The Evolving Duties of Trade Unions Toward their Members: Defining the Duties and Determining the Standards

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The Evolving Duties of Trade Unions Toward Their Members: Defining the Duties and Determining the Standards

by

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Submitted in partial fulfilment of the requirements for the degree of Master of Laws

at

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ABSTRACT

This thesis examines the continuing development of a union's duty to fairly represent its members, the duty owed by a union to its members based upon negligence principles and the recent development of the duty to accommodate in the field of human rights legislation.

As the federal government and seven of the ten Canadian provinces moved to codify the union duty of fair representation the lower courts saw a continuing need for judicial supervision in the area of intra-union conflict. However, the Supreme Court of Canada appears to have willingly accepted ouster of the courts' inherent jurisdiction in favour of statutory tribunals. I critically assess those cases in which the courts concluded their jurisdiction was ousted.

I also trace the development of the duty to accommodate union members in circumstances where the union is guilty of adverse affect discrimination. I critically assess those circumstances where the courts have allowed an extension of the jurisdiction of human rights tribunals based upon what I refer to as administrative tribunal (as opposed to judicial) lawmaking.

The analysis of the courts' willingness to accept ouster of its jurisdiction in the field of intra-union conflict and its willingness to permit human rights tribunals to expand their own jurisdiction sets the stage for a call for less law making by tribunals and a greater willingness by the courts to recognize that tribunals do not possess any jurisdiction other than that afforded by the Legislator.
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My former partner John A. Buchanan, late of Fredericton, New Brunswick, who passed away July 4, 1994. This thesis is dedicated to his memory.
Introduction

The purpose of this thesis is to critically examine the responsibility of trade unions toward their members within the context of recent judicial developments in the fields of a union's duty of fair representation toward its members as well as its duty to accommodate members. I have purposely avoided any detailed analysis of union unfair labour practices, the duty of fair representation as codified in various Provinces, and other legislative provisions that impose administrative requirements upon unions.

In Chapter I, I outline the history, largely from American materials, of this duty of fair representation and place it within the context of other significant developments in common law jurisdictions.

In Chapter II, I leave the reader a view of the varying standard of care flowing from a union's duty of fair representation in both Canada and the United States.

In Chapter III, I attempt to make the case for the imposition of liability upon a trade union based upon mere negligence. I suggest there has been a misunderstanding in the application of decisions of the Supreme Court of Canada in matters dealing with employer-union conflict. The
extrapolation of principles flowing from employer-union conflict to conflicts between the union and the employees (intra-union conflict) served by it, is not, with respect, a just and fair approach to intra union conflict. I am aided in this analysis by judgments from New Brunswick, Nova Scotia, Newfoundland and Saskatchewan.

In Chapter IV, I consider the development and application of the duty to accommodate as it relates to trade unions. The recent development of the duty to accommodate imposed upon unions in the human rights field will no doubt reduce the opportunities for the courts to further develop and refine the duty of fair representation. While I am of the view that individual union members are disadvantaged by interpretations of the Courts requiring proof of gross negligence before a union is liable for its improper conduct, unions are themselves disadvantaged as they attempt to identify those circumstances in which they might have a duty to accommodate members while respecting collective agreements negotiated by them.

In Chapter V, I use several recent cases to demonstrate why I believe the courts will be more inclined to limit the law making role with which certain labour tribunals have clothed themselves. This will foster the continued judicial development of tort duties owed by unions to their
members.

Chapter VI represents a summary of the current state of the law in relation to issues surrounding intra-union conflict discussed in this paper.
CHAPTER I

The Development of a Duty of Fair Representation

Black Americans hoping to benefit from the boom of the war years following the great conflict of 1939 - 1945 soon had their hopes and dreams shattered. Shattered by the very institutions that had been created to protect the working men and women of the western world. While union leaders espoused equality and fraternity for all, those cries rang hollow to the millions of black men and women who hoped to share in the wealth of the post-war years. Black Americans often faced a hostile union leadership that placed little value on the principle that all men and women are created equally.

When contract language in collective agreements, negotiated by white union leaders and white employers, forced black men to work at menial jobs, while supervisory positions were reserved for whites only, no complaint was heard from white union leaders. When black men were systematically replaced by white men on less labour intensive tasks because of an allegedly valid contract between an employer and the union democratically elected to represent the workers, no complaint was heard
from union leaders. Majoritarianism was the standard response used to justify intra-union discrimination.¹

The rationale for the hands-off approach by the union leaders was purportedly based upon principles of democracy and integrity. After all, was a union not a collectivity designed to protect the interests of a majority of its members in ways it considered appropriate? Surely, the state had no interest in the internal affairs of trade unions! And finally, was a trade union not unlike a fraternal organization or club, possessing the power to make its own rules?

The American jurists of the mid-twentieth century were faced with the daunting task of responding to arguments such as those set out above. American constitutional law had not yet developed to the point that it alone could be relied upon to combat the apparent racism of the unions. The principles of union democracy, majority rule, and the political clout of American white society found themselves before a Bench that seemed to have few tools with which to face the daunting challenge of fighting discrimination against black working men and women.²

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² Ibid.
In spite of the criticism that is often levelled at the courts and the justice system in general, the development of the law in the field of union responsibility toward its membership is a credit to the creativity of the Bench. The courts in the United States of America enlisted some of the most versatile and useful tools of the Anglo-American legal system as they struggled with the injustices occurring within the union ranks in post-war America. Tort concepts of neighbourliness, reasonableness, and fairness were employed in conjunction with the legal principles of agency, fiduciary duty, and contractual responsibility to craft remedies for apparent wrongs.

In the early case of *Steele v. Louisville & N.R.R. Co.*\(^3\) the Brotherhood of Locomotive Firemen and Engineeremen had acquired bargaining rights pursuant to the *Railway Labor Act*\(^4\) to represent all firemen. Service as a fireman was a prerequisite to service as an engineer. While a significant number of firemen were black Americans, the majority were white. That majority had the right to select their bargaining agent. The majority selected the Brotherhood which permitted only white members. In spite of the fact blacks could not be members of the Brotherhood, the

\(^3\) *Supra*, note 1.

\(^4\) 48 Stat. 1185; 45 U.S.C. ss 151 et. seq.
Brotherhood still had a responsibility to represent them.

The white controlled Brotherhood wished to ensure blacks were not promoted to engineer positions. It set out to accomplish this by entering into agreements that limited the number of black foremen in each seniority district, controlling the seniority rights of blacks and restricting their employment opportunities.

The petitioner Steele and fellow black employees filed a complaint in the Supreme Court of Alabama, claiming, among other relief, an injunction against the enforcement of the agreements made between the railway companies and the Brotherhood. The Supreme Court of Alabama took the position the complaint stated no cause of action because the Railway Labor Act gave to the Brotherhood, the exclusive jurisdiction to represent employees in a craft. That exclusive jurisdiction could not be interfered with by the court. The Supreme Court of the United States disagreed. In rendering the opinion of the court, Chief Justice Stone relied upon principles of duty emanating from the broad powers that had been given to the Brotherhood. He stated:

"We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution
imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the Bargaining representative with power comparable to those possessed by a legislature body both to create and restrict the rights of those whom it represents, . . . but it has also imposed on the representative a corresponding duty . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them.5

Frankly, the "corresponding duty" to which the Court referred was not imposed by Congress. It was created by the Courts to respond to the issue then before it. This corresponding duty constitutes a classic example of judicial lawmaking through application of legal principles founded in tort and agency. These legal concepts are clearly evident in the following excerpt from Steele:

"It is a principle of general application that the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise that power in their behalf! . . . 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".6

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5 Supra, note 1 at 202, 203.

6 Supra, note 1 at 202, 204.
The union, having taken upon itself the role of agent for its members, had a duty act in their best interests.\textsuperscript{7}

In \textit{Brotherhood of Railroad Trainmen v. Howard}\textsuperscript{8} a white controlled union negotiated a contract which resulted in the loss of jobs by black porters because of their race. Howard was a member of a separate black union. He and other black men in his union were adversely affected by the majority union contract. Howard’s complaint was that the defendant brotherhood discriminated against the black union. He sought an order declaring the contract null and void. In rendering judgment in favour of \textit{Howard}, the U.S. Supreme Court concluded the union must execute its trust "without lawless invasions of the rights of other workers".\textsuperscript{9}

We see, then, that by 1952 the courts had employed the notion that trade unions owe a duty toward their members in order to provide a remedy in circumstances where none seemed available. However, other than by way

\textsuperscript{7} Similar approaches are evident in the judgments in \textit{Syres, et al v. Oil Workers International Union}, et al 323 F. 2d. 739 (5 Cir. 1955), 350 U.S. 892 (1955) and \textit{Brotherhood of Railroad Trainmen v. Howard} 343 U.S. 768 (1952).

\textsuperscript{8} \textit{Supra}, note 7.

\textsuperscript{9} \textit{Supra}, note 7 at 774.
of dicta,\textsuperscript{10} the United States Supreme Court had not, by that time, applied that principle in any cases other than those involving allegations of racial discrimination in the context of workers employed in the railway sector pursuant to the \textit{Railway Labour Act}.

It was not until the case of \textit{Ford Motor Company v. Huffman}\textsuperscript{11} that the Supreme Court considered a fair representation complaint whose \textit{ratio} did not involve an allegation of racial discrimination.

In \textit{Huffman}, the company and the union had agreed to a clause which gave seniority to returning military servicemen upon completion of six month’s service with the Ford Motor Company. Huffman complained that the union had violated its duty to fairly represent all employees because it had discriminated on the basis of pre-employment military service which was unrelated to job performance. He argued the only conditions upon which a union could discriminate were those related to seniority, performance, and other job related issues. The U.S. Supreme Court concluded the seniority credit negotiated for servicemen was within the bounds of relevancy. The Court acknowledged that the employer and the

\footnotesize{\textsuperscript{10} See, for example, \textit{Wallace Corporation v. National Labour Relations Board} 323 U.S. 248 (1944) and \textit{Communications Association v. Douds} 339 U.S. 382 (1950).}

\footnotesize{\textsuperscript{11} 356 U.S. 330 (1953).}
union could make reasonable distinctions without violating the duty of fair representation. Although the Court did not interpret the duty as broadly as Huffman had hoped, (he did not obtain the relief sought) its conclusions did extend the duty beyond one which limited itself to issues of racial discrimination.

The Court concluded as follows:

"The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion".12 (emphasis added)

The corollary of the Supreme Court’s opinion was that the exercise of discretion by a union that was not made in complete good faith and honesty of purpose was actionable. While lack of good faith and honesty was actionable, no positive standard that must be met by a union had yet been defined.

Was this developing duty anything but an intentional tort? The cases seemed to be sending mixed messages. Consider the Steele case as an example. In that case, the predominantly white union sought a contract

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12 Ibid. at 338-339.
excluding blacks from serving as firemen. The petitioners sought to enjoin their union from negotiating such an agreement. The Court discussed the exercise of a granted power to act on behalf of others while at the same time exhorting the union to avoid hostile discrimination. A requirement to exercise a granted power on behalf of others imposes a higher standard upon a trade union than the mere avoidance of hostile discrimination.

The standard of care was further refined in the two leading American cases of *Humphrey v. Moore*\(^{13}\) and *Vaca v. Sipes*.\(^{14}\)

In *Humphrey v. Moore* two companies merged. Their employees were represented by the same bargaining agent. An issue arose as to whether the seniority lists should be dovetailed or whether each unit should maintain its own list. After initially announcing it would take no position on the issue, the union changed its mind and recommended dovetailing to the joint labour-management committee assigned the task of resolving the dispute. The plaintiff, who was in the unit opposed to dovetailing, sued the union president alleging the order approving the dovetailing was arbitrary, capricious, and contrary to both the practice within the industry and the

\(^{13}\) 375 U.S. 335 (1964).

\(^{14}\) 386 U.S. 171 (1967).
collective agreement.

The Kentucky Court of Appeals found there was a breach of the duty to fairly represent all employees because the union sought to represent two sets of employees with antagonistic positions. The result in the Court of Appeal was the imposition of strict liability against any union who was called upon to represent employees with conflicting interests. In considering the practicalities of union management the U.S. Supreme Court rejected such a proposition:

"We are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another ... [because] conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process"\textsuperscript{15}

Unlike the facts in the racial discrimination cases, those in \textit{Vaca} v. \textit{Sipes} did not cry out for court intervention. The employee who made the allegation that his union had treated him unfairly had returned from sick

\textsuperscript{15} \textit{Ibid.} at 349-350. In all Canadian provinces and those areas governed by federal jurisdiction such issues of successorship and inter-mingling of employees are now the exclusive domain of the labour relations tribunals.
leave with a medical certificate stating that he was fit to return to work. The employer questioned the validity of the certificate and had the employee see the company doctor who concluded the employee should not return to work which required heavy lifting. The union processed the grievance to the fourth level and then had the employee examined by an independent physician at union expense. The independent physician agreed with the company doctor’s opinion that the employee was not work-ready. The union dropped the grievance and suggested the employee accept the employer’s offer of a referral to a rehabilitation centre. The employee brought action against the union for breach of its duty of fair representation. He sought an order forcing the union to proceed with the grievance. The U.S. Supreme Court found in favour of the union. However, in the course of rendering judgment the court formulated the standard of care expected of a union in order to fulfil its duty of fair representation:

"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 toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct."\textsuperscript{16}

\textsuperscript{16} Note 9 at 358-360.
While the standard applied in *Vaca v. Sipes* imposes a higher one than that of simply avoiding hostility, the formulation of the test, because of its reference to arbitrary conduct, leaves some question about whether intentional conduct is required. The reference to "hostility or discrimination" indicates a clear requirement of some sort of guilty intent. The failure to act in good faith and with honesty contemplates proof that the union executive intentionally acted in bad faith and with dishonesty. Finally, from the cases discussed, *infra*, we will see the test for arbitrariness ranges from simple negligence to irrationality. The most commonly applied definition of arbitrariness is that it lacks a rational basis. Decisions have been held not to be arbitrary if they are based upon relevant, permissible factors. In any event, it is clear that discrimination and hostility required intentional conduct while arbitrary conduct required something more than mere or simple negligence.17

The onus upon a union member who considered himself or herself to have been mistreated by the union executive was heavy. The courts would

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only intervene in cases of hostility or discrimination, lack of good faith and honesty or where the union member could prove the union had been arbitrary in its treatment of him.

We will see that since the early cases up to and including the present time the American standard of proof for the arbitrary component of the test has, with varying interpretations, remained at one of irrationality. In fact, it could be said the standard a union must meet is lower today given some recent cases than it was in earlier stages of its development.

The Canadian standard has, however, evolved significantly. It will be demonstrated that in those Provinces where the duty has not been codified there exists substantial jurisprudence that the standard is one of simple negligence. These issues are more fully dealt with in Chapters II and III, infra.

Tort Law Context

It is surprising it took so long for the courts to develop a standard against which to measure the conduct of unions toward their members. Once a duty was recognized, courts still exhibited considerable restraint in imposing standards upon unions. Similar restraint was not exhibited in other
areas of human endeavour.

It is important to juxtapose the development of the concept of the duty of fair representation with other major developments in the field of tort and contract law.

In 1932, at least 12 years before the U.S. Supreme Court judgments in Steele and Howard, Lord Atkin wrote his infamous judgment in Donoghue v. Stevenson\(^\text{18}\) wherein he concluded that persons within our reasonable contemplation are our neighbours. We owe them a duty to avoid foreseeable harm. If the law of torts could be employed to provide a remedy to a consumer of soda in circumstances where contract principles were of no avail, could not this same concept of duty have been employed to found an action in negligence by a trade unionist toward his executive? Are not union members at least equally within the contemplation of members of the union executive as are soda pop drinkers within the contemplation of the bottler?

Obviously, the principles flowing from Donoghue v. Stevenson did not limit themselves to soda pop drinkers. Before the decision in Vaca v. Sipes,

the courts had concluded that aggrieved parties to a contract were not limited to a contractual remedy,\textsuperscript{19} and that professionals were liable in contract as well as negligence.\textsuperscript{20} There were also claims that attorneys might be found liable in negligence as well as contract.\textsuperscript{21}

Perhaps the best example of the debate concerning the duty to take care is found in \textit{Palsgraf v. Long Island Railroad Co.}\textsuperscript{22} a decision rendered long before \textit{Steele} and \textit{Howard}. Justice Cardozo, speaking for the majority concluded every negligent act must be predicated upon a duty to someone. Andrews, J. in the dissent would have us separate concepts of duty from those of liability. He would have concluded that one owes a duty to the world at large to refrain from those acts that would threaten others.

It is not my intention to repeat that debate. My purpose now is simply to suggest that union members are in a sufficiently proximate position to the executive that it should have them (the members) within their reasonable contemplation when negotiating collective agreements or


\textsuperscript{20} \textit{Chandler v. Crane, Christmas & Co.}, [1951] 2 K.B. 164.


\textsuperscript{22} (1928) 162 N.E. 99 (N.Y.C.A.); 248 N.Y. 339 (C.A.).
proceeding with grievances. However, from the era of Vaca v. Sipes to the present day, courts and tribunals have struggled with the degree to which a union owes such a duty to its members.

Uncertain of the extent to which negligence principles should govern the relationship between the union executive and the membership, the courts effectively created an intentional tort that has gradually given way to concepts of negligence. It is this evolution from the intentional tort to the tort of negligence that will be the focus of the next chapter.

**Fiduciary Duty**

Before tracing the evolution of the tort duty in matters of intra union disputes it is appropriate to comment upon the fiduciary relationship that exists between a union member and his or her executive. That relationship was an integral part of the development of the duty of fair representation in the United States. The relationship of dependence by the member upon his or her union was instrumental in the conclusion that a statutory obligation existed in Steele and Howard. The grant of power to the union required that it act in the interests of the member.

It is also important to note that the remedy sought in Steele and
Howard was not one of general damages. The petitioners sought to have the offending contract language removed. Their demand was for a remedy that historically would have been available in Courts of equity. A fiduciary relationship is distinguished from a relationship in which ordinary negligence arises by reason of the presence of loyalty, trust and confidence.\textsuperscript{23}

This fiduciary analogy is well articulated in Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry et al.\textsuperscript{24} Terry brought action against his employer for violation of the collective agreement and joined his union as a party, alleging breach of its duty of fair representation contrary to section 301 of the Labour Management Relations Act.\textsuperscript{25} The issue before the Supreme Court of the United States was whether the plaintiff was entitled to a jury trial. If the action was strictly equitable then no jury need be summoned. If the action was legal, or part legal and part equitable then the plaintiff was entitled to a jury trial. The union, not wanting a jury trial, argued the relationship between it and its member was comparable to a trust. While the Court concluded an action for breach of the duty of fair


\textsuperscript{24} 494 U.S. 558 (1990).

\textsuperscript{25} 61 Stat. 156; 29 U.S.C. s.185 (1982 ed.). A union may only be liable to its member if the plaintiff is able to prove a violation of the collective agreement.
representation was part equitable and part legal the following excerpt demonstrates the role trust considerations have played and continue to play in the development of that duty:

"Just as a trustee must act in the best interest of the beneficiaries, 2 A W. Fratcher, Scott on Trusts f170 (4th id. 1987), a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith, Vaca v. Sipes, 386 U.S. at 177. Moreover, just as a beneficiary does not directly control the actions of a trustee, 3 Fratcher, supra, f187, individual employee lacks direct control over a union’s actions taken on his behalf, see Cox, the Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 21 (1958).

The trust analogy extends to a union’s handling of grievances. In most cases, a trustee has the exclusive authority to sue third parties who injure the beneficiaries’ interest in the trust . . . The trustee then has the sole responsibility for determining whether to settle, arbitrate or otherwise dispose of the claim. Similarly, the union typically has broad discretion in its decision whether and how to pursue an employee’s grievance . . . .

That fairly recent statement of the American jurisprudence is consistent with the earlier statements of the law. In Steele the development of the duty of fair representation was grounded on the basis that a union has a granted

\(^{26}\) Supra, note 24 at 567, 568.
power to act on behalf of others and this power involves the assumption that that power will be exercised in the interest and benefit of the union member. In *Howard* the Court referred to the trust relationship existing between the union and its members. In *Bazarte v. United Transportation Union* the duty of fair representation was described as a fiduciary one. In *I.B.E.W., Local 801 v. N.L.R.B.* the duty of a union toward its members was described as a special obligation.

In Canada we have seen significant developments in the field of fiduciary responsibility in recent years. While those developments are useful for purposes of understanding the origins of the duty of fair representation, Canadian courts have not yet had the occasion to fully integrate them into the jurisprudence relating to the duty of fair representation.

In Canadian jurisprudence a fiduciary relationship is said to exist where:

(a) one party agrees to act on behalf of or in the best interests of, another person;

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27 429 F. 2d. 868, 871 (3d Cir. 1970).

28 See also, *Thompson v. Brotherhood of Sleeping Car Porters* 316 F. 2d. 210 (4th Cir. 1963).

29 307 F. 2d 679 (D.C. Cir. 1962).
(b) that party is in a position to affect the interests of another person in a legal and practical way; and

(c) that party (fiduciary) is able to use the discretion given to him or her to the detriment of the beneficiary.\(^{30}\)

Based upon the test set out above, a union member is without doubt the beneficiary of a fiduciary relationship with the union executive who has charge over the grievance process and the negotiation of benefits on his or her behalf.

The union, upon obtaining voluntary recognition or certification becomes the exclusive bargaining agent for the employee vis-a-vis the employment relationship. The union member thereby loses all rights to negotiate terms of his or her employment contract. In dealing with employers, the union effectively becomes the agent for the union member.

Recent judgments from the Canadian courts in matters unrelated to trade union affairs assist in an assessment of how the courts will deal with this relationship between tort and fiduciary obligation that flows from the employee-union relationship.

In *Blueberry River Indian Band v. Canada (Minister of Indian Affairs*

the Indian Beaver Band had surrendered mineral rights to the Crown in trust "to lease" for its benefit. In 1945 the Band surrendered the reserve to the Crown to "sell or lease". The federal Crown eventually sold the lands to the Department of Veteran's Affairs, who in turn sold it to returning veterans. Oil and gas were discovered on the lands in 1976. The Band then brought action against the federal government claiming damages by reason of the improvident sale in 1945 and transfer of mineral rights in 1940. The claim was dismissed at the trial division and in the Federal Court of Appeal. On appeal to the Supreme Court of Canada, the majority acknowledged by taking on a trustee position in relation to the mineral rights in 1940 the Crown had a duty to deal with the land in the best interests of the Band members. While the Court concluded the trust in surrendered Indian lands could not be equated with a common law trust, it did conclude that trust like obligations and principles were relevant.32

We have already seen a reference to special obligation33 to describe the fiduciary nature of a union toward its members. Similar words were

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32 Ibid at 358 (S.C.R.).
33 Supra, note 29.
employed by Justice McLachlin in *Laura Norberg v. Morris Wynrib, et al.*,34 a case where a patient sued her physician in tort (assault) and for breach of fiduciary duty. McLachlin, J. concluded that the physician patient relationship "falls into that special category of relationships which the law calls fiduciary."35

It is this special obligation or special relationship that is the underpinning of a finding of a fiduciary duty. It arises in any circumstance where one person or entity assumes the power that would normally reside with the other person.36

Perhaps the most significant aspect of a finding that a fiduciary duty has been breached as opposed to a tort duty is in the approach to damages. We are familiar with the requirement that damages must be foreseeable. No such requirement exists where the breach is of a fiduciary duty. This distinction was aptly stated by McLachlin, J. in *Canson Enterprises Ltd. v.*

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"In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is wrong in itself regardless of whether a loss can be foreseen."  

The discussion of tort duty, infra must be considered with the knowledge that a special relationship exists between a union and its members and that special relationship requires it act as it would prudently act in relation to its own affairs. Depending upon the facts of the case and the degree of negligence a trial judge considers appropriate, a fiduciary test might well be the most advantageous for an aggrieved union member to advance.

The current state of the law was appropriately summed up by McLachlin, J. in *M(V) v. M(H) and Women's Legal Education and Action Fund*.

"... a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent

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37 *Supra*, note 36 at 553.

common law claims . . . for those duties, now that common law and equity are mingled the courts have available the full range of remedies, including damages or compensation and restitutionary remedies . . ."\(^39\)

Two excellent examples of the courts using equitable remedies to right wrongs in alleged cases of unfair representation are to be found in *Paruch* v. *Nova Scotia Nurses’ Union*\(^40\) and *Donovan* v. *City of Saint John*.\(^41\) In *Paruch* the union refused to proceed with the grievance. In *Donovan* the union and employer settled a grievance that favoured another employee to the detriment of Donovan. The trial divisions in both Nova Scotia and New Brunswick determined the employees would be without a remedy but for court intervention. In *Paruch* the union was ordered to proceed with the grievance. In *Donovan* the Court, relying upon the *Municipalities Act*\(^42\) struck down the settlement of a grievance that had been negotiated by City Council and the union in circumstances clearly prejudicial and discriminatory toward the applicant.

Any application of the tort standard discussed *infra* should always be

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\(^39\) *Ibid* at 40.


measured against the backdrop of fiduciary responsibility. The extent to
which intention to deceive or to be dishonest is necessary in proof of breach
of fiduciary duty is debatable given the approach of the Supreme Court in
Blueberry River Indian Band. In that case there was no intention to deceive
or to be dishonest (a low standard to meet). There was however, a failure
to act in the best interests of the Band (a high standard to meet, even higher
than a negligence standard).

Given the approach in Blueberry River Indian Band the court may be
retreating from the admonition articulated in Girardet v. Crease & Co.\textsuperscript{43}
where Southin J. stated:

"the adjective 'fiduciary' means of or pertaining to
a trustee or trusteeship. That a lawyer can commit
a breach of the special duty of a trustee, eg. by
stealing his client's money, by entering into a
contract with the client without full disclosure, by
sending a client a bill claiming disbursements
never made and so forth are clear. But to say that
simple carelessness in giving advice is such a
breach is a perversion of words ... I make this
point because an allegation of breach of fiduciary
duty carries with it the stench of dishonesty - if not
of deceit then of constructive fraud."

Regardless, in matters involving intra-union conflict, the prudent practitioner

\textsuperscript{43} (1987), 11 B.C.L.R. (2d) 361 at 362; cited with approval in Lac Minerals Ltd.
v. International Corona Resources (1989), 61 D.L.R. (4th) 14 at 28 (S.C.C.); see also,
will frame the claim based upon contract, tort and fiduciary principles. Although the expression of these principles will no doubt be compartmentalized for purposes of pleading, it is important to note that overlays of all three are present as courts define the duty of fair representation and develop the standard by which it is measured.
CHAPTER II

Defining the Duty and Developing the Standard

The Canadian Standard

Canadian law with respect to the duty of fair representation has been influenced in two very significant ways. Firstly, the American development of the duty was transplanted onto Canadian soil. Secondly, most Canadian jurisdictions, including the federal government, quickly codified the duty thereby limiting its evolution and refinement by the courts. Courts in the Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island are therefore responsible for most of the latest judicial developments in the duty of fair representation as there has been no attempt at codification in those jurisdictions.

The British Columbia case of Fisher v. Pemberton44 is singularly responsible for transplanting American jurisprudence in relation to the duty of fair representation to Canadian soil. In considering the duty owed to Fisher by his union executive, MacDonald, J. concluded as follows:

"That duty (duty of fair representation) is not spelled out in any Canadian decisions of which I

am aware, but there are decisions of the Supreme Court of the United States which are in point. They define the duty with which I am concerned in a way which, with respect, appeals to me as sound and I therefore apply them in this case."

The facts in *Fisher v. Pemberton* constitute a classic example of one trade union fighting with another for the hearts and minds of the members of the bargaining unit - a take-over bid by a rival union. Mr. Fisher happened to be on the losing side. In fact, he had been the president of the local union displaced by that supported by Pemberton. When it came time for the union to file a grievance on behalf of Mr. Fisher it was clear he had little support from the incumbent union. In fact, there was clearly animosity on the part of the union toward Mr. Fisher and a willingness to see him dismissed. Considering this history of hostility and the perfunctory manner in which the union chose not to proceed with Mr. Fisher’s grievance, the court concluded he had been dealt with arbitrarily. Rather than order the union to proceed with arbitration, the Court considered the merits of the grievance and awarded only nominal damages having concluded that the case was without merit.

Although MacDonald, J. accepted the notion of a union duty to fairly

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represent its members and stated he found the American cases appealing to him, he does not attempt to define the standard in his own terms, nor does he describe why he finds the American cases appealing. In fact, after concluding the duty of fair representation exists in Canada, and, after citing the relevant American jurisprudence his Lordship concluded the decision to abandon the grievance was not made in a "non-arbitrary" manner. The Court did not attempt to define arbitrary.

The blanket acceptance of the early American jurisprudence has experienced legislative and judicial modifications in the past number of years. Every province except New Brunswick, Nova Scotia, and Prince Edward Island has codified the duty or some aspect of it in their relevant labour relations statute.46 Furthermore, the government of Canada has included the duty in the Canada Labour Code.47

The Supreme Court of Canada has attempted to define the duty in

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46 Labour Relations Code S.A. 1988 c. L-1.2 as amended, s. 151
Labour Relations Code S.B.C. 1992 c. 82 as amended, s. 12
The Labour Relations Act R.S.M. 1987 c. L-10, s. 20
Labour Relations Act 1995 S.S. 1995, s. 74
Labour Code, R.S.Q. 1977 c. C-27 as amended, s. 47.2
Labour Relations Act R.S.N.B 1990 c. L-1, s. 130
The Trade Union Act R.S.S. 1978 c. T-17 as amended, s. 25.1
These statutory provisions are fully set out in Schedule A, appended hereto.

47 R.S.C. 1985, c. L-2. See, Schedule A.
Canadian terms in Canadian Merchant Service Guild v. Gagnon,48 Supply and Services Union of the Public Service Alliance of Canada and Gendron and the Public Service Alliance of Canada, Local 50057,49 and Centre Hospitalier Regina Ltee. v. Prud'homme.50

In Gagnon, the grievor had been hired by the employer as a pilot boat captain. He was transferred to the position of maintenance worker. He considered the transfer to be a dismissal. A grievance was filed and taken through the first three levels of the grievance process. However, the union refused to take the grievance to arbitration. Eight months after being transferred to the position of maintenance worker, the grievor was dismissed.

He did not seek to grieve his dismissal from the position of maintenance worker. However, several months after his termination, he brought an action in the Quebec Superior Court alleging wrongful dismissal by the employer and breach of the duty of fair representation by the union, both alleged violations of obligations owed pursuant to article 1056 of the Quebec Civil Code. In both the Quebec Superior Court and the Quebec

Court of Appeal,\textsuperscript{51} the Courts concluded the union had breached its duty of fair representation.

In the Quebec Court of Appeal, L’Heureux-Dubé, J. (as she then was) concluded that Gagnon’s transfer was actually a disguised dismissal. She also concluded that considering Gagnon’s insistence that the matter be taken to arbitration and all the facts given to the union by him, the union had failed to carry out a sufficiently in-depth investigation. L’Heureux-Dubé, J. concluded the union’s conduct was "arbitrary and wrongful"\textsuperscript{52} in that it was taken negligently without thorough investigation. This is the first statement from a Court of Appeal that "negligent conduct" could meet the test of arbitrariness. Interestingly, she also concluded that "negligence and incompetence" constituted "bad faith".\textsuperscript{53}

Those conclusions in the Quebec Court of Appeal would have made unions liable for negligent conduct, a significant step in the development of the law when compared to the relatively low standard emanating from \textit{Fisher v. Pemberton}. The Supreme Court of Canada rejected that approach. It


\textsuperscript{52} Note 51 at 529 (S.C.R.).

\textsuperscript{53} Note 51 at 530 (S.C.R.).
concluded that failure to undertake a substantive or thorough investigation could not constitute bad faith. It formulated the common law duty of fair representation in the following manner:

"The following principles, concerning a union’s duty of fair representation in respect of a grievance, emerge from the case-law and academic opinion consulted:

1. the exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit;

2. when, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion;

3. this discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee of one hand and the legitimate interests of the union on the other;

4. the union’s decision must not be arbitrary, capricious, discriminatory or wrongful;

5. the representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the
employee."\(^{54}\)

It is apparent that the tests of arbitrariness, discrimination and hostility of the early American jurisprudence have survived and been transposed into the Canadian version of the duty of fair representation. In those cases where the Canadian courts conclude there is intentional conduct of the part of the union executive, virtually any fact situation can result in an award of damages should the union be found to be blameworthy. More problematic, however, is measuring the degree of serious or major negligence required to found liability.

It is significant though that *Gagnon* introduced negligence as part of the test for determining whether or not the union has met its duty, provided however, that that negligence is "serious or major".

\(\textbf{(i) Effect of Codification on the Common Law: Ouster of the Courts}\)

In *Gagnon*, this definition of the duty of fair representation constituted judicial lawmaking consistent with our common law tradition\(^{55}\) given that

\(^{54}\) Note 51 at 527 (S.C.R.).

\(^{55}\) A review of the article by H. Patrick Glenn, *The Common Law in Canada* (1995) 74 C.B.R. 261 demonstrates just how clearly the development of the duty of fair representation is a common law development. The author suggests that the common law is a method of legal thought built upon the foundation of a free people asking the right
the duty had not yet been codified in the *Canada Labour Code*, the applicable legislation governing the plaintiff’s workplace.\(^{56}\)

In *Gendron*, the Supreme Court of Canada considered the codification of the duty of fair representation as defined by the *Canada Labour Code*. The plaintiff, an employee of the Government of Canada mint, was the successful applicant for a vacancy. The three unsuccessful candidates grieved. The union conducted an investigation and concluded the employer had not applied its own standards established for assessing the candidates. Once those standards were applied, the plaintiff (grievor) was removed from the position. He then grieved the failure by the employer to award him the position.

The union supported the grievance at the first two stages of the grievance procedure but refused to submit it to arbitration. The plaintiff (Gendron) then brought action against his union in the Manitoba Court of

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questions in an environment of diverse legal traditions. If enough of us ask the right questions then we just might solve the problem. That is precisely the method by which the concept of a union’s duty to its members has developed and continues to develop. Perhaps the common law is best defined as a system of law that refuses to be static. One whose definition is totally encompassed by its evolutionary character.

\(^{56}\) Statutorily based duties are a common feature of modern negligence law and considered part of our common law development. Numerous examples of statute based duties are to be found in Linden, *Canadian Tort Law* Butterworths, 6th Edition, Toronto: 1987.
Queen's Bench. He alleged the union breached the duty of fair representation owed to him.

The issue in the case was whether the plaintiff could even bring an action before the courts given that the duty of fair representation was codified by operation of the Canada Labour Code. Did that codification oust the jurisdiction of the Court or did it place it exclusively in the hands of the Canada Labour Relations Board? In responding to that question, L'Heureux-Dubé, J., now writing for the Supreme Court of Canada, found it necessary to:

(a) examine the duty at common law; and
(b) examine the Code in order to determine whether it contemplates any role for the ordinary courts in relation to union conduct (or misconduct).

L’Heureux-Dubé, J. considered the Canadian and American cases in some detail as she established the foundation for the common law duty of fair representation. At page 1315 (S.C.R.) she concludes:

"It is clear then that Canadian Courts have followed the lead of their counterparts in the United States in inferring from the statutory grants of exclusive bargaining authority a corresponding duty of fair representation."
Before proceeding to the second phase of her analysis, that is, whether or not the codification ousted the common law, L'Heureux-Dubé, J. did not make any serious effort to define this common law duty, nor did she attempt to compare the duty at common law to the codification. One would have expected such an analysis essential before pronouncing upon the issue of jurisdiction. Obviously, if the duties were different, one from the other, would the argument that the common law courts were ousted not be weakened? Similarly, a conclusion at the first stage that the tests were identical would no doubt strengthen the argument that the court's role had been ousted. In fact, at page 1316 Justice L'Heureux-Dubé concluded the jurisdiction of the Courts is ousted even before she concluded that the content of s. 136.1 (now s. 37) of the *Canada Labour Code* is identical to the "duty at common law."\(^{57}\)

Justice L'Heureux-Dubé then arrives at another questionable conclusion. She concludes the common law duty is not in any sense additive (to the codification) but merely duplicative. With respect, I fail to understand how the common law duty could be duplicative given her extensive analysis demonstrating how that duty had developed from the

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\(^{57}\) Note 49 at 1316 (S.C.R.).
American cases and how it had developed in Canada quite in advance of any codification. By her own analysis, the codification was duplicative of the common law and not the reverse.

It is Justice L’Heureux-Dubé’s analysis that the common law is duplicative of the codification and not the reverse that appears to be the basis for her conclusion that the common law duty is ousted by the *Canada Labour Code*. Had she concluded that the *Code* duplicates or at least attempts to duplicate the common law duty, she may well have required greater proof of Parliament’s intention to oust the common law jurisdiction of the Courts.

With respect, it is submitted the Court abandoned its jurisdiction in *Gendron* without clear evidence of Parliamentary intention. Although the Court concluded the common law duty and the statutory duty of fair representation are the same, it is submitted there are sufficient differences in procedure and remedies, that, had those differences been fully examined the Court may not have concluded its jurisdiction had been ousted. Consider the following:

(a) at common law, a claim for solicitor-client costs can be made; no such right exists pursuant to the *Code*;
(b) at common law, a claim for aggravated or exemplary damages can be made; such a claim is not available pursuant to the Code;

(c) at common law, the grounds of appeal or review are broader than is the case with codification under the Code, where a very restrictive privative clause exists;\(^58\)

(d) finally, even in her own analysis, L’Heureux-Dubé concluded:

"Recent amendments to the Canada Labour Code may restrict the statutory duty ... thereby arguably leaving some room for the common law duty to operate at the collective bargaining stage."\(^59\)

Given that the common law duty embraced both contract negotiation and contract administration by the time *Gendron* was decided, it seems quite contradictory to acknowledge a possible difference and yet conclude that the common law duty is identical to the codification. Either they are the same, or they are not. In this case, even by the Courts own admission, the duties are not "obviously identical" as previously stated by her.\(^60\) It is the

\(^{58}\) Note 47, s. 122.  

\(^{59}\) Note 49 at 1320 (S.C.R.).  

\(^{60}\) Note 49 at 1316 (S.C.R.).
conclusion that the codification is identical to the common law that has caused serious error in the development of the law as it relates to whether or not the courts' jurisdiction is ousted. Unlike the United States all Provinces do not assess the issue of whether the courts are ousted based upon the federal law.  

With respect, the erroneous analysis in Gendron does not end with claims that the statutory duty and the common law duty are identical and the conclusion that damages constitute the only available remedy in the courts. With equal zeal, her Ladyship accepts the decision of the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers’ Union* as one of the determining factors in her analysis that the common law jurisdiction is ousted by the codification. Although addressed in more detail later in this paper, the decision in *St. Anne Nackawic* that the Courts had no jurisdiction to deal with a dispute between the employer and the union was premised almost exclusively on the fact that the Legislature had ousted the jurisdiction of the Courts in very clear language in section 55 of

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the New Brunswick *Industrial Relations Act*. All disputes between the parties (employer/union) were to be resolved by final and binding arbitration. Such clear words directing unions and its members to settle their differences (intra-union conflict) by some mechanism outside of the Courts (apparently ousting the jurisdiction of the courts) are not to be found in the *Canada Labour Code*. Regardless, the direction from the Supreme Court is that the statutory duty of fair representation in *Gendron* is identical to the common law duty described in *Gagnon*.

Finally, in considering those cases interpreting the duty of fair representation that have been considered by the Supreme Court of Canada, L’Heureux-Dubé, J., in *Centre Hospitalier Regina Ltee v. Prud’homme*, *supra*, describes a two stage procedure to be applied for purposes of determining whether a union has met its duty in this regard:

"First, the union must carefully consider the merits of the grievance to decide whether it should be taken to arbitration ... at the second stage, if the union decides that the grievance has merit, it must represent the employee without serious negligence, discrimination or bad faith at all subsequent stages of the grievance procedure."

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64. Note 49 at 340-341 (D.L.R.).

65. Note 50 at 622 (D.L.R.).
What constitutes serious or major negligence for purposes of meeting the standards imposed by this duty? Unfortunately, although the Supreme Court has had several occasions to define serious or major negligence in terms of a union's duty toward its members, there has been virtually no guidance from that Court in this regard except on a case-by-case basis.

No doubt, the degree of negligence most akin to "serious or major" negligence is that of gross negligence. As will be seen, infra, the distinction between it and ordinary negligence has been considered on numerous occasions by the Supreme Court of Canada.

(ii) Gross or Serious Negligence

Perhaps one of the best indicia of what is not considered major or serious negligence is found in the decision of the Canada Labour Relations Board in Brenda Haley and Canadian Airline Employees' Association and Eastern Provincial Airways (1963) Limited. The Board was called upon to interpret section 136.1 of the Canada Labour Code, the same section considered by the Supreme Court in Gendron.

In that case, the employee, Brenda Haley, was dismissed for excessive

absenteeism. She had been active in the union and, until a short period of time prior to her dismissal, appeared to have been a good employee. After receiving her dismissal notice she sought the advice of her union and filed a grievance. Not having received a response to the grievance within the time period set out in the collective agreement, the matter was referred to arbitration. At the arbitration hearing the employer objected to the arbitrability of the grievance because of a missed time limit on the part of the union. There was no lack of good faith on the part of the union. There was no arbitrary conduct, nor was there any hostile discrimination. The missed time limit was, according to the majority, the result of improperly counting the days within which action had to be taken, an innocent error. The grievance would not proceed. This was clearly a case where substantial damage had been caused to the grievor by reason of mere negligence.

The Board acknowledged that 'serious negligence' or 'gross negligence' on the part of the union would constitute a failure on its part to meet the requirements of the duty of fair representation. It also acknowledged that this particular grievance represented the most serious kind one could file. It affected the critical job interest of continued employment of the grievor. In spite of the fact that a critical job interest was
at stake, and in spite of the fact the union miscounted, the majority concluded there was no breach of the duty and the grievor was without a remedy.

Even in his dissent in Haley, board member Jamieson, was unwilling to conclude that a union could be liable for breach of the duty of fair representation based upon ordinary or simple negligence. In his attempt to fit the facts of Haley into the established jurisprudence of the Board, which required proof of more than mere negligence before a union could be liable, he concluded:

"... once a decision is taken to proceed to arbitration, it can be assumed that a trade union is fully aware of the gravity of the situation. It must be expected to act accordingly and be accountable in its duty to represent fairly. It is a gross understatement to characterize a missed time limit at this crucial stage as an 'innocent mistake'. A missed time limit during the processing of a grievance involving for example, a dispute over two hours overtime wages could be called simple negligence and should not be viewed in the same light as a missed time limit in a discharge grievance. The gravity of the issue must raise the quality of representation expected by an employee."67

67 Supra, note 66 at page 511 (C.L.R.B.R.). The American courts have not been quite so kind with respect to missed limitation dates, see for example, Ruzicka v. General Motors Corporation 523 F.2d. 306 (6th Cir., 1975) Dutrisac v. Caterpillar Tractor Co. 749 F.2d. 1270 (9th Cir. 1982) and Vencl. v. International Union of Operating Engineers
The *Haley* case is but one example of the difficulty labour boards and the courts have in determining what is serious or major negligence and what is not. Given that the courts who have considered the duty of fair representation have not attempted to define serious or gross negligence and have provided little by way of analysis that would permit one to assess whether a union’s conduct is or is not grossly negligent, it is necessary to consider other examples in tort where gross negligence is or has been the standard. A consideration of those cases will give some benchmarks by which to assess whether or not a union has met the standard required of it.

Gross negligence has been considered by our courts in numerous circumstances, including, but not limited to, those situations where the victim of an automobile accident was a gratuitous passenger, the person responsible for the safekeeping of goods was a gratuitous bailee, and where an injured plaintiff could not recover against a municipal government 137 F.3d. 420 (6th Cir. 1998) where unions were held liable for missing limitation dates. The courts considered such conduct to be ‘arbitrary’ within the definition of unfair representation.


unless the municipal authority was guilty of gross negligence.\textsuperscript{70}

In addition, contracts have been drafted so as to preclude liability unless the offending party is guilty of gross negligence.\textsuperscript{71}

In \textit{McCulloch v. Murray}\textsuperscript{72} Sir Lyman Duff, C.J.C., as he then was, defined gross negligence in the following terms:

"All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves."\textsuperscript{73}

In \textit{Studer v. Cowper}\textsuperscript{74} Kerwin, J. defined gross negligence as very great negligence. The court in \textit{Studer v. Cowper} reaffirmed that the issue of whether any given circumstance constitutes gross negligence is a question to be decided by the trier of facts.

The deference courts of appeal should demonstrate toward trial judges' conclusions in this regard was well stated by the Court in \textit{Burke v. Perry}


\textsuperscript{72} \textit{Supra}, note 68.

\textsuperscript{73} \textit{Ibid} at 145 in \textit{McCulloch v. Murray}.

\textsuperscript{74} \textit{Supra}, note 68.
Ritchie, J. (as he then was) held that the characterization of a set of facts as gross negligence:

". . . involves a reconstruction of the circumstances of the accident itself including the reactions of persons involved and this is a function for which the trial judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court."

The admonition by Ritchie, J. in *Burke v. Perry and Perry* that the trial judge is best suited to make a determination of whether the facts of a particular case constitute gross negligence appear not to have been heeded by him in the Supreme Court of Canada decision in *Goulais v. Restoule Estate*. In that case, Goulais was the only survivor of a tragic accident in which Mrs. Restoule had apparently crossed the centre line of the roadway and collided with oncoming traffic.

In *Goulais*, both the trial judge and the Ontario Court of Appeal concluded Mrs. Restoule was not guilty of gross negligence. Part of the evidence at trial included a statement from the plaintiff taken approximately

75 *Supra*, note 68.


two months post accident in which he said, *inter alia*,

"It appeared to me as if this vehicle was coming
towards our side of the road . . . I feel strongly
Marilyn (Mrs. Restoule) is not to blame for this accident."\(^78\)

In concluding the respondent was grossly negligent Ritchie, J.
speaking for the majority concluded the facts disclosed in the evidence
required some explanation, which was not forthcoming. He opined as
follows:

"In the present case there is no suggestion of
conscious wrongdoing on the part of Mrs.
Restoule, but with the greatest respect for the
judgments at trial and in the Court of Appeal, it is
my view that a driver who allows her car to
"slowly swerve" into the middle of the left hand
traffic lane in the face of the approaching lights of
another car is guilty of a "very marked departure
from the standards by which responsible and
competent people in charge of motor cars
habitually govern themselves", and having reached
this conclusion, I am satisfied that the
circumstances disclosed by the evidence in this
case were such as to require an explanation
consistent with lack of gross negligence. (See
*Walker v. Coates*).\(^79\) No satisfactory explanation
is suggested by the appellant who was the only
survivor of the accident. I appreciate that this

\(^{78}\) *Ibid* at page 371-372. Dickson, J. in dissent, would not have disturbed the
findings of the lower courts.

ipsa loquitur* could be used to conclude conduct was grossly negligent.
conclusion runs contrary to the findings of both courts below. . . "80

Res ipsa loquitur came in aid of an injured plaintiff to prove gross negligence.

In the bailment cases of Campbell v. Picard81 and Fairley & Stevens (1966) Ltd. v. Goldsworthy82 both the Manitoba Court of Appeal and Nova Scotia Supreme Court, Trial Division, respectively, adopted the test of gross negligence as set out in McCulloch v. Murray, namely, the marked departure test.

In Harper v. Town of Prescott83 the plaintiff had been injured while walking on a slippery sidewalk that was maintained by the municipal corporation. The municipality of Prescott was protected by the provisions of the Municipal Act, R.S.O. 1937, c. 266 s. 480(3)84 which provided as follows:

Note 77 at 369.

80 Supra, note 69.

81 Ibid.


83 Now, R.S.O. 1990, c. M.45, s. 284, as amended.
"Except in the case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk."

*Harper v. Prescott*, and *Holland v. City of Toronto*\(^{85}\) were both cases arising out of slip and fall accidents involving pedestrians where the standard was one of gross negligence. In *Harper v. Prescott* the Supreme Court of Canada refused to assess the facts against a standard of recklessness or flagrant conduct. However, in *Holland v. City of Toronto* the Court applied a standard of reckless indifference. Those would appear to be conflicting statements of the law.

Perhaps one of the most colourful definitions of gross negligence is that adopted by the Supreme Court of Canada in *Canada v. Canada Steamship Limited*.\(^{86}\)

The case involved a claim by Canada Steamship Lines against the Government of Canada. Canada Steamship Lines was the lessee of a part of the port at Montreal, Quebec and the Government of Canada was the lessor. Clause 7 of the lease agreement provided as follows:

"That the Lessee shall not have any claim or demand against the Lessor for detriment, damage

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\(^{86}\) *Supra*, note 32.
or injury of any nature to the said land, the said shed, the said platform, and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects, or things at any time brought, placed, made, or being upon the said land, the said platform or in the said shed."

Employees of the Government of Canada caused a fire while carrying out repairs to the leased property. Canada Steamship Lines sought to recover its damages.

Under Quebec law the clause excluding liability could not operate to avoid damages caused by gross negligence. It did operate to exempt liability for mere or ordinary negligence by the government of Canada, its servants or agents. ⁸⁷

On the facts of the case, Angers, J. of the Exchequer Court⁸⁸ concluded the workmen were guilty of gross negligence or "faute lourde". Canada Steamship Lines could therefore recover against the defendant (Canada).

In the Supreme Court of Canada, Rinfret, C.J.C. noted:

"It was common ground that the gross negligence referred to in the judgment appealed from is the equivalent of what is called ‘faute lourde’ in the

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French Civil Code, and it was not disputed either that the lease must be interpreted and applied according to the law of the Province of Quebec.89

Rinfret, C.J.C. held that the question of whether 'faute lourde' exists is more than a question of fact because the decision maker must first properly define 'faute lourde'. To arrive at a proper definition contemplates a question of law. The proper definition is to be found in the works of Pothier.90 His Lordship concluded:

"On that point, it does not seem to me that one can be on safer grounds that to adopt the definition of Pothier. This learned author, who might truly be looked upon as being in most respects the basis of the Civil Code of Quebec, says that the 'faute lourde consiste à ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires."91

That standard of gross negligence imposes a very low threshold upon would be tortfeasors. No liability would attach unless the plaintiff could establish that the defendant's conduct was more indifferent than the most

89 Supra, note 32 at 536.


91 Supra, note 32 at 537.
careless and most stupid people would exercise towards their own interests.92

One can conclude the analysis of the various judgments touching on the issue of gross negligence by making the following observations:

1. while the appropriate definition of gross negligence is a question of law, whether a set of circumstances constitutes gross negligence is a decision of fact to be decided by the trial judge;

2. evidence of intentional or wilful conduct will not be necessary to establish gross negligence;

3. the principle of *res ipsa loquitur* may be relied upon to establish gross negligence;

4. what constitutes gross negligence will vary depending upon the facts of the case; however, at a very minimum it would seem prospective plaintiffs must prove very great negligence or a marked departure from the norm;

5. when the Supreme Court of Canada refers to "serious or gross negligence" it is unclear whether the Court is speaking of equivalent standards or two different ones. The word 'serious' would seem to suggest a standard somewhere between mere negligence and gross negligence.

Against this background the following suggestions may be of some assistance to jurists who are called upon to consider whether a particular set of circumstances constitutes serious or gross negligence:

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92 *Supra*, note 32 at 548.
1. How critical is the job interest? As addressed by board member Jamieson in *Haley*, does the grievance concern two hours of pay or the future employability of the grievor?

2. How critical is the grievance to the bargaining unit as a whole? Is it a policy grievance that might affect only two hours of pay today but potentially fifty hours next month?

3. Was the union's error the result of neglect or was there a *bona fide* effort on the part of the union to ensure the member was well served?

4. Was the union’s error, however well-intentioned, the result of a failure to seek outside counsel or engage adequate resources?

5. Was the union’s error one of omission or commission?

6. Is the grievance process controlled exclusively by the union or is there an opportunity for individual action by the aggrieved employee?

7. Does the matter concern employee rights flowing from grievance arbitration or contract negotiation. No doubt greater latitude will be afforded a union in matters of contract negotiation.
The American Standard

The United States Supreme Court has consistently held that mere negligence is not sufficient to found liability against a union for breach of its duty of fair representation pursuant to the National Labour Relations Act.93

In United Steel Workers of America, AFL-CIO-CLC v. Rawson94 the union had, as part of the safety committee duties referred to in the collective agreement, agreed to assist in mine inspections. When Rawson was killed in a mine fire, his estate sued in the Idaho Supreme Court.

The issue was whether or not an action in simple negligence was preempted by operation of the federal National Labour Relations Act and s. 301 of the Labour Management Relations Act, 1947.95

Although a claim for unfair representation could be brought in state or federal court, the federal law had to govern since the inspections were contemplated in the collective agreement. In relying upon its decision in Ford Motor Company v. Huffman the U.S. Supreme Court concluded as follows:


"The courts have in general assumed that mere negligence even in the enforcement of a collective bargaining agreement would not state a claim for breach of the duty of fair representation, and we endorse that view today.

... a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents."96

The Court concluded the federal law did pre-empt the action in the state court founded on mere or simple negligence. The union's conduct would be measured against a lower standard.

The U.S. Supreme Court enunciated an even lower standard in Air Line Pilots Association v. O'Neill.97 In that case O’Neill and his fellow petitioners were opposed to the eventual settlement reached between their union, the Air Line Pilots Association and Continental Air Lines following a lengthy strike. Claiming the union had breached its duty toward them they sought to have the contract declared invalid. The United States Court of Appeals for the Fifth Circuit would have found the settlement to have been arbitrary. It assessed arbitrariness based upon the following factors:

1. whether the decision was based upon relevant, permissible union factors;

96 Supra, note 94 at 372.

2. whether the decision was rational considering those factors; and

3. whether there was a fair and impartial consideration of all employees' interests.

The U.S. Supreme Court rejected the Court of Appeal's analysis of the arbitrariness test holding that it would permit more judicial review of the substance of negotiation agreements than consistent with national labour policy.98

The appropriate standard was succinctly set out by Stevens, J. for the full court:

"We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behaviour is so far outside a "wide range of reasonableness", Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), as to be irrational"99 (emphasis added)

This test of irrationality applies to contract administration (grievances) as well as contract negotiation.100

That wide range of reasonableness has been interpreted differently by the various circuits of the United States Appeals Courts.

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98 Ibid at 77.

99 Supra, note 97 page 72.

100 Supra, note 97 at 77.
(i)  **Irrationality: Extreme Recklessness to Intentional Conduct**

The Seventh Circuit in the United States held that intentional misconduct must be shown on the part of the union in order to establish a breach of the duty of fair representation. In *Hoffman v. Lonza Inc.*\(^{101}\) the court held that an action based upon the union's duty to fairly represent its members might be more "properly labelled as an action for the union intentionally causing harm to an employee..."\(^{102}\)

In *Graf v. Elgin, Joliet & Eastern Railway*\(^{103}\) the Seventh Circuit reinforced the notion that intentional conduct on the part of the union is required in order to make the case for a plaintiff. The Court did opine that extreme recklessness might be sufficient to establish a breach of the duty but it would be so close to an intentional wrong that the treatment of the law would be the same. At page 112 of *Graf* the standard was described as follows:

"The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker. Negligence, even gross negligence is not enough; and, obviously,

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\(^{101}\) 658 F. 2d. 519 (7th Cir. 1981).

\(^{102}\) *Ibid.* at 522.

\(^{103}\) 697 F. 2d. 771 (7th Cir. 1983).
intentional misconduct may not be inferred from negligence, whether simple or gross. Although extreme recklessness is so close to intentional wrongdoing that the law treats it as the same thing, we need not worry about that refinement in this case..."

Those who hold to the notion intentional misconduct is required to establish the claim, argue that to hold otherwise might encourage collusion between the union and employee. An employee whose chances of success at grievance arbitration are not good might encourage his union to make a mistake in pursuing the grievance, thereby providing him the opportunity to bring suit against the employer under Section 301 of the Labour Management Relations Act, 1947 seeking reinstatement. With respect, this concern is easily remedied by ensuring that the reinstatement remedy not be available to the Court. With respect to complaints arising out of the grievance process, the remedies could no doubt be limited to an award of costs and the referral of the matter to arbitration.

Another justification for limiting relief to situations where the union has acted intentionally is that unions are to a large extent volunteer organizations whose stewards lack the skill and training that is necessary to hold them to a professional malpractice standard. Frankly, there is very little comparison between intentional misconduct and the standard imposed
upon professionals. It would seem one could at least reach the gross negligence standard without imposing a professional standard of care upon union executives. Also, given the contractual relationship that exists between a member and his or her union, it is reasonable to expect the member would be entitled to the best possible representation.

(ii) Irrationality: The Negligence Standards

Another refinement of the Vaca v. Sipes standard requires a union to rationally explain impugned conduct. This view holds that if a union cannot rationally explain its actions, it will be in violation of its duty to fairly represent. But for the gross negligence component of the Canadian standard of care, the test adopted by the Fifth Circuit of the United States Federal Court in Tedford v. Peabody Coal Co.\(^{104}\) bears striking resemblance to that adopted by Madame Justice L'Heureux-Dubé in Centre Hospitalier Regina Ltee., supra. At page 957 in Tedford the Court held:

"We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which exclude the possibility of it being based upon motivations such as personal animosity or political favouritism; (2) a rational result of the consideration of those factors; and (3) inclusive of

\(^{104}\) 533 F. 2d. 952 (5th Cir. 1976).
a fair and impartial consideration of the interests of all employees."

The distinction between the intentional misconduct standard and that requiring a rational explanation of union conduct appears to be a matter of proof. For those who hold to the former, the plaintiff must prove intent on the part of the executive. That can be a very heavy onus. The rational explanation standard would appear to assist plaintiffs in that "intent", if necessary, is presumed. The union must then provide some rational explanation of its conduct. Much like the application of principles of res ipsa loquitur that were applied in Goulais v. Restoule Estate, the rational explanation test would, in most cases, require the defendant to produce some evidence in order to defeat a claim.

In Harris v. Schwerman Trucking Co. the employee complained about the union’s representation of him following his discharge as a result of a customer complaint. The union presented the employee’s grievance, challenged the employer’s assessment of the facts and permitted the employee to be personally present at a joint arbitration committee. The committee upheld the discharge. The employee felt there was no lawful justification for his discharge and brought action in court against his union

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105 668 F. 2d. 1204 (11th Cir. 1982).
and the employer. At page 1207 the court concluded:

"Nothing less than a demonstration that the union acted with reckless disregard for the employee’s rights or was grossly deficient in its conduct will suffice to establish such a claim."

In *Wyatt v. Interstate & Ocean Transport Co.*\(^{106}\) the facts do not appear to constitute gross negligence. The plaintiff was discharged by his employer one month after he settled a civil law suit for personal injuries he had suffered while at work. The company took the position he was discharged because he could no longer perform the duties required of his position as a result of the injuries suffered by him. The employee’s own doctor concluded he was 25% disabled. In assessing the merits of the grievance the union officials only considered the medical report of the employee’s doctor. They neglected to request the company doctor’s assessment. That assessment found the employee suffering from no disabilities.

Given that the employee had just completed a civil action against his employer, an astute lawyer would no doubt have concluded that the company’s medical report might be more favourable to the employee as a tactic to limit any damage award against the company. Similarly, an astute

\(^{106}\) 623 F. 2d. 888 (4th Cir. 1980).
counsel may well have concluded that the medical report from the employee's own doctor might portray the injuries in the worst possible light in order to ensure adequate compensation. Unfortunately, the union representative failed to examine the company medical report and concluded there was no merit to the grievance.

The Fourth Circuit concluded that "grossly deficient conduct" on the part of the union could constitute arbitrary conduct necessary to support a finding that the union had not respected its duty to fairly represent the employee. In *Wyatt* the court concluded that failure to request the company medical report was grossly deficient conduct. With respect, while the failure to request the company report might constitute negligence I would suggest there is a substantial subjective assessment by the court in equating such a failure with gross negligence. Negligent perhaps, arbitrary or grossly negligent? I doubt it.

This case, where the statement of the standard is very similar to the Canadian definition of gross negligence is an excellent example of interpretation of the facts designed to ensure a remedy regardless of the label one employs to describe the standard. With respect, this approach is evident in the vast majority, if not all of the cases discussed, *supra*. 
Based upon the decisions from the U.S. Supreme Court, it would appear that the simple negligence standard does not constitute any part of the duty of fair representation in American jurisprudence. However, a limited role for the mere negligence standard has been accepted in at least two American jurisdictions.

In *Dutrisac v. Caterpillar Tractor Co.* the facts were very similar to those in *Brenda Haley, supra.* The union had inadvertently failed to file a grievance on time. The arbitrator dismissed the grievance as being untimely. The employee sued the union for breach of duty owed to him. The Ninth Circuit reached the opposite conclusion from the Canadian Labour Relations Board in *Haley.* In upholding the employee’s claim, the Court made a distinction between ministerial acts and discretionary acts undertaken by the union. Simple negligence would not be sufficient to found a complaint in circumstances where the union considers the pros and cons of certain action and then exercises its discretion in making its decision. However, where the individual interest at stake is high and the

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107 749 F. 2d. 1270 (9th Cir. 1982).

108 A similar result was reached in *Vencl v. International Union of Operating Engineers* 137 F.3d. 420 (6th Cir. 1998) and *Ruzicka v. General Motors Corporation* 523 F.2d. 306 (6th Cir. 1975). It seems American courts are quite willing to define "arbitrary" as negligent when critical job interests are at stake.
union's failure to complete a ministerial act completely extinguishes the employee's claim, simple or mere negligence is the standard that will be applied.\(^{109}\) This has been accomplished, however, by categorizing negligence in those circumstances as arbitrary conduct.

In the following chapter we will see that in those Canadian Provinces where the duty of fair representation has not been codified (the Maritime Provinces), the weight of judicial opinion is that trade unions will be held liable for harm resulting from acts of simple negligence. This has been accomplished boldly, in a direct and forthright manner, with the policy issues well articulated by the various courts.

\(^{109}\) See, *Veno*, supra, note 108 at 426 where the court concluded "absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the nature of the grievance, is a clear example of arbitrary conduct."
CHAPTER III

Union Liability For Simple Negligence in Canada

In those provinces where the union duty of fair representation has been codified, the weight of authority holds there is no room for action against a union arising out of ordinary or simple negligence.\(^\text{110}\) This seems to be the inevitable conclusion given the relatively clear statements from the Supreme Court of Canada in *Gagnon, Gendron,* and *Centre Hospitalier.* As a result of codification, courts in those jurisdictions were provided with little, if any, opportunity to consider the relationship between unions and their members. This naturally resulted in a halting of the evolution and refinement of the duty of fair representation that one would otherwise expect from those courts. However, an analysis of the history of the duty before codification, an examination of the jurisdictional issues decided by the courts, and pronouncements of lower courts across Canada leave room for argument that in at least the three common law Provinces

where the duty has not been codified (New Brunswick, Nova Scotia and Prince Edward Island), a union may be liable for mere negligence. Also, in Newfoundland, where at least part of the duty has been codified, there is strong judicial pronouncement in support of the position that a plaintiff has a claim based upon simple negligence where a critical job interest is at stake.\textsuperscript{111}

In \textit{Corporation de Batteries Cegelec}\textsuperscript{112}, Briere, J. suggested that simple negligence could constitute serious negligence as contemplated by paragraph 38(b) of the \textit{Quebec Labour Code}\textsuperscript{113}, the English version of which reads as follows:

"A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members."

Briere, J. in anticipation of facts similar to those in \textit{Haley}, where simple negligence denied an employee her right to grieve dismissal, concluded as follows at page 335:

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\item[\textsuperscript{112}] [1978] T.T. 328.
\item[\textsuperscript{113}] R.S.Q. 1977 c. C-27; now section 47.2.
\end{itemize}
"In my understanding, the legislator here has not wanted, despite the ambiguity of the text which seems, in effect, to require proof of serious negligence, to limit this recourse to the point where an employee will be, for example, definitely deprived of his right to arbitration of his grievance if he is able to establish only simple negligence by his union ... I do not hesitate to say that a slight error (for example, a simple act of forgetting) which brings about the loss of recourse to arbitration capable of saving an employee's employment, truly constitutes serious negligence."

The case for liability in ordinary negligence was accepted by the trial division of the British Columbia Superior Court in Stoyles v. United Steelworkers Local 7619\(^{114}\) and Mulherin v. United Steelworkers Local 7884.\(^{115}\) In both Stoyles and Mulherin the superior court concluded that an action lies against a trade union brought by a union member in simple negligence. In reaching their conclusions both the Court of Appeal in Stoyles and the superior court in Mulherin held that section 7 of the British Columbia Labour Code\(^{116}\), being the codification of the union duty of fair representation, did not oust the jurisdiction of the court to consider a claim of negligence against a union by a member. In order to reach that

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\(^{114}\) (1984), 55 B.C.L.R. 107 (C.A.); leave to appeal to the S.C.C. refused 57 N.R. 156.

\(^{115}\) Supra, note 110.

\(^{116}\) R.S.B.C. 1979, c. 212.
conclusion, it was essential to find that ordinary or mere negligence did not form part of the codification of the duty of fair representation. Interestingly, the lawyer for the union in *Mulherin* argued that mere negligence was caught by the codification set out in section 7. This approach was necessary in order to make the argument that the *Labour Code* was a complete code and there was no jurisdiction left with the courts in relation to the duty. This argument was rejected by the trial judge in *Mulherin* who stated as follows in concluding he did have jurisdiction:

"It goes without saying of course, that the legislature could have included any desired level of negligence in section 7(1) but it did not do so and I do not think I should read that concept into the section. It follows that an allegation of common law negligence in a case such as this may be tried in this court and there will be an order accordingly." (emphasis added)

The British Columbia Court of Appeal overturned the trial decision in *Mulherin* on the basis that the codification ousted the jurisdiction of the courts. It overturned its earlier decision in *Stoyles* since that decision pre-dated *Gendron*. It concluded the only duty imposed upon a union is to act without hostility or discrimination, avoid arbitrary conduct and to exercise its discretion in good faith. Following Gendron, it concluded there is no common law duty outside the duty adopted in *Fisher v. Pemberton* which
was now codified.

In spite of the decisions in *Gagnon* and *Gendron*, courts in New Brunswick, Nova Scotia and Newfoundland appear willing to impose liability upon a trade union for mere negligence in relation to the representation of its members.

In *Knight et al v. Canadian Brotherhood of Railway, Transport and General Workers et al*\(^{117}\) several employees who were members of the defendant union brought action in the trial division of the Court of Queen’s Bench for damages, fraud, deceit and misrepresentation, breach of fiduciary duty and breach of the duty of fair representation.

The legislative framework governing the parties was the *Canada Labour Code*.\(^{118}\) At the relevant time, section 136.1 of the *Canada Labour Code* setting out the duty of fair representation had been enacted. Also, the trial and appeal courts had the benefit of the decisions in *Fisher v. Pemberton, Gagnon, Mulherin, and St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219*.

The defendant union brought a motion before Russell, J. of the Court

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\(^{118}\) R.S.C. 1970, c. L-1, as amended.
of Queen's Bench seeking to strike out the claim. It alleged the *Canada Labour Code* ousted the common law jurisdiction of the Court of Queen's Bench. The trial judge concluded the claims did not arise out of rights created by the collective agreement; the court was therefore clothed with jurisdiction.

In the Court of Appeal, Russell, J.'s judgment was upheld to the extent that claims alleging fraud, deceit, misrepresentation and breach of fiduciary duty could proceed before the trial division of the Court of Queen's Bench. The Court of Appeal did, however, allow the appeal to the extent that it concluded the courts had no jurisdiction to address the claim for breach of the statutory duty of fair representation. In *Knight* no claim had been made alleging simple negligence. The decision is, however, significant in that the Court approved other common law claims against a union in spite of the codification of the duty of fair representation.

The liability of a union for the tortious actions of its agents was also the subject of the court action in *David Duke v. The Brotherhood of Locomotive Engineers*.119 The plaintiff brought action against his union alleging it was negligent in its representation of him in relation to an

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arbitration hearing held to consider the question of his dismissal by the
Canadian National Railway Company. As in Knight, the provisions of the
Canada Labour Code applied, complete with the codification set out in
section 37 (previously 136.1).

At trial, Creaghan, J. carefully analyzed the decision of the Supreme
Court in Gagnon and concluded that a claim in simple negligence against a
trade union by a union member for matters arising out of the collective
agreement is actionable in New Brunswick. This even where the duty has
been codified by the Canada Labour Code. I can do no better than to quote
extensively from Judge Creaghan’s decision in explaining why a trade union
operating in today’s environment should be liable for the negligent
representation of one of its members. His Lordship opined as follows:

"The law is clear that a duty of fair representation exists at
common law. The standard of care inherent in the duty of fair
representation has been definitively set out by the Supreme
Court of Canada in Canadian Merchant Service Guild v.
(4th) 641. This standard is stated by Chouinard, J. at page 654
D.L.R. of Gagnon and is well summarized in the headnote as
reported in that case as follows:

'A union has a duty of fair representation arising
out of its exclusive power to act as bargaining
agent for all employees in a bargaining unit.
Where a union has the right to decide whether to
take a grievance to arbitration, the union's
discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee and the legitimate interest of the union. The union’s decision must not be arbitrary, capricious, without serious or major negligence and without hostility towards the employee.’

The legislature, subsequent to the time the cause of action arose in Gagnon but prior to the decision by the Supreme Court of Canada, established fair representation as a statutory duty in section 136.1 of the Canada Labour Code, R.S.C. 1970, c.L-1... The present section 37 (formerly section 136.1) of the Canada Labour Code sets out the statutory duty in the following terms:

37. Duty of fair representation

A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.’

The Court of Appeal of British Columbia, relying on the analysis of the evolution of the duty of fair representation set out in Gagnon, has clearly determined that there is no duty of care on which a claim for negligence may be made by a member against his union other than that embraced by the duty of fair representation. Bowcott v. Canadian Brotherhood of Railway, Transport and General Workers, Local 400 et al (1988), 29 B.C.L.R. (2d) 198.

The corollary of the British Columbia decision in Bowcott is
that since the duty of fair representation is now a statutory duty embodied in the Canada Labour Code, in matters such as the instant case where the Code applies, exclusive jurisdiction to determine whether a breach of such a duty has occurred lies with the Canada Labour Relations Board and that the Supreme Court of British Columbia has no jurisdiction to hear a claim for negligence by a member against its union with respect to the standard of care exercised in the course of representing a member’s interests."

At this point in the judgment we see that Creaghan, J. has a clear grasp of the issue confronting him. He is very cognizant of the distinction between union actions arising out of its representation of a member vis-a-vis the employer and other circumstances that might arise. Should he conclude a standard of mere negligence applies to a union’s representation of its members in the face of codification he would be interpreting Gagnon differently than did the British Columbia Court of Appeal in Bowcott, supra.

His Lordship continues:

"The New Brunswick Court of Appeal in Canadian Brotherhood of Railway, Transport and General Workers et al v. Roger Knight et al ... adopted a less restrictive position. Although clearly Knight holds that a breach of the duty of fair representation as defined by the Canada Labour Code falls within the exclusive jurisdiction of the Canada Labour Relations Board, at the same time the New Brunswick Court of Appeal found that there are other tortious acts founded in common law which are independent of a statutory duty of fair representation
and for which an action may be properly brought within the jurisdiction of the Court of Queen’s Bench of New Brunswick by a member against his union with respect to the manner in which it represents his interests.

The causes of action are limited to those other than a breach of the statutory duty of fair representation as set out in section 37 of the Canada Labour Code. In this category the court allows claims alleging fraud, deceit, misrepresentation and breach of fiduciary duty but does not suggest that the specified causes of action are an exhaustive list.

While the New Brunswick Court of Appeal in Knight does not specifically reference negligence as one of the tortious causes of action that may be brought, its apparent approval of the trial judge’s remarks that the specified causes of action were "among others" gives rise to the inference that it has read Gagnon less restrictively than was done by the Court of Appeal of British Columbia in Bowcott. (emphasis added)

I have concluded with some hesitation, based on the decision in Knight, that although Gagnon does include "serious or major negligence" within the context of the duty of fair representation, the law in New Brunswick allows a further cause of action based on a duty of care by which a union must act in a reasonably prudent and diligent manner in the representation of its members. (emphasis added)

This duty of care is in addition to and not embraced by the statutory duty of fair representation set out in the Canada Labour Code which provides only that a union shall not act in a manner that is "arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them". Knight, holds that there are other obligations of conduct placed upon a union outside the statutory duty of fair representation and the duty of fair representation founded in common law stated in Gagnon, seen in the context that a
"union's decision must not be arbitrary, capricious, discriminatory or wrongful". (emphasis added)

Even with the opening provided by Knight, I am aware that the conclusion that a common law duty of care exists giving rise to a claim for negligence against a union by a member runs counter to the weight of authority.

It is clear that Canadian labour board jurisprudence has taken the position that negligence does not constitute a breach of the duty of fair representation and that no further duty exists. It is also clear that labour board jurisprudence has struggled with the concept of negligence as it should apply to union responsibility in the representation of its members."

After noting that his decision goes against the weight of authority, Creaghan, J. then explained why the earlier considerations used to justify a lower standard were no longer relevant. He attacks certain assumptions that are no longer relevant in today's society. He states:

"It must be recognized however that the duty of fair representation both as defined in statute and as developed at common law in Gagnon was limited by certain assumptions that may not be as valid as they once were.

To see serious or gross negligence as arbitrary but to see "simple" negligence as acceptable does not seem logical in the environment of today's labour relations. First it imposes a subjective standard that is bound to produce varying ad hoc decisions on whether negligent conduct is sufficiently serious conduct to be considered arbitrary. More importantly it is based on the premise that union officials who represent their members should not be held to a higher duty than that of the duty of fair representation."
Today union officials are well trained in their responsibilities and at the higher levels, where the responsibility for processing grievances such as the instant case lies, they occupy full-time positions and have ready access to information and expertise. Union officials for the great part cannot be seen as unsophisticated volunteers. The facts in this case, and the manner of their testimony at trial, clearly indicates that the union representatives responsible in the case were knowledgeable and competent in dealing with the rights of their members.

Nor can it be realistically argued that the remedy for negligent representation lies in the threat that representatives will be replaced by the membership. The politics of union organization is not that simple and further it offers no opportunity for relief to the employee who has suffered as a result of negligent representation.

It is no longer realistic to see a union in the context of some fraternal organization where unsophisticated officers speak on behalf of their membership. A mature union, such as the defendant in this case, is a highly organized and professionally managed institution well able to undertake its responsibility that being the exclusive representation of the economic interests of those it represents.

It is true that the standard of care must not be too demanding. Union representatives should not be expected to act as lawyers. In my view, however, I can see no reason why the standard of reasonableness cannot be applied nor why union representatives should not be held accountable for negligence just as would any person who accepts the exclusive right and responsibility to represent the rights of others and upon whom such persons rely for the protection of their rights. To say that a union must act in a reasonably prudent and diligent manner is not too high a standard given the reality of the development of union representation today.
Accordingly, I have decided that a union’s breach of a duty to act in a reasonably prudent and diligent manner gives rise to an action in negligence which falls outside the exclusive jurisdiction of the Canada Labour Relation’s (sic) Board and which may be brought in the Court of Queen’s Bench of New Brunswick."

Clearly, according to Mr. Justice Creaghan the modern, well-trained union executive should not benefit from the lesser standard imposed upon it that would require a member to prove serious or gross negligence in order to found a cause of action against the union.

A third case from New Brunswick also lends support to the proposition that a union is liable for negligent acts committed against its membership, whether or not those acts constitute serious or major negligence. In *Gerald Dutcher v. Construction and General Labourers’ and General Workers (Construction, Commercial, Industrial), Local Union 1079 and Labourers’ International Union of North America*\(^{120}\) the Court was not confronted with any statutorily defined duty of fair representation as was the case in *Duke* and *Gendron*. The court found itself in the same position as the Supreme Court in *Gagnon*. That is, it could define a standard of care in the fused court of law and equity in a jurisdiction where the union’s duty had not been codified. In *Dutcher*, the Court had the benefit of the

\(^{120}\) (1990), 110 N.B.R. (2d) 368 (Q.B.D.)(T.D.).
decisions of the Supreme Court of Canada in *Gagnon, Gendron*, and *Centre Hospitalier Regina Ltee v. Prud’homme*.

After carefully analyzing the various decisions of the Supreme Court of Canada touching on the issue of the union duty of fair representation as well as those of his fellow jurists in New Brunswick in *Knight* and *Duke*, McIntyre, J. concluded that a claim based upon negligence could be brought by a union member against his or her union. He concluded that the union has a responsibility to act in a reasonably prudent and diligent manner in the representation of its members.

The case for a more stringent standard upon trade unions adopted by the courts in New Brunswick has recently found favour in the superior courts of Saskatchewan and Newfoundland.

In Saskatchewan the common law duty of fair representation was codified by s. 25.1 of the *Trade Union Act*121. In *Moldowan v. Saskatchewan Government Employees' Union, et al*122 the plaintiff's grievance was dismissed by reason of the defendant union’s delay in constituting the arbitration board. The plaintiff brought action against the

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121 R.S.S. 1978 c. T-17 as amended.

122 *Supra*, note 110.
union alleging negligence or breach of the duty of fair representation under the *Trade Union Act*. With respect to the claim in negligence, the court concluded that since it was not clear whether negligence was covered under the statutory definition of fair representation, the jurisdiction of the court in the area of negligence was not ousted.

In concluding that the plaintiff could proceed before the superior court with an action based upon breach of the union duty of fair representation in this case, the court observed that the remedies available under the Saskatchewan *Trade Union Act* were not as all inclusive as those available under the *Canada Labour Code* which were considered in *Gendron*. Schiebel, J. noted that at page 1319 of her decision in *Gendron*, L’Heureux-Dubé, J. acknowledged the limits of her decision in the following terms:

"A necessary caveat to this conclusion is that, while the common law duty will be inoperative in a situation where the terms of the statute apply, a different conclusion may be warranted in a case where the statute is silent or by its terms cannot apply."

This caveat was important to the trial judge as he compared the remedial powers available under the *Trade Union Act* of Saskatchewan with those available under the *Canada Labour Code*.

Since the Saskatchewan Labour Relations Board did not have the
power to award damages, it followed that the jurisdiction of the courts was not ousted by reason of necessary implication. The Legislature of Saskatchewan had not expressed an intention to oust the jurisdiction of the courts with irresistible clarity.\textsuperscript{123}

Not only did Scheibel J. conclude an action lay in the superior court in Saskatchewan for breach of the duty of fair representation, he also concluded an action lay grounded upon negligence other than that caught by the ambit of the duty of fair representation. He was of the view the Legislature had not stated with irresistible clarity that common law negligence was subsumed by the statutory duty of fair representation. Since it was not, the jurisdiction of the court in the area of negligence had not been ousted.\textsuperscript{124}

In \textit{Moldowan} the union appealed. In the Saskatchewan Court of Appeal\textsuperscript{125} decision, the trial judge's incisive reasoning was, with respect,

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subjected to an erroneous application of the facts and the law set out in *Gendron*. The learned justices concluded that since the *Canada Labour Code* ousted the jurisdiction of the common law courts, so too must the Saskatchewan *Trade Union Act*. This, in spite of the fact the duty of fair representation is described differently in both statutes\(^\text{126}\); and, more significantly, in spite of the fact that the *Canada Labour Code* made widesweeping remedies available to the Canada Labour Relations Board, including the power to award damages, which as noted, *supra*, were not then available to the Saskatchewan Labour Relations Board.

Bearing in mind that the *Gagnon* and *Gendron* cases define the duty of fair representation and do not purport to determine whether a claim lay in ordinary negligence against a union by a union member, it is troubling that a Court possessed of inherent jurisdiction would so willingly abdicate its jurisdiction in the field of ordinary negligence. After referring to his understanding of the common law duty of fair representation, Jackson, J. A. concluded:

"Thus the common law duty has, as part of its content, a prohibition against serious or major negligence. There are not then two causes of action: the common law breach of the duty of fair

\(^{126}\) See Appendix "A", *infra*.\]
representation and negligent representation. Negligence is subsumed in the common law duty to the extent of serious or major negligence."

One must ask "Why?". What is there about a trade union that is by law granted the capacity to sue and be sued that makes it immune from an action in negligence?

The Court of Appeal in Moldowan, answered that question, in part, by relying upon the decision of the Supreme Court of Canada in St. Anne Nackawic Pulp & Paper Co. v. Canadian Paperworkers' Union, Local 219, supra. As noted earlier, the St. Anne Nackawic case was also relied upon by L'Heureux-Dubé, J. in Gendron to justify the ousting of the jurisdiction of the common law courts in the face of the legislative provisions of the Canada Labour Code.

With respect, the reliance upon the St. Anne Nackawic case by the Supreme Court of Canada and the Saskatchewan Court of Appeal to deny citizens access to the courts for wrongs committed by unions against members is not well-founded. St. Anne Nackawic examined the jurisdiction of the courts to deal with various wrongs committed during a wild-cat strike. The strike was contrary to the terms of the collective agreement which provided that there shall be no strikes or lock-outs during its term. The
employer sought to sue the union for damages. The court held that the strike constituted a violation of the terms of the collective agreement. Pursuant to section 55 of the *Industrial Relations Act*\(^{127}\) of New Brunswick, all disputes concerning the interpretation or application of the collective agreement must be resolved by binding arbitration. The jurisdiction of the Court had thereby been ousted.

In the aftermath of *St. Anne Nackawic* it has been generally concluded that in the master-servant relationship, all matters contemplated by a collective agreement between the employer and employees must be dealt with by arbitration. In the face of legislation requiring all disputes be settled by binding arbitration, such a conclusion makes abundant good sense.

However, to use that case to attempt to resolve intra-union problems, is, with respect, erroneous. Consider the features that distinguish the facts in *St. Anne Nackawic* from those in *Moldowan*:

(i) in *St. Anne Nackawic* the *lis* was between the employer and employees; in *Moldowan* the *lis* was between a union and a member served by it;

(ii) in *St. Anne Nackawic* a written contract existed between the

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two litigants; in *Moldowan* no written contract existed between the two litigants;

(iii) in *St. Anne Nackawic* a strongly worded section of the *Industrial Relations Act* provided that all disputes between the litigants arising out of the terms of the collective agreement must be resolved by binding arbitration; in *Moldowan* no provision of the *Trade Union Act* provided that disputes between a union and its members must be resolved by the Labour Relations Board;

(iv) in *St. Anne Nackawic* the arbitrator possessed authority to award damages; in *Moldowan* the Labour Relations Board had no authority to award damages to the employee;

(v) in *St. Anne Nackawic* there was no fiduciary duty of any kind between the litigants, in fact, they were adversarial; in *Moldowan* the employee relies upon the union to protect his or her interest and is paying a fee by way of union dues to ensure that happens;

(vi) in *St. Anne Nackawic* a bargaining relationship existed between the two parties. Legislation is written under the assumption
they both come to the bargaining table with strength; in *Moldowan* no bargaining relationship exists between the litigants. The union member is totally at the mercy of the union.

Based upon the above analysis, it is submitted that any effort to apply the principles of *St. Anne Nackawic* to the situation where an employee is seeking to redress a perceived wrong against the union is ill-conceived.\(^\text{128}\) If the Parliament of Canada or the Legislatures of the Provinces wished to bar actions against unions in such circumstances, there is substantial precedent for the appropriate statutory language. The approach of the Saskatchewan Court of Appeal in *Moldowan*, is, with respect, the result of blind adherence to perceived precedent without a careful analysis of whether or not the cases relied upon are truly precedent-setting to the case under review. As noted, even L’Heureux-Dubé, J. in *Gendron* urged caution in applying her decision to other cases where the statute might read differently.

The *St. Anne Nackawic* case was recently applied by the Supreme Court of Canada in *Weber v. Ontario Hydro*\(^\text{129}\) and *New Brunswick v.*

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Can it be said that those cases lend support to the proposition that relief in simple negligence is unavailable to a union member who makes a claim against his union? I would suggest to the contrary. Weber actually assists in a small way those who argue a union should be liable for simple negligence arising out of a union’s representation of its members.

In Weber v. Ontario Hydro, the employer believed the plaintiff to be malingering in relation to sick leave claims. The employer engaged a private investigator who obtained access to the employee’s home. As a result of the investigation the employee was terminated. His union filed a grievance which was eventually settled prior to arbitration. However, in addition to the filing of the grievance, Mr. Weber commenced a court action in which he claimed damages for the torts of trespass, nuisance, deceit and invasion of privacy. He also sued for breach of his section 7 and 8 rights under the Canadian Charter of Rights and Freedoms. At trial the employer’s motion to dismiss was granted on the basis that the dispute arose out of the collective agreement. The Supreme Court of Canada agreed, citing St. Anne Nackawic where Estey, J. concluded in part as follows:

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"This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of action in the courts at common law."\(^{132}\) (emphasis added)

With respect, nothing new flows from Weber or O'Leary that would oust the jurisdiction of the courts in matters relating to claims in simple negligence by a member against his or her union.

In Weber, the Court accepted the exclusive jurisdiction model which holds that if the difference arises from the collective agreement, the claimant must proceed by arbitration and the Courts have no power to entertain an action in respect of that dispute. There can be no overlapping jurisdiction. The Court also acknowledged it is impossible to categorize the classes of cases that fall within the exclusive jurisdiction of the arbitrator.

Interestingly, in identifying those areas in which the courts lack jurisdiction McLachlin, J. writing for the majority at page 602 cited Butt in support of her position that only disputes "expressly or inferentially arising out of the collective agreement are foreclosed to the courts."\(^{133}\) As will be seen,

\(^{132}\) Supra, note 129 at 599 (D.L.R.).

\(^{133}\) Supra, note 129 at 603.
infra, in Butt, L. D. Barry, J. concluded that an action lay at common law in negligence in spite of Newfoundland’s effort at codifying the duty of fair representation. The apparent acceptance of the decision in Butt would appear to run counter to the interpretation given to the Supreme Court of Canada in such decisions and Moldowan and Mulherin. In fact Moldowan specifically rejected the approach taken in Butt. Yet, as we have seen, supra, the Supreme Court denied leave to appeal in Moldowan.

In the event the apparent acceptance of Butt, following its rejection in Moldowan, is not confusing, consider the following excerpt from Mme. Justice McLachlan at page 23 of Weber:

"This does not mean that the arbitrator will consider separate "cases" of tort, contract or charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty or of the Charter." 134

I fail to understand or appreciate why an arbitrator would be concerned about whether a common law duty had been breached. Assuming an arbitrator determined he or she had jurisdiction it would appear there is

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134 While arbitrators right to determine breaches of Charter rights was confirmed in such cases as Douglas/Kwantlen Faculty Association v. Douglas College (1990), 77 D.L.R. (4th) 94 I am unaware that arbitrators determine breaches of common law duties.
no room for consideration of common law duties. I know of no common law duty enforceable by an arbitrator. If he has no jurisdiction to enforce a common law remedy, then why would he or she find it necessary to "have regard" to the issue of whether or not a common law duty had been breached? Furthermore, the thrust of *St. Anne Nackawic, Gendron* and *Weber* was to deny access to common law remedies.

In those provinces where there is a statutory duty of fair representation, there is no equivalent to section 55 of the New Brunswick *Industrial Relations Act* or section 45 of the *Ontario Labour Relations Act* requiring all disputes between the union and its members be governed by a dispute resolution process separate from the courts. It should not be presumed that even in those jurisdictions where the duty of fair representation has been codified, labour legislation is a complete statutory scheme designed to govern a *lis* between a union and one of its members.

If the labour legislation enacted in each Province is to be a complete scheme governing labour relations, it could be argued in the extreme that an employer, upon being assaulted by an employee while at work over a dispute about work assignment, would have no right to sue for assault.

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135 R.S.O. 1990 c. L.2, as amended.
Could it not be argued based upon a very strict interpretation of Weber and St. Anne Nackawic that the employer could fire the employee and grieve the assault? But for the employee being at work and governed by the employment relationship, the assault would not have occurred. Such an analysis is no more unreasonable, nor any less plausible than a reading of St. Anne Nackawic that would apply it to intra-union problems when that case's sole focus was on the employer-union relationship and the interpretation of the New Brunswick Industrial Relations Act, that, on its face, did appear to oust the jurisdiction of the courts.

It is acknowledged that the weight of judicial authority holds there is no actionable tort, regardless of the standard to be applied, against a union for breach of the duty of fair representation where that duty has been codified.¹³⁶ However, each statute should be carefully examined for purposes of determining the exact wording of the codification and the remedies available, if any. Only after such an examination is made can one truly opine whether the jurisdiction of the courts is ousted. This approach is consistent with the instruction from McLachlin, J. in Weber, supra.

The analysis adopted by L.D. Barry, J. in Butt v. United Steelworkers

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¹³⁶ Supra, note 110.
of America et al\textsuperscript{137} which appears to have the approval of the Supreme Court in Weber, is the preferred approach. In that case Justice Barry conducted a very careful analysis of the language of section 126 of the Newfoundland Labour Relations Act,\textsuperscript{138} that being the Newfoundland codification of the duty of fair representation. Justice Barry considered the following factors to be relevant in concluding that the jurisdiction of the common law courts was not ousted by s. 126:

1. \textit{Gagnon} was not a negligence case and the reference to negligence was not necessary for that decision;

2. conduct falling short of bad faith is not necessarily covered by s. 126;

3. \textit{St. Anne Nackawic} is distinguished because the Newfoundland Labour Relations Board is not given exclusive jurisdiction over "simple negligence";

4. because the Newfoundland Labour Relations Act does not deal with "simple" negligence cases it is not a "code governing all aspects of labour relations".


\textsuperscript{138} S.N. 1977, c. 64, as amended.
In *Bunt* the court found the union was liable in simple negligence for having missed a limitation period. It did not meet its duty to act in a reasonably prudent and diligent manner.

The Nova Scotia courts appear to have adopted an approach similar to that taken in New Brunswick and Newfoundland. In *Nova Scotia Union of Public Employees, Local 2 v. Kendall et al*\(^{139}\) Kendall sued his employer and his union seeking return of insurance premiums improperly paid by him. Clearly, the Court lacked jurisdiction to deal with the claim against the employer given the matter was something that could have been dealt with through the arbitration process. However, both at trial and in the Nova Scotia Court of Appeal, the Courts recognized Kendall’s right to sue his union in negligence.

The issue of a member’s right to pursue a claim based upon "mere negligence" was squarely placed before the Court. At trial, Stewart, J. set out the union’s position:

"Having undertaken due diligence and acted within its jurisdiction as set out in the Constitution, the union submits it should not be subject to a claim

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against it on the basis of ‘mere negligence’.\textsuperscript{140}

The court rejected that contention and concluded there was no basis upon which to limit the union’s liability to circumstances of gross negligence.

The Nova Scotia Court of Appeal upheld the trial court’s decision in \textit{Kendall}. However, it did qualify its decision by acknowledging that the dispute between the union and Kendall did not arise out of any collective agreement with the employer. The policy for which premiums were erroneously paid was arranged exclusively by the union.

Given the development of unionization in the past 50 years, the conclusions reached by Creaghan, J. in \textit{Duke}, McIntyre, J. in \textit{Dutcher} and Barry, J. in \textit{Butt} make eminently good sense. In the event the Supreme Court of Canada was attempting to limit wrongs for which a member could sue his union out of some sense of benevolence toward the trade union movement, it was acting upon a misunderstanding of the modern trade union. Modern unionism benefits from sophisticated organization, national offices with regional representatives, full or part-time staff, lawyers on retainer and organizers who are also paid employees.

\textsuperscript{140} \textit{Supra}, note 139 at 59 (N.S.R.).
In the event the Supreme Court of Canada was labouring under any misunderstanding, it is submitted that misunderstanding is fostered in large part by the specialized tribunals designed to deal with labour relations. Oftentimes those boards have taken and continue to take a paternalistic attitude as it relates to union matters. The attitude that the boards must be the keeper and protector of the trade union movement is not stated any more clearly than in the *Haley* case. Consider, for example, the following excerpt from the majority decision:

"Our view is that in 1978 when Parliament enacted the duty of fair representation it must be taken to have viewed unions as participatory entities which, although vested with exclusive bargaining authority for certain units of employees, must also act as the instruments to foster, preserve, and further the laudable purposes expressed in the Preamble. They do this in a social and economic context where a lack of funding, education, staffing and participation is a real, every day fact of life."\(^{141}\)

A careful review of the case does not demonstrate any evidence of underfunding or lack of staff. Further, there was no evidence called demonstrating the degree of volunteerism or democracy in the union. Such conclusions made on the basis of misplaced judicial notice form the basis upon which the labour boards and some courts seem to have defined the

\(^{141}\) *Supra*, note 66 at 509 (C.L.R.B.R.).
duty of fair representation. To adopt such an approach in the nineties is unrealistic.

In the current economic climate, there are few organizations that would admit to being adequately financed and adequately staffed. Based upon a review of fifteen trade unions operating in the Province of New Brunswick, only two used exclusively volunteer help. The other thirteen hire professionals whose tasks include organizing, managing collective agreements and filing grievances.142

In *Haley* the Board also suggested that unions are extremely democratic. Some may not agree with that suggestion. There is not one single jurisdiction in Canada that requires a secret ballot on all contract offers. Until very recently, in New Brunswick at least, two major trade unions took the position that members charged with violating the union’s discipline code could not be represented by the lawyer of their choice. Is

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that being extremely democratic?\textsuperscript{143}

Another erroneous argument in \textit{Haley} which the Board uses to justify imposing a standard of serious or major negligence before a union can be found liable for breach of the duty of fair representation is that an employee has greater recourse under the \textit{Code} than he or she did before the courts.

At page 510 (C.L.R.B.R.) the majority in \textit{Haley} opined:

"It may be said this result (major negligence requirement) is unfair because it leaves the individual with no recourse and the union unaccountable for its wrong. This is true but overlooks that in the absence of section 136.1 the individual had less recourse against the union or employer."

With respect, the statement that in the absence of section 136.1 (now section 37) of the \textit{Canada Labour Code} an individual had less recourse against the union is simply not accurate. The courts, possessed of inherent jurisdiction, starting with \textit{Fisher v. Pemberton} and later in \textit{Gagnon}, were quite prepared to recognize a remedy for an aggrieved union member. Given the fiduciary nature of the relationship that remedy could include an order that a matter proceed to arbitration. We have seen, quite ironically, that codification of

the duty has hindered courts who are attempting to protect union members from negligent acts of their union executive.\textsuperscript{144}

Finally, even if this latter argument is true, it is of little solace to a dismissed employee who has lost the right to grieve his dismissal that several years earlier he or she may have been without a remedy.

There is no doubt that labour board decisions have had a serious impact upon the Supreme Court of Canada as it struggled with the definition of the appropriate standard to impose in cases of alleged unfair representation. This is understandable given the varying responses of the Legislatures and Parliament after the decision in \textit{Fisher v. Pemberton}.

\textsuperscript{144} See, for example, trial decisions in \textit{Mulherin} and \textit{Moldowan, supra}, at note 110.
CHAPTER IV

Union Duty Of Fair Accommodation

We have seen in the past quarter of a century the courts and legislators develop standards by which unions are required to conduct themselves. Those standards are variously enforceable before labour tribunals and the courts. In addition to the union’s duty toward its members flowing from labour legislation, fiduciary relationships, neighbourliness principles, and contract law, trade unions are also subject to human rights legislation that has been implemented in every Canadian jurisdiction.

Each human rights statute in Canada prohibits a trade union from discriminating with respect to union membership. Although the protected classes vary from Province to Province, it is generally accepted that a union cannot discriminate because of an individual’s race, religion, sex, colour, et cetera. The recent development of the union duty to accommodate

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provides increased statutory protection to union members in all provinces and thereby becomes an integral part of the context within which the duty of fair representation will continue to develop in the Maritime Provinces.

While employer violations of human rights statutes have been the subject of board hearings and court proceedings for many years, it has only been recently that unions find themselves the subject of complaints before provincial and federal human rights boards. These complaints are often the result of dissatisfaction with the employer’s action or lack of action in situations where collective agreements entered into by the union and the employer have a negative impact upon a particular religious or ethnic group that is not felt by the majority. What has become known as adverse effect discrimination flows from a situation where an employer, presumably with the concurrence of the union, makes a rule or signs a collective agreement in all honesty, for sound economic and business reasons, with absolutely no intention to discriminate on the basis of one of the prohibited grounds. However, if in the course of implementing or enforcing that rule, someone protected by a prohibited ground of discrimination is negatively affected, that person or group suffers from what has become known as adverse effect
Where a person is the victim of adverse effect discrimination, the human rights tribunals have concluded there is a duty to accommodate that individual. Any analysis of the duty to accommodate must commence with the decision of the Supreme Court of Canada in *Re Bhinder and C.N.R. Co.*\(^{147}\) Bhinder, a practising Sikh, was required by his religious tenets to wear a turban and no other head covering. The employer required he wear a hard hat on the job site where he worked as a maintenance electrician. When the complainant refused to wear a hard hat, he was dismissed. The employer claimed the hard hat rule was a *bona fide* occupational qualification and there was therefore no discrimination. Bhinder complained to the Canadian Human Rights Commission alleging discrimination by reason of his religion. The Commission appointed a human rights tribunal which held hearings and concluded that Bhinder should be awarded $14,500 in compensation and reinstated to his position should he so desire.

Canadian National Railway sought judicial review before the Federal


Court of Appeal pursuant to section 28 of the *Federal Court Act*.\(^{148}\) The Federal Court of Appeal concluded that the requirement that one wear a hard hat while at work was not a discriminatory practice within the meaning of the *Canadian Human Rights Act*. It held that only intentional discrimination is forbidden by the *Canadian Human Rights Act*.\(^{149}\) The Supreme Court of Canada disagreed and concluded that unintentional acts, otherwise lawful that discriminate against individuals are violative of the *Human Rights Act*.\(^{150}\) Adverse effect discrimination and direct, intentional discrimination are both to be guarded against in Canadian society.

Having found that Canadian National had discriminated against Mr. Bhinder, the Supreme Court of Canada then had to deal with Canadian National Railway’s argument that the wearing of a hard hat was a bona fide occupational qualification pursuant to paragraph 14(a) of the *Human Rights Act*. The majority agreed with the submission by Canadian National and concluded as follows:

"... if a working condition is established as a *bona fide* occupational requirement, the

\(^{148}\) R.S.C. 1970, c.10 (2nd Supp.).


\(^{150}\) *Supra*, note 147 at 501.
consequential discrimination, if any, is permitted - or, probably more accurately - is not considered under s. 14(a) as being discriminatory."\textsuperscript{151}

Because the courts concluded the wearing of a hard hat was a \textit{bona fide} qualification of the work \textit{Bhinder} was required to do, it did not consider the question of whether the employer owed \textit{Bhinder} a duty to accommodate him.

In \textit{Bhinder} the Supreme Court of Canada could have easily imposed a duty of reasonable accommodation upon the employer. The facts strongly supported such a conclusion, given the complainant could have been assigned to other duties as a maintenance electrician. Instead, the court concluded that where a \textit{bona fide} occupational qualification is established there is no duty to accommodate the employee. This conclusion has been criticized by the authors of \textit{Employment Law In Canada}.\textsuperscript{152} As they point out, the complainant's duties were not unique, there was an ample supply of maintenance electricians and he could have been relocated to a non-hard hat area.

The \textit{Bhinder} decision contrasts with that of another 1985 decision of

\textsuperscript{151} \textit{Supra}, note 147 at 500.

the Supreme Court in *O'Malley v. Simpson Sears Ltd.* O’Malley, a Seventh Day Adventist, refused to work from sunset on Friday until sunset on Saturday. Full time clerks were required to work two Saturdays in a row in order to have the third off. As a result of O’Malley’s refusal, she was demoted to the position of part-time clerk which resulted in loss of employment benefits. The facts in *O'Malley* clearly constituted a case of adverse effect discrimination in that no rule was specifically formulated which prevented Seventh Day Adventists from obtaining employment or working full time. The employer had no malicious motive and there was no evidence of direct discrimination. The employer terminated O’Malley’s full time employment and reduced her to part-time hours.

O’Malley brought a complaint before the Ontario Human Rights Commission alleging discrimination based upon creed contrary to paragraph 4(1)(g) of the *Ontario Human Rights Code 1981.* Unlike the case in *Bhinder*, the employer could not allege the shift schedule was a *bona fide* occupational qualification since that defense was not then available for discrimination based upon creed.


As in Bhinder, a board of inquiry held O'Malley was the victim of adverse effect discrimination. Furthermore, the Board held the employer had a duty of reasonable accommodation to the employee. The Board dismissed the complaint in concluding the Commission had not established the employer acted unreasonably in its efforts to accommodate the employee.

As in the Federal Court of Appeal in Bhinder, the Ontario Court of Appeal in O'Malley concluded the Ontario legislation prohibited only intentional discrimination. The legislation did not prohibit adverse effect discrimination.\(^{155}\)

On appeal to the Supreme Court of Canada the four central issues were:

1. is unintentional discrimination that adversely affects an employee prohibited by the Ontario Human Rights Code 1981;

2. presuming such conduct is discriminatory within the language of the Code, is there a duty to accommodate the employee;

3. presuming there is a duty to accommodate, where does the onus lie, upon the Commission to prove the failure to accommodate or upon the employer to prove it made a reasonable effort to accommodate the employee; and

4. what is the nature of the duty to accommodate.

As in the development of the law with respect to the duty of fair representation, the Supreme Court of Canada drew upon the American experience. Citing with approval the American jurisprudence in *Greggs v. Duke Power Co.*\(^{156}\) the Court answered in the affirmative to questions 1 and 2, *supra*.

With respect to the third question raised above, the court concluded as follows:

"Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer’s business and without undue expense to the employer."\(^{157}\)

In its description of adverse effect discrimination, the Supreme Court of Canada also offered an interesting comparison between adverse effect discrimination and direct discrimination:


\(^{157}\) *Supra*, note 153 at 335.
"Cases such as this raise a very different issue from those which rest on direct discrimination. Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or one group, and it is the effect upon them rather than upon the general work force which must be considered. In such cases there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps toward that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, . . . short of accommodating steps on his own part . . . must either sacrifice his religious principles or his employment." ¹⁵⁸

With respect to the fourth question facing the Court in O’Malley, the Court concluded the onus is upon the employer to establish what steps, if any, were taken to accommodate the employee and, furthermore, at one point would additional steps cause "undue hardship" upon the employer.

Since the employer called no evidence on either issue before the Board of Inquiry, the Court allowed the appeal and ordered compensation be paid

¹⁵⁸ Ibid.
to Ms. O'Malley.

While there was never any doubt that the development of the concept of adverse effect discrimination in such cases as Bhinder and O'Malley applied with equal force to trade unions it was not until the decision in Central Alberta Dairy Pool v. Alberta Human Rights Commission¹⁵⁹ that the Supreme Court of Canada specifically made reference to trade unionism and the fact that the duty to accommodate might include modifications to collective agreements.

In Central Alberta Dairy Pool, an employee, Mr. Christie, became a member of the Worldwide Church of God. His religion forbade him from working on the Sabbath and other holy days, including Easter Monday. Although the employer had taken some steps to accommodate Mr. Christie in the past, that was not possible on Mondays given the onerous operational requirements of that day of the week. The employer advised Mr. Christie to attend work on Easter Monday or he would be fired. The employee failed to attend work and was terminated.¹⁶⁰

Mr. Christie filed a complaint pursuant to ss. 7(1) of the Individual’s


¹⁶⁰ There was some debate about whether Mr. Christie was a baptized follower of his faith. However, that debate is not relevant for purposes of this paper.
Rights Protection Act before the Alberta Human Rights Commission. The Board of Inquiry concluded Christie was the victim of adverse effect discrimination, which conduct was not saved by the *bona fide* occupational qualification defence. In both the Alberta Court of Queen's Bench and the Alberta Court of Appeal the courts concluded that regular attendance at the place of employment was a *bona fide* occupational qualification pursuant to subsection 7(3) of the Act and overturned the Board of Inquiry.

In the Supreme Court of Canada as in the courts below, taking the opportunity provided by *Bhinder*, the employer argued that the requirement to work on Easter Monday was a *bona fide* occupational qualification. It argued the courts were thereby precluded from considering whether the employer had made reasonable efforts to accommodate the employee. The employer argued, relying upon *Bhinder*, that given the establishment of a *bona fide* occupational qualification there was no duty to accommodate the employee. The Supreme Court of Canada, however, disagreed and reversed, in part, its decision in *Bhinder*. Madame Justice Wilson, speaking for the majority, concluded that the duty to accommodate exists whether or

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161 *Supra*, note 145.


not a *bona fide* occupational qualification has been established in cases of adverse effect discrimination. However, no such duty arises in cases of direct discrimination.\(^{164}\)

In other words, an employer may deliberately discriminate against an employee, successfully raise the *bona fide* occupational qualification defence and have no duty to accommodate the affected employee. However, the same employer who inadvertently discriminates against an employee and successfully raises the *bona fide* occupational defence does have a duty to accommodate. Ironically, the duty to accommodate arises where there is adverse effect discrimination and not direct and deliberate discrimination. Any question of compensation to those effected by direct discrimination ends with the conclusion there exists a *bona fide* occupational qualification.

The *Central Alberta Dairy Pool* decision is of extreme importance to the trade union movement given another conclusion made by Madame Justice Wilson. There, she attempts to define the extent to which parties (employers and trade unions) to collective agreements must accommodate employees adversely affected by an employer rule, whether or not a *bona fide* occupational qualification is established. Judge Wilson concludes that

\(^{164}\) *Supra*, note 159.
the duty to accommodate extends to the point of creating hardship, albeit not undue hardship. Some factors to be considered in determining whether or not there is undue hardship are the following:

"the financial costs to the firm, the magnitude of any safety risks, the degree to which collective agreements would be disrupted, the impact on the morale of employees, and the interchangeability of the work force and other facilities."\textsuperscript{165} (emphasis added)

Interestingly, the majority were quite willing to hypothesize about adjusting the terms of collective agreements but were unwilling to provide specifics concerning the extent to which employers and trade unions will be expected to go in accommodating employees.

With respect, the approach adopted by Sopinka, J. writing for the dissent in \textit{Central Alberta Dairy Pool} is the preferred one. He noted there is no distinction in Canadian human rights legislation between direct and indirect (or adverse effect) discrimination. That is, discrimination is discrimination, without qualification or distinction. Any question of a duty to accommodate could therefore be subsumed into a determination of whether or not a \textit{bona fide} occupational qualification is established.

As the law currently exists, regardless of whether or not a \textit{bona fide}

\textsuperscript{165} Note 159 at 521.
occupational qualification is established, a trade union can find itself jointly liable with an employer if it does not make sufficient effort to accommodate an employee adversely affected by the terms of a collective agreement. This was the situation faced by the Canadian Union of Public Employees, Local 573 in Central Okanagan School District No. 23 v. Renaud.

Renaud is effectively the first decision of the Supreme Court of Canada to address a trade union’s duty to accommodate, the extent to which it is expected to accommodate and the implications of accommodation upon free collective bargaining.

In Renaud, the Supreme Court of Canada had the opportunity to address the issue of the duty to accommodate arising from operation of the British Columbia Human Rights Act. It is also the first Canadian case to deal specifically with a union’s duty to accommodate.

Renaud’s religious beliefs forbade him from working from sundown on Friday night to sundown Saturday. He applied for and was successful in obtaining a position at Spring Valley Elementary School where he was required to work the 3 p.m. to 11 p.m. shift Monday to Friday. Renaud and


167 S.B.C. 1984 c. 22.
his pastor went to see the employer immediately after Renaud learned he had been successful in his job application. The employer agreed to accommodate Renaud’s request and was willing to alter the Friday evening shift. Such an alteration, however, would have been in clear contradiction to the terms of the collective agreement entered into between the employer and the union. At a meeting of the trade union, it was agreed that a policy grievance would be filed should the employer place any employee on a Sunday to Thursday shift.

Faced with opposition from the union, the employer left the shift schedule intact. The employer terminated Renaud when he failed to attend work on Friday evening.

Renaud filed a complaint against both the employer and the union with the British Columbia Council of Human Rights who upheld the complaint and ordered Renaud be reinstated and paid compensation. The employer and the union both sought judicial review. The British Columbia Court of Appeal, relying upon Bhinder, agreed with the lower court’s ruling that the requirement to work the Friday shift from 3 p.m. - 11 p.m. was a bona fide occupational qualification and rejected the appeal.

Mr. Justice Sopinka clearly stated the issues and the potential
implications of any decision the Court might make in the opening paragraph of his judgment. He cautioned as follows:

"The issue raised in this appeal is the scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union. While this duty has been recognized and discussed as it relates to employers ... little judicial consideration has been given to the question raised by the involvement of a collective agreement and a certified trade union. Is a trade union liable for discrimination if it refuses to relax the provisions of a collective agreement and thereby blocks the employer's attempt to accommodate? Must the employer act unilaterally in these circumstances? These are issues that have serious implications for the unionized workplace."168 (emphasis added)

Applying its decision in Central Alberta Dairy Pool, the court defined the duty resting on an employer as requiring measures short of undue hardship. Rather than define the duty in positive terms, the Court applied a negative definition. "Short of undue hardship" imports a limitation on the employer's obligation so that measures that occasion undue interference with the employer's business or undue expense are not required. Undue interference and undue expense are issues of fact to be determined by the trier of fact.

168 Supra, note 166 at 975.
Although no definition of undue interference and undue expense is proffered by the Court it does clearly reject the definition adopted by the Supreme Court of the United States in *Trans World Airlines Inc. v. Hardisen.*\(^{169}\)

That test holds that where an employer is required to incur more than minimal costs then an undue hardship is incurred. The "*de minimus*" test espoused by *Hardisen* was rejected in both *O'Malley* and *Renaud*.

The Supreme Court of Canada concluded the *de minimus* test would virtually remove any duty to accommodate. As a result of the decision in *Renaud* there are at least three components to the duty to accommodate in Canada:

1. more than negligible effort is required to satisfy the duty;
2. something less than undue hardship is required;
3. the employer and the union must go to "reasonable" efforts to accommodate and in each case "reasonableness" is a question of fact that will vary in the circumstances.

Significant about the *Renaud* decision is the fact that by and of itself, the potential breach of a collective agreement does not constitute undue

\(^{169}\) 432 U.S. 63 (1977).
hardship. It is no defense to a claim of adverse effect discrimination that
the union and the employer were ad idem with respect to the terms of a
collective agreement and that the employer feared the filing of a grievance
if it did accommodate the complainant.

What does this mean to the trade union movement? A union can be
liable for discriminatory conduct in one of two ways. Firstly, if it
participates in the formulation of the discriminatory rule, and, secondly, if
it impedes the employer in efforts to accommodate the aggrieved employee.
The defence of bona fide occupational requirement can be raised by the
employer but is unavailable to the union. This poses special problems for
a trade union against whom an accusation of discriminatory conduct has
been made.

At least one author\(^{170}\) has suggested placing such liability upon a
union is unfair given that it is a fiction (as stated in Renaud) that in
Collective agreements "all provisions are formulated jointly by the
parties."\(^{171}\) It has been suggested that there is not a joint formulation of
provisions because employers control the capital, control the place of work


\(^{171}\) (1992) 92 CLLC 17032 at page 16,258.
and benefit from strongly worded management rights clauses.172

One cannot fault the conclusion made by the Supreme Court of Canada that unions and employers should not be able to effectively contract out of human rights obligations. Otherwise the end result could be human rights violations justified by agreement of the parties which would bring us full circle to the railway cases referred to earlier in this paper.173

It is, however, respectfully submitted that for purposes of the remedy available no distinction should be made between direct discrimination and adverse effect discrimination. In a multi-cultural society such as Canada it is becoming increasingly difficult to direct one's mind to all the possible unintended adverse effects that might flow from the language of a collective agreement.

The duty to accommodate as it has developed should be collapsed into a determination of whether or not a bona fide occupational requirement has been established. This, regardless of whether the discrimination is direct or indirect. Assuming such a requirement has been established, there is no need for any further investigation. Assuming it has not, it follows there is liability

172 Supra, note 170.

173 See, supra, notes 1 and 7.
upon any party responsible for the discrimination, regardless of whether it is the employer or the union. While the efforts of the courts to be fair and just to all concerned is laudable, the recent applications of the duty to accommodate ignore the reality of Canadian society.

In many parts of Canada today employers could spend more time and money accommodating the diverse interests of the work force than otherwise managing the enterprise.

Life for the vast majority of Canadians must continue relatively unimpeded by the extreme religious views of fellow Canadians. Perhaps father’s week-end visit with his child on a Saturday is just as important a value to foster as the religious custom of a Seventh Day Adventist, Baptist, Catholic, Jew, Muslim et cetera. Perhaps an employer’s desire to ensure safety in the work place is just as important a value to foster as someone’s right to wear the religious attire he or she feels obliged to wear. Perhaps a mother’s desire to be with her children during their March break, to which she is entitled because of seniority, is a value worth fostering that is no less important than someone’s desire to attend Easter services but who does not yet have the requisite seniority to have the day off. These are value judgments unions and employers are quite capable of deciding without
excessive interference from human rights tribunals.

The development of the union duty to accommodate is the result of what I refer to as administrative tribunal law making.

Human rights tribunals and the Courts appear to have given life to a concept never contemplated by the Legislator. Will Canadian law continue to develop in this direction? Will administrative tribunals continue to exercise the influence and power demonstrated in the study of the duty to accommodate? These are questions that are extremely difficult to answer. Furthermore, a proper analysis of those issues would no doubt constitute a thesis in and of itself.

However, the issues raised in this thesis, including the apparent willingness of the courts to accept ouster of their jurisdiction and the method by which an onerous duty to accommodate has developed, have led to the development of the next chapter.

Given some of the judicial pronouncements discussed, infra, it is my view human rights tribunals and labour relations boards can look forward to more, rather than less, judicial and legislative control.
CHAPTER V

Judicial Development of Unions’ Duties Strengthened:
A Check on the Power of Labour Tribunals

We have seen the courts’ willingness to conclude ouster of their jurisdiction in cases where there was no explicit instruction from the Legislator. We have also observed the courts grant to human rights tribunals a certain "inherent" jurisdiction under the guise of statutory interpretation. The result has been a tremendous opportunity for administrative tribunal law making.

Unlike the duty of fair representation, the duty to accommodate was not a judicial creation. However, the judiciary gave it life by endorsing it and accepting that human rights tribunal had the competence to create such a concept even in the absence of specific legislative authority.174 It no doubt seemed a relatively minor extension of the tribunal created concept of adverse effect discrimination. Note, however, there is no legislative authority that adverse effect discrimination is even "discrimination" as contemplated by the various human rights statutes. Like the duty to accommodate this too is an example of administrative tribunal law making.

174 See, Bhinder, supra, note 147.
It is submitted the confidence displayed by such tribunals in "making law" can be attributed to three distinct and recent developments in Canadian law:

1. the degree of curial deference afforded tribunals when acting within the scope of their jurisdiction.

2. decisions of the Supreme Court of Canada that permit tribunals to determine the constitutionality of statutory provisions under section 52(1) of the Constitution Act, 1982.\textsuperscript{175}

3. decisions of the courts concluding its jurisdiction had been ousted without very clear language to that effect. The best example of this is to be found in the Saskatchewan Court of Appeal decision in Maldowan.

It would appear that courts in New Brunswick have been the most vigilant in ensuring their jurisdiction is not ousted expect by clear and unequivocal instruction from the Legislature.\textsuperscript{176}

In the preceding chapters I have demonstrated how the union duty of fair representation, once transplanted to Canadian soil, quickly evolved and advanced even further than American jurisprudence in protecting union members from wrongs committed by the executive. Canadian judicial development of the duty has, however, been slowed by codification in most


\textsuperscript{176} See, for example, supra, notes 119, 120.
provinces and the federal jurisdiction as well as by increased protection to union members under human rights legislation. Judicial development of the duty, even if the Maritime Provinces, was recently threatened by efforts of the New Brunswick Labour and Employment Board to assume jurisdiction over allegations of unfair representation even in the absence of codification.

Although the New Brunswick *Industrial Relations Act* contains no codification of the union duty of fair representation. It does however, contain a provision specifically requiring that accredited employer organizations fairly represent all employers bound by an accreditation order.\(^{177}\) Until the recent decision of the New Brunswick Labour and Employment Board in *Laviolette v. United Brotherhood of Carpenters and Joiners of America, Local 1023*\(^{178}\) New Brunswick practitioners had clear direction from the Court that its jurisdiction had not been subsumed by the Labour and Employment Board.

However, in *Laviolette*, Kuttner, Vice Chair of the Labour and Employment Board attempted to clothe the Board with jurisdiction in matters

\(^{177}\) R.S.N.B. c.I-4 ss. 51(1).

involving alleged breaches of the union duty of fair representation.

The facts in LaViolette were relatively straightforward. LaViolette, a carpenter by trade, received assignments based upon referrals from his union, otherwise known as a hiring hall. On May 13, 1996 LaViolette received a referral to attend work at Dalhousie, New Brunswick for On-Site Mechanical Ltd. When he was laid off some five days later he complained that relatives of the business manager were still working. He alleged he was not being treated fairly by his union. Mr. LaViolette filed a grievance with the employer. That grievance was resolved to the satisfaction of the employer and the union but not to LaViolette's satisfaction. LaViolette then filed an internal union complaint which, once again, was not resolved to his satisfaction. He then filed a complaint before the New Brunswick Labour and Employment Board alleging a violation of section 5(2) of the Industrial Relations Act. That section, one of several setting out union unfair labour practices, provides as follows:

5(2) No trade union or council of trade unions, and no person acting on behalf of a trade union or council of trade unions, shall seek by intimidation, by coercion, by the threat of dismissal or loss of employment, by the imposition of a pecuniary or other penalty, by undue influence or by any other means, to compel or to induce an employee or other person to become or to refrain from
becoming, or to cease to be, a member or officer of a trade union or council of trade unions, or to deprive an employee or other person of his rights under this Act."

The trade union objected to the jurisdiction of the Labour and Employment Board to hear LaViolette’s complaint.

The issue was framed by Vice Chair Kuttner in the following terms:

"Does the Labour and Employment Board have jurisdiction to entertain a complaint under section 106(1) of the Industrial Relations Act that a trade union which holds bargaining rights pursuant to the Act has breached its duty of fair representation owed to employees in the bargaining unit for which its acts as bargaining agent?" and secondly, "whether the terms of the Act are sufficiently capacious to embrace the duty of fair representation is the very matter now before us for determination."^179

Vice Chairman Kuttner answered the questions in the positive. He dismissed Justice McIntyre’s observation in Dutcher that "the common law applies and recourse may be had to this court"^180 by stating the court was "merely observing that the Act lacks explicit statutory language imposing a duty of fair representation."^181

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^179 Supra, note 178 at 143,307.

^180 Note 120 at 379.

^181 Note 178 at 143,308.
In the absence of explicit statutory language and in the face of clear pronouncements from the New Brunswick courts that it had jurisdiction in matters involving alleged unfair representation, how then did Vice Chairman Kuttner conclude he had jurisdiction? With respect, by clothing himself with the powers of a federally appointed judge. This was accomplished by carefully and selectively applying decisions of the Supreme Court of Canada that failed to acknowledge administrative tribunals (particularly labour tribunals) are part of the executive branch of government and thereby treating them as if they were federally appointed judges possessed of inherent jurisdiction.

Consider for example the reasoning of Vice Chair Kuttner:

1. firstly, he took cognizance of the fact that L’Heureux-Dubé in *Gendron* had concluded that the "common law and statutory codifications [p 1319] had the same content." I have already indicated that erroneous statement has hindered appropriate assessment of the issues in the Provinces. The case of *Maldowan* is the best example.

2. secondly, he relies upon the decision of the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada* (Labour Relations Board)\[1][182] where the court concluded a labour tribunal could impose a collective agreement upon the parties as part of its remedial power in the absence of explicit language in the statute. And, significantly, in the face of specific language

authorizing such a procedure for first agreements. 183

3. thirdly, he relies upon what he refers to as the "judicial preference for the resolution of work place disputes before specialized tribunals." In doing so he cites St. Anne Nackawic Pulp & Paper Co, O'Leary, and Weber. 184

4. fourthly, he relies upon the interpretative role tribunals may now play given the existence of the Charter of Rights and Freedoms. He states:

"Through constant exposure to a climate suffused with constitutional values, tribunals become ever more sensitized to them and, by a process almost spontaneous, refine legislative values to the rigours of that climate. In this way, constitutional norms are breathed into legislative ones in the ordinary process of the interpretation of enabling legislation by tribunals such as ours." 185

5. finally, he makes reference to the broad protection from review afforded by Canadian Union of Public Employees and New Brunswick Liquor Corporation. 186 He refers to this case as the cornerstone in the "consistent trend in modern jurisprudence to emphasize the peculiar strength of labour tribunals as the preferred instrumentality for the resolution of work place disputes arising within the context of labour legislation." 187

While concluding the Labour and Employment Board did have

183 See, sub-sections 80(1) and 99(2) of Canada Labour Code.

184 Supra, note 178 at 143,314.

185 Supra, note 178 at 143, 313.


187 Supra, note 178 at 143, 314.
jurisdiction to hear the complaint, by separate decision rendered May 7, 1997 the complaint was dismissed.\textsuperscript{188}

The LaViolette matter came on for judicial review before Deschênes, J.\textsuperscript{189} His Lordship concluded the standard of review was one of patent unreasonableness although he did consider, whether, given the jurisdictional nature of the question posed, it might be appropriate to apply a correctness standard.\textsuperscript{190}

Even applying the patently unreasonable standard for review the learned trial judge concluded the Labour and Employment Board’s decision should be removed into the superior court and quashed. The basis for his decision included, \textit{inter alia}, the following:

1. the plain meaning of subsection 5(2) of the \textit{Industrial Relations Act};\textsuperscript{191}

2. the fact the Legislature had specifically provided for a duty of fair representation toward employers of an accredited employer’s organization (s. 51(1) of the Act)\textsuperscript{192} and had

\begin{itemize}
\item \textsuperscript{188} Unreported decision dated May 7, 1997, N.B. Labour & Employment Board, Vice Chairman Kuttner.
\item \textsuperscript{189} \textit{United Brotherhood of Carpenters & Joiners of America, Local 1023 et al. and Lionel Lavette,} et al. (1997), 98 C.L.L.C. 220-014 at 143,116 (N.B.Q.B.)(T.D.).
\item \textsuperscript{190} \textit{Ibid} at 143,121.
\item \textsuperscript{191} \textit{Supra}, note 189 at 143,122.
\item \textsuperscript{192} \textit{Supra}, note 189 at 143,123.
\end{itemize}
chosen not to do so for employees.

3. the fact the Board ignored the comments of "three different courts to the effect that the legislature in our Province has not codified the union duty of fair representation."\textsuperscript{193}

In LaViolette, the issue of most serious import was much broader than whether or not the complainant had a right of redress before the courts or an administrative tribunal. The most serious question concerned the paramountcy of Parliament. That issue was brought clearly into focus by Deschênes, J. on several occasions in the course of rendering his judgment. He stated:

"Although I share the views expressed by the Board that Labour tribunals should probably be considered as the "preferred instrumentality" for the resolution of such disputes, such decisions belong to the legislature and not to the judiciary or labour tribunals."\textsuperscript{194}

"In my opinion, the New Brunswick legislature has, for whatever reason, chosen not to enact a provision codifying the union duty of fair representation and to imply such a duty . . . cannot be rationally supported by the relevant legislation."\textsuperscript{195}


\textsuperscript{194} \textit{Supra}, note 189 at 143, 123.

\textsuperscript{195} \textit{Ibid}. 
The Labour and Employment Board appealed the matter to the New Brunswick Court of Appeal.\textsuperscript{196} The Court of Appeal concluded the whole issue then before it was moot. The Labour and Employment Board had dismissed the complaint. Laviolette took no interest in the issue then before the Court. The employer took no interest in the issue. Since the trade union had obtained the remedy it was seeking before the Board (dismissal of the complaint), it too, according to the Court of Appeal, had no "lis" with any other proper party before the Court of Appeal.

However, after concluding the issue was moot and Deschênes, J. therefore had no jurisdiction to render the decision he did, the Court, clearly in \textit{obiter}, did indicate its agreement with the conclusions reached by Deschênes, J., assuming the matter had been properly before him.

As was the case in \textit{St. Anne NacKawic} and \textit{O'Leary}, we see the New Brunswick Court of Appeal once again showing preference toward the courts and the Legislature over an expanded role for statutory tribunals.

Two recent judgments of the Supreme Court of Canada show an increased sensitivity toward the courts' own jurisdiction and the role of the Legislator. Those decisions, \textit{Brotherhood of Maintenance and Way

Employees and Canadian Pacific Ltd.\textsuperscript{197} and Bell v. Canada (Human Rights Commission)\textsuperscript{198} may well signal a change in attitude by the Supreme Court of Canada. The result may be a more cautious approach to the role to be played by administrative tribunals in our democracy.

While this paper is not intended to be a critique of the current trends in judicial review, this study of the evolution of the duty of fair representation and the duty to accommodate has demonstrated to me how quickly some administrative tribunals, with the full complicity of the Supreme Court of Canada build upon their own decisions and those of the Supreme Court to continually expand their influence. As that influence expands, the Legislator becomes an ignored partner in the governing process.

Those concerns are much better articulated by Lamer, C.J.C. in Bell. The facts in Bell and its companion case, Cooper v. Canadian Human Rights Commission\textsuperscript{199} concerned allegations of age discrimination. Two airline pilots who were forced to retire at age 60 brought complaints of age discrimination before the Canadian Human Rights Commission pursuant to


the *Canadian Human Rights Act*.\textsuperscript{200} The Commission dismissed the complaints and refused to appoint a tribunal. The retirement was not discriminatory because the pilots had reached the normal retirement age and furthermore, if there was discrimination, it was justified under section 1 of the *Canadian Charter of Rights and Freedoms*. Applications for judicial review were not successful. Furthermore, in the Federal Court of Appeal\textsuperscript{201} Marceau, J. concluded neither the Commission nor a tribunal appointed by it had the power to determine the constitutionality of its enabling statute.

In the Supreme Court of Canada the majority judgment was written by La Forest, J. (Sopinka, Gonthier and Iacobucci, JJ. concurring). Lamer, C.J.C. wrote his own judgment in which he concurred with the conclusion reached by La Forest, J. Their Ladyships McLachlin and L'Heureux-Dubé concurred in their dissent from the majority.

The issue facing the Supreme Court in *Bell* was whether the Human Rights Commission had the power to determine the constitutionality of its enabling statute.


\textsuperscript{201} (1994), 94 C.L.L.C. 17,032 (Fed. C.A.).
The disquiet of the Chief Justice is evident in the opening remarks of his judgment:

"Although my colleagues disagree on the outcome of these appeals, they nevertheless agree on the governing legal proposition: that tribunals which have jurisdiction over the general law, have jurisdiction to refuse to apply - and have effectively to render inoperative - laws that they find to be unconstitutional, since through the operation of s.52 of the Constitution Act, 1982, the constitution is the supreme law of Canada. I agree with them that this proposition emerges from previous decisions of this Court and that it binds us today. However, I hope that a full bench of this Court will eventually be afforded the opportunity to revisit this proposition."

His Lordship urges his brother and sister judges to seriously consider how their previous decisions in *Cuddy Chicks Ltd. v. Ontario Labour Relations Board*, *Tetreault-Godoury v. Canada (Employment and Immigration)*, and *Douglas/Kwantlen Faculty Association v. Douglas College* have, in effect, resulted in the tail wagging the dog.

In the trilogy of cases referred to by Lamer, C.J.C. the Supreme Court of Canada had concluded that administrative tribunals, possessed of no inherent jurisdiction, could declare laws inoperative and refuse to apply them. While a tribunal could not declare a law invalid, the distinction between invalidity and inoperability, is not one that would be appreciated by
the average person on the street or for that matter, the average person’s representative who was entrusted to enact the law.

It is that power, apparently bestowed upon tribunals by the Courts, and not devolved by the Legislator that now troubles the Chief Justice. In a very thoughtful analysis, he urges a reconsideration of the broad powers afforded by the Courts to administrative tribunals.

He bases his argument upon two central themes. Firstly, given the role of the courts to superintend the Legislator and make decisions concerning the validity or invalidity of laws, no body other than courts of inherent jurisdiction should exercise that function. I wholeheartedly agree. Before the advent of the Charter, when the vast majority of constitutional cases were decided based upon the division of powers, it would have been highly irregular for a tribunal, being a part of the executive branch of government, to proclaim laws inoperative because they encroached upon the powers of another level of government.

The second basis upon which the Chief Justice relies in urging a reconsideration of the powers afforded to tribunals is rooted in the concept of Parliamentary democracy. He states that one of the aspects of Parliamentary democracy is the legal relationship between the executive
branch and the legislative branch. Central to that relationship is that the executive must implement policies approved and enacted by the legislature. If the executive branch, *qua*, administrative tribunal, possesses the power to render inoperative laws enacted by its Creator, where then is to be found the principle of Parliamentary democracy? I would hesitate to use the word Creator to describe the relationship between the legislature and an administrative tribunal if it (the tribunal) was possessed of some, albeit minor, inherent jurisdiction. I know of none.

The Chief Justice is quick to point out that his approach does not in any way limit the use of the *Charter* by tribunals as they seek to interpret enactments they are to presume are constitutionally valid.

It is this expressed desire to rein in administrative tribunals that might in the future limit the Supreme Court’s willingness to presume ouster of its jurisdiction where none is explicitly stated; equate its own jurisdiction in fields of negligence with a codification of some similarity but lacking exactitude; and finally, permit the creation by administrative tribunals of duties such as the duty to accommodate when no statutory basis for such a duty exists.

The second case that indicates the Courts might be more willing in the
future to assert their distinctiveness from administrative tribunals is that of
Brotherhood of Maintenance and Way Employees. The employer sought to
change its employees’ work schedule from 10 days on and 4 days off to 5
days on and 2 days off. The union grieved pursuant to the collective
agreement then in force. While awaiting the arbitration ruling the union
sought and obtained an interim injunction from the British Columbia
Supreme Court to prevent the employer from implementing the new work
schedule. The employer’s appeals to the British Columbia Court of Appeal
and the Supreme Court of Canada failed. It is interesting to note that all nine
justices of the Supreme Court of Canada sat on the appeal, and all nine
justices concurred. Only one judgment was rendered.

Why was leave granted? When one considers that four justices of the
British Columbia court (one trial judge and three appellate judges) were
apparently of one mind and the only cases cited of significance by the full
bench of the Supreme Court of Canada were St. Anne Nackawic, Weber and
O’Leary it is this author’s view the Supreme Court wanted to qualify
somewhat the impressions left in earlier decisions that it considered itself
ousted from a consideration of labour matters unrelated to wildcat strikes.
Relying upon those same three cases the Supreme Court could have just as
easily concluded the jurisdiction of the courts was ousted, the interim injunction was made without jurisdiction, and it should thereby be lifted.

The Canada Labour Code, the legislation at issue in Brotherhood of Maintenance and Way Employees contained a clause virtually identical to section 55 of the New Brunswick Industrial Relations Act that was considered in St. Anne Nackawic and O'Leary. Every collective agreement was to contain a clause providing for the final settlement of all differences between the parties or employees bound by the agreement.

The contract was in full force.

There was a standard management rights clause that granted the employer the right to manage its work force.

The Supreme Court of Canada acknowledged there is a general rule in labour relations that employees "obey now, grieve later." Relying upon its residual discretionary power to grant relief not available under the statutory scheme the Court concluded the injunction was a valid exercise of discretion by the lower court. With respect, nothing under the statutory scheme prevented the employer and the union from

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202 R.S.C. 1985, c. L-2, s. 57(1).

203 Supra, note 197 at 294. This principle was approved by the Court in Kelso v. The Queen, [1981] 2 S.C.R. 199; 120 D.L.R. (3d) 1 (S.C.C.).
agreeing to dispense with the "obey now, grieve later" rule. Furthermore, nothing prevented the employer and the union from agreeing that an arbitrator properly seized with a grievance could make appropriate interim orders.

Given these recent judgments from the New Brunswick Court of Appeal and the Supreme Court of Canada it would appear that in New Brunswick, Nova Scotia and Prince Edward Island the courts will continue, unimpeded by labour tribunals, to develop standards unions are expected to meet when dealing with their members.
CHAPTER VI

Conclusion & Summary

The genesis of the duty of fair representation is a classic example of the common law approach to the resolution of problems arising between individuals in our society in those circumstances where the Legislator had not specifically provided a remedy.

In a similar fashion, human rights tribunals have employed the same common law approach to develop the duty of reasonable accommodation. With respect, given that those tribunals were not judges possessed of inherent jurisdiction the constitutional basis of the duty to accommodate is suspect. No doubt Lamer, C.J.C.'s desire to revisit the role of tribunals in interpreting the Charter would include a re-evaluation of administrative law making in general.

Without question, the current state of the law in Canada concerning a union's responsibility toward its members is a collection of differing statutes, interpretations of those statutes, and differing applications of common law principles.

In those Provinces where the duty of fair representation has not been
codified, complaints about a union's conduct in the collective bargaining or rights determination process will no doubt be subjected to a standard of ordinary negligence. In Provinces where the duty has been codified, except in cases where statutory language declares a different standard, tribunals will no doubt continue to apply the gross negligence standard.

Whether or not the duty has been codified, it seems actions founded in simple negligence survive where the union's conduct is unrelated to the collective bargaining process or grievance arbitration. For example, where it undertakes to implement its own health plan and negligently allocates premiums.

While the gross negligence test might be the proper standard by which to measure a union's conduct at the negotiating table, it is submitted a simple negligence standard is appropriate for the determination of rights under the collective agreement, especially where matters of discipline and termination are involved.

The Legislatures and Parliament, have, by their enactments, or lack of legislative control, made policy decisions about the duty of unions toward their membership. In those circumstances where the Legislator has chosen not to act we have seen efforts by tribunals to fill the perceived void. As a
result, particularly in the case of the duty to accommodate we have seen the courts permit tribunals to be the crafters of legislation as well as arbiters of its impact. This author seriously doubts whether the Legislator intended tribunals to exercise such wide powers.

It is appropriate to close by posing the following question with respect to the interplay between human rights developments and the duty of fair representation. What role, if any, does the courts' approval of the concept of unintentional (adverse effect) discrimination have upon the "non-discrimination" component of the duty of fair representation? In the past that component was only violated if the union was guilty of intentional discrimination. The "arbitrary" component of the test caught unintentional conduct. Has the test been dramatically altered by recent interpretations of human rights legislation? That issue has yet to be addressed by the courts. Hopefully, the Legislator will intervene before that becomes necessary.
APPENDIX A
LABOUR LEGISLATION
(FAIR REPRESENTATION)

Canada

Canada Labour Code
R.S.C. 1985, c. L-2 as amended

Sec. 37  A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

Newfoundland

Labour Relations Act
R.S.N. 1990, c. L-1 as amended

Sec. 130  (1)  An employee in a bargaining unit, who claims to be aggrieved because his or her bargaining agent has failed to act in good faith, in the handling of a grievance that he or she has filed with that bargaining agent in accordance with a procedure

(a)  that has been established by the bargaining agent; and

(b)  to which the employee has not been given ready access,

may make a written complaint to the board.

(2)  A complaint made under subsection (1) shall be made within 90 days from the date on which the grievance first arose.

(3)  The board shall investigate a complaint made to it under subsection (1) and determine whether there was a failure by the bargaining agent to act in good faith.
(4) A provision in this Act or a collective agreement that limits the time in which a grievance or arbitration proceeding shall begin or a decision made does not apply where a matter is referred to the board under this section.

(5) Where, on investigation of a complaint in accordance with subsection (3), the board finds that there was a failure to act in good faith by the bargaining agent concerned, the board shall direct that bargaining agent to take those steps that the board thinks appropriate in the circumstances.

(6) Where a collective agreement expires before a complaint is made to the board under subsection (1), or where a collective agreement expires before the board completes its investigation, the board may order the bargaining agent to compensate the employee to a reasonable extent that the board may prescribe.

Nova Scotia  
Trade Union Act  
R.S.N.S. 1989, c. 475 as amended

Prince Edward Island  
Labour Act  
R.S.P.E.I. 1988, c. L-1 as amended

New Brunswick  
Industrial Relations Act  
R.S.N.B. 1973, c. I-4

Quebec  
Labour Code  
R.S.Q. 1977, c. C-27 as amended

Sec. 47.2  A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees compromised in a bargaining unit represented by it, whether or not they are members.
Ontario

Labour Relations Act, 1995
S. O. 1995, c. L-2

Sec. 74
A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Sec. 75
Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

Manitoba

The Labour Relations Act
R.S.M. 1987, c. L-10 as amended

Sec. 20
Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,

(a) in the case of the dismissal of the employee

(i) acts in a manner which is arbitrary, discriminatory or in bad faith, or

(ii) fails to take reasonable care to represent the interests of the employee; or

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.
Saskatchewan  The Trade Union Act
R.S.S. 1978, c. T-17 as amended

Sec. 25.1  Every employee has the right to be fairly represented in
grievance or rights arbitration proceedings under a collective
bargaining agreement by the trade union certified to represent
his bargaining unit in a manner that is not arbitrary,
discriminatory or in bad faith.

Alberta  Labour Relations Code
S.A. 1988, c. L-1.2 as amended

Sec. 151 (1)  No trade union or person acting on behalf of a trade
union shall deny an employee or former employee who is or
was in the bargaining unit the right to be fairly represented by
the trade union with respect to his rights under the collective
agreement.

(2)  Subsection (1) does not render a trade union liable to an
employee for financial loss to the employee if

(a)  the trade union acted in good faith in representing
the employee, or

(b)  the loss was as the result of the employee’s own
conduct.

(3)  When a complaint is made in respect of an alleged denial
of fair representation by a trade union under subsection (1), the
Board may extend the time for the taking of any step in the
grievance procedure under a collective agreement,
notwithstanding the expiration of that time, subject to any
conditions that the Board may prescribe, if the Board is
satisfied that
(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,

(b) there are reasonable grounds for the extension, and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

British Columbia Labour Relations Code
S.B.C. 1992, c. 82 as amended

Sec. 12 (1) A trade union or council of trade unions shall not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit, or

(b) in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

(2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which

(a) an employer is permitted to hire by name certain trade union members,

(b) a hiring preference is provided to trade union members resident in a particular geographic area, or

(c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties.
(3) An employers’ organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employers in the group appropriate for collective bargaining.
APPENDIX B
HUMAN RIGHTS LEGISLATION

Canada

Canadian Human Rights Act
R.S.C. 1985, c. H-6 as amended

Sec. 7
It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

Sec. 9
(1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

(a) to exclude an individual from full membership in the organization;

(b) to expel or suspend a member of the organization; or

(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.
Exception

(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual.

Definition of "employee organization"

(3) For the purposes of this section and sections 10 and 60, "employee organization" includes a trade union or other organization of employees or local thereof, the purposes of which include the negotiation, on behalf of employees, of the terms and conditions of employment with employers.
occupational qualification.

(2) An employer, or a person acting on behalf of an employer shall not use, in the hiring or recruitment of persons for employment, an employment agency that discriminates against persons seeking employment because of their race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, marital status, physical disability or mental disability.

(3) A trade union shall not exclude a person from full membership or expel or suspend or otherwise discriminate against 1 of its members or discriminate against a person in regard to his or her employment by an employer, because of

(a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, marital status, physical disability or mental disability; or

(b) that persons' age, if that person has attained the age of 19 years and has not reached the age of 65 years.

Nova Scotia

Human Rights Act
R.S.N.S. 1989, c. 214

Sec. 3 (k) "person" includes an employer, employers' organization, employees' organization, professional association, business or trade association, whether acting directly or indirectly, alone or with another, or by the interposition of another.

Sec. 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the
effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

Sec. 5 (1) No person shall in respect of

(a) the provision of or access to services or facilities;
(b) accommodation;
(c) the purchase or sale of property;
(d) employment;
(e) volunteer public service;
(f) a publication, broadcast or advertisement;
(g) membership in a professional association, business or trade association, employers’ organization or employees’ organization,

discriminate against an individual or class of individuals on account of

(h) age;
(i) race;
(j) colour;
(k) religion;
(l) creed;
(m) sex;
(n) sexual orientation;
(o) physical disability or mental disability;
(p) an irrational fear of contracting an illness or disease;
(q) ethnic, national or aboriginal origin;
(r) family status;
(s) marital status;
(t) source of income;
(u) political belief, affiliation or activity;
(v) that individual’s association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

Prince Edward Island Human Rights Act

Sec. 8 No employee’s organization shall exclude any individual from full membership or expel or suspend any of its members on a discriminatory basis or discriminate against any individual in regard to his employment by an employer.

New Brunswick Human Rights Act

Sec. 3 (1) No employer, employers’ organization or other person acting on behalf of an employer shall

(a) refuse to employ or continue to employ any
person, or

(b) discriminate against any person in respect of employment or any term or condition of employment, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

(2) No employment agency shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex, discriminate against any person seeking employment.

(3) No trade union or employers' organization shall

(a) exclude any person from full membership;

(b) expel, suspend or otherwise discriminate against any of its members, or

(c) discriminate against any person in respect of his employment by an employer, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

(4) No person shall

(a) use or circulate any form of application for employment,

(b) publish or cause to be published any advertisement in connection with employment, or

(c) make any oral or written inquiry in connection with employment,
that expresses either directly or indirectly any limitation, specification or preference, or requires an applicant to furnish any information as to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex.

(5) Notwithstanding subsections (1), (2), (3) and (4), a limitation, specification or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex shall be permitted if such limitation, specification or preference is based upon a bona fide occupational qualification as determined by the Commission.

(6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to

(a) the termination of employment or a refusal to employ because of the terms or conditions of any bona fide retirement or pension plan;

(b) the operation of the terms or conditions of any bona fide retirement or pension plan that have the effect of a minimum service requirement; or

(c) the operation of terms or conditions of any bona fide group or employee insurance plan.

(6.1) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

(7) The provisions of subsections (1), (2), (3) and (4) as to physical disability and mental disability do not apply to
(a) the termination of employment or a refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstance of the place of work in relation to the physical disability or mental disability, as determined by the Commission; or

(b) the operation of terms or conditions of any *bona fide* group or employee insurance plan.

**Quebec**

Charter of Human Rights and Freedoms
R.S.Q. 1977, c. C-12, as amended

Sec. 17 No one may practice discrimination in respect of the admission, enjoyment of benefits, suspension or expulsion of a person to, of or from an association of employers or employees or any professional corporation or association of persons carrying on the same occupation.

**Ontario**

Human Rights Code
R.S.O. 1990, c. H-19 as amended

Sec. 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Sec. 24 (1) The right under section 5 to equal treatment with respect to employment is not infringed where,
(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place or origin, colour, ethnic origin, creed, sex, age, marital status or handicap employs only or gives preference in employment to, persons similarly identified if the qualification is a reasonable and _bona fide_ qualification because of the nature of the employment;

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and _bona fide_ qualification because of the nature of the employment;

(c) an individual person refused to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person; or

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

**Reasonable Accommodation**

(2) The Commission, the board of inquiry or a court shall not find that a qualification under clause (1)(b) is reasonable and _bona fide_ unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
Sec. 12 For the purpose of interpreting and applying sections 13 to 18, the right to discriminate where *bona fide* and reasonable cause exists for the discrimination, or where the discrimination is based upon *bona fide* and reasonable requirements or qualifications, does not extend to the failure to make reasonable accommodation within the meaning of clause 9(1)(d).

Sec. 13 (5) No person who undertakes, with or without compensation, to

(a) obtain any other person for an employment or occupation with a third person; or

(b) obtain an employment or occupation for any other person; or

(c) test, train or evaluate any other person for an employment or occupation; or

(d) refer or recommend any other person for an employment or occupation; or

(e) refer or recommend any other person for testing, training or evaluation for an employment or occupation;

shall discriminate when doing so, unless the discrimination is based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation.

(6) No trade union, employer, employers' organization, occupational association, professional association or trade association, and no member of any such union, organization or association, shall
(a) discriminate in respect of the right to membership or any other aspect of membership in the union, organization or association; or

(b) negotiate on behalf of any other person in respect of, or agree on behalf of any other person to, an agreement that discriminates;

unless *bona fide* and reasonable cause exists for the discrimination.

**Saskatchewan**

The Saskatchewan Human Rights Code  
S.S. 1979, c. S-24.1

**Sec. 17** Every person and every class of persons shall enjoy the right to membership, and all the benefits appertaining to membership, in any professional society or other occupational association without discrimination because of his or their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance.

**Sec. 18** No trade union shall exclude any person from full membership or expel, suspend or otherwise discriminate against any of its members, or discriminate against any person in regard to employment by any employer, because of the race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance by that person or member.

**Alberta**

Individual’s Rights Protection Act  
R.S.A. 1980, c. I-2 as amended

**Sec. 10** No trade union, employers’ organization or occupational association shall
(a) exclude any person from membership in it,
(b) expel or suspend any member of it, or
(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or member.

**British Columbia**  **Human Rights Code**
S.B.C. 1984, c. 22 as amended

Sec. 9  No trade union, employers' organization or occupation association shall

(a) exclude any person from membership,
(b) expel or suspend any member, or
(c) discriminate against any person or member

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended membership.
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Texts


Periodicals


