THE ENFORCEMENT OF COLLECTIVE AGREEMENTS

It is a tribute to Canadian employers and trade unions that there are only a handful of reported Canadian cases dealing in any way with problems of enforcement of collective agreements. Apparently even the least congenial of unions and employers regard it their duty to comply with the terms of a collective agreement, at least after bona fide disputes as to the meaning of the agreement have been settled by arbitration or otherwise.

Although the decision as to what action to take to enforce a collective agreement may not frequently arise in practice, it is an ever present problem and can become important at any time if one's opponent is particularly recalcitrant. While not intended to be an exhaustive treatment of the subject, it is hoped this paper may help to point the way for the busy practitioner faced with an enforcement problem.

LEGAL STATUS OF COLLECTIVE AGREEMENTS

Consideration of the legal status of a collective agreement, as will be seen, has become academic as a result of recent legislative developments (except in Ontario) but a brief statement is not out of order as a prelude to the understanding of the main problem.

At Common Law, in Canada at least, a collective agreement was regarded as merely a statement of working conditions not forming part of the individual's contract of employment.[1] The employee, unless he actually was a signatory to a collective agreement, was thus left with no remedy against an employer who breached the agreement[2] unless he could establish that the union entered into the agreement as his duly authorized agent.[3] The only effective remedy for a breach of a collective agreement was stated by the Judicial Committee of the Privy Council to be economic action in the form of a strike by the union or a lock-out by the employer.[4]

The unenforceability of collective agreements, as between employer and employee, did not prohibit actions between the employer and the union itself if they were actually parties to the contract. The lack of legal validity vis-a-vis an employee resulted solely from the fact that the employee was not a party to the agreement. The only problem in an employer - union case was the question whether the union had status to sue and be sued.

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(1) **Young v C.N.R.** [1931] 1 D.L.R. 645 (P.C.); **Aris v Toronto, Hamilton & Buffalo R. Co.** [1933] 1 D.L.R. 634 (Ont.); **Wright et al v Calgary Herald** [1938] 1 D.L.R. 111 (Alta. A.D.).

(2) **Ziger v Shiffer & Hillman Co. Ltd.** [1933] 2 D.L.R. 691 (Ont. C.A.).

(3) **Ibid.** per Logie, J., trial judge, at p. 695.

(4) Lord Russell of Killowen in **Young v C.N.R.** [1931] 1 D.L.R. 645 at p. 66?.

ENFORCEMENT BY ECONOMIC ACTION

The case in which the Judicial Committee decreed that economic action was the sole means of enforcing a collective agreement was decided before the advent of statutory provisions, which are now common to most labour relations legislation, that no strike or lock-out can be declared during the currency of a collective agreement.[5] With the advent of this legislation, the remedy of enforcing a collective agreement by economic action disappeared. Economic action can now be used only as a means of forcing the opposite party to enter into a collective agreement in favourable terms.

ENFORCEMENT BY ARBITRATION OR COURT ACTION?

Most labour relations legislation now requires that all collective agreements contain a provision for final settlement of disputes and that parties to the agreement must comply with that provision and give effect thereto.

In New Brunswick, section 18 of the Labour Relations Act[6] reads:

> 18. (1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final settlement, without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
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> (2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this section, the Board shall, upon application of either party to the agreement, by order prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties to and all persons bound by the agreement and all persons on whose behalf the agreement was entered into.
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> (3) Every party to and every person bound by the agreement and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

The difficulties existing at Common Law as to whether a collective agreement is binding upon the individual employee have been overcome by legislation, such as section 17 of the New Brunswick Act, which provides that a collective agreement is, subject to and for the purpose of the Act, binding upon the union and all the employees in the unit as well as the employer.[7] This section is sufficient to give efficacy to the provisions of section 18.

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(5) New Brunswick Labour Relations Act, R.S.N.B. 1952, c. 124, s. 21; Nova Scotia Trade Union Act, R.S.N.S. 1954, c. 295, s. 22. The Prince Edward Island Trade Union Act prohibits strikes and lock-outs until disputes are arbitrated, but does not specifically forbid such action during the curency of an agreement; see R.S.P.E.I. 1951, c. 164, s. 13(1). The text of this paper, in general, refers to the New Brunswick Act; references will also be made in the footnotes to the Nova Scotia and Prince Edward Island legislation.

(6) R.S.N.B. 1952, c. 124; s. 19, R.S.N.S. 1954, c. 295 is identical; there is no similar provision in the P.E.I. Act.

(7) R.S.N.B. 1952, c. 124; s. 18(1), R.S.N.S. 1954, c. 295 is identical; there is no similar provision in P.E.I.

The words of section 18 appear to be sufficiently directive that any person, either employer, employee or union, seeking to enforce the terms of a collective agreement must do so through the means for final settlement provided in the agreement or prescribed by the Labour Relations Board. In a recent Ontario case this result is strongly indicated.[8] An employer who was dissatisfied with the finding of an arbitration board applied to the court by way of certiorari to quash the award on the ground that the arbitration board had exceeded its jurisdiction, but certiorari could only lie if the board was a "statutory tribunal." It was held that the provisions of the Labour Relations Act compelling the parties to arbitrate their dispute was sufficient statutory authority to render the board, in effect, a statutory tribunal and that certiorari was applicable. The effect of this decision, for present purposes, is that section 18 is an absolute statutory direction which the parties must obey. The same compulsion was indicated recently by the Supreme Court of British Columbia,[9] where it was stated that if the employees concerned had any dispute with their employer, it was their duty to resolve it in accordance with the arbitration clause of the collective argeement.

Section 18 calls for a provision for "final settlement of all differences between the parties. . . .concerning its meaning or violation." It is difficult to see what dispute could arise respecting a collective agreement that would not come within these words. They are broad enough to include any type of dispute that could otherwise be raised in the form of a legal action if the difficulties mentioned above respecting the bringing of action did not exist.

It is a rule of statutory construction applicable in considering whether a statutory procedure abolishes previously existing actions to ask: Is the substituted procedure a complete one, and have the parties the same rights to be heard as they formerly possessed?.[10] Section 18 not only gives the parties the same rights as they had before, but appears to enlarge them in that the previously existing common law disabilities have been taken away. Section 18 is phrased in clear and unmistakeable terms.

It seems to follow that any possibility of court action to enforce a collective agreement either between the actual signatories to the agreement (the union and the employer) or by or against any employee has been taken away by statute and that enforcement must be accomplished through the procedure established pursuant to the statute.[11]

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(8) **Re Arbitration of International Union of Mine, Metal and Smelter Workers, re International Nickel** (1956) 1 CCH Canadian Labour Law Reporter (hereinafter cited as C.L.L.R.) 15,063 (Ont. C.A.).

(9) **Dawson, Wade & Co. Ltd. et al v Tunnel and Rockworkers Union of Canada et al** [1956] 5 D.L.R. (2nd) 663.

(10) Hals (2nd), Vol. 31, p. 503.

(11) In Ontario s. 3(3) of The Rights of Labour Act, R.S.O. 1950, c. 341, provides: "A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this act or of The Labour Relations Act", so that whatever actions existed at Common Law appear to still exist in that province. In a paper presented at the Canadian Bar Association annual meeting in 1956, Prof. J. McL. Hendry expressed the view that collective agreements could still be enforced by court action.

A recent decision of Clyne, J. in the British Columbia Supreme Court,[12] however, casts doubt on the validity of this conclusion. A company became involved in a jurisdictional dispute between the union with which it had a collective agreement and another union which contended certain work should be done by its members rather than those of the first union. The company ordered the first union and its men to do the work as it was included in the work defined in the collective agreement. The union refused and also declined to follow the grievance procedure of the agreement. The company brought an action against its own union for an injunction and a declaration to compel the union and its members to do the work covered in the agreement, and against the second union to restrain it from inducing a breach of contract by the first union. Notwithstanding that the statute contained provisions identical with subsections (1) and (2) of section 18, the court held the first union had breached the collective agreement and gave judgment for the company. The decision makes no reference to these statutory provisions. The only distinguishing feature of this case is that the statute did not contain the provisions of subsection (3) of section 18 which direct the parties to abide by the result of an arbitration clause. On the other hand the statute did contain a section, as does the Nova Scotia Act, requiring all parties concerned to do everything they are required to do by the provisions of the collective agreement.

With respect, it is difficult to see why the parties to this case should not have been compelled to arbitrate their difference in accordance with the clear language of the statute. It is submitted that, inasmuch as the decision does not refer to the arbitration sections of the statute, this case does not weaken the foregoing thesis that the clear language of the statute must be obeyed and that the jurisdiction of the courts is ousted.

The last mentioned case brings up a subsidiary problem: what means of enforcement can be adopted if the alleged offender fails to appoint an arbitrator as required by the arbitration clause? The answer seems to be that the arbitration clause should spell out a method for completing the arbitration in the event of a refusal to appoint and that, if the clause does not so provide, the complaining party would have a right to apply under the Arbitration Act to complete the arbitration in the way in which that Act provides.

Section 18, however, does not affect the special terms of any individual contract of employment that may exist separate from a collective agreement. For example, a man might be employed for a fixed term of one year in a classification covered by a collective agreement, the terms of his employment to be as set out in the agreement. Assuming the collective agreement contains no terms restricting the employer's right to discharge employees, the employee would have an action against the employer for damages for wrongful dismissal prior to the end of the one year period. This would not be a difference concerning the meaning or

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(12) **G. H. Wheaton Ltd. v Local 1598, United Brotherhood of Carpenters & Joiners of America et al** [1957] 6 D.L.R. (2nd) 500.

violation of the collective agreement but a dispute arising out of the separate agreement of service. There is nothing in the Act precluding action in the courts on this type of claim.

ENFORCEMENT OF ARBITRATION AWARD

Once having taken the dispute to an arbitration board and the board having rendered its final award, the next hurdle is the problem of how to enforce the award should the losing party fail to voluntarily comply with it.

There seems to be two avenues open, first, by signing judgment under the Arbitration Act; secondly, by a prosecution for a breach of the Labour Relations Act.

1. Enforcement under Arbitration Act

Section 3 of the New Brunswick Arbitration Act[13] states that the Act applies to every arbitration under any Act as if the arbitration were pursuant to a submission. In view of the Ontario decision that a labour arbitration board is, by virtue of the Labour Relations Act, a statutory tribunal for purposes of certiorari, it seems apparent that it must be an arbitration "under" an Act within the meaning of section 3 of the Arbitration Act. The effect is the same as if the Labour Relations Act itself contained the required arbitration submission applicable to all collective agreements.

It seems also clear that a labour arbitration comes within the Arbitration Act apart from the effect of the Labour Relations Act. The relevant sections of the Arbitration Act refer to a "submission", and a submission is defined as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." In the definition of "submission" there is no reference to an arbitration agreement existing by virtue of an Act of the Legislature and it is therefore indicated that the Arbitration Act applies to all arbitration submissions regardless of their source.[14]

The enforcement section of the Arbitration Act is section 18 which provides:

> An award on a submission may, by leave of the Court, be entered as a judgment of the Court and may, with taxed costs, be enforced in the same manner as a judgment or order to the same effect.[15]

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(13) R.S.N.B. 1952, c. 9. The Arbitration Act of Nova Scotia, R.S.N.S. 1954, c. 13 does not contain similar provisions and, therefore, this paragraph does not apply to that province. S. 3, R.S.P.E.I. 1951, c. 12 is identical to s. 3 of the N.B. Act; see also s 19 of the P.E.I. Trade Union Act as enacted by s. 1 of c. 3 of the Statutes of P.E.I. 1953 (2nd Sess.).

(14) R.S.N.B. 1952, c. 9, s. 1(g); R.S.N.S. 1954, c. 13, s. 1(d) and R.S.P.E.I 1951, c. 12, s 1 are similar in terms.

(15) R.S.N.B. 1952, c. 9; R.S.N.S. 1954 c. 13, s. 14 and R.S.P.E.I. 1951, c. 12, s. 13 are substantially to the same effect.

It is therefore open to a party seeking to enforce an award of a labour arbitration board to have the award entered as a judgment of the court. This makes it possible to enforce the award through any of the ordinary means of enforcing court judgments—executions, examinations proceedings, etc. It also means that failure to abide by the directions of an award so entered will be a contempt of court, punishable by imprisonment or sequestration.

The peculiar problems of enforcing a judgment against a union deserve special treatment. The Common Law difficulties arising from the status of unions as mere unincorporated associations have, in the past, created enforcement problems. These obstacles are dealt with in the judgment of Ritchie, J., in the recent Saint John I.L.A. dispute,[16] the decision of the Manitoba Court of Appeal in the famous *Tunney* case,[17] (both of which judgments are under appeal and therefore subject to being overruled) and many recent decisions holding that a certified union is a legal entity with power to sue and be sued.[18] In the *I.L.A.* and *Tunney* cases the court directed judgment against the union and held that the union's funds could be levied on to satisfy the judgment. If these judgments stand, the same relief should be available to satisfy a monetary claim arising out of an arbitration award entered as a judgment, and it should not be carrying the analogy too far to apply sequestration against a union for failure to comply with a non-monetary order.

If the *I.L.A.* and *Tunney* cases are overruled on the point now discussed, employees seeking to obtain payment of monetary awards out of union funds must resort to the rules of law under which judgments against trustees may be satisfied out of trust funds held by them. This is only possible when union officers who are trustees of union funds can be made parties to the proceedings. This procedure is fraught with difficulties which are purposely passed over in this paper.

2. Enforcement by Prosecution

Section 18 (3) of the Labour Relations Act provides that every party to and every person bound by a collective agreement, or on whose behalf it was entered into, must comply with the provision for final settlement and give effect thereto. Under this section the parties to a labour arbitration are bound by statute to carry the award into effect. Section 40 makes it an offence for a person to do anything prohibited by the Act or to refuse to do anything required by the Act, and provides pen-

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(16) **Carlin & Cusack v Galbraith et al**——January, 1957 (unreported).

(17) **Tunney v Orchard et al** [1955] 3 D.L.R. 15.

(18) **Ibid**, per Tritschler, J., at p. 47 et seq. **Hollywood Theatres v Tunney** [1940] 1 D.L.R. 452; **Re Patterson & Nanaimo, etc.** [1947] 4 D.L.R. 159; **Medalta Potteries v Lomgridge** [1947] 2 W.W.R. 856; **Peerless Laundry etc. Union** (1952) 1 C.L.L.R. 15,041; **Re Medjucks Furniture** (1957) 1 C.L.L.R. 16,062 (N.B.L.R.B.); in **Christie Woodworking v National Union of Woodworkers** (1956—unreported), Bridges, J. ordered an injunction and declared against a certified union itself. In a paper presented at the Canadian Bar Association Annual Meeting in 1955, R. V. Hicks, Q.C. and W. S. Whittaker of the Ontario Bar, concluded that unions could not sue or be sued in Ontario. It is submitted that the above authorities are preponderant and that in the other Common Law provinces the status of a union to sue and be sued must be regarded as settled.

alties for a breach.[19] Thus, either independently of, or concurrently with, the enforcement procedures outlined above, the party in whose favour the award is made may prosecute the offending party for a breach of the Labour Relations Act.

Damages

If a breach of a collective agreement can now only be enforced by arbitration and not by court action, the question would arise: "What about damages?" Although damages against the offending party are not generally regarded as necessary or desirable in many labour relations disputes, there will certainly arise cases in which damages are appropriate. For example, if an employee is discharged contrary to the terms of the wage agreement, he would have redress under the arbitration procedure required by the Act, but if the collective agreement does not specifically provide for ordering the offending employer to compensate the employee for lost wages due to an improper dismissal, surely the employee should not be without a remedy for damages. Conversely if an employee breaches a collective agreement and damages result to the employer, the employer should have the right to recover damages from the offending employee, or if the union is at fault, from the union. The awarding of damages appears, therefore a void left by the taking away of court action.

The obvious solution, of course, is for the collective agreement itself to provide for payment of some damages, and to provide that the arbitration board may determine them. Labour practitioners should endeavour to see that collective agreements provide for this contingency. If the agreement provides for payment of lost wages to an employee improperly dismissed, no damages problem arises. The difficulty is the practical impossibility of providing in a collective agreement for all eventualities which might give rise to a proper claim for damages.

Another solution seems to be possible from the words of section 18 providing for "final settlement. .of all differences". If a difference arises in such circumstances that it is proper that the offending party should pay damages to the innocent party, it would appear that no settlement can be "final" until the amount of such damages has been determined and awarded. For example, where an employee is improperly discharged and has lost several weeks wages before the arbitration board finds the dismissal was improper, the difference has not been finally settled as far as the employee is concerned until he is compensated for his lost wages. Thus, if the agreement is silent as to the award of damages by an arbitration board, it would appear to be open to the aggrieved party to apply to the Labour Relations Board under subsection (2) for an order prescribing a provision for "final settlement". The board would have power, under the subsection to prescribe a method for determining and awarding the damages properly due.

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(19) R.S.N.B. 1952, c. 124; s. 42, R.S.N.S. 1954, c. 295, is identical; for P.E.I. see s. 25(2) Trade Union Act as enacted by c. 3 of the statutes of that province for 1953 (2nd Sess.).

It should be pointed out in passing that the damages awarded would only be those which a court could award for a breach of contract. No claim for exemplary or punitive damages could be entertained since those types of damages are peculiar to tort and alien to contract.

ENFORCEMENT BY IMMEDIATE PROSECUTION

A few words should be said about immediate prosecution as a method of enforcing a collective agreement.

There is no section in the New Brunswick Labour Relations Act making it an offence for any person to violate the terms of a collective agreement (other than section 18(3) referred to above). Direct prosecution, therefore, is impossible unless of course an unfair labour practice is involved. Prosecution as a method of enforcement can only be employed to enforce an arbitration award as outlined above. It makes little difference, however, whether a prosecution is started immediately or after an arbitration because in most prosecutions the question would be raised whether the alleged offender had in fact violated the Labour Relations Act, and this dispute would have to be resolved by arbitration in any event.

The situation seems to be different in Nova Scotia. Section 18(2) of the Trade Unions Act of that province requires every person bound by a collective agreement to do everything he is required to do and refrain from doing anything he is required to refrain from doing by the provisions of the collective agreement. Penalties are provided, as in the New Brunswick Act, for a violation of the Act. For what it is worth, therefore, an immediate prosecution for a violation of a collective agreement can be taken in Nova Scotia without resorting to arbitration, provided, of course, there is no difference or dispute as to whether the collective agreement has been violated, which must, by statute, be referred to an arbitration board.

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