II. PUBLIC POLICY AND GRIEVANCE ARBITRATION IN CANADA

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Students of labor and management relations who study the Canadian system in comparison with the American will on a superficial examination note the similarity of these two systems. This is to be expected; indeed, it would be surprising if marked differences were discovered. There are many circumstances which have stimulated the development of similar public policies and legal structures concerned with industrial relations and other matters. These include the common heritage of British law; the fact that both countries emerged from the same colonial system; the influence of a common language; the almost unique personal freedom of movement for many decades with little or no concern for the international boundary; the similarities of westward expansion in the two countries; the emergence of a common industrialism as reflected in continental markets; capital flows and labor-force migrations, both temporary and long term; the internationalization of many business organizations, including corporations and unions; and a common technology. In general, Canada like the United States has relied on free collective bargaining involving the right of individuals to join unions, of unions to represent majority employee units in collective bargaining, and of employees and unions to resort to work stoppages to force concessions. Both countries have established similar administrative machinery to ensure that the rights of the parties are protected and to assist them to reach agreements and thereby reduce the volume and intensity of overt conflict. Labor relations boards play a key role in the functioning of industrial relationships in the two countries, as do conciliation or mediation services. On first look, a European visitor would believe that there was a common system.

A closer examination reveals very important differences. Relatively speaking, the American system is centralized under federal rather than state authority. The reverse is true for Canada, where each province has jurisdiction over practically the whole of the

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mining, industrial, and commercial sectors of the economy, leaving interprovincial and international businesses such as telecommunications, railway, shipping, air transport, and a few other areas to the federal authority.

Each province has a complete paraphernalia of agencies such as labor relations boards and conciliation or mediation services. Of course, each has full constitutional authority to legislate within its own jurisdiction. It might be expected that there would be a confusing hodge-podge of public policies; and to a certain extent this is true. But, for reasons which can only be explained by a study in depth of the evolution of policy for about 70 years, there is a Canadian pattern which, while not universally applied across the country, is distinctly different from the American pattern.

This paper deals with only one of the areas of difference—the provisions for the settlement of grievances which arise during the life of a collective agreement—in other words, the area of particular interest to the members of the National Academy of Arbitrators.[1] Here Canadian public policy differs in principle from American policy and reflects rather wide variations within Canada itself. A summary statement might be helpful.

All jurisdictions but one have included in their legislation regulating labor relations provisions which either expressly forbid or indirectly render illegal both strikes and lockouts for the term of a collective agreement. The same jurisdictions have also imposed on the parties the responsibility of establishing procedures for the final and binding settlement of intra-contract period disputes. It appears to be the intention in Canadian labor relations laws to guarantee that all arbitrable disputes can be settled without stoppage of work while a labor contract binds the parties. Strikes and lockouts over grievance disputes are not bargainable issues. Settlement procedures are bargainable only as to form, not as to fact.

Arbitration of Grievance Disputes

A system of this character raises some very interesting questions concerning arbitration of grievance disputes. Some attention will be paid to a few of the more significant issues.

[1] The writer has escaped formal training in the mysteries of the law and is therefore quite unqualified to present the paper. Nonetheless, as Jules Justin said to this body years ago, like any good arbitrator he may be wrong but never in doubt. Blessed are the ignorant.

The Binding Nature of a Collective Agreement

The federal law contains the following clause:

> A collective agreement entered into by a certified bargaining agent is . . . binding upon (a) the bargaining agent and every employee in the unit of employees for which the bargaining agent has been certified, and (b) the employer who entered into the agreement or on whose behalf the agreement has been entered into." [2]

Similar legislation binding the employer, the union, and the employees in the unit is present in all provinces but Saskatchewan.[3] In its simplest form, this provision would seem to render illegal a strike or lockout during the life of a collective agreement. In most jurisdictions this policy intention is backed up by a statutory prohibition of the strike or lockout while a collective agreement is in effect. Thus, in 10 of the 11 jurisdictions in Canada, the parties are prohibited from resorting to economic force if they are dissatisfied with a collective agreement to which they are bound or if they feel it is being misinterpreted or violated. Although an explicit proscription is not found in the Alberta statute, it is implied by another section which prescribes arbitration to settle grievance disputes.[4] Eight other provinces have based themselves on a section of the federal statute, stating that

> (a) no employer bound by or who is a party to a collective agreement . . . shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into and,
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> (b) during the term of a collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement was entered into . . . shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.[5]

One province, Ontario, requires that a no-strike and no-lockout clause be included in the agreement.[6]

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[2] Canada, *Industrial Relations and Disputes Investigation Act* (I.R.D.I.A.), §18.

[3] *Alberta Labour Act* (Alta.), §73(19), (20); *British Columbia Labour Relations Act* (B.C.), §§20, 21; *Manitoba Labour Relations Act* (Man.), §18; *New Brunswick Labour Relations Act* (N.B.), §17; *Newfoundland Labour Relations Act* (Nfld.), §18; *Nova Scotia Trade Union Act* (N.S.), §18; *Ontario Labour Relations Act* (Ont.), §§37, 38; *Prince Edward Island Industrial Relations Act* (P.E.I.), §22; *Quebec Labour Code* (Que.), §§55, 56.

[4] Alta., §73(5).

[5] I.R.D.I.A., 22(1); B.C., §46(1), (2); Man., §21(1); N.B., 21(1); Nfld., §23(1); N.S., §22(1); Ont., §54(1); P.E.I., §39; Que., §§95, 97.

[6] Ont., §33. If the parties do not include such a clause, the Board may add one on the application of either party.

The prohibition of the work stoppage is not absolute in the Province of Quebec. Where the agreement "contains a clause permitting the revision thereof by the parties . . .," failure to reach an agreement on a reopening provision may be followed by a legal work stoppage.[7] In other words, the parties are authorized by the law to contract out of the bar to the strike and lockout by providing for reopeners. Saskatchewan is the only jurisdiction which does not prohibit the work stoppage during the term of a collective agreement. In that province the strike and lockout and the grievance procedure, as well as arbitration of "rights" disputes, are bargainable issues during the time when the agreement is being negotiated. This is also the situation in the United States. If the parties do not contract in the no-strike and no-lockout clause, work stoppages are available during the life of the agreement.

Settlement of Disputes of Right

In addition to the legal requirement binding the union, the employees, and the employer, and the prohibition of the strike and lockout during the life of a collective agreement, most Canadian jurisdictions impose on the parties a legal requirement to provide for the final and binding settlement of "disputes arising." There is considerable variation in the respective labor relations acts with important implications flowing from the differences.

Since Saskatchewan does not prohibit resort to work stoppages during the life of the agreement, it is not surprising that it does not require settlement of these disputes.

In several jurisdictions the parties are given a choice of procedures. Thus the federal act provides:

> Every collective agreement . . . 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.[8]

New Brunswick, Nova Scotia, Prince Edward Island, Manitoba, and Newfoundland use the same key words, "arbitration or other-

[7] Que., §§95, 97
[8] I.R.D.I.A., §19(1).

wise." Alberta and British Columbia have slightly different wording which conveys the same meaning.[9]

Ontario gives no option to the parties:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.[10]

Quebec offers a choice of methods of arbitration but not a choice between arbitration and some other device.

> Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the parties abide by it; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agreement, appointed by the Minister.[11]

A nonlawyer must rely on those who are experts in the craft for an interpretation of these statutory provisions and their practical effects. Two points need to be noted. It would appear that where arbitration alone is required by statute, as in Ontario, the courts will be free to quash an award by writ of certiorari, whereas in the case of a voluntary choice of arbitration as in several other provinces, the courts will be more restrained and will respect arbitration as a free choice of the parties.[12]

Secondly, where the parties have a choice, it has been interpreted to permit an aggrieved party to appeal to the courts rather than go to arbitration; in Ontario and Saskatchewan this privilege would not be available.[13]

Statutory Provision in Support of Arbitration

The law in Canada goes beyond requiring the use of arbitration or some other method leading to a binding decision in disputes arising during the life of the agreement. It provides the means

[9] N.B., §18(1); N.S., §19(1); P.E.I., §23(2); Man., §19(2), (2a); Nfld., §19(2); Alta., §73(6), (7); B.C., §22(2).
[10] Ont., §34(1).
[11] Que., §88.
[12] A. W. R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1965), pp. 373–374.
[13] The parties must use arbitration in Ontario and collective agreements cannot be the subject of an action in court in Saskatchewan. A. W. R. Carrothers, *Labour Arbitration in Canada* (Toronto: Butterworths, 1961), p. 18.

by which arbitration shall be available if the parties fail to arrange it themselves. Several devices appear in different jurisdictions.

The federal act states:

> Where a collective agreement 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.[14]

This authority granted to a labor relations board is also found in four of the provinces.[15] The effect of such legislation is to empower the appropriate labor relations board to insert into a collective agreement, which does not contain one, a clause which sets up a procedure for final and binding settlement of disputes of interpretation or application of an agreement if one of the parties so requests. More simply put, the labor relations boards can design the legally required arbitration clause if the parties fail to do so themselves.

A second approach to approximately the same end is to include in labor relations legislation an arbitration clause which is presumed to be in any collective agreement where the parties have neglected to design one for themselves. Thus, the Ontario law provides:

> If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision:
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> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any queston as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appoint-

[14] I.R.D.I.A., §19(2).
[15] N.B., §18(2); N.S., §19(2); P.E.I., §23(2); B.C., §19(2).

> ment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chairman governs.[16]

Section 34(1) requires the parties to include an arbitration clause in their agreement. If they do not, the statutory clause quoted above is automatically operative and binding on the parties. In such a situation the parties have an arbitration clause the moment they sign an agreement whether they have negotiated one or not. Several other jurisdictions make similar provision for a statutory clause which is applicable unless the parties signing an agreement design their own.[17]

It is worth noting in this prototype that the vexed question of arbitrability is included as part of the arbitrator's or arbitration board's jurisdiction.

A third variant of statutory insertion of an arbitration provision into agreements is found in the law of Quebec already quoted, which requires that grievances shall be arbitrated in the manner provided in the agreement or, if this fails, by an officer appointed by the Minister of Labour.[18]

Of some significance is the fact that grievances alone must be resolved, and a grievance is given a particular meaning in this legislation. It is defined as any disagreement respecting the interpretation or application of a collective agreement.[19] Indeed, Section 90 of the Quebec Code specifically requires that disagreements other than grievances can be settled only by formal machinery if the parties have so provided. Unlike the Ontario prototype, the Quebec Labour Code does not specifically give to the arbitrator the authority to deal with questions of arbitrability. On the other hand, it breaks with a long-established Canadian

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[16] Ont., §34(2).
[17] Alta., §73(6); Man., §19(2); Nfld., §19(2).
[18] Que., §88.
[19] *Id.*, §1(g).

tradition and provides for a single arbitrator rather than the conventional tripartite board.

It will be recalled that the Province of Saskatchewan, by not requiring the inclusion in agreements of an instrument of settlement, has adhered more closely to the American policy. Nevertheless, it has legislation designed to protect the right to arbitration of parties who have voluntarily and jointly accepted arbitration. This takes the form of a statutory clause which is presumed to be in any collective agreement which provides for arbitration but does not include a procedure of arbitration.[20]

Failure to Appoint

Required arbitration and statutory machinery will produce settlements only if the parties are prepared to respect their legal or contractual obligations. If, for example, a party refuses to name a representative to an arbitration board, or if the parties or their nominees fail to agree on a neutral third party as chairman, the system breaks down and, short of a legislative solution, resort to the courts would be necessary. Some Canadian jurisdictions have met this problem by identifying some neutral third party and endowing him with the authority to name the missing persons. Thus, in the Quebec provision already quoted,[21] the Minister of Labour is empowered to appoint an arbitration officer if the parties fail to agree on one themselves. In Ontario, appointments to arbitration boards of the representatives of the parties or the chairmen can, in default by the parties, be made by the Minister of Labour.[22] In Alberta, representatives of the parties may be named by the Board of Industrial Relations, and the chairman may be named by the Minister of Labour.[23] The British Columbia provision is identical.[24] One province, Manitoba, provides that on application by either party the Board may alter a deficient arbitration clause.[25] Presumably, this could be used in cases where a party was not compelled by some other provision to name representatives on an arbitration board.

[20] *Saskatchewan Trade Union Act* (Sask.), §23B.
[21] Que., §88.
[22] Ont., §§34(4), (5); 79a.
[23] Alta., §73(7).
[24] B.C., §22(3).
[25] Man., §19(2A).

Carrothers points out that provision is made in the various arbitration acts of the provinces for the completion of the composition of the arbitration board by the court.[26] Presumably, this would provide a means of assuring that arbitration could proceed in New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland, and the federal jurisdiction, none of which provide in their labor relations laws for appointments in cases of default by the parties.

Power to Modify

Three provinces have empowered their labor relations boards to modify arbitration clauses considered to be defective.[27] The Ontario provision reads as follows:

> If, in the opinion of the Board, any part of an arbitration provision, including the method of appointment of the arbitrator or arbitration boards, is inadequate, or if the provision set out in subsection 1 or 2 is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision . . . but, until so modified, the arbitration provision in the collective agreement or in subsection 2, as the case may be, applies.

Legal Control of Procedures

The situation regarding legal control of the procedures of the arbitrators or arbitration boards is confused and complex. In some jurisdictions, general arbitration laws apply to labor arbitration.[28] In others, the labor relations laws specifically exempt labor arbitration from arbitration acts.[29] In others, the labor legislation itself provides rules of conduct for arbitration.[30] Of course, in all jurisdictions except Quebec, arbitration is subject to common law. In Quebec, the Code of Civil Procedures applies.[31]

Enforcement

There is little evidence that the parties in arbitrations refuse to accept arbitration awards in a significant number of cases. In

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[26] A. W. R. Carrothers, *Labour Arbitration in Canada* (Toronto: Butterworths, 1961), p. 103.
[27] Ont., §34(3); Man., §19(2A); Nfld., §19(3).
[28] A. W. R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1965), p. 362.
[29] Ont., §34(10); Man., §19(4); Alta., §73(18).
[30] Ont., §34(7); Alta., §73(10).
[31] *Supra*, note 28.

any case, there are various legal devices to ensure that awards will be respected. As has already been mentioned, all jurisdictions except Saskatchewan require that collective agreements shall be respected as binding. This would imply that an agreement to arbitrate must itself be respected, including compliance with the award. Secondly, all jurisdictions, including Saskatchewan, make the award binding on the parties.[32] Finally, some jurisdictions provide special machinery in their labor relations laws to back up awards with the authority of either a labor relations board or the courts.

Ontario provides that an arbitration award may be filed with the Supreme Court of the province and that an award so filed is enforceable as an order of that court.[33] Alberta provides a special legal procedure to enforce awards.[34]

But the same provision authorizes the court to set aside an award if the court is satisfied that the award was improperly reached or that the arbitrator misconducted himself, and to order arbitration to proceed if, in the court's view, an arbitrator erred in declaring a case not arbitrable, and to set aside an award if the court decides the case was not arbitrable. In Saskatchewan, all awards have the same status as decisions of its Labour Relations Board and can be enforced as such.[35] An award in Quebec may be "executed under the authority of a court of competent jurisdiction." [36]

Conciliation of Arbitrable Cases

One of the areas of public policy in labor relations in which Canadian law and practice differ markedly from American is conciliation and mediation.[37] The history of this difference need not detain us; suffice it to say that, by 1948, there had emerged a statutory two-stage procedure which, in all jurisdictions except Saskatchewan, imposed on parties who had failed to reach agreement, first, a conciliation officer, and second, if he failed, usually

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[32] I.R.D.I.A., §19(3); Alta., §73 (11); B.C., §21; Man., §19(3); N.B., §18(3); Nfld., §19(4); N.S., §19(3); Ont., §34(8); P.E.I., §23(3); Que., §89; Sask., §23A.
[33] Ont., §§34(8), 82.
[34] Alta., §73(13)-(17).
[35] Sask., §23A(c).
[36] Que., §§81, 89.
[37] Generally speaking, Canadians use the term "conciliation" rather than the term "mediation," which is much more commonly used in the United States.

a tripartite conciliation board. While it was generally permissible in most jurisdictions to introduce conciliation officers or commissioners at any time in the history of a dispute, there was a strong tendency to restrict the service to the two compulsory stages and perhaps to offer further conciliation on a voluntary basis if the formal steps failed. In other words, it was unusual and unlikely that conciliation would be available for disputes arising during the life of an agreement. This situation was not clearly established until after the introduction in Canada of the Wagner Act principle of certification during the Second World War, when compulsory arbitration of rights disputes was also established.[38] Prior to the clarification of rights and interest disputes, conciliation officers were used more or less indiscriminately in any kind of dispute, and even the conciliation boards were occasionally used in rights disputes.[39] The elimination of conciliation officers from the rights-dispute area was never complete. Indeed, until 1961, the Province of Quebec, which only then imposed compulsory arbitration of rights disputes, required conciliation in disputes arising during the life of an agreement before a strike or lockout could take place. Saskatchewan, it will be recalled, never prohibited the strike and lockout during the life of an agreement. Consequently, while its Labour Relations Act makes no provision for conciliation officers, it has been following the practice of supplying officers of the department at the request of one of the parties to a dispute arising during the life of an agreement.

Informal Conciliation of "Disputes Arising" in Saskatchewan

Conciliation officers are provided as follows:

> There is no provision in the *Trade Union Act* for informal conciliation service. However, the department does provide this very important service on a voluntary basis. Either or both parties to any dispute desiring to use the service may contact the Industrial Relations Office of the Department at Regina, and an experienced mediator will help in every way possible to bring the dispute to a mutually satisfactory conclusion.[40]

[38] Canada, *Wartime Labour Relations Regulation,* P.C. 1003, February 1944.
[39] C. H. Curtis, *The Development and Enforcement of the Collective Agreement,* (Kingston, Ontario: Industrial Relations Centre, Queen's University, 1966), pp. 42–51.
[40] This is contained in a reference handbook prepared by the Department of Labour for employees, unions, and employers. Saskatchewan, Department of Labour, *Saskatchewan Labour Legislation,* (August 1965), p. 9.

The Department of Labour in Saskatchewan has been intervening on a voluntary basis in grievance and negotiation cases. Interestingly enough, it has had considerable success with the "disputes arising" and is thereby reducing the number of cases going to arbitration. Saskatchewan is not an industrialized province and the conciliation workload is small. Approximately one third of the cases concern rights disputes. The following table indicates the disposition of these rights disputes over a five-year period.

TABLE I

SASKATCHEWAN
GRIEVANCE DISPUTE SETTLEMENT BY
CONCILIATION OFFICERS
1961–1966

Disposition	Year 1961–62	1962–63	1963–64	1964–65	1965–66
Settled at conciliation	4	19	18	19	18
Settled at conciliation during strike	—	1	3	5	2
Settled directly by parties after conciliation	1	7	5	—	—
Referred to Labour Relations Board for arbitration [a]	1	2	1	3	—
Referred to arbitration under terms of agreement	—	1	2	6	2
Pending as of last day of fiscal year	1	—	1	3	5
Total grievance disputes handled	7	30	30	36	27

Sources: Saskatchewan, Department of Labour, *Annual Reports*, 1962–1966.
[a] Under the Saskatchewan Act, §23, the parties to a dispute may jointly refer any dispute to the Labour Relations Board for arbitration.

The table reveals that approximately 60 percent of the cases are being resolved without arbitration. In addition, a significant number of cases dealt with by the officers are being resolved short of arbitration after the officer withdraws. On the whole, only 10 or 15 percent of cases are going to arbitration. Since the total number of cases is small and has remained very constant over the last four years, it is probable that few cases are being referred to officers which would not have become arbitration cases in the

absence of this conciliation provision. The evidence as to the merits of this system is too limited for final judgment. Other factors need to be taken into account. Thus, there is no charge for this service, and this might encourage both referral and settlement of grievance disputes as a means of avoiding arbitration costs.

Conciliation of Rights Disputes in British Columbia

A second interesting case, where conciliation may intervene between the grievance procedure and arbitration, occurs in British Columbia. That province requires, as already stated, that every collective agreement contain a procedure for final and conclusive settlement of grievance disputes. In 1963, the legislature enacted a new clause providing for appeals to the Labour Relations Board of cases which otherwise would be expected to be within the scope of private or statutory arbitration. The clause reads:

> (a) if, at any time prior to the appointment of a board of arbitration or other body, either party to the collective agreement requests the Registrar in writing to appoint an officer of the Department of Labour to confer with the parties to assist them to settle the difference, and where the request is accompanied by a statement of the difference to be settled, the Registrar may
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> (i) appoint an officer to confer with the parties; or
> (ii) refer the difference to the Board
>
> (b) where an officer is appointed under clause (a), the officer shall, after conferring with the parties, make a report to the Registrar, which report may be referred to the Board;
>
> (c) where the difference is referred to the Board under clause (a), or the report of the officer is referred to the Board under clause (b), the Board may, if in its opinion the difference is arbitrable,
>
> (i) refer the difference back to the parties; or
> (ii) inquire into the difference and, after such inquiry as the Board considers adequate, make an order for final and conclusive settlement of the difference;
>
> (d) where the Board refers the difference to the parties under clause (c), the parties shall follow the procedure in the provision required or prescribed under subsection (1) or (2), as the case may be, for final and conclusive settlement of the difference;
>
> (e) where the Board
>
> (i) inquires into the difference under clause (c); or
> (ii) advises the parties that in its opinion the difference is not arbitrable,

neither the *Arbitration Act* nor any other procedure for settlement of the differences shall apply;

(f) the order of the Board for final and conclusive settlement of the difference is final and binding on the parties and all other persons bound by the collective agreement, and such parties and persons shall comply with the order;

(g) if, after service of the order, and after the expiration of fourteen days from the date of the order or the date provided in the order for compliance, whichever is the later, the employer, trade-union, or other person fails to comply with the order, and the employer, trade-union, or other person affected by the order notifies the Board of the failure, the Board shall file in the Office of the Registrar of the Supreme Court a copy of the order, and thereupon the order is enforceable as a judgment or order of that court.[41]

The policy implicit in this clause must be considered in conjunction with Section 22(6) of the B.C. Labour Relations Act which reads as follows:

(6) Parties to a collective agreement may at any time by written agreement specifically exclude the operation of subsection (4), and in that event subsection (4) shall not apply during the term of the collective agreement.

In effect these provisions make available to the parties the use of conciliation officers of the Department of Labour and arbitration by the Labour Relations Board of cases not settled by the officer. Some of the latter may be declared nonarbitrable, and some are referred by the Board back to the parties for arbitration in the conventional manner. The table on page 33 shows the disposition of cases from 1963 to 1966.

The table indicates a rather high degree of success by the officer. In these four years of experience, about 65 percent of the cases have been settled with the aid of the conciliation officers. About 23 percent resulted in arbitration orders by the Labour Relations Board. It is also to be noted that the percentage referred back to the parties has risen slightly, but this may not be significant since the total in any year is small.

The reasons given for the introduction of this service are: the

[41] B.C. Labour Relations Act, §22(4). In Subsection (d) reference is made to §§ (1) and (2) which mean, respectively: the arbitration clause in a collective agreement which the parties have negotiated; the arbitration clause which the Minister of Labour has inserted into an agreement where the parties did not have one.

TABLE II

BRITISH COLUMBIA;
APPLICATION UNDER SECTION 22(4) BY DISPOSITION
1963–1966

Disposition	1963 [a]		1964		1965		1966	
	Year							
	No.	%	No.	%	No.	%	No.	%
Settled by officer	37	64	87	69	101	66	148	65
Order issued by Board	10	18	29	23	34	23	52	23
Referred back to parties	4	7	7	6	10	7	25	11
Declared not arbitrable	6	11	3	2	6	4	2	1
Total grievance disputes handled	57	100	126	100	151	100	227	100

Sources: B.C., Department of Labour, *Annual Reports*, 1963–1966.
[a] §22(4) was added to the B.C. Labour Relations Act at the end of March 1963, and therefore was not operable for about a quarter of 1963.

high cost of arbitration, the difficulty in finding arbitrators, and the time delays in the private systems.

An interesting aspect of the system is the procedure used in practice. First, it should be noted that the decision to ask for the services of an officer to help in the settlement of the dispute is not a mutual one. Either party has a right to apply. In effect, this means that a union can decide to set aside the agreed arbitration procedure and seek conciliation of a rights dispute without getting the approval of the employer, and vice-versa. In other words, the process can be imposed by one of the parties on the other. True, at the time an agreement is being negotiated the parties may by mutual action contract out of this section of the act. Nevertheless, the weight of the law is to provide an alternative to the agreed or statutory forms of arbitration. Secondly, the officers appear to look on their responsibility as one of getting a settlement without too much regard to the terms of the agreement, as one might expect of conciliators.

If the officer fails, the procedure used is disturbing. The officer makes a report to the Labour Relations Board which includes any documents submitted by the parties to the officer, as well as the officer's analysis of the case and his recommendation for settle-

ment. The parties may also submit briefs to the Board. The Board then decides the issue according to the alternatives of *nonarbitrable, return to the parties,* or *award on the merits.* This is done without a hearing, the Board relying on the data supplied by and through the officer and the written submissions. Thus, the usual protections deriving from the principles of natural justice or due process do not appear to be supported by the adversary system in this procedure. Interestingly, no case has been taken to the courts. It may be that the tendency of the Board to refer back to the parties the "dicey" cases, as one member of the Department of Labour put it, has kept the Board out of the courts on this unusual procedure.

Some important issues are involved in this experiment. If its use should continue to expand, the Labour Relations Board would gradually be taking on the character of a labor court for grievance cases. Inquiries as to whether the Board is beginning to develop a consistent jurisprudence in arbitration cases and to introduce consistency from one contract to others have produced answers in the negative. It is possible that the rise in the number of applications under Section 22(4) reflects the decline in cost to the parties to a dispute because the officer stage and the Board are available without charge. Conceivably, there could be a tendency by the parties to avoid unpleasant decision-making since the alternative of using government machinery is not costly. On the other hand, while unions consulted seemed more favorable to this system than employers, a number of unions have signed agreements under clause 22(6) to opt out in favor of traditional privately arranged arbitration. The extent to which the system will be used will partly depend on the Board, and particularly the way in which it exercises its authority to return cases to the parties. If the Board applies even loosely a test of ability to pay, the number of cases would be kept to modest proportions. If, however, the Board is strongly influenced by a belief in the value of settlement by conciliation, the volume of cases could increase in accordance with the evaluation of the parties themselves. And in this connection it should be remembered that only one party need desire this alternative.

Students of arbitration should not dismiss this experiment lightly. The fact that two thirds of the cases referred are being

resolved with dispatch by officers must raise questions regarding the relationship between grievance procedures and arbitration. The former is primarily an accommodative procedure and the latter is essentially judicial. The conventional wisdom of the arbitration fraternity assumes that arbitration is a last resort after it has been established that further mediation efforts are hopeless. The statistical results in both British Columbia and Saskatchewan do not support such dogmatism. It is possible that the abrupt switch from an accommodative to a judicial action without the availability of an intervening third party misreads the true nature of the relationship of the parties and the pressures, both toward and against settlement, under which they function.

Conclusion

Canadian arrangements regarding the settlement of rights disputes are different in quite important respects from the American. There has been a great deal of experience with settlement by statutory requirement. Elaborate systems designed to protect the contractual rights of the parties have been inserted into labor relations acts. Obligations to refrain from strikes and to use arbitral procedures are spelled out in the law. In some jurisdictions, every point at which the system could break down has a legislative corrective imposing either the responsibility to act or substituting an outside authority in case of failure to act by one of the parties. Finally, the experiments in two western provinces suggest a need to reexamine policy with regard to the relationship between internal grievance procedures and arbitration.

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Discussion——

LLOYD ULMAN *

It occurs to me that the primary task of a commentator who has recently gained a slight acquaintanceship with the British system of industrial relations is to assure Mr. Fairweather's American audience that his thoughtful and absorbing paper is not an excursion into the domain of fiction, although it may be taken as strong supporting evidence that truth is stranger. For it is true that one twelfth of the British labor force is covered by a single set of negotiations and that, at least until recently, the substantive agreements issuing have been open-ended (as are most others). They are not systematically cast in written form; they are not enforceable at law; and they are not subject to final and binding interpretation by expert and impartial third parties. On the contrary, please note that employers sit in the chair in the last three steps on the road to York. In partial consequence of the foregoing, the employer is often unprotected from rank-and-file pressure and subject to continual bargaining, principally by shop stewards who are almost completely unrestrained by international authority.

I also agree with Mr. Fairweather's claims that such distinctions from American practice are associated with certain differences in performance in the areas of strike activity, wage increases, and productivity, although it is not obvious that such comparisons invariably cast the British system in a bad light.

The British system undoubtedly invites wildcat strikes. It has

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