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Duty of Fair Representation Recent Attitude in British Columbia and Ontario
L'obligation d'une représentation équitable : l'exemple de la Colombie Britannique et de l'Ontario

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See table of contents

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Article abstract

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Duty of Fair Representation

Recent Attitudes in British Columbia and Ontario

David C. McPhillips

This paper discusses how far the duty of fair representation should be broadened in Canada and then argues that the Labour Boards are not the appropriate body to have jurisdiction over such matter.

"Unions have become so powerful that they don't even represent their membership."

The above statement, which in one form or another is often expressed at seminars and courses in Labour Relations, essentially poses a political problem. If it were true, the union or unions in question would be removed democratically. However, anyone with even the slightest understanding of democrates realizes that individual members and minorities within larger groups require protection. A trade union, once certified, is the exclusive bargaining agent for all the employees in the unit. Depending on the circumstances of the representation vote and the terms of the collective agreement, the union might represent not only strong supporters of the union but also passive supporters, those who actually voted against the union and refused to join and those who had to join sometime after the vote (due to closed or union shop provisions in the contract). Therefore, the trade union must accept the obligations of exclusive representation, namely that all members are fairly represented. The existence of this duty can be inferred from the fact that the bargaining agent is given the exclusive authority to bargain collectively on behalf of all employees in a bargaining unit. This inference permitted the Labour Boards to exact from the unions a compliance with basic standards of fair representation even before many of the present statutory provisions were enacted.

The historical evolution of this doctrine is very clearly set out in other papers[1] and will not be repeated here. This paper will discuss how far the

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1 ZABOS, Gary A., "Fair Representation, the Arbitrary, Discriminatory or Bad Faith", Test in Canada, (1978-1979) 43 *Saskatchewan Law Review* 19.

duty should be broadened in Canada and then argue that the Labour Boards are not the appropriate body to have jurisdiction over this area of labour relations.

SCOPE OF THE DUTY OF FAIR REPRESENTATION

The federal and provincial labour codes in Canada each contain a section dealing with the duty of fair representation. The statutes impose upon the trade union a duty to represent all the members of the bargaining unit in a manner that is free of bad faith, discrimination and arbitrariness[2]. The *Canada Code,* as of 1978, requires that the bargaining agent "represent, fairly and without discrimination, all employees in the bargaining unit"[3]. It has yet to be decided whether the federal language differs significantly enough to give rise to a different type of obligation. The Labour Boards have used these sections to ensure that the unions use their power vis-à-vis the employer for the good of the membership at large, but the Boards have not used it to limit extensively the internal affairs of the union. It is only if a union's actions in its capacity as bargaining agent in some way jeopardizes that employee's employment relationship will the Board intervene[4].

In general the internal affairs of the union have been viewed as a private contractual matter between the trade union and the employee. The proper formal forum for resolution of disputes related to constitutional problems such as election of officers, membership, and discipline is either the courts or, if it is applicable, the Human Rights authorities[5]. Further, there are a number of other avenues open to dissatisfied member including:

(i) removal of the exclusive by the constitutional processes;
(ii) decertification of the existing union and withdrawal from collective bargaining;
(iii) removal of the existing union and replacement with a more suitable one.

2 E.g. *Labour Code of British Columbia,* 1973 S.B.C. c. 122 as amended Sec. 7; *Ontario Labour Relations Act,* 1970 RSO c. 232 as amended by 1975 S.O.C. 76, sec. 60; see also ADELL, B., "The Duty of Fair Representation; Effective Protection for Individual Rights in Collective Agreements", (1970) Vol. 25, *Relations Industrielles,* p. 602.

3 *Canada Labour Code,* 1966-67. C. 62 as amended, sec. 136.1

4 *Rayonier,* 1975 2 Can. LRBR 497, B.C.C.R.B. Decision No. 40/75; *Johnston and B.C. Hydro,* B.C.L.R.B. Decision No. 7/75; 1975 1 Can. L.R.B.R. 362; *Reginald Fulks* and *Teamsters,* B.C.L.R.B. Letter Decision L83/79, July 23, 1979, *Atchison and AUCE,* B.C.L.R.B. Letter Decision L66/79, June 28, 1979; *Joyce, Harvey, Halverson and Vancouver Municipal & Reg. Employees Union,* B.C.L.R.B. Decision No. 79/79; *George Lochner,* 1980 1 Can. L.R.B.R. 149 (Ont.).

5 *Johnston and B.C. Hydro, op. cit.,* at footnote (4) at 362.

However, it should be noted the federal Code appears to go further than the provincial statues in permitting intervention in internal affairs of the union[6].

"Sec. 185 No trade union and no person acting on behalf of a trade union shall:

...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to him in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to him in a discriminatory manner the standards of discipline of the trade union;

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of his having refused to perform an act that is contrary to this Part; or"[7]

The effect of these sections was reviewed recently in the case of *Terry Matus and the International Longshoremen's and Warehousemen's Union Local 502*[8]. Chairman Marc Lapointe, after examining other jurisdictions, indicated that the reluctance to intervene in internal union affairs was undoubtedly a sensible approach, but the explicit language of Section 185 requires the Canadian Board to protect rights that Parliament has explicitly conferred on the employees within the federal realm. In this case, one of suspension for dual unionism, the Board ordered reinstatement. The complainant has been told he was "dead as a longshoreman" which of course in a hiring hall situation might be interpreted as a threat of more than simply internal discipline. Furthermore, to the extent that section 185 they will basically do so only when internal appeal procedures have been exhausted[9].

It should also be noted that most Canadian Labour Codes contain provisions[10] restricting any person, including the union from any coercive or intimidating action compelling or inducing any person from becoming or refraining from becoming or continuing to be a member of a union. Therefore, should a union's conduct reach such proportions as to contravene these sections, the Boards will assume jurisdictions.

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6 *Nowatnick and Ostby and Grain Workers Union Local 333,* [1979] 2 Can. L.R.B.R. 466 (Can.).

7 *Canada Labour Code,* Sec. 185.

8 Decision No. 211, March 6, 1980.

9 *Gerald Abbott,* [1978] 1 Can. LRBR 305 (Ont.); *George Lochner, op. cit.,* at footnote (4).

10 *B.C. Code* Sec. 5; *Ont. Code* Sec. 161; *Canada Code* Sec. 186.

Finally, it is obvious that to be protected by the duty of fair representation, an employee must be a member of a bargaining unit rather than of management[11] and must be a member at the time of the alleged infraction[12].

APPLICATION OF THE DUTY

The requirement of the absence of bad faith, discrimination and arbitrariness has been held to apply to a union in two areas; during negotiations and during the administration of a collective agreement. Let us look briefly at how these areas have traditionally been affected.

Negotiations

THE SUBJECT MATTER OF THE CONTRACT

THE DEGREE OF LATITUDE ENJOYED BY THE UNION

The issue before us at this point is the extent to which the union enjoys the freedom to negotiate terms which it feels are in the best interests of most of its members. It is a trite observation that any *collective* agreement cannot completely satisfy each and every member of a bargaining unit. As a result of this, the Boards have in fact given the unions substantial latitude in terms of the content of collective agreements and we suggest that the reasons can be divided into two categories.

The Majority Rules: the first rationale finds its strength in the theory that what is best for the most will ultimately be to the benefit of everyone in a collectivity. This position was implicitly adopted by the B.C. Board in the *Esco*[13] and *B.C. Distillery*[14] cases in which the Board cited a United States Supreme Court Decision in *Ford Motor Company* v. *Huffman* to the effect that:

"The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[15]

11 *S.C. Leeson and Labourers International Union of North America, Security Officers and Miscellaneous Personnel Local 105,* B.C.L.R.B. Letter Decision L64/79, June 28, 1979.

12 *International Union of Bricklayers and Allied Craftsmen, Local 2 and Bricklayers, Masons Independent Union of Canada, Local 1, Bricklayers Masons Independent Union of Canada, Local 1, Welfare Trust Fund and John Meiorin,* [1979] 2 Can. LRBR 233 (Ont.); *James Mason & CUPE Local 87,* [1979] 2 Can. LRBR 173 (Ont.); *Joyce, Harvey, Halvorsen and Vancouver Municipal & Reg. Employees Union, op. cit.,* at footnote (4).

13 *Esco,* B.C.L.R.B. Decision No. 55/77 at pp. 8-9.

14 *B.C. Distillery,* B.C.L.R.B. Decision No. 85/77 at p. 7.

15 -23 LC 145 at pp. 148-149.

Practical Problems: Even if the Board had the inclination to tinker with collective agreements, there are very serious practical considerations associated with such an approach. If the union had to be concerned as to whether dissident employees "could come to the Board and readily attack the reasonableness and fairness of any contract terms" the entire process could break down[16]. The more appropriate recourse for the dissatisfied membership is to refuse to ratify the contract.

SPECIFIC SITUATIONS WHERE THE BOARD WOULD INTERVENE

However, there are always exceptions to a rule. At what point could a member successfully complain about the terms of an agreement? The basic test which the B.C. Board has laid down in this regard is:

> "What the Board is concerned about in measuring the conduct of union representatives during the negotiating process is whether the employees affected have been treated honestly and in good faith. The adequacy of the settlement is not necessarily in issue. What is in issue is whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment."[17]

The restriction is thus based on whether the union's action can be characterized as being unfair — not on whether the settlement is inadequate in the eyes of the Board.

The Negotiation of Oppressive Terms: The Ontario Board is responding to a complaint from students in the *Mason* case that the union had negotiated a lower rate for them cited the cases of *C.U.P.E.*[18] and *Ford Motor Company*[19] and reterated its position that trade-offs are part of collective bargaining and may involve the abandonment of the interests of certain individual members. The test to be applied is whether "... the respondent has exerted equal effort on behalf of all classifications in the bargaining unit."[20] If the union were to negotiate terms of contract which unduly favored some employees over others and there was no conceivable justification for that position, the Board would have to intervene. Examples which have been suggested would include clauses which contain lower pay rates for female jobs, separate seniority lists for certain groups due to race, colour or creed and higher wage rates for union members (over non-union members who are performing the same tasks)[21]. Of course, this is an extremely dangerous

16 *B.C. Distillery, op. cit.*, at footnote (14) at pp. 8-9.

17 *Esco, op. cit.*, at footnote (14) at p. 15, quoting *Diamond Z. Association,* 1975 OLRB 796.

18 [1976] O.L.R.B. Rep., (Sept.) 508.

19 [1973] O.L.R.B. Rep., (Oct.) 519.

20 *Mason, op. cit.*, at footnote (12) at 180.

21 *B.C. Distillery, op. cit.*, at footnote (14).

proposition for it would open the door for Labour Boards to involve itself in the review of the terms of each collective agreement negotiated within its jurisdiction.

Significant Alterations in the Contract: The B.C. Board in the *B.C. Distillery* case[22], took the opportunity to discuss (in *obiter* as the case was decided on other technical grounds) a situation in which a union negotiated "superseniority" provisions for workers who had actively participated on the picket line throughout a lengthy strike.

Under the agreement made with the employer, these employees were to be given first option at the positions available in the plant. The Board expressed a definite inclination to look behind the scenes in cases where, on the face of the matter, there appears to be potential irregularity. In doing so, it adopted the following position:

"As Professor Archibald Cox has said: "When established seniority rights are changed, the bargaining representative should be required to show some practical justification beyond the design of the majority to share the job opportunities theretofore enjoyed by a smaller group." (Cox, "The Duty of Fair Representation", 1957 , 2 *Villanova L.R.* 151 at p. 164)...

Rather, I simply want to emphasize the point that the Notion of superseniority, involving as it does a stark deviation from the basic principle of seniority clauses for the benefit of a particular and preferred group of employees, does invite legal scrutiny from the Board. Such superseniority clauses do require justification on their merits before they can be legally sustained."[23]

The Settlement of Outstanding Grievances: A common-place occurrence at the bargaining table is the establishment of procedures which are designed to expedite unresolved grievances. The Ontario Board has taken the position that this approach is quite acceptable and notes that parties often "have fashioned a procedure that ties grievance negotiations to the negotiation of a new collective agreement in order to provide an underlying urgency for compromise and rational discussion... and neither procedure is inherently unfair or arbitrary."[24]

There is little Canadian jurisprudence on this subject but there has been some discussion of the matter in the United States.

"The key consideration from the standpoint of swapping, however, is the union's knowledge that the trade will disadvantage a particular individual. Courts can safely favor union swapping discretion when no identified individuals or groups are involved. In trading one general proposition for another — for example, ex-

22 *Ibid.*

23 *Ibid.*, at pp. 12-15.

24 *Nick Bachiu and U.S.W. Local 1005 and Steel Company of Canada,* [1976] 1 Can. L.R.B.R. 439 (Ont.).

25 *Ibid.*, at p. 439.

posure to compulsory overtime in exchange for better vacation benefits — the union should have a free rein. If some employees later complain that the benefits and burdens fell unequally, the inequality can be tolerated as an incidental effect of the bargaining process."[26]

Judging from other comments, it seems likely that the Boards in Canada will follow this approach. The Ontario Board has noted:

"This is not a case of an individual grievance that has been abandoned. Here the union has settled during negotiations for a collective agreement for the discharge grievances of a large number of employees on terms providing for the reinstatement of them all. In such circumstances a union is not required to consider in detail the merits of every grievance before it. What is required is that the union put its mind to the situation as a whole and engage in a process of decision-making which cannot be considered unreasonable or capricious."[27]

Non-Representation of an "Insignificant Minority": The B.C. Board has also expressed sentiments to the effect that a union must represent even the smallest group of workers within the unit. When the Public Service Commission and the British Columbia Government Employee Union began their initial negotiations, they agreed to not worry about some small employee groups "whose special work situation and schedules would seem to have required a special set of contract terms"[28].

The Board indicated that this was a reasonable and practical step in initial negotiations for a group of 40,000 employees but that a continuing failure to provide for these employees would be unacceptable.

THE PROCESS OF NEGOTIATION

The process of negotiations involves the union in a number of steps including the preparation for negotiations, the actual bargaining and finally the solicitation of the approval of the membership. What are the union's responsibilities in terms of the procedures it adopts at these times?

PREPARATION AND BARGAINING

The Boards have not been faced with many significant problems relating to the events before and during negotiations. The major reasons for this are undoubtedly the necessity of secrecy prior to negotiations in order to enhance a union's bargaining position and the obvious political requirement

26 CLARK, Julia P., "The Duty of Fair Representation: A Theoretical Structure", *51 Texas L. Rev. 1* (1973), p. 1174, par. 119.

27 *Vincent,* [1979] 2 Can. L.R.B.R. 139 (Ont.) at p. 145.

28 *Robert Enoch,* B.C.L.R.B. Decision No. 24/76, at p. 12.

of at least superficially canvassing the membership's initial demands where there is any significant potential for devisiveness. Further, there is normally very little information available to the individual employee concerning the negotiations themselves on which to build a case of unfair representation.

In determining whether there has been a breach of the duty of fair representation in those cases that do exist, the Boards have again reiterated that the test is not the adequacy of the formal processes adopted in order to arrive at an accommodation but rather whether the union officers have "exercised complete good faith and honesty of purpose"[29].

One of the issues that has arisen, however, concerning behavior during actual bargaining is the speed at which the contract is negotiated. The B.C. Board has held that a hurried signing of an agreement in a raid situation is permissible if there is "ample opportunity for the membership to consider and vote upon the terms of the collective agreement"[30]. The Ontario Board has also indicated that there could be some circumstances (unspecified) in which it would look unfavorably upon a situation where there was undue haste[31].

THE APPROVAL OF THE MEMBERSHIP

However, once the agreement has been signed, the potential for rank and file discontent is substantial. The employees are then aware of the trade-offs which have been made and the leadership is in a position of having to win over the membership (or overwhelm dissident members) in order to secure their political positions with both the membership and management.

Full Disclosure: Once an agreement has been negotiated, there is a very clear obligation upon the union officials to inform the membership of its contents. However, as long as the union gives the membership ample opportunity to ascertain the contents of the collective agreement and to discuss its feasibility, there is no breach of duty[32]. To the extent that the union has adopted procedures to disseminate information (e.g., holding meetings, etc.) it must do so in a manner that does not involve bad faith, discrimination or arbitrariness.

There will be a breach of the duty in the case where a union official indicates to the employees that there has been a "misunderstanding" about a

29 *Diamond Z. Association, op. cit.*, at footnote (17) at p. 423; *Esco, op. cit.*, at footnote (13).

30 *Canex Placer*, B.C.L.R.B. Decision No. 91/74, [1974] 1 Can. L.R.B.R. 443.

31 *Magold et al.*, 1976] 1 Can. L.R.B.R. 392 (Ont.).

32 *Ibid;* also see *Harvey Adams*, [1976] 1 Can. L.R.B.R. 192 (B.C.).

term of a contract and that their ratification of the proposal was subject to the "proper" interpretation and then formally signs a contract without the "proper" interpretation included[33]. Furthermore, there is a violation by the union when it is unresponsive, rude and abrupt in dealing with inquiries from the membership concerning certain provisions in the collective agreement[34].

Ratification of the Contract: As the ratification of the contract provides the opportunity for the membership to exercise their democratic rights, the union must be very certain to act in a fair manner during this process. Proper notice must be given to the membership and must be done in a way consistent with past practice[35]. On theory, the "packing of meeting" is a questionable practice[36] but it is suggested that unless restrictions were placed upon the attendance of members of the opposite faction, the Boards would view it merely as political manoevering rather than as unfair representation.

Very recently, the B.C. Board was faced with an application from non-union members of the bargaining unit for a declaration that they would have the right to vote in the ratification of a collective agreement[37]. In that case, the Board rejected the application as:

> The exclusion of non-union members from voting about contract proposals is a common practice in British Columbia industrial relations. There is a simple, practical reason for that policy: that it is the Union members who bear the responsibility, pay the costs, and make the commitments which are entailed by these decisions. For example, it is the membership of the Union which pays the dues that support the Union negotiators, build up the strike funds, pay for arbitration fees, and so on."[38]

Therefore, there is no legal requirement that non-members be permitted a vote during ratification proceedings in B.C. or for that matter in Ontario[39]. This is particularly interesting in light of the fact that many collective agreements contain the Rand Formula, which requires that non-members in the unit must still pay dues. In those cases, it might be a sensible policy to give them the right to vote although it can be argued that the *quid pro quo* of their not joining the union is a loss of voting rights. In fact, in Ontario, the Labour Board has held that an employee in specific circum-

33 *Diamond Z. Association, op. cit.,* at footnote (17).

34 *Renaud and U.S.W. and Hawker Industries,* (1976) 2 Can. L.R.B.R. 28 (Ontario); *Harvey Adams* (B.C.).

35 *Mason, op. cit.,* at footnote (12).

36 *Fogal,* [1976] 2 Can. L.R.B.R. 464 (Ontario).

37 *Esco, op. cit.,* at footnote (13).

38 *Ibid.,* at p. 17.

39 *Magold et al., op. cit.,* at footnote (31).

stances may not even have the right to speak at a meeting, let alone to vote[40]. Although this may seem unfair to the non-union members, the Boards have accepted this as one of the realities of a collective bargaining system:

"As a matter of sensible union policy, it must ensure that its efforts are reasonably acceptable to all the constituencies whom it must represent. However, the best way for the inside workers to maintain such representation is to join the union, to participate in its activities, to be represented again on the executive, and thus be able to achieve substantial influence on the policies of their bargaining agent."[41]

A Board's reticence to interfere will, however, give way to action in situations where the union has flagrantly abused its authority.

"It is one thing for a union to follow a consistent policy based on a principle which everyone can understand, although not necessarily agree with. But if a union makes these exclusionary judgments on an *ad hoc* basis, in an attempt to respond tactically to the course of events, there is always a latent potential that a decision will be motivated by hostility and ill will generated in the heat of the moment."[42]

Similarly, in Ontario, where the Board has also held the restriction of the vote to members is not a *per se* violation of the union's duty of fair representation, the procedure that is used must not be arbitrary, discriminatory or in bad faith[43]. The type of situation which could give rise to an unfair representation charge would be a case where the union (which had 60% of the bargaining unit as members) had traditionally allowed all members of the unit to vote but disqualified the non-union members from voting in a year where they had negotiated a union or closed shop provision in the collective agreement.

In the *B.C. Distillery* case, the union in defending its position on super-seniority clauses, put forward the argument that the contract had been ratified by a majority of the members. The Board responded:

"If it is unfair representation for the Union to take that step itself, as the legal bargaining agent, the legal picture does not improve when it is done by a majority vote. As well, as a practical matter, the vast majority of the employees are not affected by such a provision, and many may have wanted the overall contract settlement in any event, irrespective of their views about this individual item."[44]

Therefore the presence of a majority is not in and of itself a complete defense to a charge of breach of duty of fair representation. This is particularly true when one realizes that the situations where a breach arises normal-

40 *Britnell and I.U.E.W. and R.C.A. Limited,* [1974] 1 Can. L.R.B.R. 319.

41 *Town and Smithers and CUPE,* B.C.L.R.B. Decision No. 80/74, at p. 11.

42 *Esco, op. cit.,* at footnote (13) at p. 24.

43 *Fogal, op. cit.,* at footnote (36).

44 *B.C. Distillery, op. cit.,* at footnote (14) at p. 16.

ly involve a minority (if not a truly small minority) who feel they have been oppressed. It is probably safe to say, however, that the Board will still consider the majority position as important evidence in its assessment of the union's behavior.

In conclusion then, there is scope for the Board's involvement in the process of negotiation of a collective agreement although they have often chosen not to use it. Now let us turn to administration of the collective agreement.

The administration of the agreement

BASIC PRINCIPLES

The greatest percentage of complaints concerning unfair representation are based on the behavior of the union during the administration of a collective agreement. Contract administration has been described as "not simply the enforcement of individual contract claims"; it is also an extension of the collective bargaining process. As such, it involves significant group interests which the union may represent even against the wishes of particular employees[45]. But if the process of Industrial Relations is to be effective, the trade union must be secure in its own position as well as in the perception of its position by the other side during the administration of the contract.

This authority must however not be abused. The Ontario Board in the *Gain and Smith* case[46] found that the union had exceeded its rights when it both refused membership to the complainants who had been transferred into the unit and then did nothing to deal with those members who refused to work with them. The basis for this refusal was the fact that the newcomers allegedly crossed a picket line of the local when they were working in another division of the company. The union also expressed the concern that there was an erosion of jobs occurring at the plant. The Board noted:

"In our view the complainants had a right to expect that their employment interests would be protected by the respondent and would only be modified to the extent necessary to achieve a legitimate collective goal and then only in a manner which was not arbitrary, discriminatory or in bad faith. The evidence is that the respondent took a number of steps including resort to an unlawful strike to accomplish the demise of the complainants' employment relationship and this, surely, can only be characterized as the antithesis of protecting the complainants' employment interests."[47]

45 *Rayonier, op. cit.*, at footnote (4) at p. 203 (B.C.). See also *Vincent,* [1979] 2 Can. L.R.B.R. (Ont.); *George Lochner,* [1980] 1 Can. L.R.B.R. 149 (Can.); *John J. Huggins,* 1980 1 Can. L.R.B.R. 364 (Can.).

46 [1979] 3 Can. L.R.B.R. 205.

47 *Ibid.*, at p. 214.

However, in terms of activities during the administration of a contract, it is the method of handling grievances that is most often the source of difficulty. The Boards' basic proposition here is that non-interference is the order of the day. The B.C. Board supports this with two practical considerations. The first deals with the integrity of the union and is explained in the *Rayonier* case and reiterated with emphasis added in the *Cowichan District Hospital* case.

"First, while arbitration is the ultimate mode of settlement of grievances, it is expensive, takes time, and consumes the energy and attention of the parties. For that reason, it is preceded by a grievance procedure... But the institution can function successfully only if the union has the power to settle or drop those cases which it believes have little merit, even if the individual claimant disagrees. This permits the union to ration its own limited resources by arbitrating only those cases which have a reasonable prospect of success... It is important as a maker of industrial relations policy that a union must be able to assume the responsibility of saying to an employee that his grievance has no merit and will be dropped."[48]

The second reason is concerned with the issues of the availability of information and political expediency.

"By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration... it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution... The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal." (Cox, *Law and the National Labour Policy,* 1960, pp. 83-84)[49].

The Ontario Board has also adopted these basic principles[50]. Therefore, the Boards have indicated that they realize that this approach impinges on the rights of the individual members but that this is the cost of group representation. Therefore from the above it is clear that the individual member does not enjoy an absolute right to have his grievance taken to arbitration[51].

48 B.C.L.R.B. Decision No. 56/76, at p. 11.

49 *Rayonier, op. cit.,* at footnote (4), pp. 203-204; see also *B.C. Distillery, op. cit.,* at footnote (14) at p. 5.

50 *Prinesdomu and CUPE,* [1975] 2 Can. L.R.B.R. 310 (Ont.).

51 *Rayonier, op. cit.,* at footnote (4); *Bey,* B.C.L.R.B. Letter Decision No. L38/79, April 4, 1979; *Bachiu, op. cit.,* at footnote (24) at p. 437; *Melillo and Sheet Metal Workers International Association Local 540 and Barber Coleman of Canada Ltd.,* [1977] 1 Can. L.R.B.R. 182 (Ont.); *S. Mohammed and Local 439 U.A.W. and Massey Ferguson,* [1977] 2 Can. L.R.B.R. 8 (Ontario).

It should also be noted that before an employee can complain to the Board, he generally must exhaust the procedures under the trade union's by-laws unless to do so would obviously be a total waste of effort. It is only when the union has made a final decision not to proceed (e.g., the Executive Committee) that the complainant should seek the Board's help[52]. The B.C. Board noted in the *Western Carrier* case that unions have adopted extensive internal procedures to safeguard against findings of unfair representation. It would only be judicious to allow them to use these mechanisms before intervening in what are essentially internal matters. This is not to say that the Board is abdicating its responsibility in this area. It is merely awaiting the appropriate time to act. The Ontario Board has indicated that it follows the same procedure, not because it has to under the statute but rather as a matter of discretion under its remedial powers (S. 79). It will defer to the internal union procedures if:

> "It is assured that the machinery available will afford "due process" and "natural justice" to the persons concerned (*Canadian Textile and Chemical Union,* 1971 ; OLRB 469) and that it is not an illusory process (*General Impact Extrusions (Mfg.) Ltd. and U.A.W. Local 1408,* 1972 ; OLRB 798). We would elaborate this latter requirement to embrace the necessity that adequate relief be available to the charging parties and that the speed, economy and convenience of such a forum be somewhat equivalent to that associated with the Board's processes."[53]

The Board may also intervene prior to the exhaustionof the internal procedures if there is a significant burden on the employee, for example if he has been discharged from his job and would lose his means of livelihood while having to go through the internal procedures[54].

CRITICAL FACTORS IN ESTABLISHING WHETHER A BREACH HAS OCCURRED

THE IMPORTANCE OF THE MATTER TO THE GRIEVOR

The Board may also intervene prior to the exhaustion of the internal have on the individual grievor as well as on the union. In situations where an adverse decision will cause severe harm to an individual or to a small group, the Boards will review the circumstances more carefully.

THE VALIDITY OF THE CLAIM

The union is on very safe ground when it is patently obvious to everyone that a grievance will fail. Although the Board will generally not look in-

52 *Western Carriers,* B.C.L.R.B. Decision No. 19/76; *Johnston and B.C. Hydro, op. cit.,* at footnote (4).

53 *Ward Shellington,* [1975] 1 Can. L.R.B.R. 1 at p. 20 (Ont.).

54 *Fulks, op. cit.,* at footnote (4).

to the merits of a particular case, there are isolated examples where it is clear that there is no case whatsoever and in many of these cases the employee is simply trying to cause trouble. In those cases the Board is less likely to find a breach of a duty[55].

However, in situations where there is some question as to the merits of a grievance, the Boards will investigate, but only on the basis of attempting to determine whether the union has acted reasonably. The Board will not determine the merits of the case[56]; the quality or prima facie merits of the grievance are merely evidence in the complaint as the "union's perception of those merits and the reasonableness of that perception are very often key indicators of the quality of the union's representation"[57].

Furthermore, the union is free to override meritorious grievances if in their best judgment it is to the benefit of the bargaining unit as a whole:

> "(The union) was also entitled to consider that to pursue the matter through to arbitration to exact further concessions from the employer might well jeopardize the settlement and result in an interpretation of the agreement which would be detrimental to the overall interests of the union and its membership. There appeared to be considerable backing for the employer's original position and if an arbitration were to rule against the grievors, the ruling might open the door to all kinds of chaotic developments at other bargaining units throughout the local and elsewhere."[58]

Similarly, the union is perfectly entitled to refuse to pursue a grievance when it holds the honest opinion that in doing so, they are "advancing the more pressing needs of other employees"[59], for example, in a case where a union feels that the pursuit of a grievance may lead to an interpretation which would adversely affect previous favorable rulings[60]. Also the union is permitted to refuse to proceed if in doing so they would be taking a losing case which would impair their integrity as bargaining agent for the members[61]. In the situation where a union fells that a grievance is frivolous, it is acceptable for them to require the grievor to pay the costs of arbitration rather than dissipate union funds[62].

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55 *Karl Krafcek,* [1974] 1 Can. L.R.B.R. 397 (Ont.).

56 See for example, *S. Mohammed, op. cit.,* at footnote (51).

57 *Ibid.,* at p. 14; see also *Ronald Lewis,* [1974] 1 Can. L.R.B.R. 384 (Ont.); *Ford Company, op. cit.,* at footnote (19).

58 *Scott and IWA,* B.C.L.R.B. Decision No. 15/77, [1977] 1 Can. L.R.B.R. 497 at p. 502.

59 *Rayonier, op. cit.,* at footnote (4).

60 *Kenneth Hughes,* [1974] 1 Can. L.R.B.R. 326 (Ont.).

61 *Johnson and Teamsters,* B.C.L.R.B. Letter Decision No. L84/79, July 23, 1979.

62 *Kenneth Hughes, op. cit.,* at footnote (60).

THE THOROUGHNESS OF THE INVESTIGATION BY THE UNION

In cases where the union has carried out no investigation whatsoever, the Board will likely find that the union was operating in an arbitrary manner. Therefore, if a union makes a decision to drop a grievance without informing the grievors of the particulars of the charge or without giving the individuals involved a chance to respond to the evidence, there is a clear violation of responsibility[63].

The B.C. Board has also implied that when an investigation has been carried out, some neutral officials (i.e. other than those individuals immediately involved in the events) should review the circumstances before a decision to drop the grievance is finalized[64]. In one case the Ontario Board speculated as follows:

"But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint."[65]

Where the union officials are honestly mistaken about what they are supposed to do and the grievor was aware of the problem and could have rectified it, there is no breach of the duty of fair representation[66]. For example, in one case, the expiry of a time limitation through the total neglect (but not intentional) of the union officials was held not to be a violation of this provision[67]. However, total failure to even consider the complaint which results in the passing of a deadline will likely constitute a violation[68].

Under normal circumstances, the union is protected as long as it does a thorough and reasonable job. Such was the situation in the *Vincent* case where the union had:

(1) anticipated and attempted to prevent the complainant's discharge even before it occurred — by informing him of the work stoppage and advising him to stay away; (2) made immediate efforts upon learning of his discharge to secure his reinstatement by writing the arbitrator and requesting a reopening of proceedings; (3) investigated, to the extent permitted by the employer, the circumstances surrounding his dismissal — by interviewing the complainant, making inquiries of others, and suggesting that he obtain from Comeau corroboration of his story; (4) sought confirmation of its opinion of the merits of the complainant's grievance before deciding to negotiate on his behalf."[69]

63 *Murphy*, [1977] 1 Can. L.R.B.R. 422 (Ont.).

64 *Rayonier, op. cit.*, at footnote (4).

65 *Prinesdomu, op. cit.*, at footnote (50).

66 *Karl Krafczek, op. cit.*, at footnote (55).

67 *Diamond Z. Association, op. cit.*, at footnote (17).

68 *Compton*, [1972] O.L.R.B. 916.

69 *Op. cit.*, at footnote (27) at p. 148.

As long as the union is able to demonstrate it was conscientious, they have fulfilled their duty. They must be honest, not necessarily right[70]; they are not expected to have the "skill, ability, training and judgment of a lawyer"[71].

PARTICIPATION BY THE GRIEVOR

Must a union permit the grievor to actively participate at all times? An example of a union fulfilling its duty in this regard is the *Cowichan District Hospital*[72] case. An employee, Barbara Evans, was dismissed by the employer after a number of complaints were received from a fellow-worker concerning her performance on the job (e.g. excessive numbers of personal telephone calls, socializing, tardiness, late filing). A grievance was filed and after a grievance meeting at which the grievor was not present, the dismissal was upheld. Evans felt that she had not been fairly represented and filed a complaint with the Labour Board. The Board felt that the union's decision to keep Evans from the meeting was a reasonable and fair one (given that she had been disruptive and antagonistic in previous meetings) and is in fact a common practice within that province.

The Ontario Board was of the same opinion in a case where the union failed to contact the grievor after the brief had been prepared; it held that the union had nevertheless fulfilled its duty as it had many other sources of information and the grievor had no additional information that would have caused the committee to change its decision[73].

EVIDENCE OF FLAGRANT ABUSE OF POWER

If there is clear evidence that the union's behavior was motivated by ill-will or hostility or if there is objective evidence of unfairness, the Boards will intervene. Rather than attempt to further define these terms (which are in themselves definitions), we will describe examples in which the Boards have acted.

In some cases, a test which borders on strict liability will be imposed. For example, "when an employee of 16 years is terminated by his employer on the basis that he does not possess the necessary skills for his position, it is hard to conceive of circumstances where a union would not be in breach of S. 7 by not making an attempt to have that decision reviewed by the employer..."[74]

70 *Bey*, B.C.L.R.B. Decision No. 27/80.

71 *Kerber*, [1979] 3 Can. L.R.B.R. 235 (Ont.) at p. 237.

72 *Op. cit.*, at footnote (48).

73 *Op. cit.*, at footnote (50).

74 *Harvey Adams, op. cit.*, at footnote (32).

The Boards may also find a violation where there is an obvious case of personal hostility. Evidence of this has been held to include:

(a) an absolute refusal to help the grievor[75],

(b) a refusal to discuss a grievance at a union meeting[76],

(c) an attempt to deceive a grievor as to the occurrence of a union meeting[77],

(d) failure to present points which are valid and have been proposed by the grievor[78],

(e) failure to respond to telephone calls by the grievor[79],

(f) rudeness during the dealings between the parties[80],

(g) refusal to give the grievor access to an internal appeal procedure[81].

The Ontario Board has intervened in a case where the union's refusal to pursue a grievance (concerning a promotion) was in the opinion of the Board motivated by the fact that relatives of the union official and foremen had been promoted instead of the grievors[82].

The intentional act of preventing a union member from addressing a union meeting concerning his grievance by failure to give notice of the meeting is a reckless act and has been held to be both arbitrary and discriminatory in Ontario. However, in the case where a member has been suspended from the union, he is not entitled to attend a meeting as long as he is being treated as any other suspended member would be in those circumstances[83].

THE PREVIOUS PRACTICE IN SIMILAR CASES

A sudden and unannounced change in policy is of course one of the clearest yardsticks by which the Board can adjudge union behavior to be suspicious.

AN INADEQUATE GRIEVANCE PROCEDURE

One issue that came before the Ontario Board in 1979 was whether the nature of the grievance procedure itself could lead to a complaint under the

75 *Murphy, op. cit.*, at footnote (53).

76 *Ibid.*

77 *Ibid.*

78 *Scott and IWA, op. cit.*, at footnote (58).

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 *Ronald G. Lewis,* [1974] 1 Can. L.R.B.R. 384 (Ont.).

83 *Murphy, op. cit.*, at footnote (63).

duty of fair representation. In the *Kerber and Doublas Aircraft of Canada*[84] case, the complainant who had been laid off filed a grievance and was told (correctly) by the union that due to the priority system of scheduling arbitrations and delays in the availability of the designated panel of arbitrators that the grievance could not be settled for four or five years. The Board in denying the complaint indicated that despite the cumbersome and unresponsive nature of the negotiated grievance procedure, there was no violation of the duty of fair representation as there was no evidence of improper motive or discrimination. The Board further noted:

> "In the absence of an inexpensive, expeditious, statutory, arbitration process, the parties must negotiate their own procedures. Like other terms and conditions of employment, the grievance procedure will reflect their particular needs as well as their relative economic strength and bargaining power, and an "improvement" in the grievance procedure may well involve either a strike or the compromise of other bargaining goals. In the present case, the respondents have chosen to maintain their grievance procedure in approximately the same form of a number of years."[85]

Once again, the basic position of non-interference by the Boards had been demonstrated.

HAS THE DUTY BROADENED

The Traditional Approach

Bad Faith has been used to describe the type of misconduct which falls within the category involving situations where there is evidence of:

(a) A prior history of dispute, ill-will or personal hostility between the member and the union officials[86];

(b) Political revenge[87];

(c) Lack of fairness or impartiality[88];

(d) Lack of total honesty with the employee (e.g. withholding information)[89];

(e) Flagrant dishonesty in dealing with the union member (e.g. lying)[90];

(f) A sinister motive on the part of the union officials[91].

84 *Kerber, op. cit.*, at footnote (71).

85 *Ibid.*, at p. 239.

86 *Scott and IWA, op. cit.*, at footnote (58); *Esco, op. cit.*, at footnote (13); *Rutherford Dairy Limited,* 1972 O.L.R.B. 240; *Leonard Murphy, op. cit.*, at footnote (63).

87 *Esco, op. cit.*, at footnote (13).

88 *Rutherford's Dairy Limited, op. cit.*, at footnote (86).

89 *Murphy, op. cit.*, at footnote (63).

90 *Esco, op. cit.*, at footnote (13).

91 *Murphy, op. cit.*, at footnote (63).

In general, this prohibition against bad faith involves a "determination of the state of mind of the union officers"[92]. When the union's officers have made an honest mistake even if it is such that the Board would label it as "negligence bordering on disgrace", the Board will not categorize it as an unfair labour practice[93]. Mere inadequacy and human shortcoming must be distinguished from bad faith[94].

Discrimination is included to ensure that employees are treated equally and not on the basis of "such factors as race and sex (which are also illegal under the Human Rights Codes) or simple, personal favoritism"[95]. This prohibition is also directed to the intention in the minds of the union officers and is not concerned with objective tests of discrimination.

Many definitions of what constitutes *"arbitrariness"* have been suggested by the Labour Boards. A number of them simply introduce other terms which themselves must be defined. However, the attempts to give some practical meaning to the word "arbitrary" have resulted in it being described as behavior which could be categorized as perfunctory, capricious or cursory, such as involving any one of or a combination of the following:

(a) The lack of any investigation of the circumstances surrounding a complaint[96]. This involves a failure of the union to turn its mind to the merits of a complaint and to act on the available evidence[97]. Where the union has addressed itself to the complaint and decides it should be rejected, the Board will not review the merits of that decision[98].

(b) The failure to advance plausible arguments during the hearing which would have been apparent after an adequate investigation had been made[99].

(c) A superficial handling of a complaint[100].

(d) The failure to act in the absence of any evidence of practical considerations by which the union could support its non-action[101].

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92 Labour Law Casebook Group, *Labour Relations Law,* Industrial Relations Centre, Queen's University, 1974, at p. 393.

93 *Gina Ercegavio,* [1976] 1 Can. L.R.B.R. 157 (Ont.); *Karl Krafczed, op. cit.,* at footnote (55).

94 *Diamond Z. Association, op. cit.,* at footnote (17).

95 *Esco, op. cit.,* at footnote (13) at p. 12.

96 *Scott and IWA, op. cit.,* at footnote (58).

97 *Murphy, op. cit.,* at footnote (63) at p. 248 (Ontario).

98 *Lewis, op. cit.,* at footnote (82).

99 *Scott and IWA, op. cit.,* at footnote (58).

100 *Scott and IWA, ibid.; Esco, op. cit.,* at footnote (13); *Lewis, op. cit.,* at footnote (82).

101 *Lewis, op. cit.,* at footnote (82); *Company Limited, op. cit.,* at footnote (19).

(e) Behavior which could be described as whimsical and capricious[102].

(f) A sudden and unjustified change from established procedures[103].

It would not include "clumsy" behaviour[104] or where the union "could have" been thorough[105].

The Ontario Board has traditionally taken the position that this duty does not require it to "assess the quality of the representation in an abstract way"[106]. It is sufficient that the union show that it represented all its members in the same way.

Perhaps the clearest statement of the concept is contained in the *Prinesdomu* case in Ontario where in the Board acknowledged that there is a wide disparity in the quality of union leadership.

"... it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness."[107]

Recent Developments

Although the tests of bad faith and discrimination are likely to remain much the same, the concept of arbitrariness is slowly changing. As we have noted, in cases where the union could have been more diligent and careful, the Boards would only intervene if the union's judgment was ill-considered, capricious or by any ill-will or discriminatory consideration[108]. But this might now be changing. First of all let us look at the American position:

"... The duty of fair representation originated as a judicial doctrine based on the grant of exclusive bargaining agency. There, the courts have opened up the *Vaca* v. *Sipes* notion of arbitrariness to include gross negligence (see *Robesky* v. *Quantas Empire Airways Ltd.*, 573 F 2d 12082 (9th Cir. 1978). The Sixth Circuit Court has gone so far so to find that simple negligence may constitute "arbitrary" conduct (*Ruzicka* v. *General Motors Corp.*, (1975) 90 L.R.R.M. 2497). The National Labour Relations Board (NLRB) has acknowledged that gross negligence will constitute a breach of the duty but that mere negligence will not (*Bostick Foundry*, (1978) CCH NLRB 20, 184; *Great Western Unifreight System*, (1974) CCH NLRB 26, 295)"[109].

102 *Prinesdomu, op. cit.*, at footnote (50).

103 *James Mason and C.U.P.E., op. cit.*, at footnote (12).

104 *School District No. 56, Nechako*, B.C.L.R.B. Letter Decision Oct. 10, 1975.

105 *Pat G. Kenney*, B.C.L.R.B. Letter Decision May 9, 1978.

106 *Donald G. Lewis, op. cit.*, at footnote (82) at p. 385, quoting *Rutherford's Dairy Limited, op. cit.*, at footnote (86).

107 *Ibid.*, at p. 16; also see *C. U P E Local 1000 and Hydro Employees Union*, 1975 O.L.R.B. Rep. (May) 444.

108 *Kinney and Service Employees Internation Union*, B.C.L.R.B. Letter Decision No. 46/79, May 2, 1979.

109 As cited in *Charles Morgan*, B.C.L.R.B. Decision No. 89/79.

Therefore in the United States, gross negligence will certainly run afoul of the statutory duty and there has been some inclination to view even ordinary negligence unfavourably.

The British Columbia Board in two cases, *Charles Morgan*[110] and *Raymond Bey*[111] has recently given indications that, following the American approach, it too will broaden the duty, at least to include gross negligence.

> "As a result of this experience, the NLRB is attempting to draw the line at gross negligence, which it defines as negligence so gross as to constitute a reckless disregard of the interests of the employee. Such conduct will constitute a breach of the duty but "the mere fact that the union is inept, negligent, unwise, insensitive, or ineffectual, will not, standing alone, establish a breach of the duty"... After an examination of the arguments infavour of widening the duty and of the consequences which would likely flow from such a widening, we are convinced that it would be antithetical to good labour relations and the orderly and constructive settlement of disputes to make simple negligence a basis for remedy under Section 7 (1).
>
> By defining "arbitrary" conduct as including gross negligence, we may arguably by broadening slightly the scope of the duty of fair representation. But it is our intention to maintain a closely-guarded standard with respect to what does or does not constitute gross negligence as a class of arbitrary conduct for the purposes of Section 7 (1). To broaden the duty further would be to invite the kind of consequences foreseen in *Rayonier* and recently experienced in the U.S.A."[112]

It might be suggested that gross negligence will be used in those situations where there is such wanton disregard that bad faith probably is present but there is no real evidence to be able to document it as such. There are many practical reasons set out in the decisions for the limiting of the duty but one must wonder whether as a policy matter, inept, unwise, or merely ineffectual behaviour should not also be looked at. The many reasons for preserving a union's strength really revolve around the proposition that the strength and security is needed so that they might be able to better protect the rights of the membership. That is hardly accomplished when negligent behaviour is excused.

Certainly the remedies could be different in cases where there is bad faith or gross negligence rather than mere error. For example, where a union has incorrectly refused to take a grievance through gross negligence, it might be liable for costs and compensation. The B.C. Board did this in the *Harvey Adams* case:

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110 *Charles Morgan, op. cit.*, at footnote (109).

111 *Raymond Bey, op. cit.*, at footnote (70).

112 *Charles Morgan, op. cit.*, at footnote (109) at pp. 35-36.

"... the Symphony should not be exposed to a back pay liability if Harvey Adams is successful. If the dismissal was wrongful, then Adams should be compensated for any lost earnings. But the compensation should flow from the union."[113]

There is little solace to the member who has lost his rights if the Board finds that the leadership was negligent but not grossly so.

ARE THE LABOUR BOARDS THE PROPER FORUM

When it comes to policing the internal problems within a union, the Labour Boards are obviously uncomfortable in a role of watchdog of the union. The Boards are statutory tribunals which have been established to instill some sense of continuity and fairness into decisions affecting the world of Industrial Relations. To do so primarily involves being an intermediary between companies on one hand and the unions on the other. This is a difficult task even in the best of times.

It is my opinion that the scope of the Board's authority should be restricted to the problems related to these relationships. To require the Labour Board to involve itself in the internal matters of only one of these constituencies is congruous at best and downright suicidal at worst.

Any involvement the Board has with the domestic problems of either of the parties could very easily threaten its status as a reasonable and independent arbiter of problems between management and unions. For example, if a union feels the Board has unfairly criticized the union's procedure in the handling of a grievance in one case, they are likely to perceive the Board as having a negative pre-disposition towards them in any subsequent disputes with the company. A further argument which can be made is that in as much as the Board does not involve itself with the internal issues of the company (e.g. minority shareholder rights) then it is only logical that the internal affairs of the union should also be beyond its mandate.

The Boards understandable reluctance to interfere should not be interpreted as meaning there is no need for some supervision in the area of internal policies and procedures. An aggrieved employee has recourse to the courts on the basis of breach of contract but there are too many practical problems (e.g. cost, cause of action) for this to be a viable option for the ordinary employee involved in a dispute with his union.

113 *Ward Shellington, op. cit.*, at footnote (53); *Harvey Adams, op. cit.*, at footnote (63); see also *John Bourgeois*, [1975] 1 Can. L.R.B.R. 256 (Ont.).

To some degree, the existence of Human Rights legislation may be of aid to employee. However, there are two problems; the protection afforded will chiefly be only in the area of discrimination and secondly there is still the problem of efficacy of the complaint procedures. Although this type of legislation serves well as an educational tool and as an informal indicator of expected behavior, the set-up of the branches and commissions in terms of number of people, procedural requirements, Boards of Inquiry, etc. does not make at the ideal vehicle for complaints concerning a trade union. The proof of that statement can be found in the fact that there simply has not been much use made of the legislation for the purpose.

Therefore, I would recommend that the government establish a separate mechanism to deal with this problem and the most obvious choice is the appointment of an Ombudsperson under the Labour Statutes. The *B.C. Code* already has a provision creating the position (Sec. 129) but it has not been proclaimed into Law. It is suggested that there would be difficulties in finding the right individual for the job and the government has not felt any real pressure from anyone to proceed with the proclamation. Individual employees are not likely to put much pressure on the powers that be; the employers and their organizations are not directly involved; and the unions as institutions are unlikely to be overly enthusiastic about any form of supervision.

In conclusion, the union has to be given sufficient authority to represent the collectivity properly and in most cases, this authority is used judiciously. However, some controls are necessary for those cases where poor or over-zealous leadership infringes on the rights of the individual. After all, the Codes are written to protect the rights of everyone, the employer, the union and the employee; it makes little sense to leave an obvious part of the job undone.

L'obligation d'une représentation équitable: l'exemple de la Colombie britannique et de l'Ontario

Cet article traite de l'obligation formelle pour le syndicat de représenter les salariés d'une façon équitable, c'est-à-dire sans mauvaise foi, sans discrimination et sans arbitraire, ce qui découle de son caractère de représentant exclusif de tous les salariés compris dans une unité de négociation.

Tout d'abord, les conseils des relations de travail, en révisant cette obligation, ne se mêlent pas de questions contractuelles privées (c'est-à-dire de fonctionnement interne du syndicat) entre le syndicat et ses membres. Ce domaine est laissé aux cours

civiles et aux autres tribunaux administratifs, en particulier les commissions des droits de la personne. Les conseils de relations de travail ne s'occupent des rapports entre le syndicat et les salariés que dans la mesure où ils affectent les relations de travail du salarié avec l'employeur. En conséquence, l'obligation formelle de représenter les salariés peut s'envisager sous deux aspects: les négociations et l'administration d'une convention collective.

Les négociations: En ce qui a trait aux négociations, le syndicat possède une très grande latitude lorsqu'il s'agit de ce qui convient le mieux aux membres en général. Les conseils sont d'accord pour laisser au syndicat le soin de déterminer par vote majoritaire des membres si ceux-ci sont satisfaits de la façon dont il les représente. Toutefois, il y a des circonstances exceptionnelles où les conseils interviennent.

a) *Le contenu de la convention:* On a interdit aux syndicats la liberté de négocier des clauses opprimantes, de faire à la convention des accrocs qui sont au détriment de quelques-uns des membres, de supprimer des griefs évidents d'une façon arbitraire ou de refuser de représenter de manière adéquate une petite minorité de salariés.

b) *Le processus de négociation:* Le devoir essentiel imposé au syndicat sur ce point, c'est l'obligation de s'assurer que les membres sont informés de ce qui se passe et qu'ils sont en mesure de prendre une décision avisée touchant l'acceptation ou le refus d'une offre de l'employeur.

c) *L'administration de la convention collective:* Dans l'administration de la convention collective, le syndicat doit considérer sérieusement le grief de chaque salarié. Les conseils ont souvent noté qu'il peut y avoir des intérêts concurrents, c'est-à-dire que l'avantage qui en résulterait pour le plaignant peut venir en conflit avec le point de vue du syndicat sur l'opportunité de pousser l'affaire en vue du bien de l'ensemble des membres. Le plaignant n'a pas un droit absolu de voir son grief soumis à l'arbitrage, mais le syndicat, en s'y refusant, doit agir de façon responsable.

En révisant la décision du syndicat sur ce point, les conseils tiendront compte, entre autres choses, de l'importance de l'affaire pour le plaignant, du bien-fondé apparent de la réclamation, du caractère approfondi de l'enquête effectuée par le syndicat, de la facilité que l'on a donnée au plaignant de s'impliquer dans l'affaire, de tout abus flagrant de la part du syndicat et de son attitude antérieure dans des cas similaires.

En résumé, l'obligation de représentation équitable s'étend à trois domaines:

1) La mauvaise foi qui provient de la volonté malveillante, de l'hostilité, de la revanche politique, du manque d'impartialité et de la malhonnêteté.

2) La discrimination fondée sur la nationalité, le sexe, la religion, etc.

3) L'arbitraire qu'on a défini comme un comportement qui serait futile, superficiel, capricieux et bâclé.

Depuis quelques années, la définition de l'arbitraire a été élargie de manière à comprendre ce que l'on peut désigner sous le nom de négligence grossière et qui, occasionnellement, se rapproche de la simple erreur et de la nonchalance.

Finalement, on peut se demander si les conseils du travail sont le bon forum pour réviser les affaires relatives à l'obligation de représentation équitable. Les conseils ont suffisamment de pain sur la planche pour maintenir des relations à peu près convenables entre les employeurs et les syndicats. De plus, à toutes fins pratiques, le salarié est probablement aussi impressionné d'avoir à se présenter devant un conseil des relations du travail que devant une cour de justice. Pour ces raisons, un autre système n'est-il pas à préconiser, soit l'institution d'un «protecteur» du salarié dont le rôle serait de traiter des affaires qui se rattachent à l'obligation pour le syndicat de représenter équitablement les membres d'une unité de négociation.