rise to controversy. There have been numerous attempts to define the collective
agreement. English courts, anxious to explain the differences they saw between an ordinary
commercial contract have defined the collective agreement variously as a treaty of peace, a
gentleman’s agreement or a promise of fair dealings. Mr. Justice Jackson in *J.I. Case Company v. N.L.R.B.* held that a collective agreement resembles the tariffs established by a carrier or standard provisions for insurance policies or utility schedules of rates and rules for service. Mr. Justice Jackson saw the provisions of a collective agreement becoming effective only when someone was employed and an employer-employee relationship was established. This he thought was much like the rates of the carrier or insurance company or public utility that only became effective as transactions to which the rates apply take place.

The United States Fourth Circuit Court in *N.L.R.B. v. Highland Park Manufacturing Company, 110 F. (2d) 632* at p. 638, defines a collective agreement as an industrial constitution setting out the broad general principles on which the relationship of employer and employee will be conducted. A collective agreement has also been described as a set of standards serving as a guide in the administration of employer-employee relations in a plant.

A combination of these definitions is found commonly in the literature of labour relations. Some writers tend to emphasize the governmental aspect of the agreement. Others place greater emphasis on its wage-schedule aspect.

**2. The Function of the Collective Agreement**

Unions and employers have long recognized that a collective agreement serves to stabilize the relations between a union and an employer by ending, for a time, recurring demands on the part of the union for changes in wages, hours and conditions of employment and by holding the employer to a specific set of working conditions.

If a collective agreement really works in the sense that both sides live up to the obligations it imposes on them, advantages will flow to both parties. The employer will be assured a stable working force whose services can be used at a predictable cost. The union will have some assurance of work for its members at known rates of pay for known hours of work.

It is generally agreed, too, that stable employer-employee relations are in the public interest, serving to maintain employment, to facilitate the efficient use of labour and to maximize production.

Early collective bargaining legislation in the United States and Canada did not deal specifically with the collective agreement. Its main concern was with the establishment of collective bargaining relationships and with ensuring that the process of collective bargaining would be carried out. Thus the United States’ Wagner Act, 1935, British Columbia’s *industrial*
The Conciliation and Arbitration Act, 1937, and Ontario's Collective Bargaining Act, 1943, were concerned with the definition of the rights of employees to bargain with their employers and with the proper functioning of collective bargaining as a procedure for the determination of mutually satisfactory wages, hours and conditions of employment. No doubt the legislators who enacted the early collective bargaining statutes expected that collective bargaining would produce collective agreements. But they did not explicitly mention collective agreements as the end to be achieved.

The Canadian Wartime Labour Relations Regulations, P.C. 1003, 1944, was unique in that it made the collective agreement an instrument of public policy to be used to stabilize employer-employee relations at a time when the emergency of war required uninterrupted industrial production. The Regulations, like the Wagner Act, defined the rights of employees to bargain with their employer, provided the machinery necessary for the certification of bargaining agents and made provision for the proper conduct of bargaining relations. Unlike the Wagner Act, the Regulations provided for the compulsory conciliation of disputes regarding the content of a collective agreement, thus retaining the typically Canadian procedures of the Industrial Disputes Investigation Act of 1907, but extending their application to cover war industries. Then, in their entirely new feature, the Regulations provided that the duty to bargain — which was imposed on both parties — was discharged when a collective agreement was signed, that that collective agreement was binding on the union, the employer and the employees and that neither strike nor lock-out was to be undertaken during the term of the collective agreement, which was to be for at least one year.

Since World War II the Regulations have been replaced by the federal Industrial Relations and Disputes Investigation Act and by the various provincial statutes. All of those statutes, except that of Saskatchewan, have followed the Regulations in making the signing of a collective agreement the terminal point of the statutory duty to bargain in declaring the collective agreement binding on all concerned and in forbidding the strike and the lock-out while a collective agreement is in effect. The result is that neither the employer nor the union, having signed a collective agreement, can require the other to bargain again with a view to changing the agreement reached or adding new provisions to it. A union which, following the signing of a collective agreement, decides that it should have demanded the inclusion of some additional provision has no alternative but to wait until the agreement expires to submit its demands.

As a practical matter, it may become necessary and desirable for the parties to a collective agreement to re-negotiate some of its provisions or to add some new provision. There is nothing in Canadian statutes forbidding amendment by mutual consent. But if,
during the term of an agreement, the parties reach an impasse in negotiations which they agreed to undertake, the union cannot lawfully strike and the employer cannot lawfully lock his employees out.

Some statutes do provide for disputes that may arise when parties to a collective agreement re-negotiate wage rates under an open-end wage agreement. But unions and employers in Canada prefer firm agreements and the open-end wage clause is unusual.

Traditionally, collective agreements are unenforceable and Canadian courts have said so on many occasions, offering a variety of reasons in support of their conclusions; thus, in the past, the courts left parties to collective agreements to their own devices when the question of enforcement arose.

The statutory declarations that a collective agreement is binding on the parties concerned points up very sharply the problem of enforcing such agreements. For the declarations make the observance of collective agreements by the unions and the employers who enter into them a matter of public policy. They also create a reasonable expectation in the mind of each party signing such an agreement that, should the necessity arise, the other can be held to its undertakings. But such declarations could not be made effective by the use of any existing procedures of enforcement, for no orderly procedures for the enforcement of collective agreements were at hand when the declarations were first made.

It followed that the legislatures were faced with the necessity of providing some method of enforcing the collective agreements that they declared to be binding on the parties entering into them. With the exception of Saskatchewan, the legislatures have now followed the lead of the Regulations and the federal Industrial Relations and Disputes Investigation Act that replaced them. They provide that every collective agreement must make provision for the final and binding settlement, without stoppage of work, of all disputes arising out of the administration of the agreement.

The problem of making collective agreements binding has not been solved to the satisfaction of all concerned by the adoption of procedures that comply with the requirements of Canadian collective bargaining legislation. Most of the statutes allow the parties a certain amount of leeway which some have used to explore various means of enforcing collective agreements. Thus the problem of making collective agreements binding is still a live one.

The study will examine the problem of enforcing collective agreements as the common law courts saw it and dealt with it. It will proceed to examine the problem as it
appeared to those who enacted the early labour relations statutes and continue through the most recent collective bargaining statutes. The study is concerned particularly with a description of the procedures now open to those faced with the problem of enforcing a collective agreement and with an appraisal of the alternatives.
CHAPTER II

THE COLLECTIVE AGREEMENT AT COMMON LAW

Courts of law in this country have given parties to collective agreements very little help with what are now termed "disputes regarding the interpretation, application, administration and alleged violation of collective agreements". The courts’ inability, or perhaps even unwillingness, to be helpful in these matters has been largely a result of two basic common law propositions, the first that unions are incapable of bringing or defending an action in a court of law and the second that collective agreements are not contracts legally binding on the parties to them. Consequently, the courts have usually held that, on one of those grounds or the other, the collective agreement is unenforceable at common law.

The purpose of this chapter is to examine the two original grounds on which the courts have held that agreements were unenforceable at common law. Part 1 will deal with the status of the trade union and Part 2 with the status of the collective agreement.

1. The Status of Trade Unions at Common Law

*Polakog v. Winters Garment Company*, (1928) 62 O.L.R. 40, illustrates very well one aspect of the common law status of trade unions. The Polakog case arose out of an action really brought by the International Ladies' Garment Workers' Union to enforce a collective agreement it entered into in February, 1925 with the Toronto Cloak Manufacturers’ Association. Raney, J., who heard the case in the Supreme Court of Ontario, noted that it was the first action of its kind in the province. He noted, too, that no precedents in English courts were cited by either party.

The defendant company raised two defenses:

1. The International Ladies' Garment Workers' Union is an unlawful association being in unreasonable restraint of trade. Therefore the courts will not assist it to enforce its contracts.

2. The contract itself is in unreasonable restraint of trade and so unenforceable.

Raney, J., found that the law regarding the capacity of a trade union to sue and be sued was set out by the House of Lords in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421. In the *Russell* case, the widow of a man who had belonged to the Amalgamated Society of Carpenters and Joiners and who had regularly for some forty years paid his contributions to the Society as its rules required, brought action against the
Society to recover certain superannuation payments that she alleged were due to her husband under the rules of the Society.

Russell had been ill for some time before his death and had drawn sick benefits from the Society. Then he became insane and was committed to an asylum. At that time benefits ceased.

In defense the Society pleaded that it was in unreasonable restraint of trade, submitted its rules as proof and contended that its agreements were unenforceable.

The House of Lords found that the rules of the Society were such that it was, in fact, in restraint of trade, as it claimed, to a degree that made its agreements unenforceable. In this connection Lord MacNaughten pointed out that not every restraint of trade is unlawful, but restraint of trade that is unreasonable, offensive and destructive of individual liberty is unlawful. Lord Robson pointed out that the rule of the Society that constrained a member by fine, or suspension and threat of expulsion, to comply with the directions of the executive regarding strikes and to observe the rules of the Society regarding the conditions of work, was sufficient in itself to mark the Society as being in unreasonable restraint of trade.

Raney, J., in dealing with the Polakoff case noted too that the Manitoba courts faced the same problem that he was facing in Starr v. Chase, [1923] 2 D.L.R. 1112; [1923] 4 D.L.R. 103; [1924] 4 D.L.R. 55. But before noting Mr. Justice Raney’s comments on the Starr case it would be well to outline the case itself.

Chase et al. v. Starr was a representative action begun in the Manitoba courts by Chase and Nash on their own behalf and on behalf of all members of the Brotherhood of Locomotive Engineers and all other members of the General Committee of Adjustment in the employ of the Canadian National Railway. Plaintiffs Chase and Nash sought to recover certain sums of money from defendant Starr who, on May 25, 1921, had been removed from his office as Secretary of the General Committee and had, it was alleged, failed to pay over or account for the money in question. The plaintiff also asked for an accounting.

The trial judge dismissed the action on the ground that the rules of the Brotherhood of Locomotive Engineers were in restraint of trade and rendered the organization an unlawful trade union to the extent of preventing its enforcing its agreements and trusts in a court of law.
The Manitoba Court of Appeal reversed the decision of the trial judge largely on the ground that the defendant at the trial had not properly raised the question of the illegality of the union. The court held that, under such circumstances, it could only take cognizance of illegality when it was so obvious as to preclude any possible hope of overcoming it.

The Supreme Court of Canada dismissed Starr’s appeal from the judgment of the Manitoba Court of Appeal. Duff, J., for the majority, reviewed the constitution of the General Committee of Adjustment and found that the Committee’s basic function was to safeguard the interests of the members of the union and to settle their disputes with the company. He found that the rules imposed no unreasonable restrictions on the members of the Brotherhood, allowing them to work with non-members and providing for the processing of the grievances of all union members and non-members alike. Duff, J., found that the funds in question were used only for the purposes of the Committee, none of whose objects had an illegal purpose. The rules were not like those of the union involved in *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506. Duff, J., also expressed the opinion that the *Trade Union Funds Protection Act*, 1869 (Imp.) c. 61, applied in Manitoba to enable the union to recover from the Committee’s secretary-treasurer.

An interesting aspect of *Starr v. Chase* is to be found in the court’s view that quite apart from the question of the legality or illegality of the union’s purposes and quite apart from any statute under which the union might have taken action against the secretary-treasurer, the court had to recognize that the union was entitled to take steps to protect its members’ funds from dishonest officers. As Duff, J., put it:

> May one not say that at this point one encounters a paramount policy which has to do with the protection of the owners of property against the defalcations of dishonest custodians?  

Mr. Justice Raney, dealing with the *Polakoff* case, expressed grave doubts about the validity of the doctrine of restraint of trade as it was applied to trade unions. He pointed out that the doctrine was an expression of public policy by the courts, not by the appropriate authority, parliament. He pointed out, too, that the courts formulated the doctrine during the period in England when the movement for the extension of the franchise was pressing for the passage of the reform bills. The courts at the time seemed carried away by their concern for the liberty of the individual. So they concluded that the constraints that the rules of the craft unions imposed on their members affected the liberty of the individual and so made the trade union an organization in unreasonable restraint of trade.

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Mr. Justice Raney pointed out, too, that the doctrine of restraint of trade as applied to trade unions was formulated in 1855 in *Hilton v. Eckersley*, 6 E. & B. 47, a decision that dealt with a trade union of manufacturers. These manufacturers had formed an association and drawn up rules governing the activities of each member with penalties for infractions. When the question of imposing the penalties agreed upon arose, the members of the association went to the court to enforce them. The court found the rules restrictive on the activities of the members to a degree that made the association an undertaking that restrained trade against the interests of the community. The court found the association illegal in the sense that its agreements were unenforceable. The idea that militant trade unionism — unionism that exercised control over its members and used the strike to put pressure on the employer — is against public policy was derived from the *Hilton* case and became the law as it is stated in the *Russell* case.

Mr. Justice Raney agreed with the view of the Manitoba Court of Appeal that a decision to accept the doctrine of restraint of trade as it appears in the *Russell* case as applicable in the *Starr* case would be to deny the plaintiff justice. He stated:

Seeking a way of escape from so palpable a miscarriage of justice, the Manitoba Court of Appeal reviewed the history of the common law doctrine, as applied to labour unions, that combinations and contracts in unreasonable restraint of trade are against public policy, and therefore, in a civil sense, unlawful. A majority of the Manitoba Judges found in the books ample authority for the proposition that public policy with reference to restraint of trade as that doctrine had been applied to labour unions, is a vague and variable quantity, without fixed rules to determine what it is, and that at all events the public policy of the *Russell* case was not the public policy of Manitoba. In arriving at this view they were assisted by pronouncements of eminent English Judges. And the Manitoba Judges went farther. They found that public policy in Manitoba clearly supported the formation of associations in the nature of trade unions.\(^\text{11}\)

In spite of the fact that he thought the doctrine of restraint of trade as it was applied to trade unions was not a true statement of public policy in Ontario, Mr. Justice Raney found that he was bound by the decision of the House of Lords in the *Russell* case. He pointed out that the Judicial Committee of the Privy Council stated in *Robins v. National Trust Company*, [1927] A.C. 515, that a colonial court which is regulated by English law is bound to follow the supreme tribunal that settles English law, the House of Lords. So, since the House of Lords ruled that a trade union whose rules are in unreasonable restraint of trade is illegal and

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\(^{11}\) 62 O.L.R. 40 at p. 42.
incapable of enforcing its agreements that is the law and remains the law in the Province of Ontario until the legislature changes it.

Raney, J., went on to find that the rules of the International Ladies’ Garment Workers’ Union, by the criteria set out in the *Russell* case, showed that the union was in unreasonable restraint of trade and so illegal and incapable of suing to enforce its collective agreement with the Toronto Cloak Manufacturers’ Protective Association.

Thus in the *Polakoff* case the union failed to enforce its collective agreement because, being in restraint of trade, it was unable to bring the action that was necessary for such enforcement. The union’s failure was attributable to its own nature, not to any characteristic of the collective agreement.

But trade unions originally possessed a much more fundamental disability than the one that stemmed from what they did in restraint of trade. This disability arose from the fact that the common law did not recognize a trade union as a "person" and so would not entertain any action by or against a trade union as such.

At common law a "person" is any being held to be capable of exercising rights and assuming duties and responsibilities. Originally the common law could conceive of no being except a "natural" person that could possibly qualify as a "person". However, the needs of the business community in due time called for the recognition of the corporation and corporate bodies were created by statute and by statute they are recognized in law as "persons", although artificial. Thus it became possible to identify and name in a court of law a "natural" person or an "artificial" person, a corporation, as party to an action.

A trade union as an association of individuals is neither a "natural" nor an "artificial" person. A trade union’s members, unlike the shareholders in a company, are not prompted to incorporate either to facilitate their transaction of business or to avoid and limit personal financial obligations to which membership in the union might make them liable. So the trade union remains an aggregation of individuals. At common law it was originally accorded no status other than that possessed separately by the various individuals who constituted its membership. As a consequence, an appearance in a court of law by a trade union required the participation of all its members. If such participation were impossible, an appearance was impossible.

In *Robinson v. Adams*, [1925] 1 D.L.R. 359; 56 O.L.R. 217, this particular disability of unincorporated associations, as it applies to trade unions, is discussed at length and the leading cases are cited. However, in *The Krug Furniture Company of Berlin v. The Berlin Union No. 112, Amalgamated Woodworkers, International Union of America*, (1903) 5 O.L.R.
463, the court entertained an action brought against a union in its own name and gave judgment against the union as such.  

The *Krug* case arose out of the objections of the "finishers" in the company’s plant to certain conditions of their employment which the company refused to change in spite of their protests. There was at the time some arrangement in the nature of a collective agreement between the company and the Berlin Union No. 112. Eventually the union went out on strike in support of the "finishers" complaints and by doing so interfered with the company's operations. So the company sued to recover damages for the wrong it contended the union had done, and the company succeeded.

During the trial the union protested that it was an unincorporated body and so incapable of defending an action. Mr. Justice Meredith held that the union’s objection came too late because earlier it had appeared without protest, pleaded and consented to an interlocutory order against it in the name under which it was being sued. Mr. Justice Meredith remarked that the objection the union raised was in any case only a technical one because it could be reached by a class action. He said:

> The defendants, the organized body, contend, apparently now for the first time, that they are not an incorporated body, and that therefore the action should be dismissed as against them; but it seems to me to be too late to make any such point; it is but a technical objection, and one which ought not to be given effect to, to shield these defendants from wrongdoing, unless it can be insisted on as a matter of right.

However, the *Krug* case is not good law. The law is correctly stated, for example, in *Metallic Roofing Company of Canada v. Local No. 30, Amalgamated Sheet Metal Workers International Association et al.*, (1905) 9 O.L.R. 171 (C.A.). There the Ontario Court of Appeal held that the action brought by the company, in the nature of an action of tort for conspiring to injure the plaintiffs in their business by calling out their workmen on strike, could not be brought against the union in its own name. True, the name of the union appears in the record of the case, but it has no significance.

The original common law is set out clearly, too, in *Society Brand Clothes Limited v. Amalgamated Clothing Workers of America*, [1931] S.C.R. 321, a Quebec case that is similar in some respects to the *Krug* case and shows that the basic position of unions under the civil law in Quebec is much like their basic position in the common law provinces.

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13 5 O.L.R. 463 at p. 468.
It was at trial in the *Society Brand Clothes* case, as in the *Krug* case, that counsel for the union first raised the point that the union was an unincorporated association incapable of defending an action. The trial judge in Superior Court held that the union could not be sued in its own name, the Quebec Court of King’s Bench upheld the trial judge’s decision and the Supreme Court of Canada dismissed the company’s appeal against the lower court’s decision. The Supreme Court took the view that if a body is a non-entity, it is such, and no failure to plead lack of entity entitles a court to proceed as if a body were a legal entity. Mr. Justice Cannon expressed the Court’s view as follows:

... we feel inclined to accept the view that a court should *proprio motu* take notice that an aggregate voluntary body, though having a name, cannot appear in court as a corporation, when in reality not incorporated.\(^{14}\)

Clearly then the trade union’s unintegrated membership produces a more serious and fundamental defect in its nature than does its activity in restraint of trade. For, as Mr. Justice Cannon states, the courts must themselves note and give effect to the fact of lack of incorporation where it exists, while the Manitoba Court of Appeal held in the *Chase* case that a court need take cognizance of a union’s actions in restraint of trade only if they are so obvious as to preclude any hope of overcoming the illegality stemming from them.

In refusing to entertain actions against trade unions in their own names in the period before the enactment of collective bargaining legislation, the courts in this country were not unaware of the unions’ ability to formulate and carry out programmes of action that had a significant effect on the life of a community. The courts were, in their own view, simply stating the law as they found it. Mr. Justice Cannon put it this way — he wrote in 1931 of Quebec, but his statement has wider application — he stated:

The existing legislation compels us to reach the conclusion that Parliament and the legislature have not deemed it proper or necessary to compel, even international trade unions, although governed by foreign administrators, to acquire legal existence and liability in Canada through registration. We must, accordingly, ignore the industrial reality and must refuse to regard an unincorporated labour union as, in law, an entity distinct from its individual members.\(^{15}\)


The basic common law status of trade unions was successfully questioned in England in an action for damages brought by the Taff Vale Railway Company against the Amalgamated Society of Railway Servants.\footnote{The Taff Vale Railway Company v. Amalgamated Society of Railway Servants, [1901] A.G. 426.}

There is nothing particularly unusual about the incidents that prompted the Taff Vale Railway Company to take its difficulties with the Amalgamated Society to the courts. The company had a dispute with the union over the terms and conditions of employment to be included in a collective agreement. The local branch of the union, against the advice of its London office, went out on strike to enforce its demands. But the local’s strike was conspicuously unsuccessful, so much so that the London office felt compelled to step in and help even though it had refused in the first instance to sanction the strike.

The company made strenuous efforts to maintain its work force and keep its services in operation, while the union made strenuous efforts to keep the company from operating effectively. As the strike progressed it became a bitter one and the strikers took drastic steps to interfere with those who tried to get to work and to interfere with the company’s use of its property.

The usual course of action in a situation like this was to prosecute the individuals who had engaged in lawless acts. The \textit{Conspiracy and Protection of Property Act} of 1875 defined certain of the acts to which pickets resorted in the course of violent strikes as crimes and provided penalties for those found guilty of engaging in them. Also, it was possible sometimes to have interferences with the use of property stopped by enjoining the individuals responsible for them.

But the Taff Vale Railway Company undertook not only to have the strike enjoined but also to bring suit not only against certain officers of the union but also against the union itself, in its own name, to recover damages suffered to its business as a result of the strike.

Counsel for the union moved to have the name of the Amalgamated Society struck out on the ground that it was an unincorporated association incapable of appearing in its own name to defend an action. The court ruled otherwise, and granted an interim injunction restraining two named officers of the society and the society itself.

The court held that the \textit{Trade Union Acts} of 1871 and 1876, under which the Amalgamated Society was registered, gave the union both the capacity to own property and the capacity to act through agents, two of the essential qualities of a corporation. Consequently, in the court’s view the union had power and influence. The court concluded that, under the circumstances,
it must have been the intent of the Legislature that such an organization should answer for any wrongs it might do. Farewell, J., states the court’s position thus:

Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents.17

The Court of Appeal reversed the decision of the lower court:

In order . . . that the action can be maintained against the defendants in the name of "Amalgamated Society of Railway Servants" there must be some statute enabling this to be done either by creating the society a corporation, or enacting that it may be sued in its registered name; and thus depends on the true construction of the Trade Union Acts of 1871 and 1876.

The Court of Appeal held that the Legislature knew how to state in plain terms that a trade union could be sued in its own name, but it did not do so. Therefore, the Legislature did not intend that a union could be sued in its own name. The Legislature provided merely for registration.

But, the House of Lords in a unanimous decision reversed the finding of the Court of Appeal and sustained the ruling of the original court. The Lord Chancellor, the Earl of Halsbury, stated his opinion thus:

If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.18

And Lord Macnaghten wrote:

Has the Legislature authorized the creation of numerous bodies of met, capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs they may do to other persons by the use of that wealth and the employment of those agents? In my opinion, Parliament has done nothing of the

18 (19011) A.C. 426 at p. 436.
kind. It is quite true that a registered trade union is not a corporation, but it has a
registered name and a registered office. The registered name is nothing more than a
collective name for all the members. The registered office is the place where it
carries on business. A partnership firm which is not a corporation, nor, I suppose, a
legal entity, may now be sued in the firm’s name. And when I find that the Act of
Parliament actually provides for a registered trade union being sued in certain cases
for penalties by its registered name, as a trade union, and does not say that the cases
specified are the only cases in which it may be so sued, I can see nothing contrary to
principle, or contrary to the provisions of the Trade Union Acts, in holding that a
trade union may be sued by its registered name.19

Following its successful appeal to the House of Lords, the Taff Vale Railway Company
proceeded with its action against the Amalgamated Society and in due course got
judgment against the Society for damages in the amount of $23,000.

The whole question of the status of unincorporated trade unions has been reviewed
thoroughly by the House of Lords in a recent decision, Bonsor v. Musicians Union, [1956]
A.C. 104. The House of Lords affirmed there the earlier decisions that an unincorporated
trade union, registered under the Trade Union Acts of 1871 and 1876, has a legal status
such that it may sue and be sued and damages may be recovered from its common
funds.20

The status that the Courts accorded unions, enabling them to sue and be sued in
their own names, is a new status at common law. This is so because it was a product of
the Courts’ deliberations on the substance of the statute, which deliberations resulted in
an amplification of the status explicitly set out in the statute. The Law Lords took what
seemed to them to be a logical step beyond the statute to make the trade union per se a
legal entity.

In Canada in 1901 there was no statute that served as the basis on which unions
could be found to be legal entities in the sense laid down in the Taff Vale case. The
Canadian Trade Unions Act of 1872, although superficially much like the Imperial statute
of 1871 did not put any pressure on trade unions to register and very few registered.
Since the dictum in the Taff Vale case is that registered trade unions are legal entities,
unions in this country could not qualify for this new status. The question of legal status

20 "But the Trade Disputes Act, 1906, 6 Edw. VII, c. 47, stands in the way of certain actions against trade unions. Section
4(1) of the Act provides: "An action against a trade union ... in respect of any tortious act alleged to have been
committed by or on behalf of the trade union, shall not be entertained by any Court".
that arose with the enactment in this country of collective bargaining legislation will be considered in a later section of this study.

Although the main dictum of the *Taff Vale* case had no immediate application in most Canadian jurisdictions, an *obiter dictum* was applicable. In the course of expressing their views on the main issue before them on the *Taff Vale* case, the ability of the union to defend an action in its own name, the Law Lords expressed the opinion that another form of action against the union was possible. Both Lord Macnaghten\(^{21}\) and Lord Lindley\(^{22}\) stated that a trade union whether registered or not might be sued in a representative action. Lord Lindley explained the procedure in this way:

... if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed...if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union.\(^{23}\)

This procedure was derived from a practice established in the old courts of equity. These courts faced the problem of dispensing justice in cases where large numbers of people had an interest in a single issue. The courts found that mere numbers in such cases sometimes made it impractical for a group to appear in court, with the result that someone, or perhaps many, might suffer an injustice through the failure of the court to function in such a situation. So the court began to entertain actions brought and defended by a few people appearing as representatives of a larger group. The court insisted, among other things, that the persons appearing were, in fact, representative of the larger group.

The business of the courts of equity was consolidated with that of the other courts in England in the late 19th Century and so certain practices of those courts were adopted by the High Court. However, until 1901 there appears to have been some uncertainty in the application of the rules governing representative actions in the High Court and there may still be some difficulties. But, just before it dealt with the *Taff Vale* case the House of Lords had dealt with a representative action undertaken on behalf of a group of market gardeners against the Duke of Bedford. In their decision in this case, *Duke of Bedford v. Ellis*,\(^{24}\) the Lords made it clear

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\(^{22}\) Ibid, p. 443
\(^{23}\) Ibid.
\(^{24}\) [1901] A.C. 1.
that representatives of a group such as a trade union might sue or be sued on behalf of all those in the group. Lord Macnaghten described the practice of the earlier courts in this way:

Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.  

This proposition became law in Canada, too, and provision is made for representative actions in Rule 75 of the Supreme Court as follows:

Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of all.

In the common law provinces there are numerous cases where actions have been brought by and against persons representing a group. These are considered in some detail in Body v. Murdoch, [1954] O.W.N. 658, a case in which representatives of one trade union tried to bring action against representatives of another trade union to recover damages.

The courts have been disposed to lay down rather rigid requirements that a plaintiff must satisfy if he is to proceed against a representative defendant. In particular the court must be satisfied that the group against which an action is brought has a common fund out of which the plaintiff’s claim could be paid. So in Barrett v. Harris, (1921) 51 O.L.R. 484; 69 D.L.R. 503, Middleton, J., states:

. . . in an action to recover damages for a tort the Rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as entitle the plaintiff to resort to that fund in satisfaction of his claim: in such case the trustees may be appointed to represent the general membership in defending the fund.

Mr. Justice Middleton’s statement of practice was approved in Robinson v. Adams, [1925] 1 D.L.R. 359. In the Ontario High Court of Justice, Marriott, Senior Master, dismissed an application for an order to appoint certain persons to represent the membership of a union and defend an action in Body v. Murdoch, [1954] O.W.N. 658. The court accepted the evidence of the secretary-treasurer of the union that the union’s funds were not sufficient to meet the plaintiff’s claims and that, if the plaintiff secured judgment against the union, the funds would have to be replenished by a per capita levy on the

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membership. The court held that the order should not be made because it would allow the plaintiff, if successful, to get what would in effect be a personal judgment against every member of the union for the tortious acts of only some of the members. This finding is in line with the rule established by the courts that the members of an unincorporated group, as individuals, are not to be held responsible for acts of the group as a whole.²⁶

The conclusion of this matter is that representative action is a procedure whereby actions may be brought by and against trade unions in the common law provinces. Thus it seems at first glance that a collective agreement is no longer unenforceable at common law because of the trade union's inability to appear in court as party to an action. However, this is not quite true, for the difficulties of suing by means of representative action may make the procedure impractical and so leave the status of a union, for all practical purpose, as it was originally at common law.

2. The Status of Collective Agreements at Common Law

One of the earliest cases in which a union tried to enforce the provisions of a collective agreement shows that it faced not only the problem of its own status but also the problem of the status of the agreement itself. Thus, in *United Mine Workers v. Strathcona Coat Company* (1908),²⁷ the union was unsuccessful. However, the court did not dismiss the case out of hand but took the trouble to explain in detail how the union and the agreement stood in the courts.

It should be noted, too, that the status of the union may affect the status of the collective agreement, for it may be argued that the union, a body with no status at common law, cannot make an agreement which has status at common law.²⁸

Young v. Canadian Northern Railway Company²⁹ is a case where an employee attempts to enforce the collective agreement under which he works, so that the union's status does not enter into the outcome.

The story of the Young case is briefly this: Young was hired by the Canadian Northern Railway Company on June 9, 1920, as a machinist and was told by the foreman who hired him that he would be paid the going rate. When Young was hired there was an agreement dated December, 1919, between the Canadian Railway War Board and Division No. 4, Railway Employees' Department, AFL. There was a wage schedule appended to the agreement and forming part of it. This schedule was revised from time to time while Young was in the employ

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of the company and he was paid the rate for his job in effect from time to time as shown on the schedule. His name appeared on the seniority list.

The agreement also contained rules that the railway company was to observe in its dealings with its employees. Rules 35 and 36 made provision for the handling of employees’ grievances and Rule 37 provided that an employee should not be discharged for any cause without being given an investigation. Rule 37 provided:

An employee who has been in the service of the railroad for over 30 days shall not be dismissed for incompetence nor be discharged for any cause without first being given an investigation.

The rules set out in the collective agreement were not posted by the company. However, copies of the rules were available and distributed to employees who asked for them.

On June 13, 1927, Young’s employment was terminated. A younger man with much less seniority than he was retained in his place. Young protested as best he could according to the procedures contained in the agreement. The trial judge expressed the opinion that he did all he could under the agreement.” He contended that he had been laid off contrary to the provisions of Rule 37, while an employee with less seniority than he had been retained.

The trial judge notes that at the time Young’s employment was terminated the company’s officials drew up a list of employees to be dismissed. They included Young in the list "because he was a proper man to get rid of". The trial judge expressed the opinion that this explanation did not establish that the company dismissed Young for cause and that there was no evidence establishing a cause for his dismissal. However, Young did not protest the company’s action on that basis.

The trial judge noted, too, that Young was not a member of the AFL union that had the collective agreement with the company, but a member of a rival union, the One Big Union. The judge suggests that the union had no interest, for that reason, in pursuing Young’s case. So Young might well have been "a proper person to get rid of" in the opinion of the union as well as in the opinion of the company.

Young’s position before the court was that he was laid off and that his layoff was in violation of Rule 27 of the collective agreement between the AFL union and the railway company. Thus Young’s case raises squarely the question of the status of the collective agreement which he alleged was applicable to his employment.

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30 [1929] 4 D.L.R. 452.
Young commenced his action against the railway company in the Manitoba Court of the King’s Bench, where his case was dismissed on the ground that the collective agreement was not in the form of a contract for it lacked mutuality and Young was not privy to it and had not ratified it.

Young’s appeal from the decision of the trial judge was dismissed in the Manitoba Court of Appeal and his appeal from that court was dismissed in the Privy Council.

Fullerton, J. A., in the Manitoba Court of Appeal found that there was no evidence to prove that Young had actually entered into a contract of employment with the company embodying the provisions of the collective agreement. He wrote:

There is nothing in the evidence to show that the plaintiff agreed to work under the conditions fixed by the rules. When his contract of employment was made he did not know of their existence. At what time then can it be said that the rules became a part of his contract? Wage agreements were made from time to time between Division No. 4 and the defendant. Which particular agreement governed plaintiff’s contract? Can it be said that every time a new wage agreement was made its rules automatically attached to his contract? All these considerations show how impossible it is, in the absence of evidence of some active assent on plaintiff’s part, to spell out for him a contract incorporating any of these rules.31

Fullerton, J.A., goes on to say that even if the contract had been written up in its existing form especially for the company and Young, it would be unenforceable because it lacked mutuality. Fullerton, J. A., pointed out that in the agreement the company binds itself to employ practically for life any workman whom it employs, but the workman is at liberty to leave at any time. This fact, he held, established lack of mutuality which he pointed out was defined in 13 Corp. Jur., pp, 331-2, par. 179 as follows:

Mutuality of contract consists in the obligation of each party to do so, or to permit something to be done, in consideration of the act or promise of the other . . . Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.

Thus where only one of the parties to an agreement binds itself to do something (the railway in this case undertakes to maintain certain conditions and employment) and the other party

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31 36 C.R.C 339 at p. 343
promises nothing in return (the union promised nothing), the agreement is not legally binding on either party.

Lord Russell wrote the opinion for all in the Privy Council. He agreed with the Manitoba Court of Appeal that the wage agreement was not in a form that adapted it for conversion into, or incorporation with, a service agreement so that the employer and employee could enforce it against one another. He went on to say that the company was under no obligation to apply the rules of the agreement to all employees and that it did offer them only because it was expedient to do so. Lord Russell stated further:

If an employer refused to observe the rules, the effective sequel would be, not an action by an employee, not even an action by Division 4 against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.32

There are several other cases which resemble the Young case closely both in the questions raised and in their disposition by the courts. Some of these, contain dicta that throw further light on the attitude of the courts to the collective agreement.

The earliest reported case is Bancroft v. Canadian Pacific Railway Company, (1920) 53 D.L.R. 272. Bancroft was employed as a telegraph operator by the railway company. One day in July, 1917, as he was leaving work, he met a carter in the yard who offered to sell him a crate of cantaloupes at an attractive price. Bancroft bought it without asking any questions. On July 27, 1917, he was arrested and charged with stealing a crate of fruit. On August 6 he was committed for trial at the preliminary hearing and on August 7 the Company discharged him. Bancroft was acquitted of the charge against him and applied for reinstatement in employment. His application was refused. Bancroft turned his problem over first to the local chairman of the telegraphers’ union that had a collective agreement with the railway company. Discussions with the company did not produce the result he sought, so he turned to the general chairman of the union for help. The company, however, persisted in its refusal to reinstate him.

Failing to achieve his purpose through the union and the investigation procedures contained in the collective agreement, Bancroft brought action against the company in the Manitoba courts to secure reinstatement in employment and to recover damages he alleged he suffered as a result of wrongful dismissal. He was not successful and the Manitoba Court of Appeal dismissed his appeal.

32 [1931] 1 D.L.R. 645 at p. 650
Fullerton, J. A., in his opinion in the Bancroft case stated that Bancroft had not submitted evidence proving the existence of the agreement on which he based his case, but that this failure was not important, for the existence of the agreement would not help his case. He explained:

It would be hopeless to urge that an agreement between the union and the defendant would enable every individual workman to attach the conditions of such an agreement to his own contract of service.

The object of the agreement is of course to secure uniform working conditions among the men and to provide means for the adjustment of disputes between them and the company and thereby prevent strikes. It is doubtful if such an agreement could be enforced at law even by the union itself, which has its own method of enforcement by going out on strike.33

Dennistoun, J. A., in his opinion stated that Bancroft’s employment was governed by common law rather than the agreement and so,

It is not necessary that the master dismissing a servant for good cause should state the ground for such dismissal; and provided good ground existed in fact it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts known subsequently to the dismissal, or on grounds differing from those alleged at the time.34

The court held that since Bancroft had participated in the investigation of his case that the company held, he was bound by its outcome and could secure no relief in a court of law.

The status of the collective agreement was examined much more thoroughly in Caven v. Canadian Pacific Railway Company, [1924] 3 D.L.R. 783; [1925] 1 D.L.R. 122; [1925] 3 D.L.R. 841. This case was begun in the Alberta courts and carried on appeal to the Privy Council.

Caven was a conductor in the employ of the Canadian Pacific Railway Company. The company dismissed Caven on the ground that he collected cash fares from passengers but did not turn them in. His dismissal followed a meeting at which officials of the company presented the charge to Caven and explained the evidence which led to their conclusion that he failed to turn in fares he had collected.

33 (1920) 53 D.L.R. 272 at p. 279
34 (1920) 53 D.L.R. 272 at p. 281.
Caven did not protest the company's decision at the time and did not appeal to higher levels of management or to the union but instead brought suit against the company to recover damages for what he alleged was wrongful dismissal.

Caven argued at his trial that the procedure by which he was found to have failed to turn in fares collected was not really conducted as a trial. The persons whose fares it was alleged he collected did not appear and no evidence was taken under oath. He alleged that justice was not done him at this meeting and that he was entitled to justice.

Caven appealed from the decision of the trial judge, who dismissed his case, to the Alberta Supreme Court. There Caven's appeal was dismissed on the ground that at the time the company confronted him with the reason for discharge he accepted the procedure by which the company explained the reasons and subsequently he did not take the final appeal step provided in the agreement. In view of his failure to appeal and to exhaust the possibilities of protesting against the company's action as the collective agreement entitled him to do, the court held that he was not entitled to relief in the courts. The Privy Council upheld this decision.

Clarke, J.A., supporting the decision of the Alberta Supreme Court, expressed the opinion that the document on which Caven based his action entitled "Schedule of rates and rules for conductors, baggagemen, brakemen and flagmen" was an agreement binding on the company and on Caven. But it appears that Mr. Justice Clarke regarded the substance of the agreement to be very meager indeed. He stated that without a contract for permanent employment, an employer could discharge an employee without cause, provided reasonable notice was given. He found that the agreement in this case gave an employee the advantage of a hearing before discharge. However, he did not find anything in the agreement to give an employee a hearing before discharge that would deprive the company of its right to discharge as it saw fit, even in the absence of reasons that could be established by legal evidence. He stated:

It must be that reasons frequently exist for terminating an employment which cannot be established by legal evidence to the satisfaction of a Court or jury and it would be strange indeed if in such a case the company would for a moment deprive itself of the right to manage and control its own servants according to the judgment of its own officers who have the responsibility of maintaining an efficient organization and affording a proper service to the public. ³⁵

³⁵ [1925] 1 D.L.R. 122 at p. 156.
Mr. Justice Clarke’s view seems to be that the agreement brought Caven certain advantages and that one such advantage was the provision for an investigation before dismissal. Were it not for that provision of the agreement, Mr. Justice Clarke held that the company could have dismissed Caven without giving him reasons.

Mr. Justice Clarke had some doubts about the extent to which the company was really legally obliged to go through with an investigation. His support of the finding that Caven’s appeal should be dismissed came from his conclusion that Caven himself went along with the initial steps of the investigation without protest and did not take the steps outlined in the agreement to appeal the outcome. Since he did not take full advantage of the procedure, he could not claim it was unjust.

Hyndman, LA., expressed the opinion that as long as the officer of the company who conducted the investigation acted in his quasi-judicial capacity fairly and gave the employee about to be discharged every reasonable opportunity to give and adduce evidence, the company’s decision must be accepted as final and binding.

Stuart, LA., thought that the wage schedule in the agreement was enforceable as between the company and an individual employee:

In so far as wages earned are concerned I think there is no doubt that an employee working under these rules and regulations could rely upon them in a Court of law to establish the amount owing him by the company.36

But he expressed the opinion that the article of the agreement setting out a procedure for the handling of charges against an employee was just a promise of fair dealing never intended by either party to operate in the field of law. He stated:

I can find nothing in the rules and regulations which obligated the defendant, as a matter of law, to retain any particular employee in its service permanently or indefinitely.37

He thought the employees never intended to bind themselves to accept the finding of the hearing because if they did so they would be allowing themselves to be tried on criminal charges before an official of the company.

Mr. Justice Stuart noted that the company had not agreed to arbitrate an employee’s claim that he should not be discharged and he expressed the view that a company could not undertake to pass control of such a question out of its own hands. He thought the

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37 Ibid. at p. 137.
company could dismiss an employee without holding the hearing provided in the agreement and that, should it do so, it must answer to a court of law if the question of wrongful dismissal were raised.

Aris v. Hamilton & Buffalo Railway Company, [1933] 1 D.L.R. 634, is an Ontario case. Aris, an employee of the Hamilton & Buffalo Railway Company, was injured in February, 1920, and lost an arm as a result of the injury. The Workmen’s Compensation Board awarded him $50 a month compensation for his injury.

In June, 1921, Aris was re-employed by the railway company as a switch operator and paid the regular rate for that classification. But in August, 1921, the company reduced Aris’s pay by $50 a month on the advice of the Workmen’s Compensation Board that such was not contrary to the Act.

The Brotherhood of Railway Trainmen, of which Aris was a member, objected to the reduction in Aris’s pay on the ground that it violated the wage schedule of its agreement with the company. But the Brotherhood either withdrew or abandoned its protest. Aris was discharged in July, 1931 and after that he brought action against the company to recover what he alleged were arrears in his wages.

Mr. Justice Logie, who decided this case, noted that the defence might have claimed estoppel by conduct, for Aris had worked for ten years at reduced wages well aware during that time that the reduction was equivalent to the sum he was receiving from the Workmen’s Compensation Board. But Mr. Justice Logie concluded that this case was the same as the Young case, that Aris had not followed the procedure for protesting his rate reduction through and was not entitled to any relief in the courts.

Edgeworth v. New York Central Railway Company, [1935] 4 D.L.R. 408, is the case of a baggageman dismissed for leaving a passenger alone in a baggage car. Edgeworth’s case was handled as a grievance by the Brotherhood of Railway Trainmen, but it was not carried through the entire procedure provided in the collective agreement.

The court felt that Edgeworth had had his grievance processed and had no further rights in that connection. The court expressed the view that the penalty imposed on Edgeworth, although heavy, was imposed by the company in its discretion and could not be altered.

Bertrand v. Canadian National Telegraph Company, [1947] 1 W.W.R. 762, [1948] 1 D.L.R. 209, was an action brought in the Saskatchewan courts by Bertrand, a telegrapher in the employ of the telegraph company to secure reinstatement in employment and damages for what he alleged was wrongful dismissal.
Bertrand had refused to recopy a social message as he was instructed to do by his supervisor. He was suspended and then dismissed.

Bertrand had resigned from the union some time before this incident occurred and so he made no attempt to process a grievance in the manner provided in the agreement between the company and the union. He went directly to the courts for relief.

Bertrand appealed from the decision of the trial judge to the Saskatchewan Court of Appeal. There his appeal was dismissed. The court held that Bertrand should have exhausted his rights under the collective agreement first before coming to the court. The court recognized the difficulty Bertrand had getting the union to take up his case since he had withdrawn his membership. But the court held that Bertrand resigned from the union knowing what was involved. He had deprived himself of the grievance procedure by his own action.

Wright et al, v. Calgary Herald, [1938] 1 D.L.R. 111, was an action brought by certain employees of the Calgary Herald for wrongful dismissal and for the enforcement of a collective agreement.

The Herald had been under agreement with the International Typographical Union when a dispute arose between its employees and the union regarding the establishment of a five-day work-week. The International adopted the policy of the five-day week but most of the Herald’s employees refused to go along with it, formed a new union, the Calgary Newspaper Printers’ Association affiliated with the All-Canadian Congress of Labour, and entered into an agreement with the Herald.

The new union gave all employees concerned an opportunity to join before the closed shop arrangement became operative. Wright and certain others did not join and on July 9, 1935, they found that their names had been removed from the list showing those who were available for work at the Herald. They considered themselves dismissed and commenced this action.

Wright and his associates contended that they had contracts of employment with the Herald in the terms set out in a collective agreement between the newspaper and Typographical Union No. 449 and that the Herald was in breach of these contracts when it dismissed them. The plaintiffs asked, too, for a declaration that the matters in dispute should be referred to arbitration as the collective agreement provided. It is significant that Wright was suing to enforce the old collective agreement while the main group of employees had signed a new agreement with the employer through a new union.
Wright’s case was dismissed by the trial judge and his appeal was dismissed by the Appellate Division of the Alberta Supreme Court following the Young and the Bancroft cases. Thus the courts found that the conditions set out in the collective agreement between the Herald and the Typographical Union No. 449 could not be attached to any contracts of employment Wright and the others had with the Herald.

Chief Justice Harvey pointed to Clause 5 of the agreement between the Herald and Typographical Union No. 449 as a significant part of the agreement:

> The party of the first part agrees to employ in its composing room and departments thereof members only of Typographical Union No. 449 provided said union furnishes enough competent members to enable party of the first part to issue its publications promptly and regularly. Party of the second part agrees to furnish such members.\(^{38}\)

Chief Justice Harvey found that that clause did not create any individual contracts of employment. However, he expressed the opinion that there was a contract, but that it was a contract between the Union and the Herald, not between each individual employee and the Herald:

> It is contended that the Union has contracted for its members, which I think is quite correct, but it was contracting for them collectively and not individually. It was a collective agreement in the full sense of the word. It is not a contract with the defendant that it will hire only union members on the terms specified in the agreement leaving it to make its contracts of service with the members it desires to employ but it is a contract by which the union will furnish the services just as an ordinary contractor would.\(^{39}\)

The courts also denied Wright’s request for a declaration that the matters in dispute should be referred to arbitration, holding that the right to resort to arbitration was the right of the union under the agreement and not the right of an individual employee.

Corbett et al. v. Canadian National Trade Union et al.\(^{40}\) resembles the Wright case in some respects. The employees of the Calgary Herald and the employees of the Albertan were together in Local No. 1, Calgary Printing Trades Union, that had a collective agreement with the two newspapers. The collective agreement that expired in 1941 provided a rate of 85 cents an hour for the employees in both papers, but for a night

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38 [1938] 1 D.L.R. 111 at p. 112.
scale of $2.40 a week for Herald employees only. The agreement provided, too, for a closed shop and hiring through the union.

The executive of the union, supported by a majority of the members, drafted a new agreement providing a 92 cent rate for the Herald’s employees and an 85 cent rate for the Albertan’s. The decision to agree to two rates was apparently prompted by the general conviction that the Albertan’s management would not pay more than it had been paying while the Herald’s management would agree to an increase in rates.

Employees of the Albertan objected to the provisions of the new agreement, voted against it at the meeting but, as a minority in the union, they were overruled.

In anticipation of the outcome of negotiations, some of the employees of the Albertan joined the International Typographical Union before the new agreement was signed. In the end, some of the Albertan’s employees resigned from Local No. 1, and some were expelled. The officers of the local union then went to the Albertan offices and removed the names of those who were no longer members of the local from the board listing those entitled to work. However, the plaintiffs in this case continued to work under the provision of the agreement that permitted the employer to return non-unionists when union members were not available.

Corbett and his fellow employees secured an interim injunction restraining Local No. 1 from interfering directly or indirectly with their contractual rights of employment. The trial judge, following a nine-day trial, granted a permanent injunction. However, the Alberta Court of Appeal, by a majority decision, allowed the union’s appeal on the grounds that Corbett and his associates had actually suffered no harm and that the union people were simply acting to protect their own interests. The court found, too, that under the collective agreement the union had the right to have its members alone employed and the Albertan was under obligation to employ only union members. This finding is consistent with the opinion in the Wright case that the collective agreement was a contract between the union and the employer for the furnishing of men. However, the court did not take any positive step to enforce the new collective agreement between the two newspapers on the one hand and Local No. 1 on the other. The court simply left the parties to apply the agreement as they understood it.

Devonald v. Rosser & Sons, [1906] 2 K.B. 728, is a case that illustrates one set of circumstances in which the provisions of a collective agreement are enforceable.

Devonald was employed by Messrs. Rosser & Sons as a piece worker in a tin plate plant under a set of rules providing rates of pay and providing that an employee could leave or be
dismissed only on 28 days notice, notice to be given on the first Monday only of each calendar month before 12:00 noon.

The company closed its plant down on July 20 and notified the plaintiff on August 3 that he was dismissed. Devonald brought action to recover damages for breach of an implied agreement to provide him with work between July 20 and August 31.

The trial judge found that the rules in question were posted and that when Devonald was employed both he and the employer must have known the terms and regarded them as part of the contract of employment. The court found, too, that there was no custom or usage in the trade supporting the employer’s action in closing down the plant as he did, throwing men out of work.

The trial judge gave judgment for the plaintiff and awarded him a sum equal to average wages for the period in question. The company’s appeal against the judgment was dismissed.

Ziger et al. v. Shiver & Hillman Company Limited, (1932) 41 O.W.N. 392; [1933] 2 D.L.R. 691, is a case in which the Ontario Court of Appeal reversed the decision of the trial judge awarding the plaintiff damages for breach of a collective agreement, but agreed with the trial judge that the collective agreement was in such a form that under ordinary circumstances it would have been enforceable.

The plaintiffs in the case sued individually for wages they alleged were due them by virtue of oral and written agreements.

The circumstances leading to this action were, briefly, as follows:

The company proposed to its employees that they leave the union, that it would leave the manufacturers’ association to which it belonged and that they sign a new collective agreement. The employees decided to go along with the company’s proposal and the parties drew up and signed an agreement. In the agreement the company recognized the right of the employees to organize and to deal with management through a committee. The company guaranteed the workers the right to their jobs and the committee agreed to supply extra help as it was needed. The agreement ran for one year, provided for a 44-hour work-week and the union scale of wages. The agreement was signed by representatives of the company and by all the employees, including the plaintiffs.

Then the Amalgamated Clothing Workers organized a strike against the company. Some employees were intimidated, others assaulted, some left the company, some joined the union, but the plaintiffs remained with the company. Then the company came to terms with the Amalgamated Clothing Workers and signed a closed shop agreement.
with it. The company dismissed the plaintiffs because they were not members of the union and they brought this action to recover wages.

The trial judge found that the agreement was not a mere nullity even though the plaintiffs were members of an unincorporated association. He noted that each of the employees had signed the agreement, that there was mutuality of obligation because the plaintiffs gave valuable consideration in leaving the union and the company promised them work. He thought the agreement was different from that in the Young case and the Bancroft case. He gave judgment for the plaintiffs with costs.

The Ontario Court of Appeal did not quarrel with the trial judge’s findings regarding the nature of the agreement between the company and the committee representing its employees. The Court of Appeal found that the agreement was made on the assumption that an independent shop would persist. Then "some higher authority" intervened and made it impossible for the employer to carry on an independent shop. This "higher authority" was responsible for the employer’s default and so he was not liable for the damages suffered by the plaintiffs. The court found, too, that certain of those who had signed the agreement broke away and joined the union, contributing to the employer's difficulty. The court concluded that there must be implied a term in the agreement relieving the employer of his obligations in these circumstances. Accordingly the court allowed the company’s appeal from the decision of the trial judge awarding Ziger and his associates damages.

National Coal Board v. Galley, [1958] 1 W.L.R. 161, is an English case where the court awarded the employer damages for costs incurred as a result of Galley’s failure to work as the collective agreement provided Galley was a supervisor, a member of the National Association of Colliery Overseers, Deputies and Shotfirers that had a collective agreement with the National Coal Board. Galley had a written contract with the Board dated March 1, 1949, in which specific mention was made of the collective agreement and in which it was noted that the contract was governed by the collective agreement. In 1952 the collective agreement was amended by the addition of provisions regarding work done on Saturdays. The agreement provided for weekly wages and that deputies should only work such days or part days or Saturdays as management should reasonably require to promote safety and efficiency.

In 1956 Galley and some others refused to work on certain of the Saturdays requested and the National Coal Board had to get substitutes to fill their places at a cost of £3/18/2 a shift. Finally the Board brought action for damages for breach of contract against Galley when he refused to work on June 16, 1956.
The court found that Galley’s contract of employment embodied the new provisions added to the collective agreement. The court held that by working under the new agreement Galley had made its terms part of his contract of employment. The court found that the employer had asked Galley to work at a time that was reasonable and that Galley was in breach of his contract of employment when he refused. The court awarded the Board £3/18/2 damages. However, the court did not squarely face the question of the contractual nature of the collective agreement.

The conclusion to be drawn from these cases is that normally collective agreements possess certain characteristics which, in the view of the courts, make them unenforceable at common law. An employee of a company under agreement with a union cannot enforce it as his contract of employment because he was not privy to it and did not formally ratify it. Such is normally the case for it is not common practice for all employees to enter into the agreement by signing it as they did in the Ziger case. And it is not normal practice in this country for an employee to have a written contract such as Galley had.

But even if all employees did take part in the making of the agreement and did sign it, the courts usually hold that it is still in its form unenforceable because it does not possess mutuality.

There are some expressions of judicial opinion in these cases that might tempt one to conclude that some members of the judiciary saw some substance in collective agreements. Clarke, J.A., in the Caven case thought the collective agreement bound the parties, but a reading of his full opinion reveals that the only specific part of the agreement he thought binding was the undertaking to go through the motions of investigating an employee’s grievance. In general, the courts leave the impression that they felt that the investigation procedures in such cases as the Young case, the Caven case and the Bancroft case, bring employees distinct advantages particularly in the way these procedures modify the rigorous application of the common law to employer-employee relations. However, it is clear that the courts’ view in those cases is that the common law, in the final analysis, governs, for it appears that an employer is not bound to change his decisions because investigation procedures exist and it is quite possible that he can ignore them altogether.

In the Wright case and the Corbett case there are opinions to the effect that there was an agreement and it was between the union, as a contractor providing labour, and the employer. However, there is no specific finding in either case that the agreement was an enforceable one. The decisions did not turn on that point at all. And there is in the Wright case explicit approval of the dictum in the Young case that unions have ways of their own to enforce collective agreements, namely, resort to the strike.
Then there is another opinion, in the *Bancroft* case particularly, that holds that the collective agreement is unenforceable because the parties do not intend to be bound by it. And Stuart, J.A., in the *Caven* case expresses the view that, apart from the wage schedule which he thought was enforceable, the agreement consisted essentially of promises of fair dealings and as such they were unenforceable.

Finally in the *Young* case and in the *Bancroft* case there is the dictum that collective agreements are not enforceable in the courts either by the unions or by employees because unions have their own device of enforcement, the strike. But even that dictum is ignored in the *Hollywood Theatres* case.

*Hollywood Theatres v. Tenney*, [1939] 1 D.L.R. 798; [1940] 1 D.L.R. 452, is a case where the union concerned resorted to strike action to enforce the collective agreement it had with the company operating the Hollywood Theatre in Vancouver and the company succeeded in getting an injunction restraining the strike and damages for losses suffered. The decision of the trial judge was upheld by the British Columbia Court of Appeal.

This dispute arose at a time when the regulations regarding the number of projectionists required in a theatre was in a state of flux. The regulations had required two licensed projectionists, but an amendment reducing the number to one was held suspended by order-in-council. Eventually the original regulation requiring two projectionists was retained and in the interval the Projectionists’ Union had succeeded in retaining provision for two licensed projectionists in its collective agreements with theatre owners.

The owner of Hollywood Theatres signed with the union. However, he proposed and the union agreed that the provision "the party of the first part agrees to employ only projectionists supplied by the party of the second part" should be amended by adding a second sentence: "Except and only when members of the family of the party of the first part are not available”.

The courts accepted the owner’s statement that he explained to the union that the amendment would enable him and his son when the latter became licensed — to be the two operators and that they would eventually need no projectionists from the union.

The owner’s son secured his license in March, 1938 and the owner dismissed the one union projectionist in his employ after giving him notice as the agreement provided.
The union took the view that the clause in question required the company to employ at least one union projectionist and that there was an understanding apart from the agreement to that effect. The owner took the opposite view. The union set up a picket which the court found developed into a mass demonstration. The owner brought action for an injunction restraining the picketing and for damages.

The Court of Appeal noted that the Trade-unions Act, R.S.B.C. 1936, c. 289 under Section 4, provided that trade unions were exempted under certain circumstances from liability for publishing information regarding a labour dispute or warning or urging workmen not to seek work. But the majority of the court concluded that the union's actions in this case went beyond those contemplated in the statute.

The opinion of the majority of the court was summed up by O'Halloran, J.A., when he stated that this was not an ordinary labour dispute within the meaning of the statute but a controversy regarding the interpretation of a contract. Mr. Justice O'Halloran went on to say that a union cannot force its interpretation of a collective agreement on an employer as the union was doing here, and that a union cannot compel an employer to accept its interpretation of an agreement without recourse to the courts!

This definition of the term "labour dispute" probably goes back to the rather narrow interpretation given that term as it was used in English statutes prior to the Trade Disputes Act of 1906. However, it is a definition that applies in many jurisdictions in Canada under present statutes, but with a significant difference. The British Columbia Court of Appeal ruled that a strike to enforce a collective agreement is not a labour dispute and sent the union people to the courts with their troubles — a place where they could get no relief. Existing statutes, such as the Ontario Labour Relations Act, also state, in effect, that a strike to enforce a collective agreement is not a labour dispute. For that Act declares that a strike undertaken when an agreement is in effect is unlawful. But the Ontario Act provides a place for the unions to go with their troubles where they can get relief — to arbitration.

It appears then, either that the Hollywood Theatres case was bad law, or a collective agreement was not enforceable at all, not even by resort to strike or lock-out.
CHAPTER III

THE COLLECTIVE AGREEMENT UNDER STATUTE LAW

1. The Conciliation Era

The first Canadian statute relating to trade unions was the federal Trade Unions Act of 1872. Patterned after the Trade Union Act, passed by the British Parliament in 1871, it was apparently intended to give unions some legal status and some relief from the legal disabilities under which they carried on. It clearly was not intended to change the common law status of collective agreements for its section 4(1) says so. However, the Act applies only to registered unions and few have registered, so that its effects have been insignificant. Moreover, sections 409 and 410 of the Criminal Code seem to give all trade unions part of the relief provided for unions registered under the Act by relieving them of liability to prosecutions as criminal conspiracies in restraint of trade.

The first Canadian statute that might possibly have affected the enforcement of collective agreements was the Trades Arbitration Act passed by the Ontario Legislature in 1873. This statute, described as an act to facilitate the adjustment of disputes between Masters and Workmen, provided that a group of masters and a group composed of their workmen might agree to form a Board for the friendly settlement of differences between them and that, upon registering their agreement in the Registry Office of the County, they could appoint a Board with power to hear and make binding decisions on their disputes. Thus the Act made provision for the voluntary establishment of a bona fide arbitration tribunal with authority to deal effectively with any dispute submitted to it. So it seems that it was open to the parties that established a Board, to submit their disputes involving the enforcement of their collective agreements to arbitration. However, there was nothing in the statute making it obligatory for one party to submit to an arbitration initiated by the other, even in cases where a Board had been established. Moreover, it seems to be true that, at that time, collective agreements had not developed to the point where their enforcement by a judicial tribunal was a matter of much concern to anyone. The public was more concerned about strikes undertaken to establish terms and conditions of employment. In this area the statute in its original form was useless, for its section 4 provided:

41 Statutes of Ontario, 1873, c 36.
but nothing in this Act contained shall authorize the said Board to establish a rate of wages or price of labour or workmanship, at which the workman shall in future be paid.

This provision was not in the statutes of Ohio, Pennsylvania or New Jersey, which appear to be the source of the legislation.\(^43\)

In 1890 the *Trades Arbitration Act* was amended to extend the jurisdiction of Boards established by joint agreement to questions of wages. But the Act remained a dead letter and it was repealed in 1911.

Then in 1888 the Legislature of the Province of Nova Scotia passed the *Mines Arbitration Act*\(^44\) that provided for the establishment of an arbitration board to deal with disputes in the mines regarding wages. The Act forbade strikes and lock-outs before the procedures prescribed were followed, and conferred on a board powers which should have enabled it to function effectively. However, the Act in its original form was not put into operation, and in a form slightly amended in 1890 it was used only once. But it was not designed to deal at all with the sort of dispute under consideration in this study—disputes regarding the administration of the collective agreement. It was intended to provide machinery for the settlement of disputes over the content of the agreement.

In the *Report of the Royal Commission on the Relations of Labour and Capital*, 1889, Mr. Jules Helbronner, a member of the Commission, pointed to the French "Conseils des Prud’hommes" as successful and desirable devices for resolving disputes between labour and management. Mr. Helbronner explained that the "Conseils" try first to bring about agreement between the parties to a dispute and so administered what appears to have been a sort of grievance procedure, but with third party intervention. If the "Conseils" failed to settle a question by the first method, they would proceed to sit and hear the case and hand down a binding decision.

The "Conseils" dealt with disputes that we would describe as disputes regarding the interpretation, application, administration of an agreement. They could hand down binding decisions on such disputes. They also dealt with disputes regarding the terms and conditions of employment to be agreed upon by the parties, wage rates, hours of work, etc., but in this area they could not make binding decisions.

Two Canadian statutes follow the pattern of these "Conseils". In 1894 the Ontario Legislature passed the *Trade Disputes Act* (57 Vict. c. 42), "an Act respecting councils of

\(^{43}\) *Report of the Royal Commissions*, p. 95.

\(^{44}\) Statutes of Nova Scotia, 1888, c. 3.
conciliation and of arbitration for settling Industrial Disputes”. This Act provided for ad hoc conciliation boards and for two permanent arbitration boards, one for the railways and one for other industries. Conciliation was to precede arbitration, except where one party refused to participate, but arbitration was avoidable and in any case the award was binding only by joint consent of the parties.

The *Trade Disputes Act* did not prove successful and amendments in 1897, making it more difficult for a party to avoid the arbitration procedure and increasing the conciliatory powers of the arbitrators rather than their powers to make binding decisions, added nothing to the success of the measure.

The British Columbia *Labour Conciliation and Arbitration Act*, passed also in 1894 (57 Vict. c. 23), followed an act passed in 1893 establishing a bureau of labour statistics and making provision for the arbitration and conciliation of labour disputes. But British Columbia’s Act was less elaborate than Ontario’s and provided that both councils of conciliation and councils of arbitration should be ad hoc. In 1922 the Act was repealed.

In the early 1900’s several statutes were passed providing conciliation services. The federal Parliament passed the *Conciliation Act* in 1900. The Legislature of Quebec passed the *Trade Disputes Act* in 1901. The federal Parliament passed the *Railway Labour Act* in 1903 and in the same year the Legislature of Nova Scotia passed the *Conciliation Act*. Then in 1906 the two federal statutes, the *Conciliation Act and the Railway Labour Act*, were consolidated in the *Conciliation and Labour Act*.

The federal *Conciliation Act* and Quebec’s *Trade Disputes Act* were alike in that they provided for the registration of conciliation boards established by parties to disputes. They are alike, too, in that each bore some resemblance to the French "Conseils des Prud’hommes" in their provision of a form of arbitration where conciliation failed. But the federal Statute made provision for the Minister to intervene in disputes, if he saw fit, by inquiring into their causes and taking steps to see that the parties met to discuss their difficulties. The Minister was empowered, too, to appoint a conciliator if the parties requested one and to have a commissioner appointed under the *Inquiries Act*, with the consent of the parties, to investigate a dispute. After 1900 the Quebec statute and the Ontario statute mentioned earlier were amended to provide for governmental intervention to promote settlements of disputes.

The *Railway Labour Act* differed from the others in giving the Minister an active part in establishing committees of conciliation and boards of arbitration to deal with disputes on the railways. It also provided that a board of arbitration should make recommendations for the settlement of a dispute and that these recommendations should be
published. Thus conciliation under this Act was not quite as voluntary as it was under the other statutes. The procedure could well produce a recommended settlement that the parties would find difficulty in avoiding.

In 1906 the Ontario Legislature passed the *Railway and Municipal Board Act* dealing with disputes on steam and electrical railways and later, by amendment, with disputes in public utilities. The Act contained a unique provision that empowered the Railway and Municipal Board to take over the operation of a railway in certain instances to protect the public. These conciliation services were used.

The "conciliation era" in labour relations culminated in the *Industrial Disputes Investigation Act* passed by the Parliament of Canada in 1907. The Act originally applied only to coal mining, to transport and communications, and to gas, electric, water, and power works, but it made conciliation services available to parties in other industries who asked for them.

The jurisdiction of the Dominion to deal with disputes in the industries originally listed in the Act was questioned first in 1911, again in 1917, and then more effectively in 1923. In the latter year the Toronto Electric Commissioners secured a restraining order halting the proceedings of a Board of Conciliation established to deal with a dispute between the Commissioners and employees of the street-railway. The case was taken eventually to the Privy Council which held that the Act dealt with property and civil rights, subjects reserved to the provincial legislatures.\(^{45}\)

Following the decision of the Privy Council, the *Industrial Disputes Investigation Act* was amended to restrict its application to matters within the jurisdiction of Parliament. At the same time, it was provided, by amendment, that any provincial legislature might pass legislation extending the provisions of the Act to disputes that came under provincial jurisdiction. By 1932 most provincial legislatures had passed this enabling legislation. However, there was some question about the authority of provincial legislatures to delegate their powers — a question that was not finally answered until the Act had passed out of existence.

The *Industrial Disputes Investigation Act* made it an offence for an employer to lock out his employees or for employees to go on strike until their dispute had been submitted to a board of conciliation and the board had completed its work.

The Minister of Labour was empowered originally to appoint a board of conciliation only on the application of one or the other of the parties to a dispute. But amendments to the

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Act empowered him to appoint a board at the request of a municipality if a strike had occurred or on his own motion if a strike had occurred or seemed imminent.

A request for a board of conciliation to be established under the Act had to be accompanied by convincing evidence that the dispute was serious enough to justify the appointment of a board. In practice this requirement prompted unions to take strike votes and get authorization from their memberships to strike if necessary. Thus to get a board of conciliation to resolve a dispute, a union might have been prompted to take a preliminary step that would aggravate the difficulties facing the parties.

The primary duty of a board of conciliation was to effect a settlement of the dispute which occasioned its appointment. Failing a settlement, the board was to report to the Minister and include in its report its "recommendation for the settlement of the dispute according to the merits and substantial justice of the case" (section 25).

A board’s recommendations were not binding upon the parties to a dispute unless they agreed to be bound. But it was the intent of the Act to put the pressure of public opinion behind a board’s recommendation. So section 29 of the Act provided, in part:

... the Minister may distribute copies of the report, and of any minority report, in such manner as to him seems most desirable as a means of securing a compliance with the board’s recommendation.

There were, then, two elements of compulsion in the Industrial Disputes Investigation Act, but the degree of compulsion depended on the circumstances in which the parties found themselves. In the first place, the parties to a dispute might not be able to pursue their differences vigorously without first clearing the way by going through the process of conciliation. Then they could strike or lock-out as the case might be. So there was compulsion in the fact that conciliation was a necessary preliminary to a lawful strike or lock-out. In the second place, the parties might find that the process of conciliation with its board’s report and recommendations created pressures on them such that they could not avoid making some sort of settlement of their differences. On the other hand, one or both of the parties might be able to circumvent the whole process by evasive action of one sort or another. This latter possibility was very real because of the official view that more could be accomplished by emphasizing the mediatory and conciliatory aspects of the process than by emphasizing its curial aspects and by the reluctance of the Minister to impose the penalties provided for infraction of the Act.
The provisions of the *Industrial Disputes Investigation Act* made no attempt to classify labour-management disputes or to provide different remedies for different issues. The Act's definition of a dispute was very broad. Section 2(d) reads in part:

"dispute" or "industrial dispute" means any dispute or difference between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, or as to privileges, rights and duties of employers and employees, not involving any violation thereof as constitutes an indictable offence. . . ."

This broad definition certainly included any dispute that might arise out of the administration of a collective agreement. In fact, section 2(d) lists disputes regarding the interpretation of a collective agreement as one type of dispute that falls within the definition. Thus the *Industrial Disputes Investigation Act* was the first Canadian statute to make specific, though brief, reference to the question of enforcing a collective agreement. And, of course, the process of enforcement was the same as that applied to other disputes, conciliation with final resort to strike or lock-out if no settlement of the matter emerged. However, the processes of the *Industrial Disputes investigation Act* were ill-suited to the settlement of disputes arising out of the administration of the collective agreement. The procedure for the reference of disputes to the Minister did not facilitate the submission to boards of conciliation of small, recurring matters such as those commonly forming the basis of employees' grievances. In particular, the requirement in section 16(2) of the Act that the applicant for conciliation declare and show that the dispute was serious led to the practice of taking strike votes that is noted above. No doubt some apparently trivial unresolved grievances involve principles that prompt unions to take strike positions, But most unresolved grievances do not create emergencies that justify the use of such ponderous devices as boards of conciliation. That probably explains the fact that very, very few boards were established to deal with disputes arising out of the administration of collective agreements.

There seems to be very good reason for the failure of the legislatures to give any special consideration to disputes regarding the interpretation, application, administration and alleged violation of collective agreements. Such disputes were not considered to be important. A search of the tables in the Department of Labour's annual report *Strikes and Lockouts in Canada* down to 1943 reveals very few instances where the reported cause of a strike seems to be an attempt to enforce a collective agreement. For example, as late as 1932 only 3 of the 111 strikes reported for the year seem to be the result of attempts to
enforce collective agreements. In 1933 one reported strike out of a total of 125 was an attempt by millinery workers in Toronto to put pressure on their employer who, they alleged, violated the agreement they had with him.

It is equally difficult to find cases where boards of conciliation were appointed to deal with disputes arising from attempts to enforce collective agreements. But there are a few cases in the later years of the Act’s operation; for example, in April, 1940, a board reported on a dispute between Canadian National Railways and Canadian Brotherhood of Railway Employees, that the railway had violated a section of its agreement with the union. The board recommended that the railway rectify the trouble. Then, later in the same year, a board was established to deal with a dispute at McKinnon Industries Limited resulting from the employees’ rejection of an arbitrator’s award. And in December, 1940, a Montreal local of the United Association of Plumbers and Steamfitters applied for a board to deal with its allegation that an employer had failed to pay board and transportation allowances as his agreement with the union provided.

Although disputes growing out of the administration of collective agreements did not attract public attention and so prompt the formulation of special processes to deal with them, such disputes were of some importance in particular areas. For example, during World War I disputes between the railways and their employers regarding the administration of collective agreements were sufficiently serious to lead the Canadian Railway War Labour Board and certain unions to agree to a procedure for the settlement of such differences.

So in 1918 the Board and six unions signed an agreement establishing Canadian Railway Board of Adjustment No. 1. The agreement stated that the Board of Adjustment,

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\text{Shall have full power and authority to determine all differences which may arise between any of the said railways and any of the classes of its employees above-mentioned.}
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The Board of Adjustment consisted of twelve members, six selected by the railways and six by the union. It had a chairman and vice-chairman selected by the Board itself, for a term of one year, and a secretary appointed by the chairman with the approval of the Board.

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The Board met regularly in Montreal with either the chairman or vice-chairman presiding. The Board also had authority to delegate certain of its members to meet elsewhere, but not to make final decisions themselves on issues before them.

The Board was empowered to hear disputes only after they had passed through a prescribed procedure administered by each railway concerned and the union concerned. The Board’s decision was by majority vote, the chairman voting with the rest. If a member of the Board submitted a case to the Board for determination then he and his opposite on the Board would refrain from voting on the question.

If the Board could not reach a majority decision, the dispute could be submitted to a referee agreed upon by the Board or, failing agreement, appointed by the Minister of Labour.

The agreement that created this Board of Adjustment formally passed out of existence when the Canadian Railway Labour Board was abolished. However, the Board of Adjustment was continued by a new agreement in 1921 between the Canadian Railway Association, acting on behalf of the railways concerned and the same six unions. Its cost is borne jointly by the Association and the unions that are party to the agreement.

Canadian Railway Board of Adjustment No. 1 has continued to deal with disputes unresolved by grievance procedure and devotes most of its time to questions that fall clearly in the classification of differences regarding the interpretation, application, administration and alleged violation of collective agreements. The Board is an outstanding example of a private institution that settles private quarrels privately and effectively. But apparently the parties decided that the Board outlived its usefulness and it has been abolished. A new agreement between the two large railways and four unions established a one-man tribunal to replace the Board.50

Canadian National Railway Employees Board of Adjustment No. 2 was established in 1925 by agreement between the Canadian National Railways and certain unions representing the railways’ clerks and certain other employees. This Board performed the same general function as Board of Adjustment No. 1, disposing of disputes regarding the application, non-application or interpretation of schedules of working conditions under which the employees concerned were employed. But Board of Adjustment No. 2 has not continued. Its last report in The Labour Gazette appeared in 1941.

There are other examples that are less conspicuous than the two Boards of Adjustment just described. For example, as early as 1908 an agreement between George Hall Coal

50 Ibid., Vol. LXIV, p. 371.
Company, Prescott, Ontario and Local Union No. 244, I.L.M.W. & T.A. provided that there would be no work stoppage in the case of unadjusted disputes pending the submission of the matter to an arbitration board whose decision was to be final and binding on the parties.\textsuperscript{51} And an agreement in 1910 between the Montreal Builders’ Exchange and the Bricklayers’ and Masons’ International Union No. 2 provided for a Joint Committee to deal with disputes and for reference to an umpire when the Committee could not agree. The umpire’s decision was to be final and binding. Quite a number of agreements provided for grievance procedures, but few spelled out the details. Others, particularly on the railways, provided that an employee disciplined or discharged was entitled to an investigation of his case. Some few provided that unresolved grievances might be submitted to arbitration.

In 1940 a conference in Halifax attended by representatives of the federal Department of Labour, the provincial Department of Labour, the Dominion Steel and Coal Corporation, the Nova Scotia Steel and Coal Corporation, the Cumberland Railway and Coal Company, and District 26 of the United Mine Workers of America, accepted a recommendation that the agreements between the companies and District 26 make provision for a Joint Board of Adjustment. The Board was to be composed of three members, one appointed by the companies, one by the union and one by these two appointees with resort to the Minister of Labour for Canada in case of disagreement on the latter appointment. The Board was to serve for the duration of the agreement and to have authority to make final and binding decisions on grievances arising out of the collective agreement.\textsuperscript{52}

These examples are by no means exhaustive, but they are no doubt sufficient to show that, although there was little public concern about contract administration disputes during the "conciliation era", there was concern in particular situations. In these situations the parties concerned adopted their own measures to deal with the problem of enforcing their collective agreements.

\section*{2. The Collective Agreement Under Wartime Regulations}

In the years immediately preceding World War II, labour-management relations in Canada were influenced by the aggressive CO organizational campaigns of the period and under the New Deal philosophy in the United States which gave rise to the Wagner Act in that country. But both the growth of the new CIO unions and the enactment of statutes governing collective bargaining proceeded more slowly in Canada than in the United States. True, at the outbreak of the war there was already an impressive list of provincial legislation. Beginning with Nova Scotia in 1937 all the provinces except Ontario and Prince

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\textsuperscript{51} Ibid., Vol. XIV, p. 476.
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\textsuperscript{52} Ibid., Vol. XL, p. 1239.
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Edward Island had statutes dealing with collective bargaining. However, those statutes really did nothing but declare the right of people to join unions, to bargain collectively with their employers and to be free from discriminatory pressures that might prevent their organizing and bargaining. They provided no administrative boards to make them really effective. So at the outbreak of World War II, effective public policy in Canada regarding labour-management relations was still that set out in the compulsory conciliation procedure of the *Industrial Disputes Investigation Act* of 1907.

The federal government’s first wartime measure was to extend the application of the *Industrial Disputes Investigation Act*. Order-in-Council, P.C. 3495, of November 1939 brought all defence projects and all industries producing munitions and war supplies under the statute. Almost two years later, in September 1941, the restrictions of the statute on the resort to strike were increased by Order-in-Council, P.C. 7307, which made it unlawful for employees to strike, even after the conciliation process was completed, until the strike had the approval of the employees concerned expressed in a strike-vote conducted by the Department of Labour.

Meanwhile, other elements of the government’s wartime labour relations programme had appeared. On June 19, 1940, the federal government issued a declaratory Order-in-Council, P.C. 2685, for the guidance of Boards of Conciliation and for the information of the public. The Order contained four propositions:

1. Fair and reasonable standards of wages and working conditions should be established.
2. Employees have the right to organize and to bargain with their employers.
3. Labour-management disputes should be resolved by negotiation and conciliation.
4. Collective agreements should contain grievance procedures to deal with disputes arising out of their administration.

The fourth proposition is the first statement of specific public policy dealing with the question under consideration here — the enforcement of the collective agreement.

The first of the federal government’s major wartime regulations was foreshadowed by P.C. 7440, December 1940, and P.C. 4643, June 1941. Those Orders-in-Council introduced wage controls in war industries and provided for the adjustment of wage rates to changes in the cost of living, and they contained statements of policy for the guidance of boards of conciliation. Then in October 1941, a thorough-going system of wage control was introduced with P.C. 8253 and an administrative board was provided to make the regulations effective.
There was a good deal of objection to the government's slowly developing policies both on the part of management and on the part of labour. From labour's point of view the government was slow in making provision for employees to exercise their declared right to join unions and to bargain. The unions were critical, too, of the "wage freeze" which deprived them of one of their best areas of operation — the negotiating of wage schedules. Employers, for their part, were not opposed to a "wage freeze". They were concerned about the possibility that the declarations of principles would lead to statutes like the Wagner Act which would compel them to bargain with unions. And many of them resisted vigorously and successfully both the unionization of their operations and collective bargaining. In the end, there was a compromise. The unions accepted the government’s "wage freeze" policy and the employers accepted compulsory collective bargaining.

Meanwhile, the inadequacy of boards of conciliation to deal with the number of disputes that arose in the period was recognized when P.C. 4020, June 1941, (amended in July by P.C. 4844) was issued to empower the Minister to appoint commissions to deal with the numerous and miscellaneous variety of disputes that were arising in increasing numbers. These commissions were much better suited than boards of conciliation to deal with disputes regarding the administration and enforcement of collective agreements. However, their main use was in cases of alleged discrimination, refusal to recognize unions and refusal to bargain.

The whole matter of labour-management relations was thoroughly aired in 1943. There was an inquiry in Ontario, another conducted by the National War Labour Board, and numerous consultations among government people and between them and groups representing labour and management. Two provincial statutes were enacted during the course of those discussions. The Legislature of Ontario passed the Collective Bargaining Act (Statutes of Ontario 1943, c. 4), and British Columbia amended its Industrial Conciliation and Arbitration of 1937 (Statutes of British Columbia 1943, c. 28). Both those statutes went beyond mere declarations of the right of employees to join unions and bargain through them to establish effective administrative machinery. In Ontario a special section of the High Court, the Labour Court, was established to administer the Act. In British Columbia the administration of the Act was put in the hands of the Minister of Labour.

The Collective Bargaining Act of Ontario was the first statute in Canada to make specific provision for disposing of disputes regarding the interpretation of a collective agreement. Its section 14 provided:

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Any party to a collective bargaining agreement made under the provisions of this Act on written notice to the other party there to, may apply to the court to construe, and the court shall have the power to construe, the provisions of such agreement.

The Collective Bargaining Act was not long in operation. In 1943 the National War Labour Board made its report on labour relations and wage conditions and the Ministers of the federal and provincial governments conferred on the question of suitable policy. In due course, the federal government issued the Wartime Labour Relations Regulations, P.C. 1003, February 1944, containing a comprehensive labour code to replace the Industrial Disputes Investigation Act as extended to war industries and to fit into the pattern of the wage and price control measures. The Ontario statute gave way to this new arrangement. By the Ontario Labour Relations Board Act, 1944, P.C. 1003 was made applicable to all industry in the province and the whole application of the order was put under the Ontario Labour Relations Board from whose ruling an appeal lay to the National Labour Relations Board. Most of the other provinces followed Ontario’s lead, but Alberta and Quebec made somewhat different arrangements.

P.C. 1003 was a combination of three distinct elements. In the first place it clearly established the right of employees to organize free from the interference of employers and their right to elect bargaining representatives and to bargain with employers through such representatives. The Order derived this feature from the Wagner Act, but it was in accordance, too, with a recommendation contained in the report of the National War Labour Board on its "Inquiry into Labour Relations and Wage Conditions". Like the Wagner Act, the order provided an administrative board, the Wartime Labour Relations Board, (and certain regional boards under provincial jurisdiction) to administer its provisions.

In the second place, the Order took over the broad features of the compulsory conciliation procedures of the Industrial Disputes Investigation Act, but it made these procedures available only in cases where the dispute arose during the negotiation of a collective agreement. The Order did not require such conclusive evidence regarding the seriousness of a dispute as the Industrial Disputes Investigation Act did, so its requirements did not prompt unions to take strike votes as preliminaries to an application for conciliation. But the Order established a new step in the procedure. It provided that a dispute should go first to a conciliation officer who should try to settle it. If the officer was unable to bring about a settlement, he could recommend that the Minister appoint a Conciliation Board.
Finally, the Order followed the recommendations of the National War Labour Board’s report in providing that every collective agreement should make provisions for the settlement of any differences between the parties to it regarding its interpretation or violation. So section 18 of the Order provided:

18.(1) Every collective agreement made after these regulations come into force shall contain a provision establishing a procedure for final settlement, without stoppage of work, on the application of either party, of differences concerning its interpretation or violation.

(2) Where a collective agreement does not provide an appropriate procedure for consideration and settlement of disputes concerning its interpretation or violation thereof, the Board shall, upon application, by order, establish such a procedure.

The third element in Order-in-Council, P.C. 1003, and the one that interests us particularly, is the use made of the collective agreement as a device to stabilize labour-management relations. Broadly speaking, the intent of the Order was that the signing of a collective agreement should bring to a very definite and final conclusion all major issues between the parties signing it, so that the wages, hours, and other terms and conditions of employment contained in it should prevail for at least one year. For the Order’s injunction that "the parties shall negotiate in good faith with one another. . .” (section 10(2)) directed them only to ". . . make every reasonable effort to conclude a collective agreement" (section 10(2)). Thus, if the parties succeeded in reaching an agreement they satisfied the obligation imposed on them by section 10(2). While a collective agreement was in operation, neither party was required to comply with the request of the other to open negotiations for the revision of wages, hours or other terms and conditions of employment. Either party to a collective agreement could, in effect, require the other to postpone negotiable issues until the existing collective agreement could be re-negotiated. At that time, the parties were required to enter into negotiations to renew the agreement and, to use the language of the Order, "enter into such negotiations in good faith and make every reasonable effort to secure such a renewal" (section 16).

Of course, it was necessary that P.C. 1003 should regulate the collective agreement to make it serve the intended purpose. First of all, section 2(1) (d) of the Order defined the collective agreement as:

. . . an agreement in writing between an employer or an employers’ organization on the one hand and a trade union or an employees’ organization
on the other hand containing provisions with reference to rates of pay, hours of work or other working conditions.

Then section 15 required that a collective agreement be for a period of not less than one year, and section 21(3) provided:

No employer who is party to a collective agreement shall declare or cause a lockout and no employee bound thereby shall go on strike during the term of the collective agreement.

Section 21(3) was supported by sections 40 and 41 which made it an offence, punishable by fine, for an employer to lock his employees out, for an employee to go on strike or for a trade union to authorize a strike in violation of the regulations. However, neither the Board charged with the administration of the Order nor the Minister was required to prosecute offenders. It was left to the employer who suffered from a strike or the trade union that experienced a lock-out to institute the prosecution. And according to section 45 of the Order, no prosecution was to be instituted without the consent of the Board.

In addition to section 21(3) which was intended to give stability to the collective agreement by forbidding strikes and lock-outs during its term, section 10(5) made a collective agreement rather loosely binding on the parties. It provided:

Every party to a collective agreement and every employee upon whom a collective agreement is made binding by these regulations shall do everything he is, by the collective agreement, required to do and shall abstain from doing anything he is, by the collective agreement, required not to do.

That injunction to observe the collective agreement was perhaps supported by section 42 which provided penalties for those who contravene any of the provisions of the Order. But again, the prosecution of the offender was left to the party suffering at his hands and could only be instituted with the consent of the Board.

The final and very necessary element in this use of the collective agreement was provision for the disposition of the day-to-day disputes and disagreements that are characteristic of union-management relations. That was accomplished by providing in sections 17 and 18 of the Order that every collective agreement was to contain a provision establishing a procedure for the final and binding settlement, without stoppage of work, of all differences concerning its interpretation or violation. Thus the Order assigned the task of enforcing the collective agreement not to the Board charged with the administration of
the regulations, but to the parties to the agreement themselves. The Order left the parties free to select the procedures that seemed to them most desirable, providing only that should they fail to agree on a procedure the Board would, on application, establish one.

Of course, in making the collective agreement an instrument of public policy, the Order also increased the stature of trade unions. For a trade union could become, in effect, the bargaining agent of a group of employees under the provisions of section 5(2) of the Order:

If the majority of the employees affected are members of one trade union, that trade union may elect or appoint its officers or other persons as bargaining representatives on behalf of all the employees affected; . . . .

Furthermore, a trade union was recognized as competent to enter into a collective agreement which was defined as "an agreement in writing between an employer . . . and a trade union or . . .".

Finally, a trade union was declared to be answerable for the offences it might commit. It was declared to be guilty of an offence and liable to a fine if it authorized a strike (section 41(2)) or if it contravened any of the provisions of the Order (section 42).

Thus in according status to collective agreements and to trade unions and in making a distinction between disputes regarding the content of an agreement and disputes regarding its interpretation and alleged violation, P.C. 1003 outlined the broad pattern of public policy regarding labour-management relations in Canada.

3. The Post World War II Period

Late in 1945 Parliament passed the National Emergency Transitional Powers Act to become effective on January 1, 1946. After that date the war with Germany and Japan was to be considered terminated for the purposes of the War Measures Act, 1914. The new Act was to have effect until December 31, 1946, but it was continued in force by Order-in-Council until May 15, 1947.

On the latter date the provinces assumed again full control over their own labour relations legislation. The Wartime Labour Relations Regulations, P.C. 1003, were continued in effect under the provisions of the Continuation of Transitional Measures Act, 1947, but they applied only in the federal jurisdiction.

In the summer of 1947 the federal government introduced Bill 338 in the House of Commons to provide a statute to replace the Wartime Labour Relations Regulations, but later
withdrew the Bill and reintroduced it in a slightly modified form in the next year when it was passed by Parliament as the *Industrial Relations and Disputes Investigation Act*. 54

Under the new statute the signing of a collective agreement continues to be the terminal point of the obligation laid on unions and employers to bargain. Collective bargaining is defined as

... negotiating with a view to the conclusion of a collective agreement or the renewal or revision thereof. ...” (section 2(1)(e)). On the occasion of their first bargaining, the union and the employer are required to meet after proper notice and to "commence to bargain with one another and shall make every reasonable effort to conclude a collective agreement ..." (section 14(a)).

Similarly, when an agreement is up for renewal, the parties are required, following proper notice, "to commence collective bargaining with a view to the renewal or revision of the agreement or the conclusion of a new collective agreement" (section 13).

The Statute requires that a collective agreement shall be for a term of at least one year (section 20(1)) and it declares that "subject to and for the purposes of this Act", the agreement is binding on the bargaining agent, the employer and the employees (section 18). Section 42 apparently provides a penalty for failure to observe the latter requirement, for it states that every person, trade union or employers’ organization that fails to do anything required by the Act is guilty of an offence and punishable by a fine.

Section 22 of the Act forbids the employer to declare or cause a lock-out, forbids the employees to go on strike and forbids the union to declare or authorize a strike during the term of collective agreement. Section 41 provides penalties for violation of section 22.

Finally, section 52(1) of the Act requires each of the parties to a collective agreement to file a copy, forthwith upon its execution, with the Minister.

The new Act differs from the *Wartime Labour Relations Regulations* in one respect, in its treatment of the collective agreement. The Act, unlike the Regulations, enables the parties to contract out of a completely rigid collective agreement. Section 22(2) of the Act leaves the parties to a collective agreement free to agree that certain specified provisions of their agreement may be opened for re-negotiation during its term. The section requires the parties to "bargain collectively in an attempt to conclude an agreement on the matters in dispute". Having met that condition, the section makes conciliation

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54 11-12 George VI, c. 54.
procedures available to the parties and permits them to resort to strike or lock-out upon
the conclusion of conciliation, if no settlement is reached.

Thus section 22(2) of the *Industrial Relations and Disputes Investigation Act* makes it
possible for a collective agreement to be drawn up in terms that may involve the parties to
it in negotiations more frequently than once each year. However, the section does not
make the duty to bargain collectively as continuous as it was under the Wagner Act
(*National Labour Relations Act*), for it takes the agreement of the parties to an open-end
 provision to establish the duty to bargain during the term of a collective agreement.
Circuit Judge Chase of the United States Court of Appeals in his decision in 1952 in
*National Labor Relations Board v. Jacobs Manufacturing Company* describes the duty to
bargain imposed by the Wagner Act as follows:

**Before the National Labor Relations Act was amended by the Taft-Hartley Act an**
employer was under a duty, upon request, to bargain with the representatives of
his employees as to terms and conditions of employment whether or not an existing
collective bargaining agreement bound the parties as to the subject matter to be
discussed.55

Section 8(d) of the Taft-Hartley Act relieves the parties to a collective agreement of
any obligation to bargain, during the life of an agreement, regarding proposed changes in
the matters agreed upon and included in that collective agreement. The section also
provides that there is no obligation to bargain during the term of an agreement about a
matter discussed but dropped during the negotiations leading to the contract.56 However,
in the United States the parties to a collective agreement are still under statutory
obligation to bargain about new matters during the term of a collective agreement. In the
*Jacobs* case the Appeal Court upheld a ruling of the National Labor Relations Board that
the Company was obliged to bargain about bargainable issues that had not been either
raised or discussed during the negotiations leading to the collective agreement.57

Thus, in the United States, the collective agreement does not mark the terminal point
of the statutory duty to bargain collectively as it does under the Industrial Relations and
Disputes Investigation Act.

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56 See Union Carbide and Carbon Company, 100 NLRB 689; 30 LRRM 1338 (1952); 104 NLRB 416; 32 LRRM 1276 (1953); also The
57 See Cox and Dunlop, “The Duty to Bargain During the Term of an Existing Agreement”, 63 *Harvard Law Review*, p. 1097 and
Finding and Colby, “Regulation of Collective Bargaining by the National Labour Relations Board- Another View”, 51 *Columbia Law
Review*, p. 170.
Between 1947, when the provinces recovered control of labour relations matters, and 1950 most provincial legislatures enacted new statutes governing collective bargaining. The first statutes so enacted in Nova Scotia, Ontario, Manitoba, New Brunswick and somewhat later, those enacted in Newfoundland and Prince Edward Island, were essentially the same as the *Industrial Relations and Disputes Investigation Act*, setting out the three basic provisions of the federal statute, namely that the obligation to bargain is satisfied when a collective agreement is signed; that a collective agreement is binding on the union, the employer and the employees; that strikes and lockouts are forbidden during the term of the agreement.

From the first the legislatures of Alberta, British Columbia, Saskatchewan and Quebec followed courses of their own and the legislatures of Ontario and Manitoba joined them later. Five of the six provinces just named, excluding Saskatchewan, have amended their statutes from time to time, but each of the five in its own way has developed a statute that retains the three basic features of the federal law.

Three of the provincial statutes, those of Ontario, British Columbia and Alberta do not provide for the opening of a collective agreement during its term to re-negotiate specific clauses. However, even in those jurisdictions where the federal Act is followed in allowing agreement to open specified clauses, it is not common practice to do so. But one must not ignore the fact that situations do arise during the term of a collective agreement that call for the negotiation of an amendment or for the negotiation of a new provision. Agreements, even firm agreements with no open-end clauses, can be amended by mutual consent of the parties and some statutes say so.\(^{58}\) However, such bargaining during the term of a firm agreement is dictated by practical considerations and not by statute, for the duty to bargain is fulfilled by each party when a firm agreement, containing DO open-end clauses, is signed.

Each of the six provincial statutes that departs from the letter of the federal Act in dealing with the three basic provisions contains certain characteristic features. The *Ontario Labour Relations Act* in its section 33 requires the inclusion of a "no strike" clause in every collective agreement and provides that, if no such clause is included in an agreement, it may be added to the agreement by the Labour Relations Board upon the application of either party. Of course, the Act also provides that a collective agreement is binding on all concerned with it (sections 37 and 38).

\(^{58}\) See Ontario Labour Relations Act, s. 39(5).
Manitoba’s Act provides that a collective agreement made by a certified bargaining agent is binding on all concerned and it provides further that such an agreement is binding on any new employer who takes over an undertaking or business from the employer who originally entered into the collective agreement (section 18). In the same section, the Act deals with the status of collective agreements where there is a merger of businesses.

Alberta’s Act declares that a collective agreement is binding on all concerned with it (section 73(19) and (20)). The Act also provides in section 73(23) that it is an offence punishable by fine or, in default of payment, by imprisonment for a person, an employer or a trade union to refuse to do anything required in that same section 73. This broad definition presumably makes the breach of a collective agreement a punishable offence. The Act does not state specifically that there shall be no strikes and no lock-outs during the term of an agreement, but it does so indirectly in section 73(5).

Saskatchewan’s Act, which does not follow the federal Act’s three basic provisions, defines collective bargaining as "negotiating in good faith with a view to the conclusion of a collective agreement. .." but it goes on to say that collective bargaining also includes "negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement" (section 2(1)). The Act also provides that it is an unfair labour practice for an employer or an employer’s agent to refuse to bargain collectively (section 8(1) (c)). But the Act does not declare that a collective agreement is binding on the parties to it or that a strike or lock-out during the term of an agreement is illegal. Thus Saskatchewan’s Act, unlike other Canadian statutes, does not make the collective agreement the terminal point of collective bargaining.

On the other hand, Quebec’s new Labour Code in its sections 40, 41, 53, 55 and 95 follows the broad pattern of the federal Act.

Thus, after the war, Canadian Legislatures, with one exception, Saskatchewan, enacted collective bargaining statutes that followed the policy designed to stabilize union-management relations that was introduced by the Wartime Labour Relations Regulations and continued and amplified in the Industrial Relations and Disputes Investigation Act. The collective bargaining agreement continues to be the terminal point of the statutory duty of unions and employers to bargain. In general, the agreement is declared to be binding on all concerned and strikes and lock-outs during its term continue to be prohibited.

Of course, compulsory collective bargaining was not an innovation even in 1944 when it was adopted in the Regulations. It was derived from the Wagner Act and it seemed to be

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59 The same provision is on the statutes of New Brunswick, Nova Scotia and Prince Edward Island in their sections 17, 18 and 19 respectively.
a natural application of democratic principles, an application which a democratic government could hardly avoid. But a collective agreement made firmly binding on the union and on the company who are parties to it and on the employees covered by it is quite another thing.

When collective bargaining statutes were first enacted in the United States and in Canada, the collective agreement had no legal status. It has been pointed out in an earlier chapter that a collective agreement was unenforceable at common law. Sometimes the courts refused to enforce a collective agreement on the ground that the union that was party to it was not capable of appearing in a court of law either to bring or defend an action.\textsuperscript{60} Sometimes they have refused to enforce a collective agreement because they found it in restraint of trade\textsuperscript{61} and sometimes because they found that the agreement was not a contract either in form or in content.\textsuperscript{62} And the courts, on occasion, have advised unions that they must strike if they find it necessary to enforce their understanding of the terms of a collective agreement.\textsuperscript{63} However, an employer might not choose to lock his employees out to make his reading of an agreement effective, for the lock-out is not exactly the counterpart of a strike. The employer wishing to make his reading of an agreement effective might apply the agreement according to his reading and, in effect, invite his employees to take it or make their objections good by striking.

Thus the strike served both parties as the means by which each held the other to some particular interpretation or application of the agreement. By prohibiting the use of the strike for such purposes, the post-war Canadian collective bargaining statutes deprived parties to collective agreements of the device traditionally used to enforce their agreements and brought the problem of enforcement into sharp focus.

Clearly, if the collective agreement is to be used successfully to stabilize union-management relations, it must not only be declared to be binding on the parties to it, but it must be made to bind them by some device that will make its provisions effective. It is not enough to declare that the collective agreement is binding and that there shall be no strikes during its term. There must be some way to ensure that the employer will pay the wages, observe the hours of work and maintain the conditions of employment set out in the agreement. That is the union’s concern. There must also be some way to ensure that the employees will give the employer uninterrupted work. That is the employer’s

\textsuperscript{63} Ibid., [1931] 1 D.L.R. 646 at p. 650.
concern. The problem of accomplishing those two things is the concern of the legislatures that declare the collective agreement binding on the union, the employer and the employees.

The federal government attempted to meet the problem of enforcing the collective agreement when it first arose under the Wartime Labour Relations Regulations. Section 18(1) of the Regulations provided that every collective agreement had to make provision for the final settlement, without stoppage of work, of disputes regarding its interpretation and violation. Section 18(2) provided that, if there were no such provision in a collective agreement, the Labour Relations Board would establish a procedure on the application of either party. Thus some vaguely defined special tribunals were to be set up by the parties to the agreement themselves to enforce its terms.

The Industrial Relations and Disputes Investigation Act that replaced the Regulations in 1948 is more specific in its definition of the tribunal that is to enforce collective agreements. Section 19(1) of the Act states:

Every collective agreement entered into after the commencement of this Act shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

Section 19(2) of the Act goes on to provide that upon application of either party, the Labour Relations Board will prescribe a provision for the final settlement of disputes where an agreement does not contain such a provision as section 19(1) requires.

Section 19(3) of the Act declares that every party to an agreement and every person bound by an agreement shall comply with and give effect to the provision for final settlement described in subsection (1).

Thus the Industrial Relations and Disputes Investigation Act required the parties to provide a procedure for the final settlement of contract-observance disputes. However, the Act left the parties free to devise their own method of satisfying the requirement. If they failed to agree on a procedure, the Act made it possible for one of them to invoke the intervention of the Board and have a provision prescribed — a prescription that is likely to provide for arbitration of contract-observance disputes.

The post-war collective bargaining acts of New Brunswick, Nova Scotia and Prince Edward Island follow section 19 of the federal Act in setting out the requirement that a
collective agreement make provision for the final settlement without stoppage of work, by arbitration or otherwise, of disputes regarding the meaning or violation of the agreement. But Saskatchewan’s Act does not require the parties to a collective agreement to make provision for the settlement of disputes arising during its term. That Act provides that the parties may agree to submit disputes to the Labour Relations Board for final and conclusive settlement. The Board is given power in such cases to issue an order (section 20). The Act provides further that the Minister may appoint a conciliation board to deal with a dispute regarding the interpretation of a collective agreement (section 18).

Quebec’s Labour Code seems designed to accomplish the same purpose as the provisions contained in section 19 of the federal Act. It seems to give the parties the option of arranging their own procedures for settling “grievances”. If the parties fail to do so, or fail to follow procedures agreed upon, arbitration is prescribed. The Code makes a distinction between a “dispute” which it defines as a dish agreement arising during the negotiation or renegotiation of an agreement and a “grievance” which it defines as any disagreement regarding the interpretation or application of an agreement. The Code provides for arbitration of “grievances” as follows:

Section 88. Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the parties abide by it; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agreement, appointed by the Minister

Section 89. The arbitration award shall be final and bind the parties. It may be executed in accordance with section 81.

Section 81. . . . It may be executed under the authority of a court of competent jurisdiction at the suit of a party who shall not be obliged to implead the person for whose benefit he is acting.

Newfoundland’s Labour Relations Act and Manitoba’s Labour Relations Act differ only slightly from the federal Act in their provisions dealing with the enforcement of collective agreements. But the statutes of British Columbia, Alberta and Ontario are elaborate and each contains important provisions that distinguishes it from the other two. At the same time, there are significant provisions that are common to all five of the acts and these make it convenient to deal with them as a group.

All five Acts require that procedures be included in a collective agreement for the settlement of disputes described as those arising out of the "interpretation, application, administration or alleged violation" of the collective agreement. (Manitoba’s Act says "...
concerning its meaning, application or violation" (section 19(1)). Thus all amplify the section of the federal act which describes the disputes as differences regarding the "meaning or violation" of a collective agreement.

Four of the five Acts — excluding British Columbia’s — set out a prescribed provision for the final settlement of disputes which is to be read into any collective agreement that does not contain a provision. The prescribed provision in each case calls for a tripartite arbitration board with authority to hear a dispute and hand down a final and binding decision. British Columbia’s Act follows the federal Act in providing that, on application by one of the parties, the Labour Relations Board will prescribe a clause for an agreement that makes no provision for the final settlement of disputes arising during its term.

Ontario’s Act, unlike the other four, provides that on the application of one of the parties the Labour Relations Board will change the provision for final settlement of disputes contained in an agreement if, in the Board’s view, that provision is inadequate or unsuitable. The provision as amended by the Board must conform with the prescribed provision for settlement contained in the Act.

All of the Acts provide that the settlement is to be without stoppage of work. Alberta’s and British Columbia’s Acts provide that the settlement is to be "by arbitration or such other method as may be agreed upon by the parties", while Manitoba’s Act and Newfoundland’s follow the federal Act in using the phrase "by arbitration or otherwise". Ontario's Act very significantly provides that the settlement is to be "by arbitration". The courts have held that that requirement of Ontario’s Act makes labour arbitration in that province statutory, while the more usual requirement "by arbitration, or otherwise" does not. The importance of this difference will be considered in some detail later.

Four of the five Acts, excluding Manitoba’s this time, differ significantly from the federal and from the other provincial statutes that are like it in that they require that the procedure for final settlement provides for the settlement also of the question of the arbitrability of a dispute. This is a most important point.

When the parties to a collective agreement make provision for the settlement of disputes that may arise during the term of an agreement, they are required to provide for the final settlement of disputes of a specified sort, disputes regarding the interpretation, application, administration or alleged violation of the agreement. Neither of the parties agrees with the other to participate in the arbitration of any dispute other than one of the sort covered by the

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66 See Chapter 6.
agreement to arbitrate. Thus one party confronted by the request of the other to submit to arbitration a matter that is, in fact, not covered by the agreement is under no obligation to comply with the request. Unfortunately, the arbitrability of a dispute is often difficult to determine. Consequently, the parties to a collective agreement may have an honest difference of opinion about the matter. Furthermore, in the not uncommon situation where one party or the other is not disposed to submit to arbitration if it can be avoided, the claim that a dispute is not arbitrable may be used as a device to hold proceedings up or even to frustrate them.

To deal with disputes regarding arbitrability and with the attempts of one party to frustrate an arbitration by refusing to go along with it, the statutes of British Columbia, Ontario, Newfoundland and Alberta give the arbitration tribunal authority to determine the question of arbitrability. Then, to ensure that the party wishing to arbitrate shall get before the arbitrator, the statutes of British Columbia, Ontario and Alberta provide that, should one party fail to make the appointments necessary to establish an arbitration tribunal, the other may apply to the appropriate authority to make that appointment for the defaulting party.

Alberta’s Act has something to say about the qualifications of the people who act on boards of arbitration as follows:

73(8). Unless otherwise provided in a collective agreement,

a) any person is eligible to be appointed to a position, other than as chairman, on an arbitration board, but

b) no person shall be appointed as an arbitrator who is directly affected by the matter before the arbitration board or who has been involved in an attempt to negotiate or settle such matter.

Under section 73(9) of Alberta’s Act and under section 34(5) of Ontario’s Act either party to an arbitration may complain to the Minister that an arbitrator’s decision has not been made within a reasonable time. The Minister is empowered to investigate and issue whatever order he deems necessary.

Both Acts contain a section setting out the powers of arbitrators — section 73(10) in Alberta’s Act and section 34(7) in Ontario’s Act. The provisions of these sections are essentially the same. Alberta’s Act differs from the other in that it empowers the arbitrator to correct any clerical mistake, error or omission in an award. Ontario’s Act differs from Alberta’s in stating that the arbitrator may accept such evidence as he deems proper whether admissible in a court of law or not. Both Acts empower the arbitrator to administer oaths, to summon and enforce the attendance of witnesses and to compel them to give evidence as they would be required to
do in a court of record in civil cases. Neither Act requires that the arbitrator hear only evidence given under oath.

Both Acts empower the arbitrator to enter any premise to view anything pertaining to the matter before him and to question any person there. Alberta’s Act states that the person is to be interrogated under oath in the presence of the parties or their representatives.

Both Acts empower the arbitrator to authorize any person to do anything he may do and report on the findings.

Under section 73(11) of Alberta’s Act and under section 34(8) of Ontario’s Act, the decision of an arbitrator is declared to be binding on all concerned and all concerned are enjoined to comply with the award. These sections resemble section 19(3) of the Industrial Relations and Disputes Investigation Act.

Alberta’s Act in section 73(13), consistent with a provision in the prescribed arbitration clause set out in its section 73(6), states that an arbitrator has no authority to alter, amend, or change the terms of a collective agreement. The section requires, too, that the arbitrator file a copy of his award with the Board of Industrial Relations. None of the content of section 73(13) is in Ontario’s Act.

Section 34(8) of Ontario’s Act provides that, if a party to a collective agreement has failed to comply with an arbitrator’s award, anyone concerned with the matter may, after a specified period of time, file the award with the Registrar of the Supreme Court. The decision of the arbitrator, upon filing, is to be entered "in the same way as a judgment or order of that court and is enforceable as such".

Section 73 of Ontario’s Act also provides for the enforcement of an arbitrator’s award as follows:

Proceedings to enforce . . . a decision of an arbitrator or arbitration board . . may be instituted in the Supreme Court by or against a trade union, a council of trade unions or an unincorporated employers’ organization in the name of the trade union, council of trade unions or unincorporated employers’ organization, as the case may be.

In Alberta’s Act, section 73, subsections (13) to (16) inclusive, also makes provision for the enforcement of an arbitrator’s award in the courts. After the expiration of a stipulated period of time, anyone concerned with the award may make an application to the Court,
by way of a notice of motion upon seven clear days' notice to all parties affected by the award for either an order confirming the award and declaring that it be entered as a judgment of the Court or for an order setting the award aside.

The section provides further that, where the application for an order confirming the award is unopposed, the judge shall confirm the award and declare that it be entered as a judgment of the court.

If the application for an order confirming an award is opposed or if the application is for an order to set the award aside, the judge is empowered to set it aside if he finds that the arbitrator has misconducted himself or the proceedings or if he finds that the arbitration or award was "improperly procured". The judge may also set the award aside if he finds that the matter was not arbitrable or if he finds an error of law on the face of the award "regardless of whether the question of law was submitted to be determined by the arbitrator. . .".

Section 73(16) provides:

Where an award is confirmed and entered as a judgment of the Court it is enforceable as such.

Section 73(17) sets out the general powers of the Court to deal with arbitrations governed by the Act. The Court is given the powers it may exercise when dealing with the applications just discussed. In addition, the Court may find that a question that an arbitrator or the Board of Industrial Relations has held not to be arbitrable is arbitrable. The Court may direct that such a question be submitted to arbitration. Also, the Court may hear a special case stated by an arbitrator raising a question of law arising during an arbitration or arising out of an award. Or, the Court may direct an arbitrator to state a special case raising such questions for the Court to decide.

Finally, Ontario’s Act and Alberta’s Act, as well as the Acts of British Columbia and Manitoba, exclude the application of the *Arbitration Act* that would otherwise apply to labour arbitration.

British Columbia’s *Labour Relations Act* contains two novel provisions. The first is in section 22(1) (a) and (5) (a) and (b):

Section 22(1). Every collective agreement shall contain a provision (a) governing the dismissal or suspension of an employee bound by the agreement;
Section 22(5). Where under this section a board of arbitration, the Board, or other body finds that an employee has been dismissed or suspended for other than proper cause, the board of arbitration, the Board, or other body may

a) direct the employer to reinstate the employee and pay to the employee a sum equal to his wages lost by reason of his dismissal or suspension, or such lesser sum as in the opinion of the board of arbitration, the Board, or other body, as the case may be, is fair and reasonable; or

b) make such order as it considers fair and reasonable, having regard to the terms of the collective agreement.

Such a provision is not a required one in any other Canadian statute governing collective bargaining. Most collective agreements deal with the question of dismissal and suspension, but the particular provision in each case is the product of bargaining. The second novel feature of British Columbia’s Act appears in section 22(4). That section provides that either party to a collective agreement may, before an arbitration board (or other body designed to settle disputes) is appointed, ask the Registrar of the Board to appoint an officer of the Department of Labour to confer with the parties and help them settle a dispute. The Registrar is empowered to appoint an officer as requested or to refer the dispute to the Board itself.

If the Registrar appoints an officer, that officer is to confer with the parties and then report the outcome of his conferences to the Registrar. The Registrar may refer the report to the Board.

Thus the Board may receive a dispute directly from the Registrar or it may get a dispute after an officer has dealt with it. In either case, the Board’s first step is to determine whether or not the matter is arbitrable. If the Board finds that the matter is not arbitrable, it reports that opinion to the parties. If the Board finds the matter arbitrable, it may refer it back to the parties for decision as their agreement provides, or it may inquire into the difference itself and make an order for final and conclusive settlement of the matter.

If the Board finds either that the question is not arbitrable or if it finds that it is arbitrable and decides to rule on it itself, in either case, "neither the Arbitration Act nor any other procedures for settlement of the difference shall apply" (section 22(4)(e)).

The order of the Board for final and conclusive settlement of a dispute is declared to be final and binding on all concerned. If, within a prescribed time, an employer, a trade union, or a person fails to comply with such an order, upon notification the Board will
file a copy of the order with the Registrar of the Supreme Court. The order then becomes enforceable as a judgement or order of the Court.

Section 22(6) provides that the parties to a collective agreement may at any time by written agreement agree, for the term of the agreement, not to submit their disputes for settlement by the procedure of section 22(4).

Thus there are significant differences among the various Canadian collective bargaining statutes in their provisions for the establishment of the tribunals that are responsible for ruling on disputes arising out of collective agreements. The statutes of Ontario, British Columbia, and Alberta have more detailed provisions than the others which leave most of the details for the parties to provide in their collective agreements.
CHAPTER IV

THE ALTERNATIVES TO ARBITRATION

1. Negotiated Alternatives

Ontario’s Labour Relations Act gives parties to collective agreements no alternative to arbitration as a method of settling their disputes "arising from the interpretation, application, administration or alleged violation of the agreement". Final and binding settlement is to be "by arbitration". Quebec’s Labour Code is to the same effect.

Saskatchewan’s Act does not require the inclusion of an arbitration provision in collective agreements, although such is the practice. The Act does provide an alternative to arbitration in that its section 20 empowers the Labour Relations Board to rule on matters submitted to it by agreement between the parties to a collective agreement. The Act declares that the Board’s decisions on such matters are final and conclusive and enforceable as an order of the Board.

The remaining Canadian statutes leave the parties to collective agreements free to adopt some method other than arbitration for the enforcement of their agreements. Alberta’s Act and British Columbia’s Act require arbitration or "such other method as may be agreed upon by the parties". The rest simply say that the settlement of disputes arising out of the agreement is to be "by arbitration or otherwise".

British Columbia’s Act is the only one requiring arbitration, or an alternative, that describes an alternative. The provisions of section 22(4) of the Act, outlined above, provide that either party to a collective agreement, even though it contains an arbitration provision, may submit a dispute to the Labour Relations Board. The procedures to be followed are set out in some detail in the Act. This is, in a sense, a negotiated alternative to arbitration because the parties to a collective agreement may agree not to resort to the Labour Relations Board with disputes arising out of their contract.

During the debate in the British Columbia Legislature on the speech from the Throne, in February, 1965, the Minister of Labour reported on the use made of section 22(4) of the Act. He said that during the preceding year, the procedure set out in section 22(4) was followed in 126 cases. Of these, 87 were settled by officials of the Department of Labour; 39 were disposed of by the Labour Relations Board which enquired into them and made Orders for their final and conclusive settlement; three were disposed of by the Board as

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not arbitrable and seven were referred back to the parties for settlement under the provisions of their agreements. Thus, British Columbia is the only province in which parties to collective agreements make any significant use of a negotiated alternative to arbitration for the enforcement of their agreements.

The Railway Boards of Adjustment, described in an earlier chapter, were bodies concerned with the settlement of disputes arising out of the administration of collective agreements that were not, strictly speaking, arbitration tribunals. They have passed out of existence. But some of the boards established by agreement between certain Canadian air lines and certain unions seem to function as the Boards of Adjustment did.68

2. Statutory Remedies and Penalties

Generally speaking, Canadian labour relations statutes contain provisions which, on their face at least, seem to offer some relief to the party to a collective agreement faced with the refusal of the other to abide by its terms. The most promising of those provisions are the ones dealing with what, in the Canadian labour relations system, is the most serious breach of a collective agreement, a strike or a lock-out. Many statutes make double provision for dealing with such breaches by making it obligatory for the parties to include in their collective agreement a "no-strike no-lock-out" clause and by providing further that it is an offence, punishable under the provisions of the Statute, for an employer to lock his employees out and for a union and employees to go on strike. Thus a strike and a lock-out may be, at the same time, a breach of a collective agreement and an offence under the governing statute.

The party to a collective agreement turning to the governing statute for relief from a strike or from a lock-out must ordinarily apply to the appropriate labour relations board or to the appropriate minister of labour for consent to prosecute the offending party. Having secured that consent, the party may then institute a prosecution, although it is possible in some jurisdictions that the Crown will take over. Such appears to have been the case in the prosecution of the Hamilton Building Trades Council and agents of certain of its member unions as reported in The Globe and Mail, September 13, 1961.

The Manitoba Act in section 47(3) and (4) provides that the Attorney-General of the Province may institute a prosecution without securing the consent of the Labour Relations Board and that the Minister may refer an alleged complaint to the Attorney-General for his consideration with a view to instituting a prosecution. Perhaps a union facing a lock-out or an employer facing a strike while an agreement is in effect could

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68 Canadian Air Line Pilots' Association et al. v. Canadian Pacific Air Lines Limited et al., 65 CLLC 14,057.
complain to the Minister that the act was in violation of the statute and ask that he place the matter in the hands of the Attorney-General.

The Ontario Labour Relations Act provides also that a party aggrieved by a strike or a lock-out may apply to the Labour Relations Board for a declaration that the strike or lock-out is illegal.69

Some labour relations statutes make no provision enabling a union to bring a prosecution. Thus section 45(1) of the Industrial Relations and Disputes Investigation Act provides:

A prosecution for an offence under this Act may be brought against an employers’ organization or a trade union and in the name of the organization or union and for the purpose of such a prosecution a trade union or an employers’ organization shall be deemed to be a person. . .

The Statutes of Manitoba, New Brunswick, Nova Scotia and Newfoundland originally contained the same provisions.

In Walterson and Laundry and Dry Cleaning Workers’ Union v. New Method Laundries Limited, (1954) 18 S.C.R. 336; (1955) 14 W.W.R. 541, the Court of Appeal of Manitoba held that the wording set out above gives a union limited status. The section says only that a prosecution for an offence may be brought against a union, so that a union is a legal entity only for that specific purpose. Thus a union cannot prosecute an employer and so is not entitled to apply to the Labour Relations Board for consent to prosecute. The Court relied on International Ladies’ Garment Workers’ Union v. Rothman, [1941] S.C.R. 388, where it was held that a Quebec statute which permitted actions against trade unions did not, by so providing, also give them the status they required to enter actions into court on their own behalf.

Thus provisions such as section 45(1) of the federal statute do not provide trade unions with a means of holding an employer to his obligations in those jurisdictions where unions are not legal entities. To get around the difficulty, the legislatures of Manitoba and New Brunswick amended their statutes to provide that a prosecution for an offence may be brought

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"by or against" an employers' organization or a trade union in the name of the organization or union.\textsuperscript{70}

Almost all the reported cases in which an employer or a union has resorted to prosecution to deal with a strike or lock-out have arisen in situations where the parties were negotiating agreements. The Perini case is an unusual one, for the company set out to prosecute the union for engaging in a strike while an agreement was in effect and the company was granted leave to do so by the British Columbia Labour Relations Board.\textsuperscript{71} One must conclude that little use is made of provisions such as those contained in section 45(1) of the federal statute to enforce the "no-strike no-lock-out" provisions of collective agreements by resorting to prosecutions.

The same is true of the use of the declaration that a strike or a lock-out is illegal which may be made under sections 67 and 68 of the Ontario Act. Such declarations are usually secured when the strike occurs during the negotiation of an agreement or before the union is certified.

The sections of labour relations statutes that state that the collective agreement is binding on the parties to it also seem at first glance to provide a device for the enforcement of the agreements' terms. However, some of these sections are probably only declaratory. Ontario’s Act states in section 37:

A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

On the other hand, British Columbia’s Act provides, in addition, in section 21(1) that:

Every person who is bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything that he is required to refrain from doing, by the provisions of the collective agreement, and failure to so do or refrain from so doing is an offence against this Act.

Section 18(2) of Nova Scotia’s Statute and section 22(2) of Prince Edward Island’s follow British Columbia’s section 21(1) except that they omit the last clause.

\textsuperscript{70} In Retail Clerks Union No. 1697 and Medjucks Furniture of Fredericton, (1957) CLLR ¶16,062. After reviewing the Walterson case, the New Brunswick Labour Relations Board held that the Labour Relations Act gave certified unions a status that enabled them to apply for consent to prosecute an employer.

Again there are a few reported cases where either employers or unions have attempted to have the other party prosecuted for allegedly failing to observe the provisions of a collective agreement that by the provisions of the governing statute was to be binding on all concerned. The *Ontario Labour Relations Board in Fred Farkas et al. and Heist Industrial Services*, (1962),\(^{72}\) held that section 37 of the *Ontario Act* is merely declaratory and that "failure to observe the terms of a collective agreement, standing by itself, is not a contravention of any provision of the Act". The Board referred to its ruling on this point in the *Dominion Stores Limited case* (Board File No. 2858-61-U).

The British Columbia Labour Relations Board, applying a different provision, has granted leave to prosecute for failure to observe a specified provision of a collective agreement. In *United Brotherhood of Carpenters and Joiners of America, Local No. 1370 and Rite-Way Construction Company*, (1956),\(^{73}\) the Board granted the Union leave to prosecute the company for failure to institute a union shop as agreed. But in *United Brotherhood of Carpenters and Joiners of America and Saguenay-Kitimat Company*,\(^{74}\) the Board denied the union’s request for consent to prosecute the company for allegedly overcharging union members for board and stated that the matter should be settled through the grievance procedure. In *Builders Sash and Door Limited and United Brotherhood of Carpenters and Joiners of America, Local 2527*,\(^{75}\) the Board granted the union’s request for leave to prosecute the company for its alleged failure to turn over dues collected for the union. Similarly, in *Peter Bodio (Bodio Lumber Company) and International Woodworkers of America, 1-405*\(^{76}\), the Board gave the union its consent to prosecute the employer for allegedly failing to increase wages and implement a health and welfare plan as the agreement provided.

But the Board denied the International Woodworkers, Local 1-423, leave to prosecute Boundry Sawmills Limited for allegedly failing to pay travel time as the collective agreement provided and told the union that the matter should be resolved through the grievance procedure.\(^{77}\)

The British Columbia Board does not explain on what grounds it will grant its consent to prosecute or on what grounds it will refuse its consent. Presumably the Board, in its discretion, will give its consent to prosecute an employer or a trade union alleged

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\(^{72}\) 62 CLLC 16, 263.

\(^{73}\) (1956) CLLR 16,066.

\(^{74}\) Ibid., 16,052.

\(^{75}\) Ibid., Vol. 9, No. 10, 1962, p.9.

\(^{76}\) Ibid., Vol. 11, No. 23, 1964, p.9.

\(^{77}\) Ibid., Vol. 9, No. 12, 1962.
to be in violation of section 21(1) of the Act, and the Board considers each case on its merits.

The Manitoba Labour Relations Board in November, 1960, denied Local 119 of the Teamsters leave to prosecute Cruise Dairy Limited, Dauphin, for allegedly violating certain sections of a collective agreement. The Board indicated that the proper procedure to be followed in dealing with the case was the grievance procedure or arbitration.78

In Ontario, trade unions have made numerous attempts to get the Labour Relations Board to make rulings on matters arising out of their collective agreements. Most of the unions' recent requests have been made for rulings under what is now section 79(2) of the Act. Section 79(2) provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

The Board in recent cases has taken the position that the questions of employee status raised by the unions under section 79(2) are differences between the parties to collective agreements which should be settled by arbitration. For example, in United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 67 and Robert Young (1961),79 the union claimed that the company was not abiding by the union shop provision of the collective agreement by requiring certain employees to belong to the union. The company took the position that the persons in question were not employees but members of the firm. The Board denied al' union's request for a ruling under section 79(2) on the status of the persons in question on the ground that

the issue referred to would appear to be a matter for which relief should be sought under the arbitration provision of that agreement.

In International Association of Machinists and Morse Chain of Canada Limited (1961),80 the Board refused to rule on the status of a certain person on the ground that such a procedure would involve first an application to the Board to determine status and then an arbitration. The Board stated that the whole matter was a difference between the parties and should be referred to arbitration.

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78 Manitoba Labour Relations Board, File #C-171-1, November, 1960.
80 162 CLLC ¶16,225.
In the *Industrial Food Services* case,\(^{81}\) the union requested the Board to rule on the status of a certain person after an arbitration board had declined jurisdiction, holding that the determination of employee status was for the Board under section 79 of the Act. The Board declined to make a ruling for the reasons stated in the case just described.

In the *Vera Elkington* case,\(^{82}\) the Board refused to rule on the complainant's status, holding that section 79(2) was designed to deal with questions between unions and employers, not questions between an employee and a union or between an employee and an employer.

In two cases, two individuals tried unsuccessfully to get the Board to find that their dismissals were in violation of section 50 of the Act which reads in part:

No employer . .

a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

In both cases, the union grievance committee had decided not to take the grievances to arbitration.

In the first case, *Vera Elkington and the Wallace Barnes Company Limited*, 1961,\(^ {83}\) the Board did appoint an officer to investigate the charges against the Company. The officer found no evidence that the applicant was dismissed for union activity, so, as noted above, she applied for a ruling under what is now section 79 that she was an employee. This was denied.

In the second case, *Frank Kuntz and Pitt Street Hotel Limited*, 1963,\(^ {84}\) the complainant alleged that his case was not taken beyond the steps of the grievance procedure to arbitration because of collusion between the international representative and management. The Board was not satisfied that there was collusion or any other special circumstance to justify its interference. It denied the request for a ruling under section 50 on the ground that the complainant had an alternative remedy in arbitration.

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\(^{81}\) 62 CLLC ¶16,228
\(^{82}\) 61 CLLC ¶16,198
\(^{83}\) Ibid.
\(^{84}\) 63 CLLC ¶16,275
Thus in the *Vera Elkington* case and in the *Frank Kuntz* case the Board refused to be a tribunal to which employees could go after failing to get the remedy they sought through grievance procedure and arbitration.

In Ontario, unions have also attempted to have the Labour Relations Board deal with certain grievances under what is now section 65 of the Act, subsection (1) of which reads:

> The Board may authorize a field officer to inquire into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment,

Subsection (4) empowers the Board to inquire into a complaint that a field officer has been unable to settle and to make a determination of the matter. Subsection (5) provides for the enforcement of the Board’s determination.

In the *National Showcase Company* case, the Board appointed an officer to inquire into a complaint under section 57 (now section 65) of the Act. The officer reported that the matter in dispute was one which was properly a grievance that could be handled under the grievance procedure of the agreement.

The Board inquired into the complaint and concluded that the phrase “may inquire into” in section 57 (now section 64(4)) of the Act gave it a discretion in such cases. The Board held, too, that the section of the Act providing for arbitration must be read with section 57. The Board concluded that since the Act provided in the section dealing with arbitration an alternative to the remedy in section 57 and since the legislature considered that alternative, arbitration, very important, the parties should follow it. The Board noted, too, that the parties had agreed to arbitrate their difference.

It appears then, that unions and employers have not turned very often to Labour Relations Boards to enforce their collective agreements and that they have not usually succeeded in getting Labour Relations Boards to do anything about the enforcement of their agreements. The notable exceptions are British Columbia and Saskatchewan where the provisions of the statutes and perhaps the inclinations of the Boards themselves have prompted parties to collective agreements to take their problems to the Labour Relations Boards.

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85 61 CLLC ¶16,185
3. Resort to the Courts

It was pointed out in an earlier chapter of this study that the legal disabilities of unions and the legal defects of collective agreements made it almost impossible for employers and unions to go to the courts for remedies when breaches of collective agreements occurred. The question now arises, how did the provisions of Canadian collective bargaining statutes affect the ability of employers and unions to get directly into the courts with their contract-observance disputes?

Canadian collective bargaining statutes add to the status of unions by establishing their right to act as bargaining agents for employees, with authority to make collective agreements on their behalf. The statutes add to the status of unions when they define their duties and responsibilities and make them answerable for the offences they commit.

The statutes also add to the status of collective agreements when they declare them binding on all concerned, on the union, on the employees and on the employer, and when they require that the parties to collective agreements agree upon procedures for the final and binding settlement of disputes that arise between them involving the interpretation, application, administration or alleged violation of their agreements, and almost all the statutes make it an offence for the parties to use the old common law method of enforcing their agreements — the strike and the lock-out.

It is clear that the new collective bargaining statutes have conferred new and important rights and powers on unions that greatly increase their ability to carry out their programmes and make their influence felt in the business community. It is a short step from that finding to the conclusion that the new importance and power of unions requires that they assume a new and wider responsibility for their actions, in particular that they be held liable for their wrongful acts. In all fairness that conclusion can be followed by another equally logical, that they are entitled to recognition in the courts when they appear against those who have wronged them.

In the Taff Vale case,86 the English courts took that step and held that the Amalgamated Society of Railway Servants was liable for the damages it inflicted on the Taff Vale Railway Company when it interrupted the Company’s business by striking in an unlawful manner. The United States’ Courts did the same thing in the Coronado Coal case.87 Why should not Canadian courts re-appraise the common law status of unions in the same way and find not only that they may be sued for their wrongful acts but that they may sue those who wrong them? And why should not Canadian courts hold that unions may sue

87 268 US. 295 (1925)
employers who violate collective agreements and that employers may sue unions for such violations? Ontario’s courts and Saskatchewan’s courts are precluded from following English and United States courts in establishing a new common law status for unions. At the same time they are precluded from revising their view of the common law status of collective agreements. The legislatures of both provinces have preserved the common law status of both unions and collective agreements by statute. Saskatchewan’s legislature did so in sections 23 and 24 of the Trade Union Act, R.S.S. 1953, c. 259, and Ontario’s legislature enacted the same provisions in section 3 of the Rights of Labour Act, R.S.O. 1960, c. 354. The provisions of the two statutes are the same in this respect. Ontario’s Act, subsections 3(2) and 3(3) reads:

A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of any of the provisions of this Act or of the Labour Relations Act [1950].

A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of The Labour Relations Act [1950].

In Ontario’s case, a provision such as that contained in subsection 3(3) of the Rights of Labour Act may not be necessary to keep suits involving breaches of collective agreements out of the courts. The Labour Relations Act not only requires that collective agreements make provision for the settlement of disputes regarding the alleged violation of collective agreements, but it prescribes arbitration as the procedure to be followed and it makes it impossible for the party to a collective agreement faced with an arbitration initiated by the other party to avoid the proceedings. Under such circumstances, even if there were no subsection 3(3) in the Rights of Labour Act, Ontario courts might not entertain actions involving collective agreements. The courts might well hold that the Labour Relations Act that made collective agreements binding also provided a remedy for those who suffered when agreements were breached, with the result that the aggrieved party is obliged to use the procedures provided by the statute for his relief, namely, arbitration, and so has no access to the courts.

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88 See Nipissing Hotel Limited et al. v. The Hotel and Restaurant Employees and Bartenders International Union et al., 63 CLLC ¶15,457, where it is held that this subsection bars the naming of a union as defendant in an action. See also Re Polymer Corporation and Oil, Chemical and Atomic Workers’ International Union, Local 16-14, [1961] O.R. 176, where it is held that a union has a status such that it is answerable at arbitration for the damages it inflicts on an employer by its wrongful acts.

89 See Russell on Arbitration, 15th ed., p. 57: "Where a statute provides that disputes of a particular type shall be settled by arbitration, the position is different; for the court cannot try such a dispute."
In the other provinces, where arbitration is not so clearly prescribed by statute as the procedure to be followed to enforce a collective agreement, the courts might hold that they can properly entertain suits arising out of collective agreements.

The *Grottoli* case\(^9\) decided in an Ontario court, suggests that there is possibly a roundabout way to get collective agreements into Ontario's courts. Grottoli successfully sued his employer to secure vacation pay which he claimed was due him under the provisions of a collective agreement between the union representing him and his employer. The employer applied for an order quashing the judgment on the ground that the arbitration requirements of the *Labour Relations Act* were so broad as to exclude any right of an employee under a collective agreement to bring action against his employer for wages. It was argued, on behalf of the employer, that the employee was obliged to use the arbitration procedure of the agreement and, if necessary, follow the procedure of the Act to enforce a favourable award.

The court held that the union was entitled to negotiate the provisions of a collective agreement, which provisions set out the terms of employment between each employee and his employer. But the establishment of those terms of employment did not abrogate the common law relation of an employee to his employer, so that the former retained his right of action against the latter to claim wages due him. The court cites with approval the judgment of the Honourable Mr. Justice Judson in *Le Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee*, (1959) S.C.R. 206.

It was pointed out earlier in this study that, prior to enactment of collective bargaining legislation, Canadian courts were not disposed to accept the proposition that the terms of a collective agreement are embodied in the individual employees’ contract of employment. In the *Grottoli* case the Ontario High Court seemed to accept that proposition readily, at least in so far as it concerns pay. And apparently subsection 3(3) of the *Rights of Labour Act* does not stand in the way for the subject of Grottoli’s suit is not a collective agreement but his contract of employment.

But a few months before the *Grottoli* case was decided, the Ontario High Court dealt with another one, the subject of which was also the plaintiff’s contract of employment. In *Frederick Hill v. Canadian Pacific Railway et al.*, [1962] O.R. 7, Hill, a locomotive engineer employed by the C.P.R., sought a declaration that the union dues agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen and the Railway Company was not binding on him. The dues agreement not

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only provided for the payment of dues to the appropriate Brotherhood, but provided further in the case of engineers, that any who were delinquent in the payments would lose their priority of employment.

On Hill's behalf it was argued that the Union dues agreement, a document separate from the collective agreement, was not a collective agreement and so not binding, and that Hill, having resigned from the Brotherhood, was not bound by it in any case. It was also argued that the dues agreement was illegal at common law because it required payment of dues by non-members.

The court denied Hill's claim holding that the dues agreement was a collective agreement. Here, again, it seems that the court accepted the view that the terms of the collective agreement were embodied in the employee's contract of employment.

The question of the relation between the provisions of a collective agreement and the contracts of employment of the individual employees covered by it is examined in some detail by the Supreme Court of British Columbia in Nelson Laundries Limited v. Manning, (1965) 51 W.W.R. 493. Manning, after quitting the employ of the company, allegedly violated a restrictive covenant in the collective agreement between the company and the union of which he was a member.

The provision in question provided that anyone separated from employment for any reason should not for a period of six months thereafter, for himself or for anyone else, solicit the patronage or trade or custom for laundry or any other service rendered by the company from anyone with whom the employee may have dealt during his service with the company. The company moved to enforce the restrictive covenant against Manning.

It was argued for the company that the restrictive covenant was embodied in the contract of employment between Manning and Nelson Laundries. In Manning's defence it was argued that he was not a party to the collective agreement between the company and the union and so was not bound by it. It was argued further that, in any case, the collective agreement was unenforceable.

The Court held that Manning could not rely on the Young case or the Aris case, or the Wright case, or on Bryson v. Glen-lawn S.D. for unlike those cases, the collective agreement under consideration was in a form such that it could be incorporated in a contract.

9 The collective agreement in this case was governed by the federal statute, Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152.
93 [1 93 3 ] 1 D.L.R. 634.
95 [1944] 3 W.W.R. 156; 52 Man. R. 165
of employment and the parties did intend to be bound by their collective agreement. The Court pointed out that there is legislation making collective agreements binding and that they were declared to be binding in *Hume and Rumble Limited and Peterson Electric Construction Company Limited v. Local 213 of the International Brotherhood of Electrical Workers* (A.F. of L.) *et al.*, (1954) 12 W.W.R. (N.S.) 321, at pp. 328-29. However, the court pointed out that the issue was not the enforceability of the collective agreement, but the existence of a contract of service and the content of that contract. Dryer, J., for the Court, in granting the company’s motion held:

> There was a contract of service between the plaintiff and the defendant. The question is what were its terms. In the absence of some evidence to indicate a contrary stipulation, I must find that the terms of that contract are those terms of the collective agreement which deal with the rights and obligations which are to subsist between the employer on the one part and the employee on the other.96

It should be noted that the grievance procedure of the collective agreement and arbitration would not serve the employer in the *Nelson Laundries* case for Manning having left the employ of the company could not be reached by those procedures.

In the Dinham case,97 the plaintiff sought to recover damages from his employer for allegedly dismissing him in violation of his seniority rights as set out in the collective agreement. The employer took the position that Dinham was properly retired because of his age. The plaintiff had earlier lost his grievance when a Council of Arbitration established under the provisions of the *Quebec Trade Disputes Act*, R.S.Q. 1941, c. 167, ruled against him. He asked for a declaration that the award was null and void on the ground that the Council of Arbitration altered, amended or modified one of the clauses of the agreement. The company contended that Dinham was bound by the decision of the Council of Arbitration.

This case as it was presented to the court also raised the question of the content of Dinham’s contract of service. However, on appeal, the Supreme Court of Canada did not consider that question, holding that Dinham already had his decision from a properly constituted arbitration board that acted within its jurisdiction.

The *Dinham* case suggests that an employee who has tried to secure what he regards as his rights under a collective agreement by submitting his grievance to arbitration as the agreement provides cannot subsequently secure relief in the courts. But it seems logical to

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conclude, too, that an employee who takes his case directly to the court will succeed if he can satisfy the court that the terms of the collective agreement are embodied in his contract of service and that the latter has been breached.

The latter course of action is particularly significant in Ontario where subsections 3(2) and 3(3) of the Rights of Labour Act stand in the way of actions initiated by unions to enforce collective agreements. Thus a union might decide to take its quarrel to the court and might succeed in doing so through an employee who, as an individual, has access to the court. Or, an employee himself might bypass grievance and arbitration procedures and, without consulting the union, go to the court with his complaint.

In contrast with the statutes of Ontario and Saskatchewan, the statutes of British Columbia98, Manitoba99, Newfoundland100, and Prince Edward Island101 provide that a union is a legal entity capable of suing and being sued. However, there is some variety in the degree of recognition accorded unions. British Columbia’s statute makes the union a legal entity capable of suing and being sued for the purposes of the statute itself. Suit may be brought against a union to recover damages suffered as a result of the union’s violation of any provision of the statute. Prince Edward Island’s statute says flatly that unions may sue and be sued. Newfoundland’s statute provides that all unions may be sued, but it appears to deny unregistered unions the right to sue. Manitoba’s statute accords unions status to sue and be sued “as permitted under the Act” but it also provides that either party to a collective agreement may sue the other to recover damages suffered as a result of the breach of the agreement.102

In British Columbia there was a substantial body of case law establishing the legal status of unions before the present provisions of the Trade-unions Act became law. In Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1, [1947] 2 W.W.R. 610, it was held that the Industrial Conciliation and Arbitration Act that governed labour relations at that time made unions juristic persons that could be prosecuted in their own names.103 Then in Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al., [1948] 2 W.W.R. 325, it was held that the union was a legal entity against which action could be brought for damages resulting from a breach of the statute.

98 The Trade Unions Act, R.S.B.C. 1960, c. 384, S. 7 (2).
100 The Trade Unions Act, S.N. 1960, c. 59, S. 5 (5) and (7).
101 The Industrial Relations Act, S.P.E.I. 1963, c. 20, S. 52.
102 The Bakery and Confectionery Workers’ International Union, Local 389 and Brothers Bakery Limited, (1962) 37 W.W.R. 413, a Manitoba court held that a union had no status to secure a mandatory injunction requiring the employer to implement the pension provisions of a collective agreement. The court held, too, that the agreement was non-enforceable. Section 46A of Manitoba’s statute went into effect after this decision was handed down.
103 See Sloan, C.J.B.C at p. 511; O’Halloran, J at p. 518; and Robertson, J. at p. 522.
In Walker et al. v. Billingsley et al., (1952) 5 W.W.R. (N.S.) 363, the court expressed the view that a union is a legal entity, suable in its own name, but only in cases arising under the Industrial Conciliation and Arbitration Act. (Subsequently superseded by the Labour Relations Act.)

The plaintiff in the Therien case\(^{104}\) sought to recover damages from the union on the ground that he suffered as a result of its breach of the statute. The plaintiff succeeded and the union’s successive appeals up to the Supreme Court of Canada were dismissed. In the latter Court, Lock, J., expressed the view that the trade union is a legal entity not only for purposes of the Labour Relations Act but also one which may be made liable for damages under the common law.

Meanwhile, the British Columbia Legislature had enacted the Trade-unions Act, which made unions legal entities for a narrower purpose in one sense than the Court would have allowed, that is, to sue and be sued for the purposes of the statute.

The courts of British Columbia also considered the status of the collective agreement. In Seaboard Owners v. Cross et al.,\(^{105}\) the court described a collective agreement as a "legal contract". Machinists, Fitters and Helpers Union, Local No. 3 v. Victoria Machinery Depot Company Limited et al., [1953] 3 D.L.R. 414, was an action by a union against the company and another union for a declaration that it was entitled to do certain drilling under its collective agreement with the company. The court recognized the plaintiff union as a legal entity and expressed the view that it must have the legal authority to enforce the agreement it had authority to make. In the Court of Appeal, the Court noted that the dispute was a jurisdictional one between two unions which had not been resolved by arbitration between them. Mr. Justice Smith in his judgment stated that since attempts at arranging arbitration failed, the union had a right to sue in court for a declaration of its rights under the collective agreement, joining the employer also as a defendant to bind it.

In Hume and Rumble Limited and Peterson Electric Construction Company Limited v. Local 213, International Brotherhood of Electrical Workers et al., (1954) 12 W.W.R. (N.S.) 321, the court expressed the view that a collective agreement confers on each party to it valuable rights which each can enforce in the Court.

G. H. Wheaton Limited v. Local 1598, United Brotherhood of Carpenters and Joiners and Local 2415, Pile Drivers, Bridge, Dock and Wharf Builders et al., (1957) 6 D.L.R. (2d) 500, is a case in which, through the actions of Local 1598, which agreed to provide carpenters for

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The company's undertaking, and Local 2415, which objected to the carpenters doing the work, the carpenters were persuaded to leave their jobs.

The company succeeded in its suit against the two locals to enjoin them from breaching the collective agreement and to secure damages for the loss of time suffered by the walk out. Thus the company was able to enforce the provisions of its agreement with the carpenters in the court.

The *Wheaton* case is authority for the proposition that a collective agreement is enforceable in the courts of British Columbia. But the company had two other courses of action open to it. It might have taken the matter to arbitration, for it was in a position to claim that the union was violating its agreement. Perhaps there was some doubt about the remedy that an arbitrator might give, for the question of the arbitrator's authority to award damages had not been thoroughly considered and the problem of enforcing an arbitrator's direction to the union to observe the agreement was of uncertain difficulty.

The company might have chosen to sue the union for damages, following the *Vancouver Machinery* case, on the ground that the union's action was a breach of the statute.

In the *Perini Pacific* case, some four years after the *Wheaton* case, the company concerned chose the last mentioned course of action. The company’s employees struck while a collective agree-merit was in effect and disrupted its operations. The company brought action for declarations, an injunction and damages, contending that the union and certain of its officers and members were responsible for the strike and that in directing it and participating in it they violated the provisions of the *Labour Relations Act* and the *Trade-unions Act* dealing with strikes. The court held that its jurisdiction was not ousted by the provisions of section 22 of the *Labour Relations Act* which require that the parties settle their disputes concerning the interpretation of their agreement, its application, its operation and its alleged violation "by arbitration or otherwise". The court held that the dispute under consideration was not a difference of the sort the parties had agreed to arbitrate and that it was not a *bona fide* labour dispute but rather a clear breach of the statute.

The court did not grant the declarations or the injunction on the ground that the dispute was settled but it awarded the company special damages of $39,559.03 against the defendants.

The cases described are sufficient to show the modifications that British Columbia's courts have made in the common law status of unions and collective agreements. The statutes have now caught up with the courts in most of the changes. The result is that the

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courts in British Columbia are open to both unions and employers who may go there for the enforcement of their collective agreements. Thus, in British Columbia, an employer would follow the well-developed procedures and go to the courts to recover damages suffered as a result of a strike while an agreement is in effect. In Ontario the employer would follow equally well developed procedures and go to arbitration.

In Alberta in *Medalta Potteries Limited v. Longridge et al.*, (1947) 2 W.W.R. 856, the Supreme Court considered the validity of the certification of a union, but incidentally the court remarked:

> for the purposes of The Alberta Labour Act, 1947, c. 8 and proceedings thereunder the defendant unions are legal entities distinct from their members.

In Saskatchewan the court noted in *Mackay v. International Association of Machinists*, [1946] 3 D.L.R. 38, that section 10(2) of *The Trade Union Act 1944* provides that a union may make application to the court in its own name to enforce an order of the Labour Relations Board. The court concludes that it follows that a union has status to be named party to certiorari proceedings.

In Quebec, unions may incorporate under the Professional Syndicates Act. Under the *Collective Agreement Act*, the Parity Committees that administer the collective agreement established under the Act have corporate status and may sue the employer to secure compliance with the provisions of the agreement and be sued. But, in general, unincorporated trade unions and collective agreements in Quebec have a status not unlike the traditional common law status that still prevails in some of the common law provinces.

In conclusion, it appears that the courts of British Columbia are open to unions and employers involved in disputes over the interpretation, application, administration and alleged violation of their collective agreements. The courts of Manitoba, Newfoundland and Prince Edward Island are open, too, but less used than British Columbia’s courts. At the other extreme, Ontario’s courts are practically closed and so are Saskatchewan’s. Alberta’s courts have taken the first step in the modification of the common law status of unions in the *Medalta Potteries case*. But New Brunswick’s and Nova Scotia’s courts have had little occasion to consider the question of the legal status of either unions or collective agreements.
CHAPTER V
LABOUR ARBITRATIONS IN THE COURTS

Disputes between the parties to collective agreements regarding the interpretation, application, administration, or alleged violation of their agreements may be taken directly to the courts in some provinces. But in all provinces such disputes may be taken to the courts indirectly, for the party adversely affected by an arbitrator’s decision may take the award to the court to have it set aside.

The courts have traditionally held that they have inherent jurisdiction to review arbitration awards and that they will do so even though the parties have agreed to be bound by an award and even though they have agreed that they will not have an award reviewed. The courts refuse to be deterred by a statutory provision, such as that in many of our collective bargaining statutes, declaring that an arbitration award is “final and binding” on the parties concerned. They hold that “final and binding” just means that there is no appeal from an arbitrator’s award, that no court can hand down a decision to replace it. But they insist that a statutory provision whereby the parties to an arbitration are bound by an arbitrator’s award does not prevent the courts from reviewing the award to determine whether or not the arbitrator has properly discharged his duties and made a good award.

The courts do not usually regard labour arbitrations as a special variety of arbitration which is not subject to their review. However, in some cases, they have held that the tribunal is more accurately described as a “domestic tribunal” than as an arbitration tribunal in the ordinary sense.

There is the possibility, too, that the courts in some provinces might hold that a union has no status to commence proceedings to have an arbitration award reviewed. Before Manitoba’s statute was amended giving unions status, the court in that province reached such a conclusion in J. A. Nabess and Lynn Lake Base Metal Workers’ Federal Union No. 292 and Sherritt Gordon Mines Limited, (1960) 67 Man. R. 22. But in Ontario the courts have entertained motions brought by unions to review awards on certiorari, for example, in Re International Molders and Allied Workers and Maxwell Limited, (1963) 39 D.L.R. (2d) 232.

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107 See Thomas & Sons and Hacket, (1939) 14 M.P.R. 33 (N.S.); [1939] 2 D.L.R. 332 particularly at p. 334
109 See Canadian Air Line Pilots Association et al. v. Canadian Pacific Air Lines Limited at al., 65 CLLC ¶14,057 at p. 11,266. See also Re Gainers Ltd. and Local 319, United Packinghouse Workers, (1964) 47 W.W.R. 544.
The courts' authority to review an arbitration award is summed up in *Re Bailey Construction Company and Etobicoke*, [1949] O.R. 352, and quoted by Riley, J., of the Alberta Supreme Court in his decision on a case involving a labour arbitration award:110

... an arbitrator's award may be set aside only if it has been improperly procured, or if the arbitrator has misconducted himself. Misconduct includes a case where the award is on its face erroneous in the matter of law. But an error in law to be a ground for setting aside the award, must be such that there can be found in the award itself or in a document actually incorporated therewith some legal proposition which is the basis of the award and which is erroneous. If a specific question of law is submitted to an arbitrator and he decides it, the fact that his decision is erroneous does not make the award bad on its face so as to enable a court to set it aside, and where the question referred for arbitration is one of construction (which is, generally speaking, a question of law), the decision of the arbitrator cannot be set aside merely because the court would have come to a different conclusion.

It is important to note that the courts distinguish between the error of law that the arbitrator may make when deciding a question of law that is the very question submitted for his decision and the error that he may make in a question of law that underlies the very question submitted to him and on which his decision on the latter depends. The courts hold that they cannot set aside an award for an error the arbitrator makes in answering a question of law submitted to him.111 They take the position that the parties have freely chosen to submit the question of law to the arbitrator and that they must take his award right or wrong. The fact that the arbitrator who has made such an error of law is not trained in the law is not relevant, for the parties are free to determine the qualifications of that arbitrator so that they have no one but themselves to blame if he is not qualified.

On the other hand, the courts will set aside an award if they find that the arbitrator has made an error of law in the question that underlies the very question submitted to him. In a labour arbitration an arbitrator may find that he has to interpret a clause of a collective agreement before he can deal with the question before him. If he errs in his interpretation, he makes an error of law that becomes the basis of his decision and

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111 *Re King v Duveen*, [1913] 2 K.B. 32.
makes it a bad one. Thus in Re Thomas & Sons and Hackett, [1939] 2 D.L.R. 332 the court concludes:

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\ldots \text{the award contains a fundamental error of law and fact in the interpretation of a written contract and the application of its terms to the matters in dispute. Such an error is ground for setting aside the award.} \ldots \\
\text{The award will be set aside with costs.}
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It is generally understood that an arbitrator has limited authority, only that specific and particular authority conferred on him by the parties who have agreed to the arbitration or by the statute under which the arbitration is undertaken. If the arbitrator deals with some matter which he is not empowered to decide, or if he gives some remedy which he has no authority to give, he acts outside his jurisdiction and his award is void. An arbitrator may also be held to have acted in excess of his jurisdiction if he has made an error of law in deciding a question which is basic to the question he is asked to answer, or if he refuses to admit evidence that is admissible, or if he bases his decision on bad evidence or on no evidence at all. This is so because an arbitrator has no authority to give a final and binding decision on any question except the very question put to him. Consequently, his decisions on other questions will stand only if they are correct in law.

The powers of the courts to deal with arbitration proceedings are set out in the arbitration statutes of the several provinces. There is no federal statute, so that an arbitration under the federal Industrial Relations and Disputes Investigation Act is governed by the statute of the province in which it takes place. For the purposes of this study, it is significant that the provisions of the various arbitration statutes add significantly to the common law powers of the courts to deal with arbitrations and so enable the courts to take a larger part in the arbitral process than they do under common law. However, the labour relations acts of three provinces — Ontario, Manitoba and Alberta — provide in their sections 34(10), 19(4) and 73(18) respectively, that the arbitration acts do not apply to labour arbitrations. But Ontario’s Labour Relations Act in section 34(a) provides for the enforcement of labour arbitration awards in the courts and the Alberta Labour Act sets out the powers of the courts to deal with labour arbitration in subsections 13 to 17 inclusive of section 73.

In Ontario the courts have held that labour arbitration tribunals are statutory so that certiorari lies against them.\(^{112}\) In a British Columbia case, Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663, (1962) 37

\(^{112}\) Re International Nickel Company and Rivando, [1956] O.R. 379
W.W.R. 646, the Supreme Court of Canada upheld the decision of the court of appeal holding that a labour arbitration board is not a statutory body so that *certiorari* does not lie against such a board. The courts in New Brunswick followed the *Howe Sound case in Re Atlantic Sugar Refineries Limited and Bakery and Confectionery Workers International Union, Local 443*, (1961) 27 D.L.R. (2d) 310, and the Alberta Supreme Court followed it in *Western Plywood (Alberta) Limited v. International Woodworkers of America, Local 1-207 et al.*, (1964) 44 D.L.R. (2d) 700. In all three cases the courts held that the governing labour relations act by providing that settlement of contract observance disputes was to be “by arbitration or otherwise” gave parties to collective agreements an alternative to arbitration that parties in Ontario did not have with the provision in Ontario’s Act that settlement is to be “by arbitration”.

The arbitration statutes usually set out the grounds on which the court may quash an arbitrator’s award and these are usually the same as the common law grounds, misconduct, excess of jurisdiction, bias, denial of natural justice. But the statutes provide, as the common law does not, that the court may remit an award to an arbitrator for correction or for further consideration. In Ontario where the *Arbitration Act* does not apply to labour arbitrations, the court of appeal granted a *mandamus* remitting an award to the arbitrators for their consideration on the ground that the arbitration board was statutory.

The arbitration statutes usually provide, too, that the arbitrator may state a case to the court and that, on the motion of one of the parties concerned, the court may direct the arbitrator to state a case for the court’s ruling. By this procedure the statutes enable the arbitrator to go to the court with a question of law not specifically referred to him, yet a question that is basic to his decision. The court may rule on that question and so enable him to proceed with the particular matter submitted for his decision without running the risk of making an error of law that would vitiate his award. The provision also enables a party that has some doubt about the validity of the finding an arbitrator may make on a collateral question of law to get an authoritative ruling on the question from the court.

In *Building and General Labourers’ Union, Local 602, v. Ocean View Development Limited*, [1955] 5 D.L.R. 12, a board of arbitration stated a special case for the opinion

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113 See *Re Shipping Federation of British Columbia and International Longshoremen’s and Warehousemen’s Union, Local 501, 60 CLLC 15, 277.*


*Re Pacific Western Airlines Limited and Pacific Western Airlines Pilots’ Association*, (1960) 22 D.L.R. (2d) 500 where an award was remitted to enable an arbitrator to reconsider it in the light of new evidence.

114 *Re Civic Employees’ Union No. 43 and Municipality of Metropolitan Toronto*, (1962) 34 D.L.R. (2d) 711.
of the British Columbia Supreme Court. The court was asked to determine whether the company was in breach of the collective agreement in refusing to discharge an employee who refused to join the union or to pay union dues. The court held that there was no breach of the agreement.

In Re Retail, Wholesale and Department Store Union, Local 580 and W. H. Malkin Company Limited, (1959) CLLR T[15,276, and in Westeel Products Limited and United Steelworkers of America, Local 3229, (1964) 44 D.L.R. (2d) 325, the British Columbia Supreme Court refused to grant orders directing arbitration boards to state cases for the opinion of the court on two grounds. First, the court held in both cases that the questions involved the interpretation of the agreement, which was within the jurisdiction of the arbitrators. In the second place, the court held that there was no evidence to indicate that the arbitration boards were exceeding their jurisdiction.

In Local 443, Bakery & Confectionery Workers’ International Union v. Atlantic Sugar Refineries Limited, (1960) 25 D.L.R. (2d) 308, the New Brunswick Court of Appeal granted the union’s appeal against an order of the lower court directing the arbitrator to state a special case for the opinion of the court. The Court of Appeal held that one of the questions dealt with the arbitrator’s jurisdiction, which question could not be taken to the court for an opinion as a stated case. The other two questions were questions of law which the arbitrator was required to answer.

In Re Gainers Limited and Local 319, United Packinghouse Workers, (1964) 47 W.W.R. 544, the Alberta Supreme Court dealt with a special case submitted for its opinion under the Arbitration Act, R.S.A. 1955, c. 15, s. 14. The Court was asked if the company’s nominee on an arbitration board was disqualified because he was the son of the company’s general solicitor who was acting as its counsel in the proceedings, if the selection of the chairman of the board was invalid because of the participation of the company’s nominee in his selection, and what was the position of the union’s nominee.

The Court held that labour arbitration is not like commercial arbitration and not governed by the Arbitration Act. It held further that the parties to the collective agreement had established a valid method of selecting an arbitration board and that it was not their intent that the nominees be impartial.

In Re International Union of Operating Engineers, Local 115, and Ben Ginter Construction Company Limited, 65 CLLC ¶14,066, the Supreme Court of British Columbia, dealing with the company’s petition for an order directing the arbitrator to state a special case for the Court’s opinion, proceeded, with the agreement of counsel, to rule on the question raised. The Court ruled that certain evidence that the arbitrator had refused to admit was admissible.
There are not many examples of the use of the stated case in labour arbitrations and most of those reported are in British Columbia. There is no indication that the parties are using this procedure extensively to get labour arbitrations into the courts and no indication that the courts are particularly anxious to intervene by this procedure.

Most of the labour arbitrations that get into the courts do so when one of the parties concerned objects to the arbitrator’s award and goes to the court for an order to set it aside.

When a court reviews an arbitration award on the application of one of the parties for an order to set it aside, the court will look at the award itself and at all the documents attached to it. In labour arbitration cases the court usually sees the award itself, the collective agreement and the record of the disposition of the grievance that is the subject of the arbitration. Since the award in the case of a labour arbitration is usually contained in a report that summarizes the evidence and sets out the arbitrator’s reasons for decision, the court gets an account of the case as the arbitrator saw it.

A court will also hear evidence regarding the arbitrator’s conduct of the arbitration proceedings to determine whether or not he has discharged his duties properly.

The courts will not set aside an award for error of law in the very question put to the arbitration. In an arbitration between Local 170 of the Pipefitting Industry and The Bay Company (B.C.) Limited the arbitrator was asked:

Is the Bay Company (B.C.) Ltd., liable to pay in respect of its operations at Dawson Creek, B.C. (Dawson Creek Hospital) room and board, or the equivalent as subsistence allowance in lieu of same; to all employees engaged in those operations including those who are local residents, pursuant to clause 4(a) of the collective agreement.

The company claimed that the arbitrator misconstrued the agreement and made application to the Supreme Court of British Columbia to set the award aside on the ground that there was an error of law on its face. The Court dismissed the application holding that making the interpretation of the agreement was the very question before the arbitrator and his award on that question was not reviewable.115

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Similarly, the courts will not disturb an award on a question of fact which is the very thing submitted to the arbitrator. In *Canadian Air Line Pilots Association et al. v. Canadian Pacific Air Lines Limited et al.*, 65 CLLC ¶14,057, the British Columbia Court of Appeal held that it had no authority to review the award of an arbitrator who was asked if medical causes were the decisive factor in a pilot’s inability to maintain the required qualifications and so brought about his dismissal.

The courts will set aside an award when they find that the arbitrator is guilty of what is termed "legal misconduct": if an arbitrator shows bias,\(^\text{116}\) if he denies either party a proper hearing,\(^\text{117}\) if he accepts evidence in the absence of the parties\(^\text{118}\) or if having made an award, he changes his mind and makes a different one.\(^\text{119}\)

The courts will also set aside an award in which the arbitrator exceeds his jurisdiction in the sense that he decides some question which is not before him. Thus in *Re Forest Products Industries Southern Interior Region, B.C., and S. & K. Limited v. International Woodworkers of America, Local 1-423*, (1961) 36 W.W.R. 235, the court set aside the award because the arbitrator awarded back pay to a reinstated employee when the question of back pay was not submitted for his determination.\(^\text{120}\) But in the Polymer case\(^\text{121}\) the courts held that the arbitrator had authority to award damages, although the collective agreement made no such provision. And in *Western Plywood (Alberta) Limited v. International Woodworkers of America, Local 1-207*, (1964) 47 W.W.R. 426; 44 D.L.R. (2d) 700, the court upheld the authority of the arbitrator to award back pay to a reinstated employee on the ground that such an award is "a necessary implication and ancillary to the finding that the employee should be reinstated".

In *Re International Nickel Company of Canada Limited and International Union of Mine, Mill and Smelter Workers* a board of arbitration dealt with the union’s claim that an employee had been dismissed without just cause. The board found that the company was justified in dismissing the employee, but went on to hold that discharge was an unreasonable penalty and imposed in its place a seven months’ suspension.

\(^{116}\) *Re International Union of Operating Engineers, Local 115, and Saguenay-Kitimat Company*, (1957) 6 D.L.R. (2d) 156

\(^{117}\) *Westeel Products Limited v. United Steelworkers of America, Local 3229 and Chalmers*, 64 CLLC ¶14,044.


\(^{119}\) *Nelson Laundries Limited v. Laundry, Dry Cleaning and Dye House Workers’ International Union, Local 292*, 64 CLLC 115,509

\(^{120}\) See also *Re Shipping Federation of British Columbia and International Longshoremen’s Union*, (1962) 33 D.L.R. (2d) 157 where it is held that the arbitrator acted outside the scope of his jurisdiction.

The High Court dismissed the application of the company for an order, by way of certiorari, to quash the award. But the Court of Appeal reversed that decision and granted the company's application on the ground that the arbitration board, asked to determine whether there was just cause for the employee's dismissal, exceeded its jurisdiction when it decided a different question, whether it was reasonable for the company to dismiss the employee.

In *Re Sudbury Mine Workers, Local 598, and International Nickel Company Limited*, (1962) 35 D.L.R. (2d) 371, the Ontario Court of Appeal, reversing the decision of the lower court, upheld an arbitration board's finding that it had no jurisdiction to deal with a dispute because the union had followed the wrong procedure in processing its grievance. On the other hand, in *United Steel Corporation and Harold E. Fuller et al. and United Steelworkers of America, Local 2766*, (1958) 12 D.L.R. (2d) 322, it was held by the Supreme Court of Ontario that the arbitration board erred in finding that it had no jurisdiction to deal with the matter before it. The Court held that the arbitrator had the jurisdiction set out in section 32(3) of the Ontario Labour Relations Act rather than the narrower jurisdiction described in the collective agreement and in *John Inglis Company v. United Steelworkers of America, Local 2900, et al.*, [1965] 1 O.R. 511, the Ontario High Court denied the Company's application for an order setting aside an award, holding that the arbitration board had authority under the agreement to deal with the dispute regarding classifications that was submitted to it.

There are several cases in which one of the parties to a labour arbitration has taken steps to have an award quashed on the ground that there was an error of law in a collateral question that appeared on the face of the award.

In *International Woodworkers of America, Local 423, v. S. & K. Limited*, (1962) 31 D.L.R. (2d) 463, the British Columbia Court of Appeal reviewed an award in which an arbitration board dealt with the question:

Was Jack Spencer, an employee of S. & K. Limited, discharged on August 17, 1960, for proper cause?

The board defined "proper cause" which it termed "just cause" as that "which is just and fair in the Board's opinion".

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122 [1959] O.R. 527. *Re United Electrical Workers, Local 514, and Continental Diamond Fibre Division, Arborite Co. Ltd.*, (1964) 15 L.A.C. 98 is a similar award. On September 16, 1964, the court set the award aside without giving reasons for decision. See also *International Brotherhood of Electrical Workers, Local 213 and Burrard Dry Dock Company Limited*, (1962) S.C.B.C. 62 CLLC ¶15,411, where the union contended that the arbitrator dealt with a question that was not submitted to him.
The court of appeal, upholding the lower court's decision setting the award aside, held that the board had erred in its answer to the question "what is proper cause?", a question which was not the very question put to it, but a collateral question.123

In the following cases the courts set aside labour arbitration awards on the ground that the arbitrator made an error of law in his interpretation of a provision of the collective agreement which was basic to the question submitted to arbitration:


In the following cases the courts dismissed applications for orders to set labour arbitration awards aside on the ground that the arbitrator made an error of law in interpreting a provision of the governing collective agreement:

*Re International Nickel Company and Rivando, (1956) 1 D.L.R. (2d) 775.*


In *Re Canadian Westinghouse Company Limited and UAW-CIO* (1957), listed above, Mr. Justice Aylesworth of the Ontario Court of Appeal explained that the court has no appellate function so that it is immaterial whether or not the court agrees with an arbitrator's interpretation of a collective agreement. He goes on to say that the court will not grant an order setting aside an award for error of law in the form of a misinterpretation of a collective agreement if the interpretation given by the arbitrator is one which the language of the agreement will reasonably bear.124

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124 30 D.L.R. (2d) 673 at p. 676.
In their reviews of labour arbitration awards the courts have dealt with applications for orders to set awards aside on the ground that they contained errors of law that the arbitrator made in his handling of evidence. In Re Civic Employees’ Union No. 43 and Municipality of Metropolitan Toronto, (1962) 34 D.L.R. (2d) 711, the union made application for an order, by way of certiorari, to set aside an award that denied its grievance regarding back pay for certain employees. The union contended that the arbitrator had relied on the provisions of a memorandum of settlement to determine the intent of the parties regarding the back pay in question. The union was not satisfied with the ruling of the Ontario High Court on its application and appealed.

The Court of Appeal held that the arbitration board’s reliance on such extrinsic evidence was an error of law appearing on the face of the award. The court allowed the appeal and remitted the award to the arbitrators for their reconsideration and redetermination.

However, in Re International Molders and Allied Workers and Maxwell Limited, (1963) 39 D.L.R. (2d) 232, the Ontario High Court held that the phrase of the collective agreement that the arbitrators interpreted was ambiguous and they were entitled to rely on extrinsic evidence to determine its meaning.125

The courts will also set aside an award that is based on inadmissible evidence,126 an award that is made without consideration of evidence that goes to the root of the matter127 and an award that is not supported by any evidence at all, although the court will not concern itself with the quantum of evidence.128

The Supreme Court of British Columbia has set aside two awards in which the arbitrators held that, to justify a discharge, the employer must prove "beyond a reasonable doubt" that the employees concerned were guilty of the acts alleged to justify their discharge.129

In their reviews of labour arbitration decisions the courts, almost without exception, have applied the principles that ordinarily apply to commercial arbitration awards. There is no significant practical difference between the principles applied in British Columbia, where the procedures of the Arbitration Act are followed, and those applied in Ontario where the procedure of certiorari is followed. It is interesting to note that in Re Canadian Westinghouse

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125 See also Re Canadian Westinghouse Company Limited and United Electrical, Radio and Machine Workers of America, Local 504, (1962) 30 D.L.R. (2d) 676.
127 Re Canadian Air Line Pilots Association and Pacific Western Airlines Limited, ex parte Bray et al., (1963) 40 D.L.R. (2d) 125. Super-Yalu Stores Limited and Retail Food and Drug Clerks’ Union, Local 1518, 60 CLLC ¶15,304

However, in Re Civic Employees’ Union No. 43 and Municipality of Metropolitan Toronto, (1962) 34 D.L.R. (2d) 711, Mr. Justice Aylesworth in the Ontario Court of Appeal found in Rex v. Northumberland Compensation Appeal Tribunal, ex parte Shaw, [1952] 1 K.B. 338, authority for the proposition that the court has wide powers to supervise statutory arbitration tribunals by certiorari. Mr. Justice Aylesworth was particularly interested in showing that the court had power to grant a mandamus and so authority to remit the award of a statutory arbitrator for reconsideration. But in the Northumberland case Denning, L. J., states, too, at p. 348:

Of recent years the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction.130

In a Canadian case, Rex v. Nat Bell Liquors Limited, [1922] 2 A.C. 128, Lord Sumner gives a similar definition of the points to which certiorari goes:

... one is the area of the inferior court’s jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise.

These cases support the view that a court reviewing an arbitrator’s award by way of certiorari has wider powers than at common law and wider powers than those conferred by the arbitration acts, for it can set aside an arbitrator’s award for error of law in the very question before him. Section 73(15)(c) of the Alberta Labour Act seems to confer the wider power on the court, for it provides that a court may set aside an arbitration award for error of law on its face "regardless of whether the question of law was submitted to be

130 See also Regina v. Medical Appeal Tribunal, ex parte Gilmore, [1957] 1 Q.B. 574.
determined by the arbitrator or arbitration board”. However, even without that wider power, the courts are by no means powerless to supervise the activities of labour arbitrators. Their authority to set aside an award for error of law in the arbitrator’s answer to a collateral question of law enables the courts to review and accept or reject what is commonly the foundation of the award. For it is often the case that a labour arbitrator faces a collateral question of law in the interpretation of a provision of a collective agreement which underlies the actual question put to him.
CHAPTER VI

CONCLUSION

The statutory declarations that collective agreements are binding on those who are party to them and the statutory requirements that such agreements make provision for the final and binding settlement of disputes that arise under them, seem well designed to produce a certain stability in union-management relations. Unions and employers have long recognized that they can bring stability to their relations by making and honouring collective agreements. And before any collective bargaining legislation was enacted, some unions and some employers had recognized the fact that disputes would arise under their collective agreements and they had adopted grievance procedures. Some had gone a step further and agreed upon procedures for the final and binding settlement of their contract-observance disputes. But the statutory declarations and requirements were an innovation in that they required all unions and employers dealing with one another to adopt an arrangement which previously only some had adopted voluntarily. The declarations and the requirements also made urgent the problem of finding and developing procedures for the final and binding settlement of contract-observance disputes.

It has been pointed out in the preceding chapters of this study that, prior to the enactment of collective bargaining statutes, no procedures had been developed in Canada for the enforcement of collective agreements. The courts had generally refused to entertain actions to enforce collective agreements or to recover damages for their breach. The parties to collective agreements had not developed any generally accepted procedures for the settlement of contract-observance disputes.

It is pretty generally agreed that contract-observance disputes should be settled by some tribunal other than a court of law and various reasons have been advanced in support of that view. It is argued that litigation is undertaken in a spirit of antagonism that indicates that the relations between the two parties concerned are being terminated. Such a step is hardly practical in a situation where a union and an employer must of necessity continue to live together after a dispute is settled.

Traditionally, trade union people have regarded courts as hostile tribunals where they could not possibly secure their "rights". Lord Justice Scrutton has explained labour’s position thus: I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you
do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.\footnote{131 Lord Justice Scrutton, “The Work of the Commercial Courts”, Cambridge Law Journal, I, 1921-23, p. 8.}

It has been argued, too, that the courts are not knowledgeable in the field of union-management relations and consequently are not as effective as some tribunal composed of persons who are knowledgeable. In that connection Mr. Justice McRuer wrote:

> It is always unfortunate when either employers or employees have to resort to the Courts with reference to the solution of labour problems. A forum has been provided under the Labour Relations Act to deal with labour relations, and my own personal view is that, as far as possible, these problems should be solved by those who are particularly skilled in the adjustment of labour matters.\footnote{132 General Dry Batteries of Canada Limited v. Brigenshaw et al., [1951] 4 D.L.R. 414 at p. 417.}

Canadian statutes reflect the view that courts are not the place to settle contract-observance disputes by strongly underwriting arbitration as the appropriate procedure. The notable exception is British Columbia’s statute which provides an alternative to arbitration and which provides a favourable setting for resort to the courts.\footnote{133 See, for example, Economics and Research Branch, Department of Labour, Collective Agreement Provisions in Major Manufacturing Establishments, Labour Management Research Series, Report No. 5 (Ottawa: Queen’s Printer and Controller of Stationery), p. 50.}

In view of the provisions of the statutes it is not surprising to find that arbitration is the widely accepted procedure for the settlement of contract-observance disputes. A check of any good sample of collective agreements will turn up only one or two in two or three hundred without an arbitration clause.\footnote{134 Of course, in Ontario arbitration is the required procedure. There is no alternative. Since the bulk of collective agreements is in Ontario, one would expect any sample containing a substantial number of agreements from that province to contain a large number of arbitration clauses.} Of course, in Ontario arbitration is the required procedure. There is no alternative. Since the bulk of collective agreements is in Ontario, one would expect any sample containing a substantial number of agreements from that province to contain a large number of arbitration clauses.

It is also true that the vast majority of unresolved contract-observance disputes are settled at arbitration. In contrast with the few court cases, published arbitration awards have run to fifteen volumes in Labour Arbitration Cases, which includes only a few cases outside Ontario and only a fraction of those decided in Ontario. Labour Arbitration Cases reported 31 cases in 1960 and 63 in 1961, while The Committee on the Process of Arbitration in Ontario
(The Silk Committee)\textsuperscript{134} estimated from a sample that there are between 500 and 700 cases each year in Ontario.

More recently \textit{Labour Arbitration Cases} gives a broader coverage by giving at least a summary of every case that comes to the attention of the editor. In 1964 the reports covered 204 cases.

The Silk Committee also reported that most of the arbitrations in Ontario were undertaken by a few of the large unions as follows:\textsuperscript{135}

\begin{center}
\begin{tabular}{lrr}
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 & 1960 & 1961 \\
U.A.W. & 138 & 157 \\
U.S.W.A. & 68 & 56 \\
I.U.M.M.S.W. & 37 & 20 \\
U.E. & 47 & 44 \\
I.A.M. & 13 & 19 \\
Lumber & Sawmill & 11 & 4 \\
Others & 53 & 67 \\
\hline
367 & 367 \\
\end{tabular}
\end{center}

However, almost half of the 204 cases reported in the 1964 \textit{Labour Arbitration Cases} were initiated by the various unions classified as "Others" in The Silk Committee's report. This fact suggests that arbitration is being more widely used in Ontario than it was five years ago.

The apparently extensive use of arbitration is not positive proof that it is accepted enthusiastically as the procedure to be used in enforcing collective agreements. In Ontario and Quebec there are really no practical alternatives, except of course the alternative of avoiding arbitration by negotiating settlements of all grievances that persist to the last step of grievance procedure. In the other provinces where the parties are free to adopt anything other than arbitration which serves the purpose, the alternatives are not well defined except in British Columbia where the courts are open to the parties and the Labour Relations Board is available, and in Saskatchewan where the parties may turn to the Labour Relations Board.

The clearest indications of dissatisfaction with arbitration are to be seen in British Columbia. There the parties to collective agreements are much more disposed than in other provinces to go to the courts with their differences. Also, as it was pointed out in Chapter IV, the legislature has made provision for an alternative to arbitration, apparently in response to some criticism of the arbitration process.


\textsuperscript{135} Ibid.
In Ontario the parties to collective agreements have gone to the courts more frequently than in other provinces to have arbitration awards reviewed. This tendency indicates at least that unions and employers are sometimes reluctant to accept the arbitrator as the final authority on the issues that arise between them. It is consistent with the view held by many that arbitration is satisfactory enough, provided there is some way to review awards that are not well founded.

It does not follow that all the problems involved in enforcing collective agreements have been solved by the wide acceptance of arbitration as the appropriate procedure. Having accepted arbitration, the problem of establishing actively functioning arbitration tribunals successfully engaged in the settlement of contract-observance disputes becomes the pressing matter.

The first problem that has to be resolved in establishing arbitration tribunals is obviously the problem of finding arbitrators. On this point the collective bargaining statutes give the parties no guidance.

The parties to collective agreements in Canada, and particularly in Ontario, have tried to meet the problem of finding arbitrators by turning to the county court judges. Most of the judges commonly appointed have become familiar with the ways of unions and employers through their work on conciliation boards. Thus they have acquired their knowledge without identifying themselves with either party. Besides being knowledgeable in the field of union-management relations, the judges have a status in the community which makes their decisions authoritative. However, there is still a problem of numbers, for not all county court judges are interested in taking labour arbitrations and not all have the experience and background required.

Certainly arbitration cannot proceed in a satisfactory manner without the guiding hand of someone designated to act as arbitrator. But its course may still be rough and uncertain if the parties involved in the arbitration do not know what procedures are to be followed. The statutes are as silent on this matter as they are on the matter of the arbitrator himself. The result is that the parties and the arbitrator have to develop procedures. The fact that many of the arbitrators have been county court judges and the fact that counsel is often employed by one party or by both parties has made the knowledge and experience of people accustomed to curial processes available to the parties.

Finally, there is the problem arising from the fact that there is no generally accepted jurisprudence available to the arbitrators who make decisions on contract-observance disputes.
The problem of developing a body of legal propositions applicable to the union-management relationship as it is set out in the collective agreement is a very difficult one. Since the common law courts refused to entertain actions arising out of collective agreements, they developed no body of law applicable to the interpretation of such agreements. In any case, many of the concepts of the relations between employers and unions under collective bargaining are new and probably call for a different body of law than the courts would have developed had they looked at employer-employee relations years ago.

This is not to say that there are no principles of law applicable to the arbitration of disputes over the interpretation, the application, the administration or the alleged violation of a collective agreement. Clearly each party participating in a labour arbitration is entitled to appear before the arbitrator, to be heard and to hear what the other party has to say. And there are some aspects of the law of contracts and some aspects of the law of employer-employee relations that may be applicable, but there are differences of opinion regarding what and how much of the common law is really applicable.

Many of the issues that arise frequently between unions and employers are new and call for a new body of legal propositions. Thus there are questions regarding the rights of management to manage under a collective agreement, the rights supervision may exercise in directing the work force, the rights of employees to specific job assignments, to promotion, to transfer, to work in situations of work shortage — to mention only a few.

It is not enough for the arbitrator who rules on disputes involving such questions to be impartial and to be armed with the collective agreement. He may have to look beyond the collective agreement for criteria. He must have a body of legal propositions in the light of which to formulate his decision. Furthermore those legal propositions must be known and accepted by the parties concerned if the arbitrator's award is to make sense to them and be acceptable. So, an employer and a union involved in a dispute over contracting out in the face of a collective agreement that is silent on that point will be interested in the arbitrator's views on management's rights. The union will want an arbitrator who holds the "bargaining theory" of management's rights and the employer will want one who holds the "residual rights" theory. The arbitrator's decision is likely to turn on the "legal" propositions he holds. As long as the parties persist in holding different positions on the basic factor determining the outcome, one of them is bound to regard the arbitrator's award as badly conceived — hence the need for an accepted body of law to serve as the basis for the arbitrator's decisions.
It is not suggested that, once the basic principles are decided and agreed upon, the relations of unions and employers will be all sweetness and light. Rather it is suggested that no tribunal ruling on the disputes arising between unions and employers out of their collective agreements can function effectively without some ground rules in the form of legal propositions, a jurisprudence, in the light of which to formulate its decisions. Consequently, arbitration tribunals in their efforts to do an effective job find themselves trying to develop basic legal concepts.

There seems to be good reason to assign the task of developing a jurisprudence applicable to collective agreements to arbitration tribunals rather than to the courts. The principal consideration is that the arbitral process is the more expeditious one and the more flexible, and time seems to be of the essence. The arbitrator’s decision can be had relatively quickly. But neither the arbitrator nor the award is either immovable or invariable, both can, in due course, be rejected or both supported. Thus there is a process of selection in operation. Arbitrators whose approaches do not meet the test are passed by, while others find their services in greater demand. Awards that do not measure up are not regarded as authoritative and they are not followed by other arbitrators. In this way the labour arbitration process, particularly in Ontario, is developing a few of the necessary basic legal propositions.

It is apparent that the courts with their authority to review arbitration awards can also play a part in the formulation of a jurisprudence applicable to the collective agreement. So far the courts have not been called upon very often to review awards and they have frequently seemed reluctant to disturb them. But should the courts have greater opportunity to play a larger part because of more frequent requests for reviews of awards, and should they see fit to exercise their authority, they could play the dominant role. For the legal propositions that the courts could lay down would have a finality that the propositions of arbitrators do not possess. The danger in the courts’ intervention lies in the possibility that they might be more disposed to apply old principles to new situations where many of the issues require a new jurisprudence.

We have adopted arbitration as the most desirable method of enforcing collective agreements and that does seem, on the whole, a sound decision. It is suggested here that the success of arbitration in this field depends on the success of the parties in finding personnel for arbitration tribunals and then on the success of the tribunals themselves in determining satisfactory procedures and in developing a jurisprudence specifically applicable to contract-observance disputes.
The process of developing an effective arbitral system to handle disputes arising under collective agreements would be facilitated by the more extensive publication of full and complete arbitration reports. A report is the only record of the outcome of an arbitration and the only record of the course of the proceedings leading to the award. Both aspects of a case are important to the parties engaged in arbitration and to arbitrators. For arbitration reports provide information in the light of which those concerned with arbitration shape their own course of action and so help to determine the nature of the arbitral process in which they are participating. Thus it is most important that the information contained in arbitration reports be readily available.

The development of the arbitral system would also be facilitated if arbitrators had greater opportunity to meet and to discuss their problems. Reports, valuable as they are, seldom give a full account of an arbitration, so that arbitrators might, to advantage, exchange views on the reported and the unreported problems that they have faced.

Finally, more extensive research in the field of labour arbitration would serve to gather and organize information and to advance critical examination of the arbitral system.
APPENDIX

While this study was in press the Legislature of Saskatchewan passed an amendment to *The Trade Union Act*, R.S.S. 1966, C.83, which came into force on May 31, 1966. No changes were made in the sections of the Act to which reference is made in this study, except in their numbering. Two new sections were added to the Act, Sections 23A and 23B.

Section 23A provides that, if the parties to a collective agreement have agreed to include in their contract a provision for the final settlement of contract observance disputes by arbitration, without stoppage of work, the decision of the arbitrator is final and conclusive, binding on the parties and enforceable as if it were an order of the Labour Relations Board.

Section 23B provides that, if the parties to an agreement agree to arbitrate contract observance disputes as the final step in their resolution, but have not set out an arbitration procedure in their agreement, the procedure set out in the section applies.

Thus it is still true that, in Saskatchewan, there is no statutory requirement that provision be made in collective agreements for the final and binding settlement of contract observance disputes.
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