

THE DUTY OF FAIR REPRESENTATION — EFFECTIVE PROTECTION FOR INDIVIDUAL RIGHTS IN COLLECTIVE AGREEMENTS ?

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The author uses the example of Fisher against Pemberton to illustrate the case of an individual employee action against his union for breach of the union's duty of fair representation.

The status of exclusive bargaining agent, which may be acquired by trade unions under labour relations legislation throughout North America, carries a considerable measure of authority over the rights of individual employees. To the extent that it enables the union to act effectively for all employees in negotiating a collective agreement and in administering the terms of that agreement, such authority is an indispensable feature of our system of labour relations. Ultimately, however, a major purpose of the collective agreement is to benefit the individual employee by ensuring that his terms and conditions of employment will be those negotiated for him by his union. Balancing of the union's interest in freedom to administer the collective agreement as it sees fit, for the benefit of the employees as a group, against the individual's interest in protecting his own rights under the agreement, sometimes at the expense of the group, involves difficult priorities which have not been specifically dealt with by statute.

Although labour relations boards and arbitration tribunals are the principal forums for the enforcement of North American labour relations legislation, the courts have found a vacuum in the area of individual rights under collective agreements and have moved to fill it. Nearly all Canadian and most American collective agreements contain arbitration procedures for settling questions of interpretation of the agreement at the behest of unions and employers, but almost never at the behest of individual employees. Rarely have the courts been willing to place such procedures at the disposition of individual employees. They have reasoned, quite rightly, that the intention of the legislatures as well as of the parties to

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collective bargaining is to keep the administration of the collective agreement firmly in the hands of those parties ¹.

In only two rather narrow areas have Canadian courts allowed individual employees to maintain legal action to enforce the terms of a collective agreement. The first of these, which is of very limited scope and need not concern us any further, involves individual actions in contract against an employer to collect sums owing to the plaintiff employees where the employer has not specifically disputed his liability to those employees ². The second, which was recently dealt with by a Canadian court for the first time in *Fisher v. Pemberton* ³ and which is of great potential significance, is the individual employee action against his union for breach of the union's duty of fair representations ⁴.

The duty of fair representation has been developed in the United States courts since the Second World War. It represents an attempt to give the individual employee a degree of control over the conduct of his bargaining agent without allowing him to intervene directly in the arbitral process. The duty was originally developed to deal with unfair treatment by the union of certain groups in the bargaining unit, especially racial minorities, during the negotiation of a collective agreement ⁵. It has been extended to cover union conduct in the processing of employee grievances during the lifetime of the agreement. The original basis for the duty was the status of recognized bargaining agent, the Supreme Court of the United States being of the view that any union possessing exclusive bargaining rights for a group of employees had a corresponding obligation to represent the interests of all of those employees with fairness and diligence ⁶.

¹ See, for example, *Black-Clawson Co. v. International Association of Machinists*, (1962) 313 F. 2d 179 (2nd cir.); *Republic Steel Corp. v. Maddox*, (1965) 379 U.S. 650 (U.S.S.C.).

² *Grottoli v. Lock & Son Ltd.*, (1963) 39 D.L.R. (2d) 128 (Ont. H.C.); *Hamilton Street Railway Co. v. Northcott*, (1966) 58 D.L.R. (2d) 708 (S.C.C.); *Close v. Globe and Mail Ltd.*, (1967) 60 D.L.R. (2d) 105 (Ont. C.A.), I have discussed these cases in a note, (1967) 45 *Can. B. Rev.* 354.

³ (1970) 8 D.L.R. (3d) 521 (B.C.S.C.).

⁴ If an employee is potentially affected by arbitration proceedings in which he may not be directly involved, the Supreme Court of Canada has held that he has a right to participate in the proceedings and that he can bring an action to enforce that right. *Re Hoogendoorn and Greening Metal Products*, (1968) 65 D.L.R. (2d) 641 (S.C.C.).

⁵ *Steele v. Louisville and Nashville Railroad Co.*, (1944) 323 U.S. 192 (U.S.S.C.).

⁶ *Ibid.*, pp. 202-03.

Apart from one quite a typical case in the Ontario Labour Relations Board in 1966⁷, no Canadian court or labour relations board had ever entertained an action by an employee against a union for a remedy for loss caused to the employee by the union's poor performance in processing his grievance. This situation may be changed markedly by the judgment of Macdonald J. of the British Columbia Supreme Court in *Fisher v. Pemberton*⁸.

Rather than being an attempt by an isolated individual to gain redress for a purely personal injury, *Fisher v. Pemberton* was really an episode in a continuing struggle between two unions in the British Columbia pulp and paper industry, the International Brotherhood of Pulp, Sulphite and Paper Mill Workers and the Pulp and Paper Workers of Canada⁹. Fisher was an employee of Alberni Pulp and Paper Limited and an active supporter of the Canadian union. The bargaining agent for the company's employees, however, was Local 592 of the rival International. Supporters of Local 592 brought a hollow-sounding charge against Fisher, under the International's constitution, to the effect that certain of his activities had violated that constitution.

A committee of members of Local 592 was set up to hear the charge against Fisher. Two nights before the scheduled hearing, Fisher entered the plant during his off-duty hours, encountered two of the employees on the Local 592 committee that was to hear the charge, and caused a disturbance by behaving belligerently toward them. Macdonald J. found that Fisher had gained entry to the relevant part of the plant by misleading the guard at the gate. Spencer, the acting president of Local 592, was told of the incident and reported it in full the next morning to officers of the company¹⁰. After a brief investigation, the company discharged Fisher for

⁷ *Boivin v. Plumbers and Pipefitters*, (1966) O.L.R.B. Oct. Report 513. For examples of the usual attitude of the O.L.R.B., see *Collingwood Shipyards*, (1967) O.L.R.B. May Report 376; *Goudreau v. CUPE*, (1969) O.L.R.B. May Report 279.

⁸ (1970) 8 D.L.R. (3d) 521.

⁹ This is quite evident from the fact that a very similar action, with roles of the two unions reversed, was brought in the British Columbia Supreme Court at about the same time as *Fisher v. Pemberton*, but was not carried through to a conclusion. I am indebted to Mr. D. L. Brisbin, LL.B. 1970, Queen's University, for bringing this to my attention and, more generally, for the research he has done on the duty of fair representation.

¹⁰ Macdonald J. held that Spencer's reporting of the incident to the company did not constitute a breach of any duty owed by Local 592 to Fisher, even though Spencer probably realized that some sort of disciplinary action by the company against Fisher would result. (1970) 8 D.L.R. (3d) 521, at pp. 539-43.

entering the plant improperly and causing a disturbance. Past misconduct on Fisher's part was also mentioned at the time of the discharge.

On the next day, the hearing committee of Local 592 found Fisher guilty of the charge that had been brought against him under the union constitution, but recommended that his punishment « be deferred until he comes again within the jurisdiction » of the International. Fisher had apparently grieved against his discharge, under the provisions of the collective agreement between Local 592 and the company. Notwithstanding his support of a rival union, Local 592 carried Fisher's grievance to the second and third stages of the grievance procedure, but gained no redress for him. Local 592 then dropped the grievance, refusing to take it to the fourth step or on to arbitration.

Although representatives of Local 592 did carry the grievance through part of the procedure, Macdonald J. had the following to say about the union's performance on Fisher's behalf :

Certainly in this case the local union did not make in a non-arbitrary manner a decision as to the merits of Fisher's grievance. The whole matter was handled in a perfunctory way ¹¹.

While disclaiming any intention to impose « the standards of a professional advocate » upon the union representatives ¹², Macdonald J. based his finding of « perfunctory » union conduct on these items of evidence : nearly every union representative involved was « hostile » to Fisher ; no union representative had interviewed Fisher to get his own account of what had happened, or had interviewed any potential witnesses other than the employees directly involved in the incident that had led to the discharge ; and all of the union's submissions were directed only to the severity of the penalty and not to Fisher's guilt or innocence ¹³. A breach of the duty of fair representation — the duty to represent Fisher « fairly in good faith and with honesty of purpose » ¹⁴ — had therefore been proven.

The judgment then took an interesting turn. Because Fisher's claim was against officers of Local 592 for damages arising out of their failure to make proper efforts to have him reinstated in his job, Macdonald J. proceeded to consider the merits of Fisher's claim for reinstatement to see whether Fisher had suffered any financial loss from the union's conduct.

¹¹ *Ibid.*, p. 547.

¹² *Ibid.*, p. 546.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 541.

In other words, on the basis of evidence put before it by an employee and a union in an action between them arising out of the union's treatment of the employee's grievance, the court felt able and entitled to decide what an arbitration board would have said about the merits of the employee's claim against his employer.

Because of Fisher's poor work habits and attitude and the warnings he had received from the employer, Macdonald J. concluded that the likelihood was «negligible» that an arbitration board would have reinstated him¹⁵. It followed, in Macdonald J.'s view, that Fisher had suffered no loss from the union's breach of its duty of fair representation, and that he was therefore entitled to no more than nominal damages of one dollar.

The judgment in *Fisher v. Pemberton* raises problems on several levels.

Should another head of union civil liability be built on the foundation of breach of statutory duty ?

In recent years, Canadian courts have been willing to develop new forms of civil action, or to expand existing forms, to permit the awarding of damages against trade unions for conduct deemed undesirable. These developments have characteristically involved the holding that a breach of labour relations legislation provided the element of illegality necessary to ground a civil action in tort.

Two examples will suffice. In *International Brotherhood of Teamsters v. Therien*¹⁶, a construction industry case, the union wanted to force a trucking subcontractor, who drove one of his own trucks, to join the union pursuant to a closed shop clause in the collective agreement between the union and the general contractor. Rather than using the grievance procedure of the collective agreement for this purpose, the union threatened to picket the general contractor, who yielded to the pressure by refusing to continue using the subcontractor's services. Section 21 of the British Columbia Labour Relations Act¹⁷ provided that a breach of a collective agreement was a breach of the Act. The Supreme Court of Canada allowed the subcontractor's action for damages against the union, Locke J. holding that the union's conduct was illegal in that it amounted to « a breach both of the terms of the agreement and of s. 21 of the Labour Relations

¹⁵ *Ibid.*, p. 547.

¹⁶ (1960) 22 D.L.R. (2d) 1 (S.C.C.).

¹⁷ S.B.C. 1954, c. 17; now R.S.B.C. 1960, c. 205.

Act, »¹⁸ and that a common law tort action lay for interfering by illegal means « with another man's method of gaining his living . . . »¹⁹

Similarly, in *Gagnon v. Foundation Maritime Ltd.*,²⁰ the defendant union officers resorted to picketing and a strike in an attempt to persuade the employer to recognize the union. Because the procedural prerequisites to a strike laid down in the New Brunswick Labour Relations Act²¹ had not been complied with, the strike was illegal under the Act. This element of illegality of means was in itself enough, in the opinion of the majority of the Supreme Court of Canada, to make the majority of the Supreme Court of Canada, to make the defendants' actions a tortious conspiracy.

Judson J., dissenting in *Gagnon*, argued that a bare breach of labour relations legislation not in itself amounting to a tort or a crime should not suffice to ground a common law tort action²². Similarly, one might ask whether a poor performance, for any reason, by a union in its statutory role as bargaining agent should leave the union open to civil liability of a sort not envisaged in any applicable legislation. Judicial ventures into such areas as the duty of fair representation, and perhaps even in the areas of conspiracy and illegal interference, may be inevitable when a statute confers broad powers upon a union without providing effective safeguards against their abuse. However, each such venture should be scrutinized for responsiveness to legislative purpose and to social need. By the latter criterion, the duty of fair representation fares better than the torts of conspiracy and illegal interference, but it nonetheless encourages court involvement in the administration of collective agreements, an area in which Canadian labour relations legislation quite explicitly seeks to minimize such involvement and to encourage specialized methods of dispute settlement. The question that must be answered is whether the important aims of the duty of fair representation might be served by means that are at least as effective as those used in *Fisher v. Pemberton* but that are more in accord with Canadian legislative policy toward grievance settlement.

Are the courts the appropriate forum ?

In *Fisher v. Pemberton*, the court was the forum that decided both major questions : first, whether the union had breached its duty of fair

¹⁸ (1960) 22 D.L.R. (2d) 1, at p. 13.

¹⁹ *Ibid.*

²⁰ (1961) 28 D.L.R. (2d) 174 (S.C.C.).

²¹ R.S.N.B. 1952, c. 124.

²² (1961) 28 D.L.R. (2d) 174, at pp. 187-89.

representation by failing to carry the grievance farther ; and second, if the grievance had been carried farther, whether the plaintiff would have secured a favourable arbitration award.

Taking the second question first, the obviously preferable forum for deciding whether the plaintiff would have won at arbitration was an arbitration board, not a court. Grievance arbitration is a highly specialized function, carried on by specialized personnel whose survival depends not only on adjudicative ability but also on a capacity to ground their judgments in an understanding of the practices and problems of industrial relations. Even if it be advisable, contrary to what is suggested below, for a court to make the initial decision as to whether the duty of fair representation has been violated, a court is not the proper tribunal to make the subsequent decision on the merits of the individual employee's grievance.

Moving back one step, are the courts indeed the best forum for deciding whether the union breached its duty in the first place ? Even if the substantive criterion of « good faith » is closely adhered to (the advisability of which is questioned below), no determination of whether the union has discharged its duty to the individual employee can properly be made without the consideration of a range of factors of a substantially different sort from those commonly taken account of by the courts. For example, the position of grievance processing as an important part of the collective bargaining relationship cannot be overlooked, nor can the extent to which the defendant union's performance on behalf of the plaintiff employee measures up to the general standard of performance of comparable unions in comparable circumstances.

Labour relations boards are probably the bodies best situated to decide whether fair representation has been denied, for they combine wide experience in the regulation of collective bargaining relationships with a high degree of permanence and acceptability. In a slightly different context — that of unsuccessfully urging the United States Supreme Court to treat the denial of fair representation as an unfair labour practice to be dealt with by the National Labor Relations Board rather than by the courts — Fortas J. said in *Vaca v. Sipes* :

We are not dealing here with the interpretation of a contract or with an alleged breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court — regrettably, in my opinion — ventures to state judgments as to the metes

and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board . . .²³.

Are damages the most appropriate remedy ?

A suitable remedy is vital to an effective duty of fair representation. That damages will often be far from satisfactory is clear from the relatively infrequent use of purely monetary awards by arbitration tribunals. Although sums of money are quite commonly awarded as subsidiary remedies in arbitration, the principal relief is usually in the form of an order to the employer to reinstate, reclassify or promote an employee, or to comply with a job posting provision, or to do something of the like. Remedies of this sort strike at the root of the employee's grievance by correcting the situation that is the subject of the grievance, whereas money damages can often do no more than provide compensation for an unsatisfactory situation that continues to exist.

The only viable alternative to a court-awarded remedy of damages lies in turning over to an arbitration board any case in which the union is found to have committed a breach of its duty of fair representation. The arbitration tribunal could then grant whatever remedy it would have given if the matter had come before it in the usual way rather than by virtue of an order of a court or a labour relations board. Even after the restrictive decision of the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs*²⁴, arbitration boards are able to use more flexibility than courts in fashioning appropriate remedies. Because almost any remedy ultimately granted by the arbitration tribunal would impose some sort of liability upon the employer, it would be necessary that the employer be joined as a co-defendant in the individual employee's original action in the court or labour relations board. If the union's denial of fair representation has aggravated the employee's financial loss, the arbitration tribunal's remedy could be directed in part against the union.

The suggestion that grievances involved in unfair representation cases should be turned over to arbitration boards for final adjudication raises this difficult question : who should take such a grievance to arbitration, the union or the individual employee ? Two dangers would lie in ordering the guilty union to take the matter to arbitration : first, that a union in such

²³ (1967) 386 U.S. 171, at p. 202 (U.S.S.C.).

²⁴ (1968) 70 D.L.R. (2d) 693 (S.C.C.).

a situation might not do a sincere job of presenting the individual's case, however closely its performance were watched ; and second, that the fairness of the hearing might be impaired by the necessarily close attunement of regular arbitrators to the interests of unions and employers. These dangers are probably substantial enough to justify giving the individual the right to handle the matter himself, with his own counsel, in front of an arbitrator chosen from a special panel of persons skilled in labour relations but not regularly acting as arbitrators. The initial screening function exercised by the court or labour relations board in deciding whether a breach of the duty of fair representation had been proven would probably suffice to prevent excessive use of this procedure by misguided or vindictive employees. Whether the individual or the union should bear the cost of processing an ultimately unsuccessful grievance which reached arbitration by this route is not a question that could usefully be settled by a general rule. It would be better left to the discretion of the arbitration tribunal in each case.

Is « good faith » the most appropriate criterion ?

In *Fisher v. Pemberton*, Macdonald J. accepted, without any comment other than that it « appeals to me as sound »²⁵, the view of the United States Supreme Court that the basis of the duty of fair representation is the union's status as exclusive bargaining agent and that the essence of the duty is that the union must act in good faith in handling employee grievances. Among other passages from *Humphrey v. Moore*²⁶ and *Vaca v. Sipes*²⁷, the following was quoted from the judgment of White J. in the latter case :

... [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct²⁸.

The basis for the existence of the duty in *British Columbia*, Macdonald J. held, was the same as the basis on which the duty was first held to exist in the United States — « the fact that under the Labour Relations Act, R.S.B.C. 1960, c. 205, Local 592 was the exclusive bargaining represen-

²⁵ (1970) 8 D.L.R. (3d) 521, at p. 540.

²⁶ (1964) 375 U.S. 335 (U.S.S.C.).

²⁷ (1967) 386 U.S. 171.

²⁸ *Ibid.*, p. 177.

tative of a unit of employees — which included the plaintiff — in the Port Alberni mill »²⁹.

It seems clear from the majority judgments in *Humphrey v. Moore* and *Vaca v. Sipes* that the United States Supreme Court intended to hold plaintiffs in far representation cases to the high standard of proof traditionally demanded of anyone seeking to prove bad faith. This led Black J., in his dissent in *Vaca v. Sipes*, to remark that the employee's right against his union was « ephemeral » and that the task of proving bad faith or arbitrariness on the part of the union « puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy »³⁰. Although a few American courts have applied the *Vaca* criteria with less than full rigour³¹, it appears that an American employee attempting to make out a case against his union will generally have to demonstrate that the union officers acted with subjective ill-will toward him. Motive as well as conduct is important.

In *Fisher v. Pemberton*, Macdonald J. gave careful consideration to the motives of the union officers involved, particularly to those of Spencer, the acting president, in making known to the company the incident for which Fisher was discharged. Ultimately, however, Macdonald J. based his finding of « perfunctory » union conduct in the handling of Fisher's grievance not on such purely subjective factors but on largely objective matters — the fact that Fisher « was in effect pleaded guilty at the outset . . . without his consent »³² and the fact that the union did not bother to obtain certain types of evidence that it would ordinarily have been expected to obtain. Only one item with strongly subjective overtones was explicitly relied upon — the fact that the union officers who acted for Fisher had nearly all shown recent hostility toward him.

Is there any point in pretending that subjective « bad faith » or « arbitrariness » is what the court looks for in such a case? Would the

²⁹ (1970) 8 D.L.R. (3d) 521, at p. 541.

³⁰ (1967) 386 U.S. 171, at p. 210. Some writers have expressed similar views, none more pungently than Kroner, « The Individual Employee — His 'Rights' in Arbitration after *Vaca v. Sipes*, » *Proceedings of New York University Twentieth Annual Conference on Labor*, 1968, p. 75. The sad inadequacy of the duty of fair representation in racial discrimination cases is made clear by Gould, « Labor Arbitration of Grievances Involving Racial Discrimination, » (1969) 118 *U. Pa. L. Rev.* 40.

³¹ See Feller, « *Vaca v. Sipes* One Year Later, » *Proceedings of New York University Twenty-First Annual Conference on Labor*, 1969, p. 141.

³² (1970) 8 D.L.R. (3d) 521, at p. 546.

nature of the union's obligation not be much clearer, and the rights of the individual employee more comprehensible, if the union were held to be in breach of its duty when it could be shown to have done so thoroughly careless or incompetent a job of processing the grievance that the individual in fact had no real representation, whatever the attitude of the union officers toward him ? Putting the duty on this more objective basis would not necessarily make it easier for the individual employee to prove a breach, especially if he were an obnoxious person or a rival union activist whom the officers of the incumbent union intensely disliked but whom they had tried to treat reasonably. It might be argued that well-meaning but incompetent union representatives are best disciplined through the union's internal machinery or through proceedings for the termination of bargaining rights, but such channels can give little relief to an aggrieved individual who has not received his due under the collective agreement. It can also be argued that to put the duty on an objective basis would run the dual risk, first, of undermining the union's authority by encouraging more frequent questioning of its decisions on grievances, and second, of clogging the grievance procedure by forcing the union to process more grievances. These risks cannot be disregarded, but they might well be outweighed by the fact that serious negligence or incompetence are not lightly proven and by the fact that employees who were motivated largely by hostility to the incumbent union would probably find it more difficult to maintain an action. Resort to a duty of fair representation action as a maneuver in an inter-union battle, as seems to have happened in *Fisher v. Pemberton*, would hopefully be discouraged.

LE DEVOIR DE LA JUSTE REPRÉSENTATION — PROTECTION EFFICACE DES DROITS INDIVIDUELS DANS LES CONVENTIONS COLLECTIVES ?

Le statut d'unique agent de négociation qui peut être acquis par les syndicats en vertu des lois régissant les relations industrielles en Amérique du Nord, implique une forte part de dirigisme des droits des travailleurs en tant qu'individus. Ce dirigisme est un élément irréfutable de notre système de relations industrielles, dans la mesure où il permet au syndicat d'agir en fait au nom de tous les employés dans la négociation d'une convention collective puis de voir à faire appliquer les principes de cette convention. En dernier essort, cependant, un but important de cette négociation collective est de favoriser l'employé en tant qu'individu, par l'assurance que son salaire et ses conditions de travail seront bien celles négociées pour lui par son syndicat.

Celui-ci étant entièrement libre de rechercher son avantage maximum comme bon lui semble, il convient de rechercher l'équilibre entre le bien des travailleurs en tant qu'entité, et l'avantage de l'individu en défendant ses droits par la convention, quelquefois aux dépens du groupe. Ceci implique des priorités difficiles à établir et non déterminées de façon spécifique par la législation.

Bien que les commissions des relations du travail et les tribunaux d'arbitrage soient les principaux agents de mise en vigueur des lois régissant les relations industrielles nord-américaines les cours ont trouvé un vide dans le domaine des droits de l'individu en convention collective et ont travaillé à le combler. Presque toutes les conventions collectives canadiennes et la plupart des conventions collectives américaines spécifient des processus d'arbitrage déterminant les problèmes d'interprétation de la convention, selon les directives des employeurs et des syndicats, mais presque jamais selon la volonté des employés en tant qu'individus. Les cours ont très rarement voulu placer ces processus entre les mains des employés en tant qu'individus. Elles ont pensé, fort justement d'ailleurs, que le désir des législateurs et des parties en cause dans les négociations collectives était de laisser la mise en force de la convention collective strictement entre les mains de ces parties.

Les cours canadiennes ont permis aux employés en tant qu'individus de conserver des moyens légaux de faire entrer en vigueur les points de la convention collective, seulement dans deux domaines restreints. Le premier de ceux-ci, qui a peu d'envergure et auquel nous ne nous attacherons guère, concerne les procédures engagées par un employé contre son employeur afin de percevoir des sommes dues aux employés insatisfaits quant à un point sur lequel l'employé n'a pas résilié sa responsabilité de façon spécifique. Le second, qui a récemment été discuté pour la première fois par une cour canadienne dans le cas Fisher contre Pemberton et qui peut avoir une grande importance, est celui où l'employé engage une action contre son syndicat pour violation de son devoir de juste représentation.

Ce devoir de juste représentation a été développé dans les cours américaines depuis la deuxième guerre mondiale. Il signifie une tentative de fournir à l'employé en tant qu'individu un moyen de contrôle sur son agent de négociation sans lui permettre cependant d'intervenir directement dans le processus d'arbitrage. Ce devoir a été conçu au départ pour contrer un traitement injuste de certaines parties de l'entité négociante, en particulier les groupes sociaux minoritaires au cours de la négociation collective. Il a été amplifié de façon à prévoir les attitudes du syndicat devant régler les griefs des employés au cours de la durée de la convention.

Le point de départ de ce devoir était le statut d'un agent de négociation reconnu. La Cour Suprême des États-Unis prônait que tout syndicat possédant des droits exclusifs de négocier les droits d'un groupe d'employés avait une obligation égale de veiller aux intérêts de ces employés, avec empressement et équité.

Si l'on excepte un cas assez peu typique réglé par la Commission des relations de travail d'Ontario en 1966, aucune cour canadienne ou commission des relations de travail n'a eu à juger une poursuite d'un employé contre un syndicat, afin de recouvrir une perte subie à cause du peu d'efficacité du syndicat chargé de défendre son grief. Cet état de fait peut être changé de façon significative par le jugement

rendu par M. Macdonald de la Cour Suprême de Colombie Britannique dans la cause Fisher vs Pemberton.

Plutôt que la tentative d'un individu isolé demandant réparation pour un tort personnel, la cause Fisher vs Pemberton était véritablement une étape dans l'incessante lutte entre deux syndicats colombiens de l'industrie de la pulpe et du papier, la Fraternité internationale des travailleurs de la pulpe, du sulfate et des moulins de papier et le Syndicat des employés de la pulpe et du papier du Canada. Fisher était un employé de la compagnie de pâte et papier Alberni Limited et un ardent partisan du syndicat canadien. Cependant, l'agent de négociation des employés de cette compagnie était le local 592 du syndicat rival. Les partisans du local 592 portèrent des accusations douteuses contre Fisher, en vertu de la constitution de la Fraternité internationale, selon lesquelles certains de ses actes avaient violé cette constitution.

On institua un comité des membres du Local 592 afin d'étudier les accusations portées contre Fisher. Deux jours avant l'audience, Fisher rencontra deux des membres du comité devant juger des accusations alors qu'il était entré dans la salle d'outillage au cours de ses heures de loisirs; il causa un froid en les menaçant. J. Macdonald apprit que Fisher avait dû tromper la garde à la porte pour pénétrer dans la salle d'équipements. Le président du local 592, Spencer eut vent de l'incident et le communiqua aux directeurs de la compagnie. Après une brève enquête, la compagnie congédia Fisher pour être entré dans la salle d'outillage sans autorisation et y avoir causé de la mésentente. La conduite de Fisher fut également mise en cause lors du congédiement.

Le jour suivant, le conseil d'audience du Local 592 jugea Fisher coupable de l'accusation portée contre lui selon la constitution du syndicat, mais recommanda que sa sanction soit retardée jusqu'à ce qu'il soit de nouveau sous la juridiction de la Fraternité internationale. Il semble que Fisher ait protesté contre son congédiement, ainsi que lui permettait la convention collective signée entre le Local 592 et la compagnie. Faisant abstraction de son attachement au syndicat rival, le Local 592 porta la protestation de Fisher aux deuxième et troisième paliers de la procédure, sans succès. Alors le local 592 ne s'occupa plus de ce grief, refusant de l'amener au quatrième palier de la procédure ou de le soumettre à l'arbitrage. Bien que les représentants du Local 592 aient porté le grief à travers une certaine partie de la procédure, J. Macdonald qualifia ainsi l'attitude du syndicat dans le cas Fisher :

« il est certain que le syndicat local n'a pas pris une décision objective telle que l'exigeait le grief de Fisher dans cette cause. Toute cette affaire a été menée de façon négligente ».

Tout en niant absolument de vouloir imposer aux représentants du syndicat des critères de « juristes de carrière », J. Macdonald étaya son jugement de conduite négligente de la part du syndicat par les points suivants : presque tous les représentants du syndicat impliqués étaient « hostiles » à Fisher ; aucun représentant du syndicat n'avait interrogé Fisher afin de connaître sa propre version des faits, et personne n'avait interrogé les témoins possibles autres que les employés impliqués directement dans l'incident qui avait amené son congédiement ; de plus, toutes

les suggestions du syndicat s'attachaient uniquement à la sévérité de la sanction plutôt qu'à l'innocence ou à la culpabilité de Fisher. Une infraction au devoir de juste représentation — le devoir de défendre Fisher « justement, de bonne foi et dans un but d'honnêteté » — était donc évidente.

Le jugement rendu devenait donc fort intéressant. J. Macdonald s'attacha à considérer le bien-fondé de la demande de réengagement de Fisher afin de voir si Fisher avait subi une perte financière due à l'attitude du syndicat, puisque le grief de Fisher attaquait les officiers du local 592 pour tort à leur négligence des efforts nécessaires à lui faire récupérer son emploi.

Autrement dit, en se basant sur l'évidence apportée par un employé et un syndicat, dans une cause issue de l'attitude du syndicat vis-à-vis le grief d'un employé, la cour se crut apte et autorisée à juger ce qu'un conseil d'arbitrage aurait déclaré au sujet du bien-fondé de la poursuite de l'employé contre son employeur. J. Macdonald conclut qu'il y avait peu de chances qu'un conseil d'arbitrage l'eût réengagé. Macdonald conclut que selon lui, Fisher n'avait subi aucune perte due à un manque de l'union à son devoir de juste représentation et partant, qu'il n'avait droit qu'aux torts nominaux de 1 dollar.

Le jugement rendu dans la cause Fisher vs Pemberton suscite des problèmes à plusieurs niveaux.

1. — Le gouvernement devrait-il instituer un nouveau conseil syndical dans les cas où le syndicat a manqué à un devoir statutaire ?

Les cours canadiennes ont tenté de créer de nouvelles formes de procédure civile ou de donner plus d'extension à des formes déjà existantes afin de permettre aux gens lésés de poursuivre le syndicat. Nous illustrerons par deux exemples : le syndicat tenta de forcer un sous-contracteur en camionnage à participer à une grève afin de forcer les négociations collectives entre le contracteur général et le syndicat. Le contracteur général répliqua en refusant d'utiliser les services du sous-contracteur. La Cour Suprême du Canada statua que cette procédure du syndicat était illégale puisque se servant de moyens illégaux pour intervenir dans la façon d'un tiers de gagner sa vie.

De même, la cause Gagnon vs Foundation Maritime Ltd., les officiers du syndicat décidèrent de recourir au piquetage pour obtenir de l'employeur la reconnaissance du syndicat. La loi ne reconnaissant pas les grèves au Nouveau-Brunswick, celle-ci fut déclarée illégale.

Si l'on se base sur un critère de besoin social, cela pousse l'intervention de la cour dans la mise en vigueur des conventions collectives, alors que les lois régissant les relations industrielles au Canada visent clairement à minimiser ces interventions et à favoriser des conseils spécialisés pour régler les différends. On doit s'interroger à savoir si le but très important de juste représentation serait bien servi par des moyens au moins aussi efficaces que ceux utilisés dans le cas Fisher vs Pemberton mais plus en accord avec les lois canadiennes régissant la solution des conflits.

2. – Est-ce que les tribunaux forment un conseil valable ? Dans le cas de Fisher vs Pemberton, la cour a réglé les deux questions en litige : 1 – Est-ce que le syndicat avait violé son devoir de juste représentation en ne portant pas la cause plus haut ? 2 – si ce grief avait été porté plus loin, est-ce que le plaignant aurait gagné un jugement favorable ?

Dans la première question, la cour ne peut déterminer si le syndicat a aliéné son devoir à l'employé en tant qu'individu, sans examiner une série de facteurs fort différents de ceux habituellement considérés par ces cours.

Nous pouvons répondre à la seconde question en disant que l'arbitrage des griefs est un travail hautement spécialisé, qui doit être exécuté par un personnel de spécialistes, possédant non seulement une compétence judiciaire mais aussi la possibilité de fonder leurs jugements sur la compréhension des processus et des problèmes de relations industrielles.

Les commissions de relations du travail sont donc les mieux placées pour juger s'il y a un manquement au devoir de juste représentation.

3. – Est-ce que les dommages-intérêts sont la meilleure solution ?

Les dommages-intérêts sont souvent loin d'être suffisants ainsi qu'en fait foi la relative réticence des tribunaux à donner au requérant des avantages purement monétaires ; habituellement, le tribunal dira à l'employeur de réengager l'employeur ou de le reclassifier ou de lui accorder une promotion. La solution consiste à confier le règlement des dommages-intérêts à un tribunal d'arbitrage plus souple et apte à recouvrir les torts subis par l'employé à la fois de la part de l'employeur et du syndicat ayant manqué à son devoir de juste représentation.

Qui cependant portera ce grief à l'arbitrage, le syndicat ou l'employé individuel ?

Dans la présentation de l'affaire, les deux parties sont susceptibles de manquer d'objectivité ; il ne doit pas y avoir de règle générale et dans chaque cas, la chose doit être confiée au bon jugement du tribunal d'arbitrage.

4. – Est-ce que la bonne foi est le meilleur critère ?

Il est certain que les juges s'attachent tout autant aux motifs qu'à l'attitude. Cependant il serait plus juste de s'en prendre à la négligence et à l'incompétence des officiers du syndicat dans la défense des griefs d'un de leurs employés, quels que soient leurs sentiments à son égard.

Ceci présente l'avantage que la négligence et l'incompétence importantes ne se prouvent pas facilement. De plus les attaques d'un employé ne pourront plus être causées par sa seule haine du syndicat. Ceci devient particulièrement important lorsqu'il y a lutte entre deux syndicats comme ce fut le cas dans la cause Pemberton vs Fisher.