COLLECTIVE BARGAINING IN ONTARIO: A NEW LEGISLATIVE APPROACH

The Ontario Collective Bargaining Act, 1943,[1] is unique legislation in several respects. It represents the first attempt in Canada to enforce upon employers in positive terms a duty to bargain collectively.[2] Of wider interest is the fact that it confides administration not to a minister of the Crown or a department of government or a statutory body, but to the Supreme Court of Ontario. It purports to free trade union members from the threat of civil liability for the tort of conspiracy to injure;[3] and it removes from them any disability arising from the application of the doctrine of restraint of trade.[4]

The enactment of this statute on April 14, 1943,[5] followed upon public hearings before a Select Committee of the Legislative Assembly of Ontario appointed "for the purpose of inquiring into and reporting back to [the] House regarding collective bargaining between employers and employees in respect to terms and conditions of employment." Representations were made to the Committee by associations of employers, by national and international trade unions and the congresses of labour to which they are affiliated, by independent employees' associations, by deputations of citizens from various localities, by civic bodies and even by individuals.[6] There was almost no difference of opinion so far

[1] 1943 (Ont.), c. 4.

[2] Ontario was almost the last of the provinces of Canada to introduce collective bargaining legislation, but its legislation more effectively secures the object in view, viz., to promote collective bargaining. None of the Acts in force in the other provinces provide any effective administration to which is confided the power to enforce a duty to bargain collectively. They provide either that a refusal to bargain collectively is punishable as an offence or gives rise to a dispute which is referable to conciliation. See Trade Union Act, 1937 (N.S.), c. 6; Labour and Industrial Relations Act, 1938 (N.B.), c. 68, amended 1939 (N.B.), c. 51 and 1940 (N.B.), c. 39; Strike and Lock-outs Prevention Act, R.S.M. 1940, c. 200, amended 1940 (Man. 2nd sess.), c. 38 and 1941–2 (Man.), c. 51; Freedom of Trade Union Association Act, R.S.S. 1940, c. 312; Industrial Conciliation and Arbitration Act, 1938 (Alta.), c. 57, amended 1941 (Alta.), c. 20; Industrial Conciliation and Arbitration Act, 1937 (B.C.), c. 31.

[3] 1943 (Ont.), c. 4, s. 3(1).

[4] *Ibid.*, s. 2(1).

[5] By s. 26, the Act was to become effective on the day on which it received royal assent. Unfortunately, a similar clause was not included in the amendment to the Judicature Act, R.S.O. 1937, c. 100, passed on April 14, 1943, by which a branch of the High Court called the Labour Court was constituted: 1943 (Ont.), c. 11, s. 2. Hence, s. 4(2) of the Statutes Act, R.S.O. 1937, c. 2 applied, with the result that the earliest date upon which the Labour Court could begin to function was June 14, 1943.

[6] The evidence before the Select Committee was taken in shorthand and is available for perusal in the Ontario Legislative library.

as approval of the abstract principle of collective bargaining was concerned, but divergent views emerged on the question of how that principle should be secured. But even here the prevailing view was that legislative provision should be made for compulsory negotiation.[7] While the trade union briefs urged express outlawry for "company" unions, both employers' associations and independent employees' associations were concerned to protect the plant council or inside union which, confined to the employees of a single employer, had no outside affiliation or none with the international trade union bodies. Fear was expressed by these latter groups that a blanket prohibition against "company" unions, as desired by the trade unions, would catch not only company-dominated associations of employees but also independent unaffiliated organizations of employees, and would thus be a negation of freedom of association.

The Select Committee began its hearings on February 25, 1943, and concluded them on March 18, 1943. In all, it sat for twelve days and heard ninety-two witnesses. It presented to the Legislative Assembly a report declaring that "a collective bargaining measure ought to be enacted in the Province of Ontario," and appended to the report a series of recommendations in the form of a draft bill.[8] With some modifications, this bill was enacted into law as the Collective Bargaining Act, 1943. Along with it, an amendment was made to the Judicature Act providing for a branch of the High Court of Ontario to be known as the "Labour Court."[9] Rules of practice and procedure were promulgated, in accordance with s. 21 of the Collective Bargaining Act, and they became effective on June 15, 1943. The Court began to function on July 7, 1943.

Scope of the Act

All employers who employ within the province of Ontario one or more persons are covered by the legislation.[10] Specific exemption is given to (a) the industry of farming; (2) domestic servants; (3) members of any police force; (4) the Hydro-Electric Power Commission of Ontario; and (5) municipalities, school boards and municipal boards or commissions, but such munici-

[7] A notable dissenter on this point was the Ontario Division of the Canadian Manufacturers' Association, Inc.

[8] It may be noted that this draft bill included the provision for a Labour Court to administer the proposed legislation, although the evidence before the Committee was to the effect that administration should be in the hands of the Minister of Labour or preferably an administrative board; the courts were not thought of in this connection.

[9] 1943 (Ont.), c. 11.

[10] 1943 (Ont.), c. 4, s. 1 (f).

palities, boards or commissions may bring themselves and any section of their employees under the Act by a declaration, which may be revoked.[11] An employee, for the purpose of the Act, is any person employed by an employer except (1) an officer or official of an employer and (2) a person acting on behalf of the employer in a supervisory or confidential capacity, or having authority to employ, discharge or discipline employees.[12]

Substantive Provisions of the Act

The Collective Bargaining Act declares in favour of employees' freedom to organize or associate themselves in a collective bargaining agency,[13] defined to mean "any trade union or other association of employees which has bargaining collectively among its objects" and which is not dominated, coerced or *improperly* influenced by an employer.[14] While employees may bargain collectively with their employer through a collective bargaining agency, the Act expressly preserves the individual employee's right to present personal grievances to his employer.[15] It guards in specific terms against any construction of its provisions which would give employees the privilege of engaging in union activities during working hours.[16] Mr. Justice Gillanders pointed out in *Local 2999, U.S.W.A.* v. *Toronto Shipbuilding Co. Ltd.*[17] that the Act gives no protection to employees who violate their terms of employment in the purported exercise of freedom to organize. The Act does not touch the question of the carrying on of union activities on the premises of an employer outside of working hours, but presumably this depends on the working rules of a particular establishment and may conceivably give rise to a nice question whether employees are being restrained in their exercise of freedom to organize under the guise of enforcement of a rule against engaging in any activity not connected with their employment even during non-working periods such as lunch hour.

An employer is under a duty to bargain collectively (by definition, to negotiate in good faith with a view to the conclusion of an agreement)[18] only with a collective bargaining agency which has been certified by the Court.[19] The certification amounts to a finding that the particular agency represents a majority of the

[11] *Ibid.*, s. 24.
[12] *Ibid.*, s. 1(e).
[13] *Ibid.*, s. 2(2).
[14] *Ibid.*, s. 1(b).
[15] *Ibid.*, s. 23.
[16] *Ibid.*, s. 4.
[17] Decided July 14, 1943; see (1943), 43 Lab. Gaz. 1303.
[18] 1943 (Ont.), c. 4, s. 1 (a).
[19] *Ibid.*, s. 6.

employees in a unit declared to be appropriate for collective bargaining.[20] Certification may not be revoked within one year from its date except if fraudulently obtained,[21] and possibly also if a collective bargaining agency is in default in keeping the Court informed, as required by s. 16 of the Act,[22] of changes in its constitution, rules and by-laws and in the names and addresses of its officers. The indications are that this requirement is unlikely to be regarded as one of substance, and opportunity to cure any default will probably be the normal course.[23]

Under the Act, employers and their agents are forbidden to (1) discriminate against any employee in any manner on account of (a) membership in or activity on behalf of a collective bargaining agency or (b) the institution of or participation in proceedings under the Act;[24] (2) require as a condition of employment abstinence from (a) membership or activity in a collective bargaining agency (thus outlawing "yellow dog" contracts)[25] or (b) exercising rights under the Act or under any collective agreement;[26] and (3) coerce, restrain or influence an employee respecting the exercise of any right given by the Act or by any collective agreement.[27]

No penalties are provided for violation of the Act but in such case remedial powers conferred upon the Court may be invoked. In this respect, as in many others, the Ontario measure resembles the United States National Labor Relations Act.[28]

Certain subsidiary features of the Act may be noted here. No person may publish or distribute any material relative to employment conditions unless the name and address of the person or collective bargaining agency responsible is clearly indicated thereon.[29] A collective bargaining agency which collects fees from members is required upon their request to furnish them with a financial statement without charge; in addition, the Court may order that a financial statement be filed and that copies be

[20] *Ibid.*, s. 13.
[21] *Ibid.*
[22] See, especially, s. 16(2).
[23] *Cf. Glass Bottle Blowers Assn.* v. *Dominion Glass Co., et al.*, [1943] O.W.N. 652.
[24] *Ibid.*, s. 7.
[25] The "yellow dog" contract, under which an employee engages not to join or to resign from a trade union, has been outlawed in Nova Scotia, New Brunswick, Saskatchewan, Alberta and British Columbia; see note 2, *supra.*
[26] 1943 (Ont.), c. 4, s. 8.
[27] *Ibid.*, s. 9.
[28] Under s. 10 of this Act, enacted in 1935, the National Labour Relations Board is empowered, where it finds that a person is engaging or has engaged in an unfair labour practice, to issue a "cease and desist" order and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act".
[29] 1943 (Ont.), c. 4, s. 10.

furnished to such persons as it may name.[30] By s. 12, the Dominion Reinstatement in Civil Employment Act, 1942,[31] is introduced as part of the law of Ontario, and remains applicable regardless of its repeal by the Dominion or the termination of the war.[32] The Act does not purport to make collective agreements enforceable[33] and they remain, as at common law, unenforceable "gentlemen's agreements.[34] Nor does the Act purport to endow a collective bargaining agency with legal personality so as to make it liable to suit as a party to an action.[35] Apart therefore from proceedings under the Act, the ordinary trade union, as an unincorporated association, cannot be proceeded against and made liable in its ordinary name.[36] As already indicated, the Act frees trade unions from disabilities stemming from the doctrine of restraint of trade,[37] and denies any right of action against trade union members for civil conspiracy to injure if they have been acting in furtherance or contemplation of a trade dispute. While this latter provision purports to make *Quinn* v. *Leathem*[38] inapplicable in Ontario, it may not be amiss to point out that there might have been an advantage in defining the term "trade dispute."

While by s. 5 a closed shop clause may not be made applicable to a member of a learned or scientific profession (not defined), otherwise such a provision of a collective agreement made with a *certified* collective bargaining agency is specifically protected against being considered a violation of those provisions of the Act giving employees freedom to join any collective bargaining agency and prohibiting employers or their agents from discriminating against or coercing employees in respect of their rights under the Act. It is perhaps worthy of notice that an employer who would willingly enter into a closed shop agreement with a trade union which is not certified may have to insist, in view of s. 5, that the union obtain certification first; otherwise the closed shop provision would be a violation of the Act.

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[30] *Ibid.*, s. 17.

[31] 1942 (Can.), c. 31. Reinstatement under the Dominion Act is not automatic and depends, *inter alia*, upon whether the returned serviceman is able to discharge the duties of his former employment.

[32] This is an instance of "incorporation by reference". It is probable that Ontario avoided a constitutional difficulty when it made the Dominion Act applicable regardless of its subsequent repeal by the Dominion: see *Rex* v. *Zaslavsky*, [1935] 3 D.L.R. 788, [1935] 2 W.W.R. 34 (Sask. C.A.).

[33] 1943 (Ont.), c. 4, s. 3(3).

[34] *Cf. Young* v. *C.N.R.*, [1931] 1 D.L.R. 645 (P.C.).

[35] 1943 (Ont.), c. 4, s. 3(2).

[36] *Cf. Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America*, [1931] S.C.R. 321.

[37] *Cf. Polakoff* v. *Winters Garment Co.* (1928), 62 O.L.R. 40.

[38] [1901] A.C. 495. See in this connection the recent case of *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142.

The Act says nothing of strikes, lockouts or picketing. While it is trite to say that these matters remain to be dealt with under existing law, there is no doubt, that where they arise for consideration in connection with proceedings in the Court under the Act, the Court's attitude in regard to them will have a positive effect upon the Act's operation.[39]

Jurisdiction of the Court in the Administration of the Act

Exclusive jurisdiction is given to the Labour Court, without any right of appeal from its decisions, "to examine into, hear and determine all matters and questions arising under [the] Act."[40] In exercising its jurisdiction, the Court is charged to "make such orders as appear to it just and agreeable to equity and good conscience."[41] The Act provides for a registrar of the Labour Court to whom (or to any other person) it may delegate "any of its powers which are not of a judicial nature."[42] While this is designed formally to satisfy s. 96 of the B.N.A. Act, it is at least an interesting indication that for constitutional purposes jurisdiction is not necessarily "judicial" (as opposed to administrative) merely because a Judge exercises it.[43] The degree of delegation to the registrar in the experience of the Court to date leaves the conviction that, in applications for certification at least, only the determination of the bargaining unit and the making of a certification order will remain non-delegable powers of the Court.[44]

The Act may be invoked, for certification purposes, by a collective bargaining agency or by an employer who is caught between competing agencies or who has a bona fide dispute with a collective bargaining agency.[45] Only a collective bargaining agency or an employer may apply to the Court to inquire into

[39] For example, the Court has already decided that employees who were unlawfully on strike are not eligible to vote for the selection of a collective bargaining agency, if they have not been taken back into employment by the employer; see *Local 2859, U.S.W.A.* v. *Babcock-Wilcox and Goldie-McCulloch Ltd.*, decided July 16, 1943, (1943), 43 Lab. Gaz. 1304.

[40] 1943 (Ont.), c. 4, s. 15.

[41] *Ibid.*, s. 25.

[42] *Ibid.*, ss. 1(l), 22.

[43] See Willis, *Section 96 of the British North America Act*, (1940) 18 Can. Bar Rev. 517.

[44] Among the duties delegated to the registrar have been the taking of a vote, and in connection therewith the settlement of the eligibility lists, form of ballot, time and place. The registrar has also been called on to determine whether an employee is supervisory or confidential, and hence excluded from the definition of "employee" in the Act. The registrar reports back to the Court, and objections to his report may be taken before it.

[45] 1943 (Ont.), c. 4, s. 13.

any violation of the Act by any person.[46] A collective bargaining agency or an employer may also seek from the Court a determination whether any person engaged in any calling or undertaking is an employer or employee under the Act.[47] Finally, the Court is empowered, on the application of any party to a collective agreement made under the provisions of the Act, to construe the terms of the agreement.[48] Presumably a collective agreement made under the provisions of the Act is one consummated as a result of bargaining between an employer and an agency certified by the Court.

In certification proceedings the Court is empowered to ascertain the unit of employees appropriate for collective bargaining, to take a vote of employees to determine their choice of a collective bargaining agency, and to certify that a particular agency represents a majority of the employees in the designated unit.[49] In proceedings arising from an alleged violation of the Act, the Court may restrain the violation, direct compliance with the Act (in both cases, of course, on pain of contempt proceedings) and direct reinstatement of an employee discharged in violation of the Act, with payment of any monetary loss suffered as a result of the discharge.[50] It may be a *casus omissus* that the Court is not given specific power upon a complaint of discrimination in violation of the Act, resulting in an employee's demotion, to order his reinstatement in his former position and payment of any monetary loss.[51] Conceivably the Court might exercise such a power under its omnibus authority, where a violation of the Act is alleged, to "make such other or further order as it deems proper."[52]

Constitutionality of the Act

Independently considered as a peace-time measure, the Act is undoubtedly a valid exercise of provincial legislative power.[53] It cannot, of course, reach those industries which fall within the

[46] *Ibid.*, s. 19(1).
[47] *Ibid.*, s. 20.
[48] *Ibid.*, s. 14.
[49] *Ibid.*, s. 13.
[50] *Ibid.*, s. 19(2).
[51] Under s. 7 it is forbidden to discriminate against an employee *in any manner* whether by discharging him from employment *or otherwise*, by reason of his trade union activity. But specific power to redress a violation of this provision is given to the Court only where the employee is discharged.
[52] *Ibid.*, s. 19 (2) (d). Where discrimination is practised, contrary to s. 7, by means other than discharge, it must be that the Court can take affirmative corrective action under the power to "make such other or further order as it deems proper".
[53] B.N.A. Act, s. 92(13). *Cf. Toronto Electric Commrs.* v. *Snider*, [1925] A.C. 396.

exclusive legislative authority of the Parliament of Canada by virtue of s. 91(29) and s. 92(10) of the B.N.A. Act. And while it cannot stand against inconsistent legislation validly enacted by the Dominion,[54] there is no existing Dominion legislation in this category. The only relevant Dominion legislation is s. 502 A of the Criminal Code[55] and the Industrial Disputes Investigation Act.[56] Although the latter has been extended, under the Dominion's expanded authority to legislate in time of war,[57] to cover industries engaged in war production,[58] there has been no such change in its substantive scheme as to produce an inconsistency between it and the Ontario Collective Bargaining Act.[59] As a practical matter, however, there is little advantage in establishing Boards of Conciliaton and Investigation under the Industrial Disputes Investigation Act to inquire into disputes centering in a refusal to bargain collectively.

No doubt the Parliament of Canada can (and according to recent reports may) during the war supersede the Ontario Act with legislation of its own. There are obvious advantages in a uniform Canadian labour relations law, and if a Dominion wartime measure is enacted it may be prolonged in peace either through provincial enabling legislatiôn or, although the possibly is remote, through a constitutional amendment.

Specific Problems and the Course of Decision

Practically all the proceedings before the Labour Court to date have been certification proceedings, and this phase will continue for some time to be the Court's main preoccupation. There has been no sufficient lapse of time to bring into play a second phase of the Act, viz., proceedings based upon an alleged violation of the duty to bargain collectively. The Court has allowed some latitude in procedure but in the main has preserved the characteristics of a judicial forum. It has indicated that proceedings before it partake of a summary nature and that ordinarily discovery and

[54] By virtue of the "paramountcy" doctrine of Canadian constitutional law.

[55] 1939 (Can.), c. 30, s. 11. Although doubts were expressed, prior to its enactment, as to its constitutionality, it has remained without successful challenge. See *Society Brand Clothes Ltd.* v. *The King*, [1943] 1 D.L.R. 111, especially editorial note.

[56] R.S.C. 1927, c. 112.

[57] Under the opening words of s. 91 of the B.N.A. Act. See *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.*, [1923] A.C. 695.

[58] See P.C. 3495 dated November 7, 1939, as amended by P.C. 1708, dated March 10, 1941; P.C. 7307.

[59] The Industrial Disputes Investigation Act provides for conciliation and investigation of labour disputes by *ad hoc* boards which have powers of recommendation only.

cross-examination upon affidavits will not be permitted, unless required to avoid surprise or the possibility of injustice from other cause.[60] No one Judge has been assigned to the work of the Court, and it is too early to assess the results of rotating the Judges in accordance with a schedule fixing two weeks as the duration of their respective assignments of duty.[61] It might be said, without disrespect, that the novelty of the legislation so far as the judicial art is concerned and unfamiliarity with its underlying assumptions posed a difficult task for many of the Judges, and a no less difficult one for members of the bar. The only precedents of any value in the interpretation and elucidation of the Act lay in the decisions under the National Labor Relations Act of the United States and kindred legislation of the American States. Resort to these decisions as guides bids to be a not inconsiderable feature in the administration of the Ontario Act, in the early stages of its operation at any rate. While one result of the Act has been to give the legal professon a new sphere of action, it will be unfortunate if the strictly legalistic approach stultifies the aim of the Act to establish a regime of peaceful collective bargaining relations in accordance with the wishes of employees. The Court has it in its power to avoid such a consequence by invoking its authority to "make such orders as appear to it just and agreeable to equity and good conscience." The fact that its decisions are not subject to appeal affords the Court an opportunity, even within the limits of judicial tradition, to develop a flexible technique in terms of sound labour relations policy rather than of sound legal doctrine in its administration of the Act.

The decisions of the Court to date have already erected lines and fences around a number of problems and it may be useful to indicate the Court's approach to the specific issues with which it has already been concerned.

(a) *Proper Applicants for Certification*

The definition of "collective bargaining agency" in s. 1(b) of the Act as "any trade union or other association of employees" gave rise to arguments before the Court that only a trade union consisting of employees of the particular employer was entitled to seek certification, and this was reinforced by reference to the definition of "employee," in s. 1(e), as "any person in the employment of an employer." The Court has rejected this contention

[60] *U.S.W.A., Local 1005* v. *Steel Co. of Can. Ltd. and Independent Steelworkers Assn.*, [1943] O.W.N. 563, per Barlow J.

[61] This procedure was apparently adopted by the Judges themselves.

with finality. It has held, on the one hand, that an international union may be an applicant for certification[62] and, on the other hand, that a local union of an international may also apply for certification, and this notwithstanding that applications for membership by employees are made to the international union.[63] Moreover, it has been held that a local of an international union is not disqualified as a collective bargaining agency because under the international constitution the local's collective agreements are subject to the approval of the international executive board.[63A] Not only do these holdings give effect to the phrase "trade union" in s. 1(b), but they show some appreciation of the realities in methods of organizing in vogue among trade unions.

(b) *Collective Bargaining Agencies Disqualified under the Act: Company Unions*

If the national and international affiliated unions expected the Collective Bargaining Act to solve for them the problem of the allegedly non-independent company-inspired or dominated union, they can hardly derive comfort from the decisions to date. As under the United States National Labor Relations Act, so under the Ontario Collective Bargaining Act there has been a strong response to the Act in terms of newly-formed unaffiliated employees' associations confined to employees of the particular employer. The legal rules of evidence and formal court procedure are hardly adequate instruments for discovering whether, in the words of s. 1(b) of the Act, "the administration, management or policy of [an association of employees] is dominated, coerced or improperly influenced by the employer in any manner whether by way of financial aid or otherwise." Only administrative investigation could ferret out the disqualifying facts, if they existed at all; and it would probably be incongruous to attach an administrative investigating arm to the Court. If the decisions to date are typical of what may be expected in this connection, the trade unions may well resign themselves to the task of ousting company unions through superior appeal in case of a vote or

[62] *U.A.W.* v. *Massey-Harris Co. Ltd. and Industrial Council of the Employees of Massey-Harris Co. Ltd.*, decided Sept. 7, 1943, by Barlow J.; see (1943) 43 Lab. Gaz. 1421.

[63] *U.A.W., Local 456* v. *Electric Auto Lite Co. Ltd.*, decided Oct. 5, 1943, by Mackay J. The Court pointed out that the local was an integral part of the international, and that moreover the local was not disqualified because it encompassed the employees of more than one employer. It also adverted to the fact that under the insternational constitution there was autonomy within the local for employees of a particular employer. But *quaere* whether this was crucial to the holding.

[63A] See *infra*, note 65.

through vigorous organizing campaigns. The difficulty is, of course, that in many cases inside unions, hastily organized, have rushed into Court for certification, and, being unopposed by the employer and no trade union having come into the picture which might intervene, there is nothing but the evidence of the applicant upon which the Court can act. Because certification is effective for one year, in the absence of fraud in its procurement (an extremely difficult matter to prove), trade unions are foreclosed for that period at least. Such a situation could only occur where, as in Ontario, there are large areas of unorganized workers, especially among the newly-established war industries.

"Domination" and "coercion" have not yet been defined by the Court. It stated in one case that employee representatives on an industrial council composed of equal numbers of representatives of employer and employees, where the expenses of the council were met by the employer, did not constitute an independent body.[64] Since the employee representatives, purporting to act as a collective bargaining agency, did not seek certification but merely intervened against an applicant trade union it was unnecessary for the Court to give a disqualifying edict. But a strong inference to this effect can be drawn from the fact that in directing a vote the Court ordered that only the trade union should appear on the ballot.

The term "improper influence" has been the subject of definition in only one case.[65] The Court stated that "improper influence" was a question of fact in the particular case but that acts or attitudes must, to constitute "improper influence," be such that individually or collectively they interfere with the decision, judgment or action of members of a bargaining agency, either to their prejudice or to that of those whom they represent, or at least to the extent that the members of the agency are embarrassed in making decisions or taking action. Having said that, the Court held that an employer's openly expressed preference for a particular agency did not constitute domination or improper influence. Similarly it has been held that no inference of domination, etc., could be drawn from the mere fact that an employer favoured the organization of its employees into an independent union rather than into a local of an international

[64] *U.A.W.* v. *Massey-Harris Co. Ltd. and Industrial Council of the Employees of Massey-Harris Co. Ltd.*, decided by Barlow J., [1943] O.W.N. 571.

[65] *Lakeshore Workmen's Council* v. *Lakeshore Mines Ltd. and I.U.M.M. S.W., Local 240*, decided by Roach J., Oct. 14, 1943.

union.[66] This was the construction put by the Court on a state of facts which revealed that the general manager of an employer had attended and addressed an organizational meeting of the independent union held on the employer's premises during working hours at which employees attended without suffering deductions in pay. Even allowing for the different wording of the comparable clause in the American National Labor Relations Act,[67] exoneration of the independent union from the taint of employer domination would be most unlikely at the hands of the National Labor Relations Board.[68]

Even if employer domination in fact exists, there is little likelihood of it being in any way apparent; rather one would expect subtle concealment. Many trade unions have, perhaps wisely, refrained from relying on evidence of domination, etc., although pleading it in their papers, because they have become reconciled to a longer view, viz., that in the competition between agencies for collective bargaining that one will ultimately be selected by the employees which they recognize as their own instrument.

(c) *Effect of Existing Collective Agreements*

It has been the general attitude of the Court that an existing collective agreement will not bar an application by another agency for certification if the agreement is not made with a proper qualified collective bargaining agency[69] or if it has been made with an agency which was not authorized by the majority of the employees affected to enter into the agreement or which failed to obtain their approval for the agreement subsequent to its execution.[70] It is no answer for an employer or the agency with which the employer has an agreement to say that although the agreement was not authorized or approved by the majority of the employees concerned, there was no serious protest against it.[71] An agreement made by an employer with one of two competing agencies without proof that it represented a majority of

[66] *Local 523, U.E.R.M.W.A.* v. *Atlas Steels, Ltd. and Atlas Workers Independent Union*, decided by Kelly J., Sept. 4, 1943.

[67] S. 8 (2) of the text declares it to be an unfair labour practice for an employer "to dominate or interfere with the formation or administration of any labour organization or contribute financial or other support to it".

[68] *Cf.* Third Annual Report, N.L.R.B. (1939), pp. 108–126.

[69] *Cf. U.A.W.* v. *Massey-Harris Co. Ltd. and Industrial Council of the Employees of Massey-Harris Co. Ltd.*, [1943] O.W.N. 571, per Barlow J.

[70] *I.U.M.M.S.W., Local 637* v. *International Nickel Co.*, [1943] 3 D.L.R. 790 (Gillanders J. A.).

[71] *Lakeshore Workmen's Council* v. *Lakeshore Mines Ltd. and I.U.M.M.-S.W., Local 240*, decided by Roach J., Oct. 14, 1943.

the employees and without ascertainment, either before or after the execution of the agreement, of the employees' attitude to it, does not estop them from selecting another agency for collective bargaining.[72]

In one case where a vote of employees approving an executed agreement was not taken until after certification proceedings had been instituted by a competing agency, the Court, although holding the agreement to be a bar to certification of the applicant, refused to certify the intervening independent union which was a party to the agreement and gave leave for either of the competing unions to apply again after six months.[73] This was hardly an adequate solution for a delicate labour relations problem, especially since the Court made no order prohibiting the enforcement of the agreement. In view of the fluidity of the situation, it would have been advisable to order a vote effectively to settle the matter of representation, which would have involved a holding that the collective agreement was no bar.

The Court has also held that voting for the selection of employee representatives on an industrial council on which the employer has equal representation does not constitute approval of a collective agreement previously made by the employer with the employee representatives on the council.[73A] It has given a similar decision in a similar situation involving voting by a majority of employees for election of employee representatives to a workmen's council.[73B]

It may be that the Court will hold that an agreement for an indefinite period or one foreclosing the selection of another agency for many years constitutes no bar to an application for certification.[74] Although the point has been raised in a number of cases, no decision thereon has been given.[75]

(d) *Proof of Majority*

A certification order will be made in favour of an agency which proves that it represents a majority of the employees in a designated unit. While the Act does not speak of majority mem-

[72] *U.S.W.A., Local 2905* v. *Canada Machinery Corp. Ltd. and Canada Machinery Corp. Ltd. Employees' Assn.*, decided by Gillanders J. A., July 21, 1943.

[73] *Local 523, U.E.R.M.W.A.* v. *Atlas Steela Ltd. and Atlas Workers' Independent Union*, decided by Kelly J., Sept. 4, 1943.

[73A] See note 69, *supra*.

[73B] See note 71, *supra*.

[74] This is the position under The National Labor Relations Act. See 2 TELLER, Labour Disputes and Collective Bargaining, s. 335.

[75] See note 69, *supra*.

bership but of majority representation, it is clear that membership in an applicant agency will be the normal method of proving that it represents the majority of employees. As was pointed out by the Court, although membership is not the only gauge in determining whether an applicant represents the majority of employees, it is a very important gauge.[75A] Proof of majority representation may be adduced by way of oral testimony of witnesses and by production of membership cards or books of an applicant agency, although in the case of membership cards the Court accepts them as evidencing only the knowledge as to membership of the witness. Even in the case of production of membership books, any weight given to such documentary proof may be offset on cross-examination by showing that the custodian of the books cannot say whether the persons listed are or have been employees of the employer concerned. Recently, the practice was instituted of adjourning proceedings to enable the applicant agency and the employer to check the former's membership cards or books against the latter's employment list. In contested proceedings, where there is an intervening agency, it will be rarely that the Court can certify any agency upon oral and documentary evidence alone. It may then order a vote as a means of obtaining additional evidence.[76]

The Court has, however, certified upon the basis of a hearing alone where there have been competing agencies. One particular case in which this was done involved a plant council favoured by the employer as against an outside union, and the former was certified on the basis of evidence which established its majority by negative rather than positive inferences.[76A] This, it may be suggested respectfully, is an unsatisfactory method of satisfying the conditions upon which certification may be granted, especially when a competing agency is claiming certification and asking for a vote. An order for a vote in such circumstances can hardly be prejudicial if we remember that the selection of a bargaining agency is a matter for the employees to decide.[76B]

(e) *Orders for a Vote*

While the Court is empowered by s. 13(5) of the Act to take a vote of the employees in an appropriate unit to ascertain their choice of a collective bargaining agency, it has indicated that an

[75A] *Local 34, A.W.A.* v. *Aluminium Co. of Canada*, [1943] O.W.N. 635.
[76] *E.g., U.S.W.A. Local 2537* v. *Hamilton Bridge Co. Ltd., et al.*, decided by Gillanders J.A., July 15, 1943.
[76A] See note 75a, *supra*.
[76B] See note 101, *infra*.

applicant for certification cannot invoke this power by the mere fact of application, as a means of recruiting workers into the agency. Since application for certification involves a claim that the applicant represents a majority of the employees in a designated unit, the Court has expressed the view that an applicant must, before becoming entitled to an order for a vote, make out a *prima facie* case: "Such evidence must be adduced as will enable the Court to find that it is reasonable to presume that such applicant represents the majority of the employees."[77] A *prima facie* case does not mean evidence of an actual majority, but evidence that an applicant represents a substantial portion of the employees concerned and some other evidence from which the Court could infer that the majority of the employees would select the applicant, *e.g.* employer opposition to the applicant.[78] Although it has been held that twenty-five percent membership is a substantial portion, that, without anything more, will not entitle the applicant to a vote. Presumably the Court should be satisfied, for purposes of directing a vote, with evidence of not less than twenty-five percent membership, reinforced by any evidence of resistance to the applicant's organization by the employer or his agents. It should not be necessary that this evidence of resistance, or it may be evidence of preference of the employer for some other type of association or evidence that the employer is discouraging his employees in their desire to organize for collective bargaining, be such as to warrant a finding that there has been a violation of the Collective Bargaining Act. What the Court is seeking is really an additional makeweight, which as reinforcement for evidence of substantial representation, will warrant it in directing a vote.

It is clear from the decisions of the Court that it will generally order a vote in preceedings involving competing agencies where there is evidence of conflict between them and where there is a confusing situation which prevents the Court from making any determination on the evidence before it.[80]

Where there are two or more competing agencies each of which claims some representation of employees, it should be a sufficient ground for a vote that taking their claims together it is

[77] *Victoria Employees' Independent Union, Canadian Furnace Ltd.* v. *Canadian Furnace Ltd. and Local 1177, U.S.W.A.*, [1943] O.W.N. 576.

[78] *U.E.R.M.W.A.* v. *York Arsenals Ltd.*, decided by Roach J., Oct. 1, 1943.

[79] *Ibid.*

[80] *G.B.B.A.* v. *Dominion Glass Co. Ltd., et al.*, decided by Gillanders J.A., July 13, 1943; *U.S.W.A., Local 2859* v. *Babcock-Wilcox and Goldie-McCulloch Ltd.*, decided by Gillanders J.A., July 16, 1943.

clear that a majority of employees desire a collective bargaining agency to represent them.[80A]

It has been the experience of the Court to order a vote upon consent by applicant agency and employer or by competing agencies and employer.[81]

(f) *Conditions of Vote*

The rule has been adopted in all cases where a vote is ordered that organizational activities, electioneering or propaganda by or on behalf of any of the parties shall be proscribed pending the taking of the vote. Any violation of this rule is for the consideration of the Court at the continuance of the hearing following the registrar's report on the vote. The violation may conceivably be a ground for refusing certification or for withholding it for a certain period.

The taking of a vote is a duty delegated to the registrar who is generally charged with the task of settling the date and manner, the list of eligible voters and generally also the form of the ballot, including the questions to be asked. In all these matters he may be given general directions by the Court by which he should be guided. In settling the list of eligible voters, the registrar may be called on to determine whether certain persons are employees within s. 1(e) of the Act.[82] Parties are entitled to be represented by counsel before the registrar and may, if they so desire, adduce evidence.[83]

(g) *Form of Ballot*

Where one agency only is involved, the practice of the Court is to have a straight "yes or no" ballot.[84] In one case, which stands alone, the ballot asked whether the employees desired to be represented by a collective bargaining agency, and whether they desired to be represented by the particular agency involved in the proceedings.[85] Where there are competing agencies, the practice has varied. In one case the Court directed that

[80A] *Cf.* case cited in note 71, *supra.*

[81] *Locals 2895, 2903, 2894, U.S.W.A.* v. *Shurly-Dietrich-Atkins Co. Ltd., Galt Brass Co. Ltd. and Galt Metal Industries Ltd., et al.*, decided by Gillanders J.A., July 22, 1943.

[82] *National Association of Technical Employees, Windsor Branch* v. *Canadian Bridge Co. Ltd.*, decided by Roach J., Sept. 24, 1943.

[83] *Ibid.*

[84] See note 69, *supra.*

[85] *Members of the T.W.O.C.* v. *Guelph Carpet & Worsted Spinning Mills Ltd.*, decided by Roach J., Sept. 30, 1943.

[86] *G.B.B.A.* v. *Dominion Glass Co. Ltd., et al.*, decided by Gillanders J.A., July 13, 1943.

the ballot simply give the employees the choice of either of two agencies as their collective bargaining agent.[86] In other cases, the judgments at least, have in terms provided for a ballot giving, in addition to the choice of either of two agencies, a third option of rejecting both agencies[87] or of indicating whether the employees desire to have a bargaining agent at all.[88] There is, of course, good ground for giving employees the opportunity to reject both agencies, since they may feel dissatisfied with both and can avoid unpleasantness which might attend their failure to vote. Moreover, in view of the effect which a failure to vote has on the question of "majority" (which is discussed below), it is as well to provide an opportunity to reject all agencies on the ballot. This type of ballot (three way ballot) seems to be the one which will become normal in a vote involving competing agencies. If so, the practice of the Court in regard to the form of ballot will correspond to that of the National Labor Relations Board.[89] The type of ballot which allows employees to say whether they want to bargain collectively at all is a contradiction of the very principle involved in the direction of a vote and is, moreover, extremely unsatisfactory from the standpoint of getting effective results from a vote. The parties to a proceeding might, of course, fix the form of ballot by consent, and in a number of cases involving two competing agencies the parties have been satisfied to have a vote for the selection of one or the other of the two agencies.

(h) *Date of Election*

The Court has not adopted any such practice as directing that the election be held within a stipulated period. The delegation to the registrar authorizes him to fix the date of the election, and this is normally done after consultation with the parties.

(i) *Eligibility of Employees to Vote*

Although the Court has indicated by way of guide that the eligibility of voters should be determined as of a certain date relative to a payroll period, it is usual for this to be left to the registrar who determines the question after considering the views of the parties. The agreement of the parties to this,

[87] *U.E.R.M.W.A.* v. *Fahralloy (Canada) Ltd. and Fahralloy Employees' Assn.*, decided by Gillanders J.A., July 30, 1943.

[88] *U.S.W.A. Local 2859* v. *Babcock-Wilcox and Goldie McCulloch Ltd., et al.*, decided by Gillanders J.A., July 16, 1943, See also note 71, *supra*.

[89] See, Third Annual Report, N.L.R.B. (1939), pp. 144–146.

as on the date of the election, would generally be accepted by the Court and registrar.

It is clearly established by the decisions of the Court that employees who have voluntarily left their employment at any time up to the date of the vote are disentitled to vote, as are employees who up to that date have given notice of their intention to do so.[90]

The judgments of the Court have also made it clear that persons who have gone on strike unlawfully and are not taken back into employment are disqualified from voting at an election ordered at a subsequent date.[91] It would seem that employees lawfully on strike are entitled to vote, at least if they have not taken other employment, but this has not been definitely settled. Where employees go on strike after the eligibility lists are fixed, the registrar might, as in other disputed cases, accept the votes of such persons and put them in separate envelopes, and on the basis of his investigation into the facts, make a decision whether the ballots should be counted or not. Since the registrar's report must come before the Court, it is only sensible to accept the ballots of persons whose right to vote is disputed after they have been put on the list of eligible voters; a ruling can be made on their status in the registrar's report, and it can be objected to before the Court which has the final say in the matter.

Employees who have been discharged for cause would quite clearly be ruled out as ineligible to vote. It may be difficult to deal with cases of temporary layoff of employees, seasonal employees and temporary employees. But no problem should be created by employees being temporarily absent owing to illnes or injury; clearly they are eligible.

The registrar has so far met with no extensive difficulties in determining whether persons employed by an employer are "employees" within the Act. No generalization is of course possible from the title or nominal position which a person may hold. The guide is the definition in the Act. Persons may be excluded not only because they are not "employees" within the Act but because they fall outside the bargaining unit.[92]

[90] *Lakeshore Workmen's Council* v. *Lakeshore Mines Ltd. and I.U.M.M.-S.W., Local 240*, [1943] O.W.N. 631, per Roach J.; *Members of The T.W.O.C.* v. *Guelph Carpet & Worsted Spinning Mills Ltd.*, decided by Roach J., Sept. 30, 1943.

[91] *U.S.W.A., Local 2903* v. *Galt Brass Co.*, [1943] 3 D.L.R. 796, per Gillanders J.A.; *U.S.W.A., Local 2905* v. *Canada Machinery Corp. Ltd. Employees' Assn.*, decided by Gillanders J.A., July 21, 1943.

[92] *Cf.* for example, registrar's report of July 27, 1943, in *U.S.W.A. Local 2537* v. *Hamilton Bridge Co. Ltd., et al.*

In determining exclusions, the registrar may be materially assisted by the cooperation of the parties. Difficulties are likely to arise in giving precise meaning to the terms "supervisory" and "confidential"[93] in s. 1(e), and in determining the reach of the phrase "having authority to employ, discharge or discipline employees". It would be unwise to lay down broad definitions in this connection, and this the registrar has recognized in a recent report in which he considered what was meant by "supervisory".[94]

(j) *The Bargaining Unit*

The Act contemplates in s. 13 that units appropriate for collective bargaining may include the employer unit, craft unit, plant unit or a subdivision thereof. The experience of the Court has not yet required it to lay down any far-reaching principles on the appropriate unit. Generally, applicants for certification have been industrial unions as opposed to craft unions, and office and clerical help have been excluded by the pleadings from an industrial unit comprising production workers, although this has not been invariable. In one case the Court rejected an application by a craft union which sought to set aside, as constituting an appropriate unit, a group of employees alleged to possess technical skill.[95] The evidence satisfied the Court that the allegedly technical group possessed no higher qualifications than many of the main body of employees; and even if the applicant had been led to believe that its members would be treated with separately, that alone was insufficient to warrant certification by way of estoppel. One might have liked to see a keener appreciation of the desirability of making some concession to the form of organization chosen by employees, rather than a seemingly exclusive consideration of the convenience of the employer. Certainly the position of the National Labor Relations Board is more sympathetic to the desires of employees to organize by craft and to maintain intactness of organization where they have so organized.[96]

In another instance, the Court decided in favour of an industrial unit and refused to separate off as craft units groups

[93] The registrar held, *ibid.*, that plant guards were ineligible, being "confidential".

[94] *U.S.W.A. Local 2890* v. *R. McDougall Co. Ltd. and R. McDougall Employees Assn.*, report of registrar dated Oct. 20, 1943.

[95] *A.T.E.* v. *Sutton-Horsley Co. Ltd.*, decided by Mackay J., Oct. 6, 1943.

[96] *Cf.* 2 TELLER, LABOUR DISPUTES AND COLLECTIVE BARGAINING, s. 339 *ff.*

of employees engaged in the railway yard of a mining company although those employees belonged to railway craft unions.[97] The Court took care to indicate that this was a particular decision and was based in part on the fact that the railway employees were not completely and finally allocated to railway work and could, in case of layoff, revert to other lines of work with their employer. This again, with respect, seems to be a case where greater emphasis was given to the convenience of the employer, and to the simplification in bargaining which would ensue from the establishment of an industrially organized agency of the employees.

Even if the Court should find it necessary to lay down general principles relative to the appropriate unit for bargaining, it is unlikey to deprive itself of the sensible reliance on the "facts of the particular case" rule. So far there has been little craft-industrial conflict calling for some specific solution.[98] We may expect in the future that matters such as the history of organization among employees and community of interest and skill will thrust themselves forward as elements for consideration in the definition of the appropriate bargaining unit. That has happened already in at least one case.[98A]

(k) *The Meaning of "Majority"*

S. 13 of the Act empowers the Court to certify that a collective bargaining agency represents a majority of the employees in a unit designated as appropriate for collective bargaining. "Majority" means, of course, more than fifty percent, and the question is, more than fifty percent of what? Where an application for certification can be disposed of at an oral hearing and without resort to a vote, certification must depend upon whether a particular agency proves that it represents more than fifty percent of all employees in the appropriate unit. If a vote is ordered, the result may require a decision on whether "majority" means a majority of all eligible voters, a majority merely of those voting or something in between, viz., a majority of those voting providing a majority of the eligible voters have cast good ballots. The Act offers no guide here. In the United States, the National Labour Relations Board will certify, after

[97] *Sudbury Mine, Mill & Smelter Workers Union, Local 598 of I.U.M.M.S.W.* v. *International Nickel Co. of Canada Ltd., et al.*, decided by Greene J., Oct. 28, 1943.

[98] *Cf.* 2 TELLER, LABOUR DISPUTES AND COLLECTIVE BARGAINING, s. 355 for the N.L.R.B.'s position in this connection.

[98A] See note 101, *infra*. A craft union was certified for a narrow unit.

an election, an agency which obtains a majority of the votes cast, regardless of the fact that less than a majority of those eligible to vote do so.[99] The Supreme Court of the United States has held, however, that under the Railway Labor Act "majority" means that a majority of those eligible must vote and that a majority of the votes cast must be in favour of the agency claiming certification.[100] The Supreme Court added that those who failed to vote must be presumed to have assented to the expressed will of the majority of those voting.

The Labour Court has recently established its position on the matter. Although indicating the plausibility of a rule requiring that an agency secure a majority of the eligible voters (which is what must be proved to secure certification without a vote), the Court in effect adopted the middle ground taken by the Supreme Court of the United States in relation to the Railway Labor Act. Mr. Justice Gillanders held that where a vote is taken, *prima facie* evidence that an agency represents a majority of the employees in the particular unit is furnished where it secures the majority of the votes cast, provided that a majority of those eligible to do so vote.[101] Since a vote is usually directed to provide additional evidence, such a result must be taken as *prima facie*, although in no case has certification been refused to an agency securing a majority vote where a majority has voted.

The effect of this formula is that, from an extreme viewpoint, twenty-six percent of the employees in a unit can choose a collective bargaining agent for all. But this is hardly a cause for alarm, considering what the Court requires as a *prima facie* case before it will order a vote.[101A]

(1) *Sole Bargaining Rights*

Although the Act does not confer, in terms, sole or exclusive bargaining rights upon a certified agency, it follows from the very fact of certification that an agency which is certified is the only

[99] *Matter of R.C.A. Mfg. Co. Inc.* and *U.E.R.W.A.* (1936), 2 N.L.R.B. 159.

[100] *Virginian Ry.* v. *System Federation No. 40* (1937), 300 U.S. 515.

[101] *G.B.B.A.* v. *Dominion Glass Co. Ltd., et al.*, [1943] O.W.N. 652; *U.S.W.A. Local 2859* v. *Babcock-Wilcox and Goldie-McCulloch Ltd.*, decided by Gillanders J.A., Oct. 20, 1943.

[101A] The three way ballot may create trouble for this "majority" formula where enough voters vote against both agencies to prevent either of them from securing a majority of all votes cast. This happened in the *Lakeshore Case*, note 90, *supra*. The court ordered another election between the two agencies. Perhaps this foreshadows a dropping of the three way ballot.

one entitled to insist on enforcement of the employer's duty to bargain collectively, and the only one which, for the duration of its certificate, can claim to represent all the employees in the particular unit because it represents the majority of them.

The foregoing is reinforced by the Court's statement in an early case that a trade union which seeks certification as bargaining agent for all employees in a designated unit must be prepared to service the grievances of union and non-union employees alike.[102]

(*m*) *Duty of Employer to Bargain Collectively*

This is a feature of the Act which has not yet come under the review of the Court. As already indicated, the Court is in the initial phase of certifyng bargaining representatives. It has, however, pointed out that ordinarily an employer cannot be deemed to have failed or refused to bargain collectively until a reasonable period has elapsed after certification of the complaining agency.[103] The extent of the employer's duty to bargain collectively is indicated in the definition of that term in s. 1(a) of the Act; he is required to "negotiate in good faith with a view to the conclusion of a collective bargaining agreement." If the course of decision under the National Labor Relations Act is any guide, the Court will hold that it is not essential, in law, that an agreement be reached but that if the parties do agree, good faith requires that the agreement be embodied in writing and signed.[104]

(n) *Bargaining Representatives*

Under s. 6 of the Act the employer's duty is to bargain collectively with the duly appointed or elected representatives of an agency certified in respect of the employer's employees. The Court has made it clear that where a collective agreement is being negotiated and provision is made for a grievance committee, the certified agency is entitled to insist that the members of this committee consist entirely of its appointed or elected representatives.[105] The employer cannot insist that the committee be elected or appointed by the employees at large. The Court made this decision not only upon a general consideration of the implications of collective bargaining but also in the light of s. 1(a)

[102] *U.S.W.A. Local 2853* v. *Welland-Vale Mfg. Co. Ltd.*, [1943] 3 D.L.R. 786, per Gillanders J.A.

[103] *Ibid.*

[104] *H. J. Heinz Co.* v. *N.L.R.B.* (1941), 311 U.S. 514; 2 TELLER, LABOUR DISPUTES AND COLLECTIVE BARGAINING, ss. 329–331.

[105] See note 102, *supra*.

of the Act defining "bargain collectively" to include negotiation in good faith from time to time during the term and in accordance with the provisions of a collective bargaining agreement. Settlement of disputes and grievances under a collective agreement, no less than negotiations for a collective agreement, is part of the process of collective bargaining.

It has been the custom, in accordance with the terms of s. 13(5)(b) of the Act, to include in the certification order the names of the particular persons who are the agency's representatives to bargain collectively with the employer. Obviously it would be unreasonable to consider that this fettered the power of the certified agency to change the composition of its bargaining committee during the effective period of the certification order. The Court has indicated recently that it is preferable to give the number of bargaining representatives, without mentioning names, and that it might be stated how many union (non-employee) representatives and how many employees (members of the union) would constitute the bargaining committee.[106]

The foregoing rather compressed discussion of the work of the Labour Court reveals the emergence of a particular labour jurisprudence novel in the annals of Canadian law. The importance of the work for our future industrial well-being challenges all concerned in the development of this branch of law to bring to it their best talents and most earnest efforts in the light of the social policy which gives it meaning.

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[106] *Local 522, U.E.R.M.W.A.* v. *Canada Electric Castings Ltd.*, decided by Barlow J., Nov. 13, 1943; *Local 508, U.E.R.M.W.A.* v. *Leland Electric (Canada) Ltd.*, same.