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THE CANADIAN COMPULSORY CONCILIATION LAWS AND THE GENERAL PROBLEM OF UNION POWER

*by David McCord Wright**

What shall we do about the conditions sketched in my previous paper? The labor union today, I there submitted, is often a power which will neither restrain itself nor allow restraint and which can and does often act in ways contrary to the general interest. Considerations of the general welfare mean that something must be done. Either the union power must be weakened or its exercise must be limited. My task here is, first, to describe one of the more promising of the regulation methods — the Canadian compulsory conciliation approach — and next to go on to an evaluation of general principles.

In dealing with Canadian labor law, the first thing to remember is that Canada is a far less unified country than the United States. I mean that the Canadian provinces are far stronger than the American states, relative to the Dominion government. Thus the range of application of federal labor law in Canada is, from a United States point of view, extraordinarily limited. This means that we find not one main code with a number of minor ones on the periphery, as in the United States, but on the contrary a number of independent major codes of nearly equal importance. One cannot therefore say that "Canadian labor law" is such and such with as much definiteness as he can that of the United States.

Nevertheless, Canadian labor laws for the provinces and federal government have fortunately many common basic features, especially as regards compulsory conciliation. I shall not, therefore, attempt detailed dissection of provincial codes. Instead a general bibliography is annexed to this paper which will serve as an introduction to the subject for those who wish to go further.[1] What I shall do here is to describe what might be called the typical Canadian procedure — albeit every province has its own version.

Canada has taken over from the United States much of the "certification" procedure regarding unions. In addition, the compulsory conciliation statutes only apply to designated groups — to, for example, "employees." Some complicated questions of applicability can arise in this connection. Thus, in the recent strike of the French language television producers of the Canadian Broadcasting Corporation which by-passed the conciliation machinery, CBC argued that the strike was illegal because the "producers" were employees and hence covered by the compulsory conciliation acts. The producers, on the other hand, argued that they were "management" and hence not covered. The arbitrator, H. D. Woods, ruled for the producers. But once bargaining began, the parties reversed themselves, CBC maintaining that producers were management and hence should not be unionized and the producers arguing that they were employees!

Supposing, however, that the parties are covered by the labor laws; then before a legal strike can be called notice must be given to the conciliation

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1 See *Introductory Bibliography on Canadian Compulsory Conciliation, infra* p. 696.

authorities, provincial or federal, as the case may be. Each province and the federal government maintains a conciliation service. Upon notice of a claim and dispute, the conciliation officer interviews the parties and attempts to bring them together. Supposing him to have failed to compose the dispute, an arbitration — or more accurately conciliation or investigation — board is selected. One man is usually nominated by the union, one by the employer, a third by agreement of the first two, or by appointment by the conciliation service, in case there is disagreement. I am by-passing a mass of detail here (see bibliography below) to get at the main points.

Once the conciliation board has been selected, it proceeds to hold hearings and collect data much as an arbitration board in the United States would do. There are, however, two unique features in the Canadian machinery. First, if the board cannot obtain sufficient data in the statutory period, it may postpone a decision, and the *strike cannot legally be called until the board finally renders a verdict.* Secondly, the board does not merely report failure, or "find" facts. Supposing its conciliation efforts to have failed, it is then required to go further and outline *what it considers a fair settlement of the dispute.* In other words, under the law, what is to all intents and purposes an arbitration award *precedes* a strike or lockout. After such a report, the party which nevertheless calls a strike or lockout is under the disadvantage of having rejected a careful, presumably impartial, report on the dispute.

Had the Canadian procedure been in force during our recent steel strike, things would have gone as follows: Mr. McDonald and the steel companies would first have notified a conciliation officer. If he failed, then a conciliation board would have been appointed in the manner described. The Steelworkers would not have been able to call a legal strike *until* the board felt itself able to render a decision. Then a complete report and award would have been made, and only if the union had still been dissatisfied, and in the face of the report, could a strike have been called. Obviously a very considerable change in tactics would have been involved.

How have the Canadian schemes worked? Here one will find almost as many opinions as there are people asked. Let us therefore first consider the record. It has been informally estimated that for the total coverage, provincial and federal, some 70 per cent of labor-management disputes get settled before they reach the strike stage. On the other hand, when a strike *does* occur, Canadian strikes tend to be longer and more bitter than American. Of course I speak only generally and on balance.

Now, as to opinions: Labor experts often complain that the cooling off period of the conciliation is really a heating-up period. Bargaining, they say, is not really seriously undertaken. The unions also complain that the conciliation machinery puts *them* at a disadvantage. Some people dislike the interference with "freedom." On the other hand the facts would seem to be clear that the conciliation requirements do avoid a large proportion of minor strikes, sometimes even ones that could be very serious. Thus the laws have been helpful. But on the other hand the Canadian laws are *not* "the" answer to the labor problem any more than any other set of laws, where really deep splits of opinion exist. Thus where the union is determined to press for higher

wages, or to maintain old work rules, no matter what, and the employers think they cannot meet the demand, the familiar stalemate appears. This occurred in the Canadian Pacific Railroad strike, concerning the use of firemen on diesel engines. But at least the party there resorting to force did so in the teeth of a fair investigation. This puts the onus on the actor, and I think it is a fair requirement.

Yet, since we see that even this method, had it been applied say to the United States steel strike, would probably not have avoided the prolonged strike which occurred — it might have, but not necessarily so — the question again arises: What can be done about the problem of labor power? The public interest, I submit, definitely requires that we cannot just leave it alone. The matter has become too important.

Many people will suggest the use of compulsory arbitration — not just of an infrequent or emergency type apparently envisaged by Professor Cox, but a definite system of labor courts on the Australian model — in which it is thought the public interest will find definite, dignified and continuous expression. Unfortunately, the problem is not that simple. The basic objection goes back to our analysis of the general working of the pricing system and the pushes and pulls of differential reward. We may settle a strike in plant "A" by a wage settlement that looks "fair" between the two immediate parties — only to find that in so doing we have upset the whole structure of relative wages and precipitated strikes in "B," "C" and "D." The economic system is so interrelated that it is virtually impossible to "settle" one part of it without affecting others. By the time *all* the issues have been considered — supposing they are — the arbitrator will have left behind settling *that* dispute and be busily engaged in planning the general economic system. For example, it would be tacitly up to such a system of labor courts to determine the domestic price level!

One immediate result of the general economic problem involved is that responsible arbitration boards will be extremely slow to render verdicts. In practice, a dispute is often no more than "settled" before it is begun again, for the basis of the settlement is then out of date.

But I submit that the basic superstition underlying the compulsory arbitration system is the idea that because the verdict is rendered by a public body it will necessarily reflect the public interest. This is naive. An arbitration court can make just as bad a settlement, economically, as any pair of private bargainers. All sorts of trading, lobbying, and so on are possible. Finally, compulsory arbitration need not *really* always get the men back to work. There is such a thing as the slow down — that most difficult of situations to handle. In short, a system of compulsory arbitration and labor courts becomes in practice an obfuscation office and can be just as inflationary and short-sighted as private bargaining; and, more than anything else, compulsory arbitration creates an enormously strong pressure toward a system of general economic planning and a most serious obstacle to quick, effective management and modernization.

My feeling, therefore, is that we should think more in the direction of reducing union power and putting wage bargains in the context of the pricing system. Professor Cox has sketched certain "emergency" procedures, but these,

I submit, in the frame of the preconceptions in which they are presented, would have strong pressures to develop toward an Australian-type system, which does not seem to me desirable. But Professor Cox raises a much more fundamental issue. He apparently assumes that we cannot limit union power at all without destroying unions. I may be putting it too strongly. His point, as I understand it, is rather that if we apply the theoretical standards of pure and perfect competition to the unions we would destroy them. Now this second statement is quite right. But I have also argued[2] that if we apply the standards of pure and perfect competition to the corporations we would destroy *them.* In fact, the ultimate paradox is that if we applied the theoretical standards of pure and perfect competition to the dynamic pricing system we would destroy *it!* So let us forget these static equilibrium models and talk about something relevant.

How do economists who believe in the competitive system and also in some type of unionism fit unions into the picture? The idea, as I see it, is that in the ordinary, freely-but-imperfectly competitive system, the rate of increase in real wages made possible by capital formation and pioneering management might still lag somewhat because of the bargaining advantage of the employer, and simple inertia. Economists, therefore, who accept "business unionism" would want a movement strong enough to give labor a fair share of the growing total and no stronger. In the same way, so far as the issue of "fairness" in promotion goes, one would want a union strong enough to protect against unfair discrimination between individuals *by the corporation;* but one must not forget that there also can be unfair discrimination and coercion of the employee *by the union leadership.*

Now my standards are no more than a first approximation and need detailed implementation without doubt. Yet I submit that there is clearly an area of action here in which we *can* explore limiting extremes of union power without eliminating unions. Professor Cox in effect has fallen into that fallacy of the excluded middle so brilliantly satirized by Mr. Thurber in "You can fool too many of the people too much of the time." I cannot in this paper do more than indicate an approach. My suggested attitude does not involve gratuitous union baiting. It does imply that we face the problem of excessive power, that we deflate our absurdly over-expanded ideas of the net beneficence of unions, and that we ask what can be done about them. Perhaps half the battle will be gained when the public gets over its starry-eyed view of the unions as necessarily altruistic forces for equality and progress, and sees them for what they are — often reactionary agencies of personal privilege.

2 See, *e.g.,* 37 VA. L. REV. 1333 (1951).