

5-1-1981

The Michelin Amendment in Context

Brian Langille

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Labor and Employment Law Commons](#)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 International License](#).

Recommended Citation

Brian Langille, "The Michelin Amendment in Context" (1980-1981) 6:3 DLJ 523.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

On Friday, December 28, 1979 an Act to Amend Chapter 19 of the Nova Scotia Acts of 1972, The Trade Union Act, received Royal assent. This piece of legislation is commonly (and much more conveniently) referred to as the Michelin Bill, the Michelin Act or the Michelin Amendment.¹ Its namesake is *Michelin Tires (Canada) Limited*, the Canadian subsidiary of the large French multinational radial tire manufacturer.

It must, and indeed it should, seem odd that a bill amending in general terms an act of general application (the Trade Union Act of Nova Scotia)² should bear the name of a manufacturing company located in the province. But as seems to be admitted by all concerned, there is a direct link between Michelin and the amendment. Because the link has been openly admitted or alluded to by the government which passed the amendment, much of what is contained in this comment is not new or at all extraordinary. Also, because it seems generally conceded that the handle "The Michelin Amendment" fits, in large measure the issues surrounding the Michelin Amendment are not *labour law* issues at all. The central issue is one of fundamental economic, philosophical, and political principle. To put it simply, the amendment has a great deal to do with the basic political dilemma of trading fundamental, and in a sense intangible, rights or freedoms for economic gains or increases in the general economic welfare of an economically depressed area. This is so much more important a question than any problem of tinkering with technical labour law concepts such as "appropriate bargaining units" and "community of interest" that it overwhelms any attempted labour law analysis.

So, what reasons are there for wishing to discuss the Michelin Amendment in labour law terms? First, there was an attempt to justify the amendment in labour law terms — the term "broad based

*Assistant Professor of Law, Dalhousie Law School. B.A., LL.B., B.C.L. (Oxon). This paper was prepared for and presented in abbreviated form to the annual meeting of the Canadian Industrial Relations Association at Montreal on June 2, 1980. I wish to thank my colleagues, Innis Christie and Larry Steinberg, for their comments.

1. The text of the legislation is set out in Appendix A.

2. S.N.S. 1972, c. 19 as amended by S.N.S. 1977, c. 70 and S.N.S. 1978, c. 34.

bargaining” was bandied about in connection with the bill. This analysis, however, was not used extensively by the proponents of the legislation. Second, and more importantly, the Michelin Amendment does raise basic and interesting labour law issues. In a sense the Michelin Amendment goes to the heart of the most modern thinking on bargaining unit theory developed by labour relations boards in this country. And finally, the Michelin Amendment is instructive in that it demonstrates the healthy connection between apparently innocent and neutral concepts such as “appropriate bargaining units” and fundamental political principles and freedoms. It was once said that our substantive due process lies buried in the interstices of procedure. This captures part of what I am saying here. Manipulation of technical labour law concepts can have profound effects upon substantive rights.

This comment attempts to accomplish two things. First, it attempts to put the Michelin Amendment in context by filling in some factual background. Simply laying out the facts goes a long way to explaining my view of the central issue in the Michelin Amendment controversy. Second, by drawing on some recent developments in labour law it attempts to substantiate the assertions that 1) the Michelin Amendment is directly related to much of what has been said in recent years concerning bargaining unit determination and 2) that there is a vital link between technical concepts and fundamental political issues.

I. The Michelin Amendment — Background

Michelin Tire’s first North American tire manufacturing plants went into production at Granton, Pictou County and Bridgewater, Lunenburg County, Nova Scotia, in 1971. Michelin Tire employs over 108,000 employees in 48 factories in 15 countries. The news of Michelin’s decision to locate in Nova Scotia came in 1969 and followed lengthy negotiations with federal, provincial and municipal governments which concluded with a substantial package of grants, accelerated depreciation benefits, tariff and duty concessions, low interest loans, training grants, free plant sites, and property tax reductions.³ The figure commonly used to indicate the financial value of the initial package is 81 million dollars in public funds.⁴ When Michelin went into production in Nova Scotia other

3. For a brief account of the negotiations leading to the Michelin location decision, see Kimber, “Michelin Tire Rolls On”, *Financial Post Magazine*, April 26, 1980.

4. *Ibid.*

tire manufacturers in the United States succeeded in erecting a countervailing tariff against the import of Michelin Tires into the United States on the basis that the benefits listed above gave Michelin an unfair advantage.

Michelin is one of Nova Scotia's largest employers. Initially, Michelin employed 1,300 workers but the work force has grown (along with the plants) to a combined total at both plants of 3,600. This represents over 7% of the province's employees engaged in manufacturing. A third plant is now under construction. When operational, Michelin's proportion of the manufacturing work force will exceed 10%.

The two Michelin plants in Nova Scotia are functionally interdependent. The nature of this interdependence has been summarized by the Nova Scotia Labour Relations Board in the following Manner:

Michelin Tires (Canada) Limited has manufacturing plants at Granton and Bridgewater, Nova Scotia, some 150 miles apart. At the Granton plant all material for the making of rubber are processed. At the Bridgewater plant steel cord for the metal fabric used in making tires and steel beadwire, or trindle are manufactured from raw material. Steel cord is sent from Bridgewater to Granton where it is integrated with rubber to make the metal fabric used at Granton for passenger car tires and truck tires, and some of the metal fabric is sent back to Bridgewater where it is made into tires for light commercial vehicles. Beadwire is also sent from Bridgewater to Granton for integration at a later stage of tire making.

This brief statement does not do justice to the full and graphically illustrated explanation of the tire making process at the two plants given by Mr. Gorce, Michelin Tires (Canada) Limited's general manager in his testimony to the Board. But the Board accepts that there is a high degree of functional integration between the operations at the two sites. Rubber mixes, steel cord and metal fabric are chemically and physically unstable products until the final vulcanization of the tire. They must be transported in special containers and if there is any delay in the process they will deteriorate to the point where they become unusable. Thus, stockpiling is not possible and a cessation of production at one plant will bring the other to a halt in a matter of a day or two.

From the standpoint of production, the two plants should, ideally, be part of one large complex. They are located 150 miles apart in order to tap two separate labour pools. Various financial incentives offered by the government were, apparently, granted upon conditions which, to some degree at least, dictated the

choice of two separate sites for Michelin's operations in Nova Scotia.

Not only are the production processes of the two plants functionally integrated, management and administration are also fully integrated, with Bridgewater being, in effect, a branch plant of Granton. In one other respect, as well, there is a high degree of integration: virtually all training of tradesmen and production employees takes place at Granton.

In marked contrast, however, the evidence is that there is virtually no interchange of production employees once they are established in employment. There is some interchange of maintenance employees but, measured against total man hours in maintenance work, it is insignificant. The Respondent produced lists of people who had moved from one plant to the other, mostly to perform maintenance functions, but Counsel for the Union succeeded in demonstrating through cross-examination and in argument that there is no significant interchange in employees in the bargaining unit. There is very considerable daily traffic between the two plants at the management level, but it is with the employees that we are mainly concerned here.⁵

A. *The Construction Projects Labour Management Relations Act (1971)*⁶

In late July, 1971 the Nova Scotia Legislature was called into an emergency mini session. On June 28, 1971 the then Minister of Labour, Leonard Pace, introduced An Act for the Stabilization of Labour-Management Relations Affecting Certain Construction Projects, the only legislation this session was to consider. At this time both Michelin plants were under construction and there was considerable difficulty in construction industry labour relations at the sites.⁷ There is no doubt that this rather comprehensive piece of legislation was aimed at securing the completion of the Michelin construction projects. The Act extended the terms of collective agreements until new agreements were negotiated,⁸ placed a 30 day maximum time limit on strikes and then imposed interest arbitration (if a majority of trades had concluded agreements),⁹ otherwise

5. *United Rubber, Cork, Linoleum and Plastic Workers of America, Local 1028 and Michelin Tires (Canada) Limited*, [1979] 3 Can. L.R.B.R. 429.

6. S.N.S. 1971 (2nd Sess.), c. 1. The Bill was given Royal assent on July 8, 1971.

7. See, for example, *R. v. I.B.E.W., Local 1818* (1972), 31 D.L.R. (3d) 607 (N.S.S.C. A.D.).

8. *Supra*, n. 6, s. 5.

9. *Supra*, n. 6., s. 7.

banned work stoppages and picketing,¹⁰ and established offences with possible penalties of \$1,000 a day for individuals and \$10,000 a day for unions.¹¹

The Act applied only to industrial construction projects of a cost or value exceeding 5 million dollars.¹² The Act was declared in force only in Pictou County¹³ which covers the Granton plant.

In the debates of the House of Assembly we find the following:

Mr. Pace (Minister of Labour): . . . Now, Mr. Speaker, I would suggest to the Honourable Members that legislation of this sort, the Government does not intend to proclaim it in general, but rather for the two particular situations which we have in which there has been no attempt to make it a secret, the two Michelin plants which are vital to the economy of this province, it will be made applicable to those on proclamation. . . .

An Hon. Member: That is at Granton and Bridgewater.

Mr. Pace: At Granton and Bridgewater, and then, of course, we will look for the experience over the next succeeding months, and if, in fact, it is not necessary to proclaim it further, then, of course, the government will not do so.

Mr. Veniot: If the Honourable Minister might permit a brief question. Assuming that the Act is made applicable to Granton and Bridgewater which are the two problem areas at the moment, by virtue of clause (b) on page 14 that the Act can be suspended or revoked by the Governor in Council I presume that's at any time you wouldn't keep these regulations in effect either at Granton or Bridgewater any longer than you had to, would you? What is your feeling on that point?

Mr. Pace: Mr. Speaker, in answer to the Honourable Member's question, this type of legislation is the type that no Government wishes to pass and our Government certainly does not. But it is aimed at a particular situation which is vital to the economy of this Province in which the taxpayers of this Province have a vital interest, and also where the majority of workmen on the site want the right to have their day's work conducted and receive the pay therefrom. Certainly we do not intend to make this an all-encompassing thing in order to interfere with the regular union and management relationships but in fact if the vital interests of this Province and the workers of this Province are involved, we will proclaim it for those particular purposes in

10. *Supra*, n. 6, s. 6.

11. *Supra*, n. 6, s. 9.

12. *Supra*, n. 6, s. 2(d).

13. Proclaimed July 15, 1971, 180 Royal Gazette 1515; reproclaimed due to clerical error August 31, 1971, 180 Royal Gazette 1873.

order to protect those vital interests.¹⁴

As far as I can determine, the machinery set out under the Act was never actually used and no agreement was never arbitrated pursuant to its provisions.

B. New Regulations for Craft Units - 1973 (The Michelin Regulations)

On May 10, 1973, the International Union of Operating Engineers, Local 968 applied to the Nova Scotia Labour Relations Board to be certified as bargaining agent for a unit of stationary engineers employed by Michelin Tires at the Granton plant. A hearing was scheduled for June 19, 1973 after an extension of time in which to file a reply had been granted to the employer. A few days before the scheduled hearing date the Governor in Council enacted a new regulation which dramatically affected the course of the proceedings.¹⁵

Regulation 1 was fatal to the application of the Operating Engineers. It effectively barred the certification of craft units in industrial plants and the regulation was made applicable to outstanding applications before the Labour Relations Board. It read as follows:

1. (1) In considering any application herebefore or hereafter made to the said Board under Section 23(1) of the said Act for certification of a trade union as bargaining agent of the employees in a group belonging to a craft or exercising technical skills, and in determining whether the proposed group is otherwise appropriate as a unit for collective bargaining and whether the union should otherwise be certified, the Board shall require to be satisfied:

(a) that no material community of interest exists between the proposed group and other employees of the employer;

(b) that the industry in which the employer is engaged belongs to a class of industry which traditionally or normally is organized by craft unions pertaining to such respective crafts or other skills;

(c) that the continued normal operation of the employer's production process is not dependent upon the performance of the assigned functions of the employees in the proposed unit;

(d) that the proposed group is more appropriate for collective

14. Debates of the Nova Scotia House of Assembly 1971, Volume 3, p. 33-34.

15. Pursuant to s. 9 of the *Trade Union Act*. O/C 1973-580A dated June 14, 1973.

bargaining than an employer, plant or subplant unit which included the employees in the group.

(2) This section shall not apply to the construction industry, to any non-commercial institution, or to any other industry that does not produce or deal in goods or services on a commercial basis.

As a result of this development, the union obtained an adjournment from the Board and sought a Writ of Prohibition to prohibit the Board applying this regulation in the hearing of its current application.¹⁶ The union argued that the regulations were *ultra vires* the *Trade Union Act* on two grounds: (1) that the regulations altered substantive law enacted by the Legislature and substantive rights of the union and (2) that the regulations were retrospective in operation. The Nova Scotia Supreme Court rejected these arguments and held that the regulations were *intra vires*.

As a result, the union's application was, of course, eventually dismissed.¹⁷

C. *The Michelin Amendment — 1977-1980*

In order to place the Michelin Amendment in context it is in my view necessary to recount a rather lengthy story which begins in the autumn of 1977. Although present before that time, the United Rubber, Cork, Linoleum, and Plastic Workers of America (U.R.W.) then began a major drive to organize the Michelin plant at Granton. Local 1028 was established. On December 9, 1977, the U.R.W. filed the first of what would turn out to be a total of three applications for certification regarding the production and maintenance staff at Granton. On January 25, 1978, after the usual pre-hearing vote was conducted,¹⁸ the U.R.W. withdrew its application upon receipt of the voters list, apparently realizing that it did not have the required 40% of the unit as members in order to have the vote counted in accordance with s. 24(7) of the *Trade Union Act*. On February 15, 1978, a new organizing campaign began. However, on February 29, 1978 the U.R.W. filed a

16. *Re International Union of Operating Engineers, Local 908 and Michelin Tires Manufacturing Company of Canada Limited.* (1973), 43 D.L.R. (3d) 602 (N.S.S.C. T.D.).

17. L.R.B. order 2020, January 15, 1974. Another craft unit application by the I.B.E.W. dated May 18, 1973 was withdrawn on August 21, 1973.

18. For an explanation of the history, thinking behind and working of the pre hearing "quick vote" in Nova Scotia see Christie, "Certification — Is There A Better Way to Test Employee Wishes?", in *The Direction of Labour Policy in Canada* (Montreal: McGill U., 1977).

complaint of unfair labour practices with the Nova Scotia Labour Relations Board. The complaint alleged discrimination against individual employees in contravention of s. 51(3) (a) of the *Trade Union Act* and interference by Michelin with the representation of employees by a trade union contrary to s. 51(1) (a) of the Act. These complaints were related to activities of Michelin during both the first and second organizing campaigns. In April the Labour Relations Board began what would turn out to be 24 days of hearings into these complaints. The hearings were conducted in April, May, June, October and December, 1978 and January, 1979. However, the pace of events began to quicken when, after 10 days of hearings into the unfair labour practices, the U.R.W. filed its second application for certification on June 30, 1978. It was agreed that the evidence adduced at the hearing into the unfair labour practices would be relevant to any determination in the certification proceedings as to whether s. 24(9) of the Act should be applied. S. 24(9) empowers the Labour Relations Board to certify, despite the loss of a vote, if the employer has contravened the Act in so significant a way that the vote does not reflect the true wishes of the employees. The usual pre-hearing vote was again conducted and a total of fourteen days of hearings were held in October and December, 1978 and January, 1979. The Labour Relations Board issued no decision on either the certification application or the unfair labour practices complaint until February 14, 1979.¹⁹ However the pre-hearing vote was counted in December, 1978. On Wednesday, December 13, 1978 Mr. Thornhill, the Minister of Development for Nova Scotia, rose in the House of Assembly to make the following announcement:

Mr. Thornhill: And, Mr. Speaker, because some members of the House have indicated a great interest in the vote that was taking place yesterday by the workers at Michelin Tire, I have been apprised of the vote at this particular time and the result is as follows — those for certification, 434; those opposed to certification, 909. That is the official result of the vote.²⁰

On February 14, 1979 the Nova Scotia Labour Relations Board issued Order 2505. While technically an order only in the certification proceedings, that order indicated the following:

1. That the U.R.W. had more than 40% of the appropriate unit as members.

19. L.R.B. No. 2505.

20. Debates of the Nova Scotia House of Assembly 1978-79, Volume 1, p. 181.

2. Implicitly therefore, that the Granton plant alone was an appropriate unit.
3. That a majority had not voted in favour of the union.
4. That Michelin had committed unfair labour practices (unspecified).
5. That the Board would not exercise its power under s. 24(9).
6. That the application was dismissed.

On April 11, 1979 the Board issued its decision in the unfair labour practice complaint with extensive reasons.²¹ The complaints regarding individual employees were dismissed. However, the Board found that Michelin had breached s. 51(1) (a) of the Act in three respects which it outlined as follows:

1. By telling employees, in crew meetings and in meetings between employees and management personnel that if the union was certified, bargaining would begin at the legal minimum wage and thereby, in the context, threatening the employees with the loss of wages and benefits if they supported the union;
2. By sending letters to employees and their families and by telling employees in crew meetings and in meetings between employees and management personnel that the certification of local 1028 carried the probability of a high incidence of strikes and thereby threatening employees with a loss of income, and perhaps jobs, if they supported the union; and
3. By imposing a no solicitation rule which effectively prohibited the persuasion of people to become members of local 1028 on the employer's premises during non-working hours.

We have therefore hereby ordered the Respondent to cease and desist from breaching Section 51(1) (a) of the Trade Union Act in any of these ways.

The Board is empowered by section 55 of the Trade Union Act To "by order, require the party to comply" with section 51 and to make certain other orders to effect the reinstatement of discharged employees and to award compensation for loss of remuneration, but section 55 does not appear to grant the Board the power to give the direction requested with regard to a letter from the Respondent to its employees. In any event we are satisfied that our order in this respect will be well publicized.²²

No reasons were issued in connection with the certification decision — Order 2505 — until August 6, 1979 when the Board

21. [1979] 2 Can. L.R.B.R. 388.

22. Ibid. at p. 403.

issued supplementary Order 2505.²³ It was in these reasons that the Board explained fully its decision, implicit in Order 2505, that the Granton plant alone constituted an appropriate bargaining unit.

However, shortly after the issuing of the cease and desist order in April the Michelin Bill (first version) made its appearance. The proposed legislation was in fact never introduced in the House of Assembly. However, the Minister of Labour, Ken Streach, did make it known that he was proposing an amendment which would require a union seeking to be certified as bargaining agent for employees of employers in the manufacturing industry to apply for employees of all of a multi-location employer's plants.²⁴ The proposed legislation was immediately dubbed the "Michelin Bill" — a name which has since stuck. As reported in the *Chronicle Herald*:

In an interview outside the House, Mr. Streach allowed that some people are calling the proposal a "Michelin Bill . . . and maybe it is. They are certainly one of the most prominent manufacturers who would fall into the category."²⁵

Opposition to the proposed bill was swift.²⁶ Mr. Streach publicly defended the Bill in terms of "labour stability", "a stable and reliable work force" and that this was "something to offer abroad". He said it was an example of "broad based bargaining" similar to reforms he had urged in the construction industry.²⁷ However, there seems to be some dispute as to whether Mr. Streach actually admitted that the bill was directed solely at Michelin.²⁸

One of the main aspects of the controversy surrounding the

23. [1979] 3 Can. L.R.B.R. 429.

24. "Minister Will Seek Change in Union Act" — *The Chronicle Herald*, Wednesday, April 18, 1979.

25. *Ibid.*

26. "Federation Opposed to Amendment" — *The Chronicle Herald*, Wednesday, April 18, 1979.

"Labour Councils Meet to Protest Amendment" — *The Mail Star*, Monday, April 23, 1979.

"Arsenault Motion Would Stop Bill" — *The Chronicle Herald*, Thursday, April 19, 1979.

27. "Principle of Proposed Bill on Bargaining Unit Same — Streach" — *The Mail Star*, Monday, April, 23, 1979.

"Stable Work Force Key Asset — Streach" — *The Chronicle Herald*, Tuesday, April 24, 1979.

28. See Kimber, *supra*, n. 2 where it is alleged that Mr. Streach said to members of the Labour Management Joint Study Committee "Look, let's stop fooling around, what if we wrote it just for Michelin?"

proposed legislation was the manner in which the minister had consulted with the Joint Labour Management Study Committee. This committee of labour and management representatives established under the auspices of the Institute of Public Affairs at Dalhousie University in the early 1960's had in the past always been consulted, had always studied and always vetted any proposed changes in the province's labour relations legislation. The committee was first informed of the Bill on the Thursday evening before Good Friday, and told that the Minister intended to introduce the Bill the following Wednesday.²⁹ There appears to be no question that both caucuses of the committee objected to the degree of consultation. The failure to consult the committee became, for the time being, a focal point for objection to the proposed bill.³⁰ There were also objections from other employer interests in the Province, particularly in the fishing industry, who perceived that the Bill was drafted widely enough to draw their operations into its net. In the end the Minister delayed introduction of the bill. The headline in the Chronicle Herald of Wednesday, April 25, 1979 read: "Streach Delays Labour Bill — Legislation Going Back to Committee for Study".

In fact, the proposed Bill itself was never returned to the Joint Study Committee. Rather, because the labour caucus refused to study the Bill *per se*, a larger question was referred to the Committee for study. The Committee agreed to study the relationship between broad based collective bargaining and full employment in the Province. The Committee studied this issue and ultimately reported to the Minister in September in the following terms:

The Joint Labour-Management Study Committee cannot conclude that the bill would promote full employment nor would it encourage broadening of the collective bargaining base. The difficulty with the bill is the fact that it does not address the principle that the Minister enunciated in his letter of April 25th. It

29. I am indebted to Mr. Kell Antoft of the Institute of Public Affairs, Dalhousie University, for this information concerning the role of the Joint Study Committee. Mr. Antoft was chairing the Committee at the relevant times. For information concerning the Committee generally see Henson, "The Nova Scotia Labour Management Agreement," (1969), 24 Rel. Ind. 87.

30. "C.M.A. Supports Bill's Delay" — *The Chronicle Herald*, Wednesday, April 25, 1979.

See also Surette, "Michelin Whistles. Cabinet Rolls Over" — *Atlantic Insight*, July, 1979.

would appear that the bill would have the effect of regulating the certification process within industries having multiple plants in the province, and the Committee has noted the fundamental difference between *broad-base certification and broad-base collective bargaining*.

The Committee suggests that the link between increased employment opportunities and broad-base collective bargaining is a tenuous and indirect one. The Committee feels that it would be inappropriate to amend the Trade Union Act for the purpose of making it into a major vehicle for industrial development in the province.³¹

Meanwhile, the Labour Relations Board in August had issued reasons for its decision in Order 2505, the order dismissing the certification application issued February 14, 1979. The central issue addressed in the comprehensive and lengthy decision was whether the Granton plant alone was an appropriate unit or whether it was inappropriate, because, as the employer argued, both plants at Granton and Bridgewater ought to be included. The Board decided that the Granton plant alone was an appropriate unit.³² Also discussed — and dismissed — was a preliminary objection made by Michelin to the effect that the U.R.W. lacked status as a trade union because the U.R.W. has supported countervailing duties against importation into the United States of Michelin tires.

Also in August, 1979 the U.R.W. began its third campaign to organize the Granton plant. However, Michelin did not observe the cease and desist order of the Labour Relations Board dated April 11, 1979. Among other things, it continued to impose the no-solicitation rule in contravention of the Board's order. On September 12, 1979 the U.R.W. requested the consent of the Minister of Labour to initiate a prosecution of Michelin for violation of the Board's order.³³ On September 19, 1979 Michelin commenced an action to quash the decision of the Labour Relations Board as it related to the finding of an unfair labour practice concerning the no-solicitation rule. On September 24, 1979 the U.R.W., having received no reply from the Minister to their request for consent to prosecute, started an action for an injunction to

31. *Supra*, n. 29.

32. *Supra*, n. 23.

33. *Trade Union Act*, ss. 73, 83. Note that the Act contains no provision, similar to those in the labour legislation of other jurisdictions, for filing of Board orders in the Supreme Court. Breaches of Board orders have in the past been enforced by prosecution.

restrain Michelin from breaching the Board's order and continuing to commit the acts to which the Board's order related. On the same date an application for an interlocutory injunction was filed. On September 28, 1979 Glube J. issued the interlocutory injunction requested.³⁴ Michelin appealed this decision to grant an interlocutory injunction to the Appeals Division of the Supreme Court. The appeal was heard on October 19, 1979. The U.R.W. still had received no reply to its request of September 12 for consent to prosecute.

On November 27, 1979 the Appeal Division dissolved the interlocutory injunction granted by Glube J.³⁵ The decision of the Appeals Division has disturbing implications for no solicitation rules. Still later the Supreme Court of Canada was to refuse leave to appeal from this decision of the Appeals Division.³⁶ The U.R.W. never did receive a reply from the Minister of Labour to their request for consent to prosecute.³⁷

On October 23, 1979, the U.R.W. filed its third application for certification at the Granton plant and the usual pre-hearing vote was conducted approximately a week later.

It was, however, in December of 1979 that the Michelin Amendment, as we now know it, was introduced into the Nova Scotia Legislature and passed into law. These were, in a way, exciting times. The Bill was a matter of high profile, intense public debate. It seems to me to be impossible to convey an accurate historical account of the Bill's stormy passage through the legislature. I will attempt to touch on the highlights only. A crucial point to remember, in appreciating the degree of heat generated during this period was that the U.R.W. had completed an organization campaign at the Granton plant — relying on the decision of the Labour Relations Board that it alone constituted an appropriate bargaining unit. The pre-hearing vote had already been taken and the ballots, as yet uncounted, were in the hands of the officials of the Labour Relations Board. The Board had not yet held a hearing into the matter of the third application by the U.R.W. for certification.

Although there was action within the Joint Study Committee throughout the autumn, public notice was given in November, 1979

34. (1979), 35 N.S.R. (2d) 146

35. (1979), 35 N.S.R. (2d) 104

36. Supreme Court of Canada Bulletin, January 25, 1980, p. 10.

37. Conversation with Raymond Larkin, Solicitor for the U.R.W.

that a revised version of the legislation, which had been proposed in the spring, would be introduced in a December sitting of the legislature.³⁸ It was clear that the basic idea in the legislation would be to require that all manufacturing plants of one employer which were interdependent be declared to be the appropriate bargaining unit of employees of that employer.³⁹ It was also clear that the new version of the legislation would be more narrowly drafted to expressly apply to Michelin and that it would apply to the application of the U.R.W. currently before the Labour Relations Board.

Mr. Streach again stated that the Bill "will help stabilize the province's labour force and provide employees with job security".⁴⁰ He again tied the legislation to industrial development.⁴¹ On Monday, December 3, 1979 Mr. Streach introduced Bill 98, An Act to Amend the Trade Union Act.⁴² On the same day news of a proposed third Michelin plant spread through the province. The Chronicle Herald's headline of December 4, 1979 read "Labour Act Change Unveiled — Bill Coincides with Rumour of Third Michelin Plant".⁴³ The rumours were confirmed the evening following the introduction of Bill 98 when Mr. Thornhill, Minister of Development, rose in the House to announce that Michelin Tires (Canada) Limited would build a third plant in the province and would also expand its facilities at Bridgewater and Granton.⁴⁴ He added that this would mean "at least 2,000 direct jobs" and that "the spinoff could amount to another 4,500 jobs" and that this would reduce the province's unemployment rate by some 20%. He outlined other benefits to the province as well.

The battle was on. One of the first victims was the Joint Labour Management Studies Committee which collapsed with the resignation of the labour caucus.⁴⁵ The battle raged until the passage of the

38. "Bill Has Potential to Create Jobs" — *The Mail Star*, November 27, 1979.

39. *Ibid.* And see "Trade Union Act Changes Need Lengthy Consideration" — *The Chronicle Herald*, November 28, 1979.

40. *Supra*, n. 38.

41. *Ibid.*

42. Debates of the Nova Scotia House of Assembly 1979, p. 2858.

43. See also "Officials Mum on Michelin Reports" — *The Mail Star*, December 4, 1979.

44. Debates of the Nova Scotia House of Assembly 1979, p. 2879.

45. "Labour Resigns From Committee" — *The Cape Breton Post*, December 6, 1979.

"Labor Caucus Resigns" — *The Mail Star*, December 6, 1979.

As of this date the committee has not been resurrected.

Bill on December 28, 1979. There were newspaper headlines, a campaign against the legislation on radio and in the newspapers, letters to the editor, massive crowds at Province House, a citizens coalition against the bill, an emergency meeting of the Nova Scotia Federation of Labour, and intense debates among the citizenry across the province.

Upon rereading the debates in the House and elsewhere one is struck by the absence of any discussion of the industrial relations merits or lack thereof in the legislation. Although Mr. Streach denied that Michelin had requested the legislation⁴⁶ the debate on both sides was pitched at a level in which the connection between the legislation and U.R.W.'s application before the Labour Relations Board was blatant. The argument was one about jobs and "development" as reified in the proposed Michelin expansion. Even more explicitly the government based its defence of the legislation in part upon a direct attack upon the U.R.W. Both of the government's leading spokesmen on the bill — Mr. Streach and Mr. Thornhill — adopted this approach. There was in effect a two-pronged approach — a positive link to jobs and a negative attack upon the U.R.W.

Mr. Streach asserted that he believed in the principle of the Bill which he stated to be that "this Bill stands for . . . trying to set an environment where we can get jobs for Nova Scotians".⁴⁷ He then referred to the Michelin expansion announcement and added that he was "very, very proud that I am a member of a government that is prepared to set this type of a precedent to secure jobs and secure employment in this province."⁴⁸

Reference was then made to the U.R.W.⁴⁹ One of the points the Minister made concerned the role of the U.R.W. in securing the countervailing duties in the United States against Michelin imports in 1972.⁵⁰

Mr. Thornhill also attacked the U.R.W.'s motives in organizing the Michelin plant at Granton. He also reminded the Liberal

46. "Company Didn't Ask for Amendments — Streach" — *The Chronicle Herald*, December 5, 1979.

47. Debates of the Nova Scotia House of Assembly 1979, p. 2960.

48. *Ibid.*

49. *Ibid.* p. 2962.

50. *Ibid.* And see "Labour Minister Says Bill Aimed at U.R.W." — *The Mail Star*, December 6, 1979 and "Legislation Directed at U.R.W. — Streach" — *The Chronicle Herald*, December 6, 1979.

opposition of its passing of regulations in 1973 when it had been in power. As well, he made the link with jobs and development:

We are simply and plainly taking measures to prevent irresponsible interference with our growing economy.⁵¹

The Premier, Mr. Buchanan, added:

Let me put it this way . . . when 5,000 possible jobs are at stake, when the economy of the province is at stake, then I am not going to start playing Russian roulette with 5,000 jobs and hope that Michelin will not go ahead if this Bill passes or does not pass.⁵²

There is very little in the debates about the specifics of the legislation. Very little effort was expended in explaining the link between jobs, in particular the Michelin expansion, and the legislation. The Bill received Royal Assent on December 28, 1979.

On January 3, 1980 Michelin applied under the new provisions for an order that the appropriate bargaining unit in its operations consisted of both the Granton and Bridgewater plants. On March 4, 1980 the Nova Scotia Labour Relations Board granted that order.⁵³ On the same date the U.R.W.'s third application for certification at Granton was dismissed because, of course, the unit was inappropriate.⁵⁴

The U.R.W. unsuccessfully applied to the Supreme Court of Nova Scotia for an order quashing the unit decision of the Labour Relations Board under the new legislation. The argument was based upon a problem with the transitional provisions in the legislation, which I will deal with later.

Later in March, Mr. Thornhill listed the Michelin Amendment as a "job creation" initiative of the Government. He stated that "the Government of Nova Scotia had introduced legislation at great odds, at great debate and at great personal sacrifice, which will allow the Michelin Tire Company to expand its operations in Nova Scotia".⁵⁵

Labour continued its protest against the Michelin Amendment by opposing Michelin's application for federal government funding for the then proposed third plant.⁵⁶

51. Debates of the Nova Scotia House of Assembly 1979, p. 3268.

52. Ibid. p. 3280.

53. L.R.B. Order 2604, (1980), 80 C.L.L.C. 16,026.

54. L.R.B. Order 2607.

55. "Job Creation Initiatives Included 'Michelin Bill' " — *The Chronicle Herald*, March 12, 1980.

56. See "CLC Urges Michelin Not Receive Federal Funds" — *The Chronicle Herald*, March 11, 1980.

II. *The Michelin Amendment and Bargaining Unit Theory*

The Government defended the Michelin Amendment by stating that it would create an environment conducive to the creation of jobs, particularly the expansion of Michelin within the province. Inherent in much of what was said in defence of the Bill was that there was a direct link between the Bill and Michelin's expansion. The link could be of two sorts. It could be that Michelin would not expand unless the province's *Trade Union Act* provided it with the secure knowledge that if unionized the bargaining structure would be based upon a single bargaining unit with the advantages that this would provide. On the other hand, the link could be that the expansion would not occur if Michelin were unionized at all. On this second view, the purpose of the legislation was to gerrymander the election constituency (after the vote had been taken) in order to prevent unionization. Furthermore, the legislation guaranteed security in that it would also make future attempts at unionization difficult.

Whichever view one takes, the link between Michelin and the legislation was overt and admitted. Either of these two lines of reasoning leads us straight into the heart of modern thinking about bargaining unit theory. The current thinking on bargaining unit determination demonstrates the link between the Michelin Amendment and the notion of broad based bargaining. The most interesting developments in bargaining unit theory in recent years have dealt precisely with the issues raised by both of these lines of reasoning which may underlie the Michelin Amendment.

The starting point for this discussion is the realization that the bargaining unit serves at least two functions. It serves as the basis for the formation of a long term bargaining structure and it also serves as the basis for organization. Combined with this has been the realization that these two functions often pull in opposite directions, the former in favour of large (broad based) units and the latter in favour of smaller (easier to organize) units. The whole struggle has been to reconcile these conflicting forces. In my view the Michelin Amendment, depending upon one's view of its purpose, either makes a serious (and unnecessary) error in resolving

"Michelin Not Deserving — Yetman" — *The Chronicle Herald*, April 30, 1980.

"Dark Day for Province if DREE Funds for Plant Halted by Lobby" — *The Chronicle Herald*, April 30, 1980.

"Spend 'Not Another Nickel' on Michelin, Ottawa Told" — *The Globe and Mail*, May 27, 1980.

this tension in bargaining unit determination or, recognizes this tension and exploits it in order to prevent unionization of the Michelin plants in Nova Scotia.

Before coming to the jurisprudence dealing with this tension in bargaining unit determination and the relationship of the Michelin Amendment to that tension, I would like to outline some background on unit determination, particularly in Nova Scotia.

A. Background on Unit Determination With Particular Reference to Nova Scotia

The *Trade Union Act* of Nova Scotia contains the following definition of “unit”:

“Unit” means a group of two or more employees and “appropriate for collective bargaining” with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit or any other unit and whether or not the employees therein are employed by one or more employer.⁵⁷

The Board’s determination on the unit question is protected by s. 18:

If in any proceeding before the Board a question arises under this Act as to whether:

(g) a group of employees is a unit appropriate for collective bargaining; . . .

the board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it under this Act and may vary or revoke any decision or order made by it under this Act.⁵⁸

The Act also contains a direction to the Board concerning craft units, which is not relevant to our discussion,⁵⁹ and as well, there are the regulations of 1973 concerning craft units in industrial enterprises.⁶⁰

Uniquely the Act also attempts to give direction to the Board on the issue of appropriateness. Section 24(14) states:

57. *Supra*, n. 2, s. 1(x).

58. *Ibid.* But see R. Ex. p. *Municipal Spraying and Contracting v. Labour Relations Board (Nova Scotia)*. [1955] 2 D.L.R. 681 (N.S.S.C. en banc) and R. v. *Labour Relations Board (Nova Scotia) and International Brotherhood of Boilermakers, Ex. Rel. Ocean Steel & Construction* (1961), 29 D.L.R. (2d) 449.

59. *Ibid.* s. 23.

60. *Supra*, n. 15 and text.

The Board in determining the appropriate unit shall have regard to the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.⁶¹

This is the manner in which the Act addressed the issue of appropriateness of bargaining units prior to the passing of the Michelin Amendment.

The purpose of Nova Scotia's *Trade Union Act* is to establish a mechanism whereby employees, through trade unions, may acquire the right to bargain collectively together. The legislation does, however, restrict employee freedom of choice in selection of bargaining agents.⁶² Each employee is not permitted to select his own bargaining agent, nor are employees free to band together in groups of their own selection. Rather, groups of employees who wish to engage in collective bargaining are required to demonstrate that they constitute a majority of a group of employees considered to be an appropriate bargaining unit. The determination of what constitutes an⁶³ appropriate bargaining unit (and therefore what is the constituency in which those in favour of collective bargaining must demonstrate majority support) is left by the legislation to the Labour Relations Board.⁶⁴ The role of the Labour Relations Board in determining the unit question is both difficult and crucial. It is difficult because of the wide variety and complexity of modern industrial and other organizations. It is for this reason also that most modern labour legislation does not attempt to structure the Board's power.⁶⁵ It is a crucial determination because "the choice of a unit may well constitute the decisive factor between unionism and nonunionism".⁶⁶ This is a theme which is crucial to our discussion of the Michelin Amendment and to which I shall return.

At the most basic level however it seems clear that since the

61. S. 24(14).

62. This limitation is well explained in the Board's decision on the unit question, *supra*, n. 23.

63. Not the appropriate bargaining unit. See *Michelin Tires (Canada) Limited*, *supra*, footnote 19 at p. 434. See also *Royal Bank (Gibsons)*, [1978] 1 C.L.R.B.R. 326.

64. S. 24(4) and S. 18(1). See *Transair Limited* (1976), 76 CLLC 14,024 at 14,347. Compare, however, the provisions concerning voluntary recognition in s. 28. Also vital is the Labour Relations Board's attitude towards "agreed" units.

65. Morris, *The Developing Labour Law*, (Washington: Bureau of National Affairs, 1970).

66. Abodeely, *The N.L.R.B. and the Appropriate Bargaining Unit*, (Philadelphia: The Wharton School, 1971), p. 1.

object of certifying a trade union as exclusive bargaining agent for a unit of employees is collective bargaining, the fundamental question on unit determination must be — *can* this group of employees be bargained for collectively? In order to answer this question the ancient and venerable logos “community of interest” is wheeled out. If employees have a sufficient community of interest, then they can be bargained for collectively. As the British Columbia Labour Relations Board put it

Accordingly the group on whose behalf this bargaining is to be carried on should include only those categories of employees whose interest can reasonably be reflected in one set of negotiations and whose working conditions can be incorporated in one document. If some groups differ greatly in background, skills, nature of work, method of payment and so on, it may prove difficult to accommodate their interest in one bargaining unit.⁶⁷

Without belittling the importance or difficulty of community of interest determinations, the lesson of experience seems clearly to be that answering the question “do these employees have a sufficient community of interest so that they can be bargained for collectively” does not take us very far towards answering the bargaining unit question in many types of hard cases. There are many places to draw the line of community of interest in such cases. Any one of a number of communities might fit the bill. The emphasis of modern bargaining unit determination has moved away from the community of interest question. The action is at a higher echelon of policy making. It is from this level of discussion that we must approach the Michelin Amendment.

B. *The Modern Dilemma*

Most of the important discussions of bargaining unit determination do not satisfy themselves with a discussion of whether or not a group of employees *can* be bargained for collectively, but rather, having regard to important industrial relations considerations, whether they *should* be declared to be an appropriate bargaining unit. A bargaining unit determination may determine the structure, scope, and availability of collective bargaining not only for the employees within the unit, but for those employees left outside. The decision on the bargaining unit scope must be sensitive to such issues. The impact on other employees has been outlined as follows:

67. *Insurance Corporation of British Columbia*, [1974] 1 C.L.R.B.R. 403.

. . . This certification decision not only has a considerable impact upon the employer, as we shall see, but also has an impact on other employees, both those who don't want any union and those who prefer another union . . . Moreover, that impact can be irreversible. If we follow the logic of pure freedom of choice to its ultimate point, then every time a new group of employees wanted to carve out a different bargaining unit and select a new representative, this should be permissible. Right now that is not the case and once an appropriate unit has been settled and collective bargaining has begun, a strong presumption exists against changing it. As new unions come in to organize remaining segments of the employees, their certifications will be erected around the original one. The result is often a chaotic patchwork of bargaining units dividing up the employees of one employer, a situation which it is almost impossible to rationalize later on . . .

In sum, when the first group of employees in an enterprise turns its mind to collective bargaining, its wishes cannot predominate in the decision about its own bargaining unit. The choice it makes has too much impact on the options of other interested parties. The Legislature delegated it to the board to weigh and to balance the various factors and then to make up its own mind about the proper boundaries around the bargaining unit.⁶⁸

In designing an appropriate framework for collective bargaining by employees of an employer, labour relations boards have identified and outlined reasons for favouring large units, including all-employee units, and the competing reasons favouring a bargaining structure of smaller units. In terms of structuring the long term bargaining relationship, the current trend in unit determination is towards larger bargaining units. In *Insurance Corporation of British Columbia* the British Columbia Labour Relations Board outlined several of the major reasons favouring large all employee units as follows:

1. Administrative efficiency and convenience in bargaining.
2. Lateral mobility of employees.
3. Achievement of a common framework of employment conditions.
4. Industrial stability.⁶⁹

The last factor was elaborated upon as follows:

Another factor favouring a single large unit is the objective of industrial stability. If there is one union and one set of

68. Ibid. p. 406.

69. Ibid. p. 408-409.

negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately. If there are two or more units representing employees in an operation which is functionally integrated, then if one unit goes on strike, it will put the employees in the other unit out of work as well (and even if they have nothing to gain from a strike because they have already signed their agreement). The two proposed units at I.C.B.C. are interdependent in that sense . . . Of course, it is by no means inevitable that there will be a strike just because a unit is created for collective bargaining. However, it is true that if there are two or more units, there is a greater risk of a strike than if there is only one.⁷⁰

In addition, in determining the best long term bargaining structure, the Board must be careful to create a *viable* bargaining unit. Small units may not possess sufficient economic strength to bargain collectively in an efficient manner. Also, small units might not be serviced adequately by trade unions.⁷¹ As well, fragmenting bargaining units offers the possibility of work assignment and representational disputes between different bargaining units. There are, of course, countervailing factors favouring less inclusive units and more narrowly based bargaining. The most important of these must be the risk that real divergencies of interest may be ignored when large groups of employees are lumped together in one unit. These divergencies of interest will not disappear despite the fact that employees have been placed in a single unit. They may rather manifest themselves in a number of ways including unofficial industrial strikes. This appears to me to be the lesson to be drawn from the English experience with very broad based bargaining.⁷² It is also the case that the higher the level of bargaining (the more broadly based it is) the more remote, in a democratic sense, it becomes for individual members. However, the trend in initial bargaining unit determination cases and in cases dealing with attempts to alter existing bargaining structures (the “carving out” cases)⁷³ is clearly to favour larger bargaining units as promoting stable long term collective bargaining relationships.

70. *Ibid.* p. 409. Of course, even if not functionally interdependent, unit fragmentation may lead to disruption in other units if picket lines are observed. For another case exploring the virtues of large all employee units see *B.C. Ferry Corporation*, [1977] 1 C.L.R.B.R. 526.

71. *Michelin Tires (Canada) Limited*, *supra*, n. 23 at p. 437.

72. Report of the Royal Commission on Trade Unions and Employer's Associations (The Donovan Commission) (London, 1968).

73. See, for example, *Atomic Energy of Canada Limited (Pinawa)*, [1978] 1 C.L.R.B.R. 92 (C.L.R.B.).

However, enchantment with large bargaining units has been tempered by the realization that the bargaining unit serves a function other than possibly setting out the basis for a long term collective bargaining relationship. It is the basis for organization and, to put it simply, the larger the unit the more difficult it is to organize. A great focus of activity in recent years in bargaining unit theory has been to attempt to recognize and reconcile the two conflicting functions of bargaining units. If, in the name of long term rational bargaining structures, large units are favoured the result may well be that there is no bargaining at all because the units are impossible, as a practical matter, to organize. As the Canada Labour Relations Board put it:

The fundamental dilemma the Board confronts in each certification application and bargaining unit dispute is that the bargaining unit serves two basic purposes. It is the initial constituency which will decide whether an applicant union will acquire representational rights to commence collective bargaining. It is also the basis for the bargaining structure that may obtain in the future. This Board and other labour relations boards recognize that in difficult cases, such as this one, any judgment carries its cost. The freedom of choice of employees to group into self-determined units or the most rational, long-term bargaining structure is partially or totally sacrificed.⁷⁴

And in another case:

We must weigh the competing interest of establishing, developing and continuing 'sane and healthy collective bargaining relationships' . . . on the one hand and 'making it possible for employees to assert their rights' . . . on the other hand. Often these two objectives seem incompatible in many circumstances.⁷⁵

The British Columbia Labour Relations Board posed the dilemma in the following manner:

. . . there is a tension between the two uses of the bargaining unit. On the one hand, the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to facilitate organization of the employees. On the other hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and to minimize the disruptive effects of the latter when

74. *Canadian Imperial Bank of Commerce*, [1977] 2 C.L.R.B.R. 99 (C.L.R.B.).

75. *Saskatchewan Wheat Pool*, [1977] 1 C.L.R.B.R. 510 at 519 (C.L.R.B.).

they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.⁷⁶

The battleground for the working out of this conflict in principle has been in the retail chain store business,⁷⁷ fast food outlet chains,⁷⁸ the banks⁷⁹ and (in the United States) the insurance industry⁸⁰ — all multi-location employer situations.

This story, as epitomized by the 1977 decision of the Canada Labour Relations Board decision that a branch of a bank is an appropriate bargaining unit, is now familiar to all. The recognition that the unit determination may be the key to whether any collective bargaining will occur at all has led the Labour Relations Board to declare that smaller, single location, units are appropriate.

This brings us back to the Michelin Amendment. I have said that depending upon one's view of the motives underlying the legislation, it either makes a serious and unnecessary error in reconciling the tension between the two functions of bargaining units or, recognizes that tension and exploits it in order to render organization extremely difficult. The Michelin Amendment, and the Labour Relations Board's order made pursuant to it⁸¹ declare that the appropriate unit consists of both the Granton and Bridgewater plants. If we assume that the purpose of the amendment and the link between it and jobs and development is that industry will be attracted to the province because of the stable (broad base) bargaining structures created by the labour relations board's bargaining unit orders, then it seems clear that the legislation has struck the balance between the conflicting tensions in bargaining unit theory totally in favour of long-term industrial relations stability at the expense of the other value at stake, the ability to organize at all. Labour relations boards, in the cases cited above, have been more careful in striking the balance. Broad base bargaining units, including all-employee units, are imposed only when the question of whether there will be any collective bargaining

76. *Insurance Corporation of British Columbia*, *supra*, n. 67, p. 407.

77. See, for example, *Woodward Stores (Vancouver) Limited*, [1975] 1 C.L.R.B.R. 114.

78. See, for example, *Ponderosa Steak House*, [1975] 2 C.L.R.B.R. 10 (O.L.R.B.).

79. *Canadian Imperial Bank of Commerce*, *supra*, n. 74. See also *Canada Trusto*, [1977] O.L.R.B.R. 330.

80. See Morris, *supra*, n. 65 at p. 234 and see Gorman, *Basic Text* (St. Paul: West Publishing, 1976) at p. 80-81.

81. *Supra*, n. 54.

at all is no longer an issue.⁸² Where there is no history of collective bargaining, the boards have taken this into account in their unit determinations. As the British Columbia Labour Relations Board put it;

There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stimulate opposition to a representation campaign. If, notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, this Board will exercise its discretion in order to get collective bargaining underway. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.⁸³

And as the Canada Labour Relations Board stated:

In widely organized industries, the emphasis is more on the attainment of industrial stability, administrative efficiency and convenience in bargaining, and a common framework of terms and conditions of employment. When those industries were first being organized smaller units were appropriate to facilitate the achievement of collective bargaining, but now the concern is for wider bargaining structures. This preference for wider bargaining structures in organized industries has been given expression in the enactment of procedures allowing multi-union and multi-employer bargaining . . .⁸⁴

The labour relations boards have gone further in multi-location employer cases and created bargaining units which attempt to balance the long term bargaining structure function against the ability to organize question by lumping more than one location into a unit where more than one location has been organized.⁸⁵

It would seem that the Michelin Amendment overlooks these countervailing reasons for declaring one location alone to be an appropriate unit.

Because there is no certified bargaining agent at either of Michelin's plants the subject matter of the legislation has to do with broad based certification — not broad based bargaining. This error may be an unnecessary one. Recent developments in bargaining unit

82. See *Insurance Corporation of British Columbia*, *supra*, n. 67 and the *British Columbia Ferry Corporation*, *supra*, n. 70.

83. *Insurance Corporation of British Columbia*, *supra*, n. 67 at p. 407.

84. *Saskatchewan Wheat Pool*, *supra*, n. 75 at p. 519-20.

85. *Original Dutch Pannekoek House Limited*, [1979] 1 C.L.R.B.R. 212 (B.C.L.R.B.).

determination in British Columbia demonstrate that it may be possible to reconcile the two functions of a bargaining unit in a most interesting way. It may be possible to both ensure that organization takes place and a broad based and stable bargaining structure results for collective bargaining purposes. It may be possible to have your cake and eat it too. How is this achieved?

In *Amon Investments Limited*,⁸⁶ the employer had 13 locations within Victoria and Vancouver. The union applied for a unit at one location. The employer, of course, urged that the appropriate unit was one consisting of all thirteen locations, relying on the reasons set out in the *Insurance Corporation of British Columbia* case⁸⁷ favouring large units and stable unfragmented bargaining relationships. The union naturally relied on the *Woodward Stores* principle⁸⁸ asserting that a single location was appropriate in order to permit collective bargaining to take place. After reviewing the evidence and the countervailing pressures, the Board concluded that a single location was an appropriate unit but went on to add the following crucial qualification:

This conclusion does not, as we have previously hinted, require that we ignore the concerns expressed by counsel for the Employer with regard to the potentially inconvenient and disruptive consequences of a fragmentation of the employees into a number of bargaining units. We return again to the *Woodward Decision*. In granting the Bakery and Confectionery Workers International Union of America, Local 468, certification for a unit comprised of bakery employees at only three of the several stores in which the employer in that case operated a bakery, the board added:

If and when the union organizes the employees at the other locations, the Board will enlarge the existing bargaining unit to include them.

We consider the same kind of qualification to be appropriately added to the certification the board has granted the Union for the employees . . . the effect of this qualification is to confine the number of bargaining units to only one. Any union other than the [applicant] seeking to represent employees of this Employer will be required to gain the support of those employees already represented by the [Applicant]. Further certification applications received from the [Applicant] (and there is one pending at this time) will, if the union has the required support, be disposed of

86. Decision 39/78 (B.C.L.R.B.).

87. *Supra*, n. 67.

88. *Supra*, n. 77.

by enlarging the existing unit rather than creating a new additional unit.

Our decision to uphold the present certification, subject to the proviso that future organization of the employees must be accomplished by a variance of the presently certified unit, serves to allow the employees who now desire collective representation to exercise their rights and, at the same time, accommodate the employer's concerns.⁸⁹

What I refer to as the "Amon Principle" in my view successfully achieves a reconciliation of the conflicting purposes of the bargaining unit. It enables organization to take place while at the same time ensuring that an unfragmented and thus stable and broad base bargaining structure results in the long run. The Amon Principle is also discussed in the *Woodward Stores*⁹⁰ and the *Original Dutch Pannekoek House Limited*⁹¹ cases.

If the legislature has determined that long-term stable and broad base bargaining structures are crucial in multi-location manufacturing plants, then it seems to me that the "Amon Principle" could profitably be invoked to ensure that that end is achieved without totally ignoring the other function of bargaining unit determination.

But there is one feature of the Michelin case which separates it and makes it a more difficult case than those which we have been discussing. The overwhelming majority of cases involving multi-location employers involve retail chains, fast food outlets, and banks. There is little jurisprudence concerning the manufacturing industry.⁹² But more especially there is little jurisprudence on functionally interdependent operations. The chain store, fast food outlet and bank cases are distinguishable because the locations there, although they may be dependent upon other parts of the employer's organization to continue to operate, are not functionally interdependent.⁹³ The operations of Michelin Tire's two plants in Nova Scotia are unquestionably interdependent as was explained by the Nova Scotia Labour Relations Board.⁹⁴

Labour relations boards in Canada have been sensitive to the

89. *Amon Investments Limited*, *supra*, n. 86, at p. 20-21.

90. *Supra*, n. 77.

91. *Supra*, n. 85.

92. This is also the case in the United States — see *Morris*, *supra*, n. 65 at p. 233 where he refers to the "near vacuum of Board policy in manufacturing" as compared to the retail industry.

93. See *Gorman*, *supra*, n. 80, at p. 70 and *Abodeely*, *supra*, n. 66 at p. 39-40.

94. *Supra*, p. 4-5.

issue of interdependence. In *Insurance Corporation of British Columbia*, the British Columbia Labour Relations Board drew attention to the fact that industrial stability was particularly vulnerable in cases where employees in an operation which is functionally integrated were divided into two or more units.⁹⁵

In *Woodward Stores* the Board stated:

There may be occasions when operations at separate locations are so closely intertwined that legal work stoppages at one will cause such serious dislocation to the activities of the other that a single bargaining unit is the only reasonable conclusion.⁹⁶

The Canada Labour Relations Board in the *Canadian Imperial Bank of Commerce* case distinguished the *British Columbia Ferry Corporation* case and other cases partly on the basis that the operation of bank branches were not interdependent:

The first distinguishing feature of these cases is that the unions applying for certification define their units in occupational terms. The future results of such a certification would have been that, when these employees withdrew their services, the employer's entire operation could be shut down because the occupations sought were employed in integrated operations employing several occupations. A cessation of work by one occupation could disrupt the entire system. This is not the case here where the unit sought is multi-occupational at a single location. A cessation of work at one location would not prevent the bank at its many other locations from continuing to operate. It would be essentially self-contained within the unit.⁹⁷

The thrust of these discussions is that because of the Board's interest in long range industrial stability, functional interdependence is an important element in unit determination. Certifying separately a number of units which are functionally interdependent would lead to instability. Although not well articulated in the House of Assembly Debates, Michelin Tire itself took this argument one step further. It argued⁹⁸ that because of functional interdependence a fundamental question of democracy arose in the attempted unionization of Michelin's plants. The focus was not upon the long term but upon the present. The argument was not based upon industrial stability in the future but rather upon a present question of

95. *Supra*, n. 67 at p. 409.

96. *Supra*, n. 77, at p. 122.

97. *Canadian Imperial Bank of Commerce*, *supra*, n. 74 at p. 123.

98. Through its then General Manager, Mr. Jean Gorce, in a full page interview in *The Chronicle Herald*, May 3, 1979.

fairness. Because a strike at Granton would put employees at Bridgewater out of work, it would be undemocratic to allow only those employees at Granton to vote upon a decision which would have such an impact on employees at both plants. In abstract form there is certainly merit in this contention.⁹⁹ However, there are several problems with this contention as well. First, functional interdependence is pervasive in modern industrial society and crosses employer lines. This was well explained by the Nova Scotia Labour Relations Board in the Michelin unit decision:

While the interdependence of the Granton and Bridgewater plants is physically demonstrable to a somewhat unusual degree, it is not uncommon for separate operations of the same employer to be heavily dependent upon one another in an economical sense. Thus, a fish plant cannot operate without supplies of fish and a retail outlet cannot operate if there are no shipments from the warehouse. Nobody can fail to be aware of how dependent economic units in today's world are on each other, even where they are not owned by the same employer, but these facts of economic life have never been held to dictate single province-wide bargaining units.¹⁰⁰

Secondly, there is a fundamental problem with this argument from democracy in that it too ignores the basic dilemma faced by labour relations boards in unit determinations. While in some sense it might seem abstractly more democratic to consult all employees at the outset, this ignores the real pragmatic difficulties confronting trade unions in organizing very large bargaining units, especially in the face of an organized employer campaign against unionization. The abstract appeal to the merits of democracy rings very hollow where there is no real equal opportunity to convey information and to consult all sides of the question.¹⁰¹ This has particular relevance in Michelin's case where the no solicitation rule is still in force. As John Rawls put it in *A Theory of Justice*:

Historically one of the main defects of constitutional government has been the failure to ensure the fair value of political liberty. The necessary corrective steps have not been taken, indeed, they never seem to have been seriously entertained. Disparities in the distribution of property and wealth that far exceed what is compatible with political equality have generally been tolerated by the legal system. Public resources have not been devoted to

99. The argument is well put by Abodeely, *supra*, n. 66 at p. 39-42.

100. *Michelin Tires (Canada) Limited*, *supra*, n. 23 at p. 440-41.

101. See Singer, *Democracy and Disobedience* (Oxford: Clarendon Press, 1974), especially p. 105-135.

maintaining the institutions required for fair value of political liberty. Essentially, the fault lies in the fact that the democratic political process is at best regulated rivalry; it does not even in theory have the desirable properties that price theory ascribes to truly competitive markets. Moreover, the effects of injustices in the political system are much more grave and long lasting than market imperfections. Political power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a favoured position. Thus iniquities in the economic and social system may soon undermine whatever political equality might have existed under fortunate historical conditions. Universal suffrage is an insufficient counterpoise; for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rule are seldom seriously presented.¹⁰²

It seems to me that the labour relations boards in striking the balance that they have achieved between the two functions of the bargaining unit are seeking to ensure a fairer degree of political equality.

It also seems to me that the "Amon Principle"¹⁰³ also removes the potency of the argument from democracy. In the end all are consulted and in a meaningful manner without the sacrifice of long term stability.

The American jurisprudence also supports the view that the Michelin Amendment has struck the wrong balance between long term stability and employee freedom of organization, even taking into account the functional integration of the operations. While recognizing the importance of functional integration¹⁰⁴ the N.L.R.B. presumes that a single location is an appropriate unit.¹⁰⁵ Furthermore it has found as appropriate a single plant location even when that plant is functionally integrated with another plant belonging to the same employer geographically 20 and 30 miles distant.¹⁰⁶ In these cases the N.L.R.B. expressly referred to the lack of bargaining history at both of the plants and the lack of an application from the union for the larger unit.

It is, of course, entirely possible that even if the "Amon

102. Rawls, *A Theory of Justice* (Oxford, 1971), p. 226.

103. *Supra*, n. 86.

104. *Potter Aeronautical* (1965), 155 N.L.R.B. 1077.

105. *Dixie Bel Mills* (1962), 139 N.L.R.B. 629.

106. *Black and Decker Manufacturing Company* (1964), 147 N.L.R.B. 825 and *Welsh Company* (1964), 146 N.L.R.B. 715.

principle” was invoked in the Michelin context, that one plant might be successfully organized and the other not. In fact in connection with the two Michelin plants in Nova Scotia there is a body of opinion that the Granton plant might prove significantly easier to organize than the Bridgewater plant. While Granton and Bridgewater are 150 miles apart physically, they are considered by many to be even further apart psychologically. Pictou County has an established heavy secondary manufacturing and mining industry and a significantly larger number of organized workers than does Lunenburg County. As well, that portion of the province is closer to Cape Breton and shares its tradition of unionism. None of this is true of Lunenburg County where the Bridgewater plant is located.

Whether or not this crude sociology carries any weight, there is a possibility that one interdependent plant might be organized and the other not. This, it seems to me, would not create any more *instability* than if both were organized and in the same unit. And as I have attempted to show, such a result would certainly not be in any sense undemocratic.

C. *The Text of the Michelin Amendment*

The final irony concerning the Michelin Amendment is that despite an overwhelming legislative history indicating its purpose, the actual wording of the amendment is unclear. Although the Nova Scotia Labour Relations Board and Supreme Court found that the amendment did apply to Michelin,¹⁰⁷ it is ironic that there should be any room for doubt as to the application of the provision to Michelin Tires (Canada) Limited. The difficulty is located in the transitional provisions. It should be noted, however, that the amendment sets out a separate procedure for unit determinations under its provisions. An employer with integrated manufacturing plants must make a separate application for a unit determination.¹⁰⁸ The issue is not left to be decided as certification applications are filed. The amendment does not apply to integrated operations of which any part is covered by an existing certification order or voluntary recognition agreement.¹⁰⁹ The amendment then, not very clearly, attempts to establish a one year time limit for applications. If an employer had integrated manufacturing operations existing in the

107. *Supra*, n. 53, and the unreported decision of Burchell J. dated November 20, 1980.

108. S. 24a(2) (3).

109. S. 24a(6).

province at the time of amendment, it must apply within one year of the enactment.¹¹⁰ If an employer creates new interdependent plants in the future, then he has one year to make an application from the date of commencement of production.

The difficulty is that the language of the amendment is couched in negative terms. Furthermore, the relationship between subsection 4 and subsection 5 is mysterious in the extreme. They read as follows:

(4) Subject to subsection (6) an application for an order pursuant to this Section may not be made by an employer more than one year following the commencement of production

(a) at the second manufacturing location in the Province of the Employer, claimed by the Employer to be an interdependent manufacturing location with the original manufacturing location of the Employer in the Province; or

(b) at any additional manufacturing location in the Province of an Employer already affected by an order issued pursuant to this Section.

(5) Notwithstanding subsection (4), an application for an order pursuant to this Section by an employer respecting operations at interdependent manufacturing locations in the Province at the time this Section comes into force may not be made more than one year following the date on which this section comes into force.

At the very least the statute is very unhappily drafted. There is, surprisingly, an argument that any application by Michelin Tires is out of time. It is, and will always be, out of time by subsection 4. The question is whether it is saved by subsection 5. It is not clear that subsection 5 does so. On the other hand, the intent of the legislation is abundantly clear.

III. *Conclusion*

The Michelin Amendment was not regarded by either its proponents or its opponents as raising technical issues of labour law. In this they were correct. On the other hand, the larger issues which were at stake were precipitated by tinkering with labour law concepts. Insofar as it is possible or useful to regard the Michelin Amendment as a labour law issue the Amendment does flow against the current of modern thinking on the issue of unit determination. The fact that there is some ambiguity (at the very least) with the transitional provisions is a bizarre footnote to the whole affair.

110. S. 24a(5).

APPENDIX

An Act to Amend
Chapter 19 of the Acts of 1972,
the Trade Union Act

Be it enacted by the Governor and Assembly as follows:

1 Chapter 19 of the Acts of 1972, the Trade Union Act, as amended by Chapter 70 of the Acts of 1977 and Chapter 34 of the Acts of 1978 is further amended by adding immediately following Section 24 thereof the following Section:

24A

(1) In this Section,

(a) “manufacturing” means the making of goods by hand, by machinery or by a combination of processes; and

(b) “interdependent manufacturing location” means a manufacturing location of an employer in the Province, the continued operation of which is primarily dependent on the continued normal operation of another manufacturing location or manufacturing locations of the employer in the Province.

(2) An employer claiming to be engaged in manufacturing and carrying on its operation at two or more interdependent manufacturing locations in the Province may make application to the Board for a determination that the unit appropriate for collective bargaining is the unit consisting of all employees of the employer at all such interdependent manufacturing locations, subject only to the exclusion of such positions as the Board may determine would otherwise normally be excluded.

(3) Where, upon receipt of an application pursuant to subsection (2), the Board is satisfied that

(a) an employer is engaged in manufacturing; and

(b) the employer carries on operations in the Province at two or more interdependent manufacturing locations,

the Board shall determine and order that the unit appropriate for collective bargaining is the unit consisting of all employees of the employer at all the locations determined by the Board to be interdependent manufacturing locations subject only to the exclusion of such positions as the Board may determine would otherwise normally be excluded.

(4) Subject to subsection (6) an application for an order pursuant to this Section may not be made by an employer more than one year following the commencement of production

(a) at the second manufacturing location in the Province of the employer, claimed by the employer to be an interdependent manufacturing location with the original manufacturing location of the employer in the Province; or

(b) at any additional manufacturing location in the Province of an employer already affected by an order issued pursuant to this Section.

(5) Notwithstanding subsection (4) an application for an order pursuant to this Section by an employer respecting operations at interdependent manufacturing locations in the Province at the time this Section comes into force may not be made more than one year following the date on which this Section comes into force.

(6) No application may be made for an order pursuant to this Section where a certification order has been made or voluntary recognition granted pursuant to this Act with respect to one or more of the interdependent manufacturing locations.

(7) Subject to subsections (4), (5) and (6), where any trade union makes an application for certification the Board shall give to the employer adequate opportunity to make an application pursuant to this Section before proceeding to determine the appropriate unit.

(8) This Section applies to all applications made pursuant to Section 22 which are before the Board at the date this Section comes into force or which are made after this Section comes into force.

(9) Section 24 shall, except where inconsistent with this Section, continue to apply.