Article

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Although many U.S./Canadian differences in union recognition law have been adequately analyzed, some have been overlooked — particularly differences in the frequency with which labor boards on both sides of the border dismiss unfair labor practice (ULP) cases, and the speed and fairness with which they expedite their ULP litigation. This paper analyzes these differences in detail, referring for Canada to the Ontario Labour Relations Board. It shows why they are important, how they stem from national differences in governmental structure, how they interact with other aspects of union recognition policy, and how they affect outcomes in certification cases and ultimately union growth.

Though no comprehensive theory has emerged to explain why union growth in the United States has declined so that it now covers only about one-half as large a proportion of the workforce as unions in Canada (15%-20% versus 35%-40%), the strongest partial explanations stress national differences in public policy (Troy and Sheflin, 1985; Wood and Kumar, 1987). In particular, more pro-union labor laws and more public ownership have led to more union growth in Canada by reducing employers' incentives to pursue aggressive anti-union strategies, while giving more incentives to unions and workers to organize than in the United States (Weiler, 1983; Meltz, 1985; Chaison and Rose, 1987; Bruce, 1988; Troy, 1988).

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Arguments stressing these sorts of policy differences explain more than economic arguments, which maintain that changes toward a more «post-industrial society» account for the decline of unionism in the United States. The latter are contradicted by the fact that the Canadian economy is more service- and less manufacturing-based than its U.S. counterpart, and hence actually less union-prone in terms of these factors (Meltz, 1985; Lipset, 1986b). Policy-oriented arguments also explain more than political culture arguments, which assert that Canada's more collectivist traditions have led to more favorable public attitudes toward unions, which, in turn, have supposedly generated more union growth (Lipset, 1986a, 1986b). Such arguments lack empirical support, since public opinion towards unions has been almost identical in both nations since the 1950s (Bruce, 1988), while it has only been since 1960 that Canadian union density has become significantly greater.

Although differences in Canadian and U.S. labor laws constitute only one of several factors explaining differences in these nations' union growth rates, this factor is especially important. For the public sector, it is key, since an exceptionally high density of unionization in that sector in Canada (approximately 70%, Wood and Kumar, 1987) has largely been a product of collective bargaining policies giving more extensive rights to Canadian workers than to their U.S. counterparts (Finkelman and Goldenberg, 1983; Lemelin, 1984; Huxley, et al., 1986). In private sector industrial relations, Canadian labor law has facilitated more unionization by more effectively regulating unfair labor practices (ULPs) and related, marginally legal activities through which employers exercise coercive economic power to prevent unionization (Weiler, 1983). (Since Canadian and U.S. collective bargaining laws define employer ULPs identically, national differences in these sorts of employer activity can be precisely compared.) ULPs and related forms of employer resistance to unions are generally effective at thwarting unionization, if not countered by prompt and effective government policies (Dickens, 1980; Weiler, 1983; Freeman and Medoff, 1984). And, since the regulation of such practices has been markedly more effective in Canada (Weiler, 1983, 1984), it is not surprising that Canada's private sector union density is higher. Indeed, surveying the literature exploring the effects of these practices, Freeman and Medoff concluded that they account for between one-fourth and one-half of the U.S. decline in union density since the early 1950s (Freeman and Medoff, 1984).

Although many U.S./Canadian differences in union recognition law have been adequately analyzed, some have been overlooked — particularly differences in the frequency with which labor boards on both sides of the border dismiss ULP cases, and the speed and fairness with which they expedite their ULP litigation. This paper analyzes these differences in

detail. It shows why they are important, how they stem from national differences in governmental structure, how they interact with other aspects of union recognition policy, and how they affect outcomes in certification cases and ultimately union growth.

This focus on aspects of labor law that regulate ULPs and that mainly affect private-sector union growth may seem ironic, since Canada's higher union density is often explained solely in terms of differences in public-sector union growth. For instance, Troy asserts that Canada's higher union density is due to the larger size of its public sector as a proportion of the entire workforce (approximately 28%, versus 19% in the United States), and to the greater extent of its unionization (roughly 70% versus 40%) (Troy, 1988). A similar analysis attributes Canada's relatively stable, overall union density to the facts that from 1961 to the present, public-sector union density nearly quadrupled, growing from 16% to 64%, while private-sector union density declined from 33% to 20%-25% (Dion and Hébert, 1989). But, while the growth of public-sector unionism has been important in differentiating Canada's overall union growth pattern from that in the United States, so has the less rapid decline of Canadian private-sector unionism. This decline has proceeded at approximately half the U.S. rate. That is, between 1975 and 1985, private-sector union density declined from 26,4% to 21,0% in Canada, while falling from 25,0% to 15,5% in the United States (Troy, 1988).

Within these nations' private sectors, the differences in union density are also striking. Between 1976 and 1986, union density in manufacturing in Canada was virtually stable, declining from 43,5% to 41,6% as opposed to a decline from 41,6% to 24,0% in the United States (Meltz, 1989). Large national differences also appear between most other private subsectors *(Ibid.)*. Since private-sector workers constitute approximately half of all union members in Canada (Troy, 1988; Dion and Hébert, 1989), this is thus an important determinant of Canada's higher overall unionization rate. Had Canada's unions had to contend with the much higher rates of employer anti-union discrimination one finds in the United States, its private sector union density would probably have fallen at a much steeper rate.

Understanding how ULP cases are processed more promptly (and arguably, more fairly) in Canada is crucial for comparing the evolution of these nations' collective bargaining policies and political development. Regarding policy, most previous studies have stressed the importance of certification of workers without elections in Canada as a key, preventive means of minimizing anti-union discrimination by employers. But the success of this policy does not function in isolation. It is complemented by

other policies, such as limits on appeals and judicial review, which allow for prompt enforcement of the law after ULPs occur. If ULP litigation could be protracted for as long, or if complaints of ULPs could be dismissed as arbitrarily as in the United States, Canadian employers would have more incentives to commit ULPs, even with certification by card checks, or «instant elections». Likewise, if certification by card check was introduced in the United States, employers would nevertheless frequently be able to defeat unionization by engaging in ULPs, then utilizing opportunities for strategic delay in ULP cases if this aspect of the NLRB's procedures went unreformed. Though certification by cards or instant elections would probably curb a significant portion of ULPs, determined anti-union employers could probably counter theses reforms effectively by bolstering their resources for surveillance and undertaking coercive actions sooner. Thus, the enforcement aspect of union recognition policy requires analysis for an adequate understanding of how Canadian policies protect workers' organizational rights more effectively.

From the standpoint of political development, the more effective enforcement of these rights has been accomplished by legislation giving Canadian labor relations boards more powers relative to the courts. These relationships have not only eliminated appeals and strictly limited judicial review in almost all provinces, but they have also prevented the courts from rivaling labor boards, and the statutes which empower labor boards, in the making of collective bargaining policy. These relationships differ markedly from those in the United States. Thus, analyzing how ULPs are processed differently in these nations requires analysis of national differences in governmental structures and functions.

Since collective bargaining policy falls mostly under provincial jurisdiction in Canada, it is necessary to compare the administration of ULP cases at the NLRB with their administration in individual Canadian jurisdictions. This article compares ULP case-processing at the Ontario Labour Relations Board (OLRB) with the NLRB. Ontario serves as a critical case, because it is Canada's largest and most industrialized province, including about 35% of its population. Also, most of its labor relations board procedures are common to most other Canadian labor relations boards. For example, restrictions on appeals from its decisions in ULP cases, the prosecution of ULP cases by the parties rather than the government, and less formal and court-like procedures, are found at most other Canadian labor boards (Adams, 1985).

To analyze how Canadian labor boards protect workers' organizational rights more effectively, this article compares similarities in workers' organizational rights, and the processes through which they are

administered. In particular, it analyzes key administrative differences: (a) the importance of formally heard cases to the disposition of all ULP cases in both nations; (b) national differences in the disposition of ULP case loads, and especially differences in the limits they put on workers gaining access to hearings; (c) the major reasons for these differences; (d) national differences in the speed with which ULP cases are processed, and the reasons for this; and (e) how different national distributions of powers between judiciaries, legislatures, and administrative boards have led to differences in fairness and efficiency in the processing of ULP cases.

SIMILARITIES IN RIGHTS ENFORCED AND PROCEDURES

Although the United States and Canada differ considerably in the frequency with which ULPs by anti-union employers are committed, the practices proscribed and rights protected are virtually identical in both nations (Halliday, 1982; Weiler, 1983). This is due to the fact that most Canadian collective bargaining laws adopted the spirit, and sometimes the letter of Sections 7 and 8 of the U.S. *Wagner Act* of 1935, and have changed little since *(Ibid.)*. They outlaw discriminatory discharges and demotions, refusals by management to bargain with unions, anti-union threats, and other activities outlawed by Section 8 of the U.S. *Labor-Management Relations Act*. (For detailed comparisons, see Halliday.) The key national differences, in regard to private-sector collective bargaining policy, are thus in the administration of the law. As numerous studies have noted, Canadian labor relations boards regulate ULPs more effectively than the NLRB through the use of certification by cards rather than elections, first-contract arbitration, anti-strike-breaker laws, insistence on the inclusion of agency-shop or stronger union security clauses in all employment contracts, and the enforcement of stronger bans on employers contracting-out or terminating a business to avoid unionization (Weiler, 1983, 1984; Carter, 1982, 1983; Dion and Hébert, 1989).

ULPs are also more effectively regulated by the faster processing of ULP cases in Canada (Halliday, 1982). This administrative difference, however, and the differences in governmental structure and public policy underlying it, have received little analysis. For instance, Paul Weiler has argued that «no one suggests that a trial-type procedure could produce a final decision in fewer than two or three months in even a fraction of the tens of thousands of ULP cases processed annually under the NLRA» (Weiler, 1983). But he was probably taking for granted the current American political and legal context, since in Ontario, as this article shows, most formally litigated ULP cases are resolved almost this quickly (i.e., 4-6 months). This clearly contrasts with the U.S. process, which takes years.

Given the similarity in administrative procedures and institutions in the other Canadian provinces (with the important exception of Québec) (Adams, 1985; Carter, 1983), it is likely that formally heard ULP cases are litigated at approximately Ontario's pace, and hence several times faster than in the United States, in most of the rest of Canada.

What are the main differences in the steps one must take in the processing of ULP cases in these nations, especially those alleging the most typical offenses — i.e., discriminatory discharges or closely related violations? In both nations one files a ULP complaint (or «charge»), and then is confronted by officials who seek to effect a settlement between the parties in conflict. And in both nations, cases go to formal litigation in a trial-type «hearing» if settlement fails. But, as the analysis below shows, qualification for a hearing at the OLRB is almost automatic, whereas at the NLRB, charging parties must meet difficult criteria to qualify.

A second major difference is that in Canada cases are heard directly before a labor relations board, and that is also, almost always, its final stage. In the United States, cases are first heard by administrative law judges whose «recommended orders» can almost automatically be appealed to NLRB headquarters in Washington, which may render an entirely different decision. From there, cases can then be easily appealed to the courts (Weiler, 1983). So, basically, there are three stages in the U.S. process, versus one in most Canadian jurisdictions.

THE IMPORTANCE OF HEARINGS TO THE DISPOSITION OF ALL ULP CASES

Adequate deterrence and prompt enforcement of the law regarding ULP violations is essential to fair and efficient labor board administration. The two main functions of labor relations boards are (1) to act as «fair ballot associations» and test the sentiment of workers for unionization through formal votes, or by card or membership counts, and (2) to act as «public law enforcers» in remedying and deterring ULPs, in order to guarantee workers uncoerced choices regarding unionization and in exerting other collective bargaining rights (Miller, 1980). That the NLRB fails to protect workers' rights effectively, is suggested by the fact that ULP charges against management have grown geometrically in the United States in recent decades, so that in recent years approximately 5% of union supporters in certification campaigns have alleged that they were discriminatorily discharged (Weiler, 1983). This is approximately one-fifth to one-twenty-fifth the Canadian rate, depending on the province, after adjusting for national differences in population (Weiler, 1983).

As noted, discriminatory discharges are the most typical sort of ULP case alleging anti-union discrimination by management. They have constituted approximately 90% of all Section 8(a)3 violations of the *Labor-Management Relations Act* in the United States (Cooke, 1985). And, 8(a)3 charges, in turn, have constituted a majority of all ULP charges alleging anti-union discrimination in most years since 1950 (NLRB, 1948-86). Ontario's equivalent Section 66 cases, which also prohibit discriminatory discharges, have constituted about one-half of the OLRB's ULP case load in the first half of the 1980s (Haywood, 1987).

Promptness is crucial in the processing of discriminatory discharge cases, due to the sorts of remedies they require, in particular, the reinstatement of discriminatorily fired worker(s) or the declaration of a «bargaining order». (The latter certifies a union automatically, without a vote, and sometimes without majority support, when gross abuses are found.) That is, if reinstatement is offered to a worker several months after a firing, it tends to induce him/her to return to the former job and to increase the likelihood of union victory in a certification election (Aspin, 1966; Freeman and Medoff, 1984). But reinstatement offers made after more than one-half year usually have the opposite effects (Aspin, 1966; Gagnon, 1984). Reinstatements and bargaining orders are usually the only effective remedies for such cases, since the main alternative remedy, i.e., compensating workers with back pay, is generally ineffective (Weiler, 1985).

The time that it takes ULP cases to go through a formal hearing and obtain a remedy is crucial to the outcomes of all ULP cases, despite the fact that only a small fraction of them (in both board's processes) are formally litigated. This is so, because the cases that are heard (or tried, in the more formal U.S. setting) set the bargaining contexts for the large majority of cases resolved informally through settlements or withdrawals. The speed of litigation determines the costs, to workers and employers, of fighting ULP cases. Short hearings benefit workers, and long hearings benefit employers. Few workers have the money or time to fight ULP cases over a period of years. And they will be more likely to withdraw their cases if hearings and decisions require years (as in the United States) rather than months (as in Ontario). Conversely, employers will be less likely to settle on terms favorable to workers if slow hearings and decisions offer chances for strategic delays. And, even if eventually found guilty at the end of litigation, delay often helps employers undercut union support so effectively that they can nevertheless defeat a union drive while losing the legal case. These tendencies are reinforced in the U.S. system, which (unlike the OLRB) expects workers fighting ULP cases to actively seek employment as their cases progress (MacDowell, 1988).

this and subsequent *Annual Reports* show that approximately 20% of all ULP cases in Ontario have continued to be heard. (See later *Annual Reports*.)

As Table 1 and data in subsequent *Annual Reports* show, the OLRB's is a more hearing-centered process. It has had approximately five to seven times as large a proportion of its total ULP case load as the NLRB's go through formal action, i.e., to a hearing in recent years. It has also dismissed about one-tenth as large a proportion of its cases as the NLRB in the pre-hearing stage. A dismissed case cannot be won, so the NLRB, from the outset, precludes larger proportions of workers from winning the ULP cases than the OLRB. The NLRB denies many workers opportunities to win ULP cases not only through dismissals per se, but through the incentives impending dismissals give to workers to withdraw their cases or to make settlements on comparatively disadvantageous terms (McClintock, 1980). Conversely, in the OLRB process, the prospect of a guaranteed hearing within four weeks of filing a complaint provides a stronger bargaining position for workers and unions.

Both the NLRB and OLRB try to limit the number of cases going to litigation to a manageable number, and voluntary settlements are regarded as essential to this function. As former NLRB Chairman Edward Miller has noted,

> From an administrative point of view [a] high settlement rate is what has kept the size of the agency within bounds and the cost to the taxpayer at least tolerable. While, as we have said, settlement efforts take time and skill, they do not take nearly the time and skill involved in the trial of a case. One hour spent in achieving a settlement saves, at a minimum, forty hours of trial and trial preparation time. If there were even a 20 or 30 percent increase in the number of cases which had to be tried each year, the cost of supporting this agency would rise astronomically (Miller, 1980).

Settlements are also the preferred mode of resolving conflicts at the OLRB, which likewise desires to keep litigation to a minimum (Adams, 1985). But, while both boards praise the value of the settlements as a means of limiting bottlenecks from too much litigation, the NLRB uses smaller proportions of settlements (roughly 30% versus 70%), and larger proportions of pre-hearing dismissals (approximately 30% versus 3%) to accomplish this. Dismissed cases reduce litigation as much as a settled cases. So does a withdrawn case. Often though, cases are withdrawn in the United States after the charging party is notified that its case is likely to be dismissed. If cases are either withdrawn or dismissed in the United States, this «indicates that, after investigation, they were found to be without merit» (Miller, 1980). Table 1 shows that the combined proportion of withdrawals and dismissals, i.e., cases disposed of as «without merit» at the

NLRB, equalled approximately two-thirds of all ULP cases against management in the 1981-83 period. This proportion has remained virtually constant in subsequent years. (See NLRB *Annual Reports,* Table 7, for the 1980s.) By contrast, in the early 1980s, when the OLRB published comparable data, its equivalent of these cases without «merit» equalled less than one-seventh of its ULP cases.

TABLE 1

ULP Cases Disposed of by Different Methods at the OLRB and NLRB, by Percentage

OLRB

Year	*Formal Action*	*Dismissed**	*Withdrawn*	*Settled*	*Total*
1980-81	21,0	3,0	9,0	67,0	100
1981-82	18,0	3,0	10,0	69,0	100
1982-83	15,0	3,0		82,0**	100

* Estimates.
** Withdrawn and settled.

NLRB

Year	*Formal Action*	*Dismissed*	*Withdrawn*	*Settled*	*Total*
1981	3,6	33,8	34,4	28,3	100
1982	3,3	31,6	35,4	29,6	100
1983	3,0	31,1	34,5	31,1	100

Note: The cases involving «formal action» have had hearings.

Sources: The OLRB statistics are from its *Annual Reports.* See 1980-81, p. 40; 1981-82, p. 59; 1982-83, p. 68. The NLRB statistics are from Table 7 of its *Annual Reports,* listed under CA cases, i.e., cases complaining of ULPs by management for 1981-83.

Two of the most striking differences regarding the proportion of cases that qualify for a hearing in these nations, then, are that the NLRB has found that approximately seven times as large a proportion of cases as at the OLRB do not merit a hearing, and that the OLRB has usually heard about five to seven times as large a proportion of its total ULP cases. Generally, the NLRB tends to limit its litigation load more through pre-hearing dismissals and withdrawals, than through settlements, while the OLRB relies mostly on settlements. The large proportion of cases found to lack merit in the NLRB process biases it so that it is difficult for workers to even begin to fight ULP cases.

Beyond these anti-union biases, delays in individual ULP cases can cumulate into general administrative bottlenecks. Thus, justice delayed is justice denied for other workers, as well as for collective bargaining policy as a whole. Of course, simple eligibility for a hearing, as well as prospects for its quick resolution, affect the bargaining strategies of both unions and management, since workers and unions have little to bargain with if their cases are dismissed at the outset. Conversely, businesses have more incentives to discriminatorily fire workers who face impediments in gaining a hearing.

DIFFERENCES IN ACCESS TO HEARINGS

Differences in access to a hearing, and in the promptness of such hearings, lead to differences in the proportions of cases these nations' labor boards dispose of in different ways (dismissals, withdrawals, voluntary settlements, and cases resolved through formal hearings). Despite similarities in these nations' rights to organize, the processing of ULP cases in the United States involves larger proportions of dismissals and withdrawals, and a smaller proportion of settlements and cases heard than in Ontario, as the following analysis demonstrates.

Although it is difficult to find comparable data in the publications of these labor boards, the *Annual Reports* of the Ontario Labour Relations Board, in fiscal years 1980-81, 1981-82, and 1982-83, provide statistics which can be straightforwardly compared with the NLRB's. That is, in these years, the OLRB presented figures specifying the number of ULP cases that were withdrawn and settled (a statistical practice which it has since discontinued), comparable to the NLRB's figures. This allows for comparisons of differences in the disposition of all cases for those years. The only gap in this OLRB data is the lack of a category for pre-hearing «dismissals» corresponding to the NLRB's category. Although the OLRB has a «dismissals» category, this refers to cases that are dismissed *after a hearing,* not cases that are dismissed as unqualified to go to a hearing (as in the NLRB statistics). This is a minor gap, however, since the number of cases dismissed as unqualified to go to a hearing by the OLRB's screening panel have constituted less than 5% of all ULP cases in each year in the 1980s, and usually no more than 3% (Dissanayake, 1986). Subtracting the number of cases «dismissed» in the NLRB's sense, withdrawn, and settled from the total yields the total number of ULP cases that were heard, since all cases are disposed of in one of these ways. From 1982-83 on, the OLRB has included withdrawn cases in its «settlement» category. Although this prevents as detailed a comparison with the NLRB as for the earlier years,

Legal and Procedural Reasons for More Dismissals at the NLRB

The most important national differences determining the ease with which workers/ unions can be heard in ULP cases are the different criteria these Boards use to decide which cases «merit» a hearing. The NLRB requires (1) a factual investigation and (2) an analysis of whether such facts as appear to be provable are legally sufficient so that the prosecutor should continue an effort to remedy the violation (Miller, 1980). The investigation is mandatory for all cases, and the NLRB is required to seek «all the facts and to decide whether or not a violation has occurred» (Kammholz and Strauss, 1980). As the NLRB's *Case-Handling Manual* asserts, «the investigation serves as the basis for all action eventually taken in a case. It must, therefore, reveal the *'entire picture'* of the case» (U.S. National Labor Relations Board, 1983). Exactly what the criteria are, for finding «all» the facts and judging them, is unclear, however, since they are not defined by any statutory standards (McClintock, 1980), but clearly a considerable production of evidence is required.

In Ontario, on the other hand, cases are *automatically* scheduled for a hearing, and for the vast majority of cases there is no gate-keeping investigation at all. Efforts are made to weed out frivolous or misconceived cases by an informal review of a screening panel. But this is not an investigation like the NLRB's, since no effort is made to ascertain whether the main facts on which a case hinges are provable. Instead, the OLRB screenings are concerned only with the logic of the complaint. They assume the complainant can prove its factual allegations, and then ask if this will prove that a violation of the Act occurred for which there is a legal remedy (Dissanayake, 1986). Thus, the OLRB dismisses cases «only when there is nothing in the complaint which would permit the Board to give the relief sought», including the logic of the allegation itself (Sack and Mitchell, 1985). In consequence, the OLRB is «very cautious in dismissing a complaint» before a hearing (under Rule 71), and «will do so only when it considers the position of the applicant to be clearly untenable» *(Ibid.)*. As such, qualification for a hearing is virtually automatic.

The NLRB's requirement that the investigation produce *all of the evidence,* or enough to create the *entire picture* of the case, thus places a burden on the charging party which is absent at the OLRB. This burden is especially onerous, since key jurisprudence at both labor boards has recognized «the practical reality that the employer is the party with the best access to proof of its motivation» in 8(a)3 cases (*NLRB* v. *Wright-Line,* 1980) (NLRB, 1980), and that the key «facts lie peculiarly within the

knowledge of one of the parties», i.e., business (*National Automatic Vending,* 1962), (*Canadian Labour Law Cases,* 1962). The NLRB's investigation is really are pre-hearing hearing: it requires the same sort of full, or nearly full production of evidence that a hearing would, and the NLRB investigator seeks to determine a comprehensive array of pertinent facts. Indeed, the NLRB's requirements for evidence suggest that the normal tools for evidence production in a hearing, i.e., subpoenas, cross-examinations, and rights to judicial review, would be available to the charging party if the same principles of «natural justice», or due process, were followed at the NLRB as at the OLRB. The *Ontario Labour Relations Act* (OLRA) holds that the OLRB «shall give full opportunity to the parties to any proceedings to present their evidence and make their submissions» (*Revised Statutes of Ontario,* 1980, c. 228, s. 102 {13}). As Jacob Finkelman, a former Chair of the OLRB has argued, the

> 'requirement of natural justice' ... has held that there should be 'a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view'. Carried to its logical conclusion, this principle whould call for complete disclosure to each of the parties of all relevant evidence and argument so that they may be rebutted by the parties opposed in interest (Finkelman, 1965).

Generally, these norms have been construed to give a complainant a right to a hearing in the OLRB process *(Ibid.)*, since it is often only through a hearing and associated means, such as cross-examination and subpoena powers, that such a full production of evidence can be achieved.

In the United States, however, the compulsory tools normally used to produce evidence in a hearing are usually not available in NLRB investigations. Instead, the investigator's assessments are usually based on evidence that the parties *voluntarily* supply to the investigator. And usually, only the charging party's (worker's/union's) evidence is examined, despite the likelihood that many of the most important facts reside in the employer's possession.

> As a first step, arrangements are made with the charging party to interview his witnesses and to receive such other evidence as he wishes to submit. The agent will normally not carry the investigation beyond the witnesses and the evidence offered by the charging party. If, on this basis, he determines that a *prima facie* case has been established, the investigator will seek to ascertain the position of the charged party through interviews and a review of any evidence the charged party *may submit* (my emphasis) (Kammholz and Strauss, 1980).

The words «may submit» are crucial. While the charging party is expected to make a thorough *prima facie* case from his own evidence and while labor board jurisprudence on both sides of the border has recognized that these facts are much more accessible to the employer, the employer is

under no compulsion in the investigation to produce all of the relevant facts *(Ibid.)*. Thus, NLRB investigation procedures often depend on the willingness of employers to voluntarily produce the evidence which could undermine their own arguments (Kowal, 1985).

To show how these procedures and rules can bias an investigation, suppose that a case involves a worker who was fired, according to the employer, for tardiness. If the worker's prior record regarding promptness and absenteeism had been good, and the employer had seized on a trivial instance that would not normally have occasioned discharge and exaggerated it as an intolerable offense because the worker was a union activist, this would have been a clear case of discrimination *(Ibid.)*. If the charging party (worker/union) had full access to the employer's records over a fairly long period of time, it could probably show that the employer departed from his usual standards. Such atypical employer behavior, and evidence that the employer knew of the workers' pro-union leanings, would likely suffice for an Administrative Law Judge (ALJ) to find that a ULP had been committed. On the other hand, if an employer had not proferred such records and had fired some non-union activist workers at about the same time as the union activist(s), it would have a better chance of making these pretextual actions appear legitimate. The NLRB investigator would lack a comprehensive picture of the employer's typical practices, and could thus be misled into thinking that firing for small matters was standard practice *(Ibid.)*. This would likely lead to the case's dismissal.

The Inadequacy of Equalizing Weapons

In NLRB investigations, the complainant is supposed to have legal weapons with which to offset the biases inherent in the access to information noted above — i.e., the investigatory subpoena and rights to appeal dismissal decisions. The former's purpose is to allow the charging party to subpoena records that the employer does not wish to divulge. In fact, however, the use of this tool depends on the discretion of the same General Counsel whose subordinates are responsible for dismissing cases, and its use has been granted only on «rare occasions» (Kammholz and Strauss, 1980). The NLRB's investigation process also lacks judicial review. Neither the Board in Washington, nor the courts, may hear appeals from cases dismissed in investigations. Such appeals are heard only by the General Counsel's own staff. Thus, the General Counsel's office has total control over the dismissal of NLRB cases; 94% of these are rejected (McClintock, 1980). This is much less than the 15%-20% reversal rate of administrative

decisions by the circuit courts *(Ibid.)*. This slight rate of reversal is not surprising though, since these procedures violate the principle that for appeals to be fair, they should be heard by an institution other than that from which they originate.

Of course, if the charging parties (workers and unions) in 8(a)3 cases agreed that their charges had «no merit» after receiving dismissal letters, one could assume that the NLRB's relatively high rates of dismissal and withdrawal simply eliminated cases that did not deserve a hearing. However, approximately half of all dismissed 8(a)3 cases have been dismissed against the complainant's will in recent decades *(Ibid.)*. Also, the fact that so many dismissals have occurred forcibly suggests that many of these charges may not have had merit. If the NLRB had made vigorous efforts to gain access to key evidence determining if an employer discriminated (such as disciplinary, lay-off, and other relevant business records) and thus could construct the «entire picture» of the case, and if it had clearly specified the nature of this evidence and the specific reasons why it decided that a case lacked merit in its dismissal letters, then one could infer that the Board's dismissals were probably justified. From a random sample of these letters drawn from Region 1, however, it appears that the NLRB does not follow its own rules, which obligate it to fulfill these tasks, to facilitate well-grounded appeals, and to limit abuses of its bureaucratic discretion (Bruce, 1988).

Workers and unions have at times asked for judicial review of the General Counsel's decisions to dismiss 8(a)3 cases, especially in light of the abundant opportunities for appeal offered to management after these cases are heard. Although the Supreme Court has never directly addressed the issue of the General Counsel's unreviewable right to dismiss ULP cases, the Circuit Courts have asserted that such power was necessary for administrative efficiency, and that to require a trial-type hearing whenever a charging party disagreed with the General Counsel's determinations «would further complicate the Board's task» *(Ibid.)*. Avoiding turning investigations into full-blown hearings was also necessary, according to the courts, in order to maintain the «amiable and peaceful settlement of labor disputes» *(Ibid.)*. The courts have also justified these powers on the grounds that they were consistent with the legislative intent of the *Taft-Hartley Act*. These reasons largely lack validity, however, given the ease of appeal in almost every other area of American law, and the fact that the *Taft-Hartley Act* took no position on these issues (McClintock, 1980).

Structural Reasons For More Dismissals at the NLRB

The OLRB is able to hear a larger proportion of its ULP cases, and dismiss smaller ones than the NLRB for three main reasons: (a) it covers a smaller population; (b) it has a smaller case load of ULPs due to better regulation; and (c) the charging parties pay their own expenses. In the United States, the NLRB handles an extremely large volume of cases covering virtually the entire private sector workforce. In 1983, for instance, it handled 27,454 ULP cases versus 674 at the OLRB. In Canada, though, the protection of workers' rights falls under the jurisdiction of ten provincial labor relations boards and a federal labor relations board. So, the total case intake is subdivided eleven ways, in a nation with one-tenth as large a population as that in the United States.

Despite the different territorial and demographic structures of these boards, however, the OLRB and NLRB spend almost identical amounts per worker covered under their respective jurisdictions — approximately 75 cents per voting-age citizen (Bruce, 1988). These similar per capita expenditures show that the OLRB does not hear a larger proportion of its ULP cases because it spends more money than the NLRB. Instead, these overall spending similarities suggest that the OLRB can hear a larger proportion of cases because it cuts other costs. Most significantly, it can cut costs because its overall case load is smaller, and especially since the frequency of ULPs per certification case is several times lower than in the United States (Weiler, 1983). This phenomenon is largely a function of the more effective regulation of ULPs by the OLRB, through automatic certifications and through faster ULP case processing itself. The latter enables the OLRB to play an educational role in setting clear expectations among the regulated parties and the public that violations of the OLRA will be discovered and remedied in a timely way (Adams, 1985). This provides more incentives than the U.S. process for Canadian employers (and U.S. businesses operating in Ontario) to obey the law.

The third factor that limits the number of complaints and allows the OLRB to hear a larger proportion of its ULP cases is that the parties, rather than the government, bear the costs of prosecuting their own cases. Ontario's labor law thus forces complainants to bear more of the burden in exercising their rights than in the United States, where the government prosecutes and provides counsel. Doubtless, the Canadian system limits a number of frivolous cases before they begin. It also constrains pressures from taxpayers to limit rights to a hearing. Indeed, when surveyed in the 1960s, most Canadian industrial relations experts opposed suggestions that the government prosecute ULP cases, on the grounds that this would impose too great a burden on taxpayers (Christie and Gorski, 1968).

Although the OLRB's lack of a formal investigation and guarantees of a right to a hearing suggest possibilities for reforming the NLRB, it is essential, within the OLRB's institutional design, that the parties rather than the government, prosecute. If these responsibilities were transferred to complainants in U.S. ULP cases, this could eliminate deserving cases in which workers could not afford the costs of counsel, as well as frivolous ones. This would be especially likely to occur if the unions were not willing to provide such legal assistance to workers fighting ULP cases. The Ontario system (which, in this respect, is general throughout Canada) works, in large part, because the unions have committed their lawyers to this aspect of the organizing process. In the United States, however, while union organizers often accompany workers and play a semi-active role in 8(a)3 hearings, the unions generally do not commit their lawyers to prosecuting. Instead, they view this as the NLRB's responsibility (Kowal, 1987). Unions in the United States would have to make a quantum leap in their organizational and financial commitments to make this sort of system work.

DELAY IN ULP CASES

How fast do these labor relations boards process discriminatory discharge (and closely related) cases which are formally heard? This section compares national differences in average overall time lapses, and time lapses for each stage of these cases.

Overall Differences

It is difficult to compare differences in the promptness with which the NLRB and OLRB process cases involving at least one Section 8(a)3 or Section 66 allegation — i.e., cases involving discriminatory discharges and closely related offenses, since neither board publishes these figures, per se. But overall time lapse data may, nevertheless, be obtained and compared by other means. For 8(a)3 cases, they can be tabulated from the texts of these decisions, which are all published in *Decisions and Orders of the NLRB.* These usually record the date on which charges were filed or, at least, the first date of hearing, along with the date on which the decision was completed. Though calculating time lapses from first day of hearing, rather than from when a charge was first filed underestimates time lapses, it nevertheless allows minimum estimates. Such an analysis of representative samples of 8(a)3 decisions heard, for several years in the 1980s, revealed their median time lapses to be virtually identical (i.e., less than a 3% difference) with the median time lapses for all ULPs heard in the same years

(Bruce, 1988). Assuming then, that median time lapses for 8(a)3 cases have been equal to or greater than those for all ULP cases (which are recorded in the NLRB's *Annual Reports*), the median time lapses for 8(a)3 cases would have been at least the number of days shown in Table 2.

TABLE 2

Median Time Lapse at NLRB for all ULP Cases Heard, and Estimated Median Time Lapses for 8(a)3 Cases Heard

Year	*Days*
1983	658
1984	660
1985	720
1986	769
1987	709

Source: Table 23 of *Annual Reports* of the National Labor Relations Board.

The OLRB supplied statistics from its internal records for the 1983-87 period, which gave overall time lapse statistics for every ULP case heard involving a Section 66 allegation (Haywood, 1987). These cases involve the same allegations as 8(a)3 cases in the United States (discriminatory discharges and similar offenses). They constituted 45% to 55% of all of the OLRB's Section 89 (ULP) cases in those years. Table 3 shows the overall processing times for these cases.

TABLE 3

Median Time Lapse at OLRB Section 66 Cases Formally Heard

Year	*Days*
1983-84	137
1984-85	146
1985-86	183
1986-87	187

Source: OLRB Records. From computer printouts and notes dated 1/27/87. From Len Haywood, Research Director, Ontario Ministry of Labour.

Although time lapses at both boards have worsened in recent years, it is clear that the NLRB has, in each year, had time lapses four to five times greater than the OLRB's. Since 1982 the NLRB has always taken a median of more than 658 days to process its section 8(a) cases, as Table 2 shows. In earlier decades, its median time lapses varied from 325 to 483 days (Miller, 1980). Thus, its time lapses have always been high in comparison with those in recent OLRB figures[1].

Differences by Stage

Which stages contribute most to these national differences in delay? Although the OLRB does not publish statistics recording time lapses between the stages of its «heard» cases, it does publish goals for these stages, which allow impressionistic estimates for comparison with the NLRB's more exact figures. Since the target times are reviewed critically by Ontario's trade unions and parties in the legislature, and because the Board's case monitoring system requires fairly realistic targets, these give at least a rough approximation of actual median time lapses.

In the 1983-85 period the OLRB generally scheduled hearings for 28 days after the filing of a complaint (Aynsley, 1984). (The filing of an OLRB «complaint», the very first step in the ULP process, is the same as filing a «charge» in the United States.) The OLRB's Registrar also maintained that 95% of ULP decisions were written within three weeks of the hearings' completion *(Ibid.)*. Although no OLRB time targets were available for the stage from the beginning to the close of a hearing, this can be calculated by subtracting the sum of the target times for the two stages noted above (i.e., from the filing of a complaint to the start of a hearing, and from the end of a hearing to the completion of the Board's decision) from the median total time lapse.

The NLRB does not provide breakdowns of time lapses by stage for Section 8(a)3 cases per se, although it does so on an aggregate basis for all ULPs cases. Since, as noted, median overall time lapses for all ULP cases have been similar to those for 8(a)3s, and since structural differences (especially the availability of appeals) — which are as relevant to 8(a)3 and Section 66 cases as they are to all ULP cases — largely account (see Table 4) for differences in delay in the stages where national differences are most pronounced, it is reasonable to infer that the differences by stage for 8(a)3

1 The OLRB apparently has no easily accessible record of similar data for earlier periods.

cases are broadly similar to the differences by stage for all ULP cases. Such inference-drawing thus allows a rough comparison of the efficiency of these Boards in processing their Section 8(a)3 and 66 cases by stage.

Table 4 compares time lapses, by stages, for fiscal year 1983-84 (OLRB) and 1983 (NLRB). This time period was chosen since it was one of those for which the OLRB provided overall time lapse data for Section 66 cases, and for which the Board's Registrar had volunteered estimates of the time taken for these cases to go through various stages. Table 4 shows that the biggest differences were in Stage 3, the decision-writing period between the close of a hearing and the issuance of an initial decision, and Stage 4, the period of appeal between the issuance of the Administrative Law Judge's decision and the decision of the NLRB itself in Washington, a process which has no counterpart in Ontario.

TABLE 4

NLRB and OLRB Time Lapses by Stage in all ULP Cases Heard (Fiscal Year 1983-4, OLRB; Fiscal Year 1983, NLRB)

Major Stages Completed	*NLRB Days*	*OLRB Days*
1. Filing of charge to issuance of complaint	45	28*
2. Complaint to close of hearings**	156	88
3. Close of hearing to issuance of ALJ's decision***	118	21*
4. ALJ's decision to issuance of Board decision	324	NA
5. Filing of charge to Board decision	658	137

* Estimate

** Beginning to close of hearing at the OLRB

*** Close of hearing to Board decision at the OLRB

Sources: U.S. National Labor Relations Board, *Annual Report,* 1983, Table 23. OLRB data from notes and computer printouts dated 1/27/87, provided by Len Haywood, Research Director, Ontario Ministry of Labour. Interview with OLRB Registrar Donald Aynsley, April 1984.

The overall time lapse differences between these boards are so gross that the differences by stage, even allowing for considerable imprecision in the OLRB figures, are obvious. Since the median time lapse for ALJ decision-writing at the NLRB (stage 3) almost equals that for the overall

time lapses in OLRB cases, it is probable that NLRB decision-writing time would be much longer than the OLRB's, even if the OLRB's time targets underestimated actual decision-writing time by several magnitudes. Also, the fact that the appeal from the ALJ to the NLRB has no equivalent at the OLRB makes it a source of 4-11 months of extra delay (Miller, 1980; NLRB, 1980-86). Also, once the NLRB's process of internal appeals has been exhausted, it is comparatively easy for anti-union employers to use appeals to the courts for strategic delays, and to make the 1000 day unfair labor practice case a commonplace (Weiler, 1983).

These time-lapses reflect the more pervasive influence of courts and judicial review in the NLRB's process. So does the fact that decision-writing is slower at the NLRB. The relatively great powers of U.S. courts have allowed them to disagree with the NLRB over which principles should decide 8(a)3 cases (*NLRB v. Wright-Line,* 1980). Court decisions and influences have also led to more ambiguous criteria for determining a violation, more constraints on drawing inferences from records, and more emphasis on determining the employer's state of mind in NLRB than OLRB decisions (Bruce, 1988). These differences all tend to lead to more delay in decision-writing in the U.S. Furthermore, the greater power of the courts in the U.S. constitutional system was responsible for the establishment of the NLRB's internal appeals stage (Bowman, 1942), as well as for the ease of appeal to the courts per se. Thus, while the large territory and population of the U.S. made it imperative for the Board to delegate decision-making responsibilities to officials who could serve local populations — i.e., to ALJs (or Trial Examiners, as they were known before 1971) — judicial review, and NLRB timidity in the face of it, mitigated against these officials gaining powers to make final decisions. So did the power of the Republican/Southern Democratic coalition, which defeated legislation in 1961 that proposed such reforms (Bruce, 1988).

The more judicialized character of the U.S. process also contributes to more delay in the decision-writing and hearing stages at the NLRB due to the power and judge-like independence of the ALJs. That is, while the OLRB has been able to administer its officials' work according to a systematic, «management-by-objectives», work-monitoring program (OLRB, 1981-82), the «make-believe-judges» (Miller, 1980) at the NLRB, have successfully resisted allowing themselves to be «administered» in this, or less formal ways by the NLRB's General Counsel. Thus, in all these ways, the differences in delay in these boards' ULP processing are largely structural, and derive from the relatively greater power of the courts vis-à-vis administrative agencies (tribunals) in the U.S. political system.

JUDICIAL REVIEW AND APPEALS

To compare the extent to which appeals and judicial review condition the processing of ULP cases, it is useful to note the distinctions that Canadian legal scholars make between appeals and review, and the way in which appeals, per se, of these decisions are barred in English Canada.

It should be stressed that the intervention of the courts with regard to decisions of the labor relations boards (and other administrative boards or tribunals) by prerogative writs is not considered to be the right of *appeal* but that of *review,* or to use the expression of Lord Sumner, the right of *supervision.* The difference is that the courts do not claim the right to decide issues submitted to the boards, as the courts exercising appellate jurisdiction would claim; but they claim the right to *review* or *supervise* without deciding the issues, and to uphold or quash decisions by the boards, or to remit such decisions for further consideration on certain specific grounds under common law right by prerogative writs. Thus the courts exercise a supervisory jurisdiction, not an appellate jurisdiction (Wanzycki, 1969).

Since the banning of appeals of labor relations board decisions has effectively prevented Canadian courts from «deciding the issues» in ULP cases, this has prevented them from developing a jurisprudence of their own to rival that of labor relations boards, and made the latter the sole authority in ULP jurisprudence in English Canada. This is quite different from the division of authority between the NLRB and courts in the United States (*NLRB v. Wright-Line,* 1980). Additionally, even the restricted forms of judicial review which do occur in English Canada appear to be much less frequent than appeals in the United States. For instance, the Ontario Labour Relations Board, between 1982-83 and 1984-85, had four or fewer of its ULP cases reviewed per year, out of a total of approximately 65-70 Section 66 cases — i.e. 0-6%. (Since the number of all ULPs heard was not available, using the total number of Section 66 cases as a surrogate overestimates the proportion of all ULPs reviewed)[2]. In the United States, by contrast, approximately one-third of all unfair labor practice cases against management which were decided by the NLRB were appealed to the courts in the early 1980s, as Table 5 shows.

Rules Governing Access to Appeals and Judicial Review

To determine why judicial review and appeals of labor relations board decisions are more limited in Canada, one needs to answer two main questions: (1) how do Canadian and U.S. elites differ regarding the roles they

2 All of the OLRB cases reviewed are summarized in its *Annual Reports* in the «Court Activity» section.

think courts, administrative boards, and legislatures should play in the implementation of labor relations acts; and (2) what specific legal rules bar «appeals» from Canadian labor boards, and limit the proportion of cases reviewed more stringently than in United States.

TABLE 5

Judicial Review of OLRB ULP Cases

	Total ULP cases with judicial review	*Number of Section 66 cases heard*	*% Reviewed*
1982-83	0	67 (est.)*	0
1983-84	4	70	6
1984-85	2	65	3

Sources: «Court Activity» sections of relevant OLRB *Annual Reports,* and OLRB records of section 66 cases heard, provided by Mr. Haywood, 1/29/87.

* From average of subsequent two years.

Judicial Review of NLRB ULP Cases

	*Compliance**	*Circuit Court Decrees***	*% Appeals to Courts*
1980	3,7%	1,4%	38%
1981	3,6	,9	25%
1982	3,3	1,0	30%
1983	3,0	,9	30%

Source: From NLRB *Annual Reports,* Table 7.

* Total percentage of CA cases (ULPs against management) heard and remedied.

** These are a sub-set of CA compliance cases, i.e., CA cases that get appealed to the courts after the NLRB's decision.

National Differences in Conceptions of Court/Labor Board Relations

In Canadian legal and industrial relations circles, it is generally assumed that labor relations board officials are likely to have more expertise than judges in industrial relations matters, and hence that their decisions should be final and without appeal to the courts (Adams, 1985).

Otherwise, according to this reasoning, losing parties would have chances to win decisions on second attempts in inferior tribunals, and to delay cases in which prompt remedies are essential. Accordingly, to the extent that judicial review is necessary, it should be limited as strictly as possible. The view that labor boards will generally be more expert than judges stems partly from assumptions that the latter's upper middle-class backgrounds, long years of formal education and lack of practical experience in industrial conflicts, and remoteness from the parties in conflict in litigation, vitiates their expertise in these matters (Weiler, 1976). It also derives from the fact that tri-partite (union, management, and government) representation on Canadian labor boards gives these officials more practical experience than judges in these matters. So does the fact that all hearings are held at labor boards (and this is the case in all of the English Canadian provinces), rather than by ALJs or similar delegated authorities. (This, of course, contrasts with the NLRB in Washington, which does not see the parties in conflict, but only reviews ALJ decisions). It is also widely assumed in Canada that appeals and easier review of ULP decisions would undermine the promptness required for justice to be effective in the implementation of collective bargaining policies (Adams, 1985). Given these assumptions, most Canadian labor relations acts have banned appeals of ULP decisions.

Grounds for Appeals and Review

Although some judicial review of labor board decisions is still allowed in English Canada, it is restricted much more than in the United States, as the statistics in Table 5 suggest. Labor relations board decisions need not be made with «substantial evidence» as in the U.S., where this ambiguous requirement allows courts to intervene frequently to re-weigh evidence and re-write decisions. In Canada, these decisions need be made only with «some evidence» to avoid review (Adams, 1985). This prevents judges from re-writing decisions on the basis of their own interpretations of evidence. (Though they may ask a board for a new decision if they perceive that no evidence or the wrong kind of evidence was used.) This prevents judges from writing «appeals» as defined earlier. Courts in English Canada also may not rewrite the decisions of labor relations boards if they disagree on questions of legal interpretation, since the labor boards, and not the courts, are regarded as the proper interpreters of labor relations statutes. This restriction is so strong in Ontario that it even prevents the courts from reviewing decisions which allegedly involve an «error of law on the face of the record» *(Ibid.)*.

Although a labor relations board's decision may raise questions of law or evidence, unless these are linked to questions of jurisdiction (such as, «Is the board the appropriate tribunal to hear the case?») or «natural justice» (such as, «Did the procedures of a hearing give the parties a fair right to be heard?») it will not be subject to review (Ibid.); Thus, only poorly made, relatively rare decisions will be reviewed.

These restrictions on appeals and judicial review stem from «privative clauses» in the statutes of Canada's various labour relations acts, so-called because they deprive the courts of jurisdiction. Currently, all statutes regulating collective bargaining in English Canada are covered by such clauses *(Ibid.)*. And, in accord with the rationales noted above, they restrict the jurisdiction of the courts to allow labor relations boards to function promptly, and with little challenge to their expertise, in carrying out the purpose of their statutes.

While «finality clauses» in American statutes assert that the decisions of labor relations boards should be «final», and that the courts should defer to these agencies' special competence, especially if their fact-finding efforts are supported by «substantial evidence», these clauses in fact lay NLRB decisions wide open to appeals and review, as noted previously. Comparison with the privative clause in the *Ontario Labour Relations Act* reveals the weakness of these NLRB clauses. For instance, the privative clause in the current (1980) OLRA, (which has remained the same since 1950), reads:

> 108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings (Adams, 1985; *Revised Statutes of Ontario, 1980,* c. 228, s. 108).

Of course, even these strict clauses have been vulnerable to judicial review on the grounds of «jurisdictional error» or a «denial of natural justice», as noted above. But though some Canadian lawyers have feared that these weaknesses would lead down the slippery slope to widespread judicial intervention in labor board decisions, (especially Laskin, 1952), and to the «inherent futility of privative clauses», this has not occurred to any significant extent, if the U.S. experience is used as a frame of reference.

A major reason why privative clauses have succeeded at preventing Canadian courts from re-making labor board decisions is that they fit well with the British parliamentary form of government and its traditions, which generally have limited the power of the courts more than the U.S. constitutional system. Not surprisingly, Canadian privative clauses have

antecedents in similar clauses in British statutes, the earliest of which date back to the beginnings of parliamentary sovereignty. These prevented courts from interfering in the implementation of policies by Parliament and administrative tribunals (Royal Commission, 1968). Indeed, with the development of the welfare state and other modern forms of regulation, judicial review of administrative agencies has become so restricted (through privative clauses and the norms associated with them) in Britain that it has become almost extinct (Shapiro, 1981).

Although the British parliamentary system and its traditions facilitated the weakening of court powers over labor boards in Canada, the strictness of these constraints was not an inevitable product of these constitutional factors. Instead they emerged from political conflicts and from the learning experiences of policy elites. First, judicial review has been more prevalent in Canada than in Britain, since administrative law in Canada has been a hybrid between British and American models. Thus, there has been more respect in Canada for individual rights and rights of appeal than in Britain. Canada's recent enactment of *The Charter of Rights and Freedoms* is only the latest development in an ongoing struggle between advocates of individual rights, interpreted and defended by courts, versus the communal rights enacted by legislatures[3]. The diversity of Canadian approaches toward judicial review is also evident from the fact that it varies enormously by policy field, with the dominant view holding that it generally be more limited than in the United States, tailored to the imperatives of particular policy fields (Mullan, 1974).

Labor law has been a polar and pioneering field in limiting judicial intervention in Canada. And labor lawyers such as Laskin and Finkelman provided key rationales legitimating these changes. Rather than evolving directly from Canada's governmental structure and «tory» traditions, however, the first labor law privative clauses, were advocated by Canada's social democratic party — the CCF, which won their introduction in Ontario and Saskatchewan, in the 1940s, against the opposition of Canada's major parties and the Communists (who then backed the Liberals). These parties all advocated versions of Canadian Wagner Acts which would have allowed the courts to hear ULP cases (Bruce, 1988). The CCF, on the other hand, wanted to give labor boards the power to make final decisions in these cases, free from judicial intervention and appeals, because its policy experts perceived that easy appeals inhibited the effectiveness of the *Wagner Act* in the United States *(Ibid.)*. In Saskatchewan, it

3 Or, in the case of administrative law, between lawyer's values and civil servants' values (Willis, 1968; Laskin, 1952).

fully achieved this goal in the 1940s. And the model for labor board powers which it established in these respects eventually spread throughout English Canada.

CONCLUSIONS

The analyses presented in this paper have demonstrated that Ontario workers complaining of anti-union discrimination have a much better chance of gaining a hearing, and of having their hearings promptly expedited, than their U.S. counterparts. These differences give employers fewer incentives to engage in ULPs in Ontario, and help account for the lesser frequency of ULPs, as well as the increments of increased union growth deriving from this, in comparison with the United States. These policy differences also probably contribute to the effectiveness of other aspects of Ontario's union recognition policies, particularly certification without elections and «instant elections». Also, since the structures and procedures that have led to prompter ULP hearings and easier access to them in Ontario also exist elsewhere in Canada (except Québec), these institutions probably regulate ULPs throughout English Canada more effectively than in the U.S.

Differences in the structure of the Canadian and U.S. governments, particularly the relative power of administrative agencies (tribunals) vis-à-vis the courts, and the extent to which the courts intervene in the labor relations board decision-making, are among the most important factors determining the promptness with which ULP cases are processed. These administrative differences, in turn, have derived both from differences in constitutions, and from differences in the nature of political party conflict in these nations.

Pressures for more dismissals in the U.S. derive from a variety of factors not obtaining in Ontario: (a) the much larger number of ULPs that the NLRB must process, even allowing for differences in population; (b) the fact a single labor relations board has jurisdiction over virtually all the nations' private sector ULP cases; and (c) the fact that the government, rather than the parties, prosecutes these cases at the taxpayers' expense.

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Le traitement des affaires de pratique déloyale de travail aux États-Unis et en Ontario

La densité syndicale est, en règle générale, à peu près le double au Canada qu'aux États-Unis à cause surtout des politiques nationales divergentes en matière de négociation collective. Dans le secteur privé, cet écart dans le développement du syndicalisme découle principalement de la réglementation plus efficace sur les pratiques déloyales de travail (PDT) au Canada. Comme cette politique est moins rigide outre frontière, les employeurs ont souvent plus de facilité à intimider les travailleurs en les empêchant de fonder des syndicats et de les maintenir actifs. Alors que d'autres études ont attribué la plus grande efficacité de la réglementation à la vérification des formules d'adhésion syndicale et à la tenue rapide de votes de représentation au Canada plutôt qu'aux scrutins formalistes accompagnés de longs délais auxquels le *National Labor Relations Board* (NLRB) recourt aux États-Unis, l'article révèle que d'autres mesures importantes, notamment celles qui ont trait à la disposition des affaires de manoeuvres déloyales, permettent aux commissions de relations du travail canadiennes de trancher ces questions avec une plus grande efficacité.

Étant donné que la politique de négociation collective au Canada relève généralement des provinces, l'article met en parallèle les méthodes utilisées par le NLRB et l'Ontario Labour Relations Board (OLRB). On a choisi l'Ontario comme point de comparaison parce qu'elle est la province la plus populeuse du Canada. En outre, les pratiques et les organismes sur lesquels l'article attire l'attention sont presque identiques dans l'ensemble des provinces de langue anglaise. D'une façon plus précise, il compare la facilité avec laquelle les plaintes des travailleurs et des syndicats en matière de PDT peuvent donner lieu à des auditions formelles devant l'une et l'autre commissions. Finalement, il évalue la rapidité avec laquelle les deux organismes procèdent à l'audition des plaintes.

Fondamentalement, l'article estime que les travailleurs et les syndicats plaignants ont plus facilement accès à des auditions en Ontario (et, de même, dans les autres provinces de langue anglaise), puisqu'ils peuvent les obtenir presque automatiquement. Aux États-Unis, par contre, il leur faut affronter un processus d'enquête préliminaire exigeant assorti d'attitudes partiales. Aussi, un nombre considérable des affaires qu'ils soumettent sont rejetées ou retirées avant la tenue de l'audition. Par conséquent, on y compte, proportionnellement, beaucoup moins de cas portés à l'audition qu'en Ontario. Les affaires sont aussi entendues beaucoup plus rapidement au Canada qu'aux États-Unis, soit à peu près un délai de quatre à six mois en

Ontario, alors qu'il faut patienter presque deux ans pour être entendu par le NLRB. De plus, beaucoup de ces affaires (en gros le tiers) sont par la suite portées devant les tribunaux civils aux États-Unis où il faut souvent compter une autre année ou plus avant d'obtenir une décision définitive, alors que moins de cinq pour cent des litiges en matière de pratiques déloyales de travail donnent lieu à une révision judiciaire en Ontario.

L'accès plus facile à l'audition et des délais plus courts dans le traitement des affaires relatives aux PDT sont davantage de nature à détourner les employeurs de s'y livrer en Ontario qu'aux États-Unis. Il en est de même dans les autres provinces canadiennes anglophones. Même si peu de plaintes font l'objet d'auditions formelles, l'influence d'un mode de fonctionnement différent d'un pays à l'autre est considérable. En effet, l'accessibilité à l'audition et le raccourcissement des délais influencent (et cela de chaque côté de la frontière) la possibilité de négocier à l'amiable beaucoup de plaintes qui, de toute façon, dans la plupart des cas, se règlent d'une manière informelle.

Quels sont les motifs sous-jacents de ces différences d'un pays à l'autre quand on observe la situation sous un angle administratif? L'étude démontre que, aux États-Unis, les pressions exercées donnent lieu à un nombre plus élevé de rejets découlant de beaucoup de facteurs qu'on ne retrouve pas en Ontario:

a) recours plus fréquent aux mesures déloyales de travail même si on tient compte de la population; b) existence d'une seule commission de travail ayant compétence dans presque tous les cas de pratiques déloyales de travail provenant du secteur privé; c) fait que le gouvernement, plutôt que les parties elles-mêmes, exercent les poursuites aux frais des contribuables.

Les divergences existant dans la forme des gouvernements canadien et américain, en particulier les pouvoirs moins étendus des tribunaux administratifs aux États-Unis par rapport à ceux qui relèvent des cours civiles ainsi que l'intervention plus fréquente de ces dernières dans les décisions du NLRB sont les deux facteurs les plus importants qui sont responsables de la différence dans la rapidité avec laquelle on dispose des affaires relatives aux pratiques déloyales de travail. Ces dissemblances, en retour, résultent des régimes constitutionnels et politiques du Canada et des États-Unis ainsi que de la législation que l'un et l'autre systèmes déterminent.