TITLE OF THESIS

COLLECTIVE BARGAINING AND ORDER IN COUNCIL P.C.1003

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- by -

Neil Layton Fergusson

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I N T R O D U C T I O N

The main purpose of this Paper is to examine Canada's Federal Wartime Labour Relations Regulations to ascertain what changes Order in Council, P.C.1003 has made, and how it has been applied in the field of industrial relations.

In making this examination it is proposed to give some introductory statement on labour contracts generally, and follow this up with a review of Dominion labour legislation and practice from 1867-1939 especially in regard to the development in the process of collective bargaining and touching, incidentally, the emergence of State intervention in the settlement of disputes. Following this, again, it is proposed to trace the growth in the Dominion Control over labour during the war years, with special emphasis on the technique of Government Control in the process of collective bargaining and the settlement of labour disputes. And, finally, it is proposed to deal with particular emphasis on Order in Council, P.C.1003, the Wartime Labour Relations Regulations, passed in 1944 by the Federal Government under authority of the War Measures Act, and existing today by virtue of the National Emergency Transitional Powers Act.

It will be seen from the foregoing that collective bargaining between employer and employees, agreements arrived at after negotiations, and the development of State

intervention in the settlement of labour problems, will be subjects "writ large" in this Thesis.

In conclusion, the scope of the examination undertaken here will be confined to the Federal aspect, and Provincial regulations, which are of greater importance under the present Constitutional framework of Canada during normal years, will be mentioned only incidentally.

TABLE OF ABREVIATIONS

Commerce Clearing House Inc.,(Canadian Labour Law Reporter:	C.C.H.
Dominion of Canada Labour Service (vol.1)	1 D.L.S.

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S E C T I O N O N E

DEVELOPMENT OF COLLECTIVE BARGAINING IN CANADA UP TO 1939:

Chapter I: Introduction:

(a) The Labour Contract:

A labour contract or collective agreement is the result of collective bargaining between employer and employees. The contract is in most instances reduced to writing. In order to trace the development of collective bargaining in Canada it is necessary at first to turn to Great Britain for the background.

(b) Early Status Of Workers in England; State Regulation:

The modern labour problem had its roots in the origin of the wage-earning class, which appeared in England during the Industrial Revolution in the latter part of the Eighteenth and early part of the Nineteenth centuries.(1) This does not mean there was no labour problem at all before that time. Coming events cast their shadows beforehand; the Renaissance can trace its light from the middle ages and in like manner the beginnings of labour problems might be discerned many years before the Industrial Revolution.

In the middle ages craft guilds were empowered by Sovereign authority in England to lay down the conditions

(1) An Outline of Trade Union History in Great Britain, United States and Canada; by Margaret Mackintosh (Dominion Department of Labour Publication, October 1938; November 1946,) Page 1.
The Labor Problem in the United States: E.E.Cummins, 2nd Ed., (1935) P.4-5.

under which persons might practice a trade. The emancipation of the serfs in Edward III's reign made more workmen available to the guilds which had become by that time very exclusive.(1) In the middle of the Fourteenth century two million or more people died in the "Black Death." This loss of about half of the population produced far-reaching economic effects; food prices rose and in consequence the non-guild workers demanded higher wages. The Statute of Labourers (1349) 23 Edw.III, st.,1 and (1350) 25 Edw.III, st.,2 was passed in an attempt to fix wage rates of all workmen as a counteractory measure. The 1349 Close Roll, 23 Edw.III, is addressed to the Sheriff of Kent, and notes that

> "because a great part of the people, and especially of the workmen and servants, has now died in this plague, some, seeing the necessity of laws and the scarcity of servants, will not serve unless they receive excessive wages, and others preferring to beg in idleness rather than to seek their livelihood by labour. We, by the unanimous counsel of our prelates and nobles, have thought fit to ordain that every man and woman of our Realm" (exceptions) "shall be bound to serve and receive wages as in the twentieth year of our reign or in the five or six years last preceding." (2)

(1) Legal Position of Trade Unions: Henry H.Schloesser and W.Smith Clark,1912, P.1; The Modern Law of Labor Unions: 1910 W.A.Martin, P.3; Social Change and Labor Law: Malcolm Sharp and Charles O.Gregory, 1939, P.90.

(2) The Law of Trade Unions: Slesser and Baker,1921,P.3 (quote)

This Statute crystallized for several centuries the judicial attitude toward labour in England. The servants who came within the statute were compelled to work at a reasonable rate, the statute was to operate only in Summer months for in the Winter the responsibility of fixing wage-rates fell upon justices of the peace. Labourers who since their liberation had wandered about the country offering services to the highest bidder whether trader or guild, were now tied down again to the land under penalty of imprisonment. Refusal to work was an offence, as was receiving or offering wages higher than those fixed. Craft guilds soon followed the example of Parliament and made regulations regarding wages for their members.

The Statute of Labourers was followed by other Acts fixing wages. These Acts all favoured the Lords. In (1512) 4 Hen.VIII, c.5, provision was made for the relief of a master from the obligation to pay statutory wages, as follows:

> "No penalties for giving of wages under the Statute 12 Rich.II or any other statute shall be imposed on the master or giver of wages."

By the time of Edw.VI all combinations of workmen or labourers "not to make or to do their work but at a certain price or rate was forbidden", and a third conviction involved the pillory and the loss of an ear. (1)

The next Statute of importance was the Statute of Apprentices, (1562) 5 Eliz., c 4, which was a result of the suppression of the monasteries under Hen.VIII which had added

(1) <u>The Law of Trade Unions</u>: Slesser and Baker, 1921, P.4

to the surplus of workmen. The preamble of this Act stated that it was passed "in great hope, that being duly executed it shall banish idleness, advance husbandry, and yield unto the hired person, both in time of scarcity and in time of plenty, a convenient proportion of wages."

Under the Statute of Apprentices Justices of the Peace fixed scales of wages, made territorial divisions to which these scales applied and provided punishment for employers who paid more and for workers who received more than the fixed scale. Economic necessity early drove workmen to group action and the courts in turn retaliated by declaring such combinations conspiracies.

(c) Conspiracy and Restraint of Trade:

In general it may be said that the doctrine of conspiracy means that acts lawful when done by an individual might become unlawful when committed as a result of a concerted agreement. This doctrine was based upon the idea that the concerted action of an organized group might affect society more than would the same act committed by each member of a group.

The doctrine of conspiracy had its origin in the common law. There are two views as to the origin of criminal conspiracy, the first that it existed at common law, the second that it originated in the Ordinance of Conspirators 33 Edw.I; enacted in 1305. (1) In the middle ages there was no clearly marked line of distinction between crime and tort, and the same offence was often punishable either by indictment

(1) Law of Conspiracy, David Harrison, 1924, P.6.

at the King's suit or at the suit of the injured party. In 1330 by 4 Edw.III, c 2, conspiracy was given a definite criminal character, altho before that date it might be indictable in certain cases. The offence of conspiracy consisted of a combination of two or more persons for false and malicious promotion of indictments or suits for embracery or maintenance. After the year 1306 a person found guilty of the charge was liable to the "villainous judgment".

After the Poulterers' Case (1) indictment for conspiracy might follow a combination to commit a crime in a proper case without awaiting the commission of the crime. As the number of crimes increased, the number of types of criminal conspiracies increased and the "Seventeenth Century Rule" following from the Poulterers' Case was further extended to the point that even when certain acts were no longer regarded as crimes combinations to effect such acts were held as criminal conspiracies. (2)

One of the earliest English cases involving the doctrine of conspiracy in regard to workers was the case of the Journeymen Tailors in 1721. (3) Certain tailors were indicted for criminal conspiracy for combining to raise their wages. They were found guilty under the indictment. In the opinion of the court,

(1) (1611) 9 Rep.55; Moore, 814.

(2) Law of Conspiracies: David Harrison, 1924, P.16

(3) R v Journeymen Tailors (1721) 8 Mod.10. This followed "the doubtful" case of the Tubwomen v Brewers of London where it had been held a conspiracy at common law for two or more persons to band themselves together to enforce demands for

conspiracy of any kind was illegal although the matter about which they conspired might have been lawful for them or any of them, if they had not conspired to do it.

In addition to the earlier Combination Acts, several of which were (1305) 33 Edw.I; (1425) 3 Hen.VI, c 1; (1548) 2 & 3 Edw.VI, c 3; (1662) 14 Charles II, c 15; (1720) 7 Geo.I, c 13, the common law doctrine of "restraint of trade" made illegal all combinations of workmen to regulate the conditions of their labour.

(d) <u>The Combination Acts</u>:

There were relatively few comprehensive Acts forbidding the combination of workmen in existence prior to the Nineteenth century. The (1799) 39 Geo.III, c 81, making all combination of workmen illegal, and (1800) 39 & 40 Geo.III, c 106, reaffirming and codifying the law were the most important Acts passed in that regard, both at the turn of the century.

By the 1800 Combination Act every combination to obtain an advance in wages or alteration of the hours of work, or decrease of amount of work, or the prevention of employment of workers freely, or the preventing of workers hiring themselves to whom they liked, or the inducing of workers to leave their work was considered illegal; so also was attending any meeting, called to advance any of those objects, or spending money for the furtherance of such purposes or any of them, and the penalty of imprisonment could be given for infringement thereof. (1)

A good example of the effect of the Combination Laws was

(1) (1800) 39 & 40 Geo.III, c 106 ss 2-6.

the strike of the Scottish cotton workers in 1812 for fixed wage rates, perhaps the largest strike in this period. Thousands of workers were on strike for three weeks; towards the end, the employers appeared to be yielding, when suddenly the whole strike committee was arrested and the five leaders received prison sentences for the crime of combination. This broke the strike. (1)

(e) Gradual Removal of Laws in Restraint of Workmen:

In 1824 the Combination Laws Repeal Act (1824) 5 Geo.IV c 95, s 2 removed all criminal liability of combinations in advancing or fixing the rate of wages or altering the hours or quantity of work imposed either by statute or common law. This Act was passed during the economic depression following the Napoleonic Wars and after a movement to improve conditions of workers had resulted in a Parliamentary Committee of Inquiry. This Act in particular provided that workmen or others entering into combination for the purpose of regulating wages and conditions of labour should not be subject to proceedings for conspiracy or otherwise. As a result unionization increased. This was followed by demands for improved working conditions and in some cases by strikes. There was an immediate agitation for reenactment against combinations, another inquiry took place following which the Combination Laws Repeal Act Amendment

(1) A Short History of Labour Conditions in Great Britain 1750 to The Present Day: Jurgen Kucznski-, 1944, P.53.

Act, 1825, was passed. (1) Under this latter Act the Combination Laws remained repealed, but two new offences "molestation" and "obstruction" were created. The 1825 Act also removed the immunity granted by the 1824 Act for combinations of workmen in restraint of trade. Altho the 1825 Act was more restricted than the 1824 Act so far as trade unions were concerned, it did however legalize the right to withhold labour by collective action, a right which still exists. (2)

> Dicey says: "The best and wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite Liberalism. They believed that the attempt of trade unions to raise the rate of wages was some-thing like an attempt to oppose a law of nature." (3)

Before 1825 convictions for conspiracy with others to raise wages were rare at common law; see (1721) 8 Mod.Rep.10. But after 1825 convictions for illegal combination under this Act were relatively frequent. In R v Bykerdike, (1832) 1 M & Rob.179, members of a trade union were indicted for illegal combination for merely writing to their employers that a strike would take place. In 1837 a trial for conspiracy resulted in the conviction of five spinners; R v Selsby, (1851)

(1) 6 Geo.IV, c 129.

(2) Industrial Relations Handbook (Ministry of Labour and National Service) His Majesty's Stationery Office, London, 1944, P.5-6.

(3) Law and Public Opinion in England in the Nineteenth Century: A.V.Dicey (1920) P.199.

5 Cox C.C.495 n. In 1856, Crompton, J. said that all combinations tending to impede and interfere with the free course of trade were not only illegal, but criminal. (1) The Molestation of Workmen Act (1859) 22 Vict.c 34, defined more clearly the statutory offences of molestation and obstruction created by the 1825 Act. It rendered lawful peaceful persuasion to induce workmen to abstain from working in order to raise wages.

In 1867 the Court of Queen's Bench for the first time distinguished between the criminal and civil aspects of combinations generally, thus:

> "I am very far from saying," said Cockburn, C.J., "that the members of a trade union, constituted for the purpose not to work, except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority would bring themselves within the criminal law, but the rules of the society would certainly operate in restraint of trade, and therefore, in that sense, be unlawful." (2)

(1) Hilton v Eckersley (1856) 6 E & B, P.47.

(2) Hornby v Close: (1867) 2 Q.B., 153 at 158.
Note here that the Trade Union Act (1871) 34 & 35 Vict. c 31, s 2 stated that the purposes of a trade union were not by reason merely that they were in restraint of trade to be deemed unlawful and render thereby a trade union member liable to criminal prosecution for conspiracy or otherwise. The Conspiracy and Protection of Property Act by Sec.3 provided that a combination of union members would not be considered a criminal conspiracy per se.

(f) Decline of State Regulation; Rise of Voluntary Bargaining:

As state regulation relaxed in the Eighteenth century the workers increasingly began to combine to deal with the wage problem, either through petitioning Parliament to enforce the Statute of Apprentices or through the withholding of labour. In 1811 in the case of Rex v The Justices of Kent 14 East, 395, the Court held that industries not in existence in 1563 were outside the scope of the Statute of Apprentices, and in any case that the enforcement of wage regulations was discretionary with Justices of the Peace. This decision virtually repealed the Statute of Apprentices, since the Justices refused to fix wage rates. In 1813 as a consequence, the section of the Statute relating to the fixing of wages was repealed by (1813) 53 Geo.III, c 40; (1814) 54 Geo.III, c 96.

Despite adverse conditions workers organized in England. The comparative helplessness of the individual worker in bargaining with his powerful employer who held such advantages over him drove the worker to join with his fellows in holding meetings to discuss collective action. It was thus that collective bargaining originated in Great Britain in the Nineteenth century and spread to the European continent and North America as well as other continents, later. From 1800 on, conditions of employment became less and less subject to individual arrangements between employer and employee and more and more collective arrangements, in many cases written collective agreements, all on a voluntary basis. (1)

(1) International Labour Office: Collective Agreements, Studies & Reports Series A (Industrial Relations) No.39,Pages 5,201 ff.

(g) Legal Position of Trade Unions in Great Britain in 1867:

The 1825 Amendment to the 1824 Act repealing the Combination laws made provision for molestation and obstruction by workmen. This applied particularly to associations of workmen and provided a restraint against unionization. The 1859 Molestation of Workmen Act however exempted peaceful persuasion. Strikes were frequent from 1825 on and from time to time were accompanied by violence. One outbreak in 1867 resulted in the appointment of a Royal Commission to review the whole position of trade unionism, and the recommendations of this Commission made in 1869 resulted in the passing of two important Acts in 1871.

Before the Trade Union Act of 1871 in Great Britain the objects which trade unions usually pursued, especially in regard to employment of its members and in regard to wages, were held to be illegal as being in restraint of trade. It also followed that agreements between members of a union allowed by its constitution were illegal, and further that agreements between the union and a second party were illegal and unenforceable for this and other reasons such as lack of personality due to non incorporation. In addition, the trade union became so tainted with the complex of illegality in Great Britain that it was argued that there was no legal right allowing prosecution of its officers for fraud or embezzlement of union funds. Similarly, in certain circumstances, it was considered illegal for a trade union to carry on its usual employment and wage policies because of the element of criminal conspiracy. There appears to be no basis of distinction between a criminal and a civil conspiracy, except that in the

latter damage must result. (1)

In 1867 Trade Unions in Great Britain were voluntary associations created by means of agreements among the individuals who comprised its members. The legality of these associations was based on the fact that they came into being through the lawful action of individuals who were free to do anything not forbidden by law. (2)

(1) Labour Legislation: Research Study prepared for the Royal Commission on Dominion-Provincial Relations, P.71. Prof. A.E.Grauer (1939): See also Regina v Stainer, 11, Cox's Criminal Cases, P.483.
See also Willes, J. in Mulcahy v R (1868), L.R.3 H.L. (306) H.L.

(2) It might be noted here that the 1871 Trade Union Act declared that trade unions per se were not in Great Britain illegal combinations in restraint of trade so as to render agreements between its members generally unenforceable. In no case were such agreements to be considered illegal. The Act provided further that a trade union was not to be deemed unlawful, by reason only of the fact that it was in restraint of trade so as to render it liable to criminal prosecution for conspiracy.

Chapter II: Adoption of British Experience in The New World:

(a) In the Colonies:

The British North American Colonies early accepted the common law doctrine of conspiracy and restraint of trade and reinforced them by various Combination Acts. Nova Scotia enacted the first of these Acts in 1816.

(b) In the New Dominion:

The Dominion of Canada was formed by the British North America Act in 1867. This Act assigned Criminal Law to the Dominion and property and civil rights to the Provinces. This made trade unions in Canada subject to both jurisdictions, for instance since various trade union practices are governed by the provisions of the criminal law of the Dominion and at the same time may be restrained under Provincial law by the civil process of injunctions.(1)

The division of authority between the Dominion and the Provinces in matters affecting labour has been the subject of much discussion. The British North America Act, Canada's basic documentary Constitutional norm, did not mention labour as such.(2) The result over the years has been that both Dominion and Provincial legislation deal with labour matters of all kinds

(1) Canadian Labor Laws and The Treaty: (1926): Dr. Bryce M. Stewart, P.120.

(2) The Royal Commission on the Relations of Labour and Capital in Canada: (Report, Ottawa 1889) P.7 said that: "Your Commissioners cannot venture to determine where, in legislation affecting labour and capital, the authority of the Dominion Parliament ends and that of the Provincial Legislatures begins."

in Canada, and in a manner which is not very practical today. In normal times the Federal jurisdiction over labour is ancillary to jurisdiction in other matters; eg. railways, criminal law, and the implementation of Treaties under Section 132 of the British North America Act. Provincial control over labour matters, on the other hand, rests largely on provincial jurisdiction over property and civil rights, under Section 92 (13) of the British North America Act. (1)

The status of workers associations or unions in the colonies previous to 1867 and in the Dominion in 1867 followed very closely the position of such bodies in Great Britain. The background of Canadian labour union experience is thus very definitely British.

(1) Prof. A.E.Grauer in Labour Legislation (1939) a Research Study prepared for the Royal Commission on Dominion-Provincial Relations, P.174 states that the result of this divided field has been lack of uniformity in labour legislation over the Dominion, inability to implement International Labour Organization Conventions, and lack of co-operation in general.

Chapter III: Important Dominion Enactments 1867 - 1939:

(a) The Trade Unions Act 1872:

The Trade Unions Act of 1872 (1) enacted by the Dominion shortly after Confederation was based on the British Trade Union Act of 1871. The Canadian Act did not have the same effect, disregarding the argument as to its legality, as the British Act, as it applied only to trade unions registered under its provision. (2)

The Trade Unions Act provided that any seven or more members of a trade union could register such union with the Registrar General of Canada. A trade union is defined under Section 2 of the Act as a combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. The provision also existed in the Trade Unions Act to the effect that "the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, so as to render void or voidable any agreement or trust". (3)

(1) Now, the Trade Unions Act, R.S.C. (1927) ch.202.

(2) Chase v Starr (1924) S.C.R.495 at P.507 per Duff, J.
Polakoff v Winters Garment Co. (1928) 62 O.L.R.at P.54 per Middleton, J.

(3) Now, the Trade Unions Act, R.S.C. (1927) ch.202 Sec.29.

The 1872 Trade Unions Act has not been of much effect in Canada since relatively few unions have registered under its provisions. It will be sufficient to state here that it was in a sense a recognition by enactment of the existence of trade unions, since it allowed trade unions to hold property in the name of a trustee and to take action in a suit or defence thereof. It also made officers of the union liable in a proper case for misapplication of funds of the trade union. It did not however, have any application to "collective agreements", since under Section 3 the Act has no effect on any agreement between an employer and those employed by him as to such employment. (1)

The provision in the Trade Unions Act of 1872 stating that "the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, so as to render void or voidable any agreement or trust", exists today as Section 497 of the Criminal Code. (2)

(1) Labour Legislation: A Study prepared for the Royal Commission on Dominion-Provincial Relations, Prof.A.E.Grauer (1939) P.67-70. The Act "attempts to make certain agreements and trusts of trade unions valid, provides protection of union funds, all of which are matters of property and civil rights and within the jurisdiction of the provinces". This opinion follows the question of ultra vires, first raised by Alexander MacKenzie at the time of the passing of the Act. In addition it is questionable in any case if international trade unions come within the terms of the act.

y 1892 Criminal Code to unregistered unions.

The Criminal Law Amendment Act of 1872 provided that agreements of workmen in Canada to fix wages and the use of peaceful persuasion were not grounds of indictment for conspiracy. The Act went on, however, to state that coercive methods used on employers and workers would be illegal as a conspiracy. This Section exists today as Section 501 of the Criminal Code; following the 1876 Act R.S.C. c.37 s.1.

In short, provisions deemed proper for the protection of trade unions from the harsh operations of the Criminal law are found in the Criminal Code, and not in the Trade Unions Act. This fact renders it unnecessary for all practical purposes to consider whether the provisions of the Trade Unions Act of 1872 are constitutional. (1)

(b) The Industrial Disputes Investigation Act 1907:

The next step in Federal Labour Legislation was made in the passing of the Industrial Disputes Investigation Act in 1907, which Act was passed as a result of trouble in the Alberta Coal fields in 1906 a matter tending towards national concern. The Industrial Disputes Investigation Act (now R.S.C. ch.112, 1927) is entitled "An Act to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities". The Act shall apply to disputes between employers and employees in works within the authority of the Federal Parliament in ordinary times, any works brought within Dominion jurisdiction

(1) Amalgamated Builders Council v Herman (1930) 2 D.L.R.- 512 per Middleton J.

during national emergency, and any works made subject to this Act by Provincial Legislation - Section 3. The Act provided that either party might apply to the Minister of Labour for the establishment under Section 6 of a Board of Conciliation and Investigation to which the dispute may be referred under the provisions of this Act. The Minister then within fifteen days of the receipt of the application, if satisfied that the provisions of this Act apply, may establish a Board of three members. The Minister's decision is final in this regard, but ordinarily each party submits one recommendation and the two so recommended agree on a third who is named Chairman. In any other case the Minister himself makes the appointment. As soon as possible after the Board is established the Registrar of Boards of Conciliation and Investigation shall notify the parties of the names of the members. The Board is ready for action in the dispute.

The procedure in making the application for a Board is that the application must be in writing and sent by Registered Mail to the Minister setting forth the particulars of the dispute and declaring that to the best of knowledge and belief a lockout or strike is imminent, that negotiations are off. The applicant may suggest a nominee. A copy is to go to the other side. If the application is made by a Union it must be signed by two Officers, otherwise after a majority vote. The other party to the dispute shall reply in writing and send copies to the first party and to the Registrar. There must be at least ten employees affected before the Union may make application.

In certain cases the Municipality concerned may make application for a Board, or the Minister of Labour may on his own motion in certain cases refer the dispute to a Board.

The Registrar, on the formation of the Board, is to provide the Chairman with a copy of all proceedings, and the Board is forthwith required to deal with the matter. Under Section 24 of the Act the duties of the Board are:

> "in every case where a dispute is duly referred to a Board it shall be the duty of the Board to endeavour to bring about a settlement of the dispute, and to this end the Board shall, in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits and right settlement thereof."

The Board investigates the dispute and where a settlement is effected a memorandum of the settlement signed by the parties is forwarded to the Minister together with a Report. If the parties agree before or after the Report the recommendation becomes binding "in the same manner as parties are bound upon an award made pursuant to a reference to arbitration on the order of Court of Record". - Sections 25 and 63 of the Act. If no settlement is possible the Board submits a report to the Minister setting out what it did and what it recommends "according to the merits and substantial justice of the case". The Registrar files the Report and sends a copy to the parties concerned and to others interested in the dispute. Under the Act however, there was no compulsion on either party to carry out the recommendations of the Board.

It was merely an attempt by the Federal Department of Labour to bring the parties together and effect a settlement.

The Board may summon witnesses and require documents to be produced; and any party to the proceedings may be compelled to give evidence and penalties are provided for a breach. However, one notable feature of the Act was that it prohibited a strike or lockout until the Board had submitted its Report and recommendations. It went no further. Obvious loopholes in the Act were that stoppages not considered strikes or lockouts were not covered and in any case once proceedings were carried out and a Report submitted there was no provision preventing strikes or lockouts. But the policy of bringing the parties together and forbidding stoppages for a period of time made for settlements in many cases due to the "cooling off" period.(1) The procedure for enforcing penalties where they existed under the Act was that prescribed by the provisions of the Criminal Code regarding summary convictions.-Section 62.

The Industrial Disputes Investigation Act is the first Canadian legislation restricting the right to strike or lockout pending official investigation. Section 58 states that the relations of the parties shall remain unchanged pending proceedings before the Board. Penalties are provided under Section 59 for lockouts; under Section 60 for strikes; under Section 61 for inciting to strikes or lockouts. The findings of a Board are not mandatory, unless agreed on by both parties and then the findings may be enforced under Section 63.

(1) Section 57 of the Industrial Disputes Investigation Act.

It is questionable however, whether Section 58 prohibits strikes and lockouts previous to the thirty days mentioned therein. (1)

If jointly agreed the provisions of this Act may apply to any dispute in a trade not covered by the Act.-Section 64. In certain cases even if no ordinary application, the Minister may order a Board or recommend a Commission of Inquiry under Section 65; and under Section 66 the Minister may order inquiries into industrial matters. Under Section 67 "no Court of the Dominion of Canada, or of any Province or territory thereof, shall have power or jurisdiction to recognize or enforce, or to receive in evidence, any Report of a Board, or any Testimony or Proceeding before a Board, as against any person or for any purpose, except in the case of the prosecution of such person for perjury".

The Industrial Disputes Investigation Act of 1907, patently ultra vires on its face, was declared ultra vires the Dominion in the Snider Case in 1925.(2) As a result of this decision the Act was amended in its application by R.S.C.1925,ch.14 to apply to Federal works, only invading Provincial jurisdiction when enabled to do so by the Provinces. Up until 1939 at least the Industrial Disputes Investigation Act of 1907, as amended, was in effect over the Dominion field as well as in the Provincial field by enabling legislation in all provinces except British Columbia and Prince Edward Island, where it applied only to certain classes of transport and communication agencies.

(1) 1932- 10 C.B.R. P.420 ff. Trade Unions in Canada -C.A.Pearce.

(2) Toronto Electric Commissioners v Snider et al (1925), 2 D.L.R.5.

(c) Section 502-A of the Criminal Code, 1939:

This Section of the Criminal Code came into effect on August 1,1939. It was designed to protect workers against dismissal or other discriminatory treatment because of trade union activity.

The effect of this Section will be considered in detail in a later part of this Thesis.

Chapter IV: Union Liability in Canada in 1939:

(a) Liability of Trade Unions :

The legal status of Canadian trade unions is much the same as that of the union in Great Britain before the Industrial Disputes Act of 1906. They seem to have adequate protection from the Combination Laws, but they are open to constant attacks on charges of criminal and civil conspiracy. There has been frequent use of the injunction and union funds are liable to seizure to satisfy damage actions.(1)

Trade unions are not incorporated in Canada. The Trade Unions Act of 1872 and various Provincial Acts require the registration of trade unions and thereby impart a certain status to registered trade unions.(2)

(1) Canadian Labor Laws and The Treaty: Bryce M.Stewart (1926) P.193-194. See also R v Bunn 12 Cox C.C.P.316.

(2) Labour Legislation (1939) Royal Commission on Dominion-Provincial Relations, Study, A.E.Grauer, P.74-77. See also Duff, J. in Chase v Starr (1924) 66 S.C.R. P.507. See also Margaret Mackintosh in Trade Union Law in Canada, (1938) (1946) P.39. See also U.M.W.of A. v Strathcona Coal Co.(1908) 8 W.L.R. P.649, reference to the Taff-Vale Case in England.

The Trade Unions Act of 1872 further may permit trade unions to institute or defend suits in certain cases. As a result there is thus a "peculiar condition of trade union law in Canada." (1)

(b) Liability of Trade Union Members:

The members of a trade union are individually liable in case of assault and under other sections of the criminal code. In addition, criminal liability attaches in certain cases for action in connection with union activities such as illegal picketing under Section 501 of the Criminal Code as well as under other sections.

In case of civil conspiracy, where acts which when done individually are not illegal but become so when done by a group, liability attaches when the combination goes beyond forwarding or defending its own trade and instead really concentrates on injuring another.(2) This all leads to the question of conflict of interests explained so fully in the Crofter Case in the English House of Lords and in particular with regard to the ambit of interests.(3) Mere membership in a trade union does not make members liable for wrongful acts of the union, unless there is actual participation.(4) On

(1) Labour Legislation: A study prepared for the Royal Commission on Dominion-Provincial Relations (1939) P.66. A.E.Grauer.

(2) Sorrell v Smith (1925) A.C.700. Quinn v Leatham (1901) A.C.495. Meretsky v Arntfield (1922) O.W.N.439.

(3) Bora Laskin in 1942 C.B.R. P.636 in reference to the Judgment of Lord Wright in Crofter Hand Wovan Harris Tweed Co.Ltd. v Veitch (1924) 1 All E.R. P.164.

(4) Local Union No.1562 U.M.W.of A. v Williams (1919) 3 W.W.R. 828; 59 S.C.R.240.

the other hand, a trade union is not liable for illegal acts of its members unless it ordered or notified the acts to be done.(1)

(c) The Collective Agreement:

The Privy Council has held (2) that a collective agreement had in itself no legal effect, and was subject to the interpretation of the parties themselves and not the Courts, but when the terms of the collective agreement or any part of them enters into the individual contract of the worker with his employer then the case may be different. In the latter case the collective agreement may become part of the individual contract of the worker with his employer at least impliedly, and as such be subject to the law of contract.(3) This remains essentially the position of collective labour agreements in Canada today.(4)

(1) Vulcan Iron Works v Winnipeg Lodge No.174 Iron Moulders Union (1911) 16 W.L.R. 649.

(2) Young v C.N.R. (1931) 1 W.W.R. 1931 A.C. P.3.

(3) It might be noted here that criminal law applies to workers in both Federal and Provincial jurisdictions. In the main any other Federal law relating to trade unions or members thereof (except legislation of an emergency nature) applies only in an ancillary sense as being in regard to some definite heading in Sec.91,92, eg. railways. This Thesis will not deal with the question whether Provincial laws eg. minimum wage acts will apply to Federal workers.

(4) It might further be noted that certain types of labour agreements particularly as extended in Quebec are in a different category. See (1924) R.S.Q.ch.112; (1937) R.S.Q. ch.49; (1940) R.S.Q.ch.38.

Chapter V: Collective Bargaining in Canada 1867 - 1939:

"The right of association and of organization by workers is a fundamental right. Denial or interference with this right is provocative of much ill-will in Industry. With organization is necessarily associated representation. The right of workers to bargain collectively and to be heard, through chosen representatives, in matters pertaining to their employment, are corollaries of the right of association."

Industry and Humanity:(1918) Hon.W.L.MacKenzie King,P.200-201.

(a) Introduction:

This section of the paper will deal with the development in the process of collective bargaining in Canada during the years 1867 to 1939. A special attempt will be made to elicit from the sources chosen for examination herein just to what extent the statement quoted above is applicable from time to time during the period in question.

The sources chosen for examination will in the main be confined to practice and opinions with regard to union recognition and collective bargaining.(1) Collective bargaining principles are formed through the crystallization of public opinion in industry. Consequently, this examination will be important as indicating the course of development leading up to the limited legal status of labour unions and the obligation of an employer to bargain with his employees collectively.

(1) The Research & Statistics Branch of the Dominion Department of Labour has made an analytical study of agreements in various industries. For the development in the Pulp & Paper industry see Labour Gazette, Apr.1945,P.539;Iron & Steel industry, Labour Gazette, Oct.1945,P.146,Nov.1945,P.1613;Non-Ferrous & Chemical Products, Labour Gazette, Mar.1946;Coal Mining, Dec.1946.

It will be convenient in this Introduction to indicate the position of workers in Canada in 1867, and the improvement, if any, in their status so far as collective bargaining is concerned by the year 1919.

In 1867 associations of workers were not recognized at law in Canada. The Labour Problem was relatively unimportant for the Dominion was a new country and labour as such had not been mentioned in the British North America Act. Emigrants especially from the Old Country, brought over with them the experience current in collective bargaining in their old homes and applied it to the situations in the various Colonies and later in Canada. Collective bargaining in Canada in 1867 would therefore be of a limited nature and in any case wholly voluntary on the part of the parties concerned.

A Federal Department of Labour had been established in 1900 and a Conciliation Act was then in existence; in 1907 the Industrial Disputes Investigation Act had exercised and extended the services of conciliation and provided for a "cooling off" period. However, disregarding the very limited recognition of trade unions in the 1872 Trade Unions Act, there had been no compulsion to recognize trade unions or to bargain collectively previous to 1919.

During World War I, on July 11, 1918, Order in Council, P.C.1743 had been enacted by the Canadian Government because of industrial unrest mainly due to the fact that employers still denied workmen the right to organize. Paragraph 2 of this Order in Council declared certain principles and urged their adoption, as follows:

"That all employees have the right to organize in

trade unions, and this right shall not be denied or interfered with in any manner whatsoever and through their chosen representatives should be permitted and encouraged to negotiate with employers concerning working conditions, rates of pay or other grievances."

Despite the words of this Order in Council, labour disputes continued with the result that a Royal Commission appointed to inquire into the cause of industrial unrest, stated in 1919:

"On the whole we believe the day has passed when any employer should deny his employees the right to organize. Employers claim that right for themselves and it is not denied by the workers. There seems to be no reason why the employers should deny like rights to those who are employed by them."

The idealism engendered in World War I and the promises given to the workers to reward their loyalty during the struggle required post war implementation. The Peace Treaty of Versailles attempted to secure international recognition of these promises to labour. Article 23 of the Covenant of the League of Nations speaks of "fair and humane conditions of labour ..... in all countries". The Preamble to the Labour Section of the Treaty of Versailles (Part XIII), Articles 387-427 following up Section 23 speaks of the establishment of universal peace based on social justice; and speaking further of unjust labour conditions proceeded to lay down nine "methods and principles" of special importance to the achievement of social justice. The first and second of these principles which "should be" applied to all nations are:

"First - The guiding principle that labour should not be regarded as a commodity or article of commerce.

"Second - The right of association, for all lawful purposes, by the employees as well as by the employers."

In 1919 for all practical purposes the situation so far as collective bargaining was concerned was that in spite of any promises to the contrary, workers in Canada in some cases had the privilege to unionize and deal collectively with employers but in no case had they the legal right thereto. Indeed, as a rule, employers did not look too favourably upon the idea of creating such a practice in 1919. (1)

(b) Statements of Government Leaders: Source One:

It has been declared that Sir Robert Borden, the Canadian Prime Minister in 1918-1919, assisted by Mr. P.M.Draper of the Trades and Labour Congress of Canada, had an honourable part in drafting the Labour Section of the Treaty of Versailles.(2)

The attitude of the Union Government and the Conservative Government in Canada up until 1921 was to accept collective bargaining for all industrial employees, except Government

(1) Hon.W.L.MacKenzie King in Industry and Humanity (1918) P.13-14 speaks of the refusal of management to meet representatives of labour as an example of that "certain blindness in human beings."

(2) The Labour Gazette, Oct.1920, P.1334, quoting Rt.Hon.Arthur Meighen in an address before the 36th Annual Convention of the Trades and Labour Congress held at Windsor,Ont. Sept. 13-18, 1920: Canadian Labour Laws and The Treaty: (1926) Dr. Bryce M.Stewart, P.19: The Origin of the International Labour Organization: (1934) Vol.I, Published by the Carnegie Endowment for International Peace, p.216-217.

employees, and there is also an indication that there was no clear-cut policy in regard to representation when two or more labour organizations claimed that right. (1)

Prime Minister Rt.Hon.W.L.MacKenzie King, announced to the House of Commons on March 24,1924, that the Government proposed to form a Select Standing Committee on Industrial Relations.(2) In the House of Commons on March 18,1926, Prime Minister King supported a resolution in favour of collective bargaining; the resolution was in connection with the payment of men requisitioned for fighting forest fires under Provincial enactments.(3)

The Treaty of Versailles had embodied in its Labour Clause the principle of the payment of an "adequate wage". On March 15,1926, Mr.J.S.Woodsworth of Winnipeg introduced a resolution in the House of Commons regarding a legal minimum wage, the matter was referred on the motion of Prime Minister King for further consideration to a Committee on Industrial and International Relations. The Report of this Committee was

(1) The Labour Gazette, Apr.1920, P.372; The Labour Gazette, Feb.1920, P.107 ff; The Labour Gazette, Jan.1920, P.72.

(2) The Labour Gazette, Apr.1924, P.274. Resulting from a resolution of Mr. J.S.Woodsworth, M.P: "That in the opinion of this House it is advisable to appoint a Select Standing Committee to deal with all matters coming before the House which involve Industrial Relations".

(3) The Labour Gazette, Apr.1926, P.304,305. Resolution moved by Mr.A.W.Neill, M.P., seconded by Mr. A.A.Heaps, M.P.: "That in the opinion of this House every effort should be made to affirm and establish the full industrial freedom of the citizens of Canada to bargain for their services..."

unanimously adopted in the House of Commons June 30,1926. The Report recommended a Conference of Dominion and Provincial representatives be held in the near future to find ways and means of giving effect to the "Labour Provisions" of the Treaty of Versailles,(1) a matter which trade unions in Canada had been advocating since 1919.

The Dominion Government did not enact any legislation on the matter of collective bargaining during the period 1919-1930. On Jan.27,1922 a Federal Order in Council was passed confirming the fact that agricultural workers would seem to have the same rights of association and combination as other workers.(2) On April 14,1927 a bill requested by organized labour was passed regarding union label registration; this bill was a gesture toward union recognition.(3)

The Depression period was not productive of much advance, if any, in the field of labour relations in Canada. The economic crisis of the early thirties affected every movement or effort for economic or social improvement, and the bargaining position of the worker in Canada during that period was not conducive to the development of the collective bargaining process.(4)

(1) The Labour Gazette, June 1926 P.654

(2) Canadian Labour Laws and The Treaty: (1926) Dr.Bryce M. Stewart, P.43.

(3) The Labour Gazette, April 1927, P.378-379. (Bill had been introduced on ten previous occasions)

(4) The Labour Gazette, June 1931, P.680, quoting from the 15th Annual Report of the Director of the International Labour Organization delivered in Geneva, May 1931.

On January 22, 1931, Mr.Tom Moore, President of the Trades and Labour Congress of Canada, in presenting a program of legislative and administrative changes to the Dominion Government paid tribute to the Minister of Labour, Hon.Sen.G.D. Robertson, for his firm insistence that the regulations respecting hours of labour and conditions of employment of the Federal Government should be carried out in provincial and municipal relief works. At the same time, Mr.Moore pressed for action at the forthcoming Dominion-Provincial Conference toward amending the British North America Act to allow the Federal Government to implement conventions of the International Labour Conference.(1)

Trade unions in Canada during the depression were not so much concerned with any advance in the process of collective bargaining as in seeking fuller employment.(2)

In his 1937 New Year's message, the then Minister of Labour, the late Hon.Norman McL.Rogers, declared re the right of association:

> "In connection with recent strikes in Canada there have been frequent complaints that certain employers have denied to their employees the right of association and have summarily discharged men and women who have been active in the organization of labour unions. It is necessary to state in the clearest terms that the right of association is a civil right, long established by law and usage. It was affirmed with special reference

(1) The Labour Gazette, Feb.1931, P.179-180

(2) The Labour Gazette, Mar.1932, P.249; The Labour Gazette, Sept.1931, P.999; The Labour Gazette, June 1931, P.682; The Labour Gazette, May 1931, P.553-554.

to Canada by Order in Council of July 11, 1918 (p.c.1743). It was proclaimed explicitely in the Treaty of Versailles at the close of the World War. To deny the right of workmen to combine in any lawful organization they desire for the promotion of their common welfare is an open invitation to extremists to preach the futility of collective bargaining as an alternative to direct action. The right of association for legitimate purposes should be respected in the national interest and labour should not be denied the means of organizing for collective bargaining. The right of employers to organize is not questioned in any quarter. Employers are not entitled in the same breath to protest against governmental regulation of industry and to deny to labour its right to legitimate measures of self-help through voluntary association." (1)

Again Hon.Mr.Rogers in concluding his address before the 53rd Annual Convention of the Trades and Labour Congress of Canada in September 1937 expressed the view that collective bargaining is the path most likely to lead to industrial peace in a democracy. In his Rectorial Address at Queen's University on January 12, 1938, Hon.Norman McL.Rogers in speaking on industrial peace stated that strikes are the evidence of latent antagonisms in the industrial field; and that:

(1) The Labour Gazette, Jan.1937, P.23: See also The Labour Gazette, June 1937, P.595 for statement of the Minister of of Labour at Coaticook, Que., emphasizing the advantages of collective bargaining in maintaining industrial peace.

"Whether the recognition of unions if left to the discretion of employers or made obligatory by legislation, there is no doubt that the organization of unions will continue and their membership increase."

The Minister added that governmental action may assist the practice of collective bargaining in three ways, namely maintaining law during a strike, upholding freedom of association for workmen, and providing machinery for mediation and conciliation where voluntary collective bargaining failed.(1)

These statements of the then Minister of Labour follow closely the opinions of Hon.W.L.MacKenzie King as set forth in his work entitled Industry and Humanity. It will be proper next to indicate what direct action the Government of Canada took in furtherance of collective bargaining and unionization.

On February 25,1938, the Minister of Justice, Rt. Hon. Ernest Lapointe, in reply to Mr.J.S.Woodsworth's advocacy of a bill to amend the Criminal Code by provision against refusal to employ or dismissal for membership in trade unions, states, "we are all in favour of unions".....and....."of recognizing the right of labour people to organize into unions." But the objective of the Bill, he contended would "make a crime of something which in pith and substance relates to contracts and comes under property and civil rights, and under our constitution is within the jurisdiction

(1) The Labour Gazette, January 1938, P.24 ff.,; See also The Labour Gazette, January 1938, P.22: The Labour Gazette, February 1937, P.166 at 168.

of the provinces." The Minister of Justice introduced a Bill amending the Criminal Code following Mr.Woodsworth's Bill in most particulars. The Amendment to the Criminal Code in question exists as Section 502-A.

Section 502-A of the Criminal Code represents the only direct legislative action taken by the Canadian Government in the period between the two Great Wars in relation to union recognition and collective bargaining between employer and employee. Labour had criticized the Industrial Disputes Investigation Act because of its prevention of a strike until all the procedure of the Act had been exhausted. Workmen on the other hand were liable to direct discharge or discrimination because of union activities. The fear of strikes and the fear of unemployment, discharge or unfair treatment were at the root of much of the industrial unrest. The policy of the Industrial Disputes Investigation Act had been to restore faith between employer and employee; it contained no provision compelling collective bargaining. Section 502-A of the Criminal Code was designed to relieve workmen of the feeling that employers in various ways contrived to penalize union activity.

(c) Boards of Conciliation and Investigation: Source Two:

"Conciliation is always the best of methods to employ in adjusting differences. It has regard for feelings, as well as for facts, and feelings are an all-important consideration where human relationships are concerned. The whole effort of conciliation is necessarily concentrated upon the elimination of fear and the establishment of faith between the parties concerned."

Industry and Humanity:(1918) Hon.W.L.MacKenzie King, P.206.

"Investigation, as a method of preventing and adjusting industrial disputes, stands midway between Conciliation and Arbitration. Though rightly regarded as a separate and distinct method, it is the handmaid of the other two. Investigation goes farther than Conciliation necessarily goes, and not quite so far as Arbitration."

Industry and Humanity: (1918) Hon.W.L.MacKenzie King, P.209.

The Industrial Disputes Investigation Act, R.S.C.ch.112, 1927, entitled "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities", by Section 6 provides for Boards of Conciliation and Investigation established by the Minister of Labour on application generally by either of the parties to an industrial dispute. The duties of the Board so established are set out in Section 24 and, in short are to endeavour to

bring about a settlement by inquiry. There is, however, no compulsion on the parties to accept the award of the Board unless they agree to do so.

The recommendations of Boards of Conciliation and Investigation under the Industrial Disputes Investigation Act so far as followed by the parties provide a source and means of development in the process of collective bargaining in Canada.(1) In this section of the paper an examination will be made of the Reports of various Boards of Conciliation and Investigation as reported in the Canadian Labour Gazette to indicate any development toward general principles in the process of collective bargaining in Canada between 1919 and 1939. It might be noted here that the statutory right of Boards to investigate in many cases is sufficient in itself to influence the parties in the industrial dispute to settle controversies both voluntarily and speedily; and further that the publicity given the Report makes for settlement in many cases.

The unanimous report of the Board of Conciliation and Investigation on an application of two unions and dealing especially with the issue of union recognition stated:

> "It appeared to the Board that as neither organization could be fairly said to represent all the employees a reasonable solution of the difficulty would be for each organization to appoint three representatives upon a joint committee and that such committee should

(1) Local 100,United Steel Workers of America v Steel Co.of Canada (1944) 2 D.L.R. 583 per MacKay, J. at P.587.

negotiate a schedule on behalf of the members of both organizations."(1)

The recommendation of the Board was accepted by all parties concerned.

The Report of a Board of Conciliation and Investigation where the union concerned desired to make a contract for employees of several mining companies in the place of the several individual contracts then in existence, recommended:

"We are of the opinion that a more contented state of affairs would exist among the miners if the United Mine Workers of America were permitted to contract. This is a day of co-operation....."(2)

The Report of a Board of Conciliation and Investigation in the New Brunswick Power Company dispute stated:

"The representatives of the company at the hearing state that the company had no wish to make any agreement whatsoever with its employees, and did not intend to do so, but that its intention was to deal with the employees individually and without any reference to the Division."(3)

The Board recommended in this case that the previous collective agreement continue for another year.

(1) The Labour Gazette, July 1920, P.823 at 824: Report of Board in dispute between The C.N.Express Co. and certain of its employees.

(2) The Labour Gazette, March 1921,P.317: Report of the Board in dispute between Local 4070 of the U.M.W.of A. and various Mining companies of the Edmonton, Alberta District.

(3) The Labour Gazette, July 1921,P.881 at P.883: N.B.Power Co. v Amalgamated Association of Street & Electric Railway Employees.

The Report of the Board in the case of The C.P.R.Commercial Telegraphers, 1925, dealt with the matter of union recognition and incidentally with that of union shop. The Company considered that dealing through officials of the union without recognizing the union was proper collective bargaining according to their tradition. The Minority Report alone raised objections.(1) The Canadian National Railways, a Government agency, too dealt similarly with its employees through a "General Committee".(2)

The Report of the Board in the case of The Montreal Wharf employees of the C.N.R., where two unions were concerned in a matter about union recognition in an old agreement and in the negotiation of a new one, recommended a joint committee irrespective of union affiliation. This arrangement was accepted by all concerned. The problem of union recognition was side-tracked as well as the issue of sanctity of contract.(3)

The Report of the Board in the case of The Winnipeg Electric Company in 1926 recommended direct dealing with the employees themselves and at the same time employees were not to be discriminated against for union activity.(4) A similar case was that of the various shipping interests of the Port of Saint John, N.B., and their employees in 1927.(5)

(1) The Labour Gazette, Feb. 1925, P.107 at P.113-114.

(2) The Labour Gazette, Feb. 1925, P.114 ff.

(3) The Labour Gazette, Jan. 1927, P.19.

(4) The Labour Gazette, Aug. 1926, P.754

(5) The Labour Gazette, Apr. 1927, P.359 ff.

The Majority Report of the Board in the case of The British Columbia Telephone Company Employees who sought union recognition in 1927, recommended no change in policy. The Minority Report, however, recommended collective bargaining and union recognition in preference to the policy of dealing individually with each employee.(1)

In the foregoing Reports of Boards of Conciliation and Investigation front-line cases in the industrial conflict between employer and employee have been considered and issues were joined under the headings of union recognition, representation, union shop and employer interference. As marginal cases in the "area of ever-present possible conflict" Reports of Boards of Conciliation and Investigation will deal with the most pressing focal points at any particular time.

The following are illustrations of the reasons given by employers not favouring collective bargaining:

1. In the dispute between the Winnipeg Electric Company and its motormen and conductors, the Company contended that the Industrial Disputes Investigation Act was ultra vires the Dominion. (2)
2. In the case of the Canadian National Railways and its employees on the Montreal Wharf in 1926, the Company contended that sanctity of contract was an object in the way of collective bargaining.(3)
3. In the case of The City of Winnipeg Employees in 1929 it was found that the City had required employees after 1919 to sign a pledge not to join a union.(4)

(1) The Labour Gazette, June 1927, P.612 ff.

(2) The Labour Gazette, Aug. 1926, P.754.

(3) The Labour Gazette, Jan. 1927, P.19 ff.

(4) The Labour Gazette, Nov. 1929, P.1333.

4. In the case of United Delivery Limited and its employees in 1939 a solicitor for the Company hindered work of conciliation by insisting upon legal technicalities.(1)
5. In the case of The Minto Coal Operators and their employees in 1938, members of District 26, United Mine Workers of America, the Operators objected to the union as foreign controlled and tainted with communism.(2)
6. A similar objection was raised by the Estevan Coal Mine Operators of Saskatchewan in 1939.(3)

The Report of the Board in the Inverness Railway and Coal Company case both Majority and Minority, adopted the principle of recognition of one union per unit, the choice being made by a majority vote of all eligible employees. The union selected was to represent all the employees in the unit.(4)

The Report of the Board in the Wayne Alberta Coal Companies case recommended that the operators assist their workmen in the formation of unions by allowing them to meet for such purpose on company property.(5)

The Report of the Board in the "P.E.Island" Ferry case suggested that the employees might use the services of competent outside representatives in their negotiations with the Canadian National Railways.(6)

(1) The Labour Gazette, Feb. 1939, P.128.

(2) The Labour Gazette, July 1938, P.725.

(3) The Labour Gazette, Aug. 1939, P.782 ff.

(4) The Labour Gazette, June 1927. P.606.

(5) The Labour Gazette, Aug. 1928, P.827.

(6) The Labour Gazette, July 1930, P.887; Oct.1930,P.1126.

The Report of the Board in the Ocean Steamship Companies case in 1939 took cognizance of the New Brunswick Act of 1938 which recognized the right of workmen to bargain collectively through representatives chosen by the majority; at the same time the Board did not favour union shop. An agreement on this basis was recommended for a period of one year.(1)

The Report of the Board in the case of the E.M.T. (Eastern) Limited and its employees recommended union recognition in collective bargaining. The Board was influenced in its decision because of the present day tendency to accept collective bargaining, because of the fact that a majority of the provinces of Canada had enacted legislation thereon, and because of the demonstrated psychological effect. The Minority Report stating that since there was no legal obligation on the part of the Company to grant union recognition, the Board should not attempt to interfere.(2)

The basic civil right of workers to organize into trade unions and enjoy the benefits of collective bargaining has been increasingly recognized in the record of awards of Boards of Conciliation and Investigation just examined. The outbreak of war in 1939, however, found the problem still acute and employers in many cases no more inclined to make peace with the idea that labour should be recognized.(3) In 1938 six of the Provinces of Canada had legislation granting the right of unionization to employees and restricting employers,(4) however, there were still whole industries historically opposed to unions.(5)

(1) The Labour Gazette, Apr.1939, P.371.
(2) The Labour Gazette, Oct.1939, P.979.
(3) Collective Bargaining in Canada,(1941) J.L.Cohen,K.C. P.13.
(4) The Labour Gazette, June 1938, P.618.
(5) The Labour Gazette, Apr. 1938, P.398.

(d) Reports of Other Government Boards: Source Three:

"The consequences attendant upon investigation vary according as investigation is confined to simple disclosure of facts, or is supplemented by authority to pass upon facts, and to make findings and recommendations. In such cases, consequences also vary according to the binding force given awards."
Industry and Humanity: (1918) Hon.W.L.MacKenzie King, P.211-212.

In Canada, Royal Commissions or other Boards of an investigational nature are appointed by the Government in an effort to restore faith and reason in some particular or more general industrial situation. It is imperative that the parties have confidence in such Commissions or Boards. In general, such bodies make recommendations only, and there is no compulsion to accept their awards. However, due to the publicity attending hearings, Commissions or Boards have been successful in settling many disputes in the industrial field. Such bodies are especially useful where a situation is intricate, or where the numbers of persons directly or indirectly involved or affected are considerable.

In addition to Canadian Boards and Commissions, similar bodies in the United States and Great Britain will be noted in a proper case, for both British and American precedents influence "social" practices and legislation in Canada.(1)

(1) The Labour Gazette, Feb. 1925, P.154, citing Dr.J.W.McMillan of Victoria College, Toronto, then Chairman of the Ontario Minimum Wage Board in an address before the Annual Convention of the American Association for Labour Legislation.

The Royal Commission appointed by the Dominion Government to inquire into the cause of industrial unrest in Canada reported in 1919 that employers should recognize the principles of union organization and collective bargaining, as previously mentioned in this Thesis. The Treaty of Versailles, in which Canada took part, in its Labour Section gave a strong impetus to labour legislation.(1)

The Report of the Wylie Commission appointed under Section 65 of the Industrial Disputes Investigation Act by Federal Order in Council, supplemented by Provincial authority, in 1931 stated, regarding the Estevan Saskatchewan, Coal Miners dispute:

> "Prior to the year 1931 there had been no labour organization in this field, or in the industrial mines. For several months before the strike there had been a feeling of unrest growing out of the reduction in wages and the working conditions complained of. An organization in each mine, with a committee authorized to represent the men in any difference or complaint arising out of wages or weights or working conditions would have removed much of the dissatisfaction." (2)

The Nova Scotia Royal Commission on conditions in the coal mining industry in Nova Scotia (Duncan Commission) gave its Report in February 1932. On the relationship between the Company and the Union the Commission stated as follows:

(1) The Labour Gazette, June 1927, P.629.

(2) The Labour Gazette, Oct. 1931, P.1065 ff.

The Labour Gazette, Mar. 1932, P.262.

"It is a matter of considerable satisfaction to find that the relationship between the operators and the men has improved so considerably since our previous investigation. The operators have openly accepted the U.M.W.of A. as the medium of collective bargaining between themselves and the men, and have made available to them from time to time confidential data which would enable them to apprehend the financial position. The union, on the other hand, has shown a wide understanding of the responsibilities involved in collective bargaining. We believe that the large measure of good will and confidence which has already developed can be - and will be - still further enlarged, and that successful collective bargaining on a basis of mutual interest is assured for the future." (1)

(1) The Labour Gazette, Mar. 1932, P.271 ;also July 1930, P.768, In another case in Nova Scotia, the Report of R.S.McLellan,K.C. the Royal Commissioner, appointed by the Nova Scotia Government to deal with conditions in the Westville coal area, on the question of union recognition stated in part:
"On the question of the recognition of the union, the Commissioner found that the greatest cause of difficulty between the Company and the employees was the refusal of the management to accept the principle of collective bargaining and to recognize the union, although at the time of the inquiry practically all the employees eligible were members of it; but the result of the inquiry had been such recognition and the signing of an agreement and the thorough discussion of matters in dispute....."

The Duncan Commission award was finally accepted by the miners on May 26, 1932 by a majority vote. It provided for a decrease in wages. Early in June 1931, the district officers of the U.M.W.of A. had met Dominion Coal Company officials and after lengthy negotiations a new agreement was finally agreed to extend from March 15,1932 to January 31,1933.(1) The agreement was on the basis of the recommendations of the Duncan Commission.

During the depression the Dominion Parliament appointed a Royal Commission on price spreads. The Commission submitted its Report in 1935. The Report saw the need of improvement in the industrial field in Canada. The following is a quotation from the Report of this Royal Commission: (Report P.126-127):

> "With the development of the factory system, and still more with the general trend to corporate management and concentration; the disparity in bargaining proven between the individual worker and the typical employer has grown so obvious that the abstract necessity for collective bargaining is widely accepted. On this side of the Atlantic however practice has not followed this recognition to the extent it has in other countries. This lag in industrial policy has been due in large measure to pioneer conditions, free land, unlimited employment opportunities, and a relatively high wage level. With the disappearance of these conditions, trade union membership increased, but some employers have been reluctant to recognize the unions and, in some instances, for various reasons, trade unionism has obtained little or no footing."

(1) The Labour Gazette, Aug. 1932, P.913.

The Report of the Royal Commission on Price spreads, (1934-35) felt that the Government should make some declaration on the place of trade unions in the improvement of industrial relations, for "as long as the trade union movement is only tolerated,.....it will continue to pursue defensive tactics - a prominent official calls them 'snarling dog' tactics - which are not likely to be constructive".(1) The Report further recommended the extension of The Industrial Disputes Investigation Act both in scope and in detail.(2)

The Report of the Commission on Labour Disputes in Laundries and Meat Packing Plants in Edmonton, Alberta, appointed by the Alberta Government in May 1937 recommended inter alia, that when labour organizations have been formed in accordance with the desire of a majority of the employees in any plant in preference to a "company union" the employers should be required to recognize them, even where the representatives should not be personally popular or acceptable.(3)

Hon.W.F.A.Turgeon of the Saskatchewan Court of Appeal was appointed by Order in Council on January 27, 1936, a Commissioner following closing of the Dominion Textile's Rayon Mill at Sherbrooke,P.Q. The Report of this Commissioner stated:

> "The textile industry in Canada has stood throughout its history on a basis of individual as opposed to collective bargaining", and "the attitude of the employer as a whole towards bargaining with unions was distinctly negative at the time public sittings of this Commission were being held." (4)

(1) P.128 of Report.
(2) P.136-137 of Report.
(3) The Labour Gazette, Feb. 1938, P.139-140.
(4) The Labour Gazette, Apr. 1938, P.395 at 398.

The Report of the Royal Commissioner in the Textile industry felt that lack of unionization in the past was due to the nature of the industry and the personnel employed. However, as the industry expanded the workers felt the need of unionization, thus:

> "The worker thus feels that as an individual he can no longer hope to play any part in bargaining for his conditions of employment, and that only through joint action with his fellow-workers can he establish bargaining equality with the large corporation." (1)

The following excerpt from the Report of the Industrial Relations Committee of the Canadian Manufacturers' Association, in relation to collective bargaining in 1938, indicates the general feeling of most employers in this regard in Canada immediately preceding the War in 1939; after six provinces had granted employees the right to bargain collectively:

> "Your Committee has taken the position that if trade unions are thus to be recognized as bargaining agents, they should be required to file copies of their constitution and by-laws and of the names of their officers, as well as annual financial statements setting out receipts and expenditures. Your Committee is also of opinion that if trade unions are to have the new rights and privileges accorded in the new legislation, they should be required by incorporation or otherwise, to become insurable in law for breaches of contracts into which they enter."(2)

(1) The Labour Gazette, Apr. 1938, P.398.

(2) The Labour Gazette, June 1938, P.618.

The United States Senate Committee on Education and Labour made an investigation on labour conditions in the coal fields of West Virginia in 1921. The Committee felt that industrial conferences since the First Great War had been disappointing, however, the Committee professed to see a code of industrial relations developing in practice.(1) The code as the Committee saw it included the right of both miner and operator to organize free of discrimination and intimidation. The Committee also saw developing collective bargaining, subject to the right of employees to refrain from joining the union; peaceful persuasion being permitted both on the part of operator and union in regard to refraining from joining or joining a union.

The United States Coal Commission inquiring into the "causes which induce strikes" in 1923, demanded in the public interest that the following fixed principles be recognized by capital and labour. (2) Contracts must be voluntary, and binding once made. Collective bargaining or individual bargaining are both to be allowed. In basic industries the rights of the parties, a de jure corporation and a de facto union, should be modified if necessary in the public interest, from time to time.

During Roosevelt's Administration in the early nineteen thirties the New Deal Program first favoured labour unions in an indirect manner through its Blue Eagle Label Program, later in a more direct manner by the Wagner Act and the National Labor Relations Board, by providing for union recognition in law and compulsory bargaining in good faith free from unfair practices.

(1) The Labour Gazette, May 1922, P.503 at 504.

(2) The Labour Gazette, Dec.1923, P.1399-1400.

(e) Labour Unions: Source Four:

"If Capital has been a disintegrating factor, breaking up families, and scattering individuals as atoms to end ends of the earth, more than any other agency it has also been responsible for bringing together individuals in groups and communities, and making possible an ever increasing measure of associated effort."

Industry and Humanity: (1918) Hon.W.L.MacKenzie King, P.109.

The statements considered under this heading will be of Canadian workers in the main, broken up into two periods, namely, 1919-1930 and 1930-1939. In addition the attitude of labour unions in the United States and Great Britain will be considered, in the former case because of proximity and affiliated interests, and in the latter case because of background and similarity.

1. The Period 1919 - 1930

The Trades and Labour Congress of Canada

It was pointed out earlier in this paper that Mr.P.M.Draper of the Trades and Labour Congress of Canada was one of the Canadian delegates assisting in the drafting of the Labour Conventions of the Treaty of Versailles. On February 24,1922 the Trades and Labour Congress of Canada submitted its program on labour legislation to the Dominion Government at Ottawa and requested that definite action be taken along the lines proposed. Among the proposals were the following:

"That the Government take steps to have the Conventions of the International Labour Organization accepted as

Treaty obligations and therefore brought within the jurisdiction of the Federal Government."

"That action be taken to give legislative effect to all, or such items, as may be decided to be within the jurisdiction of the Dominion Government."

"Provision for collective bargaining and democratic development within public services." (1)

The Thirty-Eighth Annual Convention of the Trades and Labour Congress of Canada, held in Montreal, P.Q. August 21-26,1922, adopted, inter alia, a resolution advocating for all workers the right to organize and that no worker should be penalized or discharged for joining or affiliating with any bona fide or recognized trade union without a just cause.(2)

The Thirty-Ninth Annual Convention of the Trades and Labour Congress held in Vancouver, September 10-14,1923, in dealing with the heading of legislation made reference to the right of labour to organize, which had been brought to the attention of the House of Commons through the dismissal of certain employees for union activity. The executive of the union stated that the Prime Minister had assured them of his concern in the matter.(3)

(1) The Labour Gazette, Mar.1922, P.264-265.

It might be noted here that as Canadian status developed the Dominion power to implement the provisions of any treaty waned. It is also of interest to note that the International Labour Organization itself has never passed a convention on collective bargaining.

(2) The Labour Gazette, Sept.1922, P.962 at 974.

(3) The Labour Gazette, Oct. 1923, P.1089-1090 quoting an executive statement.

The All-Canadian Congress of Labour

The Third Annual Conference of the All-Canadian Congress of Labour, which was formed in 1927, as a National Industrial Union, was held in Winnipeg, Manitoba, beginning November 4,1929. The Convention claimed that employers in Canada showed a "tendency" to favour "alien craft workers" as "representing the workers" regardless of whether they held a majority of the workers concerned or not and that neither employers nor "alien unions" showed due regard for Canadian workers.(1) The following program of legislation was sought:

"That the union representing the majority of the employees shall be recognized as the representative union.

"That all negotiations between any employer and the employees in any class, craft, or category respecting wages, conditions of labour or terms of employment, shall be conducted between the employer and the representative union, and no person except the accredited officers of such representative union shall have the right to negotiate for such union or enter into any agreement on behalf of the employees in such class, craft, or category.

"That all employees who are members of any union which is not the representative union shall be entitled to and shall (except as to the right to negotiate for, and, in dealings with the employer, the right to represent the employees of such class, craft, or category,) receive the same wages, and shall be entitled to and shall receive the same benefits and privileges, and shall in all respects enjoy the same terms and conditions of of employment as employees who are members of the representative union or as employees who are represented thereby."(2)

(1) The Labour Gazette, Dec. 1929, P.1359,1366.

(2) The Labour Gazette, Dec. 1929, P.1366

Canadian Unionized workers during the period 1919-1930 constantly requested the Dominion Government to enact legislation implementing the Conventions of the International Labour Organization, and if necessary amend the British North America Act. Assurance was received from the Federal Government that workers had the right to organize without discrimination from employers. Legislation was sought by the unions, which was to lay down a basis for choosing bargaining representatives for a unit. The majority union or association was to represent all the workers of the unit regardless of their affiliations.

Labour Unions in the United States

William Green, President of the American Federation of Labor, in speaking at the Fiftieth Annual Convention of the Amalgamated Association of Iron, Steel and Tin Workers, held at Pittsburg, Penn., April 7-21,1925, the Convention being attended by Canadian delegates, stated:

> "The great American Labour movement is committed to the policy of collective bargaining, wage agreements, conferences and understanding and today we find many economists, statesmen and progressive employers who have embraced that doctrine and who are committed to this whole scheme of collective bargaining, wage agreements, understanding and conferences. Only recently Sir Henry Thornton, the Manager of the Canadian National Railways, the largest single railway system in the world, stated in an address that organized labour and collective bargaining were

here and furthermore he said, "it is here to stay." He said, that as one large employer of labour he believed in dealing with trade unions. He accepted them as an institutional development of modern civilization and he advised employers of labour that it would be better for them to treat with trade unions instead of fighting with them and trying to destroy them. This statement, it seems to me is significant as showing the tendency of the times, the new concept of the organized labour movement."(1)

At the Forty-Fifth Annual Convention of the American Federation of Labor held at Atlantic City, N.J., October 5-16,1925, was considered a resolution designed to make unlawful individual contracts which were drawn to prevent union membership.(2) At the Forty-Sixth Annual Convention of the American Federation of Labor held at Detroit, Mich., October 4-10,1926, the question of company unions was dealt with by the committee on resolutions, by resolution thus:

"Company unions are a menace to the trade union movement and to American industry which must be met and overcome. Although they admit the principle of organization in form, they are not and never can be a fundamental solution to the problem of industrial relations. They deny the substance of organization."(3)

(1) The Labour Gazette, June 1925, P.592

(2) The Labour Gazette, Nov. 1925, P.1079 at 1081.

(3) The Labour Gazette, Nov. 1926, P.1091.

The Convention went on to condemn the "yellow dog" contract as an attempt by anti-union employers through individual contracts, to compel wage earners to surrender their trade union membership and agree not to take collective action.(1)

The preference of labour for co-operation rather than for militant measures was expressed by William Green, President of the American Federation of Labor in the May issue of the American Federation in 1927.(2)

The Executive of District 26, United Mine Workers of America, wrote the International Executive Board in the United States asking whether affiliation with the "Red Union Internationale" was permissible. The reply was in the negative following a report of the International Board on January 10, 1923, quoted, in part, as follows:

"Among the objects for which the Red Internationale was originally founded, it has for its purpose, first-Control and afterwards the destruction of the bona fide trade union movement....."(3) The Report adds:

"The membership of our great organization not only believes in the principle of collective bargaining, but also the sanctity of contracts....." The Report then went on to contrast the policy of the United Mine Workers of America with that set forth in Section 54 of the Red Internationale program which looks on collective bargaining merely as an armistice and contracts merely as something to be broken at will when occasion arises.(4)

(1) The Labour Gazette, Nov. 1926, P.1092.

(2) The Labour Gazette, June 1927, P.597.

(3) The Labour Gazette, June 1927, P.596-597.

(4) The Labour Gazette, Feb. 1923, P.143; see also The Labour Gazette, Nov.1925, P.1079 at 1083, statement by A.F.of L.

2. The Period 1930-1939

The Trades and Labour Congress of Canada

The Trades and Labour Congress of Canada on January 22, 1931, presented a program of legislative and administrative changes to the Dominion Government. Mr. Tom Moore, President of the Congress, at this time paid tribute to the Minister of Labour, Sen.G.D.Robertson, for his firm insistence that the regulations respecting hours of labour and conditions of employment of the Federal Government should be carried out in provincial and municipal relief works. The Council also pressed for action at the forthcoming Dominion-Provincial Conference toward amending the British North America Act to allow the Federal Government to implement conventions of the International Labour Conference.(1) The Quebec Branch of the Congress presented very similar proposals to the Provincial Quebec Cabinet on January 8,1931. (2)

The President of the Trades and Labour Congress in 1937, Mr.P.M.Draper, stated in his New Year's message:

> "True, no legal barrier exists to wage earners joining a union, but in some cases the attitude of industry has been successful in blocking the efforts of their employees - and invariably these are the industries where low wages are paid."

In the same message Mr.Draper stated: "the trade union movement looks forward in 1937 with some hope that legal recognition of this right to organize may be won in Canada, to the benefit of employees in low wage industries." (3)

(1) The Labour Gazette, Feb. 1931, P.179-180.(P.185 Bennett reply)

(2) The Labour Gazette, Jan. 1931, P.37.

(3) The Labour Gazette, Oct. 1937, P.1080 at 1081.

The Trades and Labour Congress at its Montreal Convention, September 8-12,1936, contended that the Government of Canada should provide by law that all employees should have the right to organize for their own protection and that the State should administer such Act. The Congress favoured uniform Government regulations throughout the Dominion thereon, and the imposition of heavy penalties on employers who violated the regulations. The Congress also requested the various Governments in Canada to purchase goods only from firms granting union recognition and collective bargaining rights to their employees.(1)

In a Memorandum of December 18,1936, the Trades and Labour Congress again requested amendment of the British North America Act to allow wider Federal control over social and labour legislation, and the extension of the Industrial Disputes Investigation Act to include other services such as distribution of milk, bread, coal, motor transportation, bank employees, and public servants.(2)

At the Fifty-Third Annual Convention of the Trades and Labour Congress in Ottawa, September 13-18,1937, Mr.Draper, President of the Congress congratulated the then Minister of Labour on his manifest interest in the problems of labour. The convention noted that the Draft Bill presented to the various Governments in Canada in 1936 had borne fruit in that Alberta, Nova Scotia and Manitoba had accepted the principle of the lawful right of employees to form unions, in a positive manner.

(1) The Labour Gazette, Oct. 1936, P.892 ff; the Memorandum presented to Federal Government on Dec.18,1936 requested a positive enactment and not a negative recognition of the right to organize.-cf. U.S.Blue Eagle program.

(2) The Labour Gazette, Jan. 1937, P.38 ff.

(3) The Labour Gazette, Oct. 1937, P.1081 ff.,

In his Labour Day Message 1937, Mr.P.M.Draper, President of the Trades and Labour Congress, in stressing the necessity of union organization, stated that since last Labour Day the workers of Canada had been given more direct recognition of this right than at any previous period; the legislatures of Nova Scotia, Alberta, and Quebec having conferred such a right by law. Mr.Draper exhorted workers in the other provinces to urge similar legislative recognition.(1) Mr.Draper saw in the labour movement a bulwark of constitutional democracy, which does not seek class war but rather understanding in industry founded upon social justice.(2)

On January 14, 1938, the Congress again submitted a legislative program to the Dominion Government, in which uniform legislation on union recognition and collective bargaining was requested, even if amendment of the British North America Act be necessary. The Dominion Parliament was requested to recognize these rights by law in as far as its own jurisdiction extended, as a beginning.(3) In his Labour Day Message 1938, Mr.Draper urged the provinces of Ontario and Prince Edward Island to enact legislation recognizing the right of workers to organize; adding that there was no better way to give workers a feeling of security and fair treatment, both essential to good industrial relations.(4)

The Fifty-Fourth Annual Convention of the Congress held at Niagara Falls,Ont. September 12-17,1938 proposed several features to be added to the 1937 Draft Bill. These were outlawing or

(1) The Labour Gazette, Sept.1937, P.947

(2) The Labour Gazette, Sept.1937, P.947

(3) The Labour Gazette, Feb. 1938, P.142 ff.,

(4) The Labour Gazette, Sept.1938, P.968

penalizing company unions, compelling employers under penalty to bargain with duly elected representatives of employees, and the setting up of a Government tribunal to settle jurisdictional disputes between unions.(1)

On December 15,1938, the Congress presented its annual memorandum of proposed labour legislation to the Dominion Government. It requested as a supplement to provincial legislation that the Criminal Code be amended to make it an offence to deny unjustifiably the workers' right to organize and bargain collectively. It further requested the Dominion Government to insert in all Government contracts a clause stipulating that the employer concerned practice union recognition and collective bargaining.(2)

The Labour Gazette commenting on the retirement of Mr.P.M. Draper from the presidency of The Trades and Labour Congress after a fifty-two year labour career, traced the development in labour relations from 1887, when labour was regarded generally as a commodity and the labour movement was fighting for its existence until 1939, when the right to organize and bargain collectively is being guaranteed by legislative enactment.(3)

The Fifty-Fifth Annual Convention of the Trades and Labour Congress held in London,Ont.,September 25-30,1939, referred to Section 502-A of the Criminal Code recently passed, and sought an amendment to provide for compulsory collective bargaining.(4)

(1) The Labour Gazette, Oct.1938, P.1101 ff.,

(2) The Labour Gazette, Jan.1939, P.41.

(3) The Labour Gazette, Oct.1939, P.972,973.

(4) The Labour Gazette, Oct.1939, P.1007 ff.,

The All-Canadian Congress of Labour

In presenting its memorandum of proposed legislation to the Federal Government on December 18,1936, the All-Canadian Congress of Labour commented on discrimination as defeating collective organization of workers and thereby collective bargaining as well. The Congress considered that the Government "may at the least insist that Canadian firms which enjoy the benefits of tariff protection, shall recognize the right to organize and bargain collectively regarding wages and conditions of employment, and may take vigorous action, if necessary, to compel employers to do so." (1)

The Congress expressed concern that the Supreme Court had ruled the Bennett social legislation ultra vires the Dominion Parliament and referred again to one of its recent resolutions requesting the Federal Government to amend the British North America Act so as to give the Dominion full jurisdiction over all matters of national interest. This was necessary because of unforeseen developments since 1867.(2)

Mr. A.R.Mosher, President of the All-Canadian Congress of Labour, at its Seventh Annual Convention held in Toronto, March 8-10,1937 called for a program of union organization in Canada. The Convention also requested the extension of the Industrial Disputes Investigation Act to all industries in Canada, requested the appointment of a Royal Commission to consider amendments to the British North America Act. In particular the Congress commented on the failure of the Bennett New Deal Legislation.(3)

(1) The Labour Gazette, Jan. 1937. P.38 at P.45

(2) The Labour Gazette, Jan. 1937, P.38 at P.45

(3) The Labour Gazette, Apr. 1937, P.417

In his Labour Day message in 1937, Mr.A.R.Mosher, President of the All-Canadian Congress of Labour stated that unorganized workers suffer more in a depression than organized workers.(1) The message noted that labour organizations are becoming generally recognized as essential to a stabilized industry; and that recent provincial legislation on collective bargaining has proved to employers the futility of opposing the process.(2)

The Congress submitted its proposals for legislation to the Federal Government on January 20,1938; in these proposals the Congress expressed gratitude to the Minister of Labour for his clear pronouncement on collective bargaining and for the work done by his department in the investigation and conciliation of labour disputes. The Congress called on the Federal Government to enact legislation in co-operation with the provinces to protect the right of employees to join together and bargain collectively with their employers.(3)

The Eighth Annual Convention of the Congress,held in London,Ont., April 11-13,1938 requested the Dominion Government to give effect to the recommendations of the Turgeon Royal Commission on textiles.(4)

In referring to the Dominion-Provincial conflict in jurisdiction, President Mosher stated that modern industry imperatively demanded national supervision and organization and the removal of all obstacles in the way of progress along these lines.(5) This same view was expressed by the Congress in its legislative program on January 6,1939, in urging the Federal Government to amend the Criminal Code further in regard to discrimination.(6)

(1) The Labour Gazette, Sept.1937, P.947.
(2) The Labour Gazette, Sept.1937, P.947,948.
(3) The Labour Gazette, Feb. 1938, P.152.
(4) The Labour Gazette, May, 1938, P.520.
(5) The Labour Gazette, Sept.1938, P.969.
(6) The Labour Gazette, Jan. 1939, P.47 at 48.

The Congress added that the Federal Government should grant to all of its employees the right to bargain collectively through a union of their own choice, stating that although employees of the Canadian National Railways enjoy this privilege, certain groups in the Department of Transport did not.(1)

Other Canadian labour organizations expressed themselves on unionization and collective bargaining in a similar manner to the two largest employee organizations in Canada.(2)

Labour Unions in Great Britain and the United States

The Sixty-Third Annual Convention of the Trades Union Congress of Great Britain in 1931 spoke of the seriousness of the economic situation and adopted a resolution in favour of a planned economic development.(3)

The Fifty-Eighth Annual Convention of the American Federation of Labor, was held in Houston, Texas, beginning October 4,1938. In his opening address, President William Green referred to the economic philosophy of the organization and emphasized that it was the desire of the Federation to establish a condition where men may exercise their right to organize and bargain collectively, free from intimidation and coercion, and an invitation was extended to employers of the country to accept this modern philosophy.(4)

(1) The Labour Gazette, Jan. 1939, P.47-48

(2) The Labour Gazette, Feb. 1937, P.166,168; The Labour Gazette, Mar. 1937, P.306-308; The Labour Gazette, Oct. 1937, P.1087; The Labour Gazette, Dec. 1937,P.1298; The Labour Gazette, Feb. 1938, P.149,155; The Labour Gazette,Jan.1939, P.54.

(3) The Labour Gazette, Nov. 1931, P.1165,1166

(4) The Labour Gazette, Nov. 1938, P.1239.

(f) Employer-Employee Co-operation: Source Five:

"Joint Committees and Boards on which representatives of the management and employees have opportunity to consider matters of mutual interest are useful media for bringing together a Company's officers and its men, and for developing friendly relations and preventing the estrangements which arise through ignorance and purely official meetings."

"Amongst Honest men familiarity breeds confidence, not contempt."

Industry and Humanity:(1918) Hon.W.L.MacKenzie King, P.202.

By 1914 in the United States there seemed to be an "industrial autocracy" of corporations and a disappearance of all personal relations between employer and employee. The wage earner and the operator organized on a national scale, and economic strength in bargaining rather than considerations of humanity and economic justice became the determining factor in fixing wages and conditions of employment of industrial workers.(1)

In 1918 the National War Labor Board was established in the United States and during the war co-operation of employer and employee succeeded labour struggles. After the war many attempts were made to carry over the co-operative spirit into peace time industrial relations. In Canada the situation was parallel, and the Canadian Royal Commission on Industrial Relations, followed by a "National Industrial Conference" in

(1) The Labour Gazette, Feb.1927, P.178,179, quoting W.Jett Lauck, former Secretary of the U.S., N.W.L.B. in "Political and Industrial Democracy - 1776-1926".

1918, in favour of a "Parliament of Industry", were official attempts at co-operation which failed to bring any immediate constructive benefit.(1)

Similar industrial conferences were held in the United States and Great Britain in 1919. The guiding thought of all was that the right relationship between employer and employee can best be promoted by deliberate effort and organization, which is, at the basis of the new conception of industry as a social institution. But the consideration of constructive proposals was too long delayed after 1918 and industrial unrest grew and the salesmen failed.(2)

In the meantime individual efforts were made in industry itself to further the movement towards industrial justice and democracy. The Dutchess Bleacheries in New York, the Dennison in Massachusetts, the Nash in Cincinnati, and the Mitten in Pennsylvania, are all bona fide attempts. The "B & O Plan" and the Southern Railway plan are two others worthy of mention. The C.N.R.Plan in Canada was modelled after the B & O plan.(3)

All the foregoing plans according to Professor Lauck are based on sound principles of collective bargaining, for a plan of union-management co-operation demands a responsible union as a preliminary step.(4)

At the Eighth session of the International Labour Conference held at Geneva, May 26-June 6,1926, Mr.Tom Moore, President of the Trades and Labour Congress of Canada, a worker delegate,

(1) The Labour Gazette, Feb. 1927, P.179

(2) The Labour Gazette, Feb. 1927, P.179

(3) The Labour Gazette, Feb. 1927, P.179

(4) The Labour Gazette, Feb. 1927, P.179

spoke of the development of "scientific management" in Canada and the United States, mentioning the fact that the Canadian National Railways had tried out the experiment in Canada and workers generally approved of it.(1)

Sir Henry Thornton, in an address at the A.F. of L. Convention in Toronto in 1929, spoke on the subject of Labour partnership in industrial management and presented an "idea" which he hoped could be used by employer and employee toward better industrial relations, describing as an illustration the cooperative scheme in certain sections of the C.N.R.shops in Canada, and the good results therefrom. This cooperative idea carried to its logical conclusion would mean the partnership of labour and management.(2)

Other instances of employer-employee co-operation in Canada at that time were, the Joint Council of Employees' Representation Plan established by the Dominion Iron and Steel Company, Limited, in September 1923,(3) the Borden Farm Products Plan in September 1929 (4), and the plan of the Consolidated Mining and Smelting Company.(5)

The International Relations Association held a Convention at the Hague in 1929, and considered inter alia cooperative management of industry, declaring that therein lies the hope of the future of mankind, owing to the "amazing susceptibility of the human mind to group loyalties and ideas.....an almost untilled field in psychology." (6)

(1) The Labour Gazette, July, 1926, P.674 at 676.
(2) The Labour Gazette, Nov. 1929, P.1233,1234.
(3) The Labour Gazette, July, 1926, P.665,666.
(4) The Labour Gazette, Jan. 1930, P.2-3
(5) The Labour Gazette, Feb. 1930, P.154
(6) The Labour Gazette, May, 1930, P.546

It is interesting to note here that the Third Annual Convention of the All-Canadian Congress of Labour held in Winnipeg, Manitoba, commencing November 4,1929, passed the following resolution:

> "That this Convention condemn any policy of co-operation with employers which will lead to a weakening of the militant spirit of the labour movement and ultimately to the establishment of Company unionism." (1)

In Great Britain several movements arising out of the general desire for peace in industry were evident in 1927. The Trades Union Congress at its Fifty-Ninth Annual Convention in September 1927 invited employers to join in a direct "get-together". The National Confederation of Employers' Associations welcomed the suggestion, but differed in desiring it limited from industry to industry.(2) The invitation consequently fell through. Several employers, headed by Sir Alfred Mond, succeeded in unofficially conferring with The Trades Union Congress first on January 12,1928.(3)

All unions in the Trades Union Congress were not favourable to the principle of joint conferences in the beginning, and at the Sixty-First Annual Convention of the Congress in 1929, an attempt was made to prevent further meetings of the Mond-Turner Conference. (4)

At the Eleventh Session of the International Labour Conference at Geneva in 1928 a resolution sponsored by Canadian employer and employee representatives urged a study

(1) The Labour Gazette, Dec. 1929, P.1360

(2) The Labour Gazette, Apr. 1929, P.405; Dec. 1927, P.1309

(3) The Labour Gazette, Mar. 1928, P.278

(4) The Labour Gazette, Oct. 1929, P.1099

be made of employer-employee co-operation in industry which had been so favourably received.(1) The suggestion was carried out by the International Labour Organization, and a Report, the first of a series on Industrial Relations, gave particulars of the plans adopted by leading concerns in the principal industrial countries of the world.(2)

The Report states that much of the impetus of the movement came from North America, and recalled a study on Industrial Relations in the United States and Canada made in 1927 by Mr.H.B.Butler, Deputy-Director of the Office at Geneva.(3) The Report stated that the movement was world-wide, sometimes initiated by Governments, sometimes by employers, and sometimes by workers; while in Great Britain representatives of employers' and employees' associations were meeting for regular consultations.(4)

Employer-Employee co-operative efforts for the most part, petered out in all countries during the depression years.

(1) The Labour Gazette, July 1928, P.747.

(2) The Labour Gazette, Feb. 1931, P.205.

(3) The Labour Gazette, Sept.1927, P.985.

(4) The Labour Gazette, Feb. 1931, P.205.

(g) Opinions, Official or Otherwise: Source Six:

Mr.Gerald H.Brown, Assistant Deputy Minister of Labour for Canada, in Bulletin No.84 published in 1929 by the Council of Social Service of the Church of England in Canada, on the subject of "Peace in the Industrial World" traces how "the great principles of freedom and democracy underlying the British Constitution are the basis of Canadian institutions for industrial peace." The great characteristic feature in regard to industrial relations, Mr.Brown indicated, is the voluntary principle involved which does away with compulsion.

> "In the principal industries working conditions in the widest sense, including wage rates, hours of labour, and terms of employment generally, are normally adjusted and settled by some form of direct discussion, negotiation or bargaining between the parties concerned. The state has by legislation laid down certain limits.... Broadly, working conditions are settled by the parties concerned, and public policy in Canada has tended to encourage collective bargaining by means of discussions and negotiations. The voluntary principle is deeply rooted in British practice.....In the main.... the state has been wise in allowing the parties concerned in industry to work out their own policies." (1)

The United Church of Canada at the Montreal and Ottawa Conference in 1937 adopted a resolution recognizing the right of Labour to organize and bargain collectively. The resolution in addition to urging recognition of this principle by the United Church Publishing House also called upon the governments

(1) The Labour Gazette, Aug.1929, P.867.

of Ontario and Quebec "to enact legislation protecting workers .....similar to the Trade Union Law of Nova Scotia and the Freedom of Trade Union Association Act of Alberta."(1)

On June 16,1938, President Roosevelt appointed a Commission to make a factual report on industrial relations in Great Britain. In releasing the report made by the Commission,President Roosevelt commended the findings made, and added:

> "To me the most salient feature of it is the cooperative spirit coupled with restraint which is shown by those who represent both employers and employees in Great Britain. Collective bargaining is an accepted fact and because of this the machinery which carries it out is functioning."(2)

The report stated that a collective agreement in Great Britain generally was industry-wide, and there was moral not legal enforcement. The report added: "the acceptance and general practice of collective bargaining on an industry basis places upon the employers and workers organizations, because of the sheer numbers of men and the magnitude of interests involved, a peculiarly heavy responsibility calculated by its very nature to call forth patience, understanding and a desire to make and keep agreements and achieve industrial peace."(3)

Mr.Ernest Brown, Minister of Labour for Great Britain in 1938, urged the use of legislation only as an aid to voluntary agreements, stating:

> "In Great Britain we attach greatest importance to

(1) The Labour Gazette, June 1937,P.656; The Labour Gazette, May 1938, P.523-524.

(2) The Labour Gazette, Oct. 1938, P.1117

(3) The Labour Gazette, Oct. 1938, P.1118 and P.1123

co-operation between workers and employers. We believe that the intervention of the state should be used only where absolutely essential and that, wherever the organization of employers and employed can make arrangements between themselves, it is far better that they should do so than that some system should be imposed upon them by the law."(1)

Following its study of industrial relations in Great Britain the Commission appointed by President Roosevelt conducted a similar inquiry into employer-employee relationships in Sweden. President Roosevelt observed:

"Although differences between the practices within the two countries are apparent, the striking fact emerging from a study of the two documents is the similarity of approach and the widespread satisfaction with the procedures adopted. In Sweden, as in Great Britain, employees generally have fully accepted a program of collective bargaining; there is extensive independent organization of both groups and all concerned live up to the rules of the game, participating with restraint and mutual respect in the processes of collective bargaining."(2)

(1) The Labour Gazette, July 1938, P.835

(2) The Labour Gazette, Nov. 1938, P.1245

(h) The International Labour Office; Source Seven:

At the eleventh session of the International Labour Conference held in Geneva in 1928, a resolution was sponsored by a Canadian employer delegate and seconded by the Canadian workers' adviser, requesting the Governing Body to instruct the International Labour Office to look into the program of active collaboration of employers and employees which had resulted in higher real wages and better working conditions in certain countries.(1) This suggestion was carried out and the Office began a series of studies on Industrial Relations.(2)

Mr.Harold Butler, Secretary-Treasurer and Director of the International Labour Office, at its twenty-third session at Geneva, June 3-23,1937, stated that freedom of association was one of the fundamental principles of the Constitution of that organization. However, he said that there was no convention adopted by the Conference that would warrant interference in the internal politics of a state.(3)

Mr.Gerald H.Brown, the Canadian Government delegate to the twenty-fourth session of the International Labour Conference at Geneva, June 2-22,1938, in addressing the Convention, said inter alia:

> "In an address which was delivered by one of the Government delegates for Canada in the Conference last year, reference was made to most important social and labour legislation which had been adopted in Canada during the preceding twelve months. It is

(1) The Labour Gazette, July 1928,P.747; see also The Labour Gazette, July 1930,P.790 at 806 for another resolution.

(2) The Labour Gazette, Feb. 1938, P.205

(3) The Labour Gazette, July 1937, P.754 at 761

not my intention to develop this topic further today, but let me say that the ensuing years has witnessed the continued development of legislation to safeguard and protect workers in their right of association in unions, and for the encouragement of collective agreements....." (1)

The International Labour Office followed from the Versailles Treaty in particular from the Labour section. The following quotation summarizes the work of this organization.

"The work of the International Labour Organization in the field of industrial relations has consisted of the development of techniques of international inter-group discussion and negotiation, ...and of issuing numerous publications relating to industrial relations and cognate questions, rather than in the formulation of international obligations or standards of policy."

"An attempt to secure the adoption of a convention concerning freedom of association.....was abandoned in the course of a first discussion at the seventh session of the Conference (1927) following the amendment, in a manner which was unacceptable to the workers' group, of the draft questionnaire....." (2)

(1) The Labour Gazette, July 1938, P.822 at 834.

(2) The International Labour Code:(1939) A Systematic Arrangement of the Conventions and Recommendations adopted by the International Labour Conference; 1919-1939, with appendices embodying other standards of social policy framed by the International Labour Organization, 1919-1939, Montreal 1941.

(i) Conclusion:

During the period from the Treaty of Versailles to 1930, no important laws were enacted in Great Britain, United States and Canada regarding collective bargaining. However, the spirit of the Peace Treaty still was actice in industrial relations of the three countries. Many important employers professed adherence to the principle of collective bargaining. The Canadian National Railways in Canada is an example. Yet in many instances employees claimed the principle was not recognized by employers in practice. The Peace Treaty also inspired many forms of joint employer-employee co-operation. Unions, as a whole, favoured co-operation if the seed of Company unionism was not in evidence, but jealously guarded union right to negotiate agreements. The American Bar Association sponsored the making of collective agreements legally binding once registered.(1) In England a movement to the same effect was noted,(2) while in Canada the Manufacturers' Association in 1929 opposed the principle as an unwarranted interference with the employer's right to manage his own business.(3) Labour unions as a whole in Canada disapproved of the principle, or at least were suspicious of it.

Government leaders almost without exception, in the period between the two Great Wars publically favoured union recognition and collective bargaining, whether as a matter of practical politics or genuine regard. The Dominion Government however, did not enact any direct legislation on collective bargaining during the period, except possibly Section 502-A of the Code.

(1) The Labour Gazette, Aug. 1926, P.744 to 745

(2) The Labour Gazette, Aug. 1928, P.821.

(3) The Labour Gazette, June 1929, P.625 at 627

Federal assistance in the development of the process of collective bargaining in Canada up to 1939 was largely left to Boards of Conciliation and Investigation under the Industrial Disputes Investigation Act. The awards of these Boards during the period examined show in a crystallized form from time to time, a steady development in the process from individual bargaining to collective bargaining through representatives of the majority of the employees affected. These awards proved very effective because of the publicity attending their findings,(1) and because of their moral weight in the settlement of industrial disputes.(2)

Royal Commissions and Boards have proved very useful in cases of intricate disputes in industry, and as a source of eliciting undisputable evidence essential to the restoration of faith between the parties to disputes leading up to a peaceful solution. The Duncan Commission in Nova Scotia and the Royal Commission on Price Spreads are examples, both declaring in favour of the principle of collective bargaining.

The Labour unions during the period took the lead in advocating compulsory collective bargaining and insisted upon uniform nation-wide labour legislation on collective bargaining.(3)

(1) Industry and Humanity (1918) Hon.W.L.MacKenzie King, P.212, 516-518.

(2) G.V.V.Nicholls: Industrial Relations Department,C.M.A. from a paper entitled The Prevention and Settlement of Industrial Disputes in Wartime, presented at a conference on Industrial Relations sponsored by Queen's University, April 10-12,1940, appearing in a publication of the Industrial Relations Section, School of Commerce,Queen's University,1940,P.8-9.

(3) See Industry and Humanity (1918) Hon.W.L.MacKenzie King, P.431,432.

They constantly requested that an amendment to the British North America Act be made, if necessary, to effect the latter.

The opinions of various writers in the period as well as the example of employer-employee cooperation in certain cases favoured unionization. Cooperative efforts between employers and employees in industry which were developed in the United States and Great Britain at the close of the First Great War were a step forward in the principle of responsible government in industry. This practice found acceptance to an extent in Canada previous to the depression. It was revised again during the Second Great War and recommended for industry by the Report of the National War Labour Board early in 1944.

By the year 1939 collective bargaining was definitely the rule in both Dominion and Provincial industry. The process of union development was tending to become on an industry-wide basis, and unions were concerned with methods of maintenance such as the union shop, closed shop, and check-off as a means to that end. The state, especially in the Provincial sphere had taken definite action in the industrial field in Canada, and the Dominion on the insistence of Mr.J.S.Woodsworth, M.P. for Winnipeg Centre enacted Section 502-A of the Criminal Code in an attempt at least to partially bring the right to organize under the Criminal Code.

The steady development toward responsible government in industry can be traced in the sources examined and discussed herein. The development to the point where all parties to industry will have a share in the final direction of industry is a slow process. It will not be at one stroke that the

parties will acquire equal representation, rather equality between Capital and Labour in this regard will develop by joint action in a small way before reaching equal proportions over industry as a whole.

> "In the course of industrial evolution something resembling the system of Representative and Responsible Government in the State is to be effected in industry; the evolution is certain to be gradual and wholly intermittent. It will come in industries individually before it extends to Industry collectively. It will find expression now in this individual enterprise and trade, now in that; there in one group of allied trades and industries, there in another and wholly different group; and the men who help to promote a peaceful development are the men whom History will honor."

Industry and Humanity: (1918) Hon.W.L.MacKenzie King, P.426-427.

S E C T I O N T W O

EARLIER WAR-PERIOD LEGISLATION IN THE DOMINION OF CANADA:

Chapter I: Immediate Pre-War Legislation:

(a) The Industrial Disputes Investigation Act:

The Industrial Disputes Investigation Act passed in 1907 was amended after the decision of the Snider Case in 1925. The Act is essentially a sedative measure. Its machinery begins to operate only when a dispute has arisen between an employer and any of his employees (Section 6 and 16 (2)). It is not the purpose of the Industrial Disputes Investigation Act to provide protection for freedom of association and collective bargaining, although that result may follow in some cases if there is an appropriate recommendation of a Board of Conciliation and Investigation appointed under the Act and the parties see fit to accept the recommendations of the Board. The prime purpose of the Industrial Disputes Investigation Act is to prohibit strikes and lockouts for a period of time while a Board of Conciliation is looking into the matter, in the hope that cooler counsel may prevail.(1)

(b) Section 502-A of the Criminal Code:

This Section was enacted early in 1939 by the Dominion Parliament and took effect as of August 1,1939, one month prior to the outbreak of the war.

The Section reads as follows:

> "Any employer or his agent, whether a person, company of corporation, who wrongfully and without lawful authority (a) refuses to employ or dismisses from his employment any person for the sole reason that such person is a member of a lawful trade union or of a

(1) United Steel Workers of America Local 1005 v Steel Co.of Canada Ltd.(1944) 2 D.L.R.,583 at 587 per MacKay J. (Ontario Labour Court).

> lawful association or combination of workmen or employees formed for the purpose of advancing in a lawful manner their interests and organized for their protection in the regulation of wages and conditions of work; (b) seeks by intimidation, threat or loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to such a trade union or to such an association or combination to which they have a lawful right to belong; or (c) conspires, combines, agrees or arranges with any other employer or his agent to do any of the things mentioned in the preceding paragraphs:
>
> is guilty of an offence punishable on indictment or on summary conviction before two justices, and liable on conviction, if an individual, to a fine not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, and, if a company or corporation, to a fine not exceeding one thousand dollars." (1)

This provision designed to protect workers against dismissal or other discriminatory treatment because of trade union activity, because of the language used affords little protection.(2) The words "wrongfully and without lawful authority" render conviction under Section 502-A very difficult. The use of the term "lawful" before the words "trade union" imports into the provision all of the disabilities which the common law doctrines of conspiracy and restraint of trade impose upon trade unions in Canada. Of course this latter disability may be removed where provincial legislation dealing with collective bargaining and freedom of association is enacted. Provincial legislation would not be needed on this matter if the word "lawful" had not appeared

(1) R.S.C. 1939, ch.30

(2) Collective Bargaining in Canada: (1941) J.L.Cohen, K.C. P.17

in Section 502-A in relation to trade unions, or if the words "that the purposes of trade unions are not unlawful by reason merely that they are in restraint of trade", had been inserted in the Section, as it has been in Section 497 of the Criminal Code.

The use of the term "sole reason" rendered conviction under Section 502-A difficult. The acts for which the employer might be liable under the Section were those only where the employee was the member of a trade union. Thus, there was no protection afforded organizing workers.

Added to these defects in the framing of the Section, criminal law procedure limited the effectiveness of enforcement proceedings under Section 502-A. This is especially true since the employer or his agent cannot be compelled to testify, with the result that the complainant must rely on the evidence of his fellow-employees. This might leave an opening for discrimination. In any case there was also the doctrine of reasonable doubt and mens rea. For the foregoing reasons labour in Canada felt that nothing short of legislative provisions comparable to Sections 7 and 8 of the National Labor Relations Act of the United States were required.

Thus, the only immediate pre-war legislation in the Federal sphere bearing on the subject of labour relations was the Industrial Disputes Investigation Act and Section 502-A of the Criminal Code.

Chapter II: Dominion Policy Regarding Collective Bargaining:

(a) Order in Council P.C.3495:

On November 7,1939, shortly after war was declared, the Dominion Government enacted Order in Council P.C.3495, extending the scope of the Industrial Disputes Investigation Act, so that it should:

> "Specifically apply in respect of any dispute between employers and employed engaged in the construction, execution, production, repairing, manufacture, transportation, storage or delivery of munitions of war or supplies, and in respect also of the construction, remodelling, repair or demolition of defence projects, as hereinafter respectively defined."

The Order in Council then defined the terms "munitions of war", "supplies", and "defence projects". As a result the Industrial Disputes Investigation Act came to apply to all plants producing commodities in whole or in part required or intended for war purposes. It was estimated that the Act in question covered about eighty-five percent of the country's industrial activity in 1941, as compared with fifteen percent before its scope was extended.(1).

The effect of P.C.3495 was to prevent in war industries a strike or lockout prior to or during reference of a dispute to a Board of Conciliation and Investigation; the same as in other industries ordinarily under Federal jurisdiction. Employers and employees in the industries covered by the Act were required to "give at least thirty days' notice of an intended or desired change affecting conditions of employment with respect to wages or hours; and in the event of such intended or desired change resulting in a dispute, it shall

(1) Collective Bargaining in Canada: (1941) J.L.Cohen,K.C. P.25;
See 1940 Report of Deputy Minister of Labour in the 1940 Blue Book Report of the Department of Labour, P.28.

be unlawful for the employer to make effective a proposed change in wages or hours or for employees to go on strike until the dispute has been finally dealt with by a Board, and a copy of its report has been delivered through the Registrar to both the parties affected".

The extension of the Industrial Disputes Investigation Act brought out clearly its deficiencies as a means of dealing competently with the whole problem of labour relations. Labour disputes are of two general kinds, those relating to union recognition and collective bargaining, and those relating to hours, wages and other working conditions. The Act does not lend itself to disputes arising out of the refusal of the employer to recognize or deal with trade unions. This problem is more distinctly Canadian, since in England trade unions are accepted voluntarily, while in the United States strong unionism and separate machinery under the National Labor Relations Act took care of the matter.

In Canada, previous to the war, the restricted scope of the Act had hidden this problem, since in most cases a strike might settle the question of union recognition at short notice. After the extension of the Act employees concerned could not use the strike as a lever against employers until the delay involved in the proceedings intervened. This might work hardship on workers forming a new union, since the policy of the Department of Labour was to appoint a Board only on application of a majority of the workers concerned. The employer was given an opportunity to carry out anti-union plans involving company unions while the employees were restricted by anti-strike controls. The protection afforded workers by Section 502-A of the Criminal Code was of little

value due to the wording of the Act.

In any case if a Board of Conciliation and Investigation is granted and it is assumed that the fact of granting the board implies the right of the applicant union to represent the workers concerned, there is still no compulsion on the employer to recognize the union or bargain collectively. Thus, the provisions of the Industrial Disputes Investigation Act as constituted were inadequate to deal with the issue of union recognition and collective bargaining.

Hon.Norman A.McLarty, Minister of Labour, in his 1940 New Year's Message, referred to the fact that labour had requested the extension of the Industrial Disputes Investigation Act to cover all wartime industries. This policy was in accordance with labour's pledge to co-operate during the war time and as a brake on irresponsible elements in the ranks of labour. The Minister of Labour added that care must be taken to see that begrudging employers did not take advantage of labour's co-operation to eliminate or reduce advantages already won by labour.(1)

The effect of a recommendation of a Board of Conciliation and Investigation was the same after the passing of Order in Council P.C.3495 as it was before the passing of that Order.

The Board in the dispute between the London Street Railway Company and its Motormen-Conductors, bus operators, shopmen, barnmen and truckmen, members of Division 741, Amalgamated Association of Street and Electric Railway and Motor Coach Employees of America, stated:

"As this Board has no coercive powers and in the event

(1) The Labour Gazette, Jan. 1940, P.16

> of failure to induce the parties to come to an agreement can only make recommendations which the parties are at liberty to accept or reject....." (1)

Reports of Boards of Conciliation continued to recommend the principle of collective bargaining.(2) Labour continued to press for a definite Government policy. The Industrial Relations Committee of the Canadian Manufacturers' Association, despite the recommendations of the Royal Commission on Dominion-Provincial Relations, appointed on August 14,1937, advocating enlarged Dominion jurisdiction over labour matters,(3) felt content that no new Federal legislation beyond the extension of the Industrial Disputes Investigation Act was necessary as a War Labour Policy.(4)

(b) Order in Council P.C.2685:

Instead of legislating, the Dominion Government merely adopted a declaratory position on the question of collective bargaining.

On June 19,1940, the Dominion Government enacted Order in Council P.C.2685, as a declaration of war-time labour policy.

Section 6 of its provisions stated that employees "should be free" to organize in trade unions. Section 7 similarly stated that employees "should be free" to negotiate through their chosen representatives, with a view to the conclusion of a collective agreement.

This reserved statement did not change the fact that

(1) The Labour Gazette, May 1940, P.431.

(2) See Report of Board in dispute between various Grain Elevator Companies at Port Arthur and Fort William and their employees: The Labour Gazette, Feb.1940, P.102; 105.

(3) The Labour Gazette, Sept.1937, P.945; June 1940, P.545 ff.,

(4) The Labour Gazette, June 1940, P.565-566

employees were not free in all cases either to organize or to negotiate, and that the Order in Council gave no more legislative protection for organizing or collective bargaining than did Section 502-A of the Criminal Code or the Industrial Disputes Investigation Act.

Labour in the first place believed that P.C.2685, despite its short-comings, had possibilities committing the Government by this declaration of principles to aid the right to organize and the right to negotiate by the full use of its administrative influence and pressure. In the second place labour believed that Section 6 which incorporated Section 502-A of the Criminal Code implied an assurance of the right to organize.(1) The policy of the Government apparently was to urge upon employees the observance of the principles enunciated in P.C.2685 without making them legally binding.(2)

In his Labour Day Message in 1940, Mr.A.R.Mosher, President of the Canadian Congress of Labour said, in part:

> "The statement of Labour policy contained in Order in Council P.C.2685 of July 19th, may be regarded as a great step forward for Canadian labour; the acceptance of its principles by employers generally would go a long way toward establishing industrial harmony throughout Canada, and an increasing number of employers are realizing not only that the right to organize is fundamentally sound, but that the workers will and can co-operate more effectively through their labour unions than otherwise....."(3)

(1) Collective Bargaining in Canada: (1941) J.L.Cohen,K.C,P.34.

(2) Hansard, June 18,1940, Rt.Hon.W.L.MacKenzie King, Prime Minister, speaking in the debate on the Emergency Power Bill.

(3) The Labour Gazette, Sept.1940, P.891

The Board of Conciliation and Investigation in the Teck-Hughes Gold Mine dispute (1) involving the question of trade union recognition, found after a vote that the union involved was a proper body to deal with management. After referring to recent provincial legislation and Section 502-A of the Criminal Code, the Board under the chairmanship of Mr.Justice W.M.Martin of the Saskatchewan Court of Appeal, found no reason for the company's refusal to recognize the union, thus stating:

> "In view of the general recognition which has been given both by law and practice, to the right of workers to organize and to the right of collective bargaining, it does not seem reasonable for any industry to refuse to recognize these rights unless there is some substantial justifying reason."

In the case of the John Inglis dispute in 1940, the Board found that the company preferred a company union while the majority of the employees involved preferred the trade union. The majority of the Board recommended; the trade union having sought the exclusive right to represent all employees involved:

> "That for the reasons hereinbefore given, principally due to the war emergency, the request for recognition of the union with the exclusive right to represent the trade in all matters of dispute be not granted."(2)

In the case of the Collingwood Shipyards Ltd., the Board found that the four unions involved included in their membership considerably less than the majority of the company's employees, and while regretting that the company did not enter into negotiations, concluded that the company was entitled to refuse under the circumstances. The Board recommended a draft agreement outlawing discrimination but not providing for a sole bargaining agency either for the whole or for any part of the employees concerned.(3)

(1) The Labour Gazette, July 1940, P.645 ff.,
(2) The Labour Gazette, Oct. 1940, P.1004 ff.,
(3) The Labour Gazette, Oct. 1940, P.1009 ff.,

The Board in Canadian Vickers Limited dispute in 1940, reported that an unanimous agreement containing the following clause; inter alia, was reached:

> "the company agrees that the shop committee which must consist of employees of the company, shall be the sole bargaining agency in respect to its employees, so long as the committee represents a majority of the employees covered by this agreement." (1)

From the preceding cases it may be gathered that the enactment of Order in Council P.C.2685 in conjunction with Order in Council P.C.3495 did not make for voluntary acceptance by employers of the principles enunciated by the Government in the former Order in Council. The attitude of Canadian labour during 1940 plainly shows this fact.

The All-Canadian Congress of Labour in Annual Convention at Toronto, September 9-12,1940, contended that the Government would be well advised to use its authority under the War Measures Act to enforce the labour policy as set forth in Order in Council P.C.2685. The Congress commended the Federal Government for its policy in relation to employers and workers during wartime as a step in the right direction, but felt that something further was necessary to change the attitude of reactionary employers.(2)

The Trades and Labour Congress of Canada in Annual Convention at Vancouver, September 23-27,1940, dealt with the alleged dual and conflicting authority of separate departments of Government in matters affecting labour. The Board of Munitions and Supply was especially singled out as interfering with voluntary agreements to such an extent that there was an ever-growing question in the minds of workmen as to the good faith of the Government as expressed in Order in Council P.C.2685.

(1) The Labour Gazette, Nov. 1940, P.1111 at 1114.
(2) The Labour Gazette, Oct. 1940, P.1031 - 1033.

The Congress in considering the right to organize and collective bargaining, recalled that during the First Great War the Government of the day assumed considerable authority in compelling collective bargaining on the part of obstinate employers. A resolution passed by the Convention referred to the recent amendments to the Criminal Code as only providing for penalties for interference; company unions were still allowed and there was no provision for compulsory collective bargaining. The Congress was requested to:

> "declare itself in favour of Dominion legislation similar to that contained in the Wagner Act in the United States, which gave full protection to the wage earner's right to join labour unions, definitely outlaws company unions and makes collective bargaining compulsory with the bona fide labour union. That a majority of the workers involved select and provide for a permanent authoritative tribunal to administer this Act, and if it is contended by the Dominion Government that they do not have the authority under the British North America Act to adopt said legislation, then they be requested to secure the necessary amendments to same; the executive Council was instructed to prepare a specimen Act containing the democratic features of the Wagner Labour Act in so far as they can be made applicable to provincial legislation, to be offered as a guide to respective legislative committees or federations". (1)

The Industrial Disputes Investigation Act had functioned fairly well in the pre-war period so far as disputes between well-established unions and their employers were concerned, notably in the Railway industry. In many of the basic industries which were brought within the scope of the Act by P.C.3495, in 1939, however, labour unions had not been established or were in the early stages of development. As a result, many of the disputes dealt with by Boards concerned the refusal of employers to recognize and bargain collectively with the union

(1) The Labour Gazette, Oct.1940, P.1026-1029.

involved.

The Industrial Disputes Investigation Act was thus not adaptable to disputes concerning union recognition and collective bargaining. In addition the delay involved in taking a strike vote before application for a Board further irritated newly organized groups, and in many cases furthered the attitude of the inevitability of a strike.

Order in Council P.C.2685 enunciated a labour policy in a declaratory manner. It was not an order, rather a gesture. It consisted of a series of declarations, such as that "employees should be free to organize, free from any control by employers or their agents", and that "employees, through the officers of their trade union or other representatives chosen by them, shall be free to negotiate with employers or the representatives of employers' associations, concerning rates of pay, hours of labour and other working conditions, with a view to the conclusion of a collective agreement". The Order in Council however, provided in reality no protection of the workers right to organize or to negotiate with employers, and in many cases the Order was ignored by employers, despite the fact that labour had believed the Government's administrative influence and pressure backed by Section 502-A reiteration would imply assurance that the right to organize would be established.

It was reasonable to assume that if the Government found that employers hedged in granting union recognition and collective bargaining voluntarily after this exhortation that the Government would enact legislation to make the principles of Order in Council P.C.2685 legally binding.

(c) Order in Council P.C.7440:

This Order in Council was passed on December 16, 1940, and added to the difficulties in the field of labour relations. It was framed for the purpose of establishing a policy for wage increases and provided for the cost of living bonus for all workers covered by the Industrial Disputes Investigation Act, as extended by P.C.3495.

The Order in Council was passed primarily for the guidance of Boards of Conciliation set up under the Industrial Disputes Investigation Act in carrying out their duties, and specifically directed attention to the principles enunciated in P.C.2685 which it reaffirmed. P.C.7440 departed from the declaratory words used in P.C.2685 and made mandatory provisions in regard to wages and further stated:

> "His Excellency in Council on the same recommendation, and under and in virtue of the War Measures Act (Chap.206,R.S.C.1927) is pleased to order, and it is hereby ordered that all agreements negotiated during the war period shall conform to the principles enunciated herein and in the said Order in Council, of the 19th June, 1940 - P.C.2685".

The Order in Council to an extent took wages out of the field of collective bargaining. Emphasis was placed on the wage provision of the Order in Council in comparison with the reaffirmation of the provisions and principles of Order in Council P.C.2685. Instead of a parallel policy of enforcing P.C.2685 as well as P.C.7440, a divergence of policy developed with ever greater emphasis that P.C.7440 was mandatory, while P.C.2685 was only advisory. This policy brought out first during the dispute between The Goodyear Tire and Rubber Co. and its Bowmanville employees and later followed by Boards notably in the case of The National Steel Car dispute at

Hamilton, was finally confirmed by the Minister of Labour in the House of Commons on June 6, 1941 thus:

> "The suggestion has been made that the Government should make the provisions of Order-in-Council P.C.2685 coercive, that we should compel collective bargaining. The provisions of that Order-in-Council are not mandatory; they are simply a recognition that in the opinion of the government this would be the best way to produce satisfactory labour relations in war time."

The Report of the Board of Conciliation and Investigation in the disputes between Shipping Companies on the Great Lakes and the Canadian Seamen's Union on January 14,1941, shortly after the enactment of P.C.7440, under the chairmanship of Mr.Justice C.P.McTague, states:

> "As industry has grown and developed, the right of workpeople to organize into collective associations or trade unions, and through such organizations to bargain collectively with their employers as to the terms and conditions of their employment, has been increasingly acknowledged now by law, by industrial practice, and by public policy. It has been verified by many important public pronouncements. These rights cannot be said to be effectively acknowledged unless employers are willing to negotiate and enter into agreement with the organizations which the employers have selected or formed in the exercise, in good faith, of their legal and public rights. This is in accordance with the principle enunciated by the Government of the Dominion of Canada in its Order-in-Council of the 20th June (No.2685) and later confirmed by P.C.7440 of 16th December, 1940 of:
>
> > The right of association (of workers) in labour bodies and the right of organized workpeople to enter into collective agreements through which they may expect to exercise a more organic influence on the processes of industrial life."(1)

The Board recommended that the companies concerned sign an agreement in each case with the majority union on behalf of all their respective employees. In the Dominion Steel and Coal Co. and its employees in its Peck Rolling Mills Division, case, the Company contended that P.C.2685 principles

(1) The Labour Gazette, Feb. 1941, P.95 ff.,

were not applicable in any case to non-union members.(1)

In the National Steel Car dispute at Hamilton the Interim Report of the Board on April 10,1941, had recommended a plant-wide vote on the matter of union recognition. If as a result of the vote the right of the union to represent the employees was established, the Board would consider it the duty of the corporation to negotiate with the union for a collective agreement in accordance with the language of Order in Council P.C.2685.(2) The final report of the Board in the National Steel Car case at Hamilton in June 1941, found that the company had refused to allow a vote to be taken or to conduct negotiations; a strike followed, and an Order in Council had appointed a Controller for the Hamilton plant. The employees returned to work, a vote was held which resulted in a majority for the union, but the Controller refused to accede to the demands of the union or negotiate with them, taking the position that:

> "Any man with a grievance can complain to the foreman, and if it is not settled then, he can appear before the superintendent, the general manager, and finally, if the dispute still exists, before myself." (3)

The majority of the Board "owing to the position taken by the Controller" were of opinion that they should make no finding in regard to union recognition, wages, bonus, and working conditions; the sittings were adjourned subject to resumption "if requested to do so".

(1) The Labour Gazette, Apr. 1941, P.373 ff.,

(2) The Labour Gazette, May, 1941, P.527 ff.,

(3) The Labour Gazette, Aug. 1941, P.877 at 881.

The Minority Report of J.L.Cohen, K.C. stated that the policy of the Controller was the very negation of the principles of collective bargaining expressed in Order in Council P.C.2685. When the Board resumed its sittings on July 17, 1941, the Company controller had revised his position somewhat from strict individual bargaining thus:

> "I propose, as Government controller of the plant forthwith to ask the employees of the company to appoint a representative committee to meet me at the earliest possible date and discuss the question of wages, hours and other pertinent matters, so as to arrive at an equitable understanding". (1)

The Minority Report saw in this attitude of the controller only a superficial acceptance of the principle of collective bargaining since the S.W.O.C. had already been chosen by the vote of May 8,1941, as "bargaining and negotiating agency" for the workers concerned, and nothing had happened since that date to suggest that the union did not represent the workers. The Minority Report recommended that the company should bargain through the controller with the union, thus:

> "The Board should therefore reaffirm its former recommendation that the company should recognize and deal with the union 'with a view', in the language of Order in Council P.C.2685, 'to the conclusion of a collective agreement'." (2)

Thus the administrative policy of the Government as exemplified in the attitude of the controller in the National Steel Car Co. case at Hamilton seemed to be at complete variance with the principles laid down by the Government in P.C.2685. The official statement on behalf of the Government on June 6, 1941, hereinbefore mentioned, confirmed the fact that P.C.7440 was to be interpreted as applying the principles P.C.2685 mentioned therein, in a recommendatory manner only.

(1) The Labour Gazette, Aug. 1941, P.881

(2) The Labour Gazette, Aug. 1941, P.881

Under Section 29 of the Industrial Disputes Investigation Act a copy of the Board's Report was to be sent forthwith to the parties to the dispute. Order in Council P.C.7440 in its final paragraph permitted the Minister of Labour to send the Report back to the Board for reconsideration if, in his opinion, the Report deviated from the principles of the Order in Council. This provision could be used to keep proceedings alive and restrain strike action, if need be.

(d) Order in Council P.C.4020; Order in Council P.C.4844:

On June 6, 1941, Order in Council P.C.4020 was enacted by the Dominion Government authorizing the Government to appoint an Industrial Disputes Commission composed of three members to assist the Minister in securing an expeditious handling of proceedings under the Industrial Disputes Investigation Act.

The Government felt that with the extension of the scope of the Industrial Disputes Investigation Act to cover disputes in war work there was naturally a marked increase in the number of applications for the establishment of Boards of Conciliation and Investigation, and it was found that a large number of these applications had reference to disputes of a nature prima facie as not to warrant the establishment of a board.(1)

The provisions of P.C.4020 were amended by Order in Council P.C.4844, July 6,1941, and P.C.7068, September 10,1941, to deal with the case of the discrimination of an employee "for the reason that he is a member of or is working on behalf of a trade union". The Commission inquiring into the circumstances surrounding such disputes was to advise the Minister of Labour

(1) 1942 Report of Deputy Minister of Labour in the 1942 Blue Book Report of the Department of Labour, P.17.

of the dispute and also advise him whether the evidence warranted the setting up of a Board of Conciliation and Investigation to deal further with the matter at issue. The provisions in regard to discrimination required the Commission to submit its findings to the Minister of Labour who had authority to issue whatever order he deemed necessary to effect such recommendations and such order "shall" be final and binding on all parties concerned.

Another amendment, P.C.496, January 19,1943, permits the Minister to appoint a Commission to inquire into any situation which appears to him to be detrimental to the most effective use of labour in the war.

Before Order in Council P.C.4020, a dispute arising out of union recognition or collective bargaining would be referred to a Board of Conciliation, which would, in view of the principles of Order in Council P.C.2685, generally recommend union recognition. After Order in Council P.C.7440 in regard to wages and Order in Council P.C.4844 in regard to discrimination cases became effective, an Industrial Disputes Inquiry Commission in dealing with Kirkland Lake Gold Miners' request for a Board of Conciliation proposed a formula completely at variance with the principles of Order in Council P.C.2685. The formula recommended rejection of effective union organizations.(1) In administrative and legislative practice the Government did little to assist in the process of collective bargaining, for it was not until December 1942, under Order in Council P.C. 10802 that the Government permitted Crown Company employees to organize.

1) Report of National War Labour Board arising out of its Public Inquiry into labour relations and wage conditions 1943. Minority Report P.18.

(e) Order in Council P.C.8253:

Order in Council P.C.8253 of October 24,1941 established a system of War Labour Boards to administer the wage policy of the Dominion Government. Thus, was the question of wages taken out of the hands of the Industrial Disputes Inquiry Commission and the Board of Conciliation and Investigation, leaving the duties of these agencies confined for the most part, to disputes about union recognition.

(f) Conclusion:

Labour in Canada in 1941 and 1942 was not satisfied with the policy of the Dominion Government in relation to union recognition and collective bargaining. It was felt that Order in Council P.C.2685 principles were not being followed by employers, while labour itself was living up to its pledge of co-operation during the war time. The Government had taken the matter of wages out of the voluntary process of collective bargaining to secure its anti-inflation policy, and had not given any definite backing to the principles enunciated in Order in Council P.C.2685. The Government, by Order in Council P.C.7307 in September 1941, had made the employees' effective strike weapon illegal unless a vote were taken,(1) under very undemocratic conditions.

The chief defect in the Government's labour policy was its failure to protect the right of workers to organize freely and bargain collectively with their employers through representatives of their choice. This was particularly resented by labour, since that right had already been won in Great Britain where it was taken for granted and in the United States where it was protected by legislation.

(1) The Labour Gazette,Mar.1942,P.291 ff., Feb.1942, P.177 ff.,

S E C T I O N T H R E E

WARTIME LABOUR RELATIONS REGULATIONS: ORDER IN COUNCIL P.C.1003:

Chapter I: Influences Leading to the Enactment:

(a) The Ontario Collective Bargaining Act:

The Ontario Collective Bargaining Act,1943; R.S.O., c.4, represented the first attempt in Canada to enforce upon employers in positive terms a duty to bargain collectively, altho by 1943 most of the other Provinces in Canada had enacted legislation inadequate to this end both in terms and in provisions of enforcement. The Nova Scotia Trade Union Act of 1937 was the pioneer venture in Canada in this field. The fact that the Ontario Act in question confides administration not to a Minister of the Crown or a department of government or any statutory body, but rather to the Supreme Court of Ontario indicated the judicial nature of the enactment.

The Ontario Act followed the Inquiry of a Select Committee of the Legislature of Ontario, early in 1943, into collective bargaining and conditions of employment. The Committee reported that a collective bargaining measure ought to be enacted in Ontario, and suggested a draft bill which provided for a Labour Court to administer the proposed legislation. This draft bill was modified by the Legislature and became law on April 14,1943, under the title of the Ontario Collective Bargaining Act, 1943.

Under the provisions of the Ontario Collective Bargaining Act a special branch of the Supreme Court of Ontario, termed the Ontario Labour Court, was given exclusive jurisdiction in all matters arising under the Act without right of appeal from its decisions. Consequently, Ontario proceeded to make good use

of this means of developing a flexible labour relations policy. This development had gone on to such an extent by the time that the Ontario Act was suspended by Order in Council P.C.1003 that one writer was led to state:

> "It is no secret that in the nine months of its existence the Court established through its decisions a body of labour law which was, on the whole, acclaimed both by employers and employees alike as a significant contribution to industrial peace." (1)

(b) The Report of the National War Labour Board:

A National War Labour Board and Regional Boards were established in Canada to administer the wage policy of the Federal Government. This took place by Order in Council P.C.8253 of October 24,1941, under the War Measures Act. Early in 1943 the National War Labour Board was reorganized under the Chairmanship of Mr.Justice C.P.McTague, and was to partake more of the nature of an industrial court of a representative character. The Board by Order in Council P.C 1140, February 11,1943, was vested with power "to enquire and report to the Minister of Labour from time to time as it may deem advisable" with regard to wage conditions and labour practices in Canada and to make "such recommendations as it may deem necessary in connection therewith having regard to the principles enunciated in Order in Council P.C.2685".

On April 8,1943, the National War Labour Board issued the following statement:

> "The National War Labour Board will at once institute and conduct a public inquiry into matters affecting labour relations and wage conditions in Canada."

(1) Recent Labour Legislation in Canada: 1944, Canadian Bar Review, P.776 at 783, Article by Bora Laskin, School of Law, Toronto University.

The Public Inquiry in question took place at Ottawa between April 15 and June 17,1943, and was attended by labour and management as well as other interested parties.

The most important question which came up at the Inquiry according to the Majority Board Report was that of Collective Bargaining. It was found that in practice there had in certain cases been collective bargaining in Canada for years but in law there was no such right established in the Dominion field, Canada being far behind England, Sweden, or Australia in the field of labour relations. Organized labour, as a whole, advocated compulsory collective bargaining as exemplified in the Wagner Act in the United States.(1)

The Majority Report of the National War Labour Board, in particular recommended:

1. The setting up of a National Labour Relations Board to administer a Labour Code providing for compulsory collective bargaining. The code to provide safeguards against abuses by either labour or industry, and penalties for infractions to be dealt with under the Defence of Canada Regulations.
2. All disputes arising during currency of collective agreements or where no formal collective agreement to be dealt with by compulsory arbitration under the jurisdiction of the National Labour Relations Board, with agencies set up in each province with mediation services attached. Strikes and lockouts to be outlawed and appropriate penalties provided under the Defence of Canada Regulations. Suspension of the Industrial Disputes Investigation Act until the

(1) 1945 Report of Deputy Minister of Labour in 1945 Blue Book Report of the Department of Labour, P.40.

proclamation of peace and revocation of Orders in Council inconsistent with Code were also recommended.

3. The Code would be applicable to war industry according to definition.

4. There were certain subsidiary recommendations for which no new legislation was contemplated:

   (a) Setting up of labour-management committees in industry.

   (b) Labour representation on all pertinent Government Boards.

   (c) Establishment of employers' associations in industries leading up to joint Industry-Labour Councils.(1)

Regarding the problem of administration of the proposed Code, the Report adds:

> "Both labour and industry are entitled to expect impartiality, despatch and firmness in the solution of their problems. A mere report is no effective guarantee of any such qualities. These must be brought into play in the resulting process of administration". (2)

The Report of the National War Labour Board was tabled in the House of Commons, January 28,1944. In a Radio Speech broadcast on December 4,1943, Prime Minister MacKenzie King had announced changes in the Government's wage policy, Order in Council, P.C.9384. In addition, the Prime Minister referred to the National War Labour Board's recommendations regarding a Code of Labour Relations to apply to war industries, and enforced by a National Wartime Labour Relations Board, distinct and separate from the National War Labour Board, which was to continue to exercise jurisdiction over wages. He said in part:

(1) Report of National War Labour Board (Supplement to Feb.1944 Labour Gazette, P.11)

(2) Report of National War Labour Board (Supplement to Feb.1944 Labour Gazette, P.11)

> "In peace-time, the authority to make laws to enforce the right of collective bargaining belongs to the Provinces. As a result of recent conferences with the Provincial authorities, agreement has been reached in principle on a basis of co-operation in instituting and administering compulsory bargaining ..... The Code of Labour Relations will be enacted in the near future." (1)

Chapter II: Scope of the Wartime Labour Relations Regulations:

(a) Introduction:

Order in Council, P.C.1003 of February 17,1944, enacted by the Dominion Government and entitled the Wartime Labour Relations Regulations, established a National Wartime Labour Relations Board and made provision for Provincial Boards, all of which were to come under the Dominion Department of Labour. By Section 3 of the Order in Council, virtually all Canadian industry came within its provisions because of the War Measures Act. Provincial statutes gave way in a case of conflict with the Regulations or were to be considered merely ancillary or enabling legislation.

In short, Order in Council P.C.1003, meant the bringing of American experience in labour matters, with slight exceptions, to Canada. Following in the wake of various Provincial statutes reaching toward the same goal, the Order in Council gave promise of being an epoch marking event in labour relations in Canada. (2)

(1) The Labour Gazette, Dec. 1943, P.1601.

(2) 1944 Canadian Journal of Economics and Political Science, H.A.Logan; "The State and Collective Bargaining", P.476.

The War Measures Act ceased to have effect on January 1,1946, and the National Emergency Transitional Powers Act replaced it. This Act as amended in 1946, expired on March 31,1947. On March 25,1947 the Prime Minister, Hon.W.L. MacKenzie King tabled in the House of Commons an Order in Council extending the National Emergency Transitional Powers Act, 1945, until 15th May 1947.(1) This procedure had been provided for in the speech from the Throne passed in the House shortly before. Due to this extension the Wartime Labour Relations Regulations will remain in force in Canada at least up to May 15,1947.

(b) General Purpose of the Regulations:

The preamble to Order in Council, P.C.1003, states, in part, as follows:

"Whereas it is deemed to be in the public interest, especially during the war period and more particularly in industries essential to the prosecution of the war, that employers and employees collaborate for the advancement of the enterprises in which they are engaged;
That employers and employees should freely discuss matters of mutual interest with each other;
That differences between employers and employees should be settled by peaceful means; and
That both employers and employees should be free to organize for the conduct of negotiations between them and that a procedure should be established for such negotiations;
And whereas, it is therefore deemed necessary, by reason of the war, for the security, defence, peace, order and welfare of Canada and for the effective prosecution of the war, that regulations be made in respect of such matters.
Now, therefore, His Excellency the Governor-General in Council, on the recommendation of the Minister of Labour and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes, 1927, is pleased to make the regulations hereto attached and they are hereby made and established accordingly."

(1) Hansard, March 25,1947, P.1751.

The Regulations were enacted primarily to enable employers and employees to organize for the conduct of negotiations between them and to establish a procedure for such negotiations. The initiative is taken when the employees apply to the Board to settle the question as to whether this or that particular trade union or organization is entitled to represent the employees affected in the negotiation of a collective agreement with their employer. This process of selecting and certifying bargaining representatives is prescribed by Sections 5 to 8 of the Regulations.

The Regulations require an employer to bargain with the authorized bargaining representatives of the employees, or vice versa, in good faith, with a view to the completion of a collective agreement. The appropriateness of the bargaining unit and the right of the bargaining representatives to bargain on behalf of the employees affected may be established in the certification process mentioned above or in the alternative, where the organization has established its authority to represent the employees because of the fact that it was party to the expiring agreement covering the employees in the bargaining unit. Sections 10,11,12 and 16 of the Regulations explain this process.

The Canadian Regulations go beyond the provisions of the National Labor Relations Act (The Wagner Act) of the United States. Both enactments are intended to protect workers from employer domination or interference which might hinder self-organization, designation of representatives, and collective bargaining. The Canadian provisions, in addition, name

certain unfair practices, assume State responsibility to assist the two negotiating parties to reach an agreement, and forbid strikes and lockouts during negotiations and for the term of the agreement compel fulfilment. In support of the last, the Regulations require the Board to check the grievance procedure provided for in the agreement to ensure its appropriateness under Section 18.

In neither Country, Canada nor the United States, do the respective enactments cover all "labour problems". For instance, child labour, sweat shops, minimum wages are not mentioned. In Canada, in particular, the question of wages was under the jurisdiction of a War Labour Board. There might even be cases of collective agreements where the parties thereto had made no application to come under the Regulations; in such cases however, various sections might apply to the parties, in a proper case. Again, under neither enactment is there requirement to carry negotiations to the point of the consummation of an agreement. In Canada, the Board is concerned with the form of the agreement to the extent that the grievance procedure mentioned in Sections 17 and 18 of the Regulations must be appropriate, while in the United States, in general, the National Labor Relations Board is not concerned with the form of the agreement.(1)

The most important differences between the National War Labour Board in Canada and the Wartime Labour Relations Board are that, in the main, under the latter the parties negotiated the agreement, while under the former the Board dictated the

(1) Re Matter of Consumers' Research,Inc.,(U.S.) 2,N.L.R.B. 57.

terms according to provisions laid down. In negotiations under the Regulations involving wage rates and hours, for example, the appropriate War Labour Board had to pass on the matter to see if it was in accordance with the policy of that Board. In operation, however, the Wartime Labour Relations Boards partook more of the nature of an industrial court, while the War Labour Boards were administrative bodies of the executive Government.(1)

(c) Constitutional Aspects :

In ordinary times labour legislation in Canada usually falls under Section 92 (13) of the British North America Act and exclusively within the provincial field as legislation in relation to property and civil rights. Dominion legislation on labour matters is ordinarily confined to industries within the exclusive jurisdiction of the Dominion,(2) even though in other cases "evils"may prevail in more than one province and indeed throughout the whole Dominion.(3)

After the commencement of World War II, the Federal Government, by successive Orders in Council, amended its laws relating to industrial disputes, but always limiting its jurisdiction to matters within its domain taking into consideration the essential character of the various industries concerned.

(1) Ford Motor Co.v Local 144,United Automobile,Aircraft, Agricultural Implement Workers:1 D.L.S.7-522;(National W.L.R.B.) Dec.6,1944; Canadian Pacific Railway Freight Handlers Port McNicol;2 D.L.S. 38-1044; (National W.L.B.) Aug.20,1943.

(2) Toronto Electric Commissioners v Snider,et al (1925)A.C.396

(3) Atty.Gen.for Ontario v Atty.Gen.for Dominion (1896) A.C.348.
Re Legislative Jurisdiction over Hours of Labour (1925)S.C.R.505.
Reference re Weekly Rest: (1936)3 D.L.R.673; (1937) 1 D.L.R.673.

Order in Council, P.C.1003, was not enacted for the purpose of enlarging the Federal jurisdiction, Parliament being unable to delegate power which it did not possess. Under the War Measures Act in the emergency of war, the Dominion, by the Wartime Labour Relations Regulations, however, did invade what was normally the sphere of provincial legislatures. As to what extent the Dominion has encroached, Section 3 of the Regulations, by virtue of the War Measures Act makes the Regulations applicable to war industries as defined in Schedule A to the Regulations, in all the provinces of the Dominion. By agreement, the Regulations are administered, with respect to war industries, ordinarily within the provincial field, by the provincial authorities in all provinces except Alberta and Prince Edward Island. By provincial legislation the Regulations are made applicable to other industries within provincial scope in British Columbia, Manitoba, New Brunswick and Ontario. In so far as the Regulations apply to industries normally within provincial jurisdiction, the ordinary statutory provisions of the province are in abeyance where they conflict with the Regulations.

In particular, the Regulations are made applicable (i) to employees within the legislative authority of the Dominion Parliament, including navigation and shipping, railways, canals, telegraphs, or such works as are declared to be for the general advantage of Canada; (ii) in an employment essential to the efficient prosecution of the war; or (iii) whose relations with their employers are ordinarily within the exclusive legislative jurisdiction of a provincial legislature, where

made applicable by the Province concerned under Section 3 (1)(c) and Section 3 (4) of the Regulations.

Persons employed in a work, undertaking, or business deemed to be essential to the efficient prosecution of the war are enumerated in Schedule A to the Regulations. Such Schedule may be amended either by the addition or deletion of a class of employees by an order made by the Governor in Council under Section 3 (3) of the Regulations.(1) One of the classifications, for example, included in the Schedule is employees of a work, undertaking, or business engaged in the production of machinery, arms, shells, ammunition, explosives, implements of war, or naval, military or air stores. It was held by the National Board in the Dominion Oilcloth & Linoleum case, May 10,1944, that the Dominion Regulations must be restrictively interpreted.(2) Hence, where industries "engaged in the production of naval, military, or air stores" are mentioned, this must be interpreted to mean "industries exclusively engaged in the production of naval, military or air stores", in the absence of evidence of wider intention. If it were extended to cover those employees in an industry partly engaged in producing anything which in a "total" war might be naval, military or air stores, practically all industries would be included, and no scope would be left for the application of Section 3 (4) of the Regulations. Even where the employees might come

(1) Section 3(3) of the Regulations revoked by Order in Council P.C.302, effective March 31,1947.Complete discussion P.251 ff.,

(2) Plastic and Linoleum Workers, Local 677 v Dominion Oilcloth & Linoleum Co., 1 D.L.S. 7-509;(1944) 3 D.L.R.124.

within the scope of the Industrial Disputes Investigation Act as extended by Order in Council P.C.3495, they might not come within the Regulations.(1) The effect of the Regulations in this regard was the same after the end of the war by virtue of Order in Council P.C.7414, of December 28,1945, made under Section 5 of the National Emergency Transitional Powers Act, 1945, (2).

In certain provinces enactments making the Regulations applicable to provincial industries may in some cases exempt municipal corporations, boards or commissions from the scope of the Regulations, until such time as proper by-laws are passed by the agency concerned.(3) However, essential municipal corporations are automatically covered by the Regulations under the phrase "Public Service Utilities" in Schedule A - Item 14, despite the fact that a by-law has not been passed.(4)

(1) United Electrical,Radio and Machine Workers of America, Local 528 v Canadian Marconi Co.Ltd., 1 D.L.S. 7-557 (National) Apr.10,1945. International Association of Machinists v Canadian Ingersoll-Rand Co. 1 D.L.S.7-569 (National) May 22,1945.

(2) The British Rubber Co.of Canada Ltd., v Rubber Workers Federal Union:1 D.L.S. 7-618 (National) Apr.2,1946. The provisions of the 1945 Act in question are operated until May 15,1947 by virtue of Order in Council,Mar.25,1947.

(3) Ottawa Hydro-Electric Commission v Int.Brotherhood Electrical Workers, Local 1440: 1 D.L.S. 7-665 (National) Dec.12,1946.

(4) Ottawa Hydro-Electric Commission v Int.Brotherhood Electrical Workers, Local 1440: 1 D.L.S. 7-665 (National) Dec.12,1946.

(d) Prima Facie Coverage of the Regulations:

Section 2(1)(f) of the Wartime Labour Relations Regulations defines "employee" as:

> "A person employed by an employer to do skilled or unskilled manual, clerical or technical work,"

There are exceptions to the above and they will be dealt with in a later part of this Thesis.

The definition of the term "employee" under the Wagner Act in the United States and under the Collective Bargaining Act, 1943, in the Province of Ontario, may conveniently be noted here. Without going into the question as to whether the definition in the Canadian Order in Council should be read literally or in the light of experience under the others mentioned, it is a fact that modern administrative regulations, especially in the United States, are increasingly being interpreted in a broader and more liberal manner.

Under the Wagner Act in the United States, the term "employee" includes "any employee....", subject to certain limitations imposed by the definition of the term "employer", which makes persons who act in the interest of an employer, although "employees" in the ordinary meaning of the term, not "employees" but "employers" within the meaning of the Act. There are further exceptions too in the case of the Wagner Act, but the point to be noted here is that prima facie any person may, in a proper case, be an employee.

Under the Collective Bargaining Act, 1943, in Ontario, "employee" was defined as follows under Section 1(e):

> "'Employee' shall mean any person in the employment of an employer.....,"

The Ontario Act goes on to make definite exceptions, as in the other two cases.

The coverage of the term "employee" under the Regulations is ab initio more restrictive than under either the Wagner Act or the Collective Bargaining Act, since it is restricted to "skilled or unskilled manual, clerical or technical work". In its specific exceptions the Wagner Act does not expressly mention confidential, supervisory or other types of individuals which are excluded from the definition of the term "employee" in the Dominion or the Ontario enactments, altho the definition of the term "employer" may impliedly do so.

Two views as to the interpretation of the term "employee" have developed under the Regulations. The first, that the term should be interpreted strictly according to the objective meaning of the words of the definition; this is the view of the National Wartime Labour Relations Board. The second, that the term should be interpreted more broadly according to the subjective meaning of the words of the definition read in the light of the Preamble to the Regulations and the facts in each particular case; this is the view of the Ontario Labour Relations Board.

The reason for the distinction between the National Board and the Ontario Board would appear to lie mainly in the wording of Section 25 of the Regulations. This Section appears to give the Board a more definite judicial function in deciding whether inter alia, a person is an "employer" or an "employee". Section 25 (2) by requiring the ordinary courts to abide by the decision of the Board, which is termed "final and conclusive" under Section 25 (1) adds to its judicial nature.

Except for this distinction in regard to Section 25, both the National and the Ontario Boards appear to regard their

decisions more or less as of a purely administrative nature permitting a discretion; this is true in the certification process, the granting of leave to prosecute or appeal, where the Board in satisfying itself is not bound by any common law objective standards. In fact, in the latter case the National Board altho appearing to act on standards of its own, may vary those standards from time to time as it develops a process of its own.

The view of the National Board as to the interpretation of the term "employee" under the Regulations, in consequence of the stipulations in Section 25, is that the words in Section 2 (1)(f) must be considered by themselves. There can be no consideration of "policy" in such a view, and hence the Board has tended to follow the objective standards and process of the ordinary judicial courts. The National Board did state in the Fire Bosses case, that "in interpreting the Regulations, we must not lose sight of the purpose and object of them".(1) In the Canada Coal case, November 27,1946, the Ontario Board in considering the scope of the term "employee" under the Regulations had stated that it went beyond those who stood in proximate technical legal relationship of servant to master, and following the reasoning of the National Labor Relations Board in the United States in the Seattle Post Intelligencer case (2), considered the purpose of the Act as well as the words in the particular Section.

(1) Western Canada Firebosses Association, Dist.No.1 v Crow's Nest Pass Coal Co. et al; 1 D.L.S. 7-535, Feb.1,1945.

(2) (1938) 9 N.L.R.B., 1262. See also N.L.R.B. v Hearst Publications Inc., (1943) 322 U.S.111.

The Minority judgment of the Ontario Board in the Canada Coal case felt that in determining the scope of the term "employee" the words of the Section in question must be interpreted in a strict common law objective manner according to a master-servant relationship and without regard to the Preamble or reference to experience in the United States. The National Board on appeal on March 4,1947, overruled the Majority judgment of the Ontario Board in this case and based its determination of the scope of the term "employee" strictly on a more objective standard in line with the Minority judgment of the Ontario Board, thus:

> "The test to determine the difference between an employee and an independent contractor is the degree of control exercised by the employer". (1)

This test, as stated above, is in line with that of the Minority judgment of the Ontario Board, thus:

> "The term 'employee' as defined by Section 2 (1)(f) of the Regulations appears to embrace all persons whose work is performed at the direction of another".

The judgments of the Courts of Law may be reviewed by higher Courts under the common law writs; the operation of these writs has been extended to bodies not claiming to be Courts of Justice, in the strict sense,(2) so long as these bodies in arriving at their decision used objective standards whether by common law or of their own. This practice applies to Canada.(3)

(1) Coal and Ice Drivers and Helpers, Local 3520 v Canada Coal Co.Ltd. et al; 1 D.L.S. 7-1271,on appeal from 1 D.L.S.7-1269.

(2) R v Electricity Commissioners (1924) 1 K.B. 171-204.
Local Government Board v Arlidge (1915) A.C.120.

(3) 11 Canadian Bar Review P.510; Article by D.M.Gordon.
See also Section 101 of the British North America Act.

In the Lunenburg Fishermen's Case (1), the National Board on February 7,1946, found that fishermen whose remuneration is a share in the proceeds of the fish caught, after certain deductions, are employees within the meaning of the Regulations overruling the Nova Scotia Wartime Labour Relations Board. The Nova Scotia Board had stated that the relationship between the crew members and the owners of each vessel in question was not the relationship of employees to employer required under the Regulations. The Nova Scotia Supreme Court has recently ruled contra the judgment of the National Wartime Labour Relations Board on this question.

Chapter III: Restrictions on the Scope of the Regulations:

(a) Supervisory Employees:

The Wagner Act despite its wide coverage assumed in the term "employee",found that there must of necessity be an implied limitation where the duty of an individual partook more and more of a managerial nature. The "fringe" man, the foreman, became the point of demarcation. Under the Regulations, too, some limitation in this regard even beyond that specified in Section 2 (1)(f) must be implied.

(1) Canadian Fishermen's Union, Lunenburg N.S. v Owners of "Sea Nymph" Halifax, N.S. et al; 1 D.L.S. 7-605 Feb.7,1946. The National Board cited common law decisions as to what constituted the relationship of master and servant. In particular cited in re Performing Rights Society v Mitchell (1924) 1 K.B. 762, McCardie, J. at 767 thus:

"the final test,.....and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant."

The Wagner Act did not expressly mention supervisory, confidential or other more or less official employees as being excluded from the scope of the term "employee" under the Act. The Collective Bargaining Act in Ontario specifically excluded (i) an officer or official of an employer; and (ii) a person acting on behalf of the employer in a supervisory or confidential capacity, or having authority to employ, discharge or discipline employees. The Wartime Labour Relations Regulations expressly excluded "a person employed in a confidential capacity or having authority to employ or discharge persons", but did not mention supervisory employees.

In modern industry "policy" management, "executive" management, and "supervisory" management at least to an extent, are so imbued with the employer complex that any definition of the term "employee" impliedly excludes them as being part of management. Thus, in interpreting the Regulations, the background of modern industrial society must be considered to this extent at least, for the President, Vice-President and so on down the managerial hierarchy to the foremen and further, are all paid by the same corporation.

Under the Regulations employers and individuals partaking of the nature of employers do not come under the scope of the term "employee" as set out in Section 2 (1)(f). Those latter individuals, who are in reality agents of the employer, are defined as persons having supervisory capacity and authority to discipline employees, and are impliedly excluded from the term "employee" under Order in Council P.C.1003. This class of individual as stated before is generally known under the name of "foreman".

The question follows as to whether in the interpretation of the term "employees" under the Regulations, supervisory employees are to be excluded. The fact that the Regulations make no express exclusion of supervisory employees seems to indicate that it is only that type of supervisory employee which according to the background of industrial society, is considered more as an employer than an employee, that is impliedly excluded under the Regulations.

The judgments of the National Board have tended to follow a comparatively narrow interpretation of the word "employee", excluding foremen generally as having supervisory or disciplinary powers, linking them to management, altho on occasion admitting somewhat similar categories of a limited supervisory capacity. The Ontario Board, on the other hand, has adopted a broader interpretation of the term "employee", going beyond industrial background reference in general and following very closely the experience under the Wagner Act in the United States, at first by dicta placing foremen and assistant foremen under the term, and finally deciding by definite judgment to that effect.

It will be convenient here to consider some of the judgments dealing with the term "employee" under the Regulations.

In the Firebosses Case, February 1,1945, the National Board dealt with the question as to whether firebosses (mine examiners) might form a bargaining unit under the Regulations.(1) In its Reasons for Judgment in the case the Board decided that firebosses were within the term "employee" in the Regulations,

(1) Western Canada Firebosses Association, Dist.No.1 v Crow's Nest Pass Coal Co. et al., 1 D.L.S. 7-535.

since the duties of a fireboss were not supervisory, confidential or involving the right to employ or discharge.

As to the contention that firebosses were not employed to do "skilled or unskilled, manual, clerical or technical work", and as such, partook more of the nature of managerial status than of employee status, the Board decided that the duties of firebosses as set out in the Alberta and British Columbia Mines Acts "make a clear distinction between the supervisory duties of managers, overmen, assistant overmen, cager, outside foreman, driver-boss and bankmen, on the one hand; and the duties of the examiner or fireboss, the shotlighter and the lampman, on the other hand, which are not supervisory".

This case does not definitely state whether the words "skilled or unskilled, manual, clerical or technical work" are words of limitation or example; neither does it decide that an individual may be excluded from the scope of the term "employee" under the Regulations solely because he may exercise a limited supervisory duty. Apparently, however, the case does place supervisory employees as border-line individuals.

The Minority Report of the Board in the Firebosses Case stated that an employer is responsible for the acts of his supervisors or other agents. To rule otherwise would not only excuse employers, but allow their agents to commit unfair labour practices. Individuals may not have a dual status for the process of collective bargaining, as this is inconsistent with the Regulations.

In the Searle Grain Case, May 22,1945, (1) The National Board, in speaking of the status of assistant foreman, in including them in an appropriate bargaining unit under the Regulations, stated:

> "The company admits that the assistant-foreman has no authority to employ, discharge, suspend, discipline, grant time off, promote, demote, or transfer other employees, but contends that in the absence of the foreman he does make confidential reports on the ability or conduct of employees under his jurisdiction. The Board has in other cases included employees of comparable responsibility to assistant-foremen".

In the Foreman's Guild Case, June 23,1945, (2) the Ontario Board in dicta stated that foremen and assistant foremen were within the term "employee". They arrived at this conclusion on a wide and liberal interpretation of the Regulations, assuming that the authors had been officially aware that supervisory employees were excluded in the definition under the Ontario Collective Bargaining Act. In consequence the fact that no mention was made in the Regulations of this particular category, led to the assumption that they were prima facie included. Reference was also made to the broad general principles followed in the United States under the Wagner Act.

The Minority Report of the Board held contra, stating that it could not be presumed that the precise provisions of the Ontario statute were present to the minds of the authors of the Regulations, so as to indicate a more inclusive coverage in the term "employee"; Secondly that there was no sufficient similarity between the duties of firebosses and the duties of foremen and assistant-foremen to warrant the

(1) Brotherhood of Railway & Steamship Clerks,etc. v Searle Grain Co. 1 D.L.S. 7-570.

(2) Foreman's Guild v Ford Motor Co. 1 D.L.S. 7-1190.

application of the decision of the Firebosses Case to the case at hand, since the main duty of the fireboss was to act as a safety inspector, and thus "in no way analagous to those of foremen"; Thirdly the definition of "employee" under the Wagner Act is much wider than under the Regulations; Finally even assuming that foremen and assistant-foremen come within the term "employee" under the Regulations, which is not admitted, they are excluded on the grounds of being confidential employees, that is, supervisory employees who actually reflect the policy of higher management and in addition, altho they do not exercise it, they have authority to employ or discharge employees.

In the Spruce Falls Power Case, January 29,1947, (1) the Ontario Board decided that foremen may come within the term "employee" under the Regulations in certain cases where no authority to hire and fire existed, since the confidential status of foremen had waned in recent years as experience in the United States indicated, and foremen no longer formulated policy. The Board taking judicial notice that the Ontario Collective Bargaining Act had not included supervisory and disciplinary duties under the term confidential, and applying a broad policy of interpretation, assumed that the Regulations did not exclude supervisory and disciplinary employees as such. The Board also noted that in the United States foremen, the "orphans" of industry originally had been excluded from bargaining units because of "supervisory" rather than "confidential" management relationship. In modern industry the Board found that foremen in dealing with

(1) International Brotherhood of Paper Makers, Kapuskasing Foreman's Local 523 v Spruce Falls Power & Paper Co. 1 D.L.S. 7-1301.

management had the same problem to face as ordinary employees. Consequently the Board felt it was only right to allow foremen at least in the lesser supervisory bracket, to organize, particularly in bargaining units separate from their subordinates.

The National Board does not accept "titles" as prima facie evidence of supervisory capacity. This was decided in the Canada Veneers Case (1) mentioned before, where the Board placed "lathe foremen" and "boilerhouse foremen" within the scope of the term "employee" under the Regulations, due to their limited supervisory duties. The former generally worked with lathe crews, having some supervision over them, but in turn being themselves under a foreman; the latter were third class stationary engineers with minor supervisory duties.

In the Steel Company of Canada case (2) January 28,1947, the Ontario Board held that a temporary junior melter who oversees an open hearth, consults with foremen on matters of waste, is included in a company list of employees, does not hire or fire employees, and is at the bottom of the managerial hierarchy, falls outside the unit certified under the Ontario Collective Bargaining Act as being supervisory, may still be an employee under the Regulations.

This last Case indicates that the Regulations are wider than the Collective Bargaining Act of Ontario in this regard, since employees of at least some supervisory status may be included in a proper bargaining unit.

(1) Local 1, Industrial Union of Veneer Workers v Canada Veneers Ltd.; 1 D.L.S. 7-645, November 13,1946.

(2) United Steel Workers of America, Local 1005 v Steel Co. of Canada; 1 D.L.S. 7-1297,

The Ontario Board, in the Canada Coal Case, (1) November 27,1946, held that in interpreting the term "employee" under the Regulations a liberal view which would take into account the matter of "community of interests" should be taken in preference to the strict common law master-servant approach. The National Board in overruling the judgment of the Ontario Board, in the Canada Coal Case,(2) repudiated this wider view, and stated that the test to determine the difference between an employee and the independent contractor in the case was the degree of control exercised by the employer; thus preferring the common law approach.

The National Board in a ruling on February 13,1945, (3) stated that professional and scientific personnel came under the Regulations the same as other employees. The National Board in the Canadian National Telegraph Case, (4) excluded certain engineers under the chief engineer from a bargaining unit composed of draftsmen, technical assistants, and lower class engineers, since the greater portion of the time of these particular engineers was given to supervising those working under them, although they do ordinary work on occasion.

(1) Coal & Ice Drivers & Helpers, Local 352 v Canada Coal Ltd. et al., 1 D.L.S.7-1269.

(2) C.C.H.10,503 (L.L.R.).

(3) In re Professional Employees: C.C.H.10,419 (L.L.R.)

(4) Canadian National Telegraph Unit 1, Federation of Employee-Professional Engineers & Assistants v Canadian National Telegraph Co. 1 D.L.S.7-659; see also Quebec Federation of Professional Employees etc., v C.B.C., 1 D.L.S.7-661; and Quebec Federation of Professional Employees v The Bell Telephone Co.of Canada, 1 D.L.S.7-634.

In regard to administrative workers, the National Board in the Halifax Civic Employees Case(1), September 10,1946, stated that all administrative employees of Halifax having disciplinary duties were ineligible as employees within the Regulations, since they were discharging management functions in regard to employees under them. Apparently the decision would have been the same if these particular administrative workers had requested to form a bargaining unit under the Regulations comprised entirely of administrative individuals.

(b) Confidential Employees :

Section 2 (1)(f) of the Regulations excludes specifically from the term "employee":

> "A person employed in a confidential capacity or having authority to employ or discharge persons."

The Wartime Labour Relations Regulations denies the existence of a fundamentally "confidential" quality in the relationship of any particular group of workers. (2) The determination of the status of a worker is made at the time the Board decides on the scope of a proposed bargaining unit.

Having decided that the individual concerned does not possess the capability of acting on behalf of the employer in a supervisory capacity or as a disciplinarian so as to exclude him from being an "employee" under the Regulations, the next

(1) Halifax Civic Employees' Federal Union 143 v Corporation of The City of Halifax; 1 D.L.S. 7-645

(2) See In re Professional Employees, C.C.H. 10-419 (L.L.R.) February 13,1945; A Professional Employee, for instance, is not per se of confidential status. It will rather be for his supervisory status or his authority to employ or discharge that he may be excluded from the Regulations. It is his position in the hierarchy of industry,not trade that counts.

question is, Does the individual concerned act in a confidential capacity?

In the case of The Foreman's Guild (1) June 23,1945, the Minority judgment of the Ontario Board adopted the language of the Registrar of the Labour Court of Ontario in the Ford Motor Case (2), where it was held that persons who by the nature of their duties are "under the special guidance and care of, and have an intimate relation with management", are persons employed in a confidential capacity. That definition has been cited, apparently with approval by the Majority of the National Board in the Firebosses Case (3), which last case also cited a definition of the United States Labor Relations Board (4), which stated that an employee "under the special guidance and care of, and having an intimate relation with management", was a confidential employee.

Thus, if an individual can be said to come within the general part of the definition of the term "employee", "a person employed to do skilled or unskilled manual, clerical or technical work", he may nevertheless be excluded from that class because of confidential capacity. It is the degree and quality of the confidential relationship between a worker and management which will determine whether the worker in question is, or is not, such agent of the employer as will justify his exclusion from the scope of the term "employee" under the Regulations.

(1) Foreman's Guild v Ford Motor Co.of Canada Ltd.1 D.L.S.7-1190.

(2) United Automobile Workers, Local 240 v Ford Motor Co.of Canada Ltd. (D.L.S.77-1035)

(3) Western Canada Firebosses Association Dist.No.1 v Crow's Nest Pass Coal Co.et al, 1 D.L.S. 7-535.

(4) In re Creamery Package Mfg.Co.:34 (U.S.)N.L.R.B. No.15.

The Board considers the company's practice in each particular case, in the first place to decide whether the individual in question is prima facie an employee, as being within the general part of the definition. Having decided that he does not possess sufficient supervisory status to warrant exclusion on that ground as part of the arm or agent of management, the Board in considering whether the individual in question may or may not be excluded because of confidential status, may take into consideration evidence of supervisory duties possessed.(1) However, the term "confidential" does not necessarily include supervisory or disciplinary duties.(2)

The National Board in the Canadian Pacific Railway Case (3) February 5, 1946, dealing with a request that individuals be excluded from a bargaining unit because engaged in work of a confidential nature in connection with "time-keeping, pay-rolls, and other work for the use of management, and all employees on the staff have access to all records", found that such duties did not justify exclusion on grounds of confidential capacity. This case serves to illustrate the essential distinction between supervisory duties and confidential duties, the former being direct supervision of the employees and the latter being in the nature of assistance in the work of policy and executive management.

(1) See United Steel Workers of America Local 1005 v Steel Co. of Canada Ltd. 1 D.L.S. 7-1297, January 28,1947.

(2) International Brotherhood of Paper Makers, Kapuskasing, Foreman's Local 523 v Spruce Falls Power & Paper Co.1 D.L.S.7-1301

(3) Brotherhood of Railway & Steamship Clerks, Freight Handlers, etc. v Canadian Pacific Railway 1 D.L.S. 7-611

The following cases will further illustrate the policy of the Board in dealing with the matter of confidential status under the Regulations:

In the Searle Grain Case (1) May 22,1945, the National Board excluded from an appropriate bargaining unit three watchmen who were sworn in as policemen and carried firearms; while in the same case included assistant foremen who in the absence of the foreman made confidential reports on the ability or conduct of employees under him.

In the Anchor Cap Case (2) November 14,1946, the National Board excluded General Inspectors from an appropriate bargaining unit because of confidential status. The Board stated that they "will be excluded from the bargaining unit on the ground that in view of the nature of their work, it is not appropriate to include them in the bargaining unit".

In the Canadian Westinghouse Case (3) January 31,1947, the Ontario Board certified a unit of employees made up wholly of watchmen, adding that altho watchmen had a special responsibility to the employer in question, they were not confidential employees according to the tests of the Firebosses Case. The Board purporting to follow the Searle Case, not finding them fit to be appropriately grouped with other categories of employees, went so far as to declare that watchmen might form a unit of their own under the Regulations.

In April 1944, the National Board had ruled that all persons employed in a professional capacity should be considered

(1) Brotherhood of Railway & Steamship Clerks etc. v Searle Grain Co.Ltd. 1 D.L.S. 7-570.

(2) Glass Bottle Blowers' Association & Anchor Cap Closure Co. v United Electrical, Radio etc.Workers:1 D.L.S.7-660.

(3) United Electrical,Radio & Machine Workers of America v Canadian Westinghouse Co. 1 D.L.S.7-1325.

as employed in a confidential capacity. On February 13,1945, the Board substituted a different ruling (1), stating that in a proper case the Board might certify as employees, persons of professional status. In the Toronto Hydro Case (2) the National Board confirmed this change in policy with regard to professional employees, stating:

> "This Board is prepared in proper cases to certify duly elected or appointed bargaining representatives constituted of employees employed in professional engineering or employed in training for professional engineering and to deal with the issue of whether a professional employee is employed in a confidential capacity on the facts of the particular case."

The National Board in the Halifax Civic Employees' Case (3) September 10,1946, excluded the City Solicitor and his assistants from an appropriate bargaining unit because of confidential rather than supervisory status.

The Ontario Board has definitely ruled that "confidential" status under the Regulations, following a broad policy of interpretation and the example of the Ontario Collective Bargaining Act, does not include supervisory and disciplinary status. (4) Thus, still following the broad interpretation, the

(1) In re Professional Employees, C.C.H. 10-419 (L.L.R.)

(2) Toronto Hydro Electric Employee Professional Engineers Unit 1 v Toronto Hydro Electric System; 1 D.L.S. 7-637 June 18,1946.

(3) Halifax Civic Employees Federal Union 143 v Corporation of the City of Halifax; 1 D.L.S. 7-645

(4) International Brotherhood Paper Makers, Kapuskasing Foreman's Local 523 v Spruce Falls Power: 1 D.L.S.7-1301

Ontario Board has consistently, in regard to confidential status as it has with supervisory status, followed the trend of the National Labor Relations Board in the United States.

The National Board although holding to the stricter view of interpretation has not refused to turn to the National Labor Relations Board in the United States for illustration in interpreting the term "confidential" under the Regulations (1), but has not in some cases made it clear whether certification has been refused because of supervisory or of confidential status.(2)

(c) Authority to Employ or Discharge Employees:

Section 2 (1)(f) of the Regulations, as stated before, excludes from the term "employee" a person "having authority to employ or discharge persons".

This will be a question of fact in each case for the appropriate Board to determine. The question usually arises in a case of an individual who has authority to send a man home and recommend his discharge.

The National Board in the Firebosses Case, February 1,1945, dealt with the contention that a fireboss or ordinary mine-examiner who has authority to send a man home and recommend his dismissal has by virtue of this fact really the authority to discharge employees. The facts of the case showed that instances existed where the manager had discharged and where he had reinstated employees following the recommendation of firebosses; the Board concluded from this that no authority to discharge

(1) Western Canada Firebosses Assn. v Crow's Nest Pass Coal Co. 1 D.L.S. 7-535.

(2) Glass Bottle Blowers' Assn.& Anchor Cap Corp. v United Electrical,Radio & Machine Workers; 1 D.L.S. 7-660

existed.

In the Spruce Falls Power Case (1) January 29,1947, the Ontario Board in its Majority judgment stated in its liberal interpretation, that the words engaged "to do skilled or unskilled manual, clerical or technical work" in the definition of the term "employee" are used to ensure that there will be no restrictive interpretation put on that term as under the Industrial Disputes Investigation Act. The term "authority to employ or discharge" or to hire and fire, is ambiguous and does not cover a recommendation to do so. The fact, too, that at the time of the passing of the Regulations, there were very strict stipulations under the National Selective Service Regulations on the matter of employing or discharging, and yet the Regulations do not cover specifically recommendations in this regard, leads to the conclusion that the term is limited to those actually employing or discharging. This follows from the ordinary rule of statutory construction, namely, exclusio unius, inclusio alterius.

Thus it will be seen that both the National Board and the Ontario Board have decided that the mere fact that a person has authority to recommend discharge will not in itself exclude that person from being an "employee" under the Regulations.

In addition, both Boards agree that the name given to a particular person is not conclusive as to his status in regard to the term "employee", and that the facts of each particular case must be considered. However, the National Board in general, as in the case of the Minority judgment in the Spruce Falls Power Case is wary in conceding to foremen in modern industry a less pro-employer status than originally existed, feeling

(1) 1 D.L.S. 7-1301

that even though a foreman may only exercise the power to recommend discharge, he may nevertheless have the power to discharge.

(d) Exemption of Certain Categories of Workers and Employers:

Section 2 (i)(f) (ii) specifically exempts "a person employed in domestic service, agriculture, horticulture, hunting or trapping" from the term "employee" under the Regulations.

Domestic servants have such intimate and confidential status as well as individual and personal relations in their work that they are excluded. Agricultural workers are excluded perhaps because of the seasonable nature of their work; but it might be difficult to distinguish them from industrial workers in an advanced technological state. Horticultural workers as well as those engaged in hunting and trapping are too, definitely excluded from the term "employee". It might be noted here that persons engaged in the fishing industry are not excluded.

The application of the Regulations is further expressly limited by the exclusion of an "employer" coming under Section 2 (i)(g), namely a person employing less than two individuals, and in general the Crown and its agents, except those covered under Section 2 (i)(g)(ii). It might be noted here that persons excluded from employer status under Section 2 (i)(g) have their employees also excluded from the provisions of the Regulations.(1)

(1) Canadian Airline Pilots' Assn. v T.C.A.- C.C.H.10-432 (L.L.R.)
International Brotherhood of Electrical Workers,Local B-1038 v The New Brunswick Electric Power Comm. 1 D.L.S. 7-615.

If a Province enacts legislation under Section 3 (i)(c) of the Regulations in relation to employees and employers ordinarily under exclusive provincial jurisdiction it must specifically bind the Crown in the right of the Province in order to make the provisions of the Regulations applicable.(1)

It might be noted here that the Ontario Board has included probationary employees within the scope of the Regulations,(2) while excluding temporary employees.(3) The National Board on the other hand, has excluded members of the armed services from inclusion in an appropriate bargaining unit under the Regulations.(4)

(1) International Brotherhood of Electrical Workers, Local B-1038 v The New Brunswick Electric Power Comm., 1 D.L.S. 7-615 (National) April 2,1946.

(2) International Union, United Automobile,etc.Workers of America v General Motors of Canada Ltd.1 D.L.S. 7-1181 (Ontario) June 12,1945.

(3) Local 115, United Textile Workers of America v Firestone Textiles Ltd. 1 D.L.S.7-1207 (Ontario) September 28,1945.

(4) Timmins Mine and Mill Workers' Union Local 241 v Dome Mines Ltd. et al., 1 D.L.S. 7-515 (National) November 9,1944.

Chapter IV: Bargaining Representatives under the Regulations :

(a) Introduction:

The avowed purpose of the Wartime Labour Relations Regulations is to be found in the Preamble thereto: "Whereas it is deemed to be in the public interest"....."that differences between employers and employees should be settled by peaceful means".(1)

The experience of the Dominion Government in the field of industrial relations particularly during the war period previous to 1944 had shown that the mere declaration of policy, as under Order in Council, P.C.2685, was insufficient. Consequently Order in Council P.C.1003, provided for compulsory collective bargaining in good faith between employer and employees. The Regulations under the Order in Council went further with respect to legal requirements of collective agreements than any other Dominion or Provincial Act or Order, and further than the Wagner Act in the United States, although stopping short of compelling an agreement or directly adopting compulsory arbitration of collective agreements.

Jurisdictional disputes had in the past, in Canadian industry as elsewhere, been the cause of much uncertainty and unrest. The question as to who had the right to represent a certain group of employees in negotiations with their employer had not been up to 1944 settled in Canada. Various provinces following the example of the Wagner Act in the United States had enacted legislation on that matter, the Collective

(1) Preamble to Order in Council P.C.1003 cited in Reasons for Judgment in National Wartime Labour Relations Board Case of International Union Automobile, Aircraft and Agricultural Implement Workers of America Local 195 v The Canadian Bridge Co.Ltd. Plant 3 et al.,1 D.L.S. 7-548, March 27,1945.

Bargaining Act,1943, of Ontario had set up a Labour Court to administer the Act. In the Federal field, the difficulty of providing a uniform practice in industry had been made clear in numerous Reports of Boards of Conciliation and Investigation under the Industrial Disputes Investigation Act as extended under Order in Council P.C.3495. The voluntary evolution of a suitable formula was superseded by a compulsory formula for all employees covered by the Wartime Labour Relations Regulations under Order in Council P.C.1003, provided they desired to come within the provisions of the order.(1)

The Regulations provide that the bargaining representatives chosen as representatives of the majority shall represent all the employees affected, majority and minority. The Wartime Labour Relations Regulations in Canada provide for the certification of individual employees as bargaining representatives (2), rather than agencies of employees as in the Collective Bargaining Act 1943, of Ontario (3), or as was permissible under the Wagner Act in the United States.(4)

The idea of certifying bargaining representatives comprised of individual employees, rather than a trade union or an employees' organization is novel, but not strictly practical. Obviously it is the function of bargaining representatives to engage in collective bargaining designed to produce a completed agreement, and the notion that there can be any effective

(1) Section 5 of the Regulations is permissive not mandatory in this respect.

(2) Section 5 of the Wartime Labour Relations Regulations, Order in Council P.C.1003.

(3) The Collective Bargaining Act 1943 (Ontario) Sec.1 (a)

(4) The Wagner Act, Section 2 (4).

bargaining or successful operation of a collective agreement without the employees being organized into some permanent form of association is not practical. The Regulations themselves support this conclusion indirectly by defining a "collective agreement" under Section 2 (1)(d) as:

> "Collective agreement' means an agreement in writing between an employer or an employers' organization on the one hand and a trade union or an employees' organization on the other hand containing provisions with reference to rates of pay, hours of work or other working conditions."

The Board itself in administering the Regulations has adopted the practice of certifying not only the individuals selected in a proper manner, but also the organization of which these individuals are members and which in fact represents the majority of the employees affected.(1) The Regulations further state that a trade union, as distinguished from an employees' organization,(2) may appoint its officers or other persons (3) as bargaining representatives, without previous election in the whole unit, provided the trade union concerned holds a majority of the employees in that particular unit.(4) The Regulations again provide that when representatives

(1) Ford Motor Co. v Local 144 Int.Union United Automobile, Aircraft & Agricultural,etc. Workers;1 D.L.S.7-522 (National)

(2) Section 2 (1)(n) and Section 2 (1)(i) of the Regulations; The Foreman's Guild v Ford Motor Co. 1 D.L.S.7-1190 (Ontario)

(3) See Section 5 (2) of the Regulations; also Ford Motor Co.of Can.v Local 144 Int.Union United Automobile etc.Workers 1 D.L.S.7-522 (National) where it was stated that "or" in the phrase "its officers or other persons" meant "and/or".

(4) Section 5 (2) of the Regulations; also United Electrical, Radio & Machine Workers, Local 529 v Packard Electric Co. 1 D.L.S. 7-511 (National) October 25,1944.

are duly certified "they may give the employer concerned, or the employer concerned may give the bargaining representatives, ten clear days' notice, requiring that he or they, as the case may be, enter into negotiations with a view to the completion of a collective agreement."(1) This application is submitted according to the requirements provided in the Rules and Procedure of the Board. A form of Pleadings, similar to that in ordinary courts, follows and a hearing usually takes place.(2) If the Board concerned is satisfied that the representatives have been properly elected or appointed, it will certify them as bargaining representatives for a specified bargaining unit.

The Board has invariably required that all interested parties should be given due notice of proceedings for certification before the Board administering the Regulations and a reasonable opportunity to make representation to such Board in respect thereto.(3)

The fact that directly the collective agreement is concluded, the bargaining representatives "drop out" of the picture, adds weight to the contention mentioned before that it would have been as well to have had the certificate of certification issued in the name of the trade union or employees' organization, pure and simple.

It might be pointed out here that the Board under Section 7, as part of the process of certification, also prescribes an appropriate bargaining unit for which the representatives are

(1) Section 10 (1) of the Regulations, Order in Council P.C.1003.

(2) Board Regulations, Procedure, 1 D.L.S.7-75.

(3) Section 3 of the Regulations; The Claratel Cafe v Local 751, Restaurant & Hotel Service, Employees Union; 1 D.L.S.7-676. (National) February 11,1947.

to act. Both duties of the Board mentioned are complementary. It is proposed here for convenience to deal with each process separately, the matter of bargaining representatives being treated in this chapter, while that of appropriate bargaining unit in a later part.

(b) Selection of Bargaining Representatives under Section 5 (2):

Section 5 (2) of the Regulations states:

> "If the majority of the employees affected are members of one trade union, that trade union may elect or appoint its officers or other persons as bargaining representatives on behalf of all the employees affected; for the purpose of this section, an employee shall be deemed to be a member of the trade union if he has in writing requested the trade union to elect or appoint bargaining representatives on his behalf."

The purpose of the application for certification is limited, namely, "to settle the question as to whether the union is entitled to represent a majority of the employees affected in the negotiation of the collective agreement".(1)

If the representatives are elected before hand by the trade union concerned or if they are merely appointed according to the regular union procedure, the Board under Section 7 of the Regulations may on application for certification, "by an examination of records, by a vote or otherwise, satisfy itself that an election or appointment of bargaining representatives was regularly and properly made, and in the case of a trade union, that the trade union acted with the authority of the majority of the employees affected as prescribed by subsection two of section five." The work of the Board under Section 7 will in many cases be made complicated by the intervention of an intervening union or organization.

(1) Building Service Employees' International Union, Local 204 v Toronto General Hospital; 1 D.L.S.7-584 (National) May 22, 1945.

The Wright-Hargreaves case (1) laid down rules of procedure "which it is proposed should be followed in dealing with applications by unions, subject of course, to any necessary modifications from time to time". The proposed rules indicated are intended to assist in obtaining certification,(2) and are as follows:

Rule 1: Upon receipt of the application an investigating officer of the Board will examine the membership records of the applicant union and any other union interested in the application. He will check the membership records with the Company's payroll, comparing the signatures in the union records with the signatures in the employers records, if necessary, and report to the Board.

The Reasons for Judgment in the Yale & Towne Mfg.Co. case, January 14,1947, (3) state that:

> "Under the Regulations, the duty rests on the Board to make such examination as it deems advisable of union records, and other relevant records in order to determine the merits of the petition."

Rule 2: Unless the Board is prima facie satisfied that a majority of the employees affected are members of the applicant union, the Board will reject the application.

(1) International Union of Mine,Mill & Smelter Workers Local 240 v Wright-Hargreaves Mines Ltd. & Sylvanite Gold Mines Ltd.et al., 1 D.L.S. 7-542 (National) February 28,1945.

(2) Retail Clerks International Protective Assn.Local 832 v Canadian Distributors Union,Shop-Easy Employees and Shop-Easy Stores Ltd. 1 D.L.S.7-555 (National) April 10,1945.

(3) Yale & Towne Mfg.Co. v United Electrical Radio & Machine Workers of America Local 529: 1 D.L.S.7-673; see also Glass Bottle Blowers Assn. v Anchor Cap Closure Corp. 1 D.L.S.7-660

The Reasons for Judgment of the National Board in the Asbestos Workers Case (1) April 23,1946, stated in appeal from the Quebec Board which had directed a vote in a situation where the union sponsoring the application of bargaining representatives did not prima facie represent the majority of the employees affected:

> "This Board is of the opinion that in the circumstances the application should have been rejected in conformity with the practice which has been well established by its earlier decisions; see Wright-Hargreaves and Sylvanite Case, D.L.S.7-542, as the applicant failed to show that it had a prima facie majority support in the bargaining unit."

It might be noted that no evidentiary value will be attributed to a round-robin letter purporting to indicate opposition to the petitioner where the letter was signed under misapprehension and after coaxing, and no vote will be ordered where the petitioner according to the Referee's Report, held a majority and no evidence sufficient to cast any doubt thereon came to light in the intervener's testimony.(2)

(1) Canadian Union of Asbestos Workers,Local 6 et al., v Johnson's Co. 1 D.L.S.7-622; see also The Milk Drivers & Dairy Workers Union Local 852 v The Borden Co.Ltd. et al., 1 D.L.S.7-632; Conseil des Metiers de la Metallurgie des Employes de la Industries ....v Marine Industries Ltd. Sorel,1 D.L.S.7-597; Glass Bottle Blowers' Assn. v Anchor Cap Closure Corp. et al., 1 D.L.S.7-660; Lake Shore Mines case, 1 D.L.S.7-613.

(2) National Surgical Appliance Workers, Local 1 v Ottawa Truss Company, 1 D.L.S. 7-1284 (Ontario) December 18,1946.

Rule 3: If the Board finds that a substantial majority of the employees affected are regular members of the applicant union - that is, if they have joined in the regular way and have paid dues - the Board may certify bargaining representatives without directing any vote.

The National Board in The Stauntons Ltd. case (1) November 13,1946, on an appeal from the Ontario Board's direction of a vote in a case where the investigating officer of the latter had allegedly substantiated the applicant's claim that a majority of the employees concerned were members in good standing of the applicant, stated:

> "Section 7 of P.C.1003, gives the Board the discretionary power to satisfy itself by examination of records, by vote or otherwise that in the case of a trade union, the trade union is acting with the authority of the majority of the employees affected in the appointment of bargaining representatives. The Ontario Board exercised this discretion, as it had a right to do, in ordering a vote of employees in order to satisfy itself that the union in this case had the support of the majority of employees in the bargaining unit. While it may have been within the authority of the Ontario Board to grant certification without ordering a vote in the circumstances, on the other hand it was equally a matter within the discretion of the Board to order a vote as it did."

Rule 4: If the Board finds that the majority of the employees affected who belong to the applicant union is not substantial or that an important section of the alleged majority consists of employees who are not regular members but who have signed requests for the applicant union to elect or appoint bargaining representatives on their behalf, the Board will in most cases, on the application of the employer, direct a vote.(2)

(1) Local 466,International Printing, Pressmen and Assistants' Union v Stauntons Ltd; 1 D.L.S.7-658, November 13,1946; see also The Trustees of the Queen Elizabeth Hospital... v Local 796 Industrial Union of Operating Engineers:1 D.L.S. 7-633 (National) June 17,1946.

(2) Majority Vote under these Rules is defined in 1 D.L.S.7-527.

The National Board in the Shop-Easy Stores case (1) April 10,1945 stated regarding Rule 4 in the Wright-Hargreaves case:

> "The statement in Rule 4 that 'the Board will in most cases, on the application of the employer, direct a vote' was not intended as exclusive--- that is, the Board may direct a vote on the application of any interested union or employees' association."

The Board has a discretion in directing a vote under Rule 4, as the following cases indicate:

The Reasons for Judgment in the Snyder's Ltd.(2) case where an important section of the alleged majority were not regular union members deals directly with the effect of Rule 4 in the Wright-Hargreaves case. The Ontario Labour Relations Board in certifying bargaining representatives, somewhat hesitatingly, under these circumstances, stated:

> "After a careful consideration of that case (Wright-Hargreaves), we have come to the conclusion that the rules there laid down are intended merely to guide us in the exercise of our discretion; they are not hard and fast rules which we must observe in all cases. Indeed, in the very case in which they were laid down, the National Board spoke of them as "the procedure which it is proposed should be followed in dealing with applications of unions" and in the Shop-Easy Stores case the National Board referred to them as "proposed rules". As a matter of fact, even if the rules were binding upon us, it is not of universal application, and we believe that in the circumstances of this case certification should go without a vote."

The Ontario Board in the case of MacLeod-Cockshutt Gold Mines Ltd. (3) December 17,1946, in similar circumstances to the last case directed a vote, thus:

(1) Retail Clerks Int.Protective Assn.,Local 832 v Canadian Distributors' Union,Shop-Easy Employees and Shop-Easy Stores Ltd. 1 D.L.S. 7-555.

(2) National Union of Aircraft etc.Workers Local 13 v Snyder's Ltd. 1 D.L.S.7-1266, February 20,1946.

(3) Int.Union etc. v MacLeod-Cockshutt Gold Mines,1 D.L.S.7-1281

> "The petitioner has submitted evidence of support by a majority of employees of the respondent company in a bargaining unit considered by the Board to be appropriate for collective bargaining purposes. Nevertheless, in view of the circumstances of the case and in line with the fourth of the procedural rules proposed by the National Board in the Wright-Hargreaves case we feel that a representation vote should be conducted among the employees affected."

Rule 5: The Board will not include in the ballot the name of any intervening or competing union unless the Board is also prima facie satisfied that a majority of the employees affected are members of the competing or intervening union. This will rarely happen and it can only happen if some of the employees affected belong to or sign authorizations for more than one union so that they may be deemed to be members of two or more unions.

The older practice of the Board where two agencies were competing for certification is stated in the Belleville-Sargent case (1), by the Ontario Board on August 2,1944, thus:

> "Where there are two contesting entries in a plant, we deem it unwise to deprive the employees of the opportunity of expressing their views with respect to each of the entries, save where one or other of them has forfeited its right to appear on the ballot through being a party to unfair practices, as was the case in United Garment Workers of America, Local 253 v Deacon Brothers Ltd. et al., or where its support is no more than a shadow."

However, the Board went on to say that the result of such vote was by no means binding on the Board. This older rule was followed by the Ontario Board in the Foster-Wheeler case (2), September 5,1944. On appeal to the National Board, although the Wright-Hargreaves rules had been established in the

(1) International Union United Automobile,Aircraft & Agricultural Workers,etc. v Belleville-Sargent & Co. 1 D.L.S.7-1127.

(2) The Shop Committee of Foster-Wheeler Employees v Foster-Wheeler Ltd. et al.,1 D.L.S. 7-1133; on appeal 1 D.L.S.7-564.

meantime the application was dismissed on other grounds and the decision did not turn on the change from the older to the newer rule.

The National Board in the Shop-Easy Stores case (1), April 10,1945, stated:

> "The Board adopted Rule 5 in the Wright-Hargreaves and Sylvanite case in order to make it easier for a union or employees' association to obtain certification of its bargaining representatives because this Board felt that it was more difficult for a union or Employees' Association to secure a majority of all the employees affected if more than one name was put on the ballot."

Rule 5 of the Wright-Hargreaves case, has been modified in several instances to allow of two names on the ballot directed by the Board in certification proceedings. The names may be either of trade unions or employees' associations.In addition to the specific case mentioned in the rule, namely, where the intervener has a prima facie majority, the modifications are, first, where the intervener holds the existing contract with the employer and second, where employer discrimination has been found. The following cases will illustrate these modifications.

The National Board in the New York Central Railway case (2) May 22,1945, noted that the Wright-Hargreaves rules by that case itself might be subject to necessary modifications from time to time, and went on to say in regard to Rule 5:

> "It appears that this part of the procedure is too rigid and should be modified. Here the Order of Railway Conductors has had collective agreements with the railroad companies for many years and contends that it should not be displaced as the bargaining agency for the road train conductors resident in Canada unless they are given an opportunity to mark their ballots in favour of bargaining representatives appointed by the Order of Railroad Conductors."

(1) 1 D.L.S. 7-555.

(2) Brotherhood of Railroad Trainmen v N.Y.C. Ry. 1 D.L.S.7-582; see also Nat.Steel Car Case, 1 D.L.S.7-599 (National)

The principle in the New York Central Railway case was extended to cover cases where under the Ontario Board the agency holding the existing agreement did not even bother to officially intervene. The Ontario Board in the John Wood Manufacturing Co. case (1) November 27,1945, in making the extension referred to above, stated:

> "Our conclusion in this respect is also in line with our decisions in the Beach Foundry case, and the Toronto Transportation Commission case. The underlying principle in all of these cases is that stability in collective bargaining relations should be promoted to the fullest extent that the law will permit. This case must be distinguished from those cases in which an agreement has run its full course and the trade union or employees' organization party to such agreement, having lost interest in the employees, makes no effort to renew the agreement. It must also be distinguished from those cases in which a trade union or employees' organization party to an agreement has been dissolved or has disintegrated and has thus ceased to exist, Breithaupt Leather case. In those instances, we would not be inclined to include the name of such an organization on the ballot unless it actually intervened in the proceedings. Here the trade union which was a party to the agreement was still a living force and still retained its interest in the collective agreement when the application of the present petitioner was filed."

The National Board in the Honeysuckle Bakeries Case (2), August 9,1945, where the Manitoba Board had rejected the application for certification because only nineteen out of thirty-nine persons in the unit supported the petitioner, stated:

> "If a very narrow view of the purpose of the Wartime Labour Relations Regulations, P.C.1003, is taken, it can be argued that the decision of the Manitoba Board was a proper one in accordance with Section 5 of the Regulations. However, there are present in

(1) Employees' Association of the Toronto plants of Canadian John Wood Mfg.Co. v Canadian John Wood Co., 1 D.L.S.7-1212; see also Loc.669 Int.Union Mine,Mill etc. v Hard Rock Gold Mines Ltd. 1 D.L.S.7-1265.

(2) Canadian Bakery Workers' Union Loc.1 v Honeysuckle Bakeries Ltd. 1 D.L.S. 7-593; see also Sorel Industries Case 1 D.L.S.7-664, and MacLeod-Cockshutt Gold Mines case 1 D.L.S.7-1281.

> this case, in our opinion, very good reasons why the decision of the Manitoba Board should be set aside and clearer evidence obtained as to the support given to the application by the employees affected."

The Board went on to cite cases where a vote had been directed after prima facie evidence showed the applicant to possess the support of as much as seventy percent of the employees affected. In the case at hand, the Board directed a vote, stating that the applicant had the support of approximately fifty percent of the employees affected, and in addition alleged employer discrimination. In regard to the latter allegation it has been decided that to warrant a vote the allegation must be well founded.(1)

The National Board in the Honeysuckle Bakeries Case indicates that, with the exception of the interpretation of matters mentioned in Section 25 of the Regulations, the Board is essentially administrative in its function. The following quotations from its Reasons for Judgment illustrate this:

> "The order which this Board administers is for the purpose of certifying bargaining representatives, and any reasonable doubt that may exist following the making of and the investigation of an application, should not act so as to circumvent or stultify the intent of the Regulations."

> "We are of the opinion that, in order to properly fulfil the intent of the Regulations, a vote of the employees should be taken whenever there is any reasonable doubt as to the wishes of the employees as regards bargaining representatives or as to discrimination being practiced."

Thus, while the Ontario Board would prefer to give all the provisions of the Regulations a wide and liberal interpretation as exemplified in the Chapter on The Scope of the Regulations, the National Board would definitely interpret strictly the questions set out in Section 25, especially that in relation to employer and employee where they would follow the common-law.

(1) The Sorel Industries Case: 1 D.L.S.7-664 (National).

Rule 6: If the applicant union fails to secure a majority vote of the employees affected, this will leave it open for another organization to apply and seek a new vote on its application.

It might be noted in this connection that if there is domination by the employer (1) other prejudicial acts by the employer (2) or intimidation by the employer (3) connected with the taking of the vote directed by the Board on an application for certification, the Ontario Board at least has indicated that it may direct a new vote in a proper case.

The National Board in the Selkirk Foundry Case (4), July 18,1945, on appeal from the rejection of certification because of failure to secure a majority vote, in refusing to grant the appeal stated:

> "On the vote the union did not obtain the support of a majority of the employees in the bargaining unit and even if effect were given to its present objections as to the count of certain ballots, this would not affect the result. While objections are also taken to the manner of conducting the vote, the scrutineer of the appellant signed a certificate following the ballotting that the same had been conducted in a fair and reasonable manner and no evidence was submitted to the contrary effect to satisfy the Board that the vote was conducted in a manner prejudicial to the appellant or otherwise than in a fair and proper manner. While the appellant in making application to the Manitoba Board for a second vote claimed unfair interference on the part of the Company in the election and unfair electioneering practices on the part of the intervening union and bases its appeal on the refusal of the Manitoba Board to give effect to this contention, these charges were not substantiated by evidence before the Manitoba Board nor was evidence submitted to show that the result of the vote was affected by these alleged actions."

(1) National Paper Employees' Assn. v Nat.Paper Goods Ltd., 1 D.L.S.7-1163 (Ontario) February 7,1945.

(2) Cannery Workers' Union,Loc.23728 v Lealand Co.Ltd. 1 D.L.S. 7-1245 (Ontario) July 3,1946.

(3) Int.Union United Automobile,etc.Workers v Ruddy-Freeborn Co. 1 D.L.S. 7-1255 (Ontario) August 27,1946.

(4) Selkirk Foundry Workers' v Man.Steel Foundries 1 D.L.S.7-590.

Rule 7: When this procedure has been followed and an application is rejected, a new application by the same union should not be entertained until a period of at least six months has elapsed.

The National Board in the Northern Shirt Co. Case (1) August 14,1945, stated regarding the Wright-Hargreaves rules:

> "This Board did not suggest therein, however, any restriction in point of time should be placed on the election of bargaining representatives by employees as such election is governed by the provisions of Sections 5 and 9 of the Wartime Labour Relations Regulations. Neither was it suggested therein that such proposed restriction on the consideration of a further application would apply save with respect to a further application by the same union. Moreover, although the rule as worded therein is possibly susceptible of a wider construction, this Board had in view at the time the rule was laid down that it should apply where the application was rejected after the taking of a vote rather than in all cases where the application was rejected irrespective of whether or not a vote had been taken. Due to the variety of circumstances which may be involved in the rejection of an application for certification prior to the taking of a vote, this Board has refrained from extending the six months' rule to all cases where the application has been rejected." (2)

The National Board in the Dominion Glass Company Case (3) October 22,1946, stated that the six months' limit in Rule 7 did not apply where the applicant had previously been rejected on the technical grounds of failure to pass necessary union resolutions appointing the bargaining representatives;

> "Because there was no test of strength between the two unions; that is, either one of them may have a very substantial majority of the employees affected."

(1) Amalgamated Clothing Workers of America, Local 459 v Northern Shirt Co.Ltd.et al., 1 D.L.S.7-594

(2) See also Nat.Union of Aircraft,Furniture Workers & Allied Crafts, Loc.13 v Snyder's Ltd. 1 D.L.S.7-1226 (Ontario)Feb.20,1946

(3) Int. Union,United Automobile,Aircraft & Agricultural Implement Workers, Loc.251 v Dominion Glass Co.Ltd. 1 D.L.S.7-652.

(c) Selection of Bargaining Representatives under Section 5 (1):

Section 5 (1) of the Regulations states:

> "The employees of any employer may elect bargaining representatives by a majority vote of the employees affected."

The purpose of the application for certification under this Section is the same as under Section 5 (2), namely, to determine proper representatives.

Section 5 (1) covers cases of bargaining representatives sponsored by an employees' organization which is a distinct entity from a trade union mentioned in Section 5 (2). There is no specific stipulations under Section 5 (1) in regard to employees' organizations as there is under Section 5 (2) in regard to trade unions. Presumably, however, the employees' organization would have requirements as to membership, and look forward to a collective agreement with the employer as mentioned in Section 2 (1)(d) of the Regulations.

The Rules of Procedure used by the Board in dealing with applications for certification under Section 7 of the Regulations, as set out in the Wright-Hargreaves case for trade unions, apply also to employees' organizations in a proper case.(1)

The Ontario Board in the Northern Electric Co. Case (2) February 26,1946, stated:

> "Petitioner is an unaffiliated employees' organization and as such must elect bargaining representatives in accordance with the provisions of Subsection 1 of Section 5 of the Regulations, namely, by a majority vote of the employees affected."

It is important to note that bargaining representatives chosen under Section 5 (1) of the Regulations must be elected by a

(1) The Electric Castings Case, 1 D.L.S. 7-1243, June 11,1946;& 7-564

(2) Northern Electric Telephone Employees' Assn. v Northern Electric Co.,1 D.L.S.7-1227; see also Lightning Fastener Case, 1 D.L.S. 7-1262 (Ontario) October 29,1946.

majority vote of the employees affected in a vote held before the application for certification of bargaining representatives is presented to the appropriate Board; there is no provision for appointment as in the case of a trade union.(1) In addition, the vote to select representatives under Section 5 (1) must indicate unmistakably the election of each and all of the full number of bargaining representatives to be elected by a majority of the employees affected.(2)

The Ontario Board in the Radio Condenser Case,(3) February 5,1946, has stated in regard to the election contemplated under Section 5 (1), as follows:

> "As to what constituted 'a majority vote of the employees affected', the Wartime Labour Relations Board (National) has ruled in the Hudson Bay Mining and Smelting Case, that subsection 1 of Section 5 requires bargaining representatives to be elected by more than 50 percent of the employees eligible to vote."

The words "by a majority vote of the employees affected" in subsection 1 of Section 5 of the Regulations "require that a majority of the employees affected must vote for the bargaining representatives in order to elect them". It does not mean "that if a majority of the employees vote, then a majority of those voting is sufficient to elect bargaining representatives."(4)

(1) Nat.Paper Employees' Assn. v Nat.Paper Goods; 1 D.L.S.7-545.

(2) Employees' Assn. of the Radio Condenser Co. v Radio Condenser Co., 1 D.L.S. 7-1223 (Ont.); Northern Electric Telephone Employees' Assn. v Northern Electric Co., 1 D.L.S.7-1227 (Ont.); and Employees' Union of Hugh Carson Co. v Hugh Carson Co. 1 D.L.S.7-1261 (Ont.), where it was stated that the Hare-Spence System of voters indicating first,second,etc.choices is not in compliance with the Regulations.

(3) The Radio Condenser Case, 1 D.L.S. 7-1223.

(4) The Electric Castings Case,1 D.L.S.7-1243;see Packard Case 1 D.L.S.7-527; and Foster-Wheeler Case 1 D.L.S.7-564.

If unfair discrimination or special privilege is shown by the employer, a new vote may be directed. In the McCormick's Ltd. Case (1) the National Board of April 23,1946, stated:

> "The Ontario Board found that bargaining representatives had been elected by a majority of employees in an appropriate bargaining unit and therefore a prima facie case established for certification. The Board stated, however, that it was not prepared to certify that the bargaining representatives had been regularly and properly elected on the ground that the Company had contributed financial and other support to the associations in contravention of Section 19 of the Regulations."

The National Board went on to uphold the prima facie case for certification and accordingly certified the bargaining representatives (overlooking the fact that the use of Company facilities usually indicates discrimination) since the Ontario Board had found "that the Company did not intend to show a deliberate and calculated partiality for the association," there was no discrimination by the Company shown. No vote was ordered since two previous ones in 1945 showed that the intervener was in the minority. This would appear to indicate that something in the nature of "mens rea" must accompany the action of the employer.

The National Board in the Fahralloy Case (2), October 22, 1946, stated in relation to the matter of "majority vote" under Section 5 (1) of the Regulations:

> "In the absence of specific provision therefore, for the use of proxies, the Board is of the opinion, that it is not warranted in giving recognition to the same in the election of bargaining representatives under Section 5 (1) of the Regulations."

The Board added that to allow voting by proxy would permit the giving of written proxies to an organization to select bargaining representatives and equate organizations with unions under Sec.5 (2).

(1) Employees' Assn.etc. v McCormick's Ltd., 1 D.L.S.7-620.

(2) Fahralloy Employees' Assn. v Fahralloy Ltd. 1 D.L.S.7-651.

(d) Selection of Bargaining Representatives under Section 5 (4):

Section 5 (4) of the Regulations states:

> "If in accordance with established trade union practice the majority of employees who belong to a craft by reason of which they are distinguishable from the employees as a whole, are separately organized into a trade union pertaining to the craft, such trade union may elect or appoint its officers or other persons as bargaining representatives on behalf of the employees belonging to that craft. Where any group claims and is entitled to the rights conferred by this subsection, the employees comprising the craft shall not be entitled to vote for any of the purposes of collective bargaining with that employer, except when the collective bargaining is in respect only of the craft to which they belong; nor shall they in any manner be taken into account in the computation of a majority in respect of any matter regarding which they are not entitled to vote."

In order to warrant recognition as an appropriate craft bargaining group under the provisions of Section 5 (4) the applicant group should ordinarily cover those employees in the employee unit who comprise the classifications recognized under trade union practice as constituting a craft group. In determining the scope of the employee craft group appropriate for collective bargaining, reference may be had to past collective bargaining practices in the employer's establishment, or, failing this, on the basis of other considerations which normally apply in determining the scope of the employee bargaining unit. The purpose of the subsection is to preserve the identity and bargaining rights and interests of craft groups but, on the other hand, the provisions of the subsection must also consider the identity and community of interest of the group of employees in the whole establishment, or the appropriate part thereof comprising the craft group.

The principles used in Section 5 (1) and 5 (2) in selecting bargaining representatives apply also to Section 5 (4), and need not be repeated here. However, under the heading dealing with appropriate units, craft groups will be mentioned again.

(e) Selection of Bargaining Representatives under Section 5 (5):

Section 5 (5) of the Regulations states:

> "Two or more trade unions may, by agreement, join in electing bargaining representatives on terms consistent with these Regulations."

An instance is provided in the Sylvia Hotel Case (1) September 10,1946, where the National Board upheld the certification of bargaining representatives jointly selected by Local 224 of the Building Service Employees' Union and Local 28 Hotel and Restaurant Employees' Union, for the employees of the Hotel.

(f) Selection of Bargaining Representatives under Section 9:

Section 9 of the Regulations states:

> "At any time after the expiry of ten months of the term of a collective agreement, whether entered into before or after the effective date of these Regulations, the employees affected may elect new bargaining representatives in the manner provided in Section Five and application may be made to the Board by or on behalf of such bargaining representatives for their certification. Upon receipt of such application the Board shall deal with the same as in the case of an initial application for certification under the Regulations. If on such application the Board certifies new bargaining representatives, they shall be substituted for the previous bargaining representatives of the employees affected as a party to the agreement in question, and as such may give notice of the termination thereof as provided for in the agreement or under these Regulations."

The words of Section 9 are unequivocal and must be interpreted as applying to all collective agreements; duration agreements as well as agreements for a definite term of years being covered.(2) In the case of an agreement containing an

(1) Sylvia Hotel Ltd. v Sylvia Hotel Employees' Organization et al., 1 D.L.S. 7-643.

(2) Industrial Union of Marine & Shipbuilding Workers, Local 11 v Port Arthur Shipbuilding Co. 1 D.L.S.7-513 (National) October 25,1944.

automatic renewal clause, the requirements of Section 9 are met if application for certification of new bargaining representatives is made before the date of automatic renewal, even though the application may not have been made before the thirty days' notice of termination date.(1) The fact that the application for the certification of new bargaining representatives was not made prior to the date when the agreement was purportedly automatically renewed due to neither of the original parties giving notice otherwise, will not bar the new certification, as it is quite clear that Section 9 contemplates a change in bargaining representatives during the term of the agreement.(2)

In the case of an agreement for two years or for the duration of the war wherein it was stated that it would be considered from year to year thereafter unless sixty days' notice to the contrary was given prior to the expiration date, the Board interpreted the provisions of the automatic renewal clause for the purposes of Section 9 as providing for a term of indefinite duration subject to termination or negotiation for amendment, revision or cancellation, in the manner prescribed by the clause or as otherwise provided for in the Regulations.(3) Where the intention of the parties to the agreement clearly shows that the automatic renewal clause provides for definite renewal from year to year until properly terminated by notice, the Board will give effect

(1) United Electrical Radio & Machine Workers, Local 529 v Packard Electric Co.Ltd. 1 D.L.S.7-511 (National) October 25,1944.

(2) Professional Union of Construction Workers v Anglo-Canadian Pulp & Paper Mills, 1 D.L.S.7-524 (National) Dec. 6, 1944. Following the Waite-Amulet Case.

(3) Canadian Seamen's Union v Gulf & Lake Navigation Co. 1 D.L.S. 7-644 (National) September 10,1946.

to the intention of the parties so expressed.(1)

An automatic renewal of an old agreement can only be barred, however, by a formal petition to the Board within the proper time limit as set out in Section 9. A mere notice by a petitioner to the employer cannot "stake out a claim to certification at a subsequent date" so as to bar automatic renewal of the old agreement.(2) The fact that while an application under Section 9 was pending the parties to the former agreement negotiate a new agreement, will not bar the certification of new bargaining representatives, if the applicant is otherwise entitled to certification under the Regulations. (3) If, on the other hand, an application for the certification of new bargaining representatives under Section 9 is received by the Board after the twelve months of the old agreement have expired and after a new agreement has been signed between the old parties, the application will be dismissed by the Board although it was mailed before the twelve months of the old agreement had expired.(4)

Although a collective agreement may constitute a bar to the certification of new bargaining representatives for a period of ten months from the making of the agreement, nevertheless, after the expiration of the ten months' period, in so far as an

(1) Corporation of City of Toronto, Unit 1, Federation of Employee-Professional Engineers, etc. v City of Toronto et al., 1 D.L.S.7-1219 (Ontario) January 9,1946.

(2) Branch No.1 National Organization of Civic etc. Workers v Toronto Transportation Commission, 1 D.L.S.7-1214 (Ontario) November 27,1945.

(3) Le Syndicat National des Chantiers Maritimes de Sorel v Marine Industries,Sorel,P.Q. 1 D.L.S.7-664 (National) Dec.11,1946.

(4) United Steel Workers of America,Local 3462 et al., v Aluminum Co.of Canada Ltd. Reasons for Judgment,N.W.L.R.B. Mar.4,1947.

application for certification is concerned, the Board is required to proceed as if no agreement were in existence.(1)

The words "new bargaining representatives" and the words "as in the case of an initial application" do not limit the application of Section 9 of the Regulations to agreements made after the coming into force of the Regulations on Mar.20,1944, so as to give for instance "unions which had agreements existing at the time the Regulations were passed a period of ten months thereafter.....that is until January 20, 1945 .... before new bargaining representatives could be appointed".(2)

Chapter V: Appropriate Bargaining Units Under the Regulations:

(a) Introduction:

Section 6 of the Wartime Labour Relations Regulations states that after the election or appointment of bargaining representatives application may be made to the appropriate board for their certification. The Board, upon such application, must satisfy itself as to whether there was regular and proper choice of representatives, and that, under Section 7

> "the unit of employees concerned is one which is appropriate for collective bargaining; and if the Board is not so satisfied, it shall reject the application".

Section 8 (1) states that where the Board is satisfied

> "that the bargaining representatives have been duly elected or appointed; it shall certify them as bargaining representatives, and shall specify the unit of employees on whose behalf the representatives so certified are authorized to act,..."

(1) Kingston Tannery Workers' Union, Local 110 etc. v A.Davis & Son Ltd. C.C.H.,14-151 (L.L.R.)(Ontario) June 6,1944.

(2) Industrial Union of Marine & Shipbuilding Workers, Local 11 v Port Arthur Shipbuilding Co.et al., 1 D.L.S.7-513 (National) October 25,1944.

The defining of an appropriate bargaining unit is an indispensible function of the Wartime Labour Relations Board, National or Provincial, for the employer is not obliged to bargain with any other than representatives chosen by a majority of the employees affected. In dealing with the choice of bargaining representatives, the policies and administrative procedure which enter into the determination of an appropriate unit were considered. It was found that workers who, because of their relationship to management and to other workers, are within the meaning of the Order in Council "employers" rather than "employees" may be excluded from a unit made up of their subordinates and other workers not bound by intimate ties to management.

Self-organization of workers into units may be effective without recourse to the Regulations, but all such units are unstable since the authority of the Board under the Regulations may be brought into the picture and officially settle the question of representation, and in doing so it will also have the authority to investigate and find what it considers to be an appropriate bargaining unit under the circumstances.

In the Chapter dealing with the discretion of the Board special mention will be made of the Board's discretion in determining the scope of an appropriate bargaining unit. The influence thereon of the desires of the parties and the weight given finally by the Board to this factor in its determination of an appropriate unit will also be noted. In particular, the desires of the employees for separate organization and the methods used to achieve these ends are carefully watched by the Board for signs of employer inspiration.

(b) Types of Bargaining Units under the Regulations:

The selection of an appropriate bargaining unit is fundamental in the process leading up to collective bargaining under the Regulations. It is comparable to the process of fixing electoral boundaries and determining the qualifications of voters in political society.

Section 25 (1)(b) reads as follows:

> "If a question arises under these Regulations as to whether: the unit of employees appropriate for collective bargaining is the employer unit, craft unit, plant unit, or a sub-division thereof; the Board shall decide the question and its decision shall be final and conclusive for all the purposes of these Regulations."

In the Star Publishing Co. case (1), the National Board on March 27,1945, stated:

> "This Board is of the opinion that in fixing the unit of employees appropriate for collective bargaining, it is not limited by the expressed wishes of either the union or the employer."

Consequently a trade union or employees' organization may under the Regulations be obliged to negotiate for or, on behalf of, employees for whom the agency in question might not wish to act.

In any case substantial grounds must be shown on application to the Board to warrant the breaking down of an existing bargaining unit into smaller sub-divisions thereof. In the Northern Electric Co. case (2) on December 12,1946, the National Board upheld the decision of the Ontario Board which placed office workers of the Company, in Toronto, in a separate bargaining unit, but did not consider that there was any valid

(1) American Newspaper Guild v The Star Pub.Co., 1 D.L.S. 7-502

(2) Northern Electric Co.Ltd.v United Telephone Workers of Canada, Local 4: 1 D.L.S. 7-667.

reason for sub-dividing the bargaining unit further as between employees in the telephone contract shop and warehouse, on the one hand, and the employees in the installation department on the other hand. The Board added:

> "Their interests are not divergent or incapable of being adequately represented by a common group of bargaining representatives".

In the Canadian Pacific Airlines case (1), the National Board stated that substantial grounds should be shown toward the breaking down of an existing bargaining unit; refusing to segregate dispatch personnel from other related classifications as not practical in view of the nature of the Company's operations, where it was felt that the employees' bargaining interests were already adequately protected. In the Union Gas Co. case (2), the National Board upheld the judgment of the Ontario Board which defined as an appropriate bargaining unit the employees of four separate fields. The Board felt satisfied that the degree of movement of personnel between the various fields, all engaged in similar work of extracting gas, constituted a situation which would make a smaller unit inappropriate. In the Borden Co. case (3), the National Board on March 5,1947, dismissed an appeal from the judgment of the Ontario Board which determined as an appropriate bargaining unit milk route salesmen and supervisors of its four Toronto plants, in preference to a unit consisting of all the employees therein.

(1) Canadian Airlines Dispatchers' Assn. v Canadian Pacific Airlines et al., 1 D.L.S.7-669, December 13,1946.

(2) Local 2, National Union Natural Gas Workers v Union Gas Co. of Canada, C.C.H. 10-506 (L.L.R.) March 5, 1947; see also The British Overseas Airways Corp. case C.C.H.10-500.

(3) Borden Co.Ltd.et al.,v Local 647 etc. C.C.H.10-505 (L.L.R.)

The various types of appropriate bargaining units set out in Section 25 of the Regulations are "the employer unit, craft unit, plant unit or a sub-division thereof". In practice, the Board has treated the concluding words, "sub-division thereof", as relating to each of the three types of unit specifically mentioned.

Under Section 5 (3) the employees of more than one employer may be included in a single unit. This would happen where the employers have in some manner unified their operations.

Under Section 2 (1)(g) a single employee cannot be regarded as a bargaining unit. Subject to this, the power to determine the appropriateness of a bargaining unit is vested in the Board under Section 25; the Board may, on a new application for certification, redetermine the appropriateness of the unit.

In carrying out its function of deciding in each case the appropriate unit, the Board has developed some general rules. Firstly, the desires of the employers in respect thereto and of the employees to a lesser extent are not considered to any great degree. The Board under the Wagner Act gave great weight to the preference of the employees. Secondly, in the case of craft groups, the Board gives more consideration to the desires of the parties, and current practices in the particular plant or industry. Thirdly, where there is mutuality of interests and it is practical, the Board views favourably a single unit for employees engaged in company operations in separate plants, and even at more or less distant places.

In short, the Board may determine a bargaining unit with complete employee coverage or it may separate the employees by carving out various craft or other units. In all cases, as mentioned before, the Section 2 (1)(f) definition is important.

The following are examples of the specific types of bargaining units mentioned in Section 25:

1. Employer unit: This type may include all persons who within the meaning of the Regulations are "employees" of an individual company or corporation; in some cases the unit may contain employees in several plants owned and operated by one employer.

In the Canadian National Steamships case (1), the National Board, April 12,1945, dealt with an application for certification of bargaining representatives "for the employees of the respondents". In the National Paper Goods case (2), the Ontario Board, January 31,1947, declared "all the hourly and piece work" employees in plants 1 and 2 of the company concerned, an appropriate bargaining unit. In the Sydney & Louisburg Ry. case (3), the National Board, March 27,1945, certified section-men as a "sub-division of an employer unit".

Under the heading of employer unit may be considered what is termed as a multiple-employer unit. For example, a labour organization may include within its members the employees of several independent and perhaps competing companies. The Board may permit the union to act for this all-inclusive unit, when the employees concerned have properly delegated authority to the labour organization in question.

Section 5 (3) of the Regulations provides for certification

(1) Canadian Seamen's Union v Canadian National Steamships Ltd., C.C.H. 10,433 (L.L.R.).

(2) Int.Brotherhood Bookbinders, Local 114 v National Paper Goods Ltd. 1 D.L.S.7-1321.

(3) United Mine Workers of America, Dist.26 v Sydney & Louisburg Railway Co. See also Greyhound Lines case,1 D.L.S.7-563; C.N.R.case.1 D.L.S.7-580;and 1 D.L.S.7-614; 1 D.L.S.7-639.

of bargaining representatives for employees of several employers; this provision applies only "where more than one employer and their employees desire to negotiate a collective agreement".

In the Canada Coal case (1), the National Board upheld the decision of the Ontario Board in designating separate units for the employees of each company involved, where it was found that the employees concerned were not willing to negotiate on a wider basis, even though it would lead to simplification and no lessening of the community of interest.

2. Craft unit: This type of bargaining unit is restricted to workers in an easily definable group marked by special interests, characteristic skills and training, and common working conditions.

Sometimes these groups are eligible for membership in special unions of their own. In such cases, the Board may find itself involved in a jurisdictional dispute between unions.(2)

The determination of the scope of a craft unit under the Regulations, Sections 5 (4) and 7 depends on the recognized trade union practice in the particular plant, or failing this, on the basis of the considerations normally used in determining the scope of any employee bargaining unit.(3)

It is necessary, however, to protect both the rights and interests of the craft and the community of interests of the whole group of employees out of which the craft unit may be

(1) Canada Coal Ltd.et al.,v Int.Union of Operating Engineers, Local 793, 1 D.L.S.7-613, May 22,1946.

(2) American Newspaper Guild v The Star Publishing Co. 1 D.L.S.7-552, March 27,1945.

(3) The Winnipeg Electric Employees' Federated Council (O.B.U.) v Winnipeg Electric Co., 1 D.L.S.7-628, May 20,1946.

carved. In the City of Winnipeg case (1), May 20,1946, the craft unit suggested was declared by the National Board inappropriate because it excluded employees in the same occupational classification in other branches of the Hydro Electric system without apparent reason, as well as other occupational classifications of employees equally part of the same craft group, according to established trade union practice.

In the Alberni Pacific Lumber case (2), the National Board on July 9,1946, found steam and power plant engineers employed in the sawmill operations of the company's plants to be an appropriate craft unit. This decision was arrived at according to the well-established practice of trade unions in Canada generally, and in the woods industry in Eastern Canada in particular, although it had not been the practice in this particular plant nor in the British Columbia woods industry.

In the David Spencer Ltd. case (3), the National Board, on December 13,1946, refused to certify as an appropriate craft unit the employees of the meat, butter and parcel departments, holding that such unit was not even an appropriate sub-division of the store unit. The judgment in this case was based on the fact that there was great diversity in the classifications of employees proposed to be included in the unit, but no great difference in the type of work, skills required, working conditions, or other terms of employment. In addition, it would not be in the interest of employees, employer, or the public to establish more than one unit for collective bargaining here.

(1) Federation of Civic Employees v City of Winnipeg,1 D.L.S.7-628; see also Pattern Makers' etc.v Steel Co.of Can. 1 D.L.S.7-1238.

(2) Loc.882, Int.Union Operating Engineers v Alberni Pacific Lumber Co. 1 D.L.S. 7-639.

(3) David Spencer Ltd.v Loc.222 Retail Meat etc.,1 D.L.S. 7-671.

In addition to the specific types of bargaining units mentioned in Section 25, the following are among variations which may be found under the Regulations:

1. Semi-industrial unit: This type of unit may be less broad than the plant or industrial unit, horizontal, rather than vertical, in that it conforms in scope to departmental lines (construction, production, maintenance, office, etc.). The Ford Motor Co. case (1), February 14,1945, instances a bargaining unit composed of "office and salaried employees", of the Ford Motor Co., Windsor, Ontario.

2. Technical unit: This type of unit is made up of a group whose interests are distinct from other employees,for example in a mixed industrial unit. This group must meet all the tests of coherency of a fringe group and be able to show skills as definite as a craft group, and, in addition, have more technical training. Such a group might be made up for instance, of the "engineering department" or an entire laboratory staff. In the Corbin Lock case (2),July 11,1944, the Ontario Board stated:

> "In the opinion of the Board the interests of employees in a plant and those in an office are so divergent that the two groups should be included in the same bargaining unit only if they clearly express a preference for organization along those lines".

The same considerations hold true in the case of technical workers and workers of an engineering department, in a proper case.(3)

(1) United Automobile etc.Implement Workers,Local 240 v Ford Motor Co.of Canada et al.,1 D.L.S.7-533 (National).

(2) Local 426, Int.Union United Automobile etc.Implement Workers v Corbin Lock Co.of Canada, 1 D.L.S.7-1109.

(3) Int.Union Mine,Mill & Smelter Workers Local 240 v Wright-Hargreaves Mines Ltd. et al.,1 D.L.S.7-1113 (Ontario)July 18,1944.

3. Fringe unit: This unit is made up of employees not closely identified with production and maintenance workers although possessing some degree of mutual interest with them. The group is usually characterized by some degree of special training, a social consciousness or other quality that sets them apart from members of the industrial or semi-industrial unit. Supervisory employees who have no outright power to employ or discharge subordinates come under this classification. Examples are, firebosses (1), company police (2), lathe and boilerhouse foremen (3), general inspectors (4), and mass production foremen (5).

4. Professional unit: This type of unit sometimes may be equated to a technical unit, but it usually includes employees of more formal academic training and specialized skill (6). At first the National Board, by general rule, declared all professional employees confidential and as such, outside the scope of the Regulations. This ruling was later changed and professional employees were permitted, as other employees, to form bargaining units under the usual conditions applicable to non-professional employees.(7)

5. Heterogeneous unit: This type of unit consists of a mixture of professional and non-professional workers; a unit of several categories of workers. The National Board, for instance,

(1) Western Canada Firebosses Assn., 1 D.L.S.7-535, Feb.1,1945.
(2) The Searle Grain Co.case, 1 D.L.S.7-570, May 22, 1945.
(3) The Canada Veneers Ltd. case, 1 D.L.S.7-657, Nov.13,1946.
(4) The Anchor Cap Closure Co. case, 1 D.L.S.7-660, Nov.14,1946.
(5) The Spruce Falls Power & Paper case, 1 D.L.S.7-1301,Jan.29,1947.
(6) The C.N.Telegraph Co.case, 1 D.L.S.7-659, Nov.14,1946.
(7) The Toronto Hydro-Electric case,1 D.L.S. 7-637.
Bell Telephone case, 1 D.L.S.7-634; also 7-639.

in the C.B.C. (Quebec) case, (1) November 14,1946, decided as follows:

> "The Board does not consider that for the purpose of collective bargaining, there is any important difference in interest between a professionally qualified engineer and an engineer who has not such professional qualifications provided both are carrying on work of the same or similar nature and under similar conditions. Academic attainment cannot by itself determine the community of interest. Therefore the Board is not disposed to consider as appropriate a bargaining unit which seeks to distinguish between employees solely on the basis of professional qualifications."

In conclusion, the Board in defining an appropriate bargaining unit under the Regulations has a discretion. This discretion is influenced by the unit prescribed in the application for certification. In exercising its discretion the Board considers the mutuality of interest in relation to past experience and future probabilities in the industry. For instance, in the David Spencer Co. case, the Board saw no good purpose served in sub-dividing a departmental store staff although different trades were involved, because of an over-all mutuality of interest for bargaining in one unit. Where all the workers are engaged in closely integrated activity, that is within a compact area requiring constant contact, the Board is disposed toward the plant or industrial unit. The Board is also influenced by the history of previous self-organization, because such activity is an indication of mutual interest. If the industry is highly departmentalized, the Board may lean to semi-industrial units, horizontal in type and not so sharply differentiated as craft from craft. The Board may find it appropriate to place craft groups with a history of labour organization within an industrial or semi-industrial unit.

(1) 1 D.L.S. 7-661.

Again, fringe groups are set apart because they tend to have a slight tinge of management function. The Board must study the function of the fringe group in any case to see whether the predominant mutuality of interest lies with employee or employer. Clerical workers in general are divided between "front office" and "production" workers; if within the former the mutuality of interest seems to lie with management instead of with their co-workers.

In determining the mutuality of interest, wages and educational qualifications are an important consideration. Evidently locality is not conclusive (1); and academic attainments cannot alone determine the community of interest.(2)

(1) The C.B.C. (N.B.) case, 1 D.L.S. 7-614, June 17,1946.

(2) The C.B.C. (Quebec) case, 1 D.L.S. 7-661, November 14,1946.

Chapter VI: Bargaining in "Good Faith" under the Regulations:

(a) In General:

After the proper certification of bargaining representatives on behalf of a trade union or employees' organization under Section 8 of the Regulations, the bargaining representatives may give the employer or the employer may give the bargaining representatives "ten clear days' notice requiring that he or they, as the case may be, enter into negotiations", under Section 10 (1) "with a view to the completion of a collective agreement".(1) Section 10 (2) of the Regulations provides that "the parties shall negotiate in good faith with one another and make every reasonable effort to conclude a collective agreement". It is further provided that during negotiations officers or agents of a trade union or employees' organization may under Section 10 (3) accompany the bargaining representatives. A collective agreement is defined under Section 2 (1)(d) of the Regulations;(2) during the period in which wages were under the National War Labour Board the approval of an appropriate war Labour Board was necessary under Section 2 (1)(a) for any change in wage rates. The agreement when concluded is binding on the parties concerned by Section 10 (5).

It is not definitely laid down in the Regulations as to just what constitutes negotiating in "good faith". Under Section 25 (1)(e) of the Regulations the Board shall have final and conclusive decision as to a question of whether an employer or certified bargaining representatives of employees is negotiating

(1) United Automobile, Aircraft etc. Implement Workers of America v Motor Products Corp., 1 D.L.S. 7-502 (National) Sept. 2, 1944.

(2) National Association of Marine Engineers v Union Steamships Ltd. 1 D.L.S. 7-519 (National) November 22, 1944; cf., 1 DLS. 7-1281.

in "good faith" if that question arises. Under Section 42 of the Regulations a penalty is provided for a breach of the Regulations. Section 45 provides that the consent of the Board is necessary for prosecutions in the ordinary courts, and Section 25 (2) makes it abundantly clear that in a prosecution for failure to bargain in "good faith" the ordinary courts are bound by the decision of the Board in that regard. There is but one case on the matter of negotiating in "good faith" found in the decisions of the National Board. The case of Ben's Ltd., Halifax, N.S.,(1) where it was found that the Company failed to negotiate in "good faith" with bargaining representatives of its employees. The employer ignored the submission of a draft agreement as a basis of negotiations, and ignored notices to meet for negotiations submitted on behalf of its employees. In the case mentioned before it is obvious that there was failure to negotiate in "good faith" on the part of the company concerned. In other cases where there is or has been a meeting of the parties the question would not be so easily decided, since there is no compulsion under Section 10 of the Regulations to conclude an agreement. It is not too much to say that good faith must be evidenced by reasonable effort to conclude an agreement.

The National Labor Relations Board in the United States was early faced with the question of bargaining in "good faith" under the Wagner Act, and stated in 1936:(2)

> "To meet the representatives of the employees, however frequently, does not necessarily fulfil an employer's obligation under this section....(Sec.7). Interchange of ideas, communication of facts peculiarly

(1) Local 1, Industrial Union Bakery & Confectionery Workers v Ben's Ltd., Halifax,N.S.1 D.L.S. 7-640, July 9,1946 (National)

(2) S.L.Allen, May 13,1936, 1 N.L.R.B.714, 727-728.

> within the knowledge of either party, personal persuasion and the opportunity to modify demands in accordance with the total situation thus revealed at the conference is of the essence of the bargaining process."

In sifting an employer's conduct, for instance, to determine its good faith in bargaining, the Board in the United States lays great stress on whether or not it presented counter-proposals when union proposals proved unacceptable.(1) The Wagner Act finally contemplates that the proposals and counter-proposals in a proper case lead to an understanding embodied in a binding agreement for a definite period.(2) In the case of Montgomery Ward & Co.(3), the National Labor Relations Board in the United States stated that bargaining in "good faith" implies an undertaking to discover common ground, but does not require, for instance, that an employer capitulate.

(b) Government Assistance in Collective Bargaining :

The Dominion Government under the Regulations assumes a responsibility of assisting the two negotiating parties to reach an agreement. This responsibility goes beyond that assumed under the Wagner Act in the United States, and consists of the extension of a practice long since existing. That practice was either for one of the parties or the Government on its own motion in certain cases under the Industrial Disputes Investigation Act to initiate or set in motion certain conciliation machinery. The important difference is that under Order in Council P.C.1003, conciliation will become an agency on request in all instances

(1) The Wagner Act (1941) Charles M.Bufford, P.424.

(2) The Wagner Act (1941) Charles M.Bufford, P.416.

(3) 39 N.L.R.B. P.229.

where negotiations are protracted beyond 30 days, and conversely it will not be called upon until the 30 days are completed. Furthermore, it will be brought in without there being declared an imminent threat of stoppage of work, and thus conciliation and investigation become more definitely a part of the pattern of collective bargaining in Canada.

The compulsory aspect of the collective bargaining process under the Regulations is limited. If negotiations have been continued for a period of 30 days and if "either party to the negotiations believes that an agreement will not be completed in a reasonable time" it may advise the Board under Section 11, "indicating the difficulties encountered and may ask the Board to intervene with a view to the completion of an agreement", and the Board shall refer the matter to the Minister who shall within 3 days "instruct a conciliation officer" under Section 12 "to confer with the parties and attempt to effect an agreement". The conciliation officer shall within 14 days, in the usual case, of receiving his instructions report to the Minister setting out matters of disagreement and his recommendation thereon, the term agreed upon if any, and "whether, in his view, an agreement might be facilitated by appointment of a Conciliation Board". If the recommendation of the conciliation officer under Section 12 is for the appointment of a Conciliation Board the Minister shall forthwith appoint under Section 13 a Conciliation Board as prescribed.(1) The Conciliation Board will consist of three

(1) Local 195,United Automobile,Aircraft & Agricultural Implement Workers of America, 1 D.L.S.7-502 (National) September 2,1944; United Shipbuilders of America v John East Iron Works Ltd., 1 D.L.S.7-587.

members appointed by the Minister after consultation with the parties as provided for under Section 30 of the Regulations.

On appointment the Conciliation Board shall "endeavour to effect an agreement between the parties on the matters on which they have not agreed", and, in any event shall under Section 13 (2) "report the result of its endeavours and its findings and recommendations to the Minister" within 14 days of the appointment of the Chairman, or "within such longer period as may be agreed upon by the parties or as may be allowed by the Minister". If the Report of the Board to the Minister indicates a failure to effect an agreement, the Minister shall under Section 14 send a copy to the parties and to the Board and may publish it as he thinks fit.

It might be noted here that the compulsory aspect of negotiations ceases when the first conciliation officer begins his inquiry, and the case from then on becomes one of conciliation purely. There is no provision for agreement of parties to be bound by the decision of the Board beforehand or after the Report as in the Industrial Disputes Investigation Act,(1) however the both procedures are the same in that the Report of the Board is not per se binding on the parties. There is no such provision as turning the case back to the Board after a proper period of conciliation for further supervision and pressure. In framing the Regulations the authors no doubt had in mind labour's expressed disavowal of compulsory arbitration of the terms of an agreement, which would tend to undermine completely the right to strike.

(1) Sections 25 and 63 Industrial Disputes Investigation Act, R.S.C. ch.112. 1927.

The appointment of a conciliation officer under Section 12 of the Regulations corresponds to the appointment of an Industrial Disputes Inquiry Commission under the Industrial Disputes Investigation Act as extended during the war,(1) and was for the same purpose of an initial attempt to solve the dispute and if unsuccessful to advise the Minister of Labour whether or not to appoint a Conciliation Board,(2) as a Board of Conciliation and Investigation had been created previously.(3)

The Commissioners under the Industrial Disputes Investigation Act had duties not given to conciliation officers under the Regulations, such as inquiring into discriminatory practices of employers or coercive activities of employees. However, both these duties are covered from another angle under the Regulations by Sections 19 and 20 providing for penalties and by Section 46 A which has recently provided for Industrial Disputes Inquiry Commission proceedings under the Regulations. The Commission provided for under Section 46 A shall be governed by Sections 31-34 of the Regulations as in the case of Boards of Conciliation. Its Report may deal with the matter of alleged discrimination. The finding of the Report may be made binding on all parties concerned by the order of the Minister of Labour, and to this extent at least goes further than the Industrial Disputes Investigation Act.

If the parties have exhausted conciliation measures and no agreement results, the services of a conciliator may again

(1) Order in Council P.C.4020 and 4844.

(2) Section 13 (1) of the Regulations.

(3) 1942 Report of Deputy Minister of Labour in the 1942 Blue Book Report of the Department of Labour, Page 17.

be desired by the parties. The Minister of Labour has jurisdiction in his discretion to make a conciliator available to the parties under Section 64 of the Regulations, without reference to the Board. The Minister of Labour may also in his discretion re-convene a Board of Conciliation in a proper case under the provisions of Section 31(19) of the Regulations.(1) In the early stages of negotiations the avenue of approach to the Minister is through the Board, after a Conciliation Board has been appointed and has duly reported the Minister himself may be approached directly, since in such a case, the Board will have found in connection with the first application under Section 11 that the conditions had been satisfied upon which the Minister might exercise his authority to make available to the parties the conciliation services of the Department of Labour.

In a case where the Union concerned had petitioned the Ontario Board to grant leave to prosecute for employer non-compliance with the Regulations in negotiating, the Board stated that it had a discretion in such a case;(2) in the exercise of this discretion the Board stated:

> "regard must be had to the underlying premise of the Regulations, which is that relations between employers and employees should as far as possible rest on consent rather than compulsion".

The Board felt that the employer's attitude in the case in regard to its interpretation of the termination clause was unwarranted, "nevertheless", the Board added,"we hope that through the intervention of the Conciliation services of the Government, it might be induced to take a different view of the situation". The Board then adjourned final disposition

(1) United Steel Workers of America v Steel Co.1 D.L.S.7-1229.

(2) Amalgamated Bakers etc.v Canada Bread Co. 1 D.L.S.7-1167.

on the granting of leave to prosecute pending the outcome of an application under Section 11 of the Regulations, should the petitioners file such an application.

(c) Conciliation Boards Define "Good Faith":

In Canada the question of "good faith" in negotiations under Order in Council P.C.1003, early came up.(1) Reports of Boards of Conciliation under P.C.1003, were early concerned with the matter of union security, although it was at first argued that this matter was inside the scope of such Boards. Boards of Conciliation have at various times considered the matter of bargaining in good faith under the Regulations, and lacking Board judgments thereon the following criteria taken from Conciliation Boards indicate what is meant by that term.

In the Fittings case (2) mentioned the Board of Conciliation speaks of collective bargaining as being a process of "give and take", or reciprocal courtesy. The Board of Conciliation in the Page-Hersey Tubes case (3) stated, in stressing the spirit of "give and take":

> "The purpose of the present Board is to effect conciliation in the given case rather than to prescribe any general industrial relations policy."

The Report of the Conciliation Board in the case of United Electrical, Radio and Machine Workers of America, Local 523 v Electro-Metallurgical Co.of Canada, November 11,1944, stated:

> "Genuine collective bargaining, in consonance with the essential principles of a Democratic state, must reflect a spirit of give and take. It is obvious that

(1) The Labour Gazette, Nov.1944, P.1343; Report of Board in a dispute over bargaining in good faith, September 27,1944.

(2) The Labour Gazette, Sept.1945,P.1325; Report of Board in the Canadian Rogers Sheet Metal and Roofing Co.Dispute.

(3) The Labour Gazette, Jan. 1945, P.44; Report of Board in Page-Hersey Tubes Ltd.v Loc.523 United Electrical etc.Workers.

> it can grow sturdy and effective only where compromise is present. It must seek agreement with the minimum of mutual irritation. To this type of collective bargaining there is little alternative except harsh industrial struggle or a highly rigid prescription of industrial relationships by the state, under which both employers and employees would lose much of their present free decisions."(1)

In the dispute in the Brown's Bread case (2) the Board speaks of "the willingness to meet at some reasonable point of compromise" as the essence of collective bargaining in a democracy. In the dispute in Corbin Lock case (3), the Board speaks of the place of "co-operation" in collective bargaining. In the dispute in the Ford Motors case (4), the Board stated that without the willingness to co-operate, and make mutual concessions, "collective bargaining is an impossibility".

The Wartime Labour Relations Board has itself given no lead to the requirements of bargaining in good faith under the Regulations, except to state in the Ben's case noted before that a refusal to meet at all with the other party constituted in that particular case an offence. The refusal of the Company on the other hand to meet with its employees to consider a draft agreement proposed by the Board of Conciliation apparently did not justify a prosecution for failure to negotiate in good faith under the Regulations (5),

(1) The Labour Gazette, January 1945, P.48.

(2) The Labour Gazette, Dec. 1945, P.1793; Report of Board in Brown's Bread Ltd.v Local 847 Bakery Wagon Drivers' Union; see also The Labour Gazette, Aug.1945,P.1181,Imp.Optical case

(3) The Labour Gazette, May 1945, P.709;see also The Labour Gazette, Oct. 1945, P.1496 The Firestone Tire & Rubber Co.case.

(4) The Labour Gazette, Aug.1945, P.1155; see also The Labour Gazette, July 1945, P.984,The Federal Wire & Cable Co. case.

(5) The Labour Gazette, Dec.1945, P.1798; Report of Board in Fairfield & Son v Local 459 Amalgamated Clothing Workers.

(d) In Conclusion :

The National Board stated in the Southam case (1), May 22, 1946:

> "The Regulations require an employer to bargain with authorized bargaining representatives of employees with a view to the completion of a collective agreement and provide for the intervention of the Board, on request of either party. Bargaining must be undertaken in good faith where the appropriateness of the bargaining unit and the right of the bargaining representatives to bargain on behalf of employees in such bargaining unit have been established either by virtue of certification under the Regulations". (see Sec.10,11 and 12 of the Regulations).."or, in the alternative, where the organization has as a party to an expiring agreement covering the employees in such bargaining unit thus established recognition of its authority to represent the employees affected in new negotiations (see Sec.16)."

Although the Board has not taken a very positive attitude on the question of bargaining in good faith, it will not certify bargaining representatives for the sole purpose of enabling them to put an end to a collective agreement between two other parties or to destroy a collective relationship established and not yet existing ten months, for that would encourage bargaining in bad faith.(2)

(1) 1 D.L.S. 7-629: The International Typographical Union v The Southam Co.Ltd., The National Board, May 22, 1946.

(2) 1 D.L.S. 7-1287: Corporation of City of Toronto Unit 1, Federation Employee-Professional Engineers & Assistants v Corporation of City of Toronto et al., The Ontario Board January 7,1947.

Chapter VII: The Collective Agreement under the Regulations:

(a) Introduction:

In general, bargaining representatives are individuals, but in practice unions or associations of employees are joined as sponsors. Thus, in an indirect way at least, the type of labour organization involved in the process of negotiating a collective agreement is of importance to the Board, and Section 19 in conjunction with Section 44 of the Regulations are applicable in this regard. (1)

International labour unions are the strongest type of labour organization since they are often more effective in organization and in the bargaining process. The Wartime Labour Relations Board in the Ford Motor Co. case (2), May 30,1944, interpreted Section 2 (1)(d), which defined a collective agreement under the Regulations so as to include international trade unions, despite the apparent difficulty of invoking the penalty provisions of Section 19, stating thus:

> "The definition of the term 'trade union' is clear and precise; it does not lie within the discretion of the Board to reject the petition in this case because it has been made by an international employees' organization rather than by a local branch of such organization.....Indeed, in so defining the term, they (the authors of order in council P.C.1003) were merely recognizing the well known facts of industrial organization on the continent."

There is nothing in the Regulations to suggest, on the other hand, that an unaffiliated employees' organization may by incorporation acquire the status of a trade union.(3)

(1) The McCormick's Ltd. case, 1 D.L.S. 7-620 (National) Apr.23,1946; The National Paper Goods case, 1 D.L.S.7-612; The Honeysuckle Bakeries case, 1 D.L.S.7-593.

(2) C.C.H. 10,401 (L.L.R.)(Ontario).

(3) Indepedent Steel Workers Assn. v Steel Co.of Canada, 1 D.L.S. 7-1329 (Ontario).

The Regulations do not provide machinery for the certification of bargaining representatives elected by an unorganized body; there must be a union or an association sponsoring the election under Section 5.(1) Where officers of unions certified under the Ontario Collective Bargaining Act 1943, are automatically certified under P.C.1003, the Board is not warranted in going behind the certification of the Ontario Court to see if such certification is warranted.(2)

(b) The Agreement :

A collective agreement is defined under The Wartime Labour Relations Regulations merely as an agreement in writing between an employer and a trade union or employees' organization with reference to rates of pay, hours of work or other working conditions. The Ontario Labour Relations Board has held in the Beach Foundry case (3), that formality is not of the essence of the agreement; although in an earlier case the Ontario Board had held that a document signed by two employees on behalf of the rest was not a collective agreement.(4)

Section 8 (1) provides inter alia that a collective agreement negotiated by the certified bargaining representatives shall be binding on every employee in the unit. Under Section 10 (5) every party and every employee covered by a collective agreement shall do everything he is, or refrain from doing anything he is not, to do under the agreement.

(1) The Canadian John Wood Mfg.Co. case, 1 D.L.S.7-1175 (Ontario).

(2) The Aluminum Co.of Canada case, 1 D.L.S.7-1137 (Ontario).

(3) The Beach Foundry case, 1 D.L.S. 7-1201.

(4) Int.Union of Operating Engineers Local 944 v General Motors of Canada Ltd. 1 D.L.S. 7-1145 (Ontario).

A collective agreement under the Regulations is not binding in the sense that an ordinary contract is binding. Sections 17 and 18 provide for a grievance procedure for the interpretation of the agreement or to deal with the case of violations of the agreement. Both employer and employee are bound by the settlement of the grievance arrived at through the grievance procedure, and strikes and lockouts are prohibited during the term of the agreement under Sections 40-42. Prosecutions for offences take place after the consent of the Board thereto under Section 45. The Board has no power under the Regulations to grant such remedies as injunction or mandamus, or to grant specific performance of a collective agreement.(1) The discretion given the Board under Section 45 in application for leave to prosecute may allow the Board to withhold a decision in the case in order to give the offending party an opportunity to comply with the Regulations.(2) The collective agreement not being a civil contract, one party cannot claim damages even for a fundamental breach.

(c) The Duration of the Agreement :

Collective bargaining is in essence a process whereby a trade union is enabled to pass from a position of organization to one in which it can devote its whole energy to the administration of a collective agreement. To this end it must be free from the fear of aggression for some minimum period of time. That minimum period has been fixed, both in legislative enactments and in the jurisprudence evolved under various statutes

(1) Int.Assn. of Machinists Lodge 712 v Noorduyn Aviation Ltd., 1 D.L.S. 7-566. (National).

(2) Amalgamated Bakers & Confectioners of Toronto v Canada Bread Co. 1 D.L.S. 7-1167 (Ontario).

and Orders in Council, by courts as well as by administrative authorities in Canada and in the United States, at one year.

Section 15 of the Regulations, as amended, states:

> "Every collective agreement, whether made before or after the effective date of these Regulations, shall be deemed to run for a period of not less than one year from its operative date and shall not be capable of cancellation by the parties within that period without the consent of the Board; and when any such collective agreement is expressed to run for more than one year, it shall contain or be deemed to contain a provision for the termination thereof at any time after one year from its operative date on two months' notice by either party thereto."

The present Section 15 of the Regulations came in force on September 1,1944, by virtue of Order in Council P.C.6893, replacing the original Section 15 which had not been clear as to applicability to agreements made before the effective date of the Regulations. The Section applies to agreements made either before or after the effective date of Order in Council P.C.1003.(1) An agreement under the Regulations shall be deemed to run for one year at least despite the fact that the terms of the agreement may indicate a lesser period.(2) If the terms of the agreement indicate a "duration agreement", that is, for an indefinite time of war an exception may not be made (3), and the provisions of Section 9 of the Regulations are still applicable.(4) In any case an agreement may be cancelled at any time with the consent of the Board,(5) and

(1) Motor Products Corp. v Local 195 etc.Implement Workers, 1 D.L.S.7-502. See also Pt.Arthur Shipbuilding case 1 D.L.S.7-513.

(2) Timmins Municipal Employees' Assn.case, 1 D.L.S.7-1230.

(3) Local 222 Int.Union United Automobile etc.Implement Workers, v General Motors, 1 D.L.S.7-550. See 7-1105, 7-1116.

(4) Ind.Union of Marine & Shipbuilding Workers,Loc.11 v Pt.Arthur Shipbuilding Co.et al.,1 D.L.S.7-513.

(5) See Section 15; also Amalgamated Bakers & Confectioners of Toronto v Canada Bread Co. 1 D.L.S.7-1167.

subject to the exception noted the agreement may be cancelled or terminated after one year on two months' notice. The termination under Section 15 is not affected by the fact that negotiations for renewal are going on under Section 16, provided the termination notice is given after the year is up and before another agreement is reached.

In regard to pre-Regulations agreements the Board first rules on whether or not the agreement in question is within Section 2(1)(d) of the Regulations, under Section 25. If the Board rules in the affirmative, then Sections 15 and 16 are applicable and the employee agency concerned may without certification of bargaining representatives, determine the agreement on two months' notice if in force a year or more,(1) and, incidentally, if need be, require the employer to negotiate for renewal under Section 16. (2)

(d) Renewal of the Agreement:

Under the Regulations an employer's statutory obligation to enter into negotiations with a trade union or employees' agency representing his employees may arise either after certification, where there has been no previous agreement, or within two months prior to the expiry date of an agreement, where the relations between the employer and his employees have been governed by a collective agreement. In the first of these two situations, the right of the union to speak for the employees has been confirmed by the Board. In the second, the

(1) National Association of Marine Engineers etc., v Union Steamships Ltd.et al., 1 D.L.S.7-519.

(2) National Association of Marine Engineers etc., v Union Steamships Ltd.et al., 1 D.L.S.7-519.

right of the union may flow from the fact that it has already been recognized by the employer in a prescribed manner; that is, by the collective agreement; under these latter circumstances there is a presumption that the conditions for recognition of the union have been satisfied. Certification of bargaining representatives is thus not the sole method by which a union achieves collective bargaining status; it is only one of the methods provided by law.

Section 16 of the Regulations, as amended, states:

> "Either party to a collective agreement may, on ten clear days' notice, require the other party to enter into negotiations for the renewal of the agreement within the period of two months prior to the expiry date, and both parties shall thereupon enter into such negotiations in good faith and make every reasonable effort to secure such a renewal.
>
> Where either party to a collective agreement, whether made before or after the effective date of these Regulations, has required the other party to enter into negotiations for the renewal or revision of the agreement or the conclusion of a new agreement, sections eleven, twelve, thirteen and fourteen shall apply to such negotiations as in the case of negotiations for a collective agreement following certification of bargaining representatives under these Regulations."

The present Section 16 (2) came in force by virtue of Order in Council P.C.302 of February 15,1947, to make it clear that the Section applied to agreements made before the effective date of the Regulations and applied also to negotiations leading to a new agreement as well as for a renewal or revision of the old agreement.

If a trade union which has been joined in the certification or has had an agreement previously, gives proper notice pursuant to Section 16 (1) of the Regulations, the bargaining

status of the union remains unimpaired by the termination date of the agreement, provided of course that no application is made by a rival organization pursuant to Section 9 of the Regulations or no new bargaining representatives have been appointed.

Supposing the termination day passes without any action on the part of any party, prima facie that would justify the employer in questioning the right of the union to speak for the employees before going through the process of certification, for the delay in such a case is a strong indication that the union has lost interest in the employees or has lost their support. The Backstay case (1), states, thus:

> "The Regulations contemplate continuity in the union's interest and if that continuity has been disrupted by the union's procrastination, the employer may well seek assurance that the union still represents his employees."

The Backstay case judgment indicates that the Ontario Board would be willing to allow continuity if notice were given after the ten day limit under Section 16 (1) were up, and even a few days after the termination date of the agreement, especially if the employer raised no objection. This attitude the Board felt justified by a liberal interpretation of the Section in question which saw in the provision for ten days' notice previous to expiry date a directory and not a mandatory stipulation, since the primary purpose is to preserve the continuity of bargaining relations and conciliation processes. The notice under Section 16 (1) need not be formal.(2)

(1) Int.Union United Automobile etc. Implement Workers Loc.195 v Backstay Standard Co. 1 D.L.S.7-1233.

(2) Int.Union United Automobile etc. Implement Workers Loc.195 v Motor Products Corp. 1 D.L.S. 7-530.

Thus, just as under Section 9 of the Regulations where a new agency might be certified after ten months of an agreement had passed, so either party to a collective agreement under Section 16 (1) of the Regulations may after ten months have passed require the other party on ten clear days' notice to negotiate for renewal or revision of the old agreement or for a new one. In such negotiations conciliation services are available as in original negotiations by virtue of Section 16 (2).

If there is an automatic renewal clause in the old agreement it is prima facie inconsistent with the Regulations and can operate only strictly subject to non-interference with the provisions of the Regulations.(1) Only one of the parties or the other in the agreement can give notice providing for an automatic renewal.(2) Previous to February 15,1947 when Section 16 was amended by Order in Council P.C.302, a notice given under an automatic renewal clause was held to apply only in the case of a desire to terminate the agreement and to make a new one, or when requesting a renewal with amendment since a renewal on the same terms would automatically follow if no action at all were taken.(3) The amendment confirmed this practice.

In negotiating for a renewal under Section 16 (2) the provisions of Sections 11,12,13 and 14 are available to the parties (4). Thus, the notice for renewal under Section 16

(1) Motor Products Corp. v Local 195 United Automobile etc. Implement Workers of America, 1 D.L.S.7-502.

(2) Professional Union of Construction Workers v Anglo-Canadian Pulp & Paper Mills Ltd., 1 D.L.S.7-524.

(3) Int.Union United Automobile etc.Implement Workers of America v The Canadian Bridge Co., 1 D.L.S.7-548;see also 1 D.L.S.7-1242.

(4) The Canadian Bridge Co.case, 1 D.L.S.7-548.

does not bring to an end the agreement (1) but provides for negotiations during the two months previous to the termination of the old agreement, subject however to the operation of the provisions of Section 9.(2) Unless the agreement itself provides for an expiry date for negotiations that date will be contingent on a previous notice of two months to terminate the agreement after the year is up.(3)

Thus an automatic renewal clause is operative only where the provisions of Section 9 regarding new bargaining representatives or the provisions of Section 16 regarding renewal are not invoked. (4)

A collective agreement can remain in force and be renewed automatically, even though no members of the union are currently employed in the plant (5). The opposite decision was reached where the employees' association had disintegrated and gone out of existence.(6) In the former case although the union was actually dormant it could be operated by an outside representative, an officer of the union; in the latter case the disintegration had left noone to administer the agreement.

(1) Int.Union United Automobile etc.Implement Workers Local 195 v The Canadian Bridge Co. 1 D.L.S.7-548.

(2) Port Arthur Shipbuilding Co. et al., v Ind.Union of Marine & Shipbuilding Workers,Local 11, 1 D.L.S.7-1116.

(3) Int.Union United Automobile etc.Implement Workers Local 195 v The Canadian Bridge Co. 1 D.L.S.7-548.

(4) The Steel Co.of Canada case, 1 D.L.S.7-1238 held that a new application under Sec.9 need not be for the identical unit, and that after ten months a new agency may apply under Sec.16.

(5) The Beach Foundry case, 1 D.L.S.7-1201.

(6) The Foster Wheeler case, 1 D.L.S.7-1133.

(e) Grievance Procedure:

Sections 17 and 18 of the Regulations deal with the essential matter of a grievance procedure in a collective agreement.

Sections 17 and 18 of the Regulations, state as follows:

17. "Where an employee alleges that there has been a misinterpretation or a violation of a collective agreement, the employee shall submit the same for consideration and final settlement in accordance with the procedure established by the collective agreement, if any, or the procedure established by the Board for such case; and the employee and his employer shall do such things as are required of them by the procedure and such things as are required of them by the terms of the settlement.

18(1). Every collective agreement made after these regulations come into force shall contain a provision establishing a procedure for final settlement, without stoppage of work, on the application of either party, of differences concerning its interpretation or violation.
(2). Where a collective agreement does not provide an appropriate procedure for consideration and settlement of disputes concerning its interpretation or violation thereof, the Board shall, upon application, by order, establish such a procedure."

Where misinterpretation or violation of a collective agreement is alleged by an employee, he shall submit the same for consideration and final settlement under Section 17 in accordance with the procedure established by the agreement, if any, or the procedure established by the Wartime Labour Relations Board, for such case, under Section 18.(1) The Board cannot intervene to establish a grievance procedure under Sections 17 and 18 of the Regulations if no collective agreement is in effect. (2)

(1) Scavenging & Incinerator Employees' Unit v City of Winnipeg, 1 D.L.S.7-591 (National) July 19,1945.

(2) Scavenging & Incinerator Employees' Unit v City of Winnipeg, 1 D.L.S.7-591 (National) July 19,1945.

Every agreement must under Section 18 (1) contain a provision establishing a procedure for final settlement without stoppage of work; under Section 18 (2) "where a collective agreement does not provide an appropriate procedure for consideration and settlement of disputes concerning its interpretation or violation thereof, the Board shall, upon application, by order, establish such a procedure." (1)

The Board's power to establish a grievance procedure in a proper case, is strictly limited by the words of Section 18 (2) of the Regulations to "disputes concerning the interpretation and violation of a collective agreement", and a procedure established to settle disputes "concerning a grievance arising under the collective agreement" will be amended accordingly.(2) This holding was confirmed by the National Board in the Canadian Automotive Trim case (3) on appeal from the Ontario Board, the latter purportedly following the decision of the National Board in the case of the Ford Motor Co.of Canada, on May 12,1944, which the National Board now distinguished, as follows:

> "The Ford grievance procedure was established by this Board at the request of the union and the employer company, both of whom agreed to abide by the decision of this Board. Under these circumstances, we acted as an Arbitration Board and were not limited by the provisions of Section 18 of the Regulations "concerning its interpretation or violation". In any event, the Ford grievance procedure was established on May 12,1944,while the Dominion Forge grievance procedure was revised by this Board on October 28,1944. We have no reason to think that the grievance procedure which we now establish will be satisfactory for all time."

(1) The Brotherhood of Locomotive Engineers et al., v The Wabash Railroad Co., 1 D.L.S.7-624 (National) April 24,1946.

(2) United Automobile Workers,Local 195 v Dominion Forge & Stamping Co. 1 D.L.S. 7-505 (National) September 28,1944.

(3) The Canadian Automotive Trim case, 1 D.L.S.7-539, Feb.26,1945.

As to the significance of the word "interpretation" the National Board added:

> "In the case of a dispute as to whether or not contract provisions have been violated, it must certainly be determined what the contract provisions are in order to decide whether the provisions have in fact been violated. It is for this purpose the Regulations provide for interpretation of the contract. This can, and in many cases will, be a separate arbitration and may or may not be related to a particular grievance, but may be brought about in some cases in order to avoid a grievance developing due to misunderstanding."

The National Board then proceeded to settle the grievance procedure by directing the parties to include in the collective agreement a final step in the procedure in regard to misinterpretation or violation of the agreement, the step whereby the matter was submitted to arbitration by an umpire whose decisions thereon were to be binding.

This case indicated that the Board when requested to establish grievance procedure and both parties agreed to abide by its decision, acts as an Arbitration Board and as such is not limited by the provisions of the Regulations.

In the ordinary case, however, under Section 18 where application is made by a party to the agreement Sections 17 and 18 are strictly interpreted.

Both the National Board and the Ontario Board have held that an appropriate grievance procedure will be written into an agreement under Section 18 only in the case of an application by one of the parties to the agreement.(1) Section 18 (1) of the Regulations defines an appropriate grievance procedure thus:

> "Every collective agreement made after these regulations came into force shall contain a provision establishing a procedure for final settlement, without stoppage of work, on the application of either party, of differences concerning its interpretation or violation."

(1) Joseph Stokes Rubber Co.case, 1 D.L.S.7-601 (National); City of Toronto Engineers case, 1 D.L.S.7-1287 (Ontario).

Thus, a procedure which provides for the settlement of the differences here specified on the application of either party is an appropriate procedure within the meaning of the Regulations. The Regulations are concerned with collective relations rather than with relations between the employer and an individual employee, and consequently an individual employee or any group of employees cannot have their disputes dealt with under the Regulations. This is the reason why a grievance procedure must be limited under Section 18 (2) to "disputes concerning the interpretation and violation of a collective agreement" rather than extended to include disputes "concerning a grievance arising under the collective agreement." Grievance procedure under the Regulations is established by the parties themselves or on application of either to the Board, and can be put in motion by the parties only, and not by every individual or employee concerned. In short, the Regulations definitely do not provide for compulsory arbitration of all disputes under the terms of the agreement.

The National Board considers that disposal of a grievance under an appropriate grievance procedure is preferable where applicable to a prosecution for alleged unjust dismissal.(1) In the Joseph Stokes Rubber case referred to, a clause in the collective agreement between the Company and the union provided for disposal by arbitration of charges of unjust dismissal if the claim is filed within a certain time limit. The Company claimed that notice was not filed within the time limit and hence there was no duty to arbitrate the matter. The union, on the other hand, claimed refusal to arbitrate was an offence

(1) Joseph Stokes Rubber Co. v United Electrical, Radio & Machine Workers of America, Local 523, 1 D.L.S.7-601.

under Sections 10 (5) and 38 of the Regulations, and accordingly made application to the Board under Section 45 for leave to prosecute. The Ontario Board granted leave to prosecute, the company appealed, and the National Board dismissed the appeal.

The National Board stated that there was in their opinion

> "more appropriate procedure under the Regulations for the disposition of the issues involved in this prosecution, namely, by application to the Ontario Board under Sections 17 and 18 of the Regulations for the establishment of an appropriate grievance procedure to determine the issues in dispute. Under the procedure so established the allegations of non-compliance with the provisions of the agreement could have been disposed of by arbitration."

The National Board added that although it upheld the petition and consented to prosecution (the Board's duty is to consent to prosecution if the matter is not merely frivolous or vexatious), it felt that the matter might yet be settled by submitting the case for the disposal by the grievance machinery provided under the new agreement by then concluded between the parties.

This precautionary provision that grievance arrangements must be set up in all agreements satisfactory to the Board is a novel procedure and obviously wise. However, there are no provisions provided for meeting new difficulties that may arise outside the terms of the contract, and in any case the grievance procedure only applies to certain disputes arising from the agreement.

Prior to the enactment of the Wartime Labour Relations Regulations, the Industrial Disputes Investigation Act, as extended by Order in Council P.C.3495, of November 7,1939, as amended, provided a safety valve for the consideration by an impartial tribunal of any dispute arising during the currency of a collective agreement which was likely to disrupt production.

Such a dispute might concern the interpretation or violation of a collective agreement; it might concern a grievance arising under a collective agreement; it might concern a matter which had been overlooked during the negotiation of a collective agreement. The machinery of the Industrial Disputes Investigation Act afforded an aggrieved person an opportunity to have his day in Court, to recount his complaints to a disinterested and impartial tribunal and to ascertain the views of that tribunal on the merits of the controversy. Countless strikes were averted that way.

Under the Wartime Labour Relations Regulations, however, the safety valve has been eliminated. During the lifetime of a collective agreement, an aggrieved person can no longer resort to a Board of Conciliation for a declaration of his rights, conciliation proceedings having terminated on the conclusion of the agreement. He must rely on the machinery provided by Sections 17 and 18 of the Wartime Labour Relations Regulations. The only recourse he now has is to submit his grievance for consideration and final settlement in accordance with the procedure established pursuant to Section 18 of the Regulations. But there is no guarantee that his grievance would even be dealt with by the machinery so established. The employer may well take the position that the dispute is not one concerning the interpretation or violation of the collective agreement and that the dispute is therefore not one which ought to be submitted for consideration in accordance with the grievance procedure; or, again, the employer may raise before the umpire provided for by the grievance procedure, and the umpire may uphold the preliminary objection that the dispute not being

one concerning the interpretation or violation of the agreement, the umpire has no jurisdiction to hear the dispute. In any case, the merits of the aggrieved person's complaint will never be considered. If, in any particular case, the employer's position is well taken, the employee concerned may have no legitimate complaint under the Regulations; on the other hand, if the objection of the employer is not well founded there may be a grave miscarriage of justice since employees are deprived of their right to strike during the lifetime of a collective agreement under Section 41 of the Regulations.

A collective agreement should have stability and is not something to be changed or modified from day to day. Once an employer and an employee conclude a collective agreement, they are bound by its terms whether good or bad. The grievance procedure cannot be used by either as a means of rewriting the agreement. There should, however, be adequate machinery provided for dealing with all grievances which may arise under a collective agreement, instead of providing merely for the settlement of a misinterpretation or a violation of a collective agreement. Apparently, however, such an inclusive grievance procedure might be allowed under the Regulations if both parties to the agreement requested the Board to act as an Arbitration Board. (1)

The authority of the Board to establish a grievance procedure under Section 18 applies both to agreements entered into before and after the effective date of the Regulations.

(1) The Ford Motor Co. case, May 12,1944.Cited in The Canadian Automotive Trim case, 1 D.L.S. 7-539 (National) Feb.26,1945.

There is no express provision limiting the application of Section 18 (2) to agreements made after the effective date of the Regulations, and in view of the absence of anything to otherwise indicate that this was the intent, the opinion of the National Board is that the provisions of the Section in question apply in respect to any collective agreement, irrespective of the date of its coming into being. This view is strengthened by the provisions of Section 18 (1) which specifically state that after the effective date of the Regulations all agreements entered into shall contain a grievance procedure.(1)

Chapter VIII: Unfair Practices Under the Regulations:

(a) Under Section 19:

Section 19 (1) of the Regulations states:

> "No employer shall dominate or interfere with the formation or administration of a trade union or employees' organization or contribute financial or other support to it; but an employer may, notwithstanding the foregoing, permit an employee or representative of a trade union or an employees' organization to confer with him during working hours or to attend to the business of the organization or union during working hours without deduction of time so occupied in the computation of the time worked for the employer and without deduction of wages in respect thereof."

In short, Section 19 (1) of the Regulations means that an employer is prohibited from dominating or interfering with the formation or administration of a trade union or employees' organization.

(1) The Brotherhood of Locomotive Engineers et al., v The Wabash Railroad Company, 1 D.L.S.7-624 (National) April 24,1946.

Section 19 (2) of the Regulations states:

"No employer or employers' organization, and no person acting on behalf of same shall
(a) Refuse to employ any person because the person is a member of a trade union or an employees' organization;
(b) Impose any conditions in the contract of employment seeking to restrain an employee from exercising his rights under these regulations; or
(c) seek by intimidation; by dismissal or threat of dismissal, by any other kind of threat, by the imposition of a pecuniary or other penalty, or by any other means whatsoever, to compel an employee to abstain from becoming or continuing to be a member or officer or representative of a trade union or an employees' organization, or from exercising his lawful rights;
but nothing in these regulations shall be interpreted to affect, otherwise than as expressly stated, the right of an employer to suspend, transfer, lay off, or discharge employees for appropriate and sufficient cause."

In short, Section 19 (2) of the Regulations means that an employer or his agent shall not in any way described discriminate against any person for his being a member of a trade union or employees' organization.

For brevity of expression the phrases company-dominated union and employer-interference with union activities of employees or prospective employees, may be used to include any employer practice declared unfair by any of the language of the Regulations.

The Board is directly concerned with employer practices under Section 19 in its dealing with applications for certification of bargaining representatives, for evidence of interference, domination, or discrimination may warrant rejection of the application or at least the taking of a vote.

The Board is less directly concerned in application under Section 45 of the Regulations for permission to institute prosecution proceedings in the ordinary courts for an offence under the Regulations. In such a case the Board is not required

to pass on the merits of the prosecution in anticipation of the decision of the Court. There is no need to hold an inquiry or take evidence other than for the Board to satisfy itself that the matter involved is not of a frivolous or vexatious nature.(1) The National Board early indicated its duty in this regard in the case of The Bell Telephone Co.of Canada v Plant Employees' Association of The Bell Telephone Co. (2), thus:

> "While the interpretation of Section 19 of the Wartime Labour Relations Regulations, P.C.1003, is not a duty or function of the Board, yet by reason of Section 45 of the Regulations, wherein it is provided that no prosecution for an alleged offence under the Regulations shall be instituted except by or with the consent of the Board, it is felt that the Board should declare itself as follows:
>
> The present Board is disposed to give consent for prosecution in a case where there is sufficient evidence to indicate that an unfair practice may have been committed by reason of an employer paying travelling or other expenses of an employee or a representative of a trade union; or an employees' organization, incurred in attending meetings or conferences for the purpose of collective bargaining. Beyond this the Board is unable to assist the parties with any further interpretation of Section 19."

Section 19 of the Regulations will be dealt with under two headings:

1. A petition for certification of bargaining representatives.
2. A petition for leave to prosecute for violation of the Regulations.

1. A petition for certification of bargaining representatives:

The Preamble of the Wartime Labour Relations Regulations states that it is deemed to be in the public interest that

(1) Joseph Stokes Rubber Co. v United Electrical,Radio and Machine Workers of America, Local 523, 1 D.L.S.7-601.

(2) C.C.H. 10,401 (L.L.R.)

employees should be free to organize in order to negotiate with their employer. The formation and administration of a labour organization are thus the concern of the employees and not of employers, and the domination or interference therein by an employer is prohibited under Section 19(1) of the Regulations. Interference with the right to belong to a labour organization on the part of an employer by almost any means is prohibited under Section 19(2).

In the ordinary case, under the Wright-Hargreaves Rules of Procedure No.2 the Board will reject an application for certification of bargaining representatives where there is no prima facie majority indicated. In the Honeysuckle Bakeries case (1), however, the National Board departed from a strict and narrow interpretation of the Regulations and on an application for the certification of bargaining representatives directed a vote, where the Manitoba Board had rejected the application, where the applicant had the support of but 19 of 39 persons affected.

The Board felt that since the Regulations were for the purpose of certifying bargaining representatives, any reasonable doubt that existed after an investigation of an application should not act so as to circumvent or stultify the intent thereof. It had been the practice of the Board to call for a vote in cases where the applicant possessed prima facie evidence of the support of as much as seventy per cent of the employees affected, or where other evidence made for a doubt. The Board concluded:

> "We are of the opinion that, in order to properly fulfil the intent of the Regulations, a vote of the employees should be taken whenever there is any reasonable doubt as to the wishes of the employees as regards bargaining representatives or as to discrimination being practiced."

(1) Canadian Bakery Workers' Union,Local 1 v Honeysuckle Bakeries Ltd., 1 D.L.S.7-593.

In the case of Sorel Marine Industries (1), the National Board found that neither petitioner nor intervener on investigation lived up to their prima facie status of a majority claimant. The petitioner claims that despite this failure to show a prima facie majority of the employees, in the bargaining unit a secret ballot would substantiate its contention since free of employer pressure, intimidation and discrimination against the petitioner. The Board dismissed both applications forthwith, and concluded:

> "In the opinion of the Board the allegations of the appellant that discrimination and coercion have been shown or exercised by the Company against the appellant union and in favour of the respondent union have not been satisfactorily substantiated by the appellant and do not warrant the Board in ordering a vote on this ground."

The departure in the Honeysuckle Bakeries case was further followed in the Kerr-Addison Gold Mines case (2), where the intervener held the existing contract with the company and the petitioner was applying for certification of new bargaining representatives ten months of the agreement having elapsed. Investigation by the Board found that the applicant had the support of approximately 47.7 per cent of the employees affected. Although such findings would ordinarily be sufficient to dispose of the application, the Ontario Board directed a vote of the employees with both intervener and petitioner on the ballot in order to obtain clear evidence as to the wishes of the employees after the petitioner's charge of discrimination by the company had been declared well-founded. The company

(1) Le Syndicat National des Chantiers Maritimes de Sorel v Marine Industries Ltd., Sorel, et al., 1 D.L.S.7-664.

(2) Int.Union Mine, Mill & Smelter Workers et al., v Kerr-Addison Gold Mines Ltd., 1 D.L.S. 7-1279 (Ontario).

had posted notices prohibiting employees, among other things, from carrying union cards, and was patently directed at organizational activities of the petitioner union only. The Ontario Board in referring to the Honeysuckle Bakeries precedent stated:

> "The present case appears to us to be one in which the principle established by the National Board in the Honeysuckle Bakeries case may logically be applied."

In neither of the cases, the Honeysuckle Bakeries nor the Kerr-Addison Gold Mines, was leave requested to prosecute for a breach of Section 19 of the Regulations, and apparently discrimination to a lesser extent than would warrant the Board granting permission under Section 45 of the Regulations is sufficient to justify the Board in directing a vote in these cases.

In the Lealand Company case (1), the Ontario Board on an application for certification of bargaining representatives referred the matter to a referee for inquiry under Section 7 of the Regulations. A consent vote having indicated lack of faith in the petitioner, objection was raised that the employer had prejudiced the interests of the union petitioner. A hearing was directed by the Board which found a number of employer inspired incidents such as calling for a vote on a shut-down day, had militated against a free expression of opinion by the employees in the vote taken, and that the employees affected as a consequence had not been afforded a proper and reasonable opportunity to express their wishes. A new vote was directed in this case.

(1) Cannery Workers' Union, Local 23728 v Lealand Co.Ltd., 1 D.L.S.7-1245.

In the Ruddy-Freeborn Co. case, (1) the Ontario Board on an application for certification of bargaining representatives directed a vote which showed the petitioner did not have a majority support of the employees affected. The petitioner objected to employer activity during the taking of the vote, and the Board ordered a hearing. The hearing indicated employer interference in the taking of the vote, in that circulars advised employees that by refraining from voting the employees would indicate that they voted against the union. The Board ordered a new vote and forbade propaganda or electioneering by either union or employer until after the election was held.

If the applicant in the certification of bargaining representatives can show that the application has the prima facie support of a majority of the employees affected, the Board will not ordinarily reject the application follows from Rule 2 of the Wright-Hargreaves case. However, if the Board entertains a doubt as to the freedom of choice which the employees enjoyed in selecting bargaining representatives, that is if the trade union or employees' organization sponsoring the application were employer inspired, it will in a proper case reject the application.

In the National Paper Goods case (2), the National Board upheld the judgment of the Ontario Board in dismissing the application for certification of bargaining representatives sponsored by the Employees' Association which was incorporated by a solicitor who was a director of the company involved and

(1) Int.Union, United Automobile etc.Implement Workers of America Local 397 v Ruddy-Freeborn Co.Ltd. 1 D.L.S.7-1255.

(2) National Paper Employees' Assn. v National Paper Goods Ltd. et al.,1 D.L.S.7-612.

who acted also as the solicitor of the Association before both Boards, even where the bargaining representatives had been elected by a majority vote. Dissenting members of the Ontario Board protested against the Ontario Board even granting an appeal in such cases to the National Board since they believed doing so in cases where there was a patent infraction of Section 19(1) of the Regulations, would tend to a "widespread resort to that domination and influence so carefully and specifically guarded against by the Regulations."

In the McCormick's Limited case (1), the National Board allowed the certification of bargaining representatives rejected by the Ontario Board because of their finding that the company had contributed financial and other support to the petitioner in breach of Section 19(1) of the Regulations. The National Board found that the practice of allowing vote taking on company time was of long standing and could not be considered as discrimination even where employee election officers received their usual pay. The Board further found that the free use of company facilities for meetings and social activities although not common practice in other cases and thereby creating a presumption of discrimination on the part of the company was not in this case discrimination since it was long established practice and free to all. The National Board clinched their argument by referring to the finding of the Ontario Board that there was "no deliberate or calculated partiality on the part of the Company."

(1) Employees' Assn. of McCormick's Ltd. v United Packinghouse Workers of America, Local 281, 1 D.L.S.7-620.

In the Deacon Brothers case (1), before the Rules of Procedure established in the Wright-Hargreaves case, the Ontario Board dismissed the application for certification of bargaining representatives on behalf of the intervener agency because of company domination in its formation, and directed a vote with the petitioner's name alone on the ballot. The Board stated:

> "We are of the opinion that the employer in this case has exceeded the limits set by the Regulations for legitimate employer participation in the affairs of his employees."

The same result was found in the National Paper Goods case (2), and by the Ontario Board in the McCormick's Limited case (3).

In the Belleville-Sargent & Co. case (4), before the Wright-Hargreaves Rules the Ontario Board following the older rule, stated that it was unwise not to allow both agencies concerned in the certification process to place on a ballot to determine the wishes of the employees affected, unless as in the Deacon Brothers case, unfair practices or a mere shadow support were found. In this case the employer permitted Guild organizers to address the employees with a view to sponsoring the guild, and in doing so the Board believed that the company was embarking on a course which might lead into "dangerous paths". The Board did not propose to see "the hand of Satan" in every

(1) United Garment Workers of America, Local 2530 v Deacon Brothers Ltd. and Dee Bee Workers Agency, 1 D.L.S.7-1123.

(2) National Paper Employees' Assn. v National Paper Goods Ltd., et al., 1 D.L.S.7-1205 (Ont.); also 1 D.L.S.7-612 (National).

(3) 1 D.L.S. 7-1221 (Ontario).

(4) Int.Union United Automobile etc. Implement Workers of America, Local 426 v Belleville-Sargent & Co. et al., 1 D.L.S.7-1127.

act of an employer which a trade union might find objectionable, but felt that due to the wide scope of Section 19 of the Regulations employers should be wary of interfering with the organizational activities of their employees in any way. The Board held, however, that nothing the employer had done would prevent the employees from expressing their views freely and adequately by means of the secret ballot. In other words the employer had not indulged in the "badges of unfair practices" set out in Section 19, so as to warrant rejection of the intervener's petition and its non-placement on the ballot in a vote of the employees affected.(1)

Thus, despite the fact that the Wartime Labour Relations Regulations do not necessarily certify an employee agency as a bargaining representative, the bona fides of the agency sponsoring the application for certification is important. This was stressed in the Deacon Brothers case already referred to and confirmed by the later cases also mentioned.

In the National Paper Goods case (2), the National Board held that the manager of a company in addressing the employees to persuade them not to vote for the union was not thereby seeking to compel them to vote one way or another, and was not an offence under Section 19(2)(c) so as to warrant the directing of another vote of the employees on the grounds of intimidation.

In the Selkirk Foundries case (3), the National Board stated that the charges of unfair interference on the part of the

(1) See also The Weatherhead Co.case, 1 D.L.S.7-1129; and Foster-Wheeler case, 1 D.L.S.7-1133.

(2) 1 D.L.S.7-545; also Toronto Gen.Hospital case, 1 D.L.S.7-584.

(3) Selkirk Foundry Workers' Unit v Manitoba Steel Foundries Ltd. et al.,1 D.L.S.7-590.

Company in an election, which were unsubstantiated do not warrant the taking of another vote especially where the appellant's scrutineers had signed a certificate that the balloting had been conducted in a fair and reasonable manner and where in any case the ballots objected to could not possibly affect the result of the vote.

In the Deacon Brothers case, the Ontario Board suggested that there might be some cases where an employee agency benefitted by employer activities forbidden by Section 19 of the Regulations would not be barred from proceeding further in quest of certification. But, in any case, where the trade union or employees' organization is closely connected with and dependent on the employer the Board will not even allow the agency to take part in the balloting. On the other hand, it would not appear from the cases considered that employer intervention to the extent of an offence under Section 19 is always necessary to warrant the Board in directing a new vote or in adding the aggrieved party's name to a ballot (1) in every case. That would appear all the more so since very few if any applications for leave to prosecute follow cases where employer interference or discrimination warranted the Board to add a party's name to the ballot.

(1) See The National Paper Goods case, 1 D.L.S. 7-545.

2. A petition for leave to prosecute for violation of the Regulations.

Section 45 of the Regulations states:

> "No prosecution for an offence under these Regulations shall be instituted except by or with the consent of the Board, evidenced by a certificate signed by or on behalf of the Chairman of the Board, and in exercising its discretion as to whether any such consent should be granted, the Board may take into consideration disciplinary measures that have been taken by an employers' organization or a trade union or employees' organization against the accused."

Under Section 5(1) and 5(2) of the Regulations dealing with the certification of bargaining representatives the intention is clear in regard to the choice of bargaining representatives - that choice must be made by the employees themselves. Section 19 of the Regulations, in aid of free and untrammelled selection thereof, prohibits an employer from engaging in certain activities tending to impede a free expression of opinion thereon on the part of his employees. These prohibitions are not an end to themselves; they are ancillary to the provisions of the Regulations relating to the choice of bargaining representatives.

The Regulations under Section 19 specifically prohibits not only domination and interference of the employer during the formative stages of labour organization; but also prohibits "financial or other support" as well. All forms of industrial intimidation from threats to compulsion of "any other means whatsoever" is also prohibited. Thus, the language of Section 19 is wide enough to comprehend any form of employer interference in the organizing and administration of labour organizations.

Acts prohibited under Section 19 become offences under

Section 42 of the Regulations and are with the consent of the Board under Section 45 subject to prosecution in the ordinary Courts by summary process or on indictment and to liability of penalty of fine or imprisonment or both as the case may be. There is no authorization to grant specific performance under the Regulations, and in no case may prosecution be undertaken for a breach thereof without the consent of the Board.(1)

The duty of the Wartime Labour Relations Board under the Regulations in a case where consent is sought under Section 45 for leave to prosecute for an offence is in all cases, except those enumerated in Section 25, to decide whether a prima facie case is made out. If so, consent is granted as of course. There is no need for the Board to hold a hearing, investigate, or make formal findings in order to fulfil its duty under Section 45; and in any case the Court before which the case is tried is not bound by any findings of the Board.

In the Joseph Stokes Co. case (2), the National Board stated:

> "In our opinion it is the function of the Court which deals with the charge to determine the merits of the prosecution and we do not consider that the Board on an application of this nature is required to take evidence on or pass on the merits of the case in anticipation of the decision of the Court nor is an inquiry for this purpose necessary in order to dispose of the application. As long as the Board is satisfied that the matter involved is of a serious nature and that the prosecution is not merely of a frivolous or vexatious nature, it is warranted, in our opinion in giving its consent to prosecution; or as specifically provided in Section 45 it may in making its decision take into consideration the extent of disciplinary measures already taken against the accused."

(1) International Association of Machinists, Lodge 712 v Noorduyn Aviation Ltd., 1 D.L.S.7-566.

(2) Joseph Stokes Rubber Co.Ltd., v United Electrical, Radio & Machine Workers of America, Local 523; 1 D.L.S.7-601.

It might be noted here that every person, trade union or association whether of employers or employees, to whom an order is issued must obey such order under Section 38 of the Regulations. It is further provided under Section 44 that every person is a party to an offence who actually commits it, who does any act for the purpose of aiding, abetting, counselling or procuring in relation thereto.

In the National Paper Goods case (1), the Ontario Board while stating that it was not called upon to decide whether there actually was a violation of Section 19(2)(c) of the Regulations in statements made by the employer, found that the statements were objectionable to an extent necessary to warrant calling for a new vote of the employees affected. The National Board, on appeal,(2) held that the statements were not compelling enough to allow of prosecution under Section 19(2)(c) of the Regulations, nor to warrant the taking of the vote directed by the Ontario Board.

In the case of Toronto Electric Commissioners (3), the Ontario Board granted leave to prosecute in a case where the Commission by requiring three of its employees to become members of the intervener agency, did, with a view of compelling them to join a trade union, use coercion contrary to the provisions of Section 20(1) of the Regulations; and the proviso of Section 19 was not applicable as an excuse in this case.

(1) National Paper Employees' Assn. v National Paper Goods Ltd., et al., 1 D.L.S.7-1163 (Ontario) February 7,1945.

(2) National Paper Employees' Assn. v National Paper Goods Ltd., et al., 1 D.L.S.7-545 (National) March 13,1945.

(3) Int.Brotherhood of Electrical Workers,Local 636 v Toronto Electric Commissioners et al.,1 D.L.S.7-1248 (Ontario) July 3,1946.

Further, since the requirement of membership in the intervener could not be supported under Section 20(1) of the Regulations, such conduct amounted to an interference with the formation of the petitioner union, within the meaning of Section 19(1); and again, the Commission violated the provisions of Section 19(2) of the Regulations in seeking by threats of dismissal and actual dismissal to compel three of its employees to refrain from continuing to be members of the petitioner.

In the Southam Press Case (1), the Ontario Board granted leave to the union concerned to institute a prosecution against the Southam Company and H.S.Southam for violation of Section 19 of the Wartime Labour Relations Regulations.

In an advertisement in the Ottawa Citizen of June 15,1946, the Company stated that it had definitely broken with the international headquarters of the International Typographical Union in Indianapolis and would re-hire its striking employees only on the condition that they tear up their union cards. It further urged the local union to make a complete severance from the International. The Ontario Board declared this action to be a clear interference with the administration of a trade union. A general intimation to the whole world that unionists need not apply for work, in particular, constituted a refusal to employ members of a trade union under Section 19(2)(a). There was a further inference from the advertisement, namely, that abstention from joining a union or from continuing to be a member of a union was a condition of continued employment for those currently working in the plant. This, the

(1) Int.Typographical Union & Ottawa Typographical Union 102 v Southam Co. et al., 1 D.L.S.7-1292 (Ontario) January 7,1947.

Ontario Board found, was a contravention of Section 19(2)(b) and 19(2)(c) of the Regulations which prohibits the imposition of working conditions which tend to restrain an employee from exercising his right to union membership, and which outlaws attempts by an employer to compel employees to abstain from joining or continuing to be a member of a union.

Leave to prosecute under each sub-section of Section 19 was accordingly granted.

In the Steel Company of Canada case (1), the Ontario Board found that the Company prevented an employee from continuing as a temporary junior melter after it was learned that he had become a member of a trade union. The union concerned petitioned for leave to institute a prosecution for an alleged violation of Section 19(2)(c) of the Regulations. The Company contended that this workman was not an employee under the Regulations because of the confidential and supervisory nature of his work; and had been excluded from the unit certified originally under the Ontario Collective Bargaining Act,1943, because of the supervisory nature of his employment. Supervisory duties not being mentioned in the Regulations as a ground of exclusion and the employee in question not having authority to employ or dismiss, any limited supervisory duties remaining were not considered sufficient to bar him from being an employee. The Company's case, thus resting on confidential status of the workers and the Board finding that supervisory duties were not in all cases conclusive refused to grant leave to prosecute.

(1) United Steel Workers of America v Steel Co.of Canada,1 D.L.S. 7-1297; see also The National Paper Goods case, 1 D.L.S.7-1163.

In the Steel Co.of Canada case it was also held that anyone may apply for leave to prosecute under Section 45 of the Regulations. The offence is the compelling, for example, of any employee, and a trade union may apply even though the employee in question is not numbered among its members.

In the Minneapolis Honeywell case (1) a unionist was dismissed for "insubordination", due largely to the failure of the Company to give adequate instructions. The Board, however, would not grant leave to prosecute for violation of Section 19(1) and Section 19(2). The Board, however, urged that efforts toward industrial harmony be undertaken.

In this case, the usual method of imparting Company instructions to employees, namely, through foremen, was not followed. An order was posted on the wall, which the employee read, but which he failed to follow for various reasons. As a result he was urged to resign, refused, and was finally dismissed, after an argument. The union applied for leave to prosecute, and was refused, since the "onus of proof" was not satisfied that the Company in dismissing the employee was guilty of infringing the unfair practices provisions of Section 19 of the Regulations.

In commenting on the case the Board stated that it held no brief for the employee, but felt that the Company policy of industrial relations was lax and tended to bring about such instances where it was not unnatural for a union or an employee to consider that discrimination for union activities

(1) United Steel Workers of America v Minneapolis Honeywell Regulator Co.,1 D.L.S.7-1299 (Ontario) January 29,1947.

was practiced. In any case, the Board concluded:

> "Such conditions are the stuff of which industrial unrest, rather than industrial harmony, is made,"

even though in this case a violation had not been indicated.

The National Board in the Joseph Stokes case mentioned that it was the duty of the Board on application for leave to prosecute under Section 45 to grant such leave if a prima facie case were made out. The similarity of the Board's duty with that of a preliminary hearing under the Criminal Code is further indicated by the judgment of the Ontario Board in the Steel Co.of Canada case which stated that any person may institute an action for leave to prosecute under Section 45 of the Regulations. The Ontario Board in the National Paper Goods case (1), spoke as if "mens rea" were necessary in the offender to create grounds for leave to prosecute for an offence. However, the cases as summarized in the paragraphs immediately preceding would seem to indicate that both the National Board and the Ontario Board tend to require that the petitioner under Section 45 make out more than a prima facie case. In the Minneapolis Honeywell case the Ontario Board stated that the "onus of proof" was not satisfied, in the Steel Co.of Canada case the Ontario Board stated that "there has been no suggestion in these proceedings that the Company has acted otherwise than in good faith", in the Backstay case (2), the Ontario Board adjourned its decision in the case of a petition for leave to prosecute under Section 45 for two weeks to enable the employer to comply with the Regulations, thus forestalling prosecution at its discretion. The National Board

(1) National Paper Employees' Assn.v National Paper Goods Ltd., et al., 1 D.L.S. 7-1163.

(2) Int.Union United Automobile etc.Workers, Local 195 v Backstay Standard Co., 1 D.L.S. 7-1233.

on appeal from the judgment of the Ontario Board in the National Paper Goods case, dealt with before was even more lenient with the employer.(1)

(b) Under Section 20:

Section 20 of the Regulations states:

(1)"No person shall with a view to compelling or influencing a person to join a trade union or employees' organization, use coercion or intimidation of any kind, but this subsection shall not be construed to prohibit the inclusion of any provision in a collective agreement.

(2) Except with the consent of the employer, no trade union or employees' organization, and no person authorized by the union or employees' organization to act on its behalf, shall attempt, at the employee's place of employment during his working hours, to persuade an employee to join the trade union or employees' organization.

(3) No trade union or employees' organization and no person acting on its behalf shall support, encourage, condone or engage in a "slowdown" or other activity designed to restrict or limit production; but this provision shall not be interpreted to limit a trade union's legal right to strike and a thing required by a provision in a collective agreement for the safety or health of the employees shall be deemed not to be a "slowdown" or designed to restrict or limit production.

(4) No trade union or employees' organization, and no person acting on its behalf, shall participate in, or in any way interfere with, the formation or administration of an employers' organization."

The general statements made in regard to Section 19 are applicable to Section 20; they are applicable too, to applications for leave to prosecute under Section 45 for a breach of any other Section of the Regulations.

Section 20 of the Regulations will be dealt with briefly, as Section 19 was previously in relation to certification and prosecution processes.

(1) National Paper Employees' Assn. v National Paper Goods Ltd., et al., 1 D.L.S.7-545 (National) March 13,1945.

In regard to the certification of bargaining representatives unfair practices by the employee is as much to be guarded against as unfair practices on the part of the employer. In the Sylvia Hotel case,(1) the question at issue concerned the matter of employees organizing during working hours, contrary to Section 20 of the Regulations. The British Columbia Minister of Labour certified the bargaining representatives without a vote, and the National Board refused to disturb the certification since the allegations were fully presented and examined at the earlier hearing. In the Fruehauf Trailer case,(2) the Ontario Board directed a new vote where the petitioner had improperly ascribed reasons to a decision of the Board not to place the intervener on the ballot, and such misrepresentations were calculated unjustly to influence the result of the vote.

In regard to a petition for leave to prosecute for a breach of Section 20 of the Regulations, the Board in directing the new vote in the Fruehauf Trailer case stated that such actions by the petitioner might well merit remedial action by the Board, in a proper case.

(c) Prosecution under the Regulations:

The legal status of a collective agreement under Order in Council P.C.1003 is not a full legal status. In Sweden in 1928 A Labour Court proceeded to interpret and declare the law as found in collective agreements based on previous jurisprudence built up from decisions of the ordinary courts in labour disputes.

(1) Sylvia Hotel Ltd.and Sylvia Hotel Employees' Organization v Local 224 Buildings Service Employees' Union,1 D.L.S.7-643.

(2) Int.Union,United Automobile,etc.,Implement Workers v Fruehauf Trailer Co., 1 D.L.S. 7-1268.See also Davis Leather Co. case C.C.H.10,491 (L.L.R.) (Ontario) February 18,1947.

Collective contracts in Sweden had been definitely enforceable at the hands of the regular courts over a considerable period.(1) This has not been so in Canada and there is no declaration in the Regulations giving collective agreements status with the regular courts. In fact collective agreements only come before the courts after consent has been obtained from the Board under Section 45 of the Regulations. Nevertheless the parties are prohibited by the Regulations from going on strike or lockout during the term of the agreement and also to fulfil the agreement according to decisions under the grievance procedure provided. The administrative machinery to initiate action if need be to enforce fulfilment of the agreement are the Boards, National or Provincial. If the proper Board sanctions leave to prosecute, penalties under the Regulations may be imposed by the ordinary courts.

There have been relatively few cases of prosecution before the ordinary courts for breach of the Regulations. Consequently, the legal status of collective agreements under the Regulations is more variable than that of an ordinary contract at common law. The Board has declared that once a prima facie case is made out for prosecution, the duty of the Board is to grant leave to prosecute in all cases except those under Section 25. Despite this declaration petitions for leave to prosecute under Section 45 have been few, since the Board usually finds

(1) The Government of Labour Relations in Sweden, J.J.Robbins, P.192 ff; The Swedish Collective Bargaining System, Paul H.Norgren, P.249 ff; 1944 Canadian Journal of Economics and Political Science, "The State and Collective Bargaining", H.A.Logan, P.480.

a way to forestall prosecution proceedings.(1) The result has been that collective labour agreements are still very much apart from ordinary agreements in legal status.

Chapter IX: Discretion of the Board under the Regulations:

(a) Introduction:

In a previous part of this thesis the scope of the Regulations and the limitations thereto were considered. In a general way, the authority of the Wartime Labour Relations Board was limited to certain situations, to specified functions; while at the same time general procedure for performing these functions was suggested.

The Wartime Labour Relations Regulations provided for the creation of a National Wartime Labour Relations Board and Provincial Boards. The Boards so established are administrative authorities and to the extent that they exercise "unfettered discretion" are not ordinarily subject to ordinary Courts of Law. To the extent that the process leading up to the order involves any objective standard of comparisons however, such order may be questioned by the ordinary courts through the medium of one of the common law writs, in a proper case. In both cases, legislative or quasi-judicial, the order arrived at may again be cuashed if ultra vires or contrary to "natural justice". With the exception of the process under Section 25 of the Regulations the function of the Board appears to be purely administrative, that is legislative or quasi-judicial and any standards followed are of its own creation. In the case of decisions under Section 25 the Board's duty may take

(1) Int.Union United Automobile etc.Implement Workers Local 195 v Backstay Standard Co.Ltd.,1 D.L.S.7-1233.

on more of a common law judicial nature, because of the finality of the finding of the Board and its adoption as such by a Court of Law.

The Regulations were enacted in 1944 by Order in Council under the War Measures Act during a war emergency. The Preamble to the enactment made it clear that the purpose was to make better relations between employer and employee, as a matter of Government policy. A question is increasingly arising in interpretation of this type of legislation as to how soon the rule in Heydon's case (1) will supplant the literal rule. The judgments of the Ontario Board as previously pointed out would appear to follow a liberal interpretation as compared with the stricter interpretation of the National Board. In any event the decision on doubtful points will allow for "unofficial" notice of things outside the bare words of the Order in Council. The practice of the Ontario Board is in accordance with Section 15 of the Interpretation Act, R.S.C.1927,Ch.1 which specifically directs that every Federal Act be interpreted according to the spirit of the Act. The National Board itself has gone so far as to state that in the interpretation of the Regulations their purpose and object must be kept in mind.(2)

(b) The Discretion Vested in the Board:

The field of labour relations is too vast and intricate, and too involved with "human relations" to enable legislators to set up precise and unalterable rules of administration to

(1) Co. 7B (1584).

(2) Western Canada Firebosses Assn. v Crow's Nest Pass Coal Co. 1 D.L.S.7-535 (National) February 1,1945.

govern the Board which has been entrusted with the responsibility of carrying out the work of the Order in Council. The powers of the Board are not sharply defined; rather they are outlined, and each has a nimbus of "discretion" that serves to enlarge its real meaning and extent.

The nature and extent of the discretion vested in the Board under the Regulations is not definite. It is revealed somewhat objectively in the rules established by the Board and in "principles" stated in particular cases. The judgments of the Board under the Regulations are more in the nature of court decisions than were decisions under the National War Labour Board.(1) However, except possibly in relation to judgments under Section 25 of the Regulations, the Board may not be bound even by such "precedents" as it may itself seem to establish when such precedents in particular cases hamper the Board in carrying out its duties under the Order in Council.(2)

In the process of certification of bargaining representatives under the Regulations the Board early laid down a standard process for satisfying itself as to the proper choice of the employees affected.(3) These rules, however, have been changed from time to time by the Board in its discretion or latitude in distinguishing decisions. For instance, the exception to the "six months" rule in the Wright-Hargreaves case which makes it inapplicable to cases where no vote had previously been taken,(4)

(1) Ford Motor Co.of Canada v Int.Union United Automobile etc. Implement Workers Local 144, 1 D.L.S.7-522.

(2) Retail Clerks Int.Protective Assn.Local 8320 v Shop-Easy Stores Ltd.et al., 1 D.L.S.7-555.

(3) The Wright-Hargreaves case,1 D.L.S.7-542.

(4) The Northern Shirt Co.case, 1 D.L.S.7-594.

and the exception to Rule 5 of the Wright-Hargreaves Procedure allowing the name of the agency with the previous collective agreement to be placed on the ballot.(1)

The National Board in invariably refusing applications to reconsider its previous decisions stresses the quasi-judicial nature of its function,(2) while the Ontario Board in refusing to administer the Regulations in a mechanical fashion stresses the administrative nature of its function.(3)

The function of the Wartime Labour Relations Board would appear to be quasi-judicial. It has a wide discretion combined with a leaning towards the building up of a system of case decisions or precedents. For instance, in a case not specifically covered by the Regulations, the Board can make general rules of coverage and proceed in a certain direction for a time, and later the Board may change the rule in question and proceed on another course.(4) In cases specifically covered by the Regulations the Board tends to follow "precedent" previously established, as in the case of an ordinary Court.

As previously mentioned the National Board favours a literal interpretation of the Regulations while the Ontario Board favours a liberal interpretation. This distinction is most clearly shown in the interpretation of the term "employee" under Section 25 of the Regulations.

(1) Brotherhood of Railroad Trainmen v New York Central Railroad, 1 D.L.S.7-582; see also Honeysuckle Bakeries case,1 D.L.S.7-593.

(2) United Steel Workers of America,Local 3493, v John East Iron Works Ltd., 1 D.L.S.7-587.

(3) The Breithaupt Leather Co.case, 1 D.L.S.7-1218.

(4) Quebec Federation Professional Employees, Unit No.3 v Bell Telephone Co.of Canada, 1 D.L.S.7-634; cf.,C.C.H.10,419 (L.L.R.)

The Regulations define "employee" as "a person employed by an employer to do skilled or unskilled manual, clerical or technical work...." The words "employed" and "employment", are not defined and the definition of "employer" is of no assistance.

Two views as to the coverage of the term "employee" under the Regulations may be noted here:

1. The view of the Ontario Board.
2. The view of the National Board.

1. <u>The view of the Ontario Board</u>: A wide and liberal view in line with the spirit of the enactment and the purposes sought to be accomplished. According to this viewpoint the scope of the term "employee" must be ascertained not by reading the definition section alone but by reading that section in relation to the Regulations as a whole. If the Regulations were meant to be narrowly interpreted in the common law master-servant approach there would be no need to give the Board final and conclusive authority under Section 25(1)(a) to determine whether a person is, for the purposes of the Regulations, an employee. Section 25(1) contemplates, in its five sub-sections, the exercise of discretion by the Board in a quasi-judicial manner. If it were otherwise and the function of the Board were purely judicial according to the common law standards of the master-servant relationship in tort, then the draftsmen have conferred on the Board and denied to the Courts the judicial function of interpreting the meaning of the term "employee" - a position which may well be constitutionally untenable.

The function of the Board is quasi-judicial, rather than

strictly judicial according to common law standards. In exercising its discretion in this regard, the Board must consider whether the persons concerned in the particular case are among those who, to paraphrase the wording of the Preamble to the Regulations, should collaborate with their employers for the advancement of the enterprise in which they are engaged; should freely discuss matters of mutual interest with their employer; should settle their differences with their employer by peaceable means; and should be free to organize for the conduct of negotiations with their employer.

In short, according to the interpretation of the Ontario Board, the Board must be permitted to refer to the material facts and substance of the employer-employee relationship in a given case, bearing in mind the purposes for which the Regulations were enacted. This approach goes far beyond a consideration of the bare words of the Regulations, and beyond a reference to words or phrases which have acquired a more or less standardized meaning. The scope of the term "employee", according to this view, is as wide as under the Wagner Act in the United States, which was defined thus:

> "As used in the Act the term embraces 'any employee', that is all employees in the conventional as well as the legal sense except those by express provision excluded. The primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehends securing to the individual the rights guaranteed and protection afforded by the Act."(1)

The industrial unrest which the Regulations are designed to mitigate may logically include persons who are for other

(1) Seattle Post Intelligencer case (1938) 9 N.L.R.B. 1262.

and more particular purposes not employees and their employers as well as persons who are for that other purpose employees and their employers. The emphasis is on the community of interest and not on judicial approach. This view is set out fully by the Ontario Board in the Canada Coal case (1), thus:

> "It is our opinion that the definition of "employee" in the Regulations taken together with the powers contained in Section 25(1)(a) is of as wide scope as the definition in the Wagner Act."

2. The view of the National Board: A strict and narrow view in line with the common law relationship of master and servant. According to this viewpoint the term "employee" should be given its normal and natural meaning, the meaning it has in ordinary usage. The power conferred on the Board under Section 25 of the Regulations to determine finally whether a person is an employer or an employee does not qualify the ordinary meaning of the terms. The jurisdiction given the Board under Section 25 is to determine a matter of fact, and any decision of fact must be consonant with the law. There is no suggestion that the Board has an overriding discretion in determining whether a person is an employee.

Thus, according to the view of the National Board an "employee" under the Regulations is a person whose services are used and who is kept at work by another; personal effort at the direction or under the supervision of another is always implied.

The general rule of statutory construction is that a word is to be given its literal meaning unless such construction

(1) Coal and Ice Drivers and Helpers, Local 352 v Canada Coal Ltd., 1 D.L.S. 7-1269 (Ontario) November 27,1946. See also The Spruce Falls Power & Paper case, 1 D.L.S.7-1301.

leads to ambiguity and absurdity or unless the definition section of a statute calls for a technical or artificial meaning other than the normal meaning. There is nothing in the definition section of the Regulations which requires giving the term "employee" a meaning different from the one it enjoys in ordinary usage. The modern terms "employee" and "employer" are the equivalent of the basic English terms servant and master and in the absence of a contrary intention clearly indicated in the Regulations it must be assumed that the draftsmen had these terms in mind. Throughout the common law a servant is deemed to be one who is subject to the supervision of his master as to the manner in which he does his work.

The view of the National Board is set out in its decision on appeal from the Ontario Board in the Canada Coal case.(1) The National Board overruled the Ontario Board and held that an independent truck driver who operates his own truck is not an employee under the Regulations, since he is usually working but a short time for any one company and is not sufficiently under the control of any one employer to be deemed an employee.

The other matters dealt with under Section 25 of the Regulations have not had a long history of interpretation under the common law. Consequently, the Board in dealing with the matter of bargaining in good faith, appropriate bargaining unit and the others must work out and develop a procedure of its own. Whether administrative interpretation definitely based on precedent will finally emerge is not yet definitely known as development is still going on.

(1) Coal and Ice Drivers and Helpers, Local 352 v Canada Coal Ltd., C.C.H.10,503 (L.L.R.)(National) March 4,1947.

The administrative discretion of the Board is illustrated under Section 45 in regard to consent to prosecution for an offence under the Regulations. Penalties are provided for offences under the Regulations, for example, refusal to carry out an order, interference with a trade union, striking. Such penalties are not enforced by the Board, but by the ordinary Courts on consent of the Board to prosecute under Section 45. The Board has discretion in granting consent. The National Wartime Labour Relations Board has stated in this regard:

> "As long as the Board is satisfied that the matter involved is of a serious nature and that the prosecution is not merely of a frivolous or vexatious nature, it is warranted, in our opinion, in giving its consent to prosecution; or as specifically provided in Section 45 it may take into consideration the extent of disciplinary measures already taken against the accused." (1)

In view of the policy of the National Board in particular to endeavour to forestall prosecutions before the ordinary Courts nothing very definite as a procedure of precedents has emerged.

(c) The Nature and Extent of the Board's Discretion:

(1) Limits imposed on the discretion of the Board

There may be three types:

(i) Legislative restrictions:

The discretionary power of the Board is specifically limited under Section 24(7) where the procedure of the Board must in all cases allow an opportunity to all interested parties to present evidence and make representations; Section 27 gives instances where the approval of the Minister of Labour is

(1) Joseph Stokes Rubber Co.Ltd. v United Electrical, Radio & Machine Workers of America, Local 523, 1 D.L.S. 7-601.

required to make regulations; Section 31(5) specifies that the procedure of the Board must conform to "natural justice"; and Section 45 provides that the discretion of the Board in granting permission to prosecute for an offence may be exercised subject to the disciplinary measures already taken.

(ii) Self-imposed restrictions:

If the Board had definitely ruled that all supervisory or disciplinary persons were beyond the scope of the Regulations that would have been an exercise of legislation pure and simple and not of discretion since it would not have been in relation to any particular case before the Board. The Board, for example, in dealing with particular cases may exclude persons of a supervisory or disciplinary nature according to rules of procedure which are being developed by the Board itself.

(iii) Restrictions imposed by the Court:

Prosecution for offences under the Regulations is a duty of the ordinary courts. To date few if any cases have been carried to their conclusion in the courts. In such prosecution, however, the court could legally interpret relavent provisions of the Order in Council and decide whether the Board had exercised a legitimate power. The matter of discretion might also come up in a case where an order of a Board was challenged as being ultra vires.

(2) Discretion in relation to specific provisions:

Subject to any definite procedure prescribed or developed by the Board itself, the Board has a discretion for example, under the following sections of the Regulations:

Section 7: The Board has a discretion in deciding whether bargaining representatives have been regularly and properly elected or appointed and that the bargaining unit is appropriate.

The certification under Section 8 is mandatory.

Section 8: In specifying the bargaining unit the Board "is not limited by the expressed words of either the union or the employer".(1)

Section 19: The Board holds itself and not the employees responsible for estimating the influence that the employer may have exerted over employees during their organization.

Section 20: The Board here too estimates the influence of coercion or interference of one employee over another in trade union activities.

Section 24: The Board has a discretion in relation to acceptable evidence.

Section 45: The Board has a discretion with regard to consent for leave to prosecute for an offence under the Regulations.

Section 25: The Board here, however, has more of a judicial function than a discretionary one since its finding is final and conclusive and binding on the ordinary courts. In regard to the interpretation of the terms "employee" and "employer" the National Board definitely follows the common law prototype. In regard to the interpretation of the other terms the National Board has not as yet developed a definite procedure; the various appropriate bargaining units would appear to be as literally defined; bargaining in good faith has not been defined beyond a decision that absolute refusal of an employer to meet with his employees constitutes a failure to bargain in good faith; employer and employee agencies and collective agreements have been definitely defined in practice.

(1) The Star Publishing Co. case, 1 D.L.S.7-552 (National).

(3) Decisions of the Board:

In general, Boards under Order in Council P.C.1003 are not courts; rather they are administrative or quasi-judicial bodies, separate from the hierarchy of courts. There is thus no appeal from the judgment of the Board under the Regulations to any ordinary court. As pointed out before, however, common law prerogative writs may exercise control over that part of the machinery of the Board which partakes of a judicial nature.

The ordinary court cannot require the Board to take a vote as a means of satisfying itself that bargaining representatives have been properly chosen under Section 7 of the Regulations; This function of the Board is purely discretionary. The Board however may be compelled to exercise its discretion in one way or the other.

Under Section 25 of the Regulations since the Board performs a definite judicial function its judgment is subject to review by the ordinary courts; this is especially true in regard to the interpretation of the term "employee".

The wide discretion given the Board under the Regulations and the immunity from the ordinary courts makes for a speedy process in the settlement of disputes. At the same time the National Board is in a position to work out a definite jurisprudence of its own, especially since it must grant leave to prosecute for offences under the Regulations.

(4) Precedents of the Board:

The Board under Section 27(1) may make regulations necessary to enable it to discharge its duties.

In general, the Board must decide in each case what constitutes an appropriate bargaining unit, and almost individually what workers may claim the benefit of the Regulations. This duty

does not favour the development of absolute and fixed precedents; one of the reasons for the development of administrative Boards was to get away from the fixed precedents of the ordinary courts.

However, even though the Board in each case decided on its own particular facts, it is unlikely that any such human institution could function long without developing in the course of time some grooves or patterns of conduct. But, we must be forewarned against the tendency to erect symmetrically perfect theories which have no relation to reality.

For the most part patterns emerge slowly. In the beginning, the Board might rely on two empirical forms of guidance as it groped its way toward a policy of its own. The experience of similar Boards in the United States and Canada and the voluntary forms and patterns established by labour organizations in existence in particular plants and in industry generally in Canada are the basis upon which, in general, precedents of the Board are being developed.

(d) Discretion of the Board and Desires of the Parties:

The question as to what extent the Board responds to the desires of the employees or employers in carrying out its duties under the Regulations will be dealt with under three headings:

1. Opportunity to claim or waive bargaining rights.
2. Determination of an appropriate unit.
3. Choice of bargaining representatives.

1. Opportunity to claim or waive bargaining rights:

No specific provision in the Regulations covers, or recognizes, the contingency that employees may not elect to exercise the right of choosing bargaining representatives, a pre-requisite to certification and collective bargaining, in most cases. In general, it is the employees who take the initiative in collective bargaining; the employer may, under the provisions of Sections 15 and 16, exercise rights in this regard where an agreement is in existence.

There is no provision for a "run-off" vote to determine whether the employees favour collective bargaining. The Ontario Board in its judgment in the Wright-Hargreaves case, November 15, 1944, directed a "run-off" vote where neither union on the previous vote obtained a majority; the Ontario Board felt that since an overwhelming majority of the employees concerned favoured collective bargaining it was only just to hold another vote with but one name on the ballot, that of the union holding the majority over the other in the previous vote, in order to see if the employees would rather forego collective bargaining than bargain through the sole union on the ballot. The National Board, on appeal, stated, in overruling the Ontario Board:

> "In our opinion the proper purpose of the vote is not to ascertain whether each employee is so committed to the union of his choice that he would rather forego the privilege of collective bargaining than bargain through the other union. The purpose of the vote is set out in Sections 5 and 7 of the Regulations....."

The National Board in the Shop-Easy Stores case (1), April 10, 1945, stated:

> "....the National Board does not feel that a "run-off" vote is consistent with the Regulations."

(1) 1 D.L.S. 7-555.

Thus, the Wartime Labour Relations Board has decided that it is not its function to hold elections to decide whether employees desire individual rather than collective bargaining. Indirectly, the Regulations may determine the wishes of the employees in that regard in the case of a vote where a majority of the employees affected vote for one union or on the other hand, in the case of a vote with two names on the ballot where the combined vote is less than one half of the employees concerned. In no case do the Regulations require an unwilling majority of employees to bargain through representatives.

2. Determination of an appropriate unit:

Section 25 of the Regulations gives the Board final jurisdiction to determine an appropriate bargaining unit.

The National Board in the Star Publishing Co. case (1), March 27,1945, stated:

> "This Board is of the opinion that in fixing the unit of employees appropriate for collective bargaining, it is not limited by the expressed wishes of either the union or the employer."

Under Section 5(4) of the Regulations, "if in accordance with established trade union practice" the majority of a craft belong to a separate union, that union may appoint or elect bargaining representatives. This specific reference to the wishes of the employees might by implication prescribe the discretion of the Board in the case of all employees under the Regulations. This would appear to be the view of the Ontario Board, as set out in the Wright-Hargreaves case, July 18,1944, thus:

> "In the case of employees who belong to a craft which has separate organization according to established

(1) 1 D.L.S. 7-552.

> trade union practice, the position is clear; the Regulations are silent as to the principles applicable in other cases. However, some assistance is to be derived from the very fact that the Regulations have gone to considerable lengths to protect craft groups. It may reasonably be inferred from these provisions that the legislators intended the wishes of the employees themselves to be permanent unless overborne by other considerations of great weight. Indeed, such a construction would be no more than a legislative recognition of the well established facts of industrial organization; any other construction would but defeat the very purpose which the Regulations were designed to secure."

In so far as the inclusion or exclusion of individuals is concerned, the National Board would apply the common law master-servant approach, according to a strict interpretation. In regard to the carving out of particular units from the whole group the National Board in practice is not governed by the wishes of the employees concerned, where there is no craft unit involved.(1)

The National Board, in the development of a procedure for determining appropriate bargaining units under the Regulations, would appear to have some authority to officially take notice of industrial practice. The Board, however, holds that it is not strictly limited to this practice; apparently considering that the units defined by the words of Section 25 have not acquired judicial meaning to the extent acquired by the term "employee". The wide interpretation of the Ontario Board here, as in the case of employees, must give way to the narrower interpretation of the National Board.

(1) David Spencer Ltd.v Retail Meat Employees' Federal Union, Local 222, 1 D.L.S.7-671.

3. Choice of bargaining representatives:

The desires of the majority of employees concerned is decisive in choosing bargaining representatives for an appropriate bargaining unit. The bargaining representatives properly appointed by the employees or appointed or elected by the union concerned become the exclusive bargaining representatives of the entire group - majority and minority. In respect to representation the desires of the minority are subject to the desires of the majority. The Board has a discretion as to the particular procedure taken in certain cases, but the choice of bargaining representatives is for the employees in any particular case, subject to the Board's discretion as to the unit for which they are to serve.

The National Board in the Honeysuckle Bakeries case (1), August 9,1945, stated:

> "We are of the opinion that, in order to properly fulfil the intent of the Regulations, a vote of the employees should be taken whenever there is any doubt as to the wishes of the employees as regards bargaining representatives or as to discrimination being practiced."

Sections 5-7 of the Regulations make it clear that the desires of the employees govern the Board in the certification process; the agency having the majority support of the employees affected is the bargaining agency for all the employees concerned.

The Board under Section 7 has authority to determine a procedure by which the wishes of the employees may be truly ascertained. The rules laid down in the Wright-Hargreaves case and later varied from time to time constitute the Board's procedure in this regard.

As in the case of the determination of an appropriate unit

(1) 1 D.L.S.7-593.

the wishes of the employer are negligible in regard to the choice of bargaining representatives under Section 7 of the Regulations.(1)

When the Board is in doubt as to whether a union or an association is a majority one, a vote is usually taken in order to assist the Board in its function under Sections 7 and 8 of the Regulations.

A question will arise as to the choice which should be offered the employees on the ballot. The Board must look at the history of collective bargaining in the particular plant in such a case. The first question to arise will be that of deciding whether the application for certification is in order, for example, to determine in the case where there is an agreement in existence if that agreement has run at least ten months. The second question will be to determine if the bargaining representatives are properly sponsored and chosen. This investigation will include a determination of the status of the employee agency as well as the regularity and validity of the choice of bargaining representatives. In regard to the latter, the procedure approved by the Wright-Hargreaves case requires a vote if there is a doubt.

The form of the ballot in a vote under Section 7 varies. Usually the petitioner is the only name on the ballot; if, however, the agency holding the present agreement intervenes the name of that agency should also appear on the ballot,(2)

(1) The Searle Grain Co. case,1 D.L.S.7-570,(National) May 22,1945.

(2) New York Central Railway case, 1 D.L.S.7-582.

and even if that agency does not intervene, the Ontario Board has placed the name of that agency on the ballot.(1)

If, again, the agreement has run its course and the agency party to the agreement has lost interest in the employees and made no effort to renew the agreement or, if the agency has gone out of existence, the name of the agency would not be included on the ballot with the petitioner unless actual intervention took place.(2) Where discrimination against the petitioner is shown on the part of the employer, a vote may be taken even where a prima facie majority does not exist.

The rules in regard to vote taking were first set out by the Board in the Wright-Hargreaves case as mentioned before,(3) but may be varied if proper evidence of unfair practices is presented.(4) The majority must consist of a majority at the time of application;(5) a change in the size of the unit after a vote is ordered does not warrant a refusal to certify,or the direction of a new vote.(6)

(1) Canadian John Wood Co. case, 1 D.L.S. 7-1212.

(2) The Breithaupt Leather case, 1 D.L.S. 7-1218.

(3) 1 D.L.S.7-542.

(4) The Foster-Wheeler case, 1 D.L.S.7-1133.

(5) Lockport National Sea Products Ltd. v Canadian Fish Handlers' Union, Local 7, 1 D.L.S.7-663 (National), December 11,1946.

(6) Cub Aircraft Corporation Ltd., v International Association of Machinists, et al., 1 D.L.S.7-675, (National), February 11,1947.

The form of the ballot under Section 7 is usually one of the following two types:

One: "In your dealings with Packard Electric Co.Ltd., do you wish to bargain through United Electrical Workers of America, Local 529, U.E.-C.I.O"; or

Two: "In your dealings with Wright-Hargreaves Mines Ltd., do you desire to be represented for collective bargaining purposes by International Union of Mine, Mill & Smelter Workers, Local 240? (or) Independent Canadian Mine Workers' Union?" (1)

In general, the notice of election given by the appropriate Board contains a statement similar to the following:

> "Voters are entitled to vote without interference, restraint or coercion. No electioneering will be permitted." (2)

The National Board, in the National Paper Goods case,(3), held that the manager in addressing the employees to persuade them to vote against the union was not seeking to compel them under Section 19, so as to set aside certification. The National Board, in the Toronto General Hospital case,(4) held that an employee,a member of the petitioner union, who spend election day canvassing the Hospital employees to vote for the petitioner was not improperly electioneering so as to warrant the setting aside of the vote. The Ontario Board, on the other hand, in the Davis Leather case,(5) directed a new vote in a case where it found that the employer had published certain statements in the Press previous to the first vote which had contributed to the defeat of the petitioner.

(1) Packard Electric Co. case, 1 D.L.S.7-527.
Wright-Hargreaves case, 1 D.L.S.7-542.

(2) Toronto General Hospital case, 1 D.L.S.7-584.

(3) 1 D.L.S. 7-545.

(4) 1 D.L.S. 7-584.

(5) Davis Leather Co. case,C.C.H.10,491 (L.L.R.) February 18,1947.

The majority required in a vote by the Board to determine whether bargaining representatives have been properly chosen is a majority of the employees affected. This means, not merely a majority of those voting but a majority over-all; perhaps a less democratic voting process than that which exists under Dominion or Provincial electoral systems.

Chapter X: Appeals under the Wartime Labour Relations Regulations:

(a) Introduction:

The Wartime Labour Relations Board, under Section 24(7) "shall determine its own procedure but shall in every case give an opportunity to all interested parties to present evidence and make representations."

The Board under Section 27 has authority thus:

(1) "The Board may, with the approval of the Minister make such regulations as may be necessary to enable it to discharge the duties imposed upon it by these regulations and to provide for the supervision and control of its officers, clerks and employees.

(2) The Board may prescribe anything, which, under these regulations, is to be prescribed.

(3) The Board with the approval of the Minister, may appoint an executive committee to exercise its powers subject to such directions or conditions as the Board may specify."

On June 7,1944, pursuant to Section 27 of the Regulations the Board made Regulations governing various types of applications. Under Section 7 of these Regulations (Rules of Procedure), appeals may be made to the National Board in a proper case. Section 7 is as follows:

(1) "Any person directly affected by any decision or order of a Provincial Board may appeal to the National Board, if
(a) The Provincial Board making such decision or order grants leave so to appeal and the application for such leave to appeal has been received by the Provincial Board within thirty days of the date of the mailing of the decision or order by the Provincial Board; or
(b) the National Board grants leave so to appeal, and the application for such leave to appeal has been received by the National Board within sixty days of the date of mailing of the decision or order by the Provincial Board: (December 16,1946).

(2) Within thirty days after the granting of such leave to appeal, the appellant shall appear before the National Board and present the said appeal provided, however, that the National Board may for good cause adjourn the hearing of the said appeal from time to time.

(3) On any such appeal, the decision or order of the National Board shall constitute the decision or order of the Provincial Board as if originally made by it.

(4) Except as otherwise provided in this section, an appeal shall not operate as a stay of proceedings from the decision appealed from.

(5) Where a Provincial Board has directed that a vote of employees be taken under the Regulations and an appeal has been taken from such decision, the Board appealed from or the National Board may order a stay of such proceedings.

(6) The Chairman of the Board appealed from and/or the Chairman of the National Board may act for or on behalf of his Board to dispose of any application for a stay of proceedings or to grant a stay of proceedings and any decision or order made by him pursuant hereto shall be and be deemed to be the decision or order of his Board."

(b) Leave to Appeal:

The Regulations provide for an appeal from a Provincial Board to the National Board, not as of right but by leave of the National or Provincial Board concerned. The Wartime Labour Relations Board partakes more of the nature of a Court of Law than did the National War Labour Board.(1) The former Board delivers its judgment and the matter is then res judicata; the

(1) Section 7 W.L.R.B. Regulations, 1 D.L.S.7-77. Section 10 of Wartime Wages Control Order. 1943.

latter Board, on the other hand, had a specific duty to review the decisions of Regional Boards and bring them in line with the Government's Policy.(1)

The judgment or order from which an appeal may be taken with leave is not limited to a final decision. The Ontario Board in the Port Arthur Shipbuilding case (2), felt that an appeal should not be allowed to determine whether the direction of a vote had been erroneous or not, where no final decision in the whole case had been made. The Board likened this procedure to the matter of admissibility of evidence in an ordinary court. The National Board, however, granted leave to appeal from the interlocutory order directing a vote in the eight crafts concerned. As a concession to the judgment of the Ontario Board and in order to forestall possible employer anti-union activity, the National Board directed the vote to be taken forthwith.(3)

In a case involving discretion purely, leave to appeal would not be warranted in the ordinary case. The principles of the ordinary court would apply to give an appeal in all cases on the question of constitutional jurisdiction and ultra vires.(4)

The Regulations do not set out grounds of appeal. The Board obviously may grant leave to appeal if a novel and important

(1) The Ford Motor Co.case, 1 D.L.S.7-522; John East Iron Works, 1 D.L.S.7-587; C.P.R. v Port McNicol Freight Handlers, 2 D.L.S. 38-1044.

(2) C.C.H.10,416 (L.L.R.) August 29,1944.

(3) 1 D.L.S.7-506, September 28,1944.

(4) The Motor Products Corp.case, 1 D.L.S.7-1131; The Canadian Marconi Co.case, 1 D.L.S.7-557; Dominion Oilcloth & Linoleum case, 1 D.L.S.7-509; The Noorduyn Aviation case, 1 D.L.S.7-566.

point of law is involved in order that the National Board may set at rest any doubts as to the interpretation of the law. It is obvious, too, that the Board may not grant leave where the application is frivolous or vexatious in nature. Beyond these basic rights common to most appellate courts the Board must develop its own grounds of appeal.

(c) Practice on Appeal:

The right of appeal pre-supposes some basis of comparison, otherwise the substitution of one "unfettered discretion" for another would result. Under the Wartime Labour Relations Regulations the standard of comparison may vary from the judicial one adopted under Section 25 to the almost purely discretionary one under Section 7 of the Regulations.

It might be pointed out here that no appeal will lie in the case of a pending decision. This was decided in the Penman's case, where the Ontario Board had not published its decision as to whether there should be a vote or a direct certification, before the appeal. The National Board held that the appeal was out of order and premature under these circumstances.(1)

The following summary will indicate the practice of the Board in dealing with a number of cases on appeal:

In regard to certification:

A strict adherance to precise legal form is not a condition precedent to coming within the jurisdiction of the Board. A mistake in the name of a union, whereby the words "Local 144"

(1) Penman's Limited v United Textile Workers of America, Local 153, 1 D.L.S.7-673, January 14,1947.

was inserted in the middle instead of at the end, being clearly due to inadvertence and thus a "defect of form or technical irregularity" within Section 47 of the Regulations, will not warrant rejection of bargaining representatives certified by a Provincial Board.(1) The fact that the application for certification is made on behalf of a union and does not state that it is made on behalf of the bargaining representatives does not warrant the National Board in rescinding a certificate issued by the Provincial Board. The application in such case is held to be made "on behalf of" the bargaining representatives under Section 6 of the Regulations, despite the fact that a trade union is not a full-fledged legal entity; a trade union has some legal status as an entity under the Regulations.(2)

All interested parties must be given an opportunity to present evidence and make representations as part of the process leading to certification; otherwise the certification may be set aside.(3)

Where a Provincial Board finds on the evidence that the union petitioner has a majority of the employees affected, and there is evidence before the Board on which such finding might reasonably be based, the National Board will not set aside the certification.(4)

(1) Ford Motor Co.of Canada case, 1 D.L.S.7-522; Northern Electric Co.case, 1 D.L.S.7-667; cf.,National Fish Co.case,1 D.L.S.7-531, Pease Foundry case, 1 D.L.S.7-1242.

(2) Ford Motor Co.case, 1 D.L.S.7-522.

(3) The Vivian Diesels case, 1 D.L.S.7-501.

(4) Packard Electric Co.case, 1 D.L.S.7-511.

In the case of a trade union applying for certification before it receives its Charter, the Board will allow the application to be amended as long as the Charter has been obtained before the date of the hearing of the petition.(1)

The Regulations do not provide for the revocation of a certificate of certification. Hence, where bargaining representatives have been certified and the employees have taken all the prescribed steps towards negotiation of an agreement but where the employer will not conclude the agreement because the employees have changed their affiliation, the Board will not certify the bargaining representatives appointed by another union.(2)

Section 9 of the Regulations provides that at any time after ten months of the beginning of an agreement, new bargaining representatives may be chosen under Section 5 and application made for their certification. The fact that there is a provision for an automatic renewal if the agreement is not terminated on thirty days' notice makes no difference if new bargaining representatives have been chosen and application made for their certification before the commencement of that period (3); and,indeed,perhaps if the application is made at any time up to the end of the thirty days' notice.(4)

Where a petition for certification was mailed to the Board between the tenth and twelfth months of the term of an

(1) Packard Electric Co. case, 1 D.L.S.7-511.

(2) Sitka Spruce Lumber Co.case, 1 D.L.S.7-603.

(3) Packard Electric Co. case, 1 D.L.S.7-511.

(4) Aluminum Co.of Canada case, C.C.H.10,504 (L.L.R.) March 4,1947.

agreement, but was received by the Board after the last day of the twelfth month, another body having been certified and having entered into a collective agreement in the meantime, the Board held that the application was filed too late.(1)

Previous to the amendment of Sections 15 and 16 making conciliation procedure specifically applicable to renewals, an order referring the matter to the Minister under Section 11 of the Regulations was set aside.(2)

The Rules of Procedure suggested in the Wright-Hargreaves case have been fully dealt with previously.

In regard to Grievance Procedure:

A grievance procedure established by the Board under Section 18(2) must be one concerning the interpretation or violation of the agreement; if it is one established concerning grievances arising under the collective agreement, it will be set aside.(3)

In regard to Section 25:

In regard to appeals under this heading, the National Board has adopted in particular in relation to the term "employee" its ultra-judicial approach. This is due to the fact that the terms "employer" and "employee" have acquired a definite meaning through many years of common law judicial interpretation. The judicial function of the Board under Section 25 is further stressed by its wording.

In regard to Section 45:

Where an application is made under Section 45 for leave to prosecute for an offence under the Regulations and permission is

(1) Aluminum Co.of Canada case, C.C.H. 10,504 (L.L.R.) Mar.4,1947.

(2) Spruce Falls Power & Paper Co.1 D.L.S. 7-1301.

(3) Dominion Forge case, 1 D.L.S.7-505.

granted, an appeal will not be allowed because the Board did not investigate the facts and hold a hearing, since the function of the Board under Section 45 is to satisfy itself that the prosecution is not merely of a frivolous or vexatious nature.(1)

In General:

The Board has no power under the Regulations to grant such remedies as injunction or mandamus, or to order specific performance of a collective agreement; its only power is to grant or refuse its consent to a prosecution. In one case the National Wartime Labour Relations Board corrected a decision of the Quebec Wartime Labour Relations Board, which had exceeded its authority by ordering an employer to give effect to an arbitration award on the question of the seniority clause in its agreement.(2) The National Board held that all a board could do was to institute a prosecution, or consent to its institution, for an offence under the Regulations.

(1) Joseph Stokes Rubber Co. v United Electrical, Radio & Machine Workers of America, Local 523, 1 D.L.S.7-601.

(2) International Association of Machinists, Lodge 712 v Noorduyn Aviation Ltd., 1 D.L.S.7-566.

Chapter XI: Labour Disputes and Settlement Thereof (In General):

> "Something in the nature of continuous administrative machinery for the orderly disposition of controversies is as necessary for the establishment of law and order in Industry as in the State. There is the same need for the definition of rights and obligations, the formulation and interpretation of rules, and authoritative decision in matters of controversy. In the State, procedure as respects all these particulars has been vastly elaborated. In Industry, it is at the beginning of its evolution."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.223.

(a) Types of Labour Disputes:

In the main, there are two types of Labour Disputes. One is concerned with conflicts about interests, the other, with conflicts about rights.

Conflicts about Interests or "non-justiciable disputes" arise out of a claim for the modification of an existing right or the creation of a new right, for example conflicting views on conditions of work between employers or employers' associations on the one hand, and workers or workers' trade organizations on the other. These disputes pertain less to misunderstanding in regard to accepted conditions of work than to disagreements as to what the conditions of work should be in a particular case. Conflicts about Rights, usually referred to as "disputes about rights" or "justiciable disputes", are labour disputes arising out of existing rights, whether such rights are based on the law or some works regulation, or on an individual or collective agreement between the parties.(1)

(1) International Labour Office: Labour Courts. Studies and Reports, Series A (Industrial Relations), No.40, Geneva, 1938, P.19.

Conciliation and arbitration machinery usually take care of the former, while "Labour Courts" usually deal with the latter. In some cases, however, "Labour Courts" are concerned in disputes about Interests while in others conciliation and arbitration machinery are concerned in disputes about Rights.

(b) Non-justiciable Disputes:

> "Compulsory Investigation prior to a severance of relations between the parties to a difference, and accompanied by power to make findings, the acceptance of which is left optional with the parties, appears to admit, in industrial disputes, of the application of Reason to a greater degree than is afforded by any one of the several methods individually applied. In reality it is a combination of methods, and as such it unites what is best in Conciliation, Investigation, and Arbitration, and avoids limitations which are self-evident wherever they are employed separately."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.215.

There are two basic ways of settling labour disputes of a non-justiciable nature between employer and employee. These are, in the first place, voluntary conciliation, in the second place, compulsory arbitration.(1) The two types mentioned exist in many varieties; with intermediate forms.

In most States the first efforts, at least, used toward settlement of trade disputes of this nature are based on the principle of conciliation. Great Britain is the classic example of a State adhering in the main to voluntary conciliation efforts. The Industrial Disputes Investigation Act, presently suspended during the life of Order in Council P.C.1003, is a typical example of State intervention of a limited nature in

(1) The Labour Gazette, June 1933, P.593, quoting from International Labour Office: Conciliation and Arbitration in Industrial Disputes, Studies and Reports Series A, (Ind.Rel.) No.34, Geneva, 1933,696 p.

labour disputes. This Act of the Government of the Dominion of Canada has as its object, the postponing of an open breach between the disputants until existing institutions for settlement are fully utilized. A "cooling off" period is featured, during which strikes and lockouts are prohibited pending award of a representative Board of Conciliation and Investigation appointed by the Dominion authority on request of either party or on direct Governmental intervention. There is no compulsion to accept the award of such Board, unless the parties agree to accept its findings. In event of the latter, the award becomes binding, and constitutes an example of voluntary arbitration.

Conciliation officers appointed by the Wartime Labour Relations Board under Section 12 of Order in Council P.C.1003, and Conciliation Boards appointed under Section 13, follow in the practice of The Industrial Disputes Investigation Act. Order in Council P.C.4020 as incorporated by Section 46(A) of the Regulations further extends this principle.

Australia and New Zealand have applied State intervention in conciliation and arbitration and in general have adopted a system of compulsory arbitration of labour disputes. In Sweden, on the other hand, compulsory decisions are not as a rule recognized by law, yet State intervention makes voluntary collective agreements binding at civil law. Findings of conciliation and investigation while not legally binding, if voluntarily accepted by the parties, because of publicity and the application of Reason, would appear to be more effective. Until full partnership in Industry is a fact there will be need of some form of arbitration.

As a rule, conciliation and arbitration systems have been carefully adapted in each Country so as to fit in with the general legal and economic systems prevailing.

As a general rule workingmen mistrust compulsory arbitration, especially in negotiation of agreements, feeling that where arbitrators are as a rule selected from other than the worker class, material rather than human values are stressed. Compulsory arbitration becomes accepted in Industry where Faith has supplanted Fear, otherwise the use of compulsion destroys what confidence and good-will there may exist between the parties and is only justified where publicly necessary or as a means of excape from some less acceptable way of settling the difference. The Arbitration Courts of Australia and New Zealand recognize this fact in making the fullest use of mediation services before referring labour disputes for settlement by judicial process.

The representative character of Conciliation Boards provides an instance of an effort to restore Faith in Industry. Where there is agreement to accept the awards of such Conciliation Boards Faith advances one step more in covering the field where no voluntary agreement can be reached by the parties who are negotiating.(1) The Labour Relations Boards in Canada and the United States are representative in character, indicating that they are formed with the idea of restoring Faith especially where the Canadian Board accepts the procedure of the Industrial Disputes Investigation Act.

(1) Industry and Humanity: Hon.W.L.MacKenzie King (1918) P.230.

As Faith, in the impartiality of Labour Boards and "Labour Courts" increase, it will be but one more step to the full adoption in Industry of a judicial system peculiar to labour disputes. Whether advance will ever be made to the point where full partnership in Industry exists, and whether in such a state there will still be conciliatory and judicial process, and on what basis, are other questions. It would perhaps not be too much of a guess to state that the Industrial and Political systems in each country will still be similar.

(c) Justiciable Disputes:

> "The machinery by which, in Industry and the State, it is sought to give play to the principles of Conciliation, Investigation, and Arbitration, varies from the most informal arrangements for conference between individuals to elaborate systems of judicial procedure. It embraces means of one kind or another to perform legislative, executive and judicial functions. Such means are necessary wherever, in the adjustment of human relations, an attempt is made to substitute Reason for Force."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.222.

> "Until industrial controversy and international controversy become as justiciable as property controversy, the world's peace will be at the mercy of Force, from whatever quarter it may arise."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.230.

> "Justice in the form of law as distinguished from arbitrary justice, or from private struggle decided by private force, arises the moment general principles are used for deciding particular cases."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.223-4.

It might be well to point out that in general in Great Britain and Canada labour contracts are not legally enforceable.(1)

(1) The Professional Syndicates Act (1924) R.S.Q. ch.112;

The Collective Labour Agreements' Act (1937) R.S.Q. ch.49;

The Collective Agreement Act (1940) R.S.Q. ch.38, provides for extension of agreements and enforceability thereof.

It is only in countries where collective agreements are legally enforceable, as in Sweden, that "Labour Courts" and ordinary courts develop in a parallel manner as systems of jurisprudence.

The shortcomings of the ordinary courts in regard to labour disputes, in particular, have been met in various countries in various ways. In some countries in addition to labour courts or in conjunction with the duties of labour courts as such, joint committees, labour inspectors, and conciliation, investigation and arbitrational machinery, have all dealt with disputes in industry. On the other hand, some countries have attained a high degree of industrial development without having labour courts because of the exercise of quasi-judicial functions by lesser administrative committees or boards. The Industrial Disputes Investigation Act provided a system of Boards of Conciliation and Investigation to aid in settling industrial disputes. By Section 6 and Section 2(d) the Minister of Labour, generally on application, appointed a representative Board; unless, however, the parties agreed to accept the award there was no compulsion to abide by it. Disputes under the Act covered disputes concerning negotiation and interpretation of agreements, as well as union jurisdictional disputes. The National Wartime Labour Relations Board in Canada under Order in Council P.C.1003 is more of the nature of a "Labour Court" than was process under the Industrial Disputes Investigation Act.

The National Wartime Labour Relations Board, where applicable, disposes of the question of recognition and of union jurisdictional disputes. It provided for compulsory

bargaining in good faith between the parties; penalties being provided if prosecuted with consent of the Board before ordinary courts. But there was no compulsion to reach an agreement. A feature of the Industrial Disputes Investigation Act, Boards of Conciliation, are provided to assist in reaching an agreement. The decision of the National Wartime Labour Relations Board is final in cases under Section 25. In all cases of prosecution for offences in ordinary courts consent of the Board under Section 45 is essential. There is provision for final settlement in a dispute under Sections 17 and 18 concerning interpretation and violation of a collective agreement. These latter sections provide that all agreements, under Order in Council P.C.1003 are to have a grievance procedure incorporated, either through voluntary agreement or by order of the Board in a proper case. Since the final process in such grievance clause is for compulsory arbitration, the Board indirectly deals with a great many disputes about Rights.

(d) The Origin and Development of "Labour Courts":

The accepted view of the origin of modern "Labour Courts" created by legislative enactments providing for a more or less uniform labour judiciary distinct from ordinary law courts, is that they are a development of the Conseil de Prud'hommes or Probiviral Court set up at Lyons in France by virtue of a Napoleonic law passed in 1806. The principle of the Probiviral Court as constituted had existed previously in France in an extra-legal manner. This principle was, in effect, that in the settlement of certain labour disputes a committee of the

employers' and employees' representatives were to be formed to decide issues expeditiously. These councils corresponded to the older system of prud'hommes in that they too were composed of persons specially acquainted with the subject matter with which they were required to deal. (1)

Similar systems existed in other countries of Europe in the Nineteenth century, all stemming from the example of France. The Twentieth century has seen a great expansion of labour tribunals, especially after the First Great War. This was due in considerable measure to the patent inability of the ordinary judiciary to give proper attention to any new duties. In most cases there was a slow development of the principle of equal representation on tribunals or boards; and a still slower development of the principle of the binding character of the tribunal's decision.

In instituting a system of labour tribunals in any country many problems are presented. Not the least of these will be a Constitutional one. For instance, in Canada, the question might ordinarily be asked as to whether the Dominion or the Provinces had necessary jurisdiction; in the United States a similar question poses itself. Finally, even where the Constitutional law allows or a special Act permits a separate labour administrative Board or judiciary, numerous problems still remain as to the constituting of such bodies.

In what particular districts should administrative bodies

(1) International Labour Office: Labour Courts, Studies and Reports, Series A (Ind.Rel.), No.40, Geneva, 1938, ch.1. History of Labour Courts (3) Development and Growth of Labour Courts.

or courts be set up with regard to labour disputes? Which bodies should be previously consulted, and what type of Board or court is suitable? are all proper and pertinent questions. In the main,"labour courts"tend to be constituted on a national scale. In Switzerland, however, the cantons have exclusive jurisdiction, and in Canada previous to the adoption of Order in Council P.C.1003 the Province of Ontario had its own Labour Court, and as the law stands today it will again be in order very shortly for any Province to constitute a "Labour Court" after the emergency and transitional period has passed.

The special characteristics of any region are bound to appear in the process of building up a branch of judiciary separate as to labour disputes. In some countries representative employer and employee organizations are consulted before the labour courts are established, while in others the representative organs are consulted only in the appointment of the members of the Court. In Canada Boards under the Industrial Disputes Investigation Act were representative. In 1943 the National War Labour Board held a public inquiry on industrial relations and recommended that the Dominion adopt a Labour Code and a National Labour Relations Board. Early in 1944 the Dominion Government enacted Order in Council P.C.1003 constituting a representative Board in the nature of a court to administer the Wartime Labour Relations Regulations.

The fact that many elements in the introduction of judicial or quasi-judicial machinery in the field of labour relations are administrative in character makes for much variation in labour tribunals. For instance, the law constituting the court

may provide for an attempt to settle the dispute by conciliation before the court acts in a purely judicial manner to decide the issue. The National Wartime Labour Relations Board in Canada, not purely judicial in function, provides for conciliation machinery in negotiation, and stresses voluntary arbitration rather than compulsory. Under Sections 45 and 18 the Board has at least a quasi-judicial function in that it may deal with rights already existing.

(e) The Representative Character of "Labour Courts":

> "The principle of Representation has furnished a key wherewith to unlock the door of every difficulty."
>
> Industry and Humanity: Hon.W.L.MacKenzie King, (1918) P.390.

The main idea at the basis of a labour court system is that the litigants should be judged by their peers; that is, the court should be made up of an equal representation of employers and employees, under the chairmanship of a person acceptable to both.(1) The situation, on the other hand, obtaining when ordinary court judges sit on labour cases is well put by an eminent legal authority, thus:

> "I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with labour. Labour says: ' Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?' It is very difficult sometimes to be sure that you have put yourself in a thoroughly impartial position between two disputants, one of your own class and one not of your class." (2)

(1) International Labour Office: Labour Courts, (1938) P.12.

(2) Lord Justice Scrutton in Cambridge Law Journal, 1921.

Representatives of employer and employee on labour boards are usually appointed by the administrative authority concerned from lists submitted by respective organizations. In the United States appointment is made by the President, in Canada by the Cabinet. In both cases the practice is to have an equal number of representatives of employers and employees. The number of members on a labour court of board varies from three as in the United States, to twenty as in Belgium. In practice members of labour tribunals take an oath to judge conscientiously and impartially; and maintain some discretion with respect to deliberations. Section 24 of Order in Council P.C.1003 makes such provision for members of Canada's Labour Relations Board.

(f) Some Features common to both Ordinary and "Labour Courts":

The following are several features common to labour courts qua labour courts and ordinary courts of law:

1. Either party to a dispute may cause the other to be summoned, although no previous agreement to that effect had been concluded: This is the first element of compulsion in a system of judicial procedure, and differentiates judicial procedure from conciliation, investigation, and arbitration where compulsion must rest on a special law or on previous agreement. In Canada under Order in Council P.C.1003 once certification of bargaining representatives has taken place, either party may institute proceedings and cause the other to appear before the Board in a proper case. The policy of the Order in Council regarding grievance procedure and in requiring consent to prosecute before ordinary courts tends in the same direction.

2. Once the dispute has come before the tribunal, the latter

may render a binding decision without regard to the consent or agreement of the parties: In this respect judicial or quasi-judicial procedure again differs from most forms of voluntary conciliation, investigation and arbitration procedures. In the latter cases, however, parties to a dispute may agree to abide by the decision of the Board or as in Australia and New Zealand the law may make awards binding. In Canada under Order in Council P.C.1003 binding decisions are rendered in the matter of receiving or rejecting application for certification, and in cases under Section 25 of the order, as well as in the matter of an appropriate grievance procedure and consent to prosecute; binding decisions on standards of a less strictly judicial nature are also rendered by the Board in various cases.

3. The decisions rendered by both types of courts, as a rule, may be compulsorily enforced against the party at fault; in most cases by the same or similar measures as in ordinary courts. In Canada under Order in Council P.C.1003, enforcement of the Board's decisions in the main are by prosecution in ordinary courts by virtue of consent under Section 45 of the Order.

(g) Compulsory Arbitration:

The fears of employers and trade unions over compulsory arbitration in the settlement of labour disputes stems rather from fear of that process in negotiation of the agreement than from fear in settlement of disputes under the agreement. This is the view in a recent statement of a prominent legal writer:

> "These fears will hardly be justified if employers and unions are assured that compulsory arbitration

> will be confined to the interpretation and application of privately negotiated collective agreements, especially if it appears that they will be left free to choose their own arbitrators."(1)

This statement is especially true in view of the fact that most collective agreements are for one year only, and both parties know that there has to be some convenient and expeditious method of clearing up both routine and fundamental issues arising under such agreements. The implication from a refusal to accept such procedure is that the parties desire to return to the law of the jungle.

Canada's Wartime Labour Relations Regulations provide for a procedure of arbitration in the interpretation and violation of collective agreements which points to compulsory arbitration as a final step in the grievance procedure.(2) A grievance procedure from the standpoint of the worker is the most important part of the agreement,(3) for "in a system of uniform arbitration lies the only real hope for the smooth operation of an industrial society governed by the terms of collective agreements." (4)

(1) Labor and the Law: Charles O. Gregory (1946) P.405.

(2) International Union, United Automobile and Agricultural Workers of America, Local 195 v Canadian Automotive Trim Ltd., 1 D.L.S. 7-539.

(3) Collective Bargaining: Leonard J. Smith (1947) P.202.

(4) Labor and the Law: Charles O. Gregory (1946) P.404.

(h) Powers of modern "Labour Courts":

The enactments establishing modern labour tribunals, for administrative expediency, often invest such bodies with legislative powers; in many cases conciliation and arbitration functions also exist. Similarly, purely arbitration and conciliation bodies may be granted judicial functions on occasion.

Administrative Boards having quasi-judicial functions may be created by special enactment with a procedure quite different from that of strictly judicial bodies. In some cases an agency may be created which has wide discretion in making rules and decisions, in many cases at wide variance from Dicey's "Rule of Law". Procedure under such Boards is quite informal and the Rule in Heydon's case is sometimes applied. In many cases the enactment may prohibit review of the Board's decision by the common law writs. Modern conditions render necessary variation from ordinary court procedure in cases where speedy settlement of disputes is requisite. In most cases, however, labour tribunals during the process of rendering judgments follow norms which already exist or are being gradually formed by a process of trial and error; in these cases the prerogative writs apply.(1) This process may apply to decisions on both Interests and Rights.

(1) 49 Law Quarterly Review: D.M.Gordon; P.94 ff; P.419 ff.
The Parliamentary Powers of English Government Departments,
Administrative Tribunals and the Courts (1933) John Willis,
Public Authorities and Legal Liability (1925) G.E.Robinson,
Introductory chapter by Prof.J.H.Morgan, P.XLIV ff.

Chapter XII: The Regulations in the Post-War Transitional Period:

Order in Council P.C.1003 was enacted in February 1944 under the War Measures Act, after a conference of Dominion and Provincial Labour Ministers in November 1943, and subsequent consultations between Dominion and Provincial authorities. The National Emergency Transitional Powers Act, 1945, continued from January 1, 1946 the powers granted the Governor in Council under the War Measures Act. The latter Act (1945) R.S.C.ch.25 was amended by (1946) R.S.C.ch.60 to continue in force until the earliest of (a) the 60th day of the first 1947 session and (b) March 31,1947.

Under an order of reference dated July 16,1946, the House of Commons directed the Standing Committee on Industrial Relations to investigate all issues pertaining to the current industrial unrest in Canada. After holding forty eight meetings, during which labour and management statements were heard, the findings of the Committee were reported to the House, and accepted after a debate on August 22,1946. The Report consisted of seven points of recommendation, among which were the following:

1. That a Dominion-Provincial Labour Conference be called at the earliest possible moment to draft a Labour Code within the limits of the British North America Act and with a view to establishing machinery for the prevention of dislocations in industry.
2. The taking of a strike vote under Government supervision to determine the wishes of the men affected.

On August 30,1946, the Dominion Government under the authority of the National Emergency Transitional Powers Act, 1945, by Order in Council, P.C.3689, provided for the taking of a strike vote under Government supervision at the direction of the Minister of Labour.

Order in Council, P.C.1003 declared that the Industrial Disputes Investigation Act provisions were of no effect while that Order in Council was in force. Thus, the assistance of Boards of Conciliation and Investigation were not available to the Wartime Labour Relations Board. The Board of Conciliation provided under the Order in Council dealt only with disputes in negotiating an agreement, and the provisions of Section 46 of the Regulations had limited effect.

Order in Council, P.C.4020 of June 6, 1941, had made provision for the appointment and use of an Industrial Disputes Inquiry Commission to deal with disputes in war industries. This was in turn followed by Order in Council P.C.4844 of July 6,1941 and Order in Council P.C.7068 of September 10,1941. The Wartime Labour Relations Regulations allowed Order in Council P.C.4020, as amended, to remain in force to the extent consistent with the Regulations.

The Dominion-Provincial Labour Conference was held in October 1946. At this conference the Dominion made it clear that with the lapse of the National Emergency Transitional Powers Act, on or before March 31,1947, both Order in Council P.C.1003 and Order in Council P.C.4020 would lapse and that the provinces would receive back again their whole jurisdiction over labour matters. The Dominion proposed that in the 1947 session the Industrial Disputes Investigation Act would be revived by including the substantive provisions of Orders in Council P.C.1003 and P.C.4020. The Industrial Disputes Investigation Act as revised and proclaimed would apply to Dominion industries. The Dominion further proposed to frame this legislation with a view to securing its adoption by the

Provinces in order that there might be uniformity of legislation over labour matters in Canada.

Incidentally, on November 30,1946, Order in Council P.C.4904 came into effect, rescinding the Wartime Wages Control Order. The question of wages, excluded from the Regulations, by this Order in Council, was returned to the employers and employees to be settled by them in the collective bargaining process.

On January 28,1947, the Minister of Labour wired to the provinces the Dominion's views on the transition from wartime to peacetime collective bargaining legislation, and proposed extending present agreements until May 15,1947. On February 10, 1947, the Minister of Labour tabled in the House of Commons Order in Council P.C.302, of January 30,1947 and effective February 15,1947. This Order in Council amended the Wartime Labour Relations Regulations.

The amendment to the Regulations: 1. formally returned wages to the ambit of collective bargaining; 2. incorporated in P.C.1003 the provisions of Order in Council P.C.4020 governing the appointment of inquiry commissions to investigate labour disputes; and 3. prepared the way for the return to provincial jurisdiction of industries which during the war were specifically subjected to Dominion control as war industries.

Order in Council P.C.302 amended P.C.1003 in such manner as to include the subject of wages among the other subjects open to free collective bargaining between employer and employees. Order in Council P.C.4020 was consolidated into P.C.1003 as Section 46 A. This Section provides for the appointment of Industrial Disputes Inquiry Commissions to investigate disputes

or differences between employers and employees, and also complaints of discrimination for union activity, and to report to the Minister of Labour. The Order also provided for the repeal on March 31,1947, of Schedule A to the Regulations; this has the effect of returning to the Provinces as of that date jurisdiction over certain industries enumerated in the schedule and described as war industry.

In regard to Section 46 A, the Minister of Labour stated in the House of Commons, in tabling Order in Council P.C.302:

> "It is felt that at this time it is advantageous to consolidate where possible all existing procedures in relation to the investigation and conciliation of industrial disputes into a single instrument, namely, P.C.1003." (1)

On March 25,1947, Prime Minister MacKenzie King tabled in the House of Commons an Order in Council extending the National Emergency Transitional Powers Act, 1945, until May 15,1947; this was done by virtue of Section 6 of the Act.(2) This extension made it apparent that the Dominion Government at least intends to continue the use of the Wartime Labour Relations Regulations in their application to Dominion industries until the Industrial Disputes Investigation Bill becomes law. The extension also provides time for the Dominion to review suggestions respecting the new legislation contemplated.

The Minister of Labour indicated also that he would recommend similar extension for provinces which have adapted the Regulations to Provincial industries, if they so desire. This would enable the provinces to delay passage of legislation and follow the pattern of the revised Dominion Bill.(3)

(1) The Labour Gazette, February 1947, P.132.

(2) Hansard, March 25, P.1751.

(3) The Labour Gazette, February 1947, P.132-133.

The Province of Manitoba to date has been the only Province adopting the Order in Council P.C.302 amendments. This it did by a Proclamation Gazetted March 8,1947, pursuant to Section 5 of the Manitoba Wartime Labour Relations Regulations Act.(1)

If the remaining Provinces were to follow the example of Manitoba, it would evidence a desire on the part of all the Provinces for continued uniformity in the matter of labour legislation throughout the Dominion. This would augur well for Dominion-wide uniformity, under the Constitution as it now exists, each within its own particular sphere, after the National Emergency Transitional Powers Act provisions had passed out of existence.

CONCLUSION:

The process of collective bargaining developed on a voluntary basis in Canada with little or no Governmental assistance, until a point was reached when definite rules were necessary to secure uniformity and to guarantee that the fair employer and the depressed worker should not continue to be penalized.

Government intervention meant Regulations and the creation of agencies to administer the Regulations. Administrative Boards with legislative, administrative and quasi-judicial powers, in varying degrees, exist both Federally and Provincially in Canada today. As a rule, these agencies are not considered Courts, although Section 101 of the British

(1) By a proclamation Gazetted March 8,1947, pursuant to Section 5 of the Manitoba Wartime Labour Relations Regulations Act, (1944).

North America Act of 1867, specifically grants to the Dominion power to create special Courts.

It will perhaps be in order in considering Order in Council P.C.1003 to look on the Wartime Labour Relations Board as an administrative board:

Disregarding the process of reference, the ordinary courts may interfere with administrative boards after an order is issued even though its issuance be purely legislative, on the grounds of excessive jurisdiction. Attacks on "administrative" orders are seldom confined to jurisdictional grounds; far oftener complaint is of the manner of exercising unquestioned jurisdiction, that is, complaint is of faulty procedure or of the misuse of discretion. There seems to be no convincing justification for such interference where the order has been made by a tribunal exercising purely "administrative" (legislation) functions. In rare instances courts have been expressly authorized by statute to review "administrative" orders;(1) ultra vires orders are simply nullities, and there seems to be no objection to a court so declaring them. But apart from this statutory review and jurisdictional question, the courts are not justified in interfering with "administrative" orders, except in so far as they also embrace judicial elements, and are thus in part judicial orders.

In dealing with administrative orders, discrimination must be used, for the mere fact that the order involves a judicial element does not in itself justify court review, for other grievances.

(1) Halsbury's Laws of England, X,173.

In regard to jurisdiction: Obviously there must be some check on the scope of an administrative Board's activities. The ordinary courts may, through a writ of certiorari, quash an order which the court decides was issued in regard to a matter not covered by the statute creating the administrative body. In interpreting the original statute the ordinary court uses ordinary court methods. The court might decide, for instance, that the Wartime Labour Relations Regulations were unconstitutional, and hence ultra vires; or again, the court might decide that the order was issued in relation to a person not covered by the enactment, for one reason or another.

In regard to the judicial elements: the court may review an order issued by an administrative Board to see whether it has been made contrary to ordinary or established procedure and "natural justice" as well as to see if the objective standard applicable has been followed preliminary to the issuance of the order. The court might,for instance, decide that the Wright-Hargreaves rules must be followed.

The Wartime Labour Relations Board in deciding whether a person is an employer or an employee under the Regulations is in reality determining the scope of its authority. Similarly in determining the scope of an appropriate bargaining unit the Board is indirectly involved in the same problem. Regardless of how the Board reaches its decision, for example, that the person in question is an employee, the courts can still rule on the matter jurisdictionally. In making its decision in this case the court will follow ordinary methods of interpretation; barring specific statutory instructions to the contrary. In the

Canada Coal case,(1) the National Board's literal interpretation coincided with the ordinary court's interpretation, since the term in question had a long legal history behind it. If the literal interpretation made for ambiguity, it would be in order for the court to consider matters beyond the bare words of the particular section of the enactment. However, in the ordinary case, unless the statute definitely gives a discretion, the method of interpretation according to existing authority will be the literal one.

The administrative Board may exercise its purely legislative function in its "unfettered discretion", without fear of review by the ordinary courts. Sometimes ambiguous phrases cause a little difficulty. For instance, where a tribunal is empowered to make certain orders when it "considers", or "is satisfied" or "is of opinion" that a situation calling for an order exists, the first point to be settled is whether the legislature intends the tribunal to exercise judicial or "administrative" functions in deciding this question. Where this question will involve only matters of fact, the functions exercised in deciding it will ordinarily be judicial; but where the forming of a conclusion must involve subjective elements, for example, personal taste, likes or dislikes, the forming of the conclusion is the exercise of "unfettered discretion", which the ordinary courts may not change by substituting their own discretion. Under Section 7 of the Regulations the Wartime Labour Relations Board would appear to have discretion.

(1) C.C.H., 10,503 (L.L.R.).

The Regulations by making provision for proper notice to interested parties, adopting a more or less legal procedure including pleadings, and granting opportunity for proper parties to attend the hearing and make representations, appear pretty well to cover the point of "natural justice".

The case of the Labour Relations Board of Saskatchewan v Dominion Fire Brick & Clay Products et al.,(1) is of special interest. The Labour Relations Board established under the Saskatchewan Trade Union Act held, in an application to determine a majority union for the purpose of collective bargaining, that the employees of the company concerned were not employed in "a work or undertaking engaged in mining or smelting operations" within the meaning of Section 1 of Schedule A to Order in Council P.C.1003. The Saskatchewan Board thus decided that it had jurisdiction since the company was not within the exception in the definition of "employer" in the Saskatchewan Act.

The Dominion Fire Brick Company applied to the Court of King's Bench and the Board's decision was quashed, the court holding that the Wartime Labour Relations Board had sole jurisdiction, despite the fact that the company concerned was hardly remotely connected with "mining" operations. This court decision in regard to the Regulations is definitely contrary to the decision of the Wartime Labour Relations Board in the Dominion Oilcloth case and in the Canadian Ingersoll Rand case, mentioned before, wherein it was stated that Schedule A of P.C.1003 included only those employees who are exclusively engaged in the listed undertakings.

(1) (1946) 3 W.W.R., 495.

The Dominion Fire Brick decision, while deciding no new point of law, has some significance for the various administrative boards in this country. A court may, upon a proceeding being brought by a party to a board order, inquire into the jurisdiction of the board to make the order in the light of the statute giving the board its powers. It is interesting to note that here the lower courts quashed the order of the board without the issue of a writ of certiorari and that both courts in no way reviewed the decision of the Labour Relations Board but merely inquired into the Board's jurisdiction to deal with the particular labour dispute. The court of appeal in Saskatchewan, on the Board's appeal, had declared that the Board had no interest sufficient to justify an appeal.

It is open to question, however, whether the definition of "mining" followed by the Court of King's Bench and taken from the Saskatchewan Mineral Resources Act was necessarily the one intended in Order in Council P.C.1003, or whether the meaning given a word in one enactment should be used solely in arriving at the meaning of the same word in another piece of law. Further, to hold that employees engaged in the business and manufacturing aspect of brick making while the actual mining of the clay is done by another company with a completely independent group of employees, are engaged "in a work or undertaking engaged in mining.....operations" appears to go beyond the plain and ordinary meaning of those words in Schedule A of the Regulations.

The situation in this particular case is that the employees in the Dominion Fire Brick plant cannot receive collective

bargaining rights under the Regulations or under the Saskatchewan Act.

Final disposition in this peculiar situation must await the decision of the Supreme Court of Canada. It is to be hoped that when Dominion and Provincial peacetime collective bargaining legislation is finally made, the true value and force of such provisions as Section 15 of the Saskatchewan Trade Union Act which purports to prohibit the review of Board decisions by the Courts, will be made crystal clear. This will be necessary to avoid similar deadlocks between an administrative tribunal and the Courts.

B I B L I O G R A P H Y

SECTION ONE

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