COLLECTIVE LABOUR AGREEMENTS

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This article deals primarily with the legal status of collective labour agreements; their nature, effect and enforcement in the common-law provinces of Canada, with particular reference to Ontario.

Dominion or Provincial Jurisdiction

A preliminary word might be said, however, on the question of legislative jurisdiction in Canada over collective labour agreements. During the war the Dominion, under the authority of the War Measures Act, issued orders in council on the subject; there can be no doubt that it was within its competence to do so. The constitutional position is somewhat more complicated in peacetime. Some experts argue that collective bargaining and trade unions were intended to be under the jurisdiction of the Dominion. In support of this they cite the fact that in the time of Sir John A. Macdonald the Dominion passed The Trade Unions Act of 1872.1 However, in view of the decision of the Privy Council in Toronto Electric Commissioners v. Snider et al.,2 in which the effect of the federal Industrial Disputes Investigation Act was considered, this writer has little doubt that, in peacetime, collective bargaining and labour disputes are for most industries under provincial jurisdiction.

One might argue that property and civil rights need not be affected directly by regulations on collective bargaining, as they are not in the Wartime Labour Relations Regulations. Order in Council P.C. 1003 of 1944. For example, the Regulations do not attempt to regulate wages, hours of work or other working conditions, but require merely that an employer must bargain in good faith with certified bargaining representatives and that the resulting agreement must contain certain provisions. The

argument would be that such an agreement merely sets up a relationship between an employer and his employee, giving rise to no civil rights. The remedy for a breach of the agreement is not a civil claim; there may be public disapproval of the breach and the other party may derive some satisfaction from having the offender fined, but no legal compensation is afforded him.

In the Snider case the Privy Council held that the Industrial Disputes Investigation Act infringed upon the right of the provinces to legislate on civil rights. It held further that this infringement could not be justified under the "criminal law" or "trade and commerce" clauses of section 91 of the British North America Act, or under the Dominion's general power to legislate for "peace, order and good government". A realistic interpretation would probably hold that collective bargaining regulations are not criminal law, do not regulate trade and commerce and do not affect civil rights, in other words do not come under any of the specific heads of sections 91 and 92, but are under Dominion jurisdiction as falling within the general "peace, order and good government" clause of section 91. Such an interpretation, however, seems to be precluded by the Snider case.\(^3\)

**Nature of Collective Agreements**

The legal nature of any agreement depends upon a number of factors, such as the status of the parties and the nature and form of the agreement. In the case of a collective labour agreement, the status of the parties (the question for example whether a trade union is a legally responsible body) does not matter so much because the agreement itself is regarded normally, not as an enforceable civil contract, but as a memorandum of those rights which the employer agrees to transfer to the union, or as a treaty,\(^4\) or as a constitution governing labour matters in the plant. The status of the average collective agreement was described by the Privy Council in *Young v. Canadian Northern Railway Company*\(^5\) when it stated that the agreement in that case was intended to operate merely

\(^3\) For more on this constitutional question see the judgment of Mackay J. in *United Steel Workers of America v. Steel Co. of Canada Ltd.*, [1944] 2 D.L.R. 583, in which he followed the Snider case and held the Ontario Collective Bargaining Act *intra vires* the province.

\(^4\) As suggested by Mr. Dana Porter in his article, "Civil Status and Disabilities of Trade Unions in Ontario", (1943), 21 Can. Bar Rev. 215, at 225.

any individual employee and the company which employs him. If an employer refused to observe the rules, the effective sequel would be, not a legal action against the employer for specific performance or damages but the calling of a strike.

The Wartime Labour Relations Regulations, which have been adopted and extended in Ontario, Manitoba, British Columbia, Nova Scotia and New Brunswick to cover all employees in the province, treat collective agreements, not as agreements the breach of which will give rise to an action for damages or specific performance, but as agreements the breach of which will give rise to an application to the appropriate provincial labour relations board for leave to prosecute. If such leave be granted, proceedings may then be taken before a magistrate leading to a fine if the accused employer, employee or union is convicted. The five provinces mentioned will likely carry on for some time under these or similar provisions.

There is nothing in the Wartime Labour Relations Regulations inconsistent with what has just been said as to the status of collective agreements. Section 8 (1) provides inter alia that a collective agreement negotiated by the certified bargaining representatives shall be binding on every employee in the unit. Under section 10 (5) every party and every employee covered by a collective agreement shall do everything he is, or refrain from doing anything he is not, to do under the agreement.

But a collective agreement is not binding in the sense that an ordinary contract is binding. Under section 18 of the Regulations every agreement must provide a grievance procedure looking to a final settlement and under section 17 an employee must have any grievance (a case of misinterpretation or violation of the agreement) dealt with in accordance with the procedure provided. Both employer and employee are bound by the settlement of the grievance arrived at through the grievance procedure and, during the term of the agreement, no employee shall go on strike and no employer cause a lockout.

As a sanction against strikes and lockouts, section 41 (1) provides that it is an offence to go on strike and section 40 that it is an offence to cause a lockout contrary to the Regulations. It is also an offence for a trade union to authorize such a strike (section 41 (2)) and generally it is an offence to contravene any of the Regulations (section 42).

6 In the case of railway companies and the like, the National Wartime Labour Relations Board would hear the application ab initio, whereas in all applications to a provincial board there is an appeal to the National Board.
Prosecutions arising out of offences under the Regulations are by summary conviction leading to a fine only. No prosecution may be taken without the consent of the labour relations board. In order to consent to a prosecution, the board does not have to pass on the merits of the case; all it need do is satisfy itself that the matter is a serious one and not of a frivolous or vexatious nature.

When considering the question of leave to prosecute, the board may under section 45 take into account the extent of any disciplinary measures already taken against the accused. The question does not arise where the accused is the employing company since the company could hardly discipline itself, but there may have been some measure of self-enforcement where leave is asked to prosecute an individual employee. For example, if a company asked leave to prosecute an employee who had disobeyed some provision of the agreement after the union had already fined him, the board could refuse leave on the ground that adequate disciplinary measures had already been taken.

The board has no power under the Regulations to grant such remedies as injunction or mandamus, or to order specific performance of a collective agreement; its only power is to grant or refuse its consent to a prosecution. In one case the National Wartime Labour Relations Board corrected a decision of the Quebec Wartime Labour Relations Board, which had exceeded its authority by ordering an employer to give effect to an arbitration award on the question of the seniority clause in its agreement. The National Board held that all a board could do was to institute a prosecution, or consent to its institution, for an offence under the Regulations.

A board could conceivably withhold its decision on a request for leave to prosecute in order that the accused might comply with the terms of the agreement. If the terms were complied with, the board would dismiss the application unless it were withdrawn voluntarily; if they were not complied with, leave would be granted. Withholding a decision for this purpose might involve going into the merits of the case, but there is nothing in the Regulations or the decisions of the National Board to prevent a board doing so if it wished. In fact the Ontario

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7 This was decided by the National Wartime Labour Relations Board in the appeal by Joseph Stokes Rubber Co. Ltd. from the decision of the Ontario Board granting leave to prosecute to Local 523, United Electrical, Radio and Machine Workers of America (Labour Gazette, Dec. 1945, p. 1789).
8 International Association of Machinists, Lodge 712 and Noordwijk Aviation Limited, Dominion Labour Service 7 – 566.
Board did just that in the case of *Amalgamated Bakers and Confectioners of Toronto and Canada Bread Company Limited* when it adjourned the application for leave to prosecute in order to give the company an opportunity to execute an agreement whose operative date the board held must commence on the date of execution. The board stated:

The granting or withholding of leave is a matter of discretion and, in exercising such discretion, regard must be had to the underlying premise of the Regulations, which is that relations between employers and employees should as far as possible rest on consent rather than compulsion.

There is nothing in any Ontario legislation that alters what has been said above as to the legal nature of collective agreements. In 1944 the Ontario Collective Bargaining Act was repealed by the *Labour Relations Board Act, 1944*, in order to give effect to the federal Wartime Labour Relations Regulations. Those provisions of the principal act that were not incorporated in or covered by the Regulations were then consolidated into the *Rights of Labour Act, 1944*. This act provides in section 3 (3) that:

A collective bargaining agreement shall not be the subject of any action in any court unless such collective bargaining agreement may be the subject of such action irrespective of any of the provisions of this Act or of the *Labour Relations Board Act, 1944*.

There is incidentally a similar provision in the *Trade Union Act, 1944*, of Saskatchewan.

It is submitted that, if a collective agreement is broken by one of the parties to it, the other party is not entitled to repudiate it or fail to perform any part of its covenant, nor can the other party claim damages for breach of contract. The position is the same even though the breach is a fundamental one, as for example where a union goes on strike in spite of a covenant in the agreement that it will not strike, which is stated to be, or is in fact, a condition of the agreement. This is the writer's opinion, but there is support for it in the opinion of a number of labour-law experts. It seems to follow logically from the treatment of collective agreements under the Regulations as administered by the boards, and from the fact that a collective agreement is not a civil contract. It is true that in the United

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9 Dominion Labour Service 7 – 1167.
10 7 Geo. VI, 1943, c. 4.
11 8 Geo. VI, 1944, c. 29.
12 8 Geo. VI, 1944, c. 54.
13 8 Geo. VI (2nd Session), 1944, c. 69.
States collective agreements have been treated more or less like civil contracts and courts have ordered specific performance of them or enjoined their breach. At least in Ontario, the only way in which such agreements could be treated as contracts would be for the parties to promise specifically that the agreement was to be a contract enforceable in the courts and in this way remove it from the protection of section 3 (3) of The Rights of Labour Act, 1944.

What Is a Collective Agreement?

In the Wartime Labour Relations Regulations a collective labour agreement is defined merely as an agreement in writing between an employer and a trade union containing provisions with reference to rates of pay, hours of work or other working conditions. What constitutes a collective labour agreement beyond this very general definition? The Ontario Labour Relations Board has held that memoranda recording various arrangements governing working conditions in different departments of a plant, signed by the employer and the union, were a collective agreement. The Board said that "where the intent of the parties clearly indicates that a document embodies the terms which are to govern their relations, we should be loath to hold that such a document is not a collective agreement simply because its style is somewhat out of date".¹⁴

The result would probably have been just the opposite if the memoranda had been intended merely as a record of certain points upon which the parties had agreed for later inclusion in a collective agreement. Even here the memoranda would probably become a collective agreement if negotiations on the other points that were to have been incorporated broke down. A difficulty might then arise because the parties, under section 15 of the Regulations, would be bound by the terms of the limited memoranda for one year and during that period one party could refuse to add anything to them.

In a previous decision the Ontario Board had held a document on hours of work, signed by two employees on behalf of the rest, not to be a collective agreement for the reason that it was not an agreement between an employer and a trade union.¹⁵ Here the parties intended and took care that it should not come

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¹⁴ *International Union, United Automobile, Aircraft and Agricultural Workers of America, Local 641, and Beach Foundry Limited and International Moulders & Foundry Workers Union of North America & Local 280, Dominion Labour Service 7–1201.*

¹⁵ *International Union of Operating Engineers, Local 944 and General Motors of Canada Limited, Dominion Labour Service 7–1145.*
within the definition of a collective agreement. It might be noted that the agreement was also held to be void ab initio because it sought to deprive the employees of the very rights the Regulations were designed to confer upon them.

**Legal Requirements of Collective Agreements**

The Wartime Labour Relations Regulations go further with respect to the legal requirements of collective agreements than any other Dominion or provincial act or order, and further than the American Wagner Act or any state legislation the writer has seen. It is true, generally speaking, that the Regulations do nothing more than compel an employer to bargain in good faith with a certified trade union and that there is no compulsion to reach an agreement in the case of a deadlock. Conciliation procedures similar to that contained in the Industrial Disputes Investigation Act is incorporated, but there is no compulsory arbitration.

Provision is made in section 15, however, that every collective agreement must be deemed to run at least for a period of one year from its operative date and, if it is intended to run for more than one year, it must contain, or will be deemed to contain, a provision for termination on at least two months' notice. If section 15 is read in the light of section 9 it will be found that the one-year period runs from the date of execution of the agreement; the Ontario Board so held in the Canada Bread Company case referred to above. Nothing, of course, prevents an agreement being renewed automatically from year to year.

One of the most important provisions of the Regulations is section 18, which states that every collective agreement made after the Regulations come into force must contain a grievance procedure leading to final settlement; if it does not, the board may establish a procedure. Such a provision goes much further than one would expect from the definition of a collective agreement mentioned above. The section has been implemented in a number of cases. For example, in the case of International Union, United Automobile and Agricultural Workers of America, Local 195 and Canadian Automotive Trim Limited, the National Labour Relations Board inserted an arbitration clause in the agreement between the parties, which was to be the final step in the grievance procedure.

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16 Dominion Labour Service 7 - 539.
It might be pointed out that during the war the United States went beyond the Wagner Act and gave its National War Labour Board power, in settling disputes, to provide that certain provisions, such as a maintenance of union membership clause, check-off of union dues and so on, should be contained in labour agreements. But it is likely that in the United States these special war powers will disappear, whereas in Canada the Wartime Labour Relations Regulations are now part of the labour law of Ontario, Manitoba, British Columbia, Nova Scotia and New Brunswick and may be added to in the future but are hardly likely to be limited. It is likely also that the Dominion will use them as a basis for a labour code covering such Dominion industries as railways.

**Effect of Collective Agreements**

An existing collective agreement will bar an application for certification of another union. In the *Beach Foundry* case, to which reference has been made, the Ontario Board held that a collective agreement was still in effect, having been automatically renewed from year to year, and that no other union could be certified during the first ten months of the current term.\(^\text{17}\)

Perhaps the earliest decision to this effect was *United Electrical Radio and Machine Workers of America, Local 529 and Packard Electric Company, Limited.* In *Industrial Union of Marine and Shipbuilding Workers, Local 11 and Port Arthur Shipbuilding Company Limited*\(^\text{19}\) supplementary agreements were held by the Ontario Board not to extend the term of the master agreement, which, it was provided, was to last for the duration of the war but under section 15 of the Regulations was terminable on two months’ notice after one year. Since more than one year had elapsed in this case, the master agreement was not, therefore, a bar to certification of another union. The National Board agreed with the Ontario Board in this decision.\(^\text{20}\)

A collective agreement can remain in force, and be renewed automatically, even though no members of the union are currently employed in the plant. This was the decision in the *Beach Foundry* case where it was held that, although the union was actually dormant, it could be operated by an outside repre-

\(^\text{17}\) After ten months of the current term, section 9 of the Regulations would come into operation, under which the employees could select new bargaining representatives, who, if certified, could give notice of the termination of the agreement.

\(^\text{18}\) Dominion Labour Service 7—1105.

\(^\text{19}\) Dominion Labour Service 7—1116.

\(^\text{20}\) Labour Gazette, Nov. 1944, p. 1338.
sentative, an officer of the union. The opposite decision was reached by the same board where the employees’ association had disintegrated and gone out of existence, leaving no one to administer the agreement. For this reason the agreement was held not to be in existence and to be no bar to the certification of the applicants.

Grievance Procedure

Section 18 of the Regulations, to which reference has been made already, provides:

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

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

In two cases the Ontario Board has given a broad interpretation to this section, considering that, since the Regulations deal with personal rather than property rights, they should not be interpreted too legalistically or restrictively. The board in those two cases held that the grievance procedure should not be confined to disputes over the interpretation or violation of the agreement. To do otherwise would be to leave an employee without any remedy in cases where his grievance arose during the currency of the agreement, either under the agreement or over some matter upon which the agreement was entirely silent, but not concerning the interpretation or constituting a violation of the agreement.

In International Union, United Automobile and Agricultural Workers of America, Local 195 and Canadian Automotive Trim Limited the Ontario Board pointed out that an employee having such a grievance would have had a hearing before a conciliation board appointed under the Industrial Disputes Investigation Act, which was suspended by section 48 of the Regulations, but that this recourse was no longer open to him if the Regulations were to be interpreted strictly. There was the added fact that under the Regulations an aggrieved employee was forbidden to strike. The Ontario Board in this

21 The Shop Committee of the Foster Wheeler Employees and Foster Wheeler Limited and United Steelworkers of America, Local 2223, Dominion Labour Service 7 – 1133.
22 Dominion Labour Service 7 – 1149.
case held that the grievance procedure should not be limited to disputes over the interpretation or violation of an agreement, in spite of the fact that they had been overruled by the National Board on the same point in United Automobile Workers, Local 195 and Dominion Forge and Stamping Company Ltd.\textsuperscript{23} The reason the Ontario Board did not follow the decision of the National Board in this latter case was that it felt that the National Board had itself failed to limit the grievance procedure to disputes over the interpretation or violation of the agreement when, in United Automobile, Aircraft and Agricultural Implement Workers of America, Local 240 and Ford Motor Company of Canada and Formocan Employees' Association,\textsuperscript{24} it had appointed an umpire to settle disputes while negotiations for a new agreement were going on.

As might be expected, when the Canadian Automotive Trim case was appealed the National Board again limited the grievance procedure to disputes concerning the interpretation or violation of the agreement.\textsuperscript{25} In doing so they pointed out that in the Ford case they had acted as arbitrator with the consent of the parties and were not limited by section 18 of the Regulations.

There is not much doubt that the National Board was legally correct in the Canadian Automotive Trim and Dominion Forge cases. From the labour relations standpoint also it took perhaps the safer course, because to have gone further would have meant compulsory arbitration on points not covered in the agreement. All points upon which there may be compulsory arbitration should be covered at least in a general way in the agreement. A properly worded agreement will reserve to management all rights and prerogatives not transferred to the union; if this is done, it is difficult to imagine any dispute arising that would not concern the interpretation or violation of the agreement.

The Future

It appears that we are tending more and more to some form of compulsory arbitration in labour disputes. Certainly, as our experience grows, more principles fair to all concerned will be determined and additional types of disputes can be taken from the realm of economic strife and dealt with under the "rule of law", albeit administered by a board and not a court.

\textsuperscript{23} Dominion Labour Service 7 - 505 and 7 - 1111.
\textsuperscript{24} Labour Gazette, June 1944, p. 742.
\textsuperscript{25} Dominion Labour Service 7 - 539.
On the one hand, the Regulations were only about a year old when the labour federations asked that a provision be included in them permitting the board to order such form of union security as the board deemed appropriate to be incorporated in a collective agreement. The manufacturers opposed this request and no change has been made in the Regulations.

One would think that future legislation will not go as far as the one-sided provision of the Saskatchewan Trade Union Act, which allows a dispute over union security to be determined by a majority of the employees alone. Under this act the employer has no voice in the matter of union security; is given no hearing; cannot show cause why the union should not have the benefit of the glorified maintenance of membership provision of the act. The whole issue is solved unilaterally.

On the other hand, there are requests by employers for penalty clauses in collective agreements to operate if the union or the employees break the terms of the agreement. Penalties of this sort will be incorporated in the agreement between the United Automobile, Aircraft and Agricultural Implement Workers of America and the Ford Motor Company of Canada, according to the award of the arbitrator, Mr. Justice I. C. Rand. Finally there is the question of industry-wide collective agreements. Section 5 (3) of the Regulations provides already for employers' group agreements, but they cannot be forced on employers and will only come into general use if the employers and their employees so desire. If they do become more general, they will probably seek only to stabilize wages and working conditions and are unlikely to affect the nature of collective agreements. Indeed, they will serve to emphasize in another way that collective agreements are not civil contracts; difficult as it would be to order specific performance of an agreement between a single employer and a trade union, it would be practically impossible to do so in the case of a broken agreement between a number of employers and a union or unions.

26 See The Canadian Unionist for March 1945, at p. 55.
27 See Industrial Canada for October, 1945, at p. 89.
28 8 Geo. VI (2nd Session), 1944, c. 69, s. 25.
29 The Labour Gazette, January 1946, p. 123.