

Must an individual union member's rights be sacrificed to protect the group interest? Les droits du syndiqué doivent-ils être sacrifiés pour protéger les intérêts du groupe?

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Résumé de l'article

Si un travailleur salarié ne peut présenter lui-même un grief portant sur l'application ou l'interprétation de la convention collective, si forcer le syndicat qui le représente à porter son cas à l'arbitrage, possède-t-il un recours contre le syndicat si ce dernier n'a pas accompli son devoir de représenter ses intérêts?

Nous voulons dans cet article revoir d'une façon générale quelques-unes des solutions proposées pour résoudre ce problème, en insistant sur le « devoir de juste représentation », tel qu'il est envisagé aux États-Unis et au Canada. Nous mettrons ici en relief quelques-unes des limites, et les aspects positifs des solutions envisagées.

Dans certains cas limités, un salarié est effectivement protégé contre les discriminations graves de la part de son syndicat. Toutefois, un syndicat peut compromettre la situation syndicale d'un salarié durant la négociation, aussi bien que dans l'application d'une convention collective. Bien qu'un salarié peut avoir des droits reconnus et protégés par la cour, il demeure toutefois que ses droits relèvent essentiellement de la convention collective et du pouvoir de négociation du syndicat.

Il y a parfois conflit entre les intérêts du syndicat et ceux du salarié. Pendant la négociation de la convention, une hausse de salaire ou un autre avantage pour ce salarié en échange de la conclusion d'un accord qui bénéficiera à l'ensemble du syndicat ou à la majorité de ses membres. Quoiqu'il faille protéger la liberté d'action du syndicat, on ne peut pas lui permettre, d'autre part, d'éliminer tout bonnement les droits d'un individu en vue de l'obtention de certains bénéfices pour l'ensemble des membres du syndicat. On ne peut tolérer non plus que le syndicat compromette les droits individuels qui relèvent de la convention collective, en refusant de soumettre des griefs légitimes à l'arbitrage.

Il se rencontre souvent dans une unité de négociation divers groupes dont les intérêts entrent, à un moment donné, en conflit avec les réclamations des individus. En vue de résoudre ces conflits, le syndicat peut décider de satisfaire le groupe de travailleurs majoritaires et sacrifier ainsi la demande de l'individu en faveur du « bien commun ».

CONDUITE JUSTE ET CONDUITE INJUSTE DE LA PART DU SYNDICAT

Il existe deux secteurs généraux où le syndicat peut aller à rencontre des intérêts de ses membres pris individuellement: 1) lorsque le syndicat a agi d'une façon injuste envers un individu et; 2) lorsque l'action du syndicat peut être définie objectivement comme étant juste envers les travailleurs, mais, de fait, empêcher un individu d'obtenir satisfaction dans le règlement d'un légitime grief. Entrent dans la catégorie de conduites injustes les attitudes hostiles, arbitraires ou discriminatoires que le syndicat manifeste envers l'un ou l'autre de ses membres. D'autre part, le syndicat peut, par négligence, en arriver aux mêmes résultats; enfin il y a des cas où le syndicat peut agir d'une façon juste et correcte si on se place du point de vue du syndicat même objectivement, mais pas nécessairement du point de vue de l'individu.

Les remèdes auxquels l'individu peut recourir proviennent de trois sources bien connues: la jurisprudence, la loi, les statuts des syndicats.

LES RECOURS JURIDIQUES

Les tribunaux s'attribuent le rôle de protecteurs de l'intérêt public; ils ont condamné les syndicats lorsque ceux-ci ont agi, selon le jugement de la cour, d'une façon nuisible au bien-être général de la société. Ils pourraient bien décider que les excès du syndicat et leurs abus vis-à-vis les salariés individuels soient prescrits par le judiciaire.

Malheureusement, beaucoup d'effets secondaires possibles peuvent se glisser dans des redressements créés judiciairement dans le secteur des relations du travail. Les tribunaux ont tendance à se montrer insuffisamment renseignés sur la structure et les problèmes sous-jacents à ce secteur, et à leur appliquer des considérations légales qui exacerbent indolument. Quoique ces effets ne soient pas inévitables, il reste que la réaction généralement défavorable des syndicats face aux tribunaux semble indiquer que l'on pourrait en arriver mieux à la paix industrielle si l'on cherchait ailleurs une solution aux problèmes des individus.

REMEDES D'ORDRE LEGISLATIF

Il n'existe pas de lois fédérales ou provinciales qui imposent spécifiquement aux syndicats un devoir de juste représentation, mais divers articles fournissent une assistance à l'individu dans les cas où le syndicat a exercé une discrimination à l'endroit d'un individu à cause de sa race, son origine, sa couleur, sa religion, son sexe ou son âge. Une loi sur les justes méthodes d'emploi existe déjà au fédéral et dans huit provinces canadiennes.

Une Commission des relations du travail ou un tribunal du travail pourraient fournir un substitut aux tribunaux civils pour le jugement des conflits individuels. La Commission des relations du travail est tenté, dans le passé, de trouver des solutions au problème. Si les CRT pouvaient s'occuper administrativement du cas des individus, on leur économiserait beaucoup de frais et de temps. Ce système a des mérites indiscutables. On pourrait encore créer des tribunaux du travail. Dans les deux cas, il se développerait une jurisprudence en ce domaine.

CORRECTIONS D'ORDRE SYNDICAL

Un exemple de mécanisme de redressement fournis par le syndicat est la Commission de révision publique des TUA (UAW Public Review Board) qui semble protéger davantage l'individu. Cependant, la philosophie syndicale fondamentale atténue les besoins individuels, insiste davantage sur les formes d'action collective et se montre ainsi peu favorable à ces nouveaux mécanismes. Il faut noter aussi que tout en protégeant les individus d'une hostilité flagrante de la part du syndicat, les exigences d'une Commission de révision publique ne fourniraient pas l'assurance protectrice à l'individu même dans le cas où sa requête est légitime, si ses intérêts sont contraires aux besoins de la majorité, ou si est incapable de prouver l'existence de malice syndicale dans le traitement de son cas. L'implantation de contrôles internes indiquerait une maturité croissante et un nouveau sens des responsabilités chez les syndicats.

LE DEVOIR DE JUSTE REPRÉSENTATION

Le devoir de juste représentation a été érigé en vue de protéger l'individu contre un groupe. Si l'intérêt du groupe devient le critère de la validité d'une requête, ce droit perd tout son sens en ce qui concerne l'individu. Aux États-Unis, ce sont les tribunaux qui ont développé ce droit. Le devoir de juste représentation fut reconnu lors du cas *Shore v. Louisville & N.R. Co.* Dans le cas *delMundo Fuel*, le Conseil national des relations ouvrières (The National Labour Relations Board) jugea que l'omission par le syndicat de représenter d'une façon juste le salarié constituait une pratique syndicale déloyale.

Il reste que le devoir de juste représentation a été défini d'une façon assez restreinte, laissant l'individu à la merci du syndicat. Même si le syndicat n'agit pas d'une façon objectivement hostile ou fortement négligente envers l'individu lors du règlement d'un grief, il peut de fait éliminer les réclamations justifiées de l'individu. Les syndicats peuvent aussi entacher des griefs légitimes pour un bloc d'avantages lorsque cette action favorise les intérêts de la majorité des membres du syndicat. Nous devons donc conclure cette partie en soulignant qu'à notre avis, même une définition plus large de représentation juste ne protégerait pas l'individu de façon adéquate.

LE DEVOIR DE REPRÉSENTATION JUSTE AU CANADA

Les tribunaux canadiens devraient développer une attitude face au devoir de juste représentation qui soit semblable à ce qui se passe aux États-Unis. C'est là une tâche que le système judiciaire canadien ne trouverait pas très difficile à assumer. Le remède prévu par les tribunaux américains se base sur l'obligation légale que le syndicat possède d'agir en tant qu'agent de négociation, obligation très semblable à celle que la législation canadienne en relations du travail lui accorde. Devant une attitude hostile ou discriminatoire du syndicat, le salarié canadien serait bien protégé. L'individu risque malheureusement de trouver personne pour défendre le grief qu'il souleve si la définition du « devoir de juste représentation » s'avère aussi étroite qu'aux États-Unis, et si l'individu doit prouver lui-même la « mauvaise foi » du syndicat.

Le rapport de l'Équipe spéciale a discuté du concept de « devoir de juste représentation », et a recommandé que les syndicats répondent « envers leurs membres, de leur régime interne et de leur devoir de représentation, devant une Commission publique de révision ou devant le Conseil canadien des relations ouvrières », et « devant les employeurs et les employés, des pratiques déloyales, devant le Conseil canadien des relations ouvrières ».

Il y a nul doute qu'une obligation de juste représentation augmenterait fortement les droits individuels de l'employé. Il est évident aussi qu'une telle démarche, si importante soit-elle, n'apporterait pas un règlement complet du problème. Il faut trouver une méthode qui puisse mesurer le bien fondé d'une réclamation du point de vue de l'individu, et qui ne mine pas en même temps la capacité et l'autorité du syndicat, lequel doit agir comme arbitre face aux intérêts divergents des employés en même temps que le porte-parole de l'unité de négociation.

L'ANALOGIE DE L'UTILITÉ PUBLIQUE

Un autre aspect à étudier consiste à trouver le moyen d'amener le syndicat à utiliser son monopole légal de représentation d'une façon non-discriminatoire à l'égard de l'individu et de le Conseil des relations ouvrières de ses mandats à des normes statutaires de juste représentation. Cette suggestion semble avoir le mérite de donner à la notion de « devoir de juste représentation » une définition plus large que celle qui est actuellement acceptée aux États-Unis. La norme à utiliser se base non pas sur la plainte de l'individu, mais sur le comportement du syndicat.

L'ANALOGIE COÛTS-BÉNÉFICES

Le « devoir de juste représentation » tient son origine de l'analogie « coûts-bénéfices ». En échange d'un bénéfice, soit le monopole de représentation, le syndicat doit assumer le coût qu'implique la représentation équitable de chaque salarié. Mais de fait, l'individu arrive souvent « en dessous ». Il serait peut-être logique de pousser l'analogie plus loin en vue de compenser pour les pertes de l'individu. On se sert actuellement de l'analogie « coûts-bénéfices » comme base pour une foule de réformes différentes. Éventuellement, les syndicats devraient prendre la décision de créer un fond spécial pour dédommager les individus dont les griefs légitimes ont été compromis en vue de favoriser les intérêts de l'ensemble des membres.

LES PRÉOCCUPATIONS PREMIÈRES ET SECONDAIRES DE L'EMPLOYÉ

Il faut envisager, pour remédier au problème de l'individu, une distinction entre les aspects importants d'un emploi et ceux qui lui sont secondaires. Aux premiers se greffent des problèmes tels que le congédiement, les formes de compensation, l'ancienneté, etc. tandis qu'aux seconds se rattachent des points de litige secondaires. Il est vital pour l'individu qu'il ait, comme employé, une protection minimum contre toute violation de ses intérêts premiers et qu'une forme de redressement lui soit fournie contre toute violation de ces intérêts.

CONCLUSION

Un syndicat acquiert des droits légaux en tant que groupe, et le groupe en est le premier bénéficiaire; il est donc dans l'intérêt de l'individu qu'il protège la force de son représentant. Mais cela ne signifie pas d'autre part que les droits et les intérêts de l'individu doivent être sacrifiés à la collectivité.

La démocratie occidentale a toujours favorisé les droits individuels. On manifeste de plus en plus d'intérêt aux conceptions qui créent des bénéfices collectifs, mais toujours dans l'optique que les droits de la minorité doivent être protégés. Nous devons trouver des moyens pour protéger l'individu et l'intérêt du groupe, tout en protégeant le groupe pour qu'il puisse atteindre efficacement les fins du groupe. L'individu retire des avantages d'être membre d'un syndicat qui lui sert de porte-parole efficace, mais cela ne signifie pas qu'il doit sacrifier ses intérêts personnels au profit du syndicat. Une nouvelle forme d'accommodation doit être découverte, et l'individu doit être partie du système, comme le sont actuellement l'employeur et le syndicat.

DROIT DU TRAVAIL

MUST AN INDIVIDUAL UNION MEMBER'S RIGHTS BE SACRIFICED TO PROTECT THE GROUP INTEREST ?

Reuben M. Bromstein

Assuming that an individual employee can neither sue directly on the collective agreement nor force the union to take his case through to arbitration, can he proceed against the union for its failure to discharge its duty to represent his interests?

INTRODUCTION

The purpose of this article¹ is to review, in a general way, some of the more widely proposed solutions to this question with special emphasis on the « duty of fair representation » concept, as developed in the United States, and to highlight some of the limitations, as well as the commendable features, of the various avenues of attack.

The emphasis of this work is on the situation in Ontario so that both the applicable Federal and Ontario legislation were deemed most relevant

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¹ This paper was prepared for Associate Dean H. W. Arthur's Spring 1969 Labour Problems Seminar at Osgoode Hall Law School of York University.

The topic, Responsible Decision making in Democratic Trade Unions, is fruitfully discussed by E. E. Palmer for the Task Force on Labour Relations in a separate work to be published by the Queen's Printer sometime in early 1970. Palmer surveys the problems involved in attempting to reconcile democratic and responsible decision making in trade unions, including in particular an assessment of individual rights within organizations which must act as cohesive groups if they are to function effectively as collective bargaining agents. A seemingly exhaustive list of the relevant articles, texts, and cases are included in the bibliography, footnotes and appendices and it is to be hoped that its publication will not be delayed.

The Background Notes prepared for the Canadian Bar Association, Industrial Relations Section, Panel Discussion of September 2nd, 1965 contains a list of pertinent cases, quotations and comment.

to the problem. The American experience, particularly in relation to the judicially developed duty of fair representation, has been well mooted in the available literature, and seemed to provide a useful comparison to the Ontario situation.

It would seem that in certain limited instances an employee is protected from rank discrimination by his union. For example :

« . . . Boards, using their discretion as to what constitutes a « qualified » union, might be willing to decertify any union which engages in such discriminatory activities. . . . to the extent that union activity affecting a member finds no support in the union constitution it may be declared *ultra vires*. Upon proper evidence the common law action for conspiracy may also provide protection for the individual worker, as it did in *Bolt v. S.I.U.*² where the British Columbia Court of Appeal found that the plaintiff had been excluded from the union hiring hall as a result of a conspiracy on the part of the union executive. Again, statements such as that by Sidney Smith, J.A.³ that : « One might . . . speculate whether the statutory privilege of a Union to contract with employers on behalf of its members had not added a fiduciary aspect to their relationship. » indicates that the courts are willing to entertain ideas similar to those in this field in the United States. »⁴

In addition, the decision of the Supreme Court of Canada in *Re Hoogendoorn*⁵ may be an indication that the courts would consider the deprivation of an individual's rights under a grievance to be a denial of natural justice⁶.

Unfortunately, unless an employee is able to derive a right of action under the above-mentioned possibilities, (and it must be emphasized that they are no more than possibilities), he is at the mercy of the Union, and may be unable to find any satisfaction whatsoever should the union fail to protect his interests.

A union may compromise the position of an individual employee during the negotiation as well as the administration of the collective agreement. Although an employee may have some vested rights which will be protected in a court,⁷ essentially he derives his rights from the collective agreement and the bargaining power of the union.

² 26 D.L.R. (2d) 441 (B.C. Sup. Ct. 1961).

³ *White v. Kuzych* [1950] 4 D.L.R. 187, 201 (B.C.C.A.).

⁴ Palmer, *The Impact of Union Security in Canada*, *Buffalo L.R.* 13:515, at p. 533.

⁵ *Re Hoogendoorn & Greening Metal Products*, [1968] S.C.R. 30:65 D.L.R. (2d) 641, rev'g. [1967] 1 O.R. 713.

⁶ See Arthurs, *Developing Industrial Citizenship*, 45 *Can. Bar. Rev.* 786 at p. 804, and case comment by Ferguson, *O.H.L.J.* Volume 6, No. 1, 113.

⁷ For example see *Regina v. Canadian Pacific Railway Co.*, (1962), 31 D.L.R. 209.

The interests of the employee and the union, usually considered to be identical, are sometimes conflicting. During the negotiation of the agreement the union may bargain away a job category, a wage increase or other interest of an individual employee, in order to conclude an agreement which is beneficial to the union as a whole or to a majority in the union.

While the union's freedom of action must be protected, at the same time the union cannot be allowed to bargain away with complete equanimity an individual's rights so as to benefit other members of the union. In addition, it cannot be allowed to compromise an individual's rights under the collective agreement by refusing to process legitimate grievances. The union has life and meaning only so long as it works for the interests of the individuals that it represents. As the union derives its exclusive bargaining authority from the Labour Relations Act⁸, it has the duty to work for members and non-members without discrimination.

It is generally agreed that a collective agreement establishes a framework for the terms and conditions of employment, reduces conflict and brings stability to the union-employer relationship. Agreements are often deliberately ambiguous, and there are many accidental omissions and unforeseen problems. Any disputes that arise of necessity within the jurisdiction of the union's authority. If the union does not fight for the individual, he may be without remedy.

⁸ Labour Relations legislation now in force are :

Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, amended 1966-67, c. 62.

The Alberta Labour Act, R.S.A. 1955, c. 167, amended 1957, c. 38; 1958, c. 82; 1959, c. 35; 1960, c. 54 and c. 80; 1964, c. 41; 1966, c. 13, s. 94; 1968, c. 51.

Labour Relations Act, R.S.B.C. 1960, c. 205, amended 1961, c. 31; 1963, c. 20; 1968, c. 26.

The Labour Relations Act, R.S.M. 1954, c. 132, amended 1956, c. 38; 1967, c. 36; 1958, c. 29 and c. 67; 1959, c. 32; 1960, c. 78; 1962, c. 35; 1963, c. 41; 1966, c. 33.

Labour Relations Act, R.S.N.B. 1952, c. 124, as amended 1953, c. 21; 1955, c. 57; 1956, c. 43; 1959, c. 56; 1960, c. 45; 1960-61, c. 52; 1966, c. 73.

The Labour Relations Act, R.S.N. 1952, c. 258, amended 1959, c. 1; 1960, c. 58; 1963, c. 82; 1966, c. 39; 1967, c. 12; 1968, c. 71.

Trade Union Act, R.S.N.S. 1967, c. 311, amended 1968, c. 59.

The Labour Relations Act, R.S.O. 1960, c. 202, amended 1961-62, c. 68; 1963, c. 70; 1964, c. 53; 1966, c. 76.

The Industrial Relations Act, S.P.E.I. 1962, c. 18, as amended 1963, c. 20; 1966, c. 19; 1966 (2nd session), c. 3.

The Labour Code, R.S.Q. 1964, c. 141; amended 1965, c. 50, c. 14; 1968, c. 19, c. 45; 1969, Bill 50, proclaimed in force in August and September, 1969.

The Trade Union Act, R.S.S. 1965, c. 287, as amended 1966, c. 83; 1968, c. 79; 1969, c. 66.

Within the plant there are often diverse groups whose interests will conflict with the claims of individuals in any given instance. There are often several classes of individuals that have varying and opposing interests. A claim by one employee will often affect workers in similar jobs and the adjustment of an individual grievance may in turn cause gains or losses for other workers. This means that there will often be conflicting pressures on the union from divergent groups within the union itself. The union owes a duty to all employees in the plant. In attempting to resolve these conflicts it may well choose to placate a larger group of workers and the individual's claim may be sacrificed to the « greater good ».

A plant must function efficiently and productively. Government policy is to promote industrial peace⁹. Joint union and management control of the labour relations process helps achieve the objectives of industrial harmony and productivity. These goals will also be furthered if the individual is not deprived of his rights, nor alienated from the existing system. A way must be found to create meaningful individual rights, recognition of which is the price which union and employer must pay for the privilege of otherwise unfettered freedom of operation of the productive system.¹⁰

UNFAIR VERSUS FAIR UNION BEHAVIOUR

In analyzing possible remedies that an individual employee may have against the union that represents his interests, it will be helpful to separate those areas in which the union acts unfairly towards an individual, and those in which by an objective definition the union may well have acted fairly towards the employee but has in effect deprived him of effective redress for a legitimate grievance. Under the category of unfair behaviour are included actions in which the union displays arbitrary, discriminatory, and hostile attitudes. In these instances, the union, or its leadership,¹¹ displays an intention to deliberately override the individual's interests. Alternatively, the union could by gross negligence¹² achieve the same result. There are, however, many situations in which the union may act fairly and meritoriously from the union's, and even from an objective, point of view, but not necessarily from the individual's standpoint. If the merits of the claim alone are considered, we might arrive at an entirely different conclusion. As will be seen, the courts in the United States recognize that an individual will have a claim under the duty of fair representation when a union acts unfairly, but not otherwise.

⁹ See Arthurs, *supra*, footnote 6 at p. 702.

¹⁰ Blumrosen, Legal Protection for Critical Job Interests, (1959) 13 *Rutgers L.J.* 631 at p. 650.

¹¹ In some cases the union leaders may individually, and for personal reasons, abuse their positions. In other cases the union leadership may act to protect its interests as a group, and in some instances they may do things believing they are acting in the best interests of the union as a whole.

¹² See footnote 61, *infra*.

POSSIBLE REMEDIES

The remedies that may be available to the individual fall into three recognized categories¹³ namely, judicially created rights, legislative rights (which include those arising under administrative bodies), and rights provided by unions themselves.

JUDICIALLY CREATED REMEDIES

The courts consider themselves the guardians of the public interest and have not hesitated to castigate unions when they behave in a manner considered detrimental by the courts to the general welfare of the community. They may well decide that union excesses and abuses against individual employees should be proscribed by the judiciary :¹⁴

« Both labour boards and courts have begun to grope towards a solution by giving the employee a remedy against the union based upon a breach of a fiduciary duty¹⁵ violation of the union's constitution¹⁶ or perhaps illegality under the labour relations legislation ».¹⁷

The Woods Report¹⁸ has pointed out that:

« A member or prospective member of a union may appeal to the courts if he feels his legal rights have been abridged. But these rights are not always clear ; they can be minimal, legal costs can be great, and a decision can be long in coming. Thus, resort to the courts scarcely provides a complete answer, although it has had salutary effect in several cases ».¹⁹

In *Re Hoogendoorn*²⁰ and in *Bradley*²¹ the courts seem to have adopted the view that the employee will be permitted to « intervene in

¹³ See Arthurs, *op. cit.*, *supra*, footnote 6, at p. 801.

¹⁴ For a list of cases and relevant quotations on the basis of judicial intervention see Background Notes prepared for the Canadian Bar Association, *supra*, footnote 1.

¹⁵ See e.g. *Hornak v. Patterson*, (1966), 58 D.L.R. (2d) 175 (B.C.C.A.) cf. *Murphy v. Robertson*, [1941] 3 D.L.R. 30 (Man. C.A.).

¹⁶ See e.g. *S.I.U. v. Stern*, [1961] S.C.R. 682 ; *Orchard v. Tunney* [1957] S.C.R. 436.

¹⁷ See *Canadian Dredge & Dock Co. Ltd.*, (1965), 66 C.L.L.C. p. 16, 071 (O.L.R.B.) ; *Plumbers Union, Local 67*, [1968] Oct. Mthly. Rep. 513 (O.L.R.B.) ; *Vera Elkington and the Wallace Barnes Co. Ltd.*, 61 C.L.L.C. 928 ; Arthurs, *op. cit.*, *supra*, footnote 6 at p. 804.

¹⁸ *Canadian Industrial Relations*, The Report of the Task Force on Labour Relations (the Wood's Report) Queen's Printer, Ottawa, 1969.

¹⁹ *Ibid.*, at p. 102.

²⁰ *Supra*, footnote 5.

²¹ *R. v. Ottawa Firefighters, ex p. Bradley*, [1967] 2 O.R. 311 (C.A.), 63 D.L.R. (2d) 376.

arbitration proceedings in which the union is seeking a result which specifically, directly and adversely affects his interests ». ²² This judicially created right, which is a direct assault on the union's exclusive power to administer the collective agreement, may well be a harbinger of things to come. ²³

In one Supreme Court of Canada case, Martland J. pointed out that:

« A union has, as a result of certification, ceased to be a purely voluntary association of individuals. It has become a legal entity, with the status of bargaining agent for a group of employees, all of whom are thereby brought into association with it, whether as members, or as persons whom it can bind by a collective agreement, even though not members. It must, as their agent, *deal with the members of the group which it represents equitably.* » (emphasis added). ²⁴

Whether the court would resort to the familiar legal pigeon holes of contract, usage, agency, trust or tort ²⁵ in devising a remedy is, of course, a matter of conjecture. The duty of fair representation, to be discussed *infra*, would seem to roll all of these concepts into one nominate remedy. Although this road is not necessarily exclusive to the judiciary, it has been the avenue used by the courts in the United States. As has been mentioned it would seem to be under consideration by Canadian judges. ²⁶

There are many possible unfortunate side-effects to judicially created remedies in the area of industrial relations. Courts tend to be insufficiently aware of the underlying structure and problems and bring to bear legal considerations that many often exacerbate problems unnecessarily. Although these are not inevitable side-effects, the generally unfavourable reaction of unions to the courts indicates that it might be more conducive to industrial harmony if remedies for individuals were developed elsewhere. ²⁷

²² Arthurs, *op. cit.*, *supra*, footnote 6 at p. 804.

²³ *Supra*, footnote 6.

²⁴ *Oil Chemical and Atomic Workers International Union, Local 16-601, v. The Imperial Oil Co. Ltd.*, 1963 S.C.R. 584 at p. 593 ; 41 D.L.R. (2d) 1.

²⁵ For example, see Cox, *Rights Under a Labour Agreement*, (1956) 69 *Harv. L. R.* 601 at p. 619. Many of the articles in footnote 45, *infra*, contain arguments in favour of one or more of these legal concepts. Also see Background Notes, C.B.A., *supra*, footnote 1.

²⁶ *Supra*, footnote 24.

²⁷ The above discussion assumes that the courts can intervene. *The Rights of Labour Act*, R.S.O. 1960, c. 354 s. 3, would indicate otherwise, although the section seems to be disregarded in practice.

LEGISLATIVE REMEDIES

There are no federal or provincial statutes which specifically place a duty of fair representation on unions.²⁸ There are, however, various provisions, in the acts which may assist an individual to achieve redress against the union if discriminated against because of race, national origin, colour, religion, sex or age.

Fair Employment practices legislation is enacted at the federal level and in eight provinces.²⁹ British Columbia and Ontario have enacted specific legislation to prevent age discrimination.³⁰ At the federal level we have the Female Employees Equal Pay Act and eight provinces have legislation designed to achieve similar ends.³¹

A remedy created by legislation, or by the administrative bodies created by the Labour Relations Act, would have merit in that it would most probably be based on the expectations of the parties and an understanding of the industrial relations system.

Legislation could be passed allowing an individual to sue the union in a court for damages. Some authorities³² have suggested that the remedy

²⁸ In Quebec Article 88 of the *Labour Code* provides that "Every grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the parties abide by it; otherwise it shall be referred to an arbitration officer chosen by the parties or, failing agreement, appointed by the Minister." Presumably, under this article, an employee may carry an unanswered complaint to arbitration. It does not seem to prevent a union from carrying a grievance to arbitration and adversely affecting and individual's rights so as to benefit the group.

²⁹ *Canada Fair Employment Practices Act*, S.C. 1952-53, c. 19; 1966-67, c. 62. *Human Rights Act*, S.A. 1966, c. 39; 1969, c. 52. *Fair Employment Practices Act*, R.S.B.C. 1960, c. 137, amended 1964, c. 19. *The Fair Employment Practices Act*, R.S.M. 1954, c. 81, as amended 1956, c. 20. *Human Rights Act*, R.S.N.S. 1967, c. 13. *Human Rights Act*, S.N.B. 1967, c. 130. *The Ontario Human Rights Code*, S.O. 1961-62, c. 93; as amended 1965, c. 85; 1967, c. 66; 1968, c. 85.

Employment Discrimination Act, R.S.Q. 1964, c. 142.

The Fair Employment Practices Act, R.S.S. 1965, c. 293.

³⁰ *Age Discrimination Act*, R.S.O. 1966, c. 3; 1968, c.2.

Fair Employment Practices Act, R.S.B.C. 1960, c. 137 amended 1964, c. 19; s.4.

³¹ *Female Employees Equal Pay Act*, S.C. 1956, c. 38; 1966-67, c. 62.

The Alberta Labour Act, R.S.A. 1955, c. 167 amended 1957, c. 38; 1958, c. 82; 1959, c. 35; 1960, c. 54 and c. 80; 1964, c. 41; 1966, c. 13, s. 94.

Equal Pay Act, R.S.B.C. 1960, c. 131.

The Equal Pay Act, S.M. 1956, c. 18 amended 1962, c. 66.

Female Employees Fair Remuneration Act, S.N.B. 1960-61, c. 7.

Human Rights Act, R.S.N.S. 1967, c. 130, s. 6 (1).

The Ontario Human Rights Code, S.O. 1961-62, c. 93 as amended 1965, c. 85, s. 5 (1).

The Equal Pay Act, R.S.S. 1965, c. 294.

³² See Blumrosen, *op. cit.*, *supra*, footnote 10, at p. 658.

be limited to an order requiring the union to carry the issue through to final arbitration, thereby avoiding many of the problems that arise when a court becomes involved in a labour dispute.

As an alternative to the courts, it may be argued that a Labour Relations Board³³ or a Labour Court³⁴ could provide a proper forum for adjudication of individual disputes. Labour Relations Boards have attempted to provide solutions to the problem.³⁵ Under the general powers of inquiry by Labour Relations Boards, and it should be noted that some boards seem to have wider powers than others, a board may be able to consider the union's behaviour to be an unfair labour practice proscribed by the governing act. In Ontario, for example, section 65⁴ (a) may provide the basis for such action. Presumably the argument is that a Board could fashion a remedy, including, for example, one based on the duty of fair representation, which would do justice to the individual's claim against the union. In extreme cases it would now seem to have the power to decertify unions and award damages.³⁶ Given a precipitous instance, the board might decide that the appropriate remedy is to force the union to exhaust arbitration procedures on behalf of the individual, or alternatively, pay compensation for any losses incurred.

Most individuals are unable to afford experienced counsel. If the L.R.B. was able to bring administrative machinery to bear on behalf of the individual, it might save him considerable time and money.³⁷

There are obvious merits to a remedy fashioned within the framework of the labour relations system. Presumably issues would be considered by impartial observers who are steeped in the needs and problems of the system, but who would also bring to bear concepts of justice and equity that will help preserve the integrity of the individual. If a Labour Court is created, or if the L.R.B. were to act as a court when it considers these matters, a jurisprudence of labour relations may develop in this area.

The L.R.B. is the body charged with the obligation of ensuring industrial peace and implementing the act. It seems logical to look to it for solutions. A review of the work of the Ontario Board would probably show that, although it has ingeniously developed its mandate in the face of great obstacles, it must tread gingerly when it extends the functions normally considered to be within its jurisdiction under the act. This would indicate that, in the absence of unique circumstances, such as a spectacular case which captures the public interest, whereby a board's actions might be widely acclaimed, a legislative direction will probably be needed before the Board can make much headway in this area.

³³ *Op. cit.*, *supra*, footnote 18 at p. 152.

³⁴ Some European countries use Labour Courts.

³⁵ See page one.

³⁶ See page one and Laskin, *Collective Bargaining and Individual Rights*, (1963) 6 C.B.J. 278.

³⁷ Lewis, *Fair Representation in Grievance Administration*, [1967] *U. Chi-Sup. Ct. Review* 81 at p. 97.

UNION CREATED REMEDIES

As has been pointed out elsewhere,
 « third, and most dramatic, union created tribunals, such as the UAW Public Review Board,³⁸ represent a more promising forum for genuine employee protection than administrative tribunals or the regular courts ».

If the answer to individual problems were to come from the union itself, there is no doubt that this would indicate the increasing maturity of unions. An effective internal remedy would be dramatic evidence of union desires to be more democratic and effectively represent individual interests. Unfortunately, few unions are this farsighted and the basic union philosophy that decries individual needs and emphasizes collective action mitigates against this form of internal self-development.

A number of problems in connection with union created tribunals arise. How does one ensure that the union will comply with the decisions of an independent board, particularly if the board decides that the union acted unfairly even though all proper procedures were followed?³⁹ The fighting mission of the union which promotes a party line adherence, and brands those who oppose collective interests as « scabs », indicates that the limitation of individual rights seems to be a too often accepted fact of union life.

One review of the work of the UAW Public Review Board⁴⁰ pointed out that in the first ten years of its work, there were sixty appeals involving grievance handling and that « In none of these cases was the appellant able to convince the Board that his grievance was handled for improper motivations. »⁴¹

In establishing the tribunal composed of independent and respected people, the U.A.W. had provided, not surprisingly, that « in no event shall the Public Review Board have the jurisdiction to review in any way an official collective bargaining policy of the International Union », ⁴² and that improper handling was defined to mean « fraud, discrimination,

³⁸ See Arthurs, *op. cit.*, *supra*, footnote 6 at p. 801.

³⁹ Krouner, *Arbitration on a New Frontier — the Public Review Board of the United Automobile Workers, A Quasi-arbitral Body for Dispute Settlements in the Internal Affairs of a Labour Union*, discusses this point as does the *Wood's Report*. For further discussions on Public Review Boards see Note, *Public Review Boards: A Check on Union Disciplinary Power* (1958), 11 *Stan. L. Rev.* 497; Oberer, *Voluntary Impartial Review of Labour Unions: Some Reflections* (1959), 58 *Mich. L. Rev.* 55; Stieber, Oberer, & Harrington, *Democracy and Public Review* (1960); Klein, *U.A.W. Public Review Board Report*, *Rutgers L.R.* Vol. 18, 1964, p. 308; Articles in *Fund for the Republic Report, Democracy and Public Review*, done for the Center for the study of Democratic Institutions, Santa Barbara, California (1960); Brookes, *Impartial Public Review of Internal Union Disputes; Experiment in Democratic Self-Discipline*, *Ohio State L.R.* Vol. 22, (1961) p. 89.

⁴⁰ *Ibid*, Krouner.

⁴¹ *Ibid*, at pp. 12-14.

⁴² *Ibid*, at p. 14.

or collusion with management ». ⁴³ It would appear that these requirements, while protecting individuals from overt hostility on the part of the union, will not assist in protecting the individual's interests when they conflict with majority needs or if he is unable to prove the union acted maliciously even if he had a meritorious claim.

The report concluded that the Public Review Board was useful in that it forced the union to stick to its constitutional principles and brought the U.A.W. the highest relative standard of union democracy in the United States. ⁴⁴

The principles laid down by the U.A.W. are not unlike the ones enforced by the courts in the duty of fair representation. If nothing else, the U.A.W. will be spared the embarrassment of being taken to court and having the courts impose the duty on the union. It would appear to be asking a great deal of a union to extend the principle any further at this time. The union would feel that it was acting against its own best interests in so doing. Whether it will do so in the future remains to be seen. It would, of course, indicate an extreme degree of maturity, and be a welcome development.

THE DUTY OF FAIR REPRESENTATION

The specific remedy that has been most exhaustively explored in the American literature ⁴⁵ is known as the duty of fair representation.

⁴³ *Ibid.*, at p. 17.

⁴⁴ *Ibid.*, at p. 29.

⁴⁵ Aside from other works mentioned in the footnotes to this essay, see :

Comm. on Improvement of Administration of Union-Employer Contracts, Report, in A.B.A. Section of Labour Relations Law, *Proceedings* 33 (1954), reprinted, 50 *Nw. U.L. Rev.* 143 (1955);

Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 *Col. L.R.* 731 (1950);

Hanslowe, Individual Rights in Collective Labour Relations 45 *Cornell L.Q.* 25 (1959);

Howlett, Contract Rights of the Individual Employee as Against the Employer, 8 *Lab. L.J.* 316 (1957);

Lenhoff, The Effect of Labour Arbitration Clauses Upon the Individual, 9 *Arb. J. (n.s.)* 3 (1954).

McRee, The Adversely Affected Employee and the Grievance and Arbitration Process in Symposium on Labour Relations Law 431 (Slovenko ed. 1961); Note, 34 *Ind. L.J.* 462 (1959).

Sherman, The Individual and His Grievance — Whose Grievance Is It? 11 *U. Pitt. L.R.* 35 (1949).

Summers, Union Powers and Workers' Rights, 49 *Mich. L.R.* 805 (1951)

Summers, Individual Rights in Collective Agreements — Preliminary Analysis, in Stein (ed) New York University 12th Annual Conference on Labour 63 ;

Summers 9 *Buffalo L.R.* 239.

Wellington, Union Democracy, (1958) 67 *Yale L.J.* 1327 ;

Note, 27 *Fordham L.R.* 640 (1959).

Note, 44 *Va. L.R.* 1337 (1958).

Note, 59 *Col. L.R.* 153 (1959).

Note, 25 *U. Chi. L.R.* 686 (1958).

In the United States this legal right of action was developed by the judiciary. In the case that established the duty of fair representation, *Steele v. Louisville & N.R. Co.*,⁴⁶ an employee sued his union and his employer to enjoin enforcement of contract provisions that had been negotiated by his union representative and that discriminated against him. The court found for the petitioner and pointed out that a congressional grant of power under labour relations legislation gives power to a union to act as exclusive collective bargaining representative with a corresponding reduction of individual rights of the employees, and this in turn must impose on the union a duty

« to exercise fairly the power conferred upon it on behalf of all those for whom it acts, including non-union or minority union members without hostile discrimination against them »⁴⁷

It must act fairly impartially, and in good faith⁴⁸. Although the case arose under the Railway Labor Act and involved racial discrimination, the concept has been extended to embrace other labour legislation and other discriminatory practices. The National Labour Relations Act imposes a similar obligation⁴⁹. In the *Miranda Fuel Case*, the N.L.R.B. found that a union's breach of its duty of fair representation was an unfair labour practice⁵⁰.

In one of the more recent decisions of the U.S. Supreme Court, the duty was defined as follows :

« Under this doctrine the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct ».⁵¹

In developing the protection available through enforcement of the duty of fair representation, the courts had no ready-made standards of fairness. It was reasonably clear that the duty was violated whenever the union's handling of a grievance is influenced by union memberships or activities, union politics, the exercise of political rights, or sheer favouritism⁵³.

Bad faith or abuse of discretion is now found in most instances if the "unfair" handling of the situation relates to race, membership in a

⁴⁶ 323 U.S. 192 (1944).

⁴⁷ *Ibid.*, at 203.

⁴⁸ *Ibid.*

⁴⁹ *Syres v. Oil Workers Union*, 350 U.S. 892, reversing per curiam 222 F. 2d 739 (5th Cir. 1955); *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 255-56 (1944).

⁵⁰ *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), 325 F. 2d 172 (2d Cir. 1963).

⁵¹ *Vaca v. Sipes*, 386 U.S. 171 (1967); 87 S. Ct. 903, at p. 910 per White J.

⁵³ Cox, Individual Enforcement of Collective Bargaining Agreement, 8 *Lab. L.J.* 850, 858-9 (1967).

rival union, political affiliation and sometimes on the basis of marital status and sex ⁵⁴.

From recent decisions, it would seem that a union will have discharged its duty even though it may be quite mistaken about the merits of an employee's grievance. In *Vaca v. Sipes* ⁵⁵ the majority of the Supreme Court ruled that proof of merit of an individual claim is not enough as the employee must also prove that the union's refusal to process his grievance was arbitrary and in bad faith. The importance of the asserted right to the employee seems to have no significance ⁵⁶.

Professor Cox, a leading authority in the subject has said that there would be a breach of the duty if the union refused to press a justifiable grievance either because of laziness, prejudice or unwillingness to expend money on behalf of employees who were not members of the union. The unions obligation is to act in "good faith" toward the employee. It would be a defence to show that the union and employer had made a settlement or that the union's decision not to press the claim was honest and reasonable ⁵⁷.

Cox admits that

«In practice the value of the right of fair representation must be heavily discounted because often only small sums are likely to be involved, because this branch of labor law is full of uncertainties and because individual workers often have difficulty in obtaining skilled and imaginative legal service ».⁵⁸

It would seem that the union behaves towards the individual in good faith if it bases its decisions on the legitimate interests of a group, even though the group interests are in opposition to the legitimate interests of the individual. This coincides with the American Supreme Court's decision that the presumption is in favour of the union having acted in good faith unless the individual can prove otherwise. A claim which is meritorious from an individual's point of view, may be non-meritorious from the perspective of the larger group and the test for validity of a claim has in effect become the group interest ⁵⁹. The result eliminates the original presumption on which the duty of fair representation was based. The duty was created because the individual was to be protected from the group. If the group interest becomes the test of validity of a claim the right may become meaningless to the individual employee.

⁵⁴ Blumrosen, *op. cit.*, *supra*, footnote 10, at p. 655.

⁵⁵ *Supra*, footnote 51. Also see *Humphrey v. Moore*, (1964) 375 U.S. 335.

⁵⁶ Lewis, *op. cit.*, *supra*, footnote 37, at p. 108.

⁵⁷ Blumrosen, *op. cit.*, *supra*, footnote 10 at p. 654.

⁵⁸ Cox, *op. cit.*, *supra*, footnote 25 at p. 634.

⁵⁹ Blumrosen, *op. cit.*, *supra*, footnote 10, at p. 656.

Mr. Justice Black, dissenting in *Vaca v. Sipes*,⁶⁰ said that :
 « Thus, Owens, who now has obtained a judicial interpretation that he was wrongfully discharged (the jury had awarded punitive damages) is left remediless, and Swift, having breached its contract, is allowed to hide behind and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference... whether the union's conduct is wrongful or rightful. »

So long as the duty of fair representation is so narrowly defined, the individual remains at the mercy of the union leadership. If it does not act in an overt hostile (or grossly negligent⁶¹) manner towards an individual in a grievance dispute, it may effectively eliminate his just claims. Even though it acts fairly towards an employee the employee may lose the benefit of a just claim.

The individual's rights may often be destroyed even though there was no deliberate discrimination or vindictiveness. Union officials are burdened with many problems. They may find it in the best interests of the majority of the union members to trade off some legitimate grievances when a total package is advantageous⁶². It may not have the time to make a complete investigation of the facts, may rely on unexamined evidence, and may accept the biased evaluation of witnesses, whereas a more objective inquiry might show the claim to be a worthy one. The narrower the interest, that is, the fewer the number of employees affected by the grievance, the less likely is the union to find the need to process the grievance a pressing one.

One writer, Alfred W. Blumrosen, has pointed out that :
 « The approach of Professor Cox is so narrow as to deprive the employee of protection of his critical job claims so long as the union acted in good faith. The employee whose claim has been rejected may be harmed equally whether the union acted in good faith or bad faith. His claim may, however, be clearer against the union action motivated by illicit considerations because the wrongdoer cannot claim to implement important social policy.⁶³ To protect the individual's claim against total subordination to the group, the union's obligation must be defined as a duty to process all meritorious claims of employees concerning critical job interests. Whether a claim is meritorious must be measured from the vantage point of the individual, not the group. »^{63a}

⁶⁰ *Op. cit.*, *supra*, 386 U.S. at 205.

⁶¹ Assuming that gross negligence might be covered under a definition of unfairness, but there seems to be no authority to this effect.

⁶² For specific examples see Summers, *Individual Rights in Collective Agreements and Arbitration*, (1962) 27 *N.Y.U.L. Rev.* 362, pp. 393-4, and the other articles listed in this essay.

⁶³ Blumrosen, *op. cit.*, *supra*, footnote 10 at p. 655.

^{63a} *Ibid.*, at p. 656.

Another writer, Thomas P. Lewis, has suggested that "a rule that would require a union to exhaust grievance procedures in a non-frivolous discharge case" would be an answer in discharge case,⁶⁴ but feels that :

« Certainly the difficulties of separating issues of « law » and « fact », difficulties probably compounded in the industrial relations field, prevent the creation of a workable rule under which the union would have an obligation to take all nonfrivolous factual disputes to arbitration. »⁶⁵

He arrives at the conclusion that even a broad duty of fair representation will not adequately protect the individual.

« Harassment from litigation would be a problem, and surely the greater the duty of fair representation the greater will be the uncertainty concerning the durability of settlements mutually acceptable to the collective parties. But even a broad standard of fair representation will not reach the over-whelming bulk of grievance settlements. For one thing, most settlements are honestly and fairly made. And very few settlements that are honestly made will be rejected as unfair, simply because the kinds of problems that are grist for the grievance mill — promotion, seniority, overtime, job assignment, and discharge are sufficiently open-ended, factual, and dependent on the « common law » and needs of the shop as developed primarily by the collective parties in charge, that unfairness will rarely be obvious enough to persuade a judge to action.

When we add the obstacles to successful challenges of labour management settlements that naturally attend placing the initiative on the employee, it is still more arguable that too little protection, rather than too much, will be afforded even by a broad duty of fair representation. »⁶⁶

THE DUTY OF FAIR REPRESENTATION IN CANADA

From an examination of the American approach, it will be seen that the way is open for Canadian courts to develop a duty of fair representation⁶⁷. As mentioned earlier the Canadian judiciary are not unresponsive to the idea. It would not require a great leap in legal reasoning for our courts to implement similar standards as have been developed in the United States. The American courts devised their remedy based on the union's statutory duty as bargaining agent, a status very similar to that accorded to Canadian unions under Canadian labour relations legislation. In Canada it would provide an important remedy for individuals faced with arbitrary, hostile and discriminatory practice of a union. Unfortunately, if it is as narrowly defined as it has been in the United

⁶⁴ Lewis, *op. cit.*, *supra*, footnote 37 at p. 123.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at p. 122.

⁶⁷ See Adell, note, 45, *Can. Bar. Rev.* 354, at p. 359.

N. de la R. Depuis la rédaction du présent article, voir *Fisher v. Pemberton*, (1970) 8 D.L.R. (3d) 521 (B.C.S.Ct), jugement que commentera le professeur Adell dans le prochain numéro de *Relations Industrielles*.

States, and if the individual must prove the union's « bad faith », the remedy will not be effective in many areas where an individual has a legitimate grievance.

Insofar as legislation is concerned the concept of a duty of fair representation has been mooted by the Task Force on Labour Relations in the « Woods Report ». ⁶⁸ The Woods Report points out that :

« Individualism can be sacrificed as easily in a bilateral system of industrial government as in a unilateral one. ⁶⁹

A strong case can be made for assisting unions and their leaders to contend with membership pressures without jeopardizing their own positions, the collective bargaining process, or the welfare of society at large. But an equally strong case can be made for ensuring that labour organizations do not violate basic democratic rights of their members either as a group or as individuals. These competing interests call for a delicate balancing of membership rights and union responsibilities. ⁷⁰ Another troublesome issue concerns the relative rights of the collectivity and of individuals in the negotiation and administration of a collective agreement. The problem can best be illustrated in relation to the individual member's right of access to the grievance procedure and to arbitration. Normally such access is controlled by the union, and this is as it must be if collective bargaining is not to be undermined. Yet the union should be expected to exercise this discretionary power in a fair and impartial manner if it is not to have arbitrary control over its members. *This suggests that a union should be able to show that it acts in good faith whenever it chooses not to pursue a member's grievance or to pursue another one contrary to his interest.*

This must be the limit to any concept of fair representation if responsible collective decision making within and between union and management is not to be jeopardized. ⁷¹

Whatever is done to protect union membership rights must be accomplished without undermining the basic fabric of the labour movement or its ability to play a responsible role in society. With respect to the former, a union is like a country perpetually in conflict with a neighbour without which it cannot get along. As a militant organization, a union cannot afford the ultimate in democracy. Nor would this be desirable from the viewpoint of society at large, since it might preclude a union from taking unpopular but responsible positions in the face of membership restiveness. Accordingly, the challenge is to fashion a code of civil rights for union members, and machinery for administering it, that neither so weakens unions as to render them ineffective in bargaining nor so exposes them to membership pressures that they cannot act responsibly when circumstances dictate. ⁷²

⁶⁸ *Op. cit.*, *supra*, footnote 18.

⁶⁹ *Ibid*, at p. 98.

⁷⁰ *Ibid*, at p. 101.

⁷¹ *Ibid*, at p. 104.

⁷² *Ibid*, at pp. 104-5.

In respect of industrial relations, we recommend that legislation guarantee a duty of fair representation, particularly in the handling of rights acquired under a collective agreement. We recommend that a member who is of the view that he has been denied fair representation have an appeal to the Public Review Board or, in the absence of such a board, to the Canada Labour Relations Board, and that a burden be placed on the union to establish that it considered the rights and interests of the individual and that it acted in good faith and in the interests of the bargaining unit as a whole.⁷³

It should be made clear what it is that unions should be accountable for, to whom they should be accountable, and by what procedures they should be accountable.

We recommend that unions should be accountable

*to union members before a public Review Board or the Canada Labour Relations Board generally in respect of internal affairs of unions and their duty of fair representation ;*⁷⁴

*to employers and employees before the Canada Labour Relations Board for matters declared to be union unfair labour practices.*⁷⁵

The statements of the Woods Report logically apply to the Ontario labour scene as well as to the federal level. There is little doubt that a duty of fair representation would immeasurably increase the rights of an individual employee. It is also clear, that even though it would be a major step forward, it will not be a complete answer to the problem. Some method that succeeds in measuring the merits of the claim from the standpoint of the individual grievance, and that does not also undermine the « union's ability to function as a broker between divergent employee interests, and its authority to speak on behalf of the group »⁷⁶ must be found.

THE PUBLIC UTILITY ANALOGY

It seems that most of the suggestions to limit the power of the union and develop remedies for individuals have the built-in restriction that the employee must not only show that he has been harmed by the union concessions or actions, but must also show that the union has made no serious attempt to protect his interest.

The application of responsibility is limited to situations where the union has not acted in good faith in one form or another.

⁷³ *Ibid*, at p. 152.

⁷⁴ *Ibid*, at p. 154.

⁷⁵ *Ibid*, at p. 155.

⁷⁶ Arthurs, *op. cit.*, *supra*, footnote 6 at p. 805.

Another suggestion, for example, is the approach of the utility analogy.⁷⁷ The argument here is that the union should be made to use the monopoly power that it is granted by statute in a non-discriminatory fashion, and be held accountable through the enforcement of statutory standards of fair representation by the Labour Relations Board. It is variant of the fair representation duty.

« For example, a union decision to allow management unrestricted freedom to innovate may cost workers with low skills and low seniority their jobs, although the ultimate result of the decision is to ensure better wages for the remaining employees in a more profitable enterprise. To impugn such a decision, the displaced workers would have to show not merely that they were harmed by the union's concession, but that the union made no serious attempt to protect them by negotiating for alternate employment or severance pay. Similarly, a union which provided employees with sub-standard service in the prosecution of grievances would only be called to account if it could be shown that its failure was due to neglect or discrimination, rather than lack of financial resources to employ staff or to pay arbitration costs. »⁷⁸

Although this suggestion may have the merit of allowing a broader interpretation of the duty of fair representation than is now seen in the United States, it contains the same essential demerit. The standard to be employed is based on the behaviour of the union, and not on the merits of the individual's complaint. If provisions are to be made to protect the individual's interest they should do so. The duty of fair representation tends to protect the union so long as it acts fairly. Unfortunately, in some cases, it also deprives the individual of a remedy.

THE « COST-BENEFIT » ANALOGY

The duty of fair representation originates from the idea of « cost-benefit analysis ». For every benefit there must be a corresponding cost. For the benefit of exclusive authority to represent the employees, the union must pay the cost of representing all individuals fairly. As we have seen in the United States, the individual is often short-changed. Perhaps it would be logical to carry the cost-benefit analogy one step further in order to redress the individual for his losses.

It could be argued that if a union chooses to benefit itself at the expense of the individual it should compensate him for his losses. If the union sees fit to benefit certain sections of the union at the expense of other individuals, then it should see that the individual is compensated for his loss. If it chooses not to collect compensation from the group for

⁷⁷ *Ibid.*, at p. 806, and see Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, (1964) 50 *Va. L. Rev.* 1359, at p. 1366 et seq.

⁷⁸ *Ibid.*

the individual it should be responsible to pay the individual for his reasonable losses. The union would have to pay for every benefit that it derives, such as a smoother relationship with the company in handling an excessive number of grievances. If the union wishes in the interests of the greater good, to trade-off individual benefits it must pay for this right, even though it acted fairly in the interest of the group.

The union would not be hindered in its freedom of action vis-à-vis the employer. It would compensate the employee wherever the claim itself was legitimate and the union for one reason or another decided to abrogate the claim.

Obviously, the ramifications of such a proposal would have to be pursued in greater depth. It may create more problems than it solves. However, the cost-benefit analogy is increasingly becoming the basis on which reforms in many fields are being introduced throughout the free enterprise world. In Germany if a company pollutes the air, it pays a fee for so doing. In Ontario car drivers must carry some form of insurance as a cost of the benefit of being able to use the roads. Eventually, unions may decide to create special funds from which compensation will be paid to individual employees whose legitimate grievances have been compromised in the interests of the union as a whole or other groups in the union.

CRITICAL JOB INTERESTS AND SECONDARY ONES

In devising a remedy for the individual it will be important to distinguish between critical job interests and secondary ones.⁷⁹ In the former, we are dealing with important problems involving discharge, compensation, seniority and the like, whereas secondary problems are concerned with less critical matters.

It is vital that an individual find a forum that gives him redress for violations of his critical job interests, as they go to the very heart of his self-respect as a person. If a question of discharge arises and the union feels that it has acted fairly, the individual who is a non-union employee is no longer in the plant and is easily forgotten. It is important that some minimum protection is designed for critical job interests.

Inevitably, there are many secondary matters that the union will refuse to process because the cost would be far beyond the benefit derived for the individual. One answer would be to provide that the individual should bear the costs if he is able to force an adjudication on the merits of his claim and loses. He should also bear costs if he wins and the claim was frivolous.⁸⁰

⁷⁹ Blumrosen, *op. cit.*, *supra*, footnote 10, pp. 651-3.

⁸⁰ See Lewis, *op. cit.*, *supra*, footnote 37, at p. 103; Summers, *op. cit.*, *supra*, footnote 62, at p. 403.

CONCLUSION

A union acquires legal rights as a group, and the group is the principal beneficiary.

Every individual union member recognizes that he is no stronger than the union as a whole and that his income and security are, in the main, based on its existence. It is in his interests to protect the union's power as a collective whole. An individual cannot be allowed to paralyze necessary collective action or interfere with legitimate group needs. This does not mean that his interest must be sacrificed at the altar of the collective and his rights must be protected wherever possible.

Our system of democracy operates under the supposition that individual rights are primary. Increasing attention is paid to conceptions that provide group benefits, but underlying all group justifications is the rationale that minority rights must be protected. Individual benefit is the democratic basis of collective action. The collective action of the union is justified by the benefits that it provides to the individual employee. In creating rights for the individual against the group, if the merits of the claim are judged by the interests of the group, the foundation for the right is turned upside down. We should try to find some way to protect the individual within the group and at the same time protect the group so that it can function effectively in the interests of the individuals within its purview.

Lewis has suggested that:

« A firm ruling that an individual grievant has contract rights within the limits of meaning that can be reasonably be assigned to given contract language, rights that can be taken away only through an acknowledged amendment of the contract, would make a substantial addition and departure from the theory that a union can control contract rights subject only to the duty of fair representation. The overall result would be a degree, a blend of the Cox and Summers analysis. »⁸¹

Blumrosen points out that:

« The conflict between individual autonomy and joint union-employer authority cannot be resolved solely by use of the concept that the union owes a fiduciary duty to the employee. Nor can it be resolved solely by a firm determination to protect individual employee rights against union encroachment. Both of these approaches ignore the fact that where the union sides with the employer and against the employee, it asserts, with the employer, a claim to freedom of action in running the industrial establishment. The employee's claim is not solely against

⁸¹ *Op. cit.*, *supra*, footnote 37 at p. 111.

the union. It is against employer-union joint action. This is true even where the joint decision takes the form of union acquiescence in an employer decision. »⁸²

The argument in favour of limiting the union's responsibility so long as it acts fairly is primarily based on the supposition that the union must be free to act as it sees fit in the best interests of the union. If its freedom of action is hindered, if it is forced to spend excessive amounts of time and money in dealing with minor complaints, if it is to live in fear of suits by disgruntled individuals who feel that they have been unjustly handled, then it cannot discharge its obligations to the majority of its members effectively. These are valid arguments. The individual benefits from a union that is able to speak effectively on his behalf. But this does not mean that he must sacrifice his personal interests for the benefit of the union. Individual subordination and individual deprivation are not necessarily synonymous. Some way must be found to protect the individual who has been deprived of a benefit.

We have canvassed a number of alternatives that may be available to him. It looks as if the duty of fair representation is the one most likely to be adopted in Canada if the Woods Report is any indication of the trend of current thinking.⁸³ Unfortunately, this approach does not seem to recognize that the key question is not whether the union acted unfairly but whether the employee had a legitimate grievance.

In providing answers to the problems, it often seems that we must choose between completely opposing alternatives. Although this is an inevitable concomitant of situations that involve conflicting parties with diverse interests in a given dispute, we must attempt to work out an accommodation based on the needs of all the parties. The individual must be included with the employer and the union, as one of these parties.

LES DROITS DU SYNDIQUÉ DOIVENT-ILS ÊTRE SACRIFIÉS POUR PROTÉGER LES INTÉRÊTS DU GROUPE ?

Si un travailleur salarié ne peut présenter lui-même un grief portant sur l'application ou l'interprétation de la convention collective, ni forcer le syndicat qui le représente à porter son cas à l'arbitrage, possède-t-il un recours contre le syndicat si ce dernier n'a pas accompli son devoir de représenter ses intérêts?

Nous voulons dans cet article revoir d'une façon générale quelques-unes des solutions proposées pour résoudre ce problème, en insistant sur le « devoir de juste représentation », tel qu'il est envisagé aux États-Unis et au Canada. Nous mettrons ici en relief quelques-unes des limites, et les aspects positifs des solutions envisagées.

⁸² *Op. cit.*, *supra*, footnote 10, at p. 635.

⁸³ *Op. cit.*, *supra*, footnote 71; and see the *Toronto Globe*, March 27, p. B6.

Dans certains cas limités, un salarié est effectivement protégé contre les discriminations graves de la part de son syndicat. Toutefois, un syndicat peut compromettre la situation spécifique d'un salarié durant la négociation, aussi bien que dans l'application d'une convention collective. Bien qu'un salarié peut avoir des droits reconnus et protégés par la cour, il demeure toutefois que ses droits relèvent essentiellement de la convention collective et du pouvoir de négociation du syndicat.

Il y a parfois conflit entre les intérêts du syndicat et ceux du salarié. Pendant la négociation de la convention, une hausse de salaire ou un autre avantage pour ce salarié en échange de la conclusion d'un accord qui bénéficiera à l'ensemble du syndicat ou à la majorité de ses membres. Quoiqu'il faille protéger la liberté d'action du syndicat, on ne peut pas lui permettre, d'autre part, d'éliminer tout bonnement les droits d'un individu en vue de l'obtention de certains bénéfices pour l'ensemble des membres du syndicat. On ne peut tolérer non plus que le syndicat compromette les droits individuels qui relèvent de la convention collective, en refusant de soumettre des griefs légitimes à l'arbitrage.

Il se rencontre souvent dans une unité de négociation divers groupes dont les intérêts entreront, à un moment donné, en conflit avec les réclamations des individus. En vue de résoudre ces conflits, le syndicat peut décider de satisfaire le groupe de travailleurs majoritaires et sacrifier ainsi la demande de l'individu en faveur du « bien commun ».

CONDUITE JUSTE ET CONDUITE INJUSTE DE LA PART DU SYNDICAT

Il existe deux secteurs généraux où le syndicat peut aller à l'encontre des intérêts de ses membres pris individuellement: 1) lorsque le syndicat a agi d'une façon injuste envers un individu et; 2) lorsque l'action du syndicat peut être définie objectivement comme étant juste envers les travailleurs, mais, de fait, empêche un individu d'obtenir satisfaction dans le règlement d'un légitime grief. Entrent dans la catégorie de conduites injustes les attitudes hostiles, arbitraires ou discriminatoires que le syndicat manifeste envers l'un ou l'autre de ses membres. D'autre part, le syndicat peut, par négligence, en arriver aux mêmes résultats; enfin il y a des cas où le syndicat peut agir d'une façon juste et correcte si on se place du point de vue du syndicat même objectivement, mais pas nécessairement du point de vue de l'individu.

Les remèdes auxquels l'individu peut recourir proviennent de trois sources bien connues: la jurisprudence, la loi, les statuts des syndicats.

LES RECOURS JURIDIQUES

Les tribunaux s'attribuent le rôle de protecteurs de l'intérêt public; ils ont condamné les syndicats lorsque ceux-ci ont agi, selon le jugement de la cour, d'une façon nuisible au bien-être général de la société. Ils pourraient bien décider que les excès du syndicat et leurs abus vis-à-vis les salariés individuels soient proscrits par le judiciaire.

Malheureusement, beaucoup d'effets secondaires possibles peuvent se glisser dans des redressements créés judiciairement dans le secteur des relations du travail. Les tribunaux ont tendance à se montrer insuffisamment renseignés sur la structure et les problèmes sous-jacents à ce secteur, et à leur appliquer des considérations légales qui exacerbent indûment. Quoique ces effets ne soient pas inévitables, il reste que la réaction généralement défavorable des syndicats face aux tribunaux semble indiquer que l'on pourrait en arriver mieux à la paix industrielle si l'on cherchait ailleurs une solution aux problèmes des individus.

REMÈDES D'ORDRE LÉGISLATIF

Il n'existe pas de lois fédérales ou provinciales qui imposent spécifiquement aux syndicats un devoir de juste représentation, mais divers articles fournissent une assistance à l'individu dans les cas où le syndicat a exercé une discrimination à l'endroit d'un individu à cause de sa race, son origine, sa couleur, sa religion, son sexe ou son âge. Une loi sur les justes méthodes d'emploi existe déjà au fédéral et dans huit provinces canadiennes.

Une Commission des relations du travail ou un tribunal du travail pourraient fournir un substitut aux tribunaux civils pour le jugement des conflits individuels. Les Commission des relations du travail ont tenté, dans le passé, de trouver des solutions au problème. Si les CRT pouvaient s'occuper administrativement du cas des individus, on leur économiserait beaucoup de frais et de temps. Ce système a des mérites indiscutables. On pourrait encore créer des tribunaux du travail. Dans les deux cas, il se développerait une jurisprudence en ce domaine.

CORRECTIONS D'ORIGINE SYNDICALE

Un exemple de mécanismes de redressement fournis par le syndicat est la Commission de révision publique des TUA (UAW Public Review Board) qui semble protéger davantage l'individu. Cependant, la philosophie syndicale fondamentale amenuise les besoins individuels, insiste davantage sur les formes d'action collective et se montre ainsi peu favorable à ces nouveaux mécanismes. Il faut noter aussi que tout en protégeant les individus d'une hostilité flagrante de la part du syndicat, les exigences d'une Commission de révision publique ne fourniraient pas d'assistance protectrice à l'individu même dans le cas où sa requête est légitime, si ses intérêts sont contraires aux besoins de la majorité, ou s'il est incapable de prouver l'existence de malice syndicale dans le traitement de son cas. L'implantation de contrôles internes indiquerait une maturité croissante et un nouveau sens des responsabilités chez les syndicats.

LE DEVOIR DE JUSTE REPRÉSENTATION

Le devoir de juste représentation a été créé en vue de protéger l'individu contre un groupe. Si l'intérêt du groupe devient le critère de la validité d'une requête, ce droit perd tout son sens en ce qui concerne l'individu. Aux États-Unis, ce sont les tribunaux qui ont développé ce droit. Le devoir de juste représentation fut re-

connu lors du cas *Steele c. Louisville & N.R. Co.* Dans le cas de *Miranda Fuel*, le Conseil national des relations ouvrières (The National Labour Relations Board) jugea que l'omission par le syndicat de représenter d'une façon juste le salarié constituait une pratique syndicale déloyale.

Il reste que le devoir de juste représentation a été défini d'une façon assez restreinte, laissant l'individu à la merci du syndicat. Même si le syndicat n'agit pas d'une façon ouvertement hostile ou fortement négligente envers l'individu lors du règlement d'un grief, il peut de fait éliminer les réclamations justifiées de l'individu. Les syndicats peuvent aussi échanger des griefs légitimes pour un bloc d'avantages lorsque cette action favorise les intérêts de la majorité des membres du syndicat. Nous devons donc conclure cette partie en soulignant qu'à notre avis, même une définition plus large de représentation juste ne protégerait pas l'individu de façon adéquate.

LE DEVOIR DE REPRÉSENTATION JUSTE AU CANADA

Les tribunaux canadiens devraient développer une attitude face au devoir de juste représentation qui soit semblable à ce qui se passe aux États-Unis. C'est là une tâche que le système judiciaire canadien ne trouverait pas très difficile à assumer. Le remède prévu par les tribunaux américains se base sur l'obligation légale que le syndicat possède d'agir en tant qu'agent de négociation, obligation très semblable à celle que la législation canadienne en relations du travail lui accorde. Devant une attitude hostile ou discriminatoire du syndicat, le salarié canadien serait bien protégé. L'individu risque malheureusement de trouver personne pour défendre le grief qu'il soulève si la définition du «devoir de juste représentation» s'avère aussi étroite qu'aux États-Unis, et si l'individu doit prouver lui-même la «mauvaise foi» du syndicat.

Le rapport de l'Équipe spécialisée a discuté du concept de «devoir de juste représentation», et a recommandé que les syndicats répondent «envers leurs membres, de leur régie interne et de leur devoir de représentation, devant une Commission publique de révision ou devant le Conseil canadien des relations ouvrières»; et «devant les employeurs et les employés, des pratiques déloyales, devant le Conseil canadien des relations ouvrières».

Il y a nul doute qu'une obligation de juste représentation augmenterait fortement les droits individuels de l'employé. Il est évident aussi qu'une telle démarche, si importante soit-elle, n'apportera pas un règlement complet du problème. Il faut trouver une méthode qui puisse mesurer le bien fondé d'une réclamation du point de vue de l'individu, et qui ne mine pas en même temps la capacité et l'autorité du syndicat, lequel doit agir comme arbitre face aux intérêts divergents des employés en même temps que le porte-parole de l'unité de négociation.

L'ANALOGIE DE L'UTILITÉ PUBLIQUE

Un autre aspect à étudier consiste à trouver le moyen d'amener le syndicat à utiliser son monopole légal de représentation d'une façon non-discriminatoire à le

faire répondre devant le Conseil des relations ouvrières de ses manquements à des normes statutaires de juste représentation. Cette suggestion semble avoir le mérite de donner à la notion de « devoir de juste représentation » une définition plus large que celle qui est actuellement acceptée aux États-Unis. La norme à utiliser se base non pas sur la plainte de l'individu, mais sur le comportement du syndicat.

L'ANALOGIE COÛTS-BÉNÉFICES

Le « devoir de juste représentation » tient son origine de l'analogie « coûts-bénéfices ». En échange d'un bénéfice, soit le monopole de représentation, le syndicat doit assumer le coût qu'implique la représentation équitable de chaque salarié. Mais de fait, l'individu arrive souvent « en dessous ». Il serait peut être logique de pousser l'analogie plus loin en vue de compenser pour les pertes de l'individu. On se sert actuellement de l'analogie « coûts-bénéfices » comme base pour une foule de réformes différentes. Eventuellement, les syndicats devraient prendre la décision de créer un fond spécial pour dédommager les individus dont les griefs légitimes ont été compromis en vue de favoriser les intérêts de l'ensemble des membres.

LES PRÉOCCUPATIONS PREMIÈRES ET SECONDAIRES DE L'EMPLOYÉ

Il faut envisager, pour remédier au problème de l'individu, une distinction entre les aspects importants d'un emploi et ceux qui lui sont secondaires. Aux premiers se greffent des problèmes tels que le congédiement, les formes de compensation, l'ancienneté, etc. tandis qu'aux deuxièmes se rattachent des points de litige secondaires. Il est vital pour l'individu qu'il ait, comme employé, une protection minimum contre toute violation de ses intérêts premiers et qu'une forme de redressement lui soit fournie contre toute violation de ces intérêts.

CONCLUSION

Un syndicat acquiert des droits légaux en tant que groupe, et le groupe en est le premier bénéficiaire: il est donc dans l'intérêt de l'individu qu'il protège la force de son représentant. Mais cela ne signifie pas d'autre part que les droits et les intérêts de l'individu doivent être sacrifiés à la collectivité.

La démocratie occidentale a toujours favorisé les droits individuels. On manifeste de plus en plus d'intérêt aux conceptions qui créent des bénéfices collectifs, mais toujours dans l'optique que les droits de la minorité doivent être protégés. Nous devons trouver des moyens qui protègent l'individu à l'intérieur du groupe, tout en protégeant le groupe pour qu'il puisse atteindre efficacement les fins du groupe. L'individu retire des avantages d'être membre d'un syndicat qui lui sert de porte-parole efficace, mais cela ne signifie pas qu'il doive sacrifier ses intérêts personnels au profit du syndicat. Une nouvelle forme d'accommodation doit être découverte, et l'individu doit être partie du système, comme le sont actuellement l'employeur et le syndicat.