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Quebec Labour Code and the Status of Unions and Collective Agreements
Le Code du Travail du Québec et le statut des syndicats et des conventions collectives

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Résumé de l'article

Avant la passation du Code du Travail du Québec, les principales dispositions affectant le statut des syndicats et des conventions collectives au Québec étaient contenues dans la loi des Relations ouvrières et dans celle des Syndicats professionnels. En vertu de la loi des Syndicats professionnels, un syndicat ouvrier pouvait acquérir une personnalité légale en suivant la procédure appropriée. Une convention collective signée par un tel syndicat constituait un contrat négocié librement entre l'employeur et le syndicat ouvrant des recours devant les tribunaux et liant seulement les employés qui en étaient membres ou qui l'avaient joint plus tard. La loi des Syndicats professionnels ne contenait pas de dispositions touchant le règlement des conflits pendant la durée de la convention collective par une procédure de griefs ou par l'arbitrage à sentence exécutoire.

Dans le contexte de la loi des Relations ouvrières, les syndicats (non incorporés en vertu de la loi des Syndicats professionnels) étaient des associations volontaires sans personnalité légale propre. Les conventions collectives signées par de tels syndicats n'étaient pas des contrats librement négociés donnant droit de recours devant les tribunaux, mais s'apparentaient à la nature des « gentlemen's agreements » conclus par les employeurs et les syndicats certifiés comme agents de négociation et liant non seulement les membres du syndicat mais tous les employés de l'unité de négociation. Les employeurs devaient négocier de bonne foi avec des agents de négociation certifiés. La loi des Relations ouvrières ne prévoyait pas le règlement devant les tribunaux des griefs relevant des conventions collectives, mais l'amendement de 1961 à la Loi prévoyait l'arbitrage obligatoire et à sentence exécutoire de ces griefs.

Le seul recours judiciaire devant les tribunaux inclus dans la Loi était une poursuite de caractère pénal en vertu de la loi des convictions sommaires du Québec pour infractions aux dispositions de la Loi. Depuis 1946, les dispositions de la loi des Relations ouvrières en regard de la nature et de l'application des conventions collectives s'appliquèrent aux conventions collectives conclues par les syndicats incorporés en vertu de la loi des Syndicats professionnels et certifiés comme agents négociateurs en vertu de la loi des Relations ouvrières. En 1938, une loi pour faciliter l'exercice de certains droits rendit possible le recours devant les tribunaux contre des syndicats non incorporés en leur propre nom. Ces dispositions furent ajoutées à l'amendement de 1960 au Code de procédure civile en permettant aux syndicats non incorporés de poursuivre en leur nom collectif.

Alors que ces amendements fournissaient une procédure qui permettait aux syndicats non-incorporés de poursuivre ou d'être poursuivis en leur nom, elle n'affectait pas la position des syndicats non-incorporés en tant qu'associations volontaires sans personnalité légale.

En régime de common law, les syndicats ouvriers comme tels avaient été considérés sans existence ni personnalité légale distincte de leurs membres individuels et conséquemment ils étaient exemptés des procédures judiciaires en leur propre nom. Les conventions collectives d'après le common law n'avaient pas été considérées comme contrats ouvrant des recours devant les tribunaux, mais plutôt s'apparentaient à des « gentlemen's agreements ». Cette approche en common law relativement au statut des syndicats et des conventions collectives s'est reflétée dans la législation patronale-ouvrière qui apparût dans les années qui suivirent la deuxième guerre-mondiale dans le domaine de juridiction fédérale aussi bien que dans la législation provinciale en common law. En même temps, en ce qui concerne le statut des syndicats ouvriers, certaines lois ont prévu d'accorder aux syndicats une personnalité légale afin qu'ils puissent être poursuivis en leur propre nom pour les offenses commises contre les Lois. En conséquence les tribunaux prétendaient que ces dispositions ne pouvaient pas être interprétées comme permettant également aux syndicats de poursuivre en leur nom.

En conséquence, la loi des Relations ouvrières fut amendée au Manitoba et au Nouveau-Brunswick afin d'habiliter les syndicats à poursuivre comme entités légales. Dans la plupart des juridictions, la législation ouvrière n'indiquait pas si les syndicats étaient capables de poursuivre ou d'être poursuivis en leur nom en tant que personnes légales. La présomption était à l'effet que les syndicats ouvriers étant des associations volontaires, la seule possibilité qui leur restait de poursuivre ou d'être poursuivis en justice était par la voie d'une action représentative. Dans quelques cas, cette vue fut confirmée par les tribunaux. Dans plusieurs autres cependant, les tribunaux considèrent les syndicats comme des entités légales en regard des lois de Relations ouvrières et des procédures judiciaires découlant de ces lois. Finalement, dans la cause *International Brotherhood of Teamsters, local No. 213, vs Henri Thérien* (1960) 22 D.L.R. (2d) p. 1, la Cour Suprême du Canada soutint qu'un syndicat ouvrier, en vertu de la loi des Relations ouvrières de la Colombie-Britannique, est une entité légale non seulement en regard de la loi des Relations ouvrières, mais aussi du common law et peut être tenu responsable en son nom pour dommages, soit pour aller à l'encontre d'une disposition de la loi des Relations ouvrières, soit en vertu du common law.

Dans quelques décisions qui suivirent ce jugement, les tribunaux prétendirent que le principe établi lors de la cause *Thérien* était applicable aux syndicats ouvriers en vertu de la législation ouvrière au Manitoba, en Ontario et en vertu de la loi fédérale I.R.D.I. Cette évolution du common law en regard du statut des syndicats s'est reflétée dans des dispositions légales dans quelques provinces. L'approche originelle du common law qui apparentait les conventions collectives à des « gentlemen's agreements » s'est changée à la suite des dispositions légales concernant le caractère exécutoire des conventions collectives, la méthode de faire appliquer de telles conventions par l'arbitrage obligatoire et à sentence exécutoire, et en raison des dispositions qui faisaient d'une infraction à la convention une offense en vertu de la Loi et objet de poursuite. Ceci amena les tribunaux (incluant la Cour Suprême du Canada) dans la cause *Polymer Corporation and Oil Chemical Atomic Workers International Union, Local 16-14* (1961), 26 D.L.R. (2d) 609; (1961) 28-D.L.R. (2d) 81; (1962) 33-D.L.R. (2d) 124; d'appuyer la position prise par le tribunal d'arbitrage formé en vertu de la convention collective à l'effet que pour les fins de l'arbitrage une convention collective est un contrat et que le tribunal pouvait octroyer des dommages-intérêts pour infraction à une convention collective, même si un tel pouvoir n'était pas explicitement inclus dans la convention. L'Amendement de 1962 à la loi des Relations ouvrières du Manitoba établit spécifiquement qu'une infraction à une convention collective est passible d'une poursuite pour dommages-intérêts devant les tribunaux.

Avant la passation du Code du Travail du Québec, trois versions du bill 54 furent présentées à la Législature québécoise. La première version du bill définissait un syndicat d'une façon fondamentalement semblable à la définition contenue dans la loi des Relations ouvrières. La définition incluait à la fois les syndicats incorporés comme syndicats professionnels et les syndicats non-incorporés, les premiers étant des entités légales et les derniers des associations volontaires. Cependant, le Bill ajoutait une nouvelle disposition (S. 38) par laquelle un syndicat « accrédité » ou « reconnu » devait posséder une personnalité légale quoique restreinte à l'exercice des droits et recours selon le Code du Travail ou toute convention collective. En conséquence, le statut d'associations volontaires devait être restreint aux syndicats non-incorporés n'étant pas « certifiés » ni « reconnus ». La définition de convention collective était semblable à celle contenue dans la loi des Relations ouvrières et reflétait l'approche selon laquelle une convention collective ressemblait à un « gentlemen's agreement », et non à un contrat donnant recours devant les tribunaux. Le Bill contenait des dispositions concernant le caractère exécutoire des conventions collectives qui considérait une infraction à de telles conventions comme une offense en vertu du Code et pouvant faire l'objet de poursuites et de convictions sommaires. La première version du bill prévoyait aussi que les dispositions de la convention collective applicables à un employé feraient partie *pleno jure* de son contrat individuel d'emploi et que l'employé pouvait réclamer les avantages de telles dispositions (S. 57). Cette disposition devait permettre aux employés de faire valoir leurs griefs en vertu des conventions collectives directement devant les tribunaux et conséquemment cette disposition venait en conflit avec les dispositions du Code concernant le mode obligatoire de règlement des griefs en vertu de la convention collective en dehors des tribunaux par voie d'arbitrage obligatoire et à sentence exécutoire.

La seconde version du bill 54 prévoyait qu'« une convention collective donne ouverture à tous les droits et recours prévus par la loi pour la sanction des obligations.»

Le libellé de la section 54 impliquait l'abandon de l'approche qui apparentait les conventions collectives à des « gentlemen's agreements » et qui était fondamentalement celle de la loi des Relations ouvrières et de la première version du Code, et qui rendait les conventions collectives des contrats civils permettant recours devant les tribunaux. La section 54 venait en conflit avec les dispositions concernant l'arbitrage obligatoire et à sentence exécutoire des conflits en vertu des conventions collectives.

La troisième version du Bill laissait tomber les sections 38, 54 et 57; en conséquence le Code ainsi adopté retournait au concept contenu dans la loi des Relations ouvrières du Québec à l'effet que tous les syndicats (exceptés ceux incorporés en vertu de la loi des Syndicats professionnels) sont des associations volontaires sans statut propre et que les conventions collectives ne constituent pas des contrats donnant recours devant les tribunaux.

Quebec Labour Code and the Status of Unions and Collective Agreements *

Jan K. Wanczycki

The author in this article examines the status of unions and collective agreements under the new Quebec Labour Code. He first presents a brief historical review of the laws and decisions concerning this matter not only in Quebec but also in the common law provinces. He goes on stating the conditions prevailing in Quebec as well as in the other provinces up to the enactment of the Code. He finally analyses the new provisions of the Labour Code governing the status of unions and collective agreements covered by it.

PART I

With the enactment of the Quebec Labour Code [1] the question arises as to how the provisions of the Code affect the status of unions and collective agreements. Before the enactment of the Code the main provisions concerning these matters were contained in two Acts : The Labour Relations Act [2] and in the Professional Syndicates' Act. [3]

Under the Professional Syndicates' Act a trade union could be incorporated by following the

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(1) 12-13 Eliz. II, Ch. 45, 1964.

(2) R.S.Q. 1941, Ch. 162A (originally enacted in 1944).

(3) R.S.Q. 1941, Ch. 162 (originally enacted in 1924).
It should be noted that under the Collective Agrement Act (R.S.Q. 1941, Ch. 163) a joint committee formed to administer an extended collective agreement constitutes a corporation and has the powers, rights and privileges of an ordinary civil corporation (S. 20). However judicial personality contemplated by this Act is granted to such a committee only but not to the unions affected by the Act *Society Brand Clothes Limited v. Amalgamated Clothing Workers of America,* (1931) S.C.R. 321.

procedure outlined in the Act. In this respect Section 2(1) provides :

> S. 2(1). Twenty persons or more, Canadian citizens, engaged in the same profession, the same employment or in similar trades, or doing correlated work having for object the establishing of a determined product, may make and sign a memorandum setting forth their intention of forming an association or professional syndicate.

A trade union incorporated under this Act acquires, like any other corporation, a legal personality of its own, distinct from the membership, with all the rights and obligations granted by law to a legal entity. [4]

A collective agreement concluded by an incorporated trade union under the Professional Syndicates' Act was meant to be a civil contract enforceable by the courts. This resulted from a definition of a collective agreement as contained in Section 21 of the Act and from Section 24 regarding the effects of a collective agreement.

Section 21 reads :

> S. 21. The collective labour agreement is a contract respecting labour conditions made between the representatives of a professional syndicate, or of a union, or of a federation of syndicates, on the one hand, and one or more employers, or representatives of a syndicate, union or federation of syndicates of employers, on the other hand.

Any agreement respecting the conditions of labour not prohibited by law may form the object of a collective labour agreement.

Section 24 reads :

> S. 24. The collective labour agreement shall give rise to all the rights and recourses established by the law for the enforcement of obligations

The Professional Syndicates' Act, unlike the Labour Relations Act, contained in Section 22 specific provisions regarding the binding force of collective agreements. Those who were bound by the agreements were the unions and employers who were parties to the agreements and those employees who were union members or those who later joined the union. But agreements were not binding on those employees who were

(4) In some respects a union incorporated under the Professional Syndicates' Act had more rights than other groups incorporated under the Act. Under S. 25 an incorporated union that is a party to a collective agreement could exercise all rights of action arising out of such agreement in favour of each of their members, without having to establish a transfer of claim by the person interested, provided that the latter has been advised and has not declared that he was opposed thereto. This provision was included in the Act in spite of the principle contained in Art. 81 of the Code of Civil Procedure that « A person cannot use the name of another to plead... »

not members of the union which had signed the agreement or of a union which later joined in such an agreement.

Section 22 reads :

> S. 22. The following shall be bound by the collective labour agreement :
>
> 1. The employees and employers who signed it either personally or by authorized attorney ;
>
> 2. Those who, at the time the agreement was made, are members of a group, a party to the agreement, if, within eight clear days from the deposit hereinafter provided for in section 23 of this Act, they have not resigned from such goup and have not deposited a written notice in the office of the secretary of the group and with the Minister of Labour of the Province of Quebec ;
>
> 3. Those who are members of a group which later joins in such agreement, if, from the date of the notification of such adhesion, they have not withdrawn from the group in the manner and within the delay prescribed in the above paragraph 2 ;
>
> 4. Those who, after the deposit of the agreement, join a group which was party to such agreement.

The Professional Syndicates' Act did not contain any provision regarding settlement of disputes under collective agreement by grievance procedure or compulsory and binding arbitration.

The approach of the Labour Relations Act to the status of trade unions and to that of collective agreements had been different. The definition of a trade union, although it included a union incorporated under the Professional Syndicates' Act, essentially was concerned with trade unions as voluntary associations without legal status of their own. This was reflected in the definition of a union in section 2(d) of the Act which reads :

> S. 2(d).—« Association » includes a professional syndicate, a union of such syndicates, a group of employees or of employers, *bona fide*, having as object the regulation of relations between employers and employees and the study, defence and development of the economic, social and moral interests of its members, with respect of law and authority ;

The purpose of including within this definition of unions also the unions incorporated under the Professional Syndicates' Act was apparently to bring such unions within the scheme of certification and collective bargaining without affecting the status of such incorporated unions and without affecting at first when the Act was passed in 1944

the status of collective agreements and the enforcement of such agreements as provided in the Professional Syndicates' Act.

The approach of the Labour Relations Act to the status of collective agreements concluded by these *bona fide* voluntary associations of employees had been that a collective agreement is not a contract enforceable in the courts. In this respect the Act was similar to the British approach that a collective agreement should be placed in the category of a « gentlemen's agreement » binding only as a matter of honour and supported by social rather than legal sanctions. [5] The Labour Relations Act in Section 2(e) defined a collective agreement as follows :

> S. 2(e) « Collective Agreement » or « agreement » means any arrangement respecting conditions of employment entered into between persons acting for one or more associations of employees, and an employer or several employers or persons acting for one or more associations of employers ;

A collective agreement under the Professional Syndicates' Act was meant to be a freely negotiated contract between the employer and the incorporated union and to be binding on only those employees who were members or later joined the union which signed the agreement.

Under the Labour Relations Act a certified association of employees in an establishment or in a bargaining unit did not represent only those employees who belonged to that particular union (as was the case under the Professional Syndicates' Act) but such an association represented all the employees in a bargaining unit. Further, the collective agreement was not any longer purely a voluntary act on the part of the employer. According to Section 4 of the Labour Relations Act, the employer was bound to recognize as the collective representative of his employees the representatives of any association comprising the absolute majority of his employees and to negotiate with them, in good faith, a collective agreement. Although the employer was not obliged to conclude a collective agreement, his freedom to abstain from signing one was curtailed by the fact that the Act obliged him to negotiate in good faith and, if negotiations failed, he faced the possibility of a strike.

(5) O. KAHN-FREUND, « The Common Denominator with Reference to Collective Bargaining in Europe », collected in « *Lectures of the Law and Labour-Management Relations* » (University of Michigan Law School, 1951) referred to in B. Lepkin, « A study of the legal status of collective bargaining agreements in the common law provinces of Canada », in *Papers presented at the annual meeting of the Canadian Bar Association*, Banff, 1957, pp. 193-220.

The amendment to the Act in 1961 [6] among others, in Section 24(4) [7] prohibited strikes and lockouts under any circumstances during the life of a collective agreement, and Section 24(5) [8] provided for compulsory and binding arbitration of the disputes resulting from the interpretation and application of collective agreements. The arbitration procedure was determined either by the parties to the collective agreement or was imposed by the provisions of the Quebec Trade Disputes Act (R.S.Q. 1941, Ch. 167).

Also the same amendment to the Labour Relations Act of 1961 in Section 24, subsection 6 [9] provided expressly that disputes other than those regarding the interpretation or application of collective agreements, that is, the so-called « interests » disputes, must be settled in the manner provided in the agreement and to the extent therein provided.

The provision of Section 24 (5) and (6) meant that all disputes during the life of a collective agreement, whether arising from interpretation and application of the agreement (disputes regarding « the rights »), or any other disputes (« interests » disputes) had to be settled in a manner provided in the collective agreement, and, in the case of disputes regarding « rights », by way of compulsory and binding arbitration. [10] The Labour Relations Act did not make any provision for settling the disputes in Courts.

The only court action contemplated in the Act was a penal prosecution under the Quebec Summary Convictions Act for the breach of the provisions of the Act (Sections 42-50). In particular Section 44 provided :

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(6) 1961 (9-10) Eliz. II, Ch. 73.

(7) S. 24(4) Any strike or lockout is prohibited under any circumstances during the period of a collective agreement.

(8) S. 24(5) Any complaint resulting from the interpretation or application of a collective agreement must be submitted to arbitration in the manner provided in the said agreement if it so provides, otherwise in the manner provided by the Quebec Trade Disputes Act (Ch. 167). The report of the chairman of the council of arbitration shall constitute the award if a majority is lacking. In all cases, the award shall bind the parties.

(9) S. 24(6). No complaint other than those contemplated in the preceeding subsection shall be settled otherwise than in the manner provided in the collective agreement and to the extent therein provided.

(10) Regarding the scope of the 1961 Amendments with regards to arbitration, see: R. CHARTIER, « Evolution de la Législation Québécoise du Travail — 1961 ». *Relations Industrielles*, Volume 16, No. 4, Oct. 1961, pages 381-426, at pp. 407-410.

> S. 44. Any person who fails to comply with any obligation or prohibition imposed by this act or by a regulation or decision of the Board is guilty of an offence and liable, unless another penalty is applicable, to a fine of not less than $100.00 nor more than $1,000.00 for each day or portion of a day during which the offence continues.
>
> S. 49. Any penal prosecution under this Act may be taken by the Board, or by any interested party with the written authorization of the Board or the consent of the Attorney General.

Penal sanctions under the Labour Relations Act could be invoked in connection with collective agreements if the party to the agreement did not comply with the provisions regarding the grievance procedure or when it refused to comply with the arbitration award.

At one time the Quebec Labour Relations Act and the Professional Syndicates Act drew a clear line of distinction regarding the nature of trade unions and the nature of collective agreements in Quebec. A union had been a legal entity when incorporated under the Professional Syndicates' Act and the collective agreement entered into by such an incorporated union was a civil contract under which rights and obligations could only be enforced by civil action in Courts.

On the other hand, a trade union operating under the Labour Relations Act was essentially a voluntary bona fide association, and a collective agreement concluded by such a union was not a civil contract. The Act did not contain any provision regarding the binding force of the collective agreements. Consequently, the rights and obligations acquired under the Labour Relations Act by a collective agreement were not to be enforced by the courts but rather by other means. [11] Finally the 1961 amendment spelled out that such disagreements had to be settled by grievance procedure and by compulsory and binding arbitration as provided in a collective agreement or in the Quebec Trade

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(11) The collective agreements usually provided machinery for settling disputes, or the parties could take advantage of the arbitration procedure as provided in the Trade Disputes Act.

In 1945 Section 17 was added to the Labour Relations Act which provided for grievance procedure with respect to any complaint regarding any alleged violations of the Act or of the collective agreement submitted by other association than that which was a party to a collective agreement when such an association comprises at least 20 employees, corresponding to at least 10 per cent of the group subject to a collective agreement.

In 1958, M.-L. Beaulieu wrote that considering the fact that the Labour Relations Act does not contain any provision for settling disputes resulting from collective agreements by court actions — it is a controversial matter whether the courts have jurisdiction to settle such disputes. M.-L. BEAULIEU, « Contenu, effets juridiques, application et exécution de la convention collective dans la législation du Québec », *La Revue du Barreau*, 1958, t. 18, No. 2, pp. 53-66.

Disputes Act.[12] Since then non-compliance with the grievance procedure and arbitration /s. 24/5 and 6/ could lead to prosecution for an offence under the Act.

This clear cut distinction insofar as the nature and enforcement of collective agreements was concerned partly disappeared when, in 1946, the Labour Relations Act amended by adding Section 19/a/[13] which brought under the Labour Relations Act the collective agreements entered into under the Professional Syndicates' Act by the unions recognized by the Labour Relations Board as bargaining agents.

Section 19 (a) reads :

> S 19(a). This Act shall apply to a collective agreement entered into under the Professional Syndicates' Act (ch. 162), by an association thus recognized, as from the date of the deposit of such agreement in the office of the Minister of Labour, in accordance with Sec. 23 of the said Professional Syndicates' Act ; such deposit shall dispense from this transmission contemplated in Sec. 19. The Minister shall transmit two certified copies of such agreement to the Board, for deposit in its archives.

With the enactment of Section 19 /a/ of the Labour Relations Act the provisions of the Professional Syndicates' Act regarding collective agreements ceased to apply to agreements entered into by incorporated unions and certified as bargaining agents by the Labour Relations Board. Such agreements ceased to be freely negotiated contracts enforced by civil actions and became agreements within the meaning of the Labour Relations Act which the employer was bound to negotiate in good faith. They acquired, like agreements negotiated by unincorporated unions this specific status of their own, not contracts but more than « gentlemen's agreements », because of the specific way of enforcing them through grievance procedure with final and binding arbitration, and

(12) In a recent case *L'Ecuyer et Autres v. Standard Telephone and Cables Mfg. Co. et un Autre* /1964/ R.J.C.S. Nos. 5 et 6, p. 339, Mr. Justice Smith of the Quebec Superior Court held that a grievance resulting from the interpretation and application of a collective agreement under Section 24/5/ of the Labour Relations Act could only be submitted to arbitration as provided in the collective agreement in question and the resulting arbitration award was final and could not be changed. Further, he held that because of the provisions of the Labour Relations Act to the effect that an arbitration award under collective agreement is final and binding, such an award does not require homologation by the court under section 1431 and foll. of the Code of Civil Procedure in order that the beneficiaries under the arbitration award could sue the company for the money due to them. Further, the court held that such action could not be launched by the union, but only by the individuals concerned.

(13) 10 Geo. VI, ch. 37, s. 2, 1946.

through prosecutions in case of non-compliance with the provisions regarding the settlement of disputes under collective agreements.

Section 19 /a/ did not affect the legal status of incorporated unions, whether certified or not, but changed the nature and enforcement of collective agreements, once incorporated unions were certified as bargaining agents. The application of Sections 21-26 of the Professional Syndicates' Act was narrowed down to collective agreements entered into by incorporated but not certified unions.

Such agreements continued to be freely negotiated contracts (S. 21) with civil actions as the only means of enforcing them.

Another Act in the province of Quebec which caused controversy that it might affect the status of unincorporated trade unions was « An Act to facilitate the exercise of certain rights » of 1938 [14] which was in 1941 incorporated in Sections 28 and 29 of the Special Procedure Act — Div. VIII — Summoning Unincorporated Groups. [15] The provisions of the 1938 and 1941 Acts made it possible to bring court proceedings against the voluntary associations including unincorporated trade unions in their own name. Also these provisions made such an association, in case of action for damages, financially liable with all its resources. This remedy was similar to the representative action used against collective membership of a voluntary association in the common law provinces. [16] However, where the remedy of representative action would be used in court proceedings by or against a voluntary association, the remedy provided in Quebec was limited to the proceedings against a voluntary association only. [17]

(14) 2 Geo. VI, Ch. 96, 1938.

(15) R.S.Q. 1941, Ch. 342.

S. 28. Every group of persons associated for the carrying out in common of any purpose or advantage of an industrial, commercial or professional nature in this Province, which does not possess therein a collective civil personality recognized by law and is not a partnership within the meaning of the Civil Code, is subjected to the provisions of Section 29 of this Act. 2 Geo. VI, Ch. 96, s. 1.

S. 29. The summoning of such group before the courts of this Province, in any recourse provided by the laws of the Province, may be effected by summoning one of the officers thereof at the ordinary or recognized office of such group or by summoning such group collectively under the name by which it designates itself or is commonly designated or known.

The summoning by either method contemplated in the preceding paragraph shall avail against all the members of such group and the judgments rendered in the cause may be executed against all the moveable or immoveable property of such group. 2 Geo. VI, c. 96, s. 2.

(16) See SHERBANIUK, « *Actions by and against trade unions in contract and tort* », (1958), 12 U. of T.L.J. 151.

(17) *International Ladies Garment Workers Union v. Rothman (1941) S.C.R. 388.*

In 1960 the Quebec Code of Civil Procedure was amended [18] by repealing Division VIII of the Special Procedure Act and by incorporating its provisions in Section 81(a) and by adding 81(b) which provides that a voluntary association of employees within the meaning of the Labour Relations Act may plead in courts in its own name for the purposes of any recourse provided by the laws of the Province, by depositing in the court with the writ of summons or other proceedings introductive of suit, a certificate issued by the Quebec Labour Relations Board that such a group constitutes a *bona fide* association within the meaning of the Labour Relations Act. Consequently since 1960 unincorporated trade unions in Quebec may sue and be sued in their own name.

The 1938 Act was enacted following the decision of the Supreme Court of Canada in *Society Brand Clothes Ltd v. Amalgamated Clothing Workers of America* [19] where, with respect to the unincorporated trade unions in Quebec, the Supreme Court of Canada held that such unions have no legal existence and cannot be considered in law as entities distinct from their individual members and are not suable in the common name. Mr. Justice Cannon, at page 328, stated : « the Province of Quebec has not yet legislated to give legal existence to or recourse against unincorporated bodies. »

The purpose of the 1938 Act was to provide such recourse against unincorporated unions.

With the enactment of the 1938 Act two questions were raised : first, did the Act also provide the unions with the right to sue? And second, did the Act by implication endow trade unions with legal personality?

About three years after its enactment, the 1938 Act was tested in the Supreme Court of Canada in the case of the *International Ladies Garment Workers Union v. Rothman.* [20] In this case, an International Union contended that, since the enactment of Sections 28 and 29 of the Special Procedures Act [21] which made an unincorporated union subject to

(18) /1959-1960/ Ch. 99.
(19) /1931/ S.C.R. 321.
(20) (1941) S.C.R. 388.
(21) R.S.Q. 1941, ch. 342.

summons collectively in its adopted name, the unincorporated union may likewise bring suit under that name. The Supreme Court rejected this contention and went on to declare in the words of Mr. Justice Rinfret (later Chief Justice) (on page 393) that, from the precise and unambiguous words of the statute, read in their ordinary and natural sense,

> « that statute allows the summoning of groups of the nature of the appellants before the courts of the province of Quebec, either by summoning one of their officers, or by summoning the group collectively under the name by which it is designated; but it does not permit them to bring an action before the courts. The word «summoning» is well known in the procedure of the province and it connotes the manner in which an action at law is brought against a defendant. The enactment is couched in express terms and does not admit of any possible doubt. »

Regarding the effect of the statute on the status of the unincorporated unions, Mr. Justice Rinfret said (on pp. 393/94) :

> « The statute does not purport to incorporate the groups or persons therein described, nor does it purport to confer upon them a collective legal personality. It does exclusively what is therein stated : It allows persons who have claims against them to summon them in the name of one of their officers thereof, at the ordinary or recognized office of the group, or collectively under the name by which they are commonly designated or known. »

It would seem that the decision of the Supreme Court of Canada in the *Rothman* case made clear that the 1938 Act did not affect the legal status of unincorporated trade unions in Quebec. However when in 1945 Mr Justice Duranleau of the Quebec Superior Court (an unreported judgment) in the *Lachance v. La Fraternité de Wagonniers de Chemins de Fer d'Amérique* [22] declared that the 1938 Act in substance provided merely for the summoning before the courts of certain groups of persons having no civil existence and that the purpose and ambit of the statute could not be extended into endowing unincorporate unions with legal entity, Mr. G. Favreau disagreed with this statement and argued that by inference S. 28 and 29 of the Special Procedure Act gave a « legal existence » and « corporate entity » to an unincorporated trade union. [23]

In 1948, in the Quebec court of appeal in the case of *Comtois v. L'union Locale 1552 des Lambrisseurs de Navires,* [24] Mr. Justice Casey, rendering the judgment of the court expressed views similar to Mr. Favreau's when he stated (on p. 679) :

(22) S.C.M. 232096, Feb. 26, 1945.
(23) (1948) *Canadian Bar Review*, 584-590.
(24) (1948) K.B. 671.

> « Whatever may have been the position prior to the enacting of this statute, it is quite clear that when these proceedings were started any group of persons satisfying the requirements of art. 28 (as does the defendant union) could be summoned collectively and that the judgment rendered in the suit could be executed against the assets of the group. It cannot be denied therefore, that the statute gave to such groups generally, an existence separate and distinct from that of its individual members.
>
> This legal existence and this availability of assets, evidence the intention of the Legislature that these groups should be as amenable to the Courts as any other artificial person, should one seek to exercise against them « any recourse provided by the laws of the Province ». This in my opinion is sufficient to make such a group subject to par. 2 of art. 992 C.P., and to expose it to the sanction of art. 1001 of the same Code. »

Mr. J.J. Spector disagreed [25] with the views of Mr. Favreau and of Mr. Justice Casey and, relying on the decision of the Supreme Court of Canada in the *Rothman* case, *supra*, expressed the view that Art. 28 and 29 of the Special Procedure Act did not give an unincorporated trade union an existence separate and distinct from that of its individual members. What the statutes purported to do, in his opinion, was to provide an easy method of exercising legal recourse against unincorporated associations by summoning all members of the group through one of its officers or under its designated name. He concluded that it is not to be assumed that, because Secs. 28 and 29 of the Special Procedure Act gave legal recourse against unincorporated bodies, they likewise, by the same token, gave them legal existence.

The effect of the 1938 Act on the status of trade unions was considered again in September 1953 by the Superior Court of Quebec in *MacDonald v. Tobin.* [26] Mr. Justice Jean rejected an application for injunction to remove a trusteeship imposed on the Teamsters' local 106 in Montreal by the international president of the Teamsters' union, and to restore a former union officer, on the ground that Sec. 958, par. 2, of the Quebec Code of Civil Procedure prohibits the granting of injunction to restrain exercise of any office in a public or private corporation. The plaintiff (former business agent of the union) claimed that Sec. 958 (2) was not applicable because the local in question was neither a public nor a private corporation and did not possess a legal personality distinct from its members. In rejecting this contention, Mr. Justice Jean (with reference to the judgment of the court of King's Bench in *Comtois v.*

(25) (1949) *Canadian Bar Review*, 217-224.
(26) (1954) C.S.R.J. 65.

L'union Locale 1552 des Lambrisseurs de Navires, supra) held that, since the adoption of the 1938 « Act to facilitate the exercise of certain right » (as incorporated in Secs. 28 and 29 of the Special Procedure Act, R.S.Q. 1941, Ch. 342), it has been recognized that associations of persons formed with a view to achieving some common industrial, commercial or professional purposes, in the province, have a legal personality distinct from their members. And the holding of an office in one of such associations is similar to the holding of an office in a public or private corporation.

In 1959, in the case of *Perreault v. Poirier and Dresscutters' union, Local 205, 262*, the Quebec Court of Queen's Bench [27], relying on the Supreme Court of Canada decisions in *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America* [28] and *International Ladies Garment Workers Union v. Rothman,* [29] confirmed the decision of the trial court and upheld the position that, in Quebec, voluntary associations including unincorporated unions, had no legal entity and consequently are unable to sue. The rulings of the Quebec courts were confirmed by the Supreme Court of Canada. [30] In this case the 1938 Act was not directly involved and no argument was presented that the 1938 Act might have endowed the voluntary associations including unincorporated unions, with legal entity thus giving them the right to sue. The decision in the *Perreault* case was followed in 1960 by inclusion of the Special Procedure Act in the Code of Civil Procedure as Art. 81(a) and by adding Art. 81(b) which enabled unincorporated unions to sue (1959-60) ch. 99).

If any controversy still exists regarding the effect of the 1938 Act on the legal status of unincorporated unions, it is submitted that the Supreme Court of Canada decisions in the *Rothman* case and by implication in the *Perreault* case, should be decisive. While the 1938 Act and the 1960 amendment to the Code of Civil Procedure provided a procedural device to bring actions by or against unincorporated unions in their name, these statutes did not affect the position of unincorporated unions as being voluntary associations without a legal personality of their own.

(27) (1959) R.J.B.R. 447.
(28) (1931) S.C.R. 321.
(29) (1941) S.C.R. 388.
(30) (1959) S.C.R. 843.

PART II

When considering the status of trade unions and that of collective agreements in Quebec on the eve of the introduction in 1963 of the Code of Labour (Bill 54), it might be useful to describe briefly the common law approach and the approach of labour legislation in the common law provinces regarding the same matters.

The legal status of trade unions at common law was clearly stated by Mr. Justice Cannon in *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America* [31] when he said (at pp. 327-328):

> We must accordingly reach the conclusion that, while under the prevailing policy, our legislation gives to unincorporated labour organizations a large measure of protection, they have no legal existence; they are not endowed with any distinct personality; they have no corporate entity; they constitute merely collectivities of persons. The acts of such an association are only the acts of its members. Therefore, it cannot appear before the courts and its officers have no capacity to represent it before the tribunals of the province of Quebec where « nul ne plaide au nom d'autrui » (Art. 81, C.C.P.).

The conclusion reached by the majority of the court was summed up in the headnote (at p. 321):

> An unincorporated labour union has no legal existence and cannot be considered in law an entity distinct from its individual members and is not suable in the common name.

This was quoted with approval by Mr. Justice Rinfret in the judgment of the Supreme Court of Canada in the *International Ladies Garment Workers Union v. Rothman.* [32]

Regarding the status of collective agreements at common law, the decision of the Privy Council in *Young v. Canadian Northern Railway Company* [33] had been held as authority for the principle that a collective agreement is not a contract enforceable in courts.

The legislation concerning labour-management relations in the federal field of jurisdiction and in the common law provinces that emerged in the years following World War II continued the long standing common law position that trade unions are voluntary associa-

(31) (1931) S.C.R. 321.
(32) (1941) S.C.R. 388.
(33) (1931) A.C. 83.

tions of physical persons without a legal personality of their own and that collective agreements are rather in the nature of « gentlemen's agreements » and not contracts enforceable in courts. These views were reflected in the definition of trade unions which may differ slightly from one jurisdiction to another but essentially describe a trade union as an organization of employees formed for the purpose of regulating relations between employers and employees, and in the definition of collective agreements as agreements between the employers and trade unions acting as bargaining agents, containing terms or conditions of employment including provisions with reference to rates of pay and hours of work.[34]

As to stress the common law approach to the status of trade unions and to the status of collective agreements specific provisions to endow trade unions and collective agreements with immunity from court action with regard to suing the unions and enforcing agreements through civil actions had been inserted in the Ontario Rights of Labour Act (ss. 3(2) and 3(3) [35] and in the Saskatchewan Trade Union Act in Sections 23 and 24. [36] Also the Newfoundland Trade Union Act [37] (replaced in 1960) provided in S. 6 that « An action against a trade union or against any member or official thereof on behalf of themselves and all other members of the union in respect of any tortious act alleged to have been

(34) For example the federal Industrial Relations and Disputes Investigation Act defines trade unions in S. 2(1) (r) as follows : « Trade union » or « union » means any organization of employees formed for the purpose of regulating relations between employers and employees but shall not include an employer-dominated oganization.

And in Section 2(1)(d) describes a collective agreement: «-collective agreement » means an agreement in writing between an employer or an employers' organization acting on behalf of an employer, on the one hand, and a bargaining agent of his employees, on behalf of the employees, on the other hand, containing terms or conditions of employment of employees including provisions with reference to rates of pay and hours of work.

(35) R.S.O. 1960, Ch. 354.

S. 3(2) A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of any of the provisions of this Act or of *The Labour Relations Act.*

S. 3(3) A collective bargaining agreement shal not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of *The Labour Relations Act.*

(36) R.S.S. 1953, Ch. 259.

S. 23. A trade union shall not be made a party to any action in any court unless such trade union may be made a party irrespective of any of the provisions of this Act.

S. 24 A collective bargaining agreement shall not be the subject of any action in any court unless such collective bargaining agreement might be the subject of such action irrespective of any of the provisions of this Act.

(37) R.S.N. 1952, Ch. 262.

committed by or on behalf of the trade union shall not be entertained by any court. »

At the same time with regard to the status of trade unions some statutes made provisions granting the unions legal personality that they might be prosecuted in their own name for offences committed under the Act. [38]

It was left to the courts to clarify whether the provisions of the Labour Relations Act making the unions subject to prosecutions in their own name as legal persons for breach of the Act, would by implication allow the unions as legal persons to initiate prosecutions or other legal proceedings in courts. The courts ruled that in view of the clear language of these provisions, such an implication was not acceptable. [39] As the result of the position taken by the courts, Section 46(1) of the Manitoba Act, which was identical with the federal provision, was amended in 1959 [40] to empower unions to initiate prosecutions, and in a similar way the New Brunswick Labour Relations Act was amended in 1961. [41]

In most jurisdictions labour legislation was silent as to whether unions were able to sue or be sued in their names as legal persons. It was assumed that, trade unions being unincorporated associations at common law, the only way open to them to sue or be sued was by way of representative action. Considering procedural difficulties and uncertainties of representative action particularly in actions for damages against the unions [42], in several instances court proceedings were brought

(38) In this respect Section 45 of the I.R.D.I. Act reads :

S. 45(1). A prosecution for an offence under this Act may be brought against an employers' organization or a trade union and in the name of the organization or union and for the purpose of such a prosecution a trade union or an employers' organization shall be deemed to be a person, and any act or thing done or omitted by an officer or agent of an employers' organization or trade union within the scope of his authority to act on behalf of the organization or union shall be deemed to be an act or thing done or omitted by the employers' organization or trade union.

Similar provisions were contained in the Labour Relations Acts of Manitoba, New Bunswick, Newfoundland, and Nova Scotia.

(39) See *Canadian Seamen's Union v. Canadian Labour Relations Board and Branch Lines Ltd.*, (1951) 2 D.L.R. 356 ; *Re Walterson and Laundry and Dry Cleaning Workers Union and New Method Launderers Limited* (1955) 14 W.W.R. 541 ; *The Queen v. Labour Relations Board, ex Parte Steeves Motors Ltd. and Attorney-General of New Brunswick* (1959) 17 D.L.R. (2d), p. 268.

(40) 1959 (2nd Sess., Ch. 32).

(41) (1960-61) Ch. 52.

(42) See SHERBANIUK, *ibid.*, footnote 16.

by or against the unions in their names and the courts had to decide whether within the context of labour legislation (or at common law) the unions had status to appear in courts in their own names.

In some cases the courts held that the unions as such have no legal status to appear in courts. [43]

In several cases however the courts held or accepted the unions as legal entities. [44] Three decisions in this respect are of particular importance.

In *Re Patterson and Nanaimo Dry Cleaning and Laundry Workers* Union, Local 1 [45] (a case primarily concerned with the prosecution of a union in its name as a legal entity for breach of the B.C. Industrial Conciliation and Arbitration Act), the British Columbia Court of Appeal ruled that an unregistered and unincorporated trade union but certified as a bargaining agent under the British Columbia Industrial Conciliation and Arbitration Act, 1947, (B.C.) Ch. 44, (replaced in 1954 by the Labour Relations Act), has been endowed by the Legislature by the terms of the Act with status, attributes and responsibilities of a juridical person for

(43) *Clay Product Workers' Union v. Dominion Fire Brick and Clay Products Ltd. and Labour Relations Board of Saskatchewan* (1947) 1 D.L.R. 376; *Orchard v. Tunney* (1957) 8 D.L.R. (2d), p. 273; *Charleston et al and Lodges Nos. 519, 51 and 558 of Brotherhood of Railroad Trainmen v. MacGregor and Brotherhood of Railroad Trainmen* (1957) 23 W.W.R. 353; *J.A. Nabess and Lynn Lake Base Metal Workers Federal Union No. 292 and Sherritt Gordon Mines Ltd.* (1960) 67 Man. R. 22; C.C.H. Canadian Law Reporter, para. 15, 310; *Re James Warner and the Manitoba Labour Board et al.*, (1960) 31 W.W.R. 613; *Re Bakery and Confectionary Workers' Interntional Union of America Local 389, Winnipeg, and Brothers Bakery Ltd.* (1962) 37 W.W.R. 413.

(44) *Hollywood Theatres Ltd. v. Tenney* (1940) 1 D.L.R. 452; *Mackay and Mackay v. International Association of Machinists, Lodge No. 1057, Saskatoon* (1946) 3 D.L.R. 38; *Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union, Local No. 1* (1947) 4 D.L.R. 159; *Medalta Potteries Limited v. Longridge* (1947) 2 W.W.R. 856; *Vancouver Machinery Depot Ltd. v. United Steelworkers of America* (1948) 1 D.L.R. 114; (1948) 4 D.L.R. 518; (1948) 4 D.L.R. 522; *Re International Nickel Co. of Canada Ltd., Shedden v. Kopinak* (1950) 1 D.L.R. 381; *The Manitoba Labour Relations Act; re International Union of Operating Engineers, Local Union No. 827, and Manitoba Labour Board* (1952) 5 W.W.R. (NS) 264; *Walker v. Billingsley* (1952) 4 D.L.R. 490; *Peerless Laundry and Cleaners Ltd. v. Laundry and Dry Cleaning Workers Union* (1952) 5 W.W.R. (NS) 264; *Walker v. Billingsley* (1952) 4 D.L.R. 490; *Peerless Laundry and Cleaners Ltd. v. Laundry and Dry Cleaning Workers Union* (1952) 6 W.W.R. (NS) 443; *Machinists, Fitters and Helpers Unions, Local No. 3 v. Victoria Machinery Depot Co. Ltd.* (1953) 3 D.L.R. 414; *G.H. Wheaton Ltd. v. Local 1598, United Brotherhood of Carpenters and Joiners of America* (1957), 6 D.L.R. (2d) 500; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Building Material, Construction and Fuel Truck Drivers, Local No. 213 v. Henry Therien* (1960) 22 D.L.R. (2d) p. 1; (1960) S.C.R. 265.

(45) (1947) 4 D.L.R. 159.

the purposes of the Act and proceedings thereunder. In *Vancouver Machinery Depot Ltd., v. United Steel Workers of America,* the British Columbia Court of Appeal [46] held that a union not actually certified as a bargaining agent but capable of being so certified under the Act was a suable entity (persona juridica) for the purposes of implementing that Act and for causes of action that might possible be founded directly upon its provisions or breaches thereof. On appeal [47] this ruling was confirmed and Mr. Justice Sidney Smith added :

> The status of unions — either as local or international bodies — to be sued in contract or tort, has not, however, been determined as yet by this Court. [48]

This last aspect of legal status had been considered by the Supreme Court of Canada in the case of *International Brotherhood of Teamsters, Local No. 213 v. Henry Therien* [49] when the court held that a trade union coming within the definition of that expression in the Labour Relations Act, 1954 (B.C.) Ch. 17, and particularly if it has been certified under the Act as a collective bargaining agent, is a legal entity not only for the purposes of the Labour Relations Act but under the common law and may be held liable in its name for damages either for a breach of a provision of the Labour Relations Act or under the common law (liability in contract or in tort).

In some decisions that followed this judgment, the courts held that the prnciple established in the *Therien* case was applicable to trade unions under labour legislation in Manitoba, Ontario and under the federal I.R.D.I. Act. [50]

Some provinces did not lag behind the evolution of the common law. For example in British Columbia before the Supreme Court of Canada decision in the *Therien* case was rendered, a new Trade-unions Act was enacted in 1959 [51] which stated in S. 7 that a trade union (and

(46) (1948) 4 D.L.R. 518.

(47) (1948) 4 D.L.R. 522.

(48) *Ibid.,* p. 524.

(49) (1960) 22 D.L.R. (2d) p. 1 ; (1960) S.C.R. 265.

(50) *Dusessoy's Supermarkets St. James Ltd. v. Retail Clerks Union Local No 832* (1961) 34 W.W.R. 577 ; *Boldt v. Seafarers' International Union of North America, Canadian District* (1961) 26 D.L.R. (2d) 678 ; *Re Polymer Corporation and Oil, Chemical and Atomic Workers International Union, Local 16-14* (1961) 26 D.L.R. (2d) 609 ; (1961) 28 D.L.R. (2d) 81 ; (1962) 33 D.L.R. (2d) 124 ; *Nipissing Hotel Ltd. v. Hotel and Restaurant Employees and Bartenders International Union* (1963) 38 D.L.R. (2d) 675.

(51) (1959) Ch. 90, s. 1 ; R.S.B.C. 1960, Ch. 384.

an employers' organization) is a legal entity « for purposes of prosecuting and being prosecuted for offences against the *Labour Relations Act* and for purposes of suing and being sued under this Act. » In Manitoba, the Labour Relations Act which provides in S. 46 as amended in 1959 for prosecutions by or against the unions (or employers' organizations) as legal entities for an offence under the Act, was amended again in 1962. [52] A new Section 46A was added which made unions liable for damages resulting from doing anything prohibited or required to be done under the Act. Subsection (3) stated : « For the purposes of suing or being sued as permitted under this Act, employers' organizations and trade unions are legal entities capable of suing or being sued ».

In Newfoundland, the Labour Relations Act [53] as enacted in 1950 provided in S. 46(1) for prosecution of trade unions in their name for an offence under the Act and for such purpose the union was declared to be a person. In 1960 the amendment [54] to the Act provided by adding a new S. 25A for a union's liability in damages for tortious act committed in connection with legal strikes. The new Trade Union Act enacted in 1960 [55] provided in Section 5(5) that all actions, suits, prosecutions, and complaints taken by or against a union in any court of competent jurisdiction concerning the property of a union registered under the Act shall be taken in the name of the trustees, and « all other actions by and against a union registered under this Act shall be taken in the name of the union ». Regarding unregistered unions subsection 7 of section 5 provided that « a union which has not been registered may be sued in its own name or in the name of any of its members ».

In Prince Edward Island the Trade Union Act of 1945 [56] was replaced in 1962 by the Industrial Relations Act. [57] Section 52 of the Act contains provisions regarding the status and civil liability of trade unions similar to section 18 of the former Act as amended in 1953 (2nd Sess. Ch. 3, s. 1). Section 52 reads :

> A trade union may sue and be sued by its name as filed under Section 50, and if not so filed, then by the name by which it is commonly known.

(52) (1962) Ch. 35, s. 15.
(53) R.S.N. 1952, Ch. 258.
(54) 1960, No. 58, s. 17.
(55) 1960, No. 59.
(56) R.S.P.E.I. 1951, Ch. 164.
(57) 1962, Ch. 18.

As to the status of collective agreements, as already mentioned, the definition of the collective agreement in the Labour Relations Acts embodied the common law position that collective agreements are rather in the nature of the « gentlemen's agreements », of a code of behaviour, and not contracts enforceable in courts. But at the same time provisions were made that once a union was certified as a bargaining agent for a unit of employees, the employer was bound to bargain in good faith in view of concluding an agreement.

If and when a collective agreement was concluded, labour legislation provided two ways of enforcing such an agreement. Provisions were made that the grievances resulting from interpretation, application and violation of collective agreements had to be settled through a grievance procedure by arbitration (or otherwise) without stoppage of work as provided in the agreements or in the Acts. Such settlement was final and binding on every party to and every person bound by the agreement. Non-compliance with arbitration award would constitute an offence under the Act and lead to prosecution under the Act.

Sections 19 of the federal I.R.D.I. Act provided :

> S. 19(1) Every collective agreement entered into after the 1st day of September, 1948, shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> . . . . . .
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

Also provisions were made that a collective agreement is binding on the parties to the collective agreement as well as on the employees to whom the agreement applied. A breach of the collective agreement could be prosecuted as an offence under the Act. For instance the British Columbia Labour Relations Act (R.S.B.C. 1960, Ch. 205) provides in this respect :

> S. 20 A collective agreement is binding upon
>
> a) the trade-union which has entered into the agreement and every employee covered by the agreement ; and
>
> b) the employer who has entered into the agreement, or an employers' organization authorized by the employer which has entered into the agreement.

> S. 21(1) Every person who is bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything that he is required to refrain from doing, by the provisions of the collective agreement, and failure to so do or refrain from so doing is an offence against this Act.
>
> . . . . . .

It may be assumed that within the context of the provisions of the Act regarding the final settlement of differences under collective agreement and the provisions regarding prosecution for breach of an agreement as an offence under the Act, recourse to prosecutions under the Act would have to be preceeded by an arbitration award stating a breach of the collective agreement, unless the breach was self-evident for example in case of a union calling a strike in breach of collective agreements has been strengthened. They became the focal point of the the Act dealing with strikes and lockouts and could be prosecuted as offences under the Act or enjoined without recourse to grievance procedure.

As the result of these statutory provisions the position of collective agreements has been strengthened. They became the focal point of the whole process of collective bargaining. Protected by law, enforced by way of grievance procedure with compulsory and binding arbitration which could lead to prosecutions for breach of the provisions of the labour relations Acts, collective agreements acquired a specific status of their own. They became more than « gentlemen's agreements ». However statutory provisions stopped short of making them civil contracts.

This situation led Mr. Justice Wilson of the Supreme Court of British Columbia in the case of Hume and Rumble [58] to the statement that the *ratio decidendi* in the decision of the Privy Council in *Young v.* agreement has no legal status in courts and is not a contract enforceable *Canadian Northern Railway Company* [59] to the effect that a collective

(58) *Hume and Rumble Limited and Peterson Electrical Construction Company Limited v. Local 213 of International Brotherhood of Electrical Workers* (1954) 12 W.W.R. (NS) 321. This was the case where the plaintiff companies sued for a declaration that certain letters exchanged between the companies and the union constituted a binding agreement to enter into a collective agreement, and for a declaration as to the terms of the collective agreement and for an order that the union sign and execute the said collective agreement (headnote).

(59) (1931) A.C. 83; (1931) 1 W.W.R. 49.

in the courts, is not capable of general application to all collective agreements between employers and trade unions.

Mr. Justice Wilson referred to the Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, Ch. 155, which in Section 44 provided that a collective agreement is binding on the bargaining agent, every employee in the bargaining unit and the employer who has entered into the agreement, and in Section 45 that breach of the agreement is an offence under the Act.

Then Mr. Justice Wilson added :

> ... if, when *Young v. C.N.R., supra,* was decided, their lordships of the Privy Council had had before them a provision similar to Section 45 I very much doubt that they would have arrived at the conclusion they did reach. (p. 328)
>
> . . . . . .
>
> ... if the collective agreement is declared by me to be in effect, they (the plaintiffs) will have a right arising *ex contractu* and enforceable in this court.
> ... The existence of a collective agreement confers on either other party valuable rights. It assures employers, such as the plaintiffs, industrial peace for the term of the agreement. This peace is guaranteed by the terms of the Industrial Conciliation and Arbitration Act (and, as I have said, no such Act was under consideration in *Young v. C.N.R.*) which provides penalties for any breach of a collective agreement by the union or its members. (p. 329)

In recent years the arbitration boards chaired by Professor B. Laskin [60] held that the labour unions are legal entities; that for arbitration purposes a collective agreement is a contract; and, that the unions' responsibility for the conduct of their members (or of the employees in the bargaining unit) is a contractual obligation undertaken by the union towards the employer in a collective agreement. Consequently, the boards ruled that arbitration boards have the power to award damages for breach of collective agreements even if such powers were not specifically stated in such agreements.

One of these awards which granted damages against the union for breach of collective agreement because of a wildcat strike in a dispute

(60) *United Electrical, Radio and Machine Workers of America, Local 514, In re Amalgamated Electric Corporation,* Nov. 30, 1949 and May 8, 1950 (Labour Arbitration Cases, vol. 2, pp. 591-597 and pp. 597-608). *Canadian General Electric Co. Ltd., in re United Electrical, Radio and Machine Workers of America, Local 507,* Jan. 8, 1951 and June 19, 1952 (Labour Arbitration Cases, vol. 2, pp. 608-615, and vol. 3, pp. 1090-1096). *Re Oil Chemical and Atomic Workers and Polymer Corp. Ltd.,* Sept. 4, 1958 and Nov. 10, 1959 (Labour Arbitration Cases, vol. 10, 1960, pp. 31-51 and pp. 51-65).

between Polymer Corporation and Local 16-14 of the Oil, Chemical and Atomic Workers International Union, was challenged in courts [61] and the decision of the arbitration board was upheld.

Chief Justice McRuer of the Ontario High Court ruled that a union whose labour management relations were governed by the Federal Industrial Relations and Disputes Investigation Act had the capacity to incur liability as a legal entity for damages and it was within the power of the board of arbitration set up under collective agreement to award and assess damages for breach of a no-strike clause of collective agreement. The court ruled that the arbitration board constituted under the grievance procedure as provided under the collective agreement had power to award damages for breach of the terms of the collective agreement even though such power was not expressly stated therein. Regarding the question whether the union is a legal entity under the Federal I.R.D.I. Act and as such liable for damages, Chief Justice McRuer held that the principle of law regarding the legal entity of a union as applied by the Supreme Court of Canada in the *Therien* case should apply to the union under the I.R.D.I. Act. Also, he held that when the Parliament of Canada provided in the I.R.D.I. Act for certification of a union with power to compel an employer to bargain with it and when it clothed the union with power to enter into a « collective agreement » with an employer, it invested the trade union with those corporate characteristics essential to a capacity to contract within the scope of the purposes of the Act. That being so, he added it necessarily follows from the *Therien* case that, since the trade union has a legal capacity to enter into a collective agreement, Parliament has imposed on it the responsibility that flows from a breach of the agreement.

Comparing the collective agreement under consideration with an ordinary commercial contract, Chief Justice McRuer noted that if the collective agreement was an ordinary commercial contract, any dispute regarding the alleged violation of the agreement would be the proper subject of arbitration and the question as to whether a party who had broken a term of the contract should pay damages and in what amount, would be such a dispute. However, he stressed that a collective agreement is different in some aspects from an ordinary commercial contract. It is not that sort of contract that can be terminated by repudiation by

(61) *Re Polymer Corporation and Oil, Chemical Atomic Workers International Union, Local 16-14*, (1961) 26 D.L.R. (2d) 609; (1961) 28 D.L.R. (2d) 81; (1962) 33 D.L.R. (2d) 124;

one party merely because the other party has broken one of its terms [62] because under the I.R.D.I. Act « all differences between the parties » must be settled without stoppage of work. In his opinion this aspect of the matter raises a stronger inference that the matter of damages for breach of the collective agreement should be assessed by the board of arbitration than in the case of a mere commercial contract.

The judgment of Chief Justice McRuer was upheld by the Ontario Court of Appeal and eventually the Supreme Court of Canada. During the hearing before the Supreme Court of Canada (on November 20, 1961) the question of the nature of collective agreement was raised. Counsel for the union argued to the effect that a collective agreement is in the nature of a code of behaviour and not a contract. On the other hand counsel for the company argued that a collective agreement under sec. 18 of the I.R.D.I. Act is a contract. The judment of the Supreme Court did not deal with this issue in particular, but by upholding the judgment of Chief Justice McRuer in its entirety, the court by implication rejected the union's argument that a collective agreement is rather in nature of a code of behaviour than a contract.

A significant indication of the present trend of thought in connection with the nature of collective agreement in the common law provinces is the 1962 amendment to the Manitoba Labour Relations Act [63] which states in section 46A, subsection 2, under a headnote « Breach of contract » :

> A party to a collective agreement or any employer, employers' organization, or a trade union, that is bound by a collective agreement, who or which is in breach thereof, is liable for general or special damages, or both, and may be sued by any other party thereto or person bound thereby who is injured or suffers damage as a result of the breach.

Subsection 3 of Section 46A links this status of a collective agreement as a contract with the status of trade unions as legal entities for the purposes of civil actions by stating :

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(62) In contrast to this view it should be noted that in *Shipping Federation of British Columbia and International Longshoremen's and Warehousemen's Union* (1959), C.C.H. Canadian Labour Law Reporter, para. 15, 277, the court found that the arbitration board did not err in deciding the question of law that a breach of an essential clause in a collective agreement discharged the union from further performance of its contractual duties towards the employer (the case referred to in Carrothers, *Labour Arbitration in Canada* (1961), pp. 66-67.

(63) S.M. 1962, Ch. 35, s. 15.

> For the purposes of suing or being sued as permitted under this Act, employers' organizations and trade unions are legal entities capable of suing or being sued.

It may be added that the amendment in question provides in Subsection 1 for general liability for damage for breach of the Act (which by implication would include also liability for breach of collective agreement in subsection 2) in the following terms :

> S. 46A(1) Any employers' organization, trade union, employer, employee, or person who,
> (a) does, or authorizes, or aids or abets the doing of anything prohibited under this Act ; or
> (b) fails to do anything required to be done under this Act ; or
> (c) authorizes, or aids or abets in the failure to do anything required to be done under this Act ;
>
> is liable for general or special damages, or both, to anyone who is injured or suffers damage by the act or failure.

The provisions of the 1959 British Columbia Trade-unions Act (1959 Ch. 90, s. 1) provide in S. 4 that an employers' organization, trade union, or other person who does, authorizes or concurs in anything prohibited by the Labour Relations Act or fails to do anything required by the Act, or in case of secondary picketing, is liable in damages, this provision seems to be broad enough to allow action in damages for the breach of a collective agreement.

A question arises how the specific provisions of the Manitoba Act as amended providing for civil actions in damages for breach of a collective agreement would fit into the provisions of the same Act regarding compulsory recourse to grievance procedure and final and binding settlement, by arbitration or otherwise, of any differences between the parties to, or persons bound by, the collective agreement concerning its meaning, application or violation? Is there an inherent conflict between these two sets of provisions? The answer seems to be in the negative. Section 46A(2) refers to a party which « is in breach » of a collective agreement. Such a breach, unless it is self-evident as in the case of a union calling a strike during the life of a collective agreement, would have to be ascertained first through grievance procedure including arbitration as provided in the Act under Section 19. Once such breach is found by the arbitration board the injured party would have the right either to prosecute for an offence under the Act (with the consent in writing of the labour Relations Board) under Section 46(1) or to sue for damages under Section 46A(2) if damages were not dealt with by arbitration.

Similar procedure would be applicable under the British Columbia legislation. A conflict would only arise if Section 46A(2) would grant the courts the right to ascertain whether a breach of collective agreement took place; then such provision would be in conflict with Section 19 regarding the compulsory settlement of all differences concerning the meaning, application or violation of a collective agreement, and the legislator did not make such a provision.

This has been briefly the situation in the common law provinces regarding the status of trade unions and the status of collective agreements on the eve of the introduction of Bill 54 in the Quebec legislature.

PART III

Before the Quebec Labour Code was enacted three versions of Bill 54 were introduced in the Quebec Legislature.

The question is how, during the passage of the Act, the intention of the legislator was changing with regard to the status of trade unions and the status of collective agreements and how these matters were settled in the Code as enacted.

The first version of Bill 54 was introduced in June 1963. The Bill defined in Section 1(a) a trade union as follows :

S. 1(a) « association of employees » — a group of employees incorporated [64] as a professional syndicate, union, brotherhood or otherwise, having as its object the study, safeguarding and development of the economic, social and educational interests of its members and particularly the negotiation and application of collective agreements ;

Section 1(b) and (c) defined « certified » and « recognized » associations :

S. 1(b) « certified association » — the association recognized by decision of the Board as the representative of all or some of the employees of an employer ;

(c) « recognized association » — an association which [65] is not certified but has made a collective agreement with an employer or is otherwise recognized by him as the representative of all or some of his employees ;

(64) In the second version of the Bill the word « incorporated » in the English text was changed into « constituted ».

(65) In the second version of the Bill the wording of this definition in the English text was slightly changed :

(c) « recognized association » — an association which, although not certified, has made a collective agreement with an employer or is otherwise recognized by him as the representative of all or some of his employees.

The definition of a trade union contained in Sec. 1(a) although not identical in terms with the definition contained in Sec. 2(d) of the Labour Relations Act, is however, basically similar. It includes both the unions incorporated as professional syndicates and unincorporated unions, the former being legal entities and the latter voluntary associations without a legal personality of their own.

A new provision which had a direct effect on the status of some of the *bona fide* unincorporated unions was contained in Section 38 which read :

> S. 38. Any certified or recognized association of employees, even if not incorporated, shall have the capacity to exercise in its name all its rights and recourses under this code or any collective agreement.

The wording of Section 38 implied that a « certified » or « recognized » trade union would have legal status similar to incorporated unions however restricted to the exercise of rights and recourses under the code or collective agreements. In this way the status of a voluntary association within the context of Section 1(a) would be restricted to unincorporated unions which are neither « certified » nor « recognized ».

The wording of Section 38 did not seem to restrict this contemplated legal status to the proceedings before the Labour Relations Board or a Council of Arbitration, or before an Arbitration Board in grievance procedure under a collective agreement, but would also include any court proceedings such as, prosecutions under the Act arising from the breach of the Labour Code or collective agreement; the execution by court action of the awards of council of arbitration or of arbitration awards under collective agreement; further, « certified » or « recognized » unions would have legal personality in civil proceedings in connection with prerogative writs and injunctions. However, Section 38 could not contemplate civil actions for settling grievances or other disputes during the life of a collective agreement in view of the provisions of the Code for settling of grievances by final and binding arbitration and for settling of other disagreements during the life of collective agreement by the way as provided in the collective agreement. If Section 38 was meant simply a procedural device that would enable the unions to appear in courts without affecting their status, this section would be superfluous so far as civil proceedings are concerned in view of Art. 81(a) and 81(b) of the Code of Civil Procedure [66] which provided for

(66) (1959-60) Ch. 99.

suits against or by unincorporated unions, and in view of Chapter VIII (Penalties) of the Bill and in particular of Sections 131 and 133 [67] in case of prosecution. Consequently, Section 38 meant that « certified » or « recognized » trade unions even if not incorporated were supposed to be endowed with the status of legal entities, however restricted to the rights and recourses under the Code and collective agreements.

The Bill defined in Section 1(e) a collective agreement in the following terms :

> (e) « collective agreement » — an agreement in writing respecting conditions of employment made between one or more associations of employees and one or more employers or employers' associations ;

This definition is similar to that contained in Section 2(e) of the Labour Relations Act and reflects the approach to the collective agreement as something in the nature of a gentlemen's agreement, and not enforceable through civil litigations. However it should be noted that the definition of collective agreement contained in the code mentions that the agreement should be in writing and also as the parties to the agreement it mentions the unions as such and not the representatives of the union as it was said in the definition of the collective agreement in the Labour Relations Act. Further, the Bill added a new provision which the Labour Relations Act did not contain, namely, Section 50 in the first paragraph reads :

> S. 50. The collective agreement may contain any provision respecting conditions of employment which is not contrary to public order or prohibited by law.

A somewhat similar provision was contained in the second paragraph of the definition of collective agreement in Section 21 of the Professional Syndicates' Act which refers to « the conditions of labour not prohibited by law » that may form the object of a collective agreement. But, significantly, the close resemblance is to the part of the Quebec Civil Code which lists among the requisites to the validity of a contract the following requisite in Art. 990;

> The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.

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(67) S. 131. Any penal prosecution under this code may be taken by the Board or by any interested party with the written authorization of the Board or the consent of the Attorney General.

S. 133. Any employer or association may be represented for the purposes of this code, by duly empowered representatives.

Also the Bill contained in Sections 55 and 56 (the same Sections in the Code as enacted) provisions similar to those we find in other jurisdictions but not provided in the Labour Relations Act, regarding the binding force of the collective agreements. Section 55 stated :

> A collective agreement made by a certified or recognized association shall be binding upon all the present or future employees contemplated by the certification or recognition.

Section 56 :

> A collective agreement made by an employers' association shall be binding upon all employers who are members of such association and to whom it can apply, including those who subsenquently become members thereof.

It should be noted, that unlike other jurisdictions Section 55 refers to the binding force of a collective agreement upon the employees contemplated by the certification or recognition but does not mention the union which is a party to the agreement.

The implication of these provisions is that a breach of a collective agreement is an offence under the Code and subject to prosecution (with the consent of the Labour Relations Board or of the Attorney-General) and summary conviction. Normally such prosecution would be preceded by grievance procedure where the breach of the agreement would be established.

The first version of the Bill contained also Section 57 which reads as follows :

> S. 57. The provisions of the collective agreement that are applicable to an employee shall *pleno jure* form part of his individual contract of employment and, notwithstanding any waiver, he may claim the advantages thereof.

The significance of this provision with regard to the status of collective agreements should be considered in the light of the Privy Council's decision in *Young v. Canadian Northern Railway Company.*[68] The circumstances of that case as summarized in the headnote, were as follows. The appellant was verbally engaged in 1920 by a railway company as a machinist at the « going rate » of wages. He was dismissed in 1927 on the ground of reduction of staff. He sued for wrongful dismissal, contending that a written agreement entered into by the railway company with a labour organization and called « Wage Agreement No.

(68) (1931) A.C. 83.

4 », formed part of his contract of employment, and that under it the railway company could not dismiss him on a reduction in staff, as they had retained men junior to him. The agreement had been applied to the appellant (who was not a member of the organization) as to the amount of his wages, the notice given to him, and in other respects. The railway company stated that at the time they had applied the agreement to all the men employed in their shops.

The Privy Council held that Wage Agreement No. 4 did not form part of the individual contract for the employment of the appellant. The fact that the railway company applied it to him was done not because the company was bound contractually to apply it to the appellant but because as a matter of policy the company deemed it expedient to apply the agreement to all the employees. Further, the Privy Council held that having regard to the terms and nature of the agreement it did not by itself constitute a contract between any individual employee and his employer; observance of its terms by an employer could not be enforced by action by any employee, not even by the labour organization concerned, but only by calling a strike until the grievance was remedied.

The Privy Council decided two things : 1) that a collective agreement did not by itself constitute either a contract or part of the contract or part of the contract of employment between an employee and an employer and consequently such an agreement could not be enforced by a personal court action by the employee concerned; 2) a collective agreement was not a contract enforceable in court by the labour organization that was party to the agreement.

The inference of this decision as pointed out by B. Lepkin [69] would be that the individual employee could bring suit on the ground of master and servant relationship for a breach of a collective agreement if the terms of the collective agreement by statutory provisions were meant to form a part of individual contract of employment. Then a collective agreement could be enforced indirectly by civil action of individual employees enforcing their individual contracts of employment. If this interpretation is correct then once the terms of the collective agreement applicable to the employees would form by the provisions of Section 57 an integral part of the individual contract of employment, an employee would have two ways of asserting his rights under collective agreement.

(69) See, footnote 5.

Either he could use the grievance procedure under collective agreement, or he could disregard such procedure entirely and take his cause outside the Labour Code and endeavour to enforce his rights under collective agreement by personal action within the context of the master and servant realtionship under the Civil Code. In the second alternative, the courts would be ascertaining the rights and obligations resulting from a collective agreement as applicable to individual employees and such action would be in conflict with the provisions of the Labour Code regarding the compulsory way of settling the grievances under collective agreement outside the courts by way of compulsory and binding arbitration.

The intended Section 57 was a departure from the established relationship between collective agreements and individual contracts of employment as described by Mr. Justice Judson of the Supreme Court of Canada in *Le Syndicat Catholique des employés des Magasins de Québec Inc. v. La Compagnie Paquet Ltée* [70] in which case the validity of the Rand Formula in Quebec was tested. Mr. Justice Judson described the relationship between a collective agreement and individual contract in the following way (at pp. 353-4) :

> The union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act*, the representative of all employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. *The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes.* (italics added)
>
> . . . . . .
>
> How did this compulsory check-off of the equivalent of union dues become a term of the individual employee's contract of employment? They were told by the notice that in future this deduction would be a term of their contract of employment.

and he added (at p. 355) :

> The union contracts not as agent or mandatory but as an independent contracting party and the *contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.* (italics added).

(70) (1959) 18 D.L.R. (2d) 346.

These statements implied that collective agreements under Quebec legislation do not become, by operation of law, a part of individual contracts of employment. Being independent agreements between the unions and the employers, collective agreements determine the terms which the employer and individual employees must observe if and when individual contracts of employment are entered into.

The question whether such individual contracts of employment embodying the terms of a collective agreement could be enforced directly by individual employees in a court action on the basis of master and servant relationship without recourse to grievance procedure under collective agreement was considered by Chief Justice McRuer of the Ontario High Court in *Re Grottoli v. Lock and Son Ltd.* [71] Relying on Mr. Justice Judson's judgment in the *Paquet* case, *supra,* the Chief Justice held that the common law relationship of employer and employee is not abrogated by reason of the existence of a collective agreement by whose terms the employment relationship is governed, nor does S. 34(1) of the Ontario Labour Relations Act (R.S.O. 1960, Ch. 202) requiring arbitration of collective agreement disputes, oblige an employee to resort to arbitration, to the exclusion of court action, to assert a claim against his employer for unpaid wages. Consequently, an employee could sue under his contract of employment in the ordinary courts to recover vacation pay owed to him under the collective agreement.

The proposed Code contained also Section 58 which in the Code as enacted became Section 57, and reads as follows :

> S. 58. A certified or recognized association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party as assigned his claim.

The meaning of this provision is self explanatory and would apply to grievance procedure and to prosecutions under the Act. It would be applicable also in civil proceedings within the scope of Section 38 (particularly in suits in execution of arbitration awards under collective agreements) and in this respect it would form an exception from Section 81 of the Code of Civil Procedure which provides that « a person cannot use the name of another to plead ». [72] Further, because of Section 38 a

(71) (1963) 39 D.L.R. (2d) 128.

(72) Section 58 is similar to Section 25 of the Professional Syndicates' Act but without the proviso contained therein, and to the powers of the Parity Committee under Section 20(a) of the Collective Agreement Act.

certified or recognized union acting under Section 58 would have a legal personality of its own.

Chapter IV, Division III of the Bill dealt with arbitration of grievances in basically the same way (although differing in some details) as provided in the Labour Relations Act. Section 88 provided that every « grievance » (which according to Section 1(g) means «any disagreement respecting the interpretation or application of a collective agreement ») that is a dispute concerning « rights », has to be submitted to an arbitration in the manner provided in the collective agreement if it so provides «and the parties abide by it» (the last quoted words were added to the Section as enacted and the purpose of this addition is not clear); otherwise such a grievance would have to be referred to an arbitration officer choosen by the parties or failing agreement appointed by the Minister. (The corresponding provision in the Labour Relations Act stated that, if the collective agreement did not contain a provision regarding arbitration, the dispute had to be submitted to arbitration in the manner provided by the Quebec Trade Disputes Act).

Section 89 provided that the arbitration award shall be final and binding the parties and may be executed under the authority of a court of competent jurisdiction at the suit of a party who shall not be obliged to implead the person for whose benefit he is acting.

Finally, Section 90 provided that during the period of a collective agreement any difference other than disagreements regarding the interpretation or application of collective agreements (the so-called « interest » disputes) shall be settled in the manner and to the extent as provided in the agreement. [73]

(73) Arbitration of grievances.
S. 88. Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides ; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agrement, appointed by the minister.
S. 89. The arbitration awards shall be final and bind the parties. It may be executed in accordance with Sec. 81.
S. 90. During the period of a collective agreement, any difference other than a grievance within the meaning of Section 1 shall not be settled except in the manner provided in the agreement and to the extent that th agreement so provides.
S. 81. The award shall have the effect of a collective agreement signed by the parties. It may be executed under the authority of a court of competent jurisdiction at the suit of a party who shall not be obliged to implead the person for whose benefit he is acting.

The provisions of the Bill regarding the final and binding arbitration of grievances and other disagreements during the life of collective agreement left no room for the settlement of such disagreements by civil litigations (unless an employee covered by a collective agreement would launch a civil action on the basis of his individual contract of employment under Section 57). Consequently Section 59 which provided that « rights and recourses arising out of a collective agreement or an award made *in lieu* thereof shall be prescribed by six months from the day when the cause of action arose », and that « recourse to the procedure respecting grievances shall interrupt prescription », would apply in cases of prosecutions under the Code for breach of collective agreement or of an award made in lieu of collective agreement by a council of arbitration. Further, it would apply in suits for execution of arbitration awards under grievance procedure and for execution of awards made by councils of arbitration, and in proceedings in connection with prerogative writs and injunctions. There would be no application of Section 59 in case of disagreements during the life of collective agreements because the first version of the bill did not provide for settling of such disagreements by civil litigation.

Penalty provisions in the Bill dealing with offences under the Code are similar to those contained in the Labour Relations Act and prosecutions by or against trade unions or employers or any other person for an offence under the Code including a breach of a collective agreement as ruled in the course of grievance procedure or for not abiding with the decision of the Labour Relations Board may be brought about pursuant to the Quebec Summary Convictions Act. Any penal prosecution under the code may be taken by the Board or by any interested party with the consent of the Board or the consent of the Attorney General (S. 131). S. 133 provided that « any employer or association may be represented, for the purposes of this code, by duly empowered representatives ». It seems that Section 38 added a new dimension to the prosecutions under the code. A prosecution by or against a certified or recognized union for breach of the Code or any collective agreement would be in the union's name and for the purpose of such prosecution the union in question would have legal entity.

The second version of Bill 54 was introduced in the Quebec legislature in January 1964. Among the changes brought in the second version was the inclusion of a new Section 54 which changed entirely the status of collective agreements, the way of enforcing such agreements and affected the status of unions under the Code. Section 54 read:

> A collective agreement shall give rise to all the rights and recourses provided by law for the enforcement or obligations.

The wording of Section 54 abandoned the approach to collective agreements as being of the nature of « gentlemen's agreements » which basically was the approach of the Quebec Labour Relations Act and of the first version of the Labour Code, and made collective agreements civil contracts enforceable in courts. Under Section 54 any disagreement under collective agreement could be brought directly before the courts in disregard of the provisions of the Act regarding arbitration of grievances and a union could sue or be sued for damages for breach of the collective agreement.

The inclusion of Section 54 enlarged the scope of application of Section 38. A « certified » or « recognized » union would also have the status of legal entity for the purpose of enforcement through civil actions of rights and obligations arising out of the collective agreement. Section 54 would add civil litigations to the scope of the application of Section 58 (S. 57 in the code as enacted) which entitles the union to exercise all recourses which the collective agreement grants to each employee whom it represents without being required to prove the assignment of claims and to — the application of Section 59 dealing with prescription.

The provisions of Section 54 were not entirely new to the Quebec labour legislation and as already noted, similar provisions had been inserted in Section 24 of the Professional Syndicates' Act. Also it should be recalled that the Professional Syndicates' Act was concerned with trade unions when incorporated under the Act as legal entities and also the same Act stated that a collective agreement made by such an incorporated union under the Act was a contract. As the Professional Syndicates' Act did not provide either for grievance procedure or for compulsory and binding arbitration of disputes under collective agreement, it was within the legislative logic that the only way enforcing a collective agreement which was a contract was by a court action for enforcement of contractual obligation.

The incongruity of the intended solution by inserting Section 54 in the Bill resulted from the fact that basically the approach taken by the Labour Code towards the status of trade unions and status and enforcement of collective agreements was not that of the Professional Syndicates' Act but that of the Labour Relations Act. Once the Bill, following

the Labour Relations Act, provided for grievance procedure and for final and binding arbitration of disputes during the life of collective agreement, Section 54 was in conflict with these provisions by allowing the same disputes to be brought directly before the courts.

On the other hand one can see some reasons why Section 54 was inserted in the Bill. The definition of trade union in the Code (Sec. 1(a)) included both incorporated and unincorporated unions. Section 38, by providing that any certified or recognized association of employees, even if not incorporated, shall have the capacity to exercise in its name all its rights and recourses under the code or any collective agreement, granted to unincorporated but certified or recognized unions a legal status for the purpose of the Code and the legal proceedings based on the Code or a collective agreement.

Section 57, by providing that the terms of the collective agreement applicable to an employee should by operation of law, form part of his individual contract of employment, and by giving him the right to enforce the terms of collective agreement through court action, posed the question why in those circumstances the collective agreement as such should not be a contract between the union and the employer enforceable in courts directly by the parties to the agreement.

Although the definition of a collective agreement in Section 1(e) did not define the collective agreement as a contract, however it provided that the agreement should be in writing and mentioned unions as such as parties to the agreement. Further, Section 50 dealing with the contents of a collective agreement included limitations reminiscent to limitations contained in the Civil Code with regard to contracts.

There is a link between the status of unions and the status of collective agreements and once the Bill by Section 38 granted unincorporated unions (but certified or recognized) legal entity for the purposes of the Code, the logic of legislative reasoning and the reality of labour-management relations might have lead those who drafted the Code to the conclusion contained in Section 54 making collective agreements civil contracts enforceable in courts. Also, those who drafted the Code were no doubt aware of the evolution of the common law and of statutory enactments in some jurisdictions with regard to the status of unions and collective agreement and by inserting Sections 38 and 54 they embodied in statutory provisions the trend already visible in the deci-

sions of the courts and in statutory enactments (like S. 46A of the Manitoba Act) that a trade union is a legal entity and a collective agreement is a contract and that the obligations of the parties under the agreement are contractual obligations.

Although Section 54 might have been a logical consequence of Section 38 and Section 57 its inclusion meant a clash of two basic philosophies of labour management relations. On the one hand the Code reflected the specific traditional nature of those relations based on the assumption that the unincorporated union is not a legal entity, the collective agreement is not a contract and that all disputes related to the operation of collective agreements have to be settled out of courts by grievance and arbitration procedure under the Code and collective agreements. And, on the other hand by inserting in the first version Section 38 and particularly with Section 54 in the second version the authors of the Code were implying a different philosophy of labour management relations, namely, that the union is a legal entity, when certified or recognized, that a collective agreement is a contract and like any other contract it gives rise to rights and obligations which may be enforced directly in courts including actions for damages. Actually those who drafted the Code made an attempt to bring together two different concepts of the nature of trade unions and of the nature of collective agreements as reflected respectively in the Labour Relations Act and in the Professional Syndicates' Act.

By adding Section 54 to the provisions of the Code regarding arbitration of grievances and attempt was made to combine the settlement of disputes under collective agreements by arbitration with the settlement of such disputes by the courts and, because of the inherent incongruity of these two ways of settlement, the attemps failed.

How this emerging new concept of the status of unions and of collective agreements would fit into the traditional concept of enforcing collective agreements by grievance procedure and final and binding arbitration has still to be thought through. One of the ways of solving this problem is indicated by Section 46A of the Manitoba Act which seems to open court action not for the consideration of disputes under collective agreement which are left to be settled by arbitration, but for actions in damages once, as the result of arbitration, a breach of collective agreement had been established.

In the third version of the Bill, introduced by the Quebec Government in July 1964, Sections 38 and 54 and 57 were abandoned and the Code as enacted does not contain them. The result is that with regard to the status of unions which are not incorporated and with regard to the status of collective agreements, the Quebec Labour Code returned basically to the position of the Labour Relations Act as enacted in 1944 with subsequent amendments. This means that the trade unions in Quebec, when not incorporated under the Professional Syndicates' Act, have the status of voluntary associations without personality of their own, and the collective agreements, although their status has been strenghtened particularly by provisions of SS. 55 and 56 are not contracts enforceable in courts. This leaves Quebec labour legislation behind the present evolution of common law as reflected in the judicial decisions (including the Supreme Court of Canada) and behind statutory enactments in some provinces regarding status of unions and the status of collective agreements.

This conclusion with regard to the status of trade unions in the Code as enacted, is not affected by the fact that the Code maintained Section 58 of the first and second versions of the Bill but now as Section 57 regarding the right of certified or recognized unions to exercise the recourses which the collective agreement grants to each employee. By abandoning Section 38 and Section 54 the unions in question may exercise these recourses not as legal entities any more but as voluntary associations in the way open to such associations in case of prosecution by the provisions of the Code regarding prosecutions, and in case of civil proceedings (prerogative writs, execution of arbitration awards) in the way as provided by Sections 81(a) and 81(b) of the Code of Civil Procedure.

The Code as enacted added a new Section 58 which reads:

> S. 58. The recourse of several employees against the same employer may be cumulated in a single demand and the total claimed shall determine the competency of the court of original jurisdiction as well as of appeal.

This provision is similar to Section 53 of the Collective Agreement Act [74] and it would find application in suits in execution of arbitration awards under the grievance procedure and in actions outside collective agreements based on individual contracts between employees and employers.

(74) R.S.Q. 1941, Ch. 163.

In conclusion, the problem of status of unions and of collective agreements in the Quebec Labour Code can be summed up in the following way.

The first version of the Bill, while basically maintaining the position of the Labour Relations Act that collective agreements are not contracts, granted to « certified » or « recognized » unions the status of legal entities of their own for the purposes of the Code and collective agreements. This would enable, besides the unions incorporated under the Professional Syndicates' Act, the « certified » or « recognized » unions to prosecute in their own name as legal entities for breaches of the Code or of a collective agreement and to have the same status in such proceedings as in connection with prerogative writs, injunctions and in actions in execution of arbitration awards under grievance procedure and of awards of councils of arbitration. Only the unions which were neither incorporated under the Professional Syndicates' Act, nor « certified » or « recognized » would remain voluntary associations without legal status of their own. Such a situation would be an advance when compared with the Quebec Labour Relations Act under which all unions, except those incorporated under the Professional Syndicates' Act, were voluntary associations without legal status of their own.

The second version of the Bill, by adding to Section 38 Section 54, enlarged the status of « certified » or « recognized » unions under Section 38 by making them also able to sue or be sued as legal entities to enforce the rights and obligations under collective agreements. Section 54 by making collective agreements civil contracts enforceable in courts, was in conflict with the provisions of the Bill regarding compulsory settlement of disputes under collective agreements by arbitration.

The third version of the Bill and the Code as enacted by abandoning Sections 38 and 54, returned to the concept embodied in the Quebec Labour Relations Act that all unions (except those incorporated under the Professional Syndicates' Act) are voluntary associations without status of their own and that collective agreements are not contracts enforceable in courts.

LE CODE DU TRAVAIL DU QUÉBEC ET LE STATUT DES SYNDICATS ET DES CONVENTIONS COLLECTIVES

Avant la passation du Code du Travail du Québec, les principales dispositions affectant le statut des syndicats et des conventions collectives au Québec étaient

contenues dans la loi des Relations ouvrières et dans celle des Syndicats professionnels. En vertu de la loi des Syndicats professionnels, un syndicat ouvrier pouvait acquérir une personnalité légale en suivant la procédure appropriée. Une convention collective signée par un tel syndicat constituait un contrat négocié librement entre l'employeur et le syndicat ouvrant des recours devant les tribunaux et liant seulement les employés qui en étaient membres ou qui l'avaient joint plus tard. La loi des Syndicats professionnels ne contenait pas de dispositions touchant le règlement des conflits pendant la durée de la convention collective par une procédure de griefs ou par l'arbitrage à sentence exécutoire.

Dans le contexte de la loi des Relations ouvrières, les syndicats (non incorporés en vertu de la loi des Syndicats professionnels) étaient des associations volontaires sans personnalité légale propre. Les conventions collectives signées par de tels syndicats n'étaient pas des contrats librement négociés donnant droit de recours devant les tribunaux, mais s'apparentaient à la nature des «gentlemen's agreements» conclus par les employeurs et les syndicats certifiés comme agents de négociation et liant non seulement les membres du syndicat mais tous les employés de l'unité de négociation. Les employeurs devaient négocier de bonne foi avec des agents de négociation certifiés. La loi des Relations ouvrières ne prévoyait pas le règlement devant les tribunaux des griefs relevant des conventions collectives, mais l'amendement de 1961 à la Loi prévoyait l'arbitrage obligatoire et à sentence exécutoire de ces griefs.

Le seul recours judiciaire devant les tribunaux inclus dans la Loi était une poursuite de caractère pénal en vertu de la loi des convictions sommaires du Québec pour infractions aux dispositions de la Loi. Depuis 1946, les dispositions de la loi des Relations ouvrières en regard de la nature et de l'application des conventions collectives s'appliquèrent aux conventions collectives conclues par les syndicats incorporés en vertu de la loi des Syndicats professionnels et certifiés comme agents négociateurs en vertu de la loi des Relations ouvrières. En 1938, une loi pour faciliter l'exercice de certains droits rendit possible le recours devant les tribunaux contre des syndicats non incorporés en leur propre nom. Ces dispositions furent ajoutées à l'amendement de 1960 au Code de procédure civile en permettant aux syndicats non incorporés de poursuivre en leur nom collectif.

Alors que ces amendements fournissaient une procédure qui permettait aux syndicats non-incorporés de poursuivre ou d'être poursuivis en leur nom, elle n'affectait pas la position des syndicats non-incorporés en tant qu'associations volontaires sans personnalité légale.

En régime de common law, les syndicats ouvriers comme tels avaient été considérés sans existence ni personnalité légale distincte de leurs membres individuels et conséquemment ils étaient exemptés des procédures judiciaires en leur propre nom. Les conventions collectives d'après le common law n'avaient pas été considérées comme contrats ouvrant des recours devant les tribunaux, mais plutôt s'apparentaient à des « gentlemen's agreements ». Cette approche en common law relativement au statut des syndicats et des conventions collectives s'est réflétée dans la législation patronale-ouvrière qui apparût dans les années qui suivirent la deuxième guerre-mondiale dans le domaine de juridiction fédérale aussi bien que dans la législation provinciale en common law. En même temps, en ce qui con-

cerne le statut des syndicats ouvriers, certaines lois ont prévu d'accorder aux syndicats une personnalité légale afin qu'ils puissent être poursuivis en leur propre nom pour les offenses commises contre les Lois. En conséquence les tribunaux prétendaient que ces dispositions ne pouvaient pas être interprétées comme permettant également aux syndicats de poursuivre en leur nom.

En conséquence, la loi des Relations ouvrières fut amendée au Manitoba et au Nouveau-Brunswick afin d'habiliter les syndicats à poursuivre comme entités légales. Dans la plupart des juridictions, la législation ouvrière n'indiquait pas si les syndicats étaient capables de poursuivre ou d'être poursuivis en leur nom en tant que personnes légales. La présomption était à l'effet que les syndicats ouvriers étant des associations volontaires, la seule possibilité qui leur restait de poursuivre ou d'être poursuivis en justice était par la voie d'une action représentative. Dans quelques cas, cette vue fut confirmée par les tribunaux. Dans plusieurs autres cependant, les tribunaux considèrent les syndicats comme des entités légales en regard des lois de Relations ouvrières et des procédures judiciaires découlant de ces lois. Finalement, dans la cause, *International Brotherhood of Teamsters, local No. 213, vs Henri Thérien* (1960) 22 D.L.R. (2d) p. 1, la Cour Suprême du Canada soutint qu'un syndicat ouvrier, en vertu de la loi des Relations ouvrières de la Colombie-Britannique, est une entité légale non seulement en regard de la loi des Relations ouvrières, mais aussi du common law et peut être tenu responsable en son nom pour dommages, soit pour aller à l'encontre d'une disposition de la loi des Relations ouvrières, soit en vertu du common law.

Dans quelques décisions qui suivirent ce jugement, les tribunaux prétendirent que le principe établi lors de la cause *Thérien* était applicable aux syndicats ouvriers en vertu de la législation ouvrière au Manitoba, en Ontario et en vertu de la loi fédérale I.R.D.I. Cette évolution du common law en regard du statut des syndicats s'est réflétée dans des dispositions légales dans quelques provinces. L'approche originelle du common law qui apparentait les conventions collectives à des « gentlemen's agreements » s'est changée à la suite des dispositions légales concernant le caractère exécutoire des conventions collectives, la méthode de faire appliquer de telles conventions par l'arbitrage obligatoire et à sentence exécutoire, et en raison des dispositions qui faisaient d'une infraction à la convention une offense en vertu de la Loi et objet de poursuite. Ceci amena les tribunaux (incluant la Cour Suprême du Canada) dans la cause *Polymer Corporation and Oil Chemical Atomic Workers International Union, Local 16-14* (1961), 26 D.LR. (2d) 609; (1961) 28-D.L.R. (2d) 81; (1962) 33-D.L.R. (2d) 124; d'appuyer la position prise par le tribunal d'arbitrage formé en vertu de la convention collective à l'effet que pour les fins de l'arbitrage une convention collective est un contrat et que le tribunal pouvait octroyer des dommages-intérêts pour infraction à une convention collective, même si un tel pouvoir n'était pas explicitement inclus dans la convention. L'Amendement de 1962 à la loi des Relations ouvrières du Manitoba établit spécifiquement qu'une infraction à une convention collective est passible d'une poursuite pour dommages-intérêts devant les tribunaux.

Avant la passation du Code du Travail du Québec, trois versions du bill 54 furent présentées à la Législature québecoise. La première version du bill définissait un syndicat d'une façon fondamentalement semblable à la définition contenue dans la loi des Relations ouvrières. La définition incluait à la fois les syndicats

incorporés comme syndicats professionnels et les syndicats non-incorporés, les premiers étant des entités légales et les derniers des associations volontaires. Cependant, le Bill ajoutait une nouvelle disposition (S. 38) par laquelle un syndicat « accrédité » ou « reconnu » devait posséder une personnalité légale quoique restreinte à l'exercice des droits et recours selon le Code du Travail ou toute convention collective. En conséquence, le statut d'associations volontaires devait être restreint aux syndicats non-incorporés n'étant pas « certifiés » ni « reconnus ». La définition de convention collective était semblable à celle contenue dans la loi des Relations ouvrières et reflétait l'approche selon laquelle une convention collective ressemblait à un « gentlemen's agreement », et non à un contrat donnant recours devant les tribunaux. Le Bill contenait des dispositions concernant le caractère exécutoire des conventions collectives qui considérait une infraction à de telles conventions comme une offense en vertu du Code et pouvant faire l'objet de poursuites et de convictions sommaires. La première version du bill prévoyait aussi que les dispositions de la convention collective applicables à un employé feraient partie *pleno jure* de son contrat individuel d'emploi et que l'employé pouvait réclamer les avantages de telles dispositions (S. 57). Cette disposition devait permettre aux employés de faire valoir leurs griefs en vertu des conventions collectives directement devant les tribunaux et conséquemment cette disposition venait en conflit avec les dispositions du Code concernant le mode obligatoire de règlement des griefs en vertu de la convention collective en dehors des tribunaux par voie d'arbitrage obligatoire et à sentence exécutoire.

La seconde version du bill 54 prévoyait qu'« une convention collective donne ouverture à tous les droits et recours prévus par la loi pour la sanction des obligations. »

Le libellé de la section 54 impliquait l'abandon de l'approche qui apparentait les conventions collectives à des « gentlemen's agreements » et qui était fondamentalement celle de la loi des Relations ouvrières et de la première version du Code, et qui rendait les conventions collectives des contrats civils permettant recours devant les tribunaux. La section 54 venait en conflit avec les dispositions concernant l'arbitrage obligatoire et à sentence exécutoire des conflits en vertu des conventions collectives.

La troisième version du Bill laissait tomber les sections 38, 54 et 57; en conséquence le Code ainsi adopté retournait au concept contenu dans la loi des Relations ouvrières du Québec à l'effet que tous les syndicats (exceptés ceux incorporés en vertu de la loi des Syndicats professionnels) sont des associations volontaires sans statut propre et que les conventions collectives ne constituent pas des contrats donnant recours devant les tribunaux.