Article

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DROIT DU TRAVAIL

Canadian-American Jurisprudence on 'Good Faith' Bargaining

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For decades, American jurisprudence has influenced, and been better developed and more extensive than Canadian jurisprudence on the duty to bargain «in good faith». Since the mid-1970's there was a marked increase in cases and decisions on bad faith bargaining in Canada[1]. Canadian labour relations boards, therefore, now rely somewhat more on Canadian precedents[2]. Significantly, recently developed trends in Canadian decisions may influence future American developments. For this and other reasons, it is a timely moment to appraise and reflect on lines of authority recently developed on good faith bargaining in Canada and to compare them with their counterparts in the United States. Although this article focuses primarily on breaches of the statutory duty to bargain in good faith, it also will examine other matters related to collective bargaining, such as strikers' rights.

In comparison with the dramatic upsurge in Canadian cases and decisions during the 1970's and 1980's, the National Labor Relations Board's (NLRB's) case load of bad faith bargaining complaints apparently remained at roughly traditional levels[3]. The establishment of many American lines of authority several decades ago presumably explains much of the comparatively stable volume of reported decisions in the U.S. during the 1970's and 1980's[4]. Subsequent to the enactment of the *Wagner Act* in 1935, federal and provincial governments in Canada promulgated labour statutes patterned after it[5]. But, unlike what existed in the U.S. from the mid-1930's, as clarified in the late 1940's, it generally was not until the 1970's that Canadian labour relations boards could order remedial actions for breaches of the duty to bargain in good faith, subject to possible court review[6]. Prior to that, consent was required to seek prosecution in a court of

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law[7]. Strains occurred at bargaining tables across Canada during the 1970's and first half of the 1980's, as well. They resulted from the rapid economic change which characterized the 1970's and early 1980's in both countries. An anti-inflation statute in force during 1975-78 and subsequent wage controls legislation, particularly in the public sector, caused the scope of bargaining to narrow, thereby adding stress[8]. Furthermore, at least one jurisdiction enacted a public sector statute establishing compulsory arbitration schemes and simultaneously implementing the duty to bargain in good faith, even though the «chilling effect» (i.e., «going through the motions» during negotiations to induce arbitration) may constitute «surface bargaining», which typically comprises a breach of that duty in both countries. The remedy for bad faith bargaining under such a statute normally is board refusal of interest arbitration, an ordered return to the bargaining table, and possibly mediation[9].

DUTY TO BARGAIN AND INTENTIONS

After serving notice to bargain, the parties are under the statutory obligation to bargain in good faith[10]. Section 8(d) of the *National Labour Relations Act* (NLRA) requires the parties «to meet at reasonable times and confer in good faith». The nominal obligation to meet and confer with the other party is the «duty to bargain». As an element of the good faith bargaining requirement, it clearly is intended to fortify bargaining rights secured by the union. A consistent non-availability and physical absence from the bargaining table, therefore, typically comprises bad faith bargaining in both countries[11]. The duty to bargain also governs the timing of the first meeting in Canada's English-speaking jurisdictions. A public sector board in Alberta, however, held that an attempt to establish preconditions for the tabling of requests during the first meeting did not breach the duty to bargain under a compulsory arbitration regime[12]. In addition to good faith bargaining, statutes in English-speaking Canada further stipulate that the parties «make every reasonable effort to enter into a collective agreement»[13].

By contrast, the Québec *Labour Code* requires «diligence» rather than «reasonable times» or «every reasonable effort», in addition to good faith[14]. The «diligence» standard and other features of Québec's labour legislation surprisingly have led certain labour court justices, in effect, to condone refusals to meet[15]. Nevertheless, an employer in Québec who fails to acknowledge the negotiators for a «certified association» of employees or to bargain in good faith is «guilty of an offence and liable to a fine of one hundred to one thousand dollars for each day during which such offence continues»[16].

Labour relations boards in both countries will look beyond the duty to bargain and specifically at the parties' intentions. Indeed, the «good faith» standard seems to require this subjective test; whereas, the «every reasonable effort» standard in Canada seems to «place further limitations on the objective means which each side is entitled to use in carrying out their intentions»[17]. The Ontario Labour Relations Board, for instance, stated that «the parties are obligated to have at least one common objective — that

of entering into a collective agreement»[18]. American courts have proclaimed that good faith bargaining involves negotiations «with the view of reaching an agreement if possible»[19]. However, clarifying an intention to reach agreement or lack thereof can prove difficult. Canadian boards have found evidence of bad faith bargaining in the tabling of «patently unreasonable proposals»,[20] and «gross misstatements and contradictory offers»[21]. Similarly, the NLRB has found evidence of «surface bargaining» when the employer's offer merely «reiterated existing practices»[22]. A «predictably unacceptable» employer offer also reflects surface bargaining[23]. Boards in both countries appear to take the «totality-of-conduct approach»[24]. Although each action alone need not constitute sufficient evidence to find bad faith bargaining, their «persuasiveness grows as the number of issues increases»[25]. Nevertheless, employers who vest negotiators with insufficient authority to carry out meaningful negotiations violate the duty[26].

Canadian boards have examined the intent of refusals to bargain aimed at altering the composition of the other side's negotiation committee[27]. Bad faith was found for employer refusals to deal with union committees due to the presence of an employee of a competitor company[28] and the president of the local plant workers' union at a bargaining table involving its office workers' union[29]. Moreover, the union acted in bad faith for refusing to bargain because one of its own members was on the employer's bargaining committee[30]. The NLRB also has upheld the parties' right to negotiations representatives of their own choice[31].

CIRCUMVENTION OF THE BARGAINING AGENT

Jurisprudence on circumvention of the bargaining agent is very similar in both countries. A certificate requires the employer to recognize the union as the *exclusive bargaining agent* for all members of the appropriate bargaining unit it covers. Attempts to bypass the representative are considered evidence of bad faith. Accordingly, the NLRB has ruled that during collective negotiations the employer «can no longer bargain directly or indirectly with the employees»,[32] and the Supreme Court of Canada also repeatedly found that collective bargaining excludes «private» negotiations, except where permitted by the collective agreement[33]. Subsequent Canadian jurisprudence indicates that not all direct communications between employer and employees are prohibited, but only those that constitute direct bargaining with employees in the unit. Employers may defend their bargaining positions but may not discredit the union or undermine its bargaining rights[34].

It is also well established in both countries that the collective agreement supersedes any individual employment contracts[35]. In 1944 the United States Supreme Court upheld the NLRB's decision that coverage of employees in the unit by individual contracts of employment does not justify refusing to negotiate[36]. It further acknowledged, however, that collective agreements may expressly leave certain areas open to individual bargaining. The Supreme Court of Canada also has declared the supremacy of collective agreements and indicated «that individual relationships as bet-

ween employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements»[37]. In following this line of reasoning, the British Columbia board found that even after protracted negotiations and no evidence of approaching agreement, an attempt to negotiate individual nine-month contracts with employees constituted bad faith[38]. This decision, in effect, froze terms and conditions of employment at those under the expired agreement, conceivably making it difficult for the employer to induce concessions.

Expired collective agreements, however, need not dictate the terms and conditions of individual contracts during the hiatus between collective agreements. The relevant case law can be viewed as turning on «the absence to indicate a contrary stipulation»[39]. A contrary stipulation would indicate the intent that the recently expired collective agreement not continue in force. Its absence presumably means that at least the substantive terms (covering wages, hours and working conditions), and apparently the procedural terms (grievance handling), of the recently expired agreement would be incorporated into individual contracts for bargaining unit members until the renewed agreement came into force[40].

Concession bargaining of the 1980's gave rise to a series of decisions following the latter line of authority. Those decisions arguably are more authoritative, for they are supported by denial of leave to appeal from the Alberta Court of Appeal to the Supreme Court of Canada and flow from a 1984 B.C. board decision which that board reaffirmed upon reconsideration in 1985. Courts in Alberta, in particular, upheld the validity of the following course of actions: (1) timely serving of notice to terminate the collective agreement,[41] (2) a 24-hour lockout in compliance with legal prerequisites to terminate the previous agreement, and (3) notification to the exclusive bargaining agent, the union, about the rehiring of former employees or other employees at lower compensation packages than those under the terminated agreement[42]. Thus, the preceding actions respectively comprise a contrary stipulation, apparently represent a deadlock of negotiations and do not circumvent the bargaining agent[43].

Although bad faith was not alleged in the Alberta case, the B.C. board addressed this issue in *Paccar* and ruled that good faith bargaining must precede the unilateral change; that American jurisprudence, particularly concerning impasses, though highly persuasive, will not necessarily be strictly adhered to; and that the unilateral change does not «extinguish [the employer's] obligation to continue to bargain in good faith with the trade union and make every reasonable effort to conclude a collective agreement»[44]. Furthermore, the unilateral changes generally cannot exceed those proposed at the bargaining table[45].

NLRB case law stipulated similar conditions under which concession bargaining tactics by employers during the economic downturn of the early 1980's could conform with good faith bargaining: «an employer must bargain with an honest objective of an agreement (good faith) and must do so until neither party is willing to move from its position (impasse)»[46]. Indeed, it was argued that, just as unions make gains during an upswing via

certain sanctions (explained below), employers should be permitted by law to use them during a downswing to induce concessions. In particular, employers should not have to wait until after the «good faith — impasse» chain to be able to take unilateral actions, thereby applying economic pressure to unions[47].

Nevertheless, employers in both countries generally must refrain from unilaterally altering terms and conditions of employment during agreement negotiations. The U.S. Supreme Court has found that unilateral changes in mandatory bargaining subjects (defined below) are *per se* refusals to bargain, even if the employer otherwise bargained in good faith[48]. Unilateral changes are generally treated as *per se* violations, but in some cases are treated merely as evidence showing a lack of good faith. Key bad faith indicators are unilateral wage increases and, to a lesser degree, increases in wage related fringe benefits, expense allowances, and incentive programs. Similar jurisprucence is found in Canada, particularly in Ontario, and even applies after the period of statutory freeze has expired, unless there is a *bona fide* business reason[49].

NEGOTIABLE ISSUES

Neither the Canadian nor the American statutes offer a precise statutory definition of negotiable issues; consequently, boards and courts assumed this role. Moreover, Canadian and American jurisprudence differ significantly. U.S. jurisprudence distinguishes among three fairly distinct categories: mandatory, permissive, and illegal bargaining issues. Jurisprudence in Canada generally does not distinguish mandatory from permissive issues, but illegal issues are fairly clear, and most Canadian statutes also specify several compulsory contract provisions.

The U.S. Supreme Court initially distinguished mandatory from permissive issues in 1958[50]. The basis for mandatory issues is found in Section 8(d) and 9(a) of the *NLRA* which require good faith bargaining over «wages, hours, and other terms and conditions of employment» and «rates of pay, wages, hours of employment, or other conditions of employment». Both parties are required to bargain in good faith over *mandatory* issues as long as one of the parties raises the issue at the bargaining table. A detailed discussion or even listing of the issues boards found to be mandatory is beyond the scope of this paper. As a rule, the relevant sections received a very broad interpretation[51]. *Permissive* issues, by contrast, are those over which the parties may bargain and may include in the contract, but either party may refuse to bargain over the issue, refuse to continue bargaining over the issue at any time during the negotiations, or refuse to include any clause on the issue in the contract without violating the duty to bargain in good faith. As a result, the parties cannot engage in a lawful work stoppage over permissive issues. The latter include union recognition clauses, parties to a separate agreement (in a subcontracting clause), the use of interest arbitration, bi-level bargaining, and coverage of employees not subject to the *NLRA*, such as supervisors or agricultural employees.

Provisions that are unlawful under the Act may not properly be included in the contract[52]. *Illegal* subjects include closed shop clauses, hot cargo clauses, hiring hall provisions that give preference to union members, clauses that discriminate among employees on the basis of race, religion, sex, or national origin, and provisions that violate the union's duty to fairly represent all employees in the unit. It remains unclear whether merely proposing an illegal subject is *per se* bad faith, but insisting on an illegal subject to the point of impasse clearly is a violation[53]. Though other federal statutes, including antitrust legislation,[54] may determine the illegality of an issue, it remains unclear whether insistence on a provision that is legal under the *NLRA* but illegal under state law, such as right to work laws, comprises bad faith[55].

Illegal issues are defined analogously in Canada. Indeed, bad faith generally exists, if a party makes a demand contrary to the relevant collective bargaining statute or other legislation, such as human rights[56] or wage control legislation[57]. Examples of the former include attempting (1) to provide a scope clause in the labour contract which is narrower than the appropriate bargaining unit in the certificate,[58] (2) to negotiate common law employment contracts for dependent contractors covered by the certificate,[59] and (3) to negotiate provisions for bargaining units within the same company but possibly in other jurisdictions outside the given bargaining unit[60]. Significantly, boards have gone even further and imputed bad faith to demands inconsistent with the «scheme» of the bargaining statute[61]. The «scheme» of the corresponding act includes, of course, promoting collective bargaining and, in turn, genuine union recognition or, perhaps, a union security arrangement in a collective agreement. The broadening of the legal/illegal items' distinction in Canada is related to the Canadian treatment of the American mandatory/permissive distinction. Indeed, sometimes items considered permissive by the NLRB could be termed illegal by Canadian boards[62]. Significantly, the Québec *Labour Code* permits the widest lattitude for lawful issues. A collective agreement in Québec may contain any provisions respecting conditions of employment which are «not contrary to public order or prohibited by law», and the agreement is «not invalidated by the nullity of one or more of its clauses»[63].

Issues that are categorized as permissive in the U.S. often are treated as being mandatory in Canada. Whether or not they are negotiated depends upon the parties' preferences, relative bargaining power and skills. Differences in the drafting of Canadian collective bargaining laws account for the fact that mandatory/permissive distinctions seldom are drawn in Canada[64]. The statutes typically define a collective agreement as «*containing* terms or conditions of employment» but do not necessarily provide a listing of the latter or specifically limit the contents to the latter[65]. Moreover, they customarily permit the negotiation of union security arrangements and set out items which will be deemed to be part of a collective agreement, if they are not included in it.

The latter, *compulsory* issues must be addressed in every agreement; otherwise, the statutes will read certain minimum or «model» specifications into the agreement. Thus, the Canadian legislation deviates from the philosophy originally underlying collective bargaining legislation in both

countries, namely to regulate the *procedures* of collective bargaining but not the *outcomes*. Nearly all Canadian statutes covering the private, public and parapublic sectors require that agreements address the following matters: 1) a procedure to resolve disputes concerning the interpretation, application or alleged violation of the contract; 2) the final step of that procedure (most commonly arbitration); and 3) the term of the agreement[66]. In exchange for compulsory grievance handling procedures typically culminating in arbitration, the statutes outlaw strikes and lockouts while the contract is in force. Although a grievance procedure ending in binding arbitration is included in almost all American contracts and no strike/no lockout provisions are included in approximately 95% of all contracts,[67] these are issues that may be omitted from the contract under the American legislation. Statutes in several Canadian jurisdictions require that agreements operate for a minimum term of one year,[68] include provisions recognizing the union as the exclusive bargaining agent,[69] or include some minimum form of union security clause such as «agency shop»[70] or «dues check off»[71] British Columbia and Ontario also allow exemption for employees in the unit, if they object to unions because of religious or other beliefs. Although all of these are «mandatory» bargaining issues under the American jurisprudence, the Canadian legislation goes much further by stipulating terms for possible inclusion in the agreement.

DUTY TO SUPPLY INFORMATION

Historically, the duty to supply information differed in Canada and the United States, but Canadian jurisprudence recently approached the American jurisprudence. The U.S. Supreme Court held in 1956 that employers have an obligation under section 8(a)(5) of the *NLRA* to supply relevant information to the union during contract negotiations. It reasoned that «claims made by either bargainer should be honest claims» and that, if «an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof»[72]. Further cases indicate that, once it is established the information is relevant to the negotiations, the employer's refusal to supply that information is as much a violation of the duty to bargain in good faith as if the employer had failed to meet and confer with the union in good faith[73].

Subsequent decisions expanded the duty to supply information from contract negotiations to labour-management relations during the term of the agreement[74]. It applies to union and employer alike[75]. U.S. case law also clarified what information is relevant and necessary for collective bargaining, the manner and form in which the data must be made available, the timeliness of making information available, legitimate employer defenses for refusal to supply information, and the types of information that must be furnished[76]. The latter may include financial data, wage and salary schedules, hours, insurance and pension plan information (including the employer's cost and employee benefits thereunder), seniority lists, employees' biographical information, names and addresses of strikebreakers, and information on subcontracting (including actual copies of the contracts) among many others[77].

By contrast, the Supreme Court of Canada held in 1956 that the employer is under no obligation to open the books or divulge financial information to the union under any circumstances[78]. This precedent, the *Marshall-Wells* doctrine, was applied to other forms of information, as well, and held for almost two decades.

More recently, however, several board decisions indicate a weakening of this position in the Canadian jurisprudence. In 1975 the British Columbia Labour Relations Board noted that there is some duty upon the employer to supply information but that the full extent of that duty had not been clearly defined[79]. Subsequent Ontario Labour Relations Board decisions clarified that duty. When an employer refused to provide existing wage and salary information during a first contract negotiation, the Ontario board ruled that «rational and informed discussion cannot easily take place until this information is provided to a trade union and thus this aspect of the duty supports its production»[80]. In another case, the employer made arrangements to subcontract a substantial portion of the work formerly done by the bargaining unit employees while first contract negotiations were taking place and did not inform the union. The board ruled that the employer is obliged to discuss this with the union and had failed to bargain in good faith[81].

A further case requiring disclosure of information about plant closings marks a distinct departure from the American jurisprudence[82]. The employer in this case had considered closing the plant where the bargaining unit employees worked, while contract negotiations were taking place, and, although a final decision had not been reached, it was «highly probable» that the plant would be closed. The union and employees were not notified of impending plant closure until six weeks after negotiations concluded. The board rules that failure to disclose this information was bad faith bargaining. A key point, and a point where this departs from the American jurisprudence, is that the information was unsolicited. It is well established in the American jurisprudence that the employer's duty to supply information does not arise until the union requests the information[83]. The Ontario board examined the stage in an employer's decision-making process where the employer is obligated to reveal information about major changes, and concluded that when so fundamental an issue as a plant closing is at stake even «highly probable» decisions should be revealed. Also, due to the unexpected nature of the decision, it is hardly surprising that the union did not ask, and failure to do so should be treated at most as a technical oversight.

Thus, Canadian jurisprudence apparently is departing from the *Marshall-Wells* doctrine. Whether this is beneficial to the Canadian collective bargaining system is hard to ascertain. It might promote more «informed discussion» and honest bargaining. In the final analysis, however, it might simply cause employers to delay plant closures. In *Consolidated Bathurst* the Ontario board, indeed, noted (at 14,535): «a single minded pursuit of disclosure is inconsistent with the scheme of the Act and sound collective bargaining practices. The same can be said in the opposite direction.»[84]

PROPOSALS AND CONCESSIONS

Although the American jurisprudence on proposals and concessions is much more developed, there appears to be only slight, if any, differences in the board and court rulings between the countries. Numerous American cases indicate that the advancement of proposals by a party will be viewed favourably in making a determination of good faith[85]. The role of concessions in determining good faith is also well-developed, though less clear[86]. Section 8(d) of the *NLRA* specifies that the duty to bargain in good faith does not «compel either party to agree to a proposal or require the making of a concession». However, the First Circuit ruled in 1953 that while «the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union»[87]. Thus, surface bargaining is bad faith bargaining. In other cases the NLRB found an employer's refusal to accept or consider any contract other than its own proposal[88] and a «take it or leave it» proposal on accident insurance[89] as bad faith bargaining. Even though numerous cases suggest that the NLRB simply considers the quantity and quality of concessions regarding good faith, the board stated it will look beyond concessions to the bargaining relationship[90]. Moreover, no hard and fast rules are available to indicate what comprises a significant concession, and the NLRB frequently interprets an unyielding position as «hard bargaining» and within the boundaries of good faith[91]. The latter interpretation derives from the American legislation which, unlike Canadian legislation, explicitly recognizes (in s. 8(d)) the freedom of contract: «good faith does not 'compel either side to agree to a proposal or require the making of a concession'»[92].

The refusal to make any concessions or «take it or leave it» bargaining from the outset (or Boulwarism) has not been directly tested in any Canadian cases[93]. However, numerous cases and frequent references to relevant American cases in Canadian decisions indicate that the positions of Canadian boards closely parallel the American jurisprudence on this issue. Surface bargaining was defined analogously in Canada: «a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement»[94]. By contrast, hard bargaining also has been defended in Canadian board decisions stating that good faith bargaining does not «preclude a party from taking a firm position in bargaining»[95] and that the «duty to bargain is not an obligation to agree»[96].

The American and Canadian jurisprudence also is very similar on the issue of reneging on proposals and concessions during the course of bargaining. If a party abruptly changes its position on an issue without explanation or refuses understandings that have already been reached on an issue, boards will generally find this to be in bad faith[97]. However, bad faith has not been found if, after a strike has commenced, the party backed down from concessions made before the strike began[98]. It must, in fact, be clear that reneging actually has occurred. Thus, where «various (wage) proposals did not lend themselves to meaningful comparisons», the Alberta Labour Relations Board did not find evidence of bad faith[99]. Position reversals also

are allowed in both countries where the employer's proposals were withdrawn after they had been rejected by the union[100] and where the bargaining climate was substantially altered[101].

A related matter is the «receding horizon» where new issues are brought to the bargaining table for the first time at later stages of the negotiations. Again, the American and Canadian jurisprudence are very similar. An issue that remains unclear is exactly how soon items must be introduced after the commencement of negotiations. But, bad faith was found where new proposals were raised after the parties had reached agreement on all other issues[102]. Also comprising bad faith is the tabling of additional demands, once the dispute has been defined and especially during a strike[103]. The same occurs when negotiations are «nearing completion» or after several months of bargaining[104]. The jurisprudence is divided on whether or not the concept of the receding horizon applies to negotiating clauses in back to work agreements requiring no reprisals by the union in disciplining employees for their conduct during the strike[105]. In other words, not all boards would rule that no-reprisal clauses constituted terms and conditions of employment and, therefore, were lawful issues, as is explained in the next section.

ECONOMIC SANCTIONS DURING BARGAINING

Economic sanctions are allowed during bargaining in both countries, although the restrictions on their use tend to be more extensive in Canada. The right of employees to strike is protected in sections 7 and 13 of the *NLRA* but section 8(d)4 prohibits strikes «for a period of sixty days after such notice to terminate or modify the contract is given to the Federal Mediation and Conciliation Service or until the expiration date of such contract, whichever occurs later». the U.S. Supreme Court found no bad faith in other forms of economic pressure by employees, such as refusals to solicit new business or to perform routine duties, reporting late for work, sit-ins, picketing, distributing leaflets, and soliciting signatures of customers on petitions addressed to the company. Indeed, it stated that «the presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system»[106]. Employers won the same right to economic sanctions when an offensive lockout was allowed by the Supreme Court[107]. As noted previously, however, strikes and lockouts over non-mandatory items are not lawful.

Although all of the private sector Canadian statutes specifically permit strikes and lockouts, numerous restrictions are placed on their use. After World War II all jurisdictions in Canada, except Saskatchewan, required some form of third party assistance before a legal strike or lockout could occur. Currently, only five provinces and the federal statute continue the requirement of compulsory conciliation and prohibit economic sanctions until after they have been cleared. In addition, six provinces make a favourable strike vote a precondition to a lawful work stoppage[108]. Picketing is generally restricted to the time while a lawful strike or lockout is in progress. Untimely economic sanctions clearly are illegal[109].

As to the hiring of replacements for strikers or locked-out workers, the U.S. Supreme Court ruled in 1938 that employers may legally hire temporary or permanent replacements for economic strikers[110]. The employer need not terminate the replacements and reinstate the strikers, provided the replacements were hired as permanent replacements. If, however, the replacements were specifically hired for a temporary period, then the strikers must be reinstated upon making an unconditional application[111]. The NLRB had initially ruled that temporary replacements could not be hired during an offensive lockout, but reversed that ruling in 1972[112]. The hiring of permanent replacements during an offensive lockout has not been clearly addressed[113].

Employers have the right to hire temporary replacements for striking workers in all Canadian jurisdictions, except Québec, which prohibits by statute the use of either nonstriking employees or replacements during a strike,[114] and British Columbia which prohibits the hiring of «professional strikebreakers». Some lines of authority have been drawn about permanent strike replacements. For one, a leading Supreme Court decision and some statutes provide that an employee who participates in a lawful, timely strike does not thereby resign his employment or render himself liable to discharge,[115] and very many strikes are settled on the terms that all strikers will return to their former jobs[116]. The Canada Labour Relations Board, indeed, found that failure to rehire striking machinists breached the duty to bargain in good faith: «the employer simply went too far. The victor shot the person carrying the 'white flag'»[117]. Because the employer adamantly continued to attempt to reward nonstriking replacements and to punish strikers, the CLRB issued a return to work provision honouring seniority and calling for no reprisals[118]. It later did the same for striking pilots[119]. The Ontario board, however, ruled in 1983 that the inability of a union to negotiate the displacement of junior nonstriking employees with senior striking employees simply reflected the parties' relative bargaining strengths and could be distinguished from the latter case. The strike replacements were not prestrike employees in the latter case[120]. As well, employers in Ontario, but not in Saskatchewan, can seek to negotiate no-reprisal clauses for union members working during a strike[121]. By contrast, legislation in Manitoba and Québec guarantees strikers an absolute right to reinstatement in their former jobs for an indefinite period, provided that work is still being performed, and legislation in Ontario makes a similar guarantee for a period of six months[122].

DURATION OF DUTY TO BARGAIN

The duty to bargain in good faith generally continues until the union is decertified. However, the American jurisprudence recognizes the existence of an *impasse* involving irreconcilable differences in the parties' positions after exhaustive good faith negotiations and that the duty to bargain is suspended, but not terminated, when an impasse occurs[123]. A legal impasse in bargaining may end by almost any changed condition or circumstance, including the start of a strike, changed business conditions or outlook, or a change in the bargaining position of one of the parties[124]. The duty to

bargain also continues during the term of an existing agreement[125]. The parties are not relieved of the duty to bargain over «subjects which were neither discussed nor embodied in any of the terms and conditions of the contract»,[126] unless the contract contains a «zipper clause» stipulating that the parties have resolved all proper subjects of bargaining[127]. The employer may also be relieved of the duty to bargain during the term of an agreement by a «management rights» clause that specifically gives management the right to unilateral action on that issue[128].

Canadian jurisprudence does not specifically recognize an impasse as a suspension of the duty to bargain, and the duty to bargain apparently is not extinguished with the passage of time[129]. Accordingly, the duty to bargain is not suspended by judicial review of the certification decision, complained violations of the duty to bargain or the possibility of amendments to labour relations statutes[130]. Nevertheless, cases have noted that protracted negotiations become quite different from normal bargaining and the duty to bargain may have a different effect under those situations[131]. The Canada Labour Relations Board recently held as follows: «the obligation to bargain is not a hollow one. Its purpose is to conclude a collective agreement. In the absence of any reasonable indication that discussions are likely to bear fruit, there is no obligation to meet or to commence a dialogue»[132]. The duty to bargain also continues during a strike or lockout and does not cease until a collective agreement has been executed[133].

EXECUTION OF AGREEMENT

Section 8(d) of the *NLRA* expressly requires «the execution of a written contract incorporating any agreement reached if requested by either party». Consequently, the NLRB uniformly regards the refusal to sign a written memorandum of the agreement as a *per se* violation of the duty to bargain. This requirement also applies to individual employers of multi-employer bargaining units who have agreed to be bound by the multi-employer agreement[134].

British Columbia is the only Canadian jurisdiction with an express statutory requirement (section 65(2)) that both parties execute the agreement where an agreement has been reached on all issues during negotiations. However, in other jurisdictions the boards also routinely require the joint execution of an agreement following ratification[135]. Boards have refused to grant an order to execute an agreement, if «there was a lack of understanding between the parties with respect to the intent carried by the wording of the memorandum and proposed collective agreement»[136] or if «there were different understandings present in the minds of the parties when the memorandum was signed»[137]. Moreover, the B.C. board will uphold employer refusals to execute collective agreements with a subset of an informal coalition of unions until all unions agree, only if the unions previously were led to believe such refusals could occur[138].

BOARD REMEDIES

Section 10(c) of the *NLRA* and the statutes in all Canadian jurisdictions confer broad remedial powers on labour relations boards (and labour courts). But, the typical remedy issued by the NLRB and most of the Canadian boards in cases of refusal to bargain has been a cease and desist order requiring the wrongdoer to commence bargaining in good faith. These orders do little to deter willfull violators who still reap the benefits of months or years of delay before they must begin to bargain with the union[139]. As a result, boards in both countries have begun to use additional remedies, especially compensatory damages. Several differences can be noted in the Canadian and American jurisprudence.

Although the remedial powers of the NLRB are quite broad, the U.S. Supreme Court held in 1970 that these powers do not include determining the substantive terms of the contract. In *H. K. Porter Co.* v. *NLRB* the NLRB had ordered the employer to grant a dues checkoff clause to the union, but the Court held that «allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the *NLRA* is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract»[140]. The NLRB subsequently has adhered stringently to that principle.

Several Canadian boards, especially in jurisdictions like British Columbia, where the statute specifically gives the board the power to impose a first agreement,[141] have held for some time that it is within their remedial powers to impose a collective agreement where the conduct of one of the parties has led to the frustration of the collective bargaining process[142]. Indeed a 10% wage increase was imposed in one case[143]. The B.C. board, however, refused to do so where both parties failed to bargain in good faith[144].

First agreement arbitration is much more accessible and more liberally applied in Québec. Indeed, it has been applied where no breaches of the duty to bargain in good faith were found, as upheld by Québec's Court of Appeal[145]. Greater accessibility also derives from the use of *ad hoc* arbitration boards (assisted by assessors, if the parties desire), as opposed to standing tribunals which often attempt to reduce their case loads. It is noteworthy that first agreements imposed in Québec are two years in length rather than one year, in order to attempt to effect a more lasting «trial marriage»[146].

Significantly, Canada's Supreme Court held in 1983 that under the Nova Scotia statute the authority given to the Board is simply to oblige the parties to meet and bargain collectively with one another and make every reasonable attempt to conclude and sign a collective agreement. Furthermore, although the Board had authority to direct that proposals be drawn up, it lacked the statutory power to impose or direct the terms of the collective agreement[147]. The impact of this decision on other Canadian boards remains unclear at this time, for statutory wording varies across jurisdictions. The Alberta board, for example, decided it lacks authority to impose settlements[148].

Boards in both countries, with the approval of the courts, have begun to award compensatory damages, though being very careful not to tack on punitive damages. The NLRB has ordered the employer to reimburse the members of the union negotiating committee for lost wages due to attendance at negotiating meetings which the employer's surface bargaining had made a «fruitless waste of time»[149] and to reimburse the union itself for negotiating expenses[150]. In a case where the employer's defense to the unfair labour practice allegations was «patently frivolous», the NLRB ordered the employer to reimburse the union and itself for litigation expenses in 1972, but the D.C. Circuit Court denied reimbursement of the Board's legal expenses and limited reimbursement of the union's legal expenses to those incurred prior to the Board's initial decision in the case[151]. Later cases did order reimbursement of litigation and extra organizing expenses to the union, as well as compensation to individual employees for unilateral changes in terms and conditions of employment[152].

Though reluctant to order compensatory damages in the past, the Ontario Labour Relations Board now appears willing to order reimbursement going beyond that of the NLRB, especially if additional unfair labour practices are involved[153]. In 1980, the Ontario Divisional Court upheld a board ruling that the employer reimburse the union for extra bargaining costs and ordering the employer «to pay to all bargaining unit employees all monetary losses that the [union] can establish by reasonable proof as arising from the loss of opportunity to negotiate theretofore a collective agreement due to the [employer's] earlier unlawful conduct ... with interest as appropriate»[154]. Indeed, this decision «effectively redefined the Board's remedial powers, not only with respect to the duty to bargain but *(sic)* with respect to unfair labour practices in general»[155].

The position taken by the NLRB differs substantially. In *Ex-Cell-O Corp.* a trial examiner had ordered the employer to compensate the injured employees «the monetary value of the minimum additional benefits, if any, including wages, which it is reasonable to conclude that the Union would have been able to obtain through collective bargaining with the employer»[156]. The NLRB refused on grounds that it would be an improperly speculative order, since the terms the parties would have agreed upon could not be objectively determined, and to do so would violate the principles announced by the Supreme Court in *N. K. Porter* prohibiting the imposition of substantive contract terms. The NLRB maintained this position in subsequent cases[157].

The Ontario board argued as follows in *Radio Shack:* «the power of an arbitrator to award damages in the absence of express statutory authority has had longstanding approval from the Supreme Court of Canada. It would be strange indeed if the Labour Board did not have at least equal remedial authority where the language of the legislation so clearly provides for it». Furthermore, «never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties». Also, «we embark on this new direction with caution ... however, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss»[158].

Along with these costs to individual bargaining unit members, the board awarded the union all negotiating costs and «all extraordinary organizing costs» due to the company's improper actions, but no legal costs «because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair»[159]. Aside from the compensation for individual employees, the compensatory damages to the union represented a «tack generally similar to that taken by the British Columbia Board» during the late 1970's[160]. A later case clarified the calculation of damages,[161] and another awarded damages to the employer for the union's refusal to accept the results of a statutory final offer vote[162]. A Federal Court of Appeal upheld an order by the Canada board to reinstate striking pilots, except for its cancelling of promotions during the strike[163]. The Canada board also implied that it could order an employer to compensate a union for the union dues it normally would have received, had a strike not ensued due to bad faith bargaining[164]. However, the Supreme Court of Canada, noting the statutory differences between Nova Scotia and Ontario, held that the Nova Scotia board did not have the statutory authority to order compensation due to the employer's failure to bargain in good faith[165].

Another innovative remedy in *Radio Shack* was an order to the employer specifically directing it to «cease and desist in its position on union security»[166]. The B.C. board subsequently ordered the actual rectification of the union security clause in a collective agreement as a remedy against bad faith bargaining[167]. The Ontario board ordered the deletion of positions on two illegal items from a final offer and established conditions promoting the execution of the resulting final offer as a collective agreement[168]. Furthermore, a board can order arbitration where both sides previously had agreed to it, and the board later can order reimbursement to bargaining unit members for wages and benefits they lost due to an ensuing, improper lockout[169].

CONCLUSION

Most American precedents on good faith bargaining were established much earlier than their Canadian counterparts and often influenced them[170]. Significantly, the NLRB enjoyed much broader remedial authority than Canadian boards until the 1970's and 1980's. Nevertheless, arguably the most important U.S. developments during those years involved delineating the NLRB's remedial authority and its exercise for bad faith bargaining. The NLRB can order reimbursement of litigation and extra organizing expenses, but it apparently will refrain from estimating the kind of settlement that otherwise might have been reached, for fear of engaging in the possible imposition of substantive contract terms.

By contrast, Canadian jurisprudence on bad faith bargaining blossomed in nearly all areas during the past decade. Under Canada's balkanized labour relations system, three boards generally led the way: the British Columbia, Canada (i.e., federal private sector) and Ontario boards. The former two are empowered to arbitrate first agreement disputes as a remedy

against bad faith bargaining or, alternatively, for an employer's essentially denying recognition to a newly certified union through its bargaining practices. Accordingly, they expanded Canadian jurisprudence from regulating the conduct of first agreement negotiations to regulating their content well beyond determining the legality or illegality of proposals[171]. The Ontario board possesses broader remedial authority than boards in some other Canadian jurisdictions. It developed the principles of preserving and maintaining «the decision-making framework» for negotiations,[172] of a «full and free discussion»,[173] and a «rational and informed discussion»[174] with a view of entering in collective agreement, and for first agreement negotiations of not being «blinded by» the principle of voluntarism «in critically assessing what is portrayed as hard bargaining»[175]. Hence, the content of negotiations can come under close scrutiny. Armed with broad remedial powers, in *Radio Shack* the Ontario board extended Canadian jurisprudence further than the NLRB with its «make-whole» order of retroactive compensatory relief for negotiating losses. Some Canadian boards, however, are restricted to the remedy of ordering the parties back to the bargaining table, to cease and desist bargaining in bad faith and possibly to use mediation. Significantly, first agreement arbitration is most widely available in Québec, and the Québec *Labour Code* takes the broadest view of lawful items for inclusion in collective agreements.

The American mandatory versus permissive distinction has been entertained in Canada but rarely followed, largely because Canadian statutes take a broader view of what collective agreements can and must embody and, therefore, of collective bargaining. Consequently, the American concept of an impasse has not been firmly entrenched in Canada. But, items termed illegal in Canada often are permissive items in the U.S., and the number of illegal items has expanded in Canada, though generally in a flexible manner[176]. Unlike previously, Canadian and American boards currently deal with the failure to disclose information in similar ways, except for unsolicited information. Surface bargaining has roughly the same meaning in both countries, and boards in both countries determined how concession bargaining of the 1980's could comply with good faith principles. Finally, largely because the pursuit of self-interest is inherent in, and pervades, collective bargaining, boards in both countries still struggle with the partly objective, partly subjective task of drawing the proverbial fine line between hard bargaining and bad faith bargaining.

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NOTES

1 Compare, for instance, PALMER, 1966, 410, no. 10 with the 1976-78 bad faith case load (4 of 59 complaints sustained) for British Columbia's board (MCPHILLIPS, 1981, 231). CARTER speaks of «only a handful of decisions from labour boards and courts» prior to the mid-1970's (1983, 37).

2 Compare PALMER (1966), who chiefly summarized American jurisprudence, with GAUK (1978), MCPHILLIPS (1981), ADELL (1980), ADAMS (1980), BENDELL (1980), CARTER (1983), and ADAMS (1985).

3 AROUCA and PERRITT, 1985, 153-154, who also indicate that the NLRB has been much more interventionist than the National Railroad Adjustment Board, whose statutory jurisdiction for regulating good faith bargaining under the U.S. *Railway Labor Act* arguably is very similar to that of the NLRB.

4 For instance, COX (1958) and O'NEILL (1960).

5 Jurisdiction over Canada's private and public sector labour relations rests primarily with the provinces, but several private sector industries and the Federal Public Service fall under the federal jurisdiction. Thus, private sector collective bargaining is regulated by ten different boards operating under ten different statutes, in addition to the Labour Court of Québec. The federal and several provincial jurisdictions have at least one board in the private sector, as well as in the public sector. (See ARTHURS, CARTER and GLASBEEK, 1984, 51-52 and 180.) Consequently, unlike America's nationally regulated private sector, jurisprudence in Canada's private sector often is much more confusing. Even though basic provisions of the relevant statutes are very similar across Canadian jurisdictions, and similar to the *National Labor Relations Act* as well, slight differences may affect the relevance of board or superior tribunal decisions under one statute to other boards.

6 See ADELL, 1980, 1-2. The grounds for judicial review currently comprise bias or veniality by the tribunal; denial of natural justice, including due process; excess or denial of jurisdiction; and making a «patently unreasonable» error of law.

7 PALMER (1966) suggested the expansion of remedies. Also see CARTER (1983) or ADAMS (1980). Interestingly, a private prosecution for allegedly bad faith bargaining recently was sought, apparently under the *Criminal Code,* against a Newfoundland employer, where negotiations had not taken place for six months. However, it was found that the union was responsible for the refusal to negotiate. (See *Hogan Peddle,* (1984) 48 Nfld. & P.E.I.R. 275 (Nfld. Prov. Ct.).)

8 See MASLOVE and SWIMMER, 1980, 124-127, 136-139 and 152-153 plus *Canadian Industries Ltd.,* (1976) 2 CLRBR 8 (Ontario).

9 *Public Service Employee Relations Act,* 1980 R.S.A., ch. P-33, ss. 39(3) and 50. The board administering that Act (the PSERB) found bad faith in one of four cases. The grounds were deliberately creating an impasse (*The Crown in Right of Alberta* (unreported), June 28, 1983).

10 A condition precedent to negotiations in Québec (and elsewhere in Canada) is that notice to bargain be deemed to have been served in a timely fashion. (See *Gagné* v. *La Brique Citadelle Ltée,* 55 CLLC 15,228 (Q.B., Québec).

11 MORRIS, 1983, 558 and ADELL, 1980, 2.

12 *Board of Governors of Medicine Hat College,* (1984) 7 CLRBR 118 (Public Service Employee Relations Board of Alberta).

13 See ARTHURS, CARTER and GLASBEEK, 1984, 33.

14 L.R.Q., c. C-27, s. 53.

15 BRETON, 1973, 881-883.

16 Québec *Labour Code,* [1985] CLLR 75,310, s. 141, as applied in *Robert Burke* v. *Gasoline Station Limited,* 73 CLLC 14,167 (L.C., Qué.).

17 Paul WEILER, former board chairman, in *Noranda Metals,* [1975] 1 CLRBR 145 (B.C.), at 160.

18 *DeVilbiss (Canada) Ltd.,* (1976) 76 CLLC para. 16,009 (Ontario), at 16,066.

19 *NLRB* v. *Highland Park Manufacturing Co.,* (1940) 110 F2d 632, 6 LRRM 786 (4 th Circuit).

20 *Goldcraft Printers Ltd.,* [1980] 2 CLRBR 429 (Ontario).

21 *Eastern Provincial Airways,* (1983) 84 CLLC 16,012.

22 *Irvington Motors,* (1964) 147 NLRB 656, 56 LRRM 1257.

23 *Neon Sign Corp.,* (1977) 229 NLRB 861, 95 LRRM 1161.

24 This approach was strongly criticized by GROSS, CULLEN and HANSLOW (1968, 1034) as providing the NLRB with «a hunting license to ferret out, as it did in the second *Reed & Prince* case, a sequence of picayune incidents (such as the bulletin board controversy and the use of a stenotypist) for the purpose of finding bad faith». Undoubtedly, the best known application of this approach in Canada was in *Radio Shack,* [1980] 1 CLRBR 99 (Ontario).

25 See COX, 1958, 1421.

26 *NLRB* v. *Fitzgerald Mills Corp.,* (1963) 313 F2d 260, 52 LRRM 2174, (2nd Circuit), *Radio Shack,* [1980] 1 CLRBR 99, Ontario, and in the public sector *St. Joseph's Hospital,* 76 CLLC 16,026 (Ontario).

27 *Mountain Taxi and Tours Ltd.,* 83 CLLC 14,222 (Alberta).

28 *Marshall-Wells Co.,* (1956) 55 CLLC 18,002 (Saskatchewan), and especially *Journal Publishing Company of Ottawa,* [1977] 2 CLRBR 183 (Ontario).

29 *Regina ex rel Daley* v. *No-Sag Spring Company Ltd.,* 68 CLLC 14,088 (Ontario Co. Crt).

30 *Kings County Amalgamated School Board,* [1976] 2 CLRBR 257 (Nova Scotia).

31 *Standard Oil Company* v. *NLRB,* (1963) 322 F2d 40 (6th Circuit).

32 *General Electric Company,* (1964) 150 NLRB 192, 57 LRRM 1491.

33 *Syndicat Catholique* v. *Paquet,* (1959) 18 DLR (2nd) 346 (S.C.C.), and *McGavin Toastmaster* v. *Ainscough,* 75 CLLC 14,277 (S.C.C.), at 15, 258.

34 *A.N. Shaw Restoration,* [1978] 1 CLRBR 214 (Ontario); *Noranda Metals,* [1975] 1 CLRBR 145 (B.C.); and *Adell,* 1983, 9-10.

35 *Syndicat Catholique* v. *Paquet,* (1959) 18 (2nd) 346 (S.C.C.). *Paquet,* in fact, ruled that individual contracts must be amended to conform with the new collective agreement, once the latter had been concluded.

36 *J.I. Case* v. *NLRB,* (1944) 321 US 332, 14 LRRM 501 (U.S. Supreme Court).

37 *McGavin Toastmaster* v. *Ainscough,* 75 CLLC 14,277 (S.C.C.), at 15,256.

38 *Cariboo College,* (1983) 4 CLRBR 320 (B.C.).

39 *Prince Rupert Fishermen's Co-operative Association et al.,* 68 CLLC 14,079 (B.C. Supreme Court), at 356.

40 The B.C. board, which followed *Telegram Publishing Co. Ltd. and Zwelling et al.,* (1976) 67 DLR (2d) 404 (Ont. Court of Appeal), did not conclusively decide the incorporation matter upon reconsideration of *British Columbia Hydro & Power Authority* and, more importantly, *Paccar of Canada Ltd. (Canadian Kenworth Company Division),* [1985] BCLRB No. 284/85.

41 Termination notice was required 30 to 90 days prior to expiry under the agreement. See *C.L.R.A.A.* v. *Alberta Labour Relations Board,* (1984) 33 Alta. L.R. (2d) 143 (Alberta Court of Queen's Bench).

42 *Construction Labour Relations et al.* v. *Alberta Labour Relations Bd. et al.* affirmed by Alta. Court of Appeal, (1985) 37 Alta. L.R. (2d) 1, and «Supreme Court of Canada Leave to Appeal Refused», *Alberta Weekly Law Digest* April 26, 1985. The following British Columbia board decision was followed with approval: *Paccar of Canada Ltd.,* [1984] 7 CLRBR 227.

43 A lawful lockout, however, is not required under Alberta's statutory scheme, in order for the employer to unilaterally alter terms and conditions of employment, once the agreement has expired. (See *Edmonton, Co-Operative Association* (unreported), L.R. 202-E-1, 12-31-85 (Alberta).

44 *Paccar,* [1985] BCLRB No. 284/85, at 32. The Saskatchewan board ruled similarly for voluntarily recognized trade unions in *Clark Roofing (1964) Ltd. Westeel-Rose Ltd. and Flynn & Associates Ltd.,* (1985) 9 CLRBR 96. By contrast, terms and conditions of employment remain frozen after expiry for certified trade unions in Saskatchewan, pursuant to the Act and the *Clark Roofing* decision.

45 *Paccar,* [1985] BCLRB No. 285/85, at 35 and 30, following *Dominion Directory Company Limited,* [1975] 2 CLRBR 60 (B.C.).

46 HELLER, 1984, 761.

47 HELLER, 1984, 760.

48 *NLRB* v. *Katz,* (1962) 369 US 736, 50 LRRM 2177. The category of *per se* violations is strictly American (BENDEL, 1980, 43) and has not been adopted in Canada, largely due to its rigidity (PALMER, 1966, 415).

49 Respectively, *NLRB* v. *Fitzgerald Mills Corp.,* (1961) 133 NLRB 877, 48 LRRM 1745 (2nd Circuit), and *DeVilbiss (Canada) Limited,* [1976] 76 CLLC 16,009 (Ontario).

50 *NLRB* v. *Wooster Division of the Borg-Warner Corp.,* (1958) 356 US 342, 42 LRRM 2034.

51 An excellent and very thorough discussion of mandatory, permissive, and illegal issues under the American jurisprudence can be found in MORRIS, 1983, 757-869. It should be noted that subcontracting historically was deemed to be mandatory, but employee leasing programs «motivated by considerations other than the reduction of labour costs... should not be encumbered by a duty to bargain». (See JANSONIUS, 1985, 40.)

52 *Honolulu Star-Bulletin Ltd.,* (1959) 356 US 342, 42 LRRM 2034.

53 *National Maritime Union (Texas company),* (1948) 78 NLRB 971, 22 LRRM 1289.

54 *Mine Workers* v. *Pennington,* (1965) 381 US 657, 59 LRRM 2369 (U.S. Supreme Court).

55 MORRIS, 1983, 845-869.

56 *T. Barbesin and Sons,* [1960] OLRB Rep. 80 (Ontario).

57 *Board of School Trustees of School District No. 39 (Vancouver),* [1977] 2 CLRBR 201 (British Columbia).

58 *British Columbia Telephone Company Canada,* [1977] 2 CLRBR 404.

59 *British Columbia Hydro and Power Authority,* 84 CLLC 14,087 (B.C.).

60 *Burns Meats Ltd.,* 84 CLLC 16,053 (Ontario).

61 *Carpenters Employer Bargaining Agency,* [1978] 2 CLRB 501 (Ontario).

62 For instance, a proposal to change work jurisdiction boundaries could be introduced but not become an issue of a strike, lockout or threat thereof. (See *Toronto Star Newspapers Limited,* [1979] 3 CLRBR 306 (Ontario).

63 *Labour Code,* ss. 62 and 64, respectively [1985] CLLR para. 75,179 and 75,181.

64 The Labour Relations Board of Alberta, however, followed American jurisprudence that the demand for tape recording of negotiations' sessions was permissive in *Suncor, Inc.* (unreported), 1984 L.R. 606-G-1. Previously, in *Pulp and Paper Industrial Relations Bureau,* [1978] 1 CLRBR 60, the British Columbia board (at 76) followed Mr. Justice Harlan in *Borg-Warner,* 356 U.S. 342 and found pensions for retired workers to be a potential item for a lawful work stoppage (at 80): «The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement. Section 6 does not create a set of separate duties to bargain, duties which are attachable to each of the items placed on the bargaining table by the other side. While making *bona fide* and reasonable efforts to settle a collective agreement with the CPU, the Bureau is legally entitled to discuss with the CPU the one issue of pension benefits for retired workers.»

65 *Labour Relations Act,* 1980 S.A., ch. 72, s. 1(1)(f). Two major exceptions are British Columbia (*Otis Elevator Company Limited,* (1973) 4 W.W.R. 355 (B.C.C.A.) and Saskatchewan (*Morris Rod Weeder Co. Ltd.,* [1978] 2 CLRBR 49), explained in BENDEL, 1980, 11-12, no. 47.

66 Saskatchewan follows the American model of noncompulsory grievance mechanisms, and Alberta requires no minimum term.

67 This includes both unconditional and conditional no strike/no lockout provisions (*Basic Patterns in Union Contracts,* 1983, 74).

68 Canada, s. 155; British Columbia, s. 93; Ontario, s. 44.

69 Canada, s. 185(b); Ontario, s. 59.

70 British Columbia, Québec, Saskatchewan, Manitoba, and Ontario.

71 Canada.

72 *NLRB* v. *Truitt Manufacturing Co.,* (1956) 351 US 149, 38 LRRM 2042.

73 *Curtiss-Wright Corp.* v. *NLRB,* (1965) 347 F2d 61, 59 LRRM 2433 (3rd Circuit), and *Levingston Shipbuilding Co.* v. *NLRB,* (1979) 244 NLRB 119, 102 LRRM 1127.

74 *NLRB* v. *Acme Industrial Co.,* (1967), 385 US 432, 64 LRRM 2069 (U.S. Supreme Court).

75 *Detroit Newspaper Printing (Oakland Press Co.),* (1977) 233 NLRB 994, 97 LRRM 1047.

76 See BARTOSIC and HARTLEY (1972), concerning the «presumptive relevance rule», and RUBIN (1971).

77 For a more thorough discussion see MORRIS, 1983, 606-629.

78 *Marshall-Wells Co. Ltd.* v. *Retail Wholesale,* [1956] 2 DLR (2d) 569, concerning the Saskatchewan statute.

79 *Noranda Metal Industries,* [1975] 1 CLRBR 145 (British Columbia).

80 *DeVilbiss (Canada) Limited,* [1976] 76 CLLC 16,009 (Ontario). Similar reasoning prevailed when an employer refused information on existing wages and fringe benefits during a first contract negotiation in *Northwest Merchants Ltd.,* (1983) 4 CLRBR 358.

81 *Sunnycrest Nursing Homes Ltd.,* [1982] 2 CLRBR 51 (Ontario). There was also evidence that the subcontracting cost the employer more than it had paid its own employees and therefore was not motivated by legitimate economic concerns.

82 *Consolidated Bathurst Packaging Ltd.,* 83 CLLC 16,066 (Ontario).

83 *NLRB* v. *Boston Herald-Traveler Corp.,* (1954) 209 F2d 134, 33 LRRM 2435 (1st Circuit), and *Westinghouse Electric Supply Co.* v. *NLRB,* (1952) 196 F2d 1012, 30 LRRM 2169 (3rd Circuit).

84 However, the Alberta Labour Relations Board found that, even though a subcontracting proposal had not been formally discussed during negotiations, public knowledge of this possibility constituted sufficient disclosure. It ordered the parties to bargain in good faith, despite the fact that all former bargaining unit work had been subcontracted. (See *County of Leduc No. 25* (unreported), October 26, 1984 (Alberta).)

85 See *Procter & Gamble Mfg. Co.,* (1966) 160 NLRB 334, 62 LRRM 1617; and *NLRB* v. *General Tire & Rubber Co.,* (1964) 326 F2d 832, 55 LRRM 2150 (5th Circuit).

86 See MAXWELL (1966).

87 *NLRB* v. *Reed & Prince Mfg. Co.,* (1953) 205 F2d 131, 32 LRRM 2225.

88 *NLRB* v. *Herman Sausage Co.,* (1960) 275 F2d 229, 45 LRRM 2829 (5th Circuit).

89 *General Electric Co.,* (1964) 418 F2d 736, 72 LRRM 2530.

90 *Vickers Ltd.,* (1965) 153 NLRB 561, 59 LRRM 1516.

91 MORRIS, 193, 579-589.

92 BENDEL, 1980, 13 and see WELLINGTON (1964).

93 Boulwarism, as practiced by General Electric, also involved circumvention of the bargaining agent by surveying bargaining unit members' contract desires. See BOULWARE, 1969, 82-86, 118, and 146-147, and *General Electric Co.,* (1964) 418 F2d 736, 72 LRRM 2530.

94 *The Daily Times,* [1978] 2 CLRBR 446 (Ontario), at 451.

95 *Cross Tube Products Inc.,* [1980] 3 CLRBR 513 (Ontario).

96 *Sunnycrest Nursing Homes,* (1983) 2 CLRBR 51 (Ontario). Indeed, Bendel argued that the Ontario board had over-subscribed to the American notion of the freedom of contract (1983, 14, 28-29 and esp. 31-34 and 38-39).

97 For example, see *San Antonio Machine & Supply Corp.* v. *NLRB,* (1966) 363 F2d 633, 62 LRRM 2674 (5th Circuit); and *The Crown in Right of Alberta* (unreported), 1982 (Alberta PSERB).

98 *Omaha Typographical Union* v. *NLRB,* (1976) 545 F2d 1138, 93 LRRM 3063 (8th Circuit), and *Hardisty Nursing Home Ltd.,* [1981] 3 CLRBR 240 (Alberta).

99 *Hardisty Nursing Home Ltd.,* [1981] CLRBR 240 at 243 (Alberta).

100 *Wallace Metal Products Inc.,* (1979) 244 NLRB 41, 102 LRRM; and *Toronto Jewelry Manufacturers' Association,* [1979] OLRB Rep. 719 (Ontario).

101 For instance, *Wellington-Dufferin-Guelph Health Unit,* [1980] 1 CLRBR 160 (Ontario), at 167: «and having regard to the changing economic environment, the employer is entitled to re-appraise and reformulate its earlier position — providing it is acting *bona fide* and is not injecting items at the 'eleventh' hour as a means of avoiding agreement».

102 *Cabinet Manufacturing Corp.,* (1963) 144 NLRB 842, 54 LRRM 1144; and *Eastern Provincial Airways,* 84 CLLC 14,096 (Canada).

103 *Wilson Automotive (Belleville) Ltd.,* [1981] 1 CLRBR 318 (Ontario).

104 Respectively, *Graphic Centre Inc.,* [1976] 2 CLRBR 118 (Ontario), and *Altex Manufacturing Co.,* (1962) 307 F2d 872, 51 LRRM 2139 (4th Circuit).

105 ADAMS, 1985, 576.

106 *NLRB* v. *Insurance Agents International Union,* (1960) 361 US 477, 45 LRRM 2704. Although such conduct is *not specifically protected* under the *NLRA* and may be grounds for discharge, it is *not in itself a violation* of the requirement to bargain in good faith.

107 *American Ship Building Co.* v. *NLRB,* (1965) 380 US 300, 58 LRRM 2672 (U.S. Supreme Court).

108 Alberta and British Columbia require a majority of those voting, while New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan require a majority of those in the bargaining unit.

109 *Nippissing Hotel Ltd.,* (1962) (2d) 81 (Ontario High Court).

110 *NLRB* v. *McKay Radio and Tel. Co.,* (1938) 304 US 333 (U.S. Supreme Court).

111 *Pioneer Flour Mills* v. *NLRB,* (1970) 427 F2d 983 (5th Circuit).

112 *Ottawa Silica Co.,* (1972) 84 LRRM 2300, upheld by Sixth Circuit, (1973) 482 F2d 945.

113 But see *Johns-Manville Products Corp.* v. *NLRB,* (1977) 557 F2d 1126, 96 LRRM 2010 (5th Circuit).

114 The Québec *Labour Code* also prohibits the transfer of work to other locations for no reason other than a legal strike.

115 *C.P.R.* v. *Zambri* (so-called *Royal York Hotel* case), (1962) 34 DLR (2d) 654 (S.C.C.), and s. 1(2) of the *Labour Relations Act* of Alberta.

116 ADAMS, 1985, 660.

117 *General Aviation Service Ltd.,* 82 CLLC 16,177 (Canada), at 15,469.

118 *General Aviation Service Ltd.,* 82 CLLC 16,181 (Canada).

119 *Eastern Provincial Airways Limited,* 84 CLLC 16,012 (Canada), at 14,096.

120 *Mini-Skool Ltd.* (unreported), September 15, 1983 (Ontario), which quotes favourably from *Westroc Industries Limited,* [1981] 2 CLRBR 315 (Ontario).

121 *A.N. Shaw Restoration Ltd.,* [1977] 1 CLRBR 103 and *Morris Rod Weeder Co. Ltd.,* [1978] 2 CLRBR 49 (Saskatchewan).

122 It was the Ontario provision, of course, which contributed to the union's accepting an agreement in a first agreement strike with T. Eaton Company Ltd. and subsequent to an Ontario board determination that good faith bargaining did not require a settlement above levels for its nonunion employees. (See «The Easton Strike...», *Labour Law News* (Lancaster House), 11 March, 1985, 1-6 about *T. Eaton Company Ltd.,* subsequently reported as 85 CLLC 16,027 (Ontario), and *Canada Trustco Mortgage Company* (unreported), October 29, 1984 (Ontario).)

123 *NLRB* v. *American National Insurance Co.,* (1952) 343 US 395, 30 LRRM 2147 (U.S. Supreme Court), and *NLRB* v. *Tex-Tan Inc.,* (1963) 318 F2d 472, 53 LRRM 2298 (5th Circuit).

124 *NLRB* v. *United States Cold Storage Corp.,* (1953) 203 F2d 924, 32 LRRM 2024 (5th Circuit).

125 *NLRB* v. *Sands Manufacturing Co.,* (1939) 306 US 332, 4 LRRM 530 (U.S. Supreme Court).

126 *NLRB* v. *Jacobs Manufacturing Co.,* (1952) 196 F2d 680 (2nd Circuit).

127 *American League of Professional Baseball Clubs,* (1978) Case No. 4-CA-9586, 99 LRRM 1724.

128 *Ador Corp.,* (1965 150 NLRB 1658, 58 LRRM 1280; and *Proctor Manufacturing Corp.,* (1961) 131 NLRB 1166, 48 LRRM 1222.

129 *Wellington-Dufferin-Guelph Health Unit,* [1980] 1 CLRBR 160 (Ontario). The parties had been negotiating for 3 years without concluding an agreement, but the employer's refusal to meet after «minor» concessions by the union was ruled to be bad faith.

130 ADELL, 1980, 11-12 and, concerning the latter, *Alberta Roadbuilders Association Edmonton* (unreported), November 14, 1983 (Alberta).

131 *New Method Laundry & Dry Cleaners,* 57 CLLC 18,059 (Ontario); and *CKLW Radio Broadcasting Ltd.,* [1978] 2 CLRBR 306 (Canada).

132 *Nordair Ltd.,* 85 CLLC 16,023 (Canada).

133 *General Aviation Services Ltd.*, 82 CLLC 16,177 (Canada), at 15,460.

134 *NLRB* v. *Strong*, (1969) 393 US 357, 70 LRRM 21 (U.S. Supreme Court); and *Buffalo Bituminous, Inc.*, (1977) 564 F2d 267, 96 LRRM 2884 (8th Circuit).

135 Respectively, *Coulter Copper & Brass Ltd.*, [1981] OLRB Rep. 519 (Ontario); and *Canadian Cement Lafarge Ltd.*, (1981) 82 CLLC 14,152 (Ontario Divisional Court).

136 *Lake Ontario Steel Co.*, [1979] OLRB Rep. 671 (Ontario).

137 *Sandra Instant Coffee Co.*, [1978] OLRB Rep. 455 (Ontario).

138 *Pulp and Paper Industrial Relations Bureau*, [1976] 1 CLRBR 165 (B.C.), and *Construction Labour Relations Association*, [1977] 1 CLRBR 203 (B.C.).

139 See the concerns of a former NLRB Chairman about such orders and even injunctions under s. 10(j) of the *NLRA* in McCulloch (1968).

140 *H.K. Porter Co.* v. *NLRB*, (1970) 397 US 99, 73 LRRM 2561 (U.S. Supreme Court).

141 The other jurisdictions are Québec, Manitoba, and the private sector administered by the Canada Labour Relations Board. (See ARTHURS, CARTER and GLASBEEK, 1984, 217, and ADAMS, 1985, 609-610.)

142 *Victro Registry Services Ltd.*, [1974] 1 CLRBR 440 (B.C.); *CJMS Radio Montréal Ltd.*, [1979] 1 CLRBR 332 (Canada), affirmed on reconsideration, [1980] 1 CLRBR 270; *Parta Industries*, 75 CLLC 16,152 (Ontario).

143 *Huron Broadcasting Ltd.*, 82 CLLC 16,167 (Canada).

144 *Dunlop Canada Ltd.*, [1974] 1 CLRB 435; and *Vancouver Island Publishing Co.*, [1976] 2 CLRBR 225 (B.C.).

145 *C.A.E. Electronics Ltd.*, [1982] C.A. 87 at 90-91, where the wording of ss. 53, 93.1, 93.3 and 94.4 of the Québec *Labour Code* were determinative.

146 ADAMS, 1981, 6518-6519.

147 *Labour Relations Board (Nova Scotia)* v. *Digby Municipal School Board*, 83 CLLC 14,069 (S.C.C.), at 12,348.

148 *Manalta Coal Ltd.* (unreported), LRB 346, 10-06-83 (Alberta).

149 *M.F.A. Milling Co.*, (1968) 170 NLRB 1186, 68 LRRM 1077.

150 Including clerical expenses, representative's salaries, and mileage. *Harowe Servo Controls Inc.*, (1980) 250 NLRB 958, 105 LRRM 1147.

151 *IUE (Tiidee Products, Inc.)* v. *NLRB*, (1974) 502 F2d 349, 80 LRRM 2255 (D.C. Circuit).

152 *John Singer, Inc.*, (1972) 197 NLRB 88, 80 LRRM 1340; *Teamsters Local 901 (F.F. Instrument Corp.)*, (1974) 210 NLRB 1040, 86 LLRM 1286; and *Winn-Dixie Stores Inc.*, v. *NLRB*, (1978) 567 F2d 1343, 97 LRRM 2866 (2nd Circuit). The unilateral changes occurred in *J.P. Stevens & Co. Inc.* v. *NLRB*, (1978) 582 F2d 326, 99 LRRM 2598 (4th Circuit).

153 See BENDEL, 1980, 30, no. 146 and ADAMS, 1985, 586-588, concerning using evidence about «conduct away from the bargaining table» to draw an inference of bad faith or a direct breach of the good faith duty.

154 *Tandy Electronics Ltd. (Radio Shack)*, 80 CLLC 14,017 (Ont. Div. Crt.), leave to appeal denied March 10, 1980 (Ont. C.A.). The order quoted is cited as [1980] 1 CLRBR 99 at 145.

155 See ADELL, 1983, 16-17. The Ontario board previously had indicated that it would award compensatory damages to either a union or individuals only for the most flagrant violation of the duty to bargain occurring on solely one side of the bargaining table.

156 *Ex-Cell-O Corp.*, (1970) 449 F2d 1058, 74 LRRM 1740 (D.C. Circuit).

157 See *IUE (Tiidee Products Inc.)*, v. *NLRB*, (1974) 502 F2d 349, 87 LRRM 2255 (D.C. Circuit).

158 [1980] 1 CLRBR 99 (Ontario), at 131, 136 and 138.

159 *Radio Shack*, [1980] 1 CLRBR 99 (Ontario), at 144-145 and see ADAMS (1983) for a general discussion of remedies.

160 ADELL, 1980, 18.

161 *Fotomat Canada Ltd.*, [1981] 3 CLRBR 129 (Ontario).

162 *Canada Cement Lafarge Ltd.*, [1981] 1 CLRBR 300 (Ontario).

163 *Eastern Provincial Airways Limited*, 84 CLLC 14,042 (Canada), at 12,177.

164 *Austin Airways Ltd.*, (1983) 4 CLRBR 343 (Canada).

165 *Labour Relations Board (Nova Scotia)* v. *Digby Municipal School Board*, 83 CLLC 12,348 (S.C.C.) and see ADAMS concerning the remedial authority of various Canadian boards (1983, 67, esp. n 46).

166 BENDEL, 1980, 40.

167 *Kamloops News*, [1981] 2 CLRBR 356 (B.C.).

168 *Northwest Merchants Ltd. Canada*, (1983) 4 CLRBR 358 (Ontario).

169 *Grey-Own Health Unit*, [1979] 3 CLRBR 330 (Ontario) and [1980] OLRB Rep. 1077-79-U (Ontario).

170 ADAMS, 1985, 572.

171 See MUTHUCHIDAMBARAM (1980); MCPHILLIPS (1981); ADAMS, 1981, 6517-6520; and ADELL, 1980, 17-23.

172 *Graphic Centre (Ontario) Inc.*, [1977] 1 CLRBR 408 (Ontario), at 415.

173 *Boldcraft Printers Ltd.*, [1980] 2 CLRBR 429 (Ontario).

174 *DeVilbiss (Canada) Limited*, 76 CLLC 16,009 (Ontario).

175 *Radio Shack*, [1979] OLRB, para. 74, as quoted in *Goldcraft Printers Ltd.*, [1980] 2 CLRBR 429 (Ontario), at 435.

176 See CARTER, 1983, 52-53.

La jurisprudence au Canada et aux États-Unis en matière de négociation de bonne foi

Le temps paraît opportun d'évaluer la jurisprudence établie sur la négociation de bonne foi au Canada et d'y réfléchir tout en les comparant avec leurs pendants aux États-Unis. Pendant des décennies, la jurisprudence américaine sur l'obligation de négocier de bonne foi a influencé la jurisprudence canadienne tout en étant plus abondante et plus vaste. Mais, depuis le milieu des années 1970, on a noté une augmentation notable des cas et des décisions sur la négociation de mauvaise foi au Canada. Les conseils des relations du travail canadiens, en conséquence, s'appuient maintenant un peu plus sur les précédents canadiens. Bien que l'article porte d'abord sur les infractions à l'obligation légale de négocier de bonne foi, il traite aussi d'autres questions concernant la négociation collective, comme les droits des grévistes, par exemple.

L'analyse comparative révèle plusieurs tendances intéressantes et des divergences entre ce qui se passe au Canada et aux États-Unis. Contrairement à ce qui existait antérieurement, les conseils canadiens et américains traitent maintenant la divulgation des renseignements de la même façon, sauf que le défaut de fournir des renseignements qu'on ne sollicite pas a été interprété comme de la mauvaise foi par les conseils canadiens, mais non pas par le *National Labor Relations Board (NLRB)*. La distinction américaine entre les sujets de négociation obligatoire et facultative est reconnue au Canada, mais elle n'est que rarement suivie. Les sujets considérés com-

me illégaux au Canada sont souvent autorisés aux États-Unis et, au Canada, leur nombre a tendance à s'accroître. Le concept américain d'«impasse» et la suspension correspondante de l'obligation de négocier n'est pas solidement enraciné dans la jurisprudence canadienne. Dans les deux pays, les conseils ont établi comment la «négociation à la baisse» des années 1980 pouvait être conforme aux principes de la bonne foi.

Il se peut que la différence principale entre les deux pays soit le plus grand empressement des conseils canadiens d'examiner le contenu des négociations et d'émettre des ordonnances «fourre-tout» de redressement compensatoire pour les pertes résultant des négociations. Bien que les tribunaux américains aient autorisé le NLRB à ordonner le remboursement des dépenses de procès et autres frais supplémentaires d'organisation, celui-ci a tendance à s'abstenir d'apprécier le genre de règlement auquel on aurait pu arriver autrement, par crainte de s'engager à décréter possiblement des clauses formelles de convention collective.