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## The Development of the Duty of Fair Representation in Ontario

## THE DEVELOPMENT OF THE DUTY OF FAIR REPRESENTATION IN ONTARIO

L. P. CARR\*

As trade unions grow in membership and importance, the welfare of more and more employees is controlled by their activities. For better working conditions and for the settlement of his grievances, the employee must turn to his union. This generally works to the benefit of the employee. But in some cases, the union may decide to sacrifice the rights of certain employees in order to benefit the others. There are also instances where employees are harmed by inadvertent acts, or inactivity, of officers of the trade union. What rights does an employee have against his trade union when it has injured him, consciously or otherwise? The answer to this question is vital, because by statute, in both the United States and Canada, the trade union is the exclusive bargaining agent for the employees it represents. The individual employee must arrive at a contract and settle his grievances with his employer *through his trade union*. The employee's rights directly against his employer are very limited. How can the employee force his trade union to act in his best interests?

Section 32(1) of the *Ontario Labour Relations Act* provides:<sup>1</sup>

32.(1) Every collective agreement shall provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.

In the United States, section 9(2) of the *National Labor Relations Act* reads in part as follows:<sup>2</sup>

9(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

These sections are broadly similar in intent. In the United States, the courts have used section 9(a) as the basis for a duty of fair representation. The Ontario courts have developed no such duty. Why? Would one be desirable? What would be its implications for labour relations? This paper will attempt to answer these questions, first by describing the duty as it exists in the United States, and then by looking at related developments in Ontario.

The duty of fair representation was first enunciated in the United States in *Steele v. Louisville & Nashville R. Co. et al.*<sup>3</sup> The plaintiff, a Negro fireman employed by the defendant railway, brought an action against both the employer and the trade union, requesting an injunction against the enforcement of a recent amendment to the collective agreement, on the ground that it was discriminatory. That

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<sup>1</sup> R.S.O. 1960, c. 202, as am. by 1961-62, c. 68, 1962-63, c. 70, 1964, c. 53, 1966, c. 76.

<sup>2</sup> 61 State. 136, 29 U.S.C.A. s. 151.

<sup>3</sup> 323 U.S. 192, 65 S. Ct. 226 (1944).

amendment provided in effect that in the future only white firemen were to be employed and promoted. Under the *Railway Labor Act*,<sup>4</sup> the respondent trade union was exclusive bargaining agent for *all* firemen employed by the Railroad. By its constitution, the Brotherhood excluded Negroes from its membership, although a substantial minority of employees were Negroes. Stone C.J. for the United States Supreme Court, said:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.<sup>4a</sup>

The court gave judgment for the employee. It must be noted that this case arose under the *Railway Labor Act*, which speaks of the trade union as the "representative" of all employees.<sup>5</sup> When a similar case, *Ford Motor Co. v. Huffman*,<sup>6</sup> arose under the *National Labour Relations Act*, the same duty of fair representation in the negotiation of collective agreements was held to exist. However, in this case, the court found that the union's duty of fair representation was not breached. Recognizing that the trade union must serve conflicting interests of various employees, it held that the union does not breach its duty of fair representation if it displays "complete good faith and honesty of purpose in the exercise of its discretion." The clause of the collective agreement in question, giving extra seniority to employees who had fought in the war, was held to have been arrived at in good faith.

The next step of importance was the extension of the doctrine from cases involving the *negotiation* of collective agreements to cases concerned with the *enforcement* of the collective agreement. Almost simultaneously, the National Labor Relations Board and the United States Court found that the trade union, as exclusive statutory bargaining agent, must fairly represent the employees not only in negotiating agreements, but also in the settlement of grievances.

The *National Labor Relations Board* took the step in the *Miranda Fuel Co.*<sup>6a</sup> case in 1962, when it said, after referring to the *Steele* case (*supra*),:

Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by Section 7 of the Act [N.L.R.A.] "to bargain collectively through representatives of their own choosing," we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This

<sup>4</sup> 45 U.S.C.A. ss. 151, 152.

<sup>4a</sup> 323 U.S. at 204; 65 S. Ct. at 233.

<sup>5</sup> *Railway Labor Act* s. 1, subd. 6, s. 2, subds. 2, 3, 4, 6, 7, 9; 45 U.S. C.A. ss. 151, 152.

<sup>6</sup> 345 U.S. 330, 73 S. Ct. 681 (1953).

<sup>6a</sup> 140 N.L.R.B. 181 (1962).

right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.<sup>7</sup>

The Board held the union had breached its duty of fair representation when it insisted that, pursuant to the collective agreement, an employee lose his seniority. On the facts, however, the Second Circuit Court of Appeals reversed the decision.<sup>8</sup> Nevertheless, in the subsequent case of *Local Union No. 12, United Rubber Workers of America v. N.L.R.B.*,<sup>9</sup> the Fifth Circuit upheld the *Miranda Fuel* doctrine that a breach of the duty of fair representation constituted an unfair labour practice. It will be noted, firstly, that the Board founded the union's duty of fair representation on sections 7 and 8(b)<sup>10</sup> of the N.L.R.A., and not on section 9(a) as had the Supreme Court in *Ford Motor Co. v. Huffman*. Secondly, in the *United Rubber Workers* case, the court suggested (obiter) that the Board's jurisdiction would pre-empt suits in the courts.

In 1964, while, as we have just seen, the N.L.R.B. was unsure of its jurisdiction over the duty of fair representation as an unfair labour practice, the United States Supreme Court in *Humphrey v. Moore*,<sup>11</sup> decided that the duty of fair representation extended to grievance settlements, and that the courts had jurisdiction to hear suits alleging breach of that duty under section 301(a) of the *Labor Management Relations Act*.<sup>12</sup> On the merger of the operations of two companies, the union had agreed with the employer to integrate the two seniority lists, thereby giving the employees of the older company, whose operations were being absorbed, preference over the employees of the absorbing company. Because the union's action was found to have been in good faith, there was no breach of the duty of fair representation. The court held there was "insufficient proof of dishonesty or intentional misleading on the part of the union"<sup>13</sup> to warrant finding a breach of the duty. These strong words would seem to rule out union liability for mere negligence in carrying out its duty. Thus the court, even as it adopted, on the basis of s. 9 of the N.L.R.A., a duty of fair representation in the settlement of grievances, went a long way to restrict it. As well, it expressly reserved

<sup>7</sup> 140 N.L.R.B. at 185.

<sup>8</sup> 326 F. 2d 172 (1963).

<sup>9</sup> 368 F. 2d 12 (1966).

<sup>10</sup> N.L.R.A., s. 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

s. 8(b): it shall be an unfair labour practice for a labor organization or its agents (1) to restrain or coerce (a) employees in the exercise of the rights guaranteed in section 7. . . .

<sup>11</sup> 375 U.S. 335, 84 S. Ct. 363 (1964).

<sup>12</sup> 29 U.S.C.A. s. 185(a).

<sup>13</sup> 375 U.S. at 349; 84 S. Ct. at 371.

to the union, together with the employer, the right to amend the collective agreement itself. Thus, so long as the union acts in good faith, in what it believes to be the interests of the employees, then, however unreasonable such a belief might be, the union is free to bargain away individual rights. This of course, is subject to the vested rights theory, as recently stated in *Shechy v. Seilon, Inc.*:<sup>14</sup>

. . . where an employee has complied with the conditions of his contract of employment, [and] benefits have been promised and conferred on him by his employer as an inducement for the continuance of his service to the employer, . . . he acquires, by the promise and agreement of his employer, a vested right to these benefits, and in the absence of good and sufficient causes for forfeiture, he may not be deprived thereof, notwithstanding a proviso in the contract of employment to the contrary.

This duty of fair representation, developed and applied by the court in *Humphrey v. Moore*, was adopted and followed in the recent case of *Vaca v. Sipes*.<sup>15</sup> In this case, an employee was discharged as being physically unfit for work. His own doctor certified that he was fit, but the company doctor did not agree. The union undertook to process his grievance, but abandoned it after having him examined by a third doctor who found him unfit. Although the jury found that the employee was physically fit for the work, the Supreme Court dismissed the employee's action on finding that the union had acted in good faith. This decision is unjust to the employee who has been wronged and is now left without remedy. How can such a restriction on the scope of the duty be justified?

The court cites a number of reasons for leaving the conduct of grievances in the hands of the union:

- (a) both the employer and the union contemplate that most grievances should be settled short of arbitration;
- (b) the settlement process eliminates frivolous grievances and unnecessary expense;
- (c) both sides are assured of consistency in the results;
- (d) the settlement process furthers the interests of the union as statutory agent.

What the decision does is to limit the rights of the employee in favour of the interests of the union as a whole. Only where there is a patent breach of faith, consisting of arbitrary and discriminatory conduct, or to use the words in *Humphrey v. Moore*,<sup>16</sup> "dishonesty or intentional misleading" on the part of the union, will the employee have a remedy. The *Vaca* case would even limit the right of the employee against his employer to those cases where the union has breached its duty. This last limitation is *obiter* in the *Vaca* case. Nevertheless, it is *obiter* coming from the highest court in the land and in the subsequent case of *Williams v. Wheeling Steel Corp.*<sup>17</sup> it was taken as law. In that case, the plaintiff-employee was allowed

<sup>14</sup> 227 N.F. (2d) 229, at 230 (1967) (S.C. Ohio).

<sup>15</sup> 87 S. Ct. 903 (1967).

<sup>16</sup> *Supra*, note 9.

<sup>17</sup> 65 L.R.R.M. 2080 (1967—D.C., W.Va.).

to continue his action against the defendant corporation only after he had shown that the union had possibly breached its duty of fair representation. The main action is now *lis pendens*: it will be interesting to see whether the court actually finds a breach of duty by the union. Indeed, no actual breach has yet been found in any court case dealing with the union's duty of fair representation in settling grievances.<sup>18</sup>

The court in the *Vaca* case, as in the *Humphrey* case, held that the duty of fair representation, being one implied in the contract as a result of the union's position as exclusive bargaining agent, was justifiable in the courts under section 301 of the *Labor Management Relations Act*. It thus rejected the doctrine of pre-emption by the N.L.R.B. in matters of duty of fair representation, which doctrine the U.S. Court of Appeals, in the *United Rubber Workers* case,<sup>19</sup> had suggested might apply. This doctrine, enunciated in *San Diego Building Trades Council v. Harman*,<sup>20</sup> states that, generally, neither state nor federal courts have jurisdiction over suits directly involving activities which arguably come within the jurisdiction of the N.L.R.B.; the purpose being to avoid conflicting administration of the Act.

Thus, both the N.L.R.B. and the courts of the United States have found that unions have a duty of fair representation towards the employees. Although, since the time of the *United Rubber Workers* case, the N.L.R.B. has not been faced with complaints alleging an unfair labour practice on the part of the union in breaching its duty of fair representation, it does seem that the Board is more willing to find a breach of that duty than the courts are. Indeed, in both the *Miranda Fuel* case and the *United Rubber Workers* case, the Board found a breach of the duty of fair representation. However, perhaps a court faced with the facts of the *United Rubber Workers* case, would also have found a breach of duty. The test used by the N.L.R.B. in determining breach of duty is whether the union has acted on "irrelevant, invidious, or unfair" considerations. It is suggested that the Board thus imposes a greater duty upon the union than do the courts, which insist on intentional bad faith. The scope of the duty seems to be broader, at the present time, before the N.L.R.B. than before the courts. This is probably desirable in view of the observation in the *United Rubber Workers* case that remedies in the courts in this area are somewhat inadequate.<sup>21</sup>

Having thus examined the origins and scope of the duty of fair representation in the United States, let us see what purpose it is intended to fulfil in the scheme of labour relations. White J. in *Vaca v. Sipes* says that "the duty of fair representation has stood as the bulwark to prevent arbitrary union conduct against individuals stripped of the traditional forms of redress by the provisions of the

<sup>18</sup> *Humphrey v. Moore (supra)*; *Vaca v. Sipes (supra)*; *Palmieri v. Steelworkers*, 65 L.R.R.M. 2709 (1967—D.C., W. Pa.).

<sup>19</sup> *Supra*, note 9.

<sup>20</sup> 359 U.S. 236, 79 S. Ct. 773 (1959).

<sup>21</sup> 368 F. 2d at 23.

federal labor law."<sup>22</sup> But that is all it does: it protects the individual from arbitrary union conduct. It does not give him a remedy whenever he is wronged. Indeed, in the *Vaca* case itself, as the jury found, the employee was physically fit for his work but he was denied a remedy. He cannot sue the union unless it has breached its duty; he cannot even sue the employer unless the union has breached its duty of fair representation.<sup>23</sup> He is without remedy. The reason for this, as stated in *Vaca v. Sipes*<sup>24</sup> is public policy: to protect free collective bargaining and safeguard the arbitration process. If the employee were given a right to compel arbitration, then the grievance procedure as we now know it would fall into disrepute, each employee being able to press his grievance despite a union decision that it would be best for all to settle short of arbitration. Furthermore, giving this right to the employee would be contrary to the statutory provisions to the effect that the union is the exclusive bargaining agent.

Thus in the United States there is a statutory duty of fair representation imposed on the trade union. Such duty is implied by the courts from the wording of s. 9(a) of the N.L.R.A.; and the breach of that duty is found to constitute an unfair labour practice under sections 7 and 8 of the said Act, over which the N.L.R.B. will assume jurisdiction.

In Ontario, the words of s. 32(1) of the *Labour Relations Act* are similar to those of s. 9(a) of the N.L.R.A. A duty of fair representation could thus be implied, the breach of which would give grounds for a complaint before the Ontario Labour Relations Board under section 65 of the Act.<sup>25</sup>

In the *Wallace Barnes Co.*<sup>26</sup> case, an employee alleged she was discharged in violation of the collective agreement, and, by the operation of s. 37,<sup>27</sup> contrary to the Labour Relations Act. The union had processed and settled the grievance. The Board refused to hear her application on the ground that to do so would defeat the purposes of the Act which requires arbitration of grievances<sup>28</sup> and which declares the union to be the exclusive bargaining agent for the employees.<sup>29</sup> In delivering its decision, the Board set out principles which have since governed the Board in hearing s. 65 complaints brought by employees, and which are similar to principles stated in the American cases.

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<sup>22</sup> 87 S. Ct. at 912.

<sup>23</sup> *Williams v. Wheeling Steel Corp.*, *supra*.

<sup>24</sup> 87 S. Ct. at 917.

<sup>25</sup> Ontario Labour Relations Act, s. 65(4) (a) ". . . if the Board is satisfied that the person concerned has been . . . dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment by any employer or other person or a trade union, it shall determine what [shall be done] . . . with respect thereto. . . ."

<sup>26</sup> 61 C.L.L.C. 923 (O.L.R.B.).

<sup>27</sup> Ont. L.R.A., s. 37: "A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement."

<sup>28</sup> S. 34.

<sup>29</sup> S. 32(1), *supra*, note 1.

- (a) The Act contemplates that all disputes will be settled pursuant to the terms of the collective agreement. "The ultimate decision, whether it be by negotiation or arbitration, is binding not only on the parties but on the employees as well."<sup>30</sup>
- (b) The Board cites and adopts the language used by J. Finklewan in *The Corporation of the City of Toronto* case, (1947), D.L.S. 7-1289 at 7-1291:<sup>31</sup>
- . . . The inability of an individual employee or any group of employees to have a grievance dealt with finally and conclusively does not enter into the consideration at all and rightly so because the Regulations are concerned with collective relations between the employer and an individual employee. Harmony in industrial relations is not necessarily achieved by pursuing to its ultimate conclusion every grievance, real or fancied, that may arise in the course of the day's work. . . .<sup>32</sup>
- (c) . . . it is clear that the legislation intended that in order to gain the advantages of collective bargaining, employees must be prepared to surrender rights which they might otherwise have.<sup>33</sup>

On the facts in the *Wallace Barnes* case, the union had processed the employee's grievance and settled the dispute short of arbitration. What if the union had refused to pursue the grievance? That is what happened in the *Heist Industrial Services* case.<sup>34</sup> The Board proceeded on the assumption that the union had breached the collective agreement in refusing to carry the grievance; and yet it held that this did not constitute a breach of the Labour Relations Act such as to give the Board jurisdiction under s. 65. Implicit in this decision is the denial of a duty of fair representation under the Act. The Board did not even inquire into the union's motives, but held that the Act was not breached.

However, three months later, in the *Pitt Street Hotel* case,<sup>35</sup> the Board said that it would have jurisdiction to hear a complaint by an employee, although an alternative remedy exists under the collective agreement, in exceptional circumstances, as where the employer and the union act in collusion to deny an employee his rights. No collusion was found in that case. But, if this *dicta* is accepted, then it is obvious that we have here a start of the duty of fair representation. The employee will not be bound by a collusive action of the union and employer.

In the above three cases before the O.L.R.B., the employee was complaining against the *employer*, not the union, although his reason for bringing the complaint was his dissatisfaction with the union's

<sup>30</sup> 61 C.L.L.C. at 931.

<sup>31</sup> 47 C.L.L.C. 1203 at 1205.

<sup>32</sup> 61 C.L.L.C. at 931.

<sup>33</sup> 61 C.L.L.C. at 930.

<sup>34</sup> 63 C.L.L.C. 1123.

<sup>35</sup> 63 C.L.L.C. 1148.

conduct of the case. In 1966, an individual named Boivin, made a complaint under s. 65 of the Labour Relations Act directly against the union.<sup>36</sup> He alleged that the union procured his discharge in violation of the collective agreement. Boivin was a member of Local 800 of the Plumbers' union in Sudbury. He obtained a "travel permit" which he properly filed in local 67 in Hamilton, thus entitling him to the privileges of membership in local 67. By the collective agreement, the employer was bound to lay off any non-member of local 67 in preference to a member of the said local. There being other members of local 67 not working, the union, disregarding Boivin's travel permit in order to favour its own members, required the employer to lay off the complainant. The Board held that the union had dealt with the complainant contrary to the Act and granted the complainant damages, saying that it would also have ordered reinstatement had the employer been made a party to the application. The Board, at the request of the union, later reconsidered its decision<sup>37</sup> and affirmed it.

In the *Boivin* case, the Board set an important precedent. It held that a breach of the collective agreement was a breach of s. 37 of the Act, set out above.<sup>38</sup> The collective agreement being binding upon the trade union, "the procuring of the dismissal of the complainant in violation of this agreement constitutes, in our opinion, a dealing with him contrary to the provisions of the Labour Relations Act. . . ."<sup>39</sup> The Board went on to say "that the deliberate procuring of a wrongful breach of such a binding agreement must be, at least in the circumstances of this case, contrary to the Act." The Board purported to distinguish the *Heist Industrial Services* case—but the distinction is not very clear. There is room for a distinction of fact: in the *Heist* case, the union was passive, in that it refused to carry out a grievance; whereas here, in the *Boivin* case, the union actively procured the complainant's dismissal.

This decision does not detract from the reasoning in the *Wallace Barnes* case, that case being concerned with the interpretation of the agreement, a matter to be left with the parties. In *Boivin*, the facts disclose an intentionally wrongful act of the union. The case falls, as the Board holds, within the "exceptional circumstances" alluded to in the *Pitt Street Hotel* case.<sup>40</sup>

In what circumstances will the Board exercise jurisdiction when the subject matter of a dispute falls under the collective agreement and is subject to arbitration? Three 1967 cases before the Ontario Labour Relations Board would indicate that generally, to use American terms, the jurisdiction of an arbitration tribunal would

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<sup>36</sup> *Boivin v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67*, [1966] O.L.R.B. 513.

<sup>37</sup> [1966] O.L.R.B. 617.

<sup>38</sup> *Supra*, note 17.

<sup>39</sup> [1966] O.L.R.B. at 517.

<sup>40</sup> *Supra*, p. 11.

pre-empt the jurisdiction of the Board. If the matter in dispute comes within the terms of the collective agreement, the employee must first submit his complaint to arbitration, as provided by that agreement. This is made clear in *Thompson v. Scarboro Board of Education*<sup>41</sup> and in *Hood v. General Bakeries Ltd.*,<sup>42</sup> both of which cite the famous passage from the *Wallace Barnes* case:

The trade union is also their bargaining agent with respect to the administration of the collective agreement and when disputes arise involving the interpretation or alleged violation of the agreement, these are matters for the partes to that agreement, that is, the trade union and the employers.<sup>43</sup> (italics are mine)

In both these cases, the Board refused to hear a complaint that the employees were dealt with contrary to section 50(a) of the Act, referring the matter back to arbitration.

In July 1967, a similar complaint was also dismissed by the Board on the same grounds in *Canadian Union of Shipbuilding and Marine Workers (C.N.T.V.) v. Collingwood Shipyards, Division of Canadian Shipbuilding and Engineering Ltd.*<sup>44</sup> The C.N.T.V. represented four employees who were previously shop stewards in a rival union, the United Steelworkers of America. After an illegal walkout, these four were not permitted to return to work, whereas another 150 employees were so permitted. They lodged a grievance under the collective agreement which was in effect between the Steelworkers and the employer. The Board refused to hear the complaint because it came within the jurisdiction of the arbitration tribunal. The court said that to exercise jurisdiction may give rise to two conflicting decisions, each of which could be filed in the Ontario Supreme Court for enforcement.

Nevertheless, the Board, *in dicta*, mentioned special circumstances (as in the *Pitt Street Hotel* case), where it *might* exercise jurisdiction:

- (a) where the adversely interested representative union does not press the arbitration to a conclusion.
- (b) where the representative union, in the arbitration proceedings, breaches the "duty of good faith representation."
- (c) where the arbitration board finds the matter to be outside its jurisdiction.

Where does this leave the duty of fair representation as administered by the Ontario Labour Relations Board? First, it must be mentioned that only in the *Collingwood Shipyards* case has the Board ever mentioned such a duty. From the *Pitt Street Hotel* case, it may be assumed that the Board will not defer to an arbitration award where the union is guilty of collusion with the employer. And from the *Boivin* case, it is probably fair to say that whenever the union

<sup>41</sup> O.L.R.B., Jan. 1967 Rep., 822.

<sup>42</sup> O.L.R.B., Jan. 1967 Rep., 823.

<sup>43</sup> 61 C.L.L.C. 928.

<sup>44</sup> O.L.R.B., July 1967 Rep., 376.

breaches the collective agreement, at least actively, it may be liable therefor to the employee who has been wronged. Indeed, an active breach of the collective agreement can be interpreted as a breach of the Labour Relations Act and may be grounds for a complaint under s. 65 of the Act.

In March, 1967, the Board decided the case of *Ocepek v. International Association of Machinists, Lodge No. 1031*.<sup>45</sup> This was a complaint under s. 65, alleging that the union had breached the collective agreement. In essence the union, upon the merging of two companies the employees of which it represented, proposed that the seniority lists of the two companies be fully integrated. The membership voted down this proposal, with the result that the employees of the acquired company lost their seniority rights under their collective agreement. The complaint alleged that the union breached the agreement in allowing the complainants to lose their seniority. The Board held there was no such breach, the union and the company having "done nothing in any way adverse to the complainants interest."<sup>46</sup> This case is important in two respects. First, it implies that a settlement ratified by the membership cannot amount to a breach of the agreement; the board thus opened the door for oppression of the minority by the majority, so long as the officers of the union *do nothing* (i.e. no active breach of duty) adverse to the complainant's interest. Second, the Board treated as established law the fact that a breach of the collective agreement could give rise to a complaint under section 65: indeed, the Board considers the issue to be, not whether a breach of the agreement is a breach of the Act, but whether the evidence discloses a breach of the agreement. Board member Irwin, in his concurring opinion, states:

There is no evidence of violation of any provision of the collective agreement presently in effect between the respondent company and International Association of Machinists, Lodge No. 1031, or any substantive provision of the Labour Relations Act.

Hence, any breach of a collective agreement may now be considered as a breach of the Act. But the Board will still refuse to exercise jurisdiction if there is a remedy under that collective agreement, except in special circumstances such as those mentioned in the *Pitt Street Hotel*, *Boivin*, and *Collingwood Shipyard* cases.

The Ontario Labour Relations Board has not developed a duty of fair representation as such. But it has developed something quite analogous to it, requiring that the Union officers do nothing adverse to the employees' rights and interests under the collective agreement. Is the American duty of fair representation any wider in scope? Or can a breach of that duty be readily shown only when there is a breach of the agreement? The denial of a remedy to the aggrieved employee in both the *Humphrey* and *Vaca* cases would suggest that though the duty of fair representation is wider in scope than is the

<sup>45</sup> [1967] O.L.R.B. March Report 99F.

<sup>46</sup> *Id.* 999.

duty not to breach the contract or the Act, in actual practice, both may be largely equivalent.

Having thus examined what limitations the Ontario Labour Relations Board imposes on the activities of trade union in settling disputes, let us see how the courts treat unions in similar situations.

There are only two cases in Ontario in which members of a union have challenged the action of their exclusive agent, both having been decided within the last year. In the first, *Re Bradley et al. and Ottawa Professional Fire Fighters Association*<sup>47</sup> the applicants sought to quash an arbitration award which denied them the promotion they had been given by their employer. The arbitration award had resulted from a grievance initiated by other employees who claimed that they were entitled to the promotion under the terms of the collective agreement. The union brought a policy grievance, but the arbitrator, in his award, expressly ordered the applicant demoted. No actual breach of duty, nor damages, were proven. But the Court of Appeal held, reasoning in the same way that it had in the *Hoogendorn* case,<sup>48</sup> that this was really in the nature of an individual grievance, the award being made in relation to individuals, and that the applicants were denied natural justice. It therefore quashed the award. The court explained that the applicants were denied the opportunity to be properly represented in the arbitration proceedings, though their rights were involved. The employer could not be counted on to represent the employees it had promoted; nor could the union, which was pursuing the grievance on behalf of other employees of adverse interests.

Once it is accepted, as it must be, that the benefits running to employees may differ according to job classification or seniority ranking (to take two illustrations), and that the representative union is put to a choice between employees who competed for the same preferment as to which it will support against a different choice made by the employer, substantive employment benefits of particular employees are put in issue and they are entitled to protect them if the union will not.

It follows that they are entitled to notice of arbitration proceedings taken to test their right to continued enjoyment of the benefits.<sup>49</sup>

This result was arrived at, as suggested above, on the basis of *dicta* of the Court of Appeal itself in the *Hoogendorn* case.<sup>50</sup> In that case, the union grieved against the employer to have the latter comply with a term of the collective agreement requiring the dismissal of any employee who refused to join the union and pay union dues. Hoogendorn, the employee concerned, had refused to join the union on religious grounds. The arbitrator ordered that the employer comply with the collective agreement. The Court of Appeal refused to quash the decision of the arbitrator on the ground that this was a policy

<sup>47</sup> [1967] 2 O.R. 311 (C.A.).

<sup>48</sup> *Infra*, note 50.

<sup>49</sup> [1967] 2 O.R. at 317.

<sup>50</sup> *Re Hoogendorn and Greening Metal Products*, [1966] 2 O.R. 746, 58 D.L.R. 2d 338 (H.C.); [1967] 1 O.R. 712, 62 D.L.R. 2d 167 (C.A.); (1967) 65 D.L.R. 2d 641 (S.C.C.).

grievance, and implied that there was no breach of natural justice nor any breach of the duty of fair representation, if there was such a duty in Ontario. As pointed out above, *Re Bradley* was distinguished on the ground that it was an individual grievance and that there was a breach of natural justice in not giving notice of the arbitration to the complainants, being employees whose interests might be affected by the award.

On appeal of the *Hoogendorn* case to the Supreme Court of Canada,<sup>51</sup> it was held that, although the grievance was framed as a policy grievance, *i.e.*, the interpretation of those parts of the agreement dealing with deduction of union dues, it was in fact an individual grievance, because the decision would affect the rights of a specific individual, Hoogendorn. The issue was then whether natural justice had been done—and the answer was no, since Hoogendorn was not given notice of the proceedings, (though he knew of them), nor was he given the opportunity to be adequately represented.

Thus we have only two cases in Ontario where an employee has attacked an arbitration award on the ground that the union was not his true representative. In both cases, judgment was given for the employee. What is more interesting is that the employee was given a remedy in circumstances under which, applying the duty of fair representation as elaborated in *Vaca v. Sipes (supra)*, he would have been denied a remedy in the United States. For it is obvious that in neither of the two Ontario cases did the union breach its duty of good faith; in neither did the union act upon "irrelevant, invidious, or unfair" considerations;<sup>51</sup> and in neither case was the union arbitrary and discriminatory.<sup>52</sup>

We return to the question: does the duty of fair representation exist in Ontario? Perhaps it would be more appropriate to ask: does the employee have any remedies against his exclusive bargaining agent when it has wronged him. To this question, the answer must be yes. It would even seem that the employee has greater rights in Canada against his union than his counterpart in the United States. Indeed, the American employee must abide by a decision reached by his union in good faith, despite the possibility that the union's decision was unreasonable, and whether in fact the employee has been wronged or not. In Ontario, if the union's action is collusive with the employer,<sup>53</sup> or, as recent cases<sup>54</sup> seem to indicate, if the union's action breaches the collective agreement, and thereby, by the operation of s. 37, the Act itself, (and generally, it is submitted, a bad faith decision of the union will result only from collusion or breach of the agreement), then the employee can apply to the Ontario Labour Relations Board to seek redress. Even if the union's action is neither collusive nor in breach of the agreement, the employee in Ontario

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<sup>51</sup> (1968) 65 D.L.R. (2d) 641.

<sup>52</sup> See note 5, *supra*.

<sup>53</sup> See *Vaca v. Sipes, supra*.

<sup>54</sup> *Supra*, Pitt Street Hotel case, 10.

<sup>55</sup> See *Boivin and Ocepek cases, supra*.

will still have redress before the courts if he can show that he is the victim of a breach of natural justice.<sup>55</sup>

Furthermore, the *Vaca* case suggested, and the *Williams* case<sup>56</sup> confirmed, that in the United States an employee has no remedy against his employer unless the union has breached its duty of fair representation. In Ontario, however, there is strong authority that the employee has a right of action against his employer upon an established right (the existence of which was either conceded or pronounced upon by an arbitration tribunal or by the Labour Relations Board) no matter what the position of the union.<sup>57</sup> The position of the employee in Ontario is therefore much better than in the United States.

Do these greater rights of the employee in Ontario detract from the role of the trade union as exclusive bargaining agent? It seems not. The union and employer can still effectively settle a grievance short of arbitration, and such settlement will be respected by the O.L.R.B. and by the courts. But if in settling a grievance the union impeaches upon the rights of the employee, either under the *Labour Relations Act* or under the collective agreement, then it seems that the O.L.R.B. or the courts will grant him a remedy. The employee will not have a remedy in all situations: he had no remedy in the *Wallace Barnes* case and he would have no remedy if the *Vaca v. Sipes* situation occurred in Ontario. But when the employee's interests conflict with those of the union, the employee has a right to be heard, under the *Hoogendorn* principle, which right was denied him in the *American Miranda Fuel* case (*supra*). The Ontario courts and the O.L.R.B. thus truly recognize the union's exclusive agency; yet they are determined to curb all abuses of this agency whether or not the agent has acted in good faith.

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<sup>56</sup> *Supra*, Hoogendorn case.

<sup>57</sup> *Supra*, pp. 6, 7.

<sup>58</sup> Re Grottoli v. Lock (1963) 39 D.L.R. 2d 128; Hamilton Street Railway v. Worthcott (1966) 58 D.L.R. 2d 709 (S.C.C.); Close v. Globe and Mail (1967) 60 D.L.R. 2d 105.