

COMMENT

Bargaining structure, bargaining power, and the law: a comment on the *Burns Meats* case

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THE DEBATE ABOUT JURIDIFICATION in Europe¹ has illuminated for Canadians just how profoundly our legal system shapes labour-management relations. More than in any other western nation, labour law in Canada defines the practice and procedure of collective bargaining for the parties. In our enthusiasm to regulate and institutionalize industrial conflict, we have come to prefer legally prescribed structures and procedures over those created by employers and unions for themselves. So great is our fascination with the law that when, from time to time, voluntarily determined practices come into our line of sight, their continued existence is frequently threatened by the interventionist spirit of labour boards and courts. Just how vulnerable voluntary structures are is evident from the decision of the Ontario Labour Relations Board in the case of *Burns Meats*.² Ruling that national bargaining in the meat-packing industry had no foundation in law, the OLRB not only undercut a bargaining structure that had been in place for almost forty years, it reinforced the bias towards decentralized bargaining already prevalent in Canadian labour law.

I. BARGAINING STRUCTURE

THE EXTENT TO WHICH collective bargaining is decentralized in Canada is remarkable by international standards. Whereas multi-employer bargaining is the norm in Europe and Scandinavia, just one collective agreement in twelve encompasses more than one employer in Canada. The proportion of collective agreements negotiated on a single-estab-

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1 See, e.g., S. Simitis, "The Juridification of Labour Relations," (1986) 7 *Comp. Labour L.* 93 and Lord Wedderburn, "The New Policies in Industrial Relations Law," in P. Fosh and C.R. Littler, eds., *Industrial Relations and the Law in the 1980s: Issues and Future Trends* (Aldershot, England: Gower Publishing Company, 1985).

2 *Burns Meats, Ltd.* (1984), [1984] O.L.R.B. Rep. 1049, 7 C.L.R.B. Rep. (N.S.) 355, 84 C.L.L.C. 16,053.

lishment basis is almost one in two while, in manufacturing, an astonishing 73 per cent of collective agreements are single-establishment in scope.³ So decentralized a structure suggests a chaotic process of wage determination: a system "too fragmented to be efficient", in the opinion of some.⁴ Yet, what the process lacks in formal structure is made up for, in part, by pattern bargaining. In many industries, pattern setting and following bring order to a highly fragmented structure. Rather than several hundred, independent bargains, certain "key settlements" form the basis for agreements throughout an industry.

The disparity between bargaining structure and bargaining practice is attributable, in some measure, to the law. Woods thought it "not unreasonable to assume that [bargaining] units are smaller than they would have been, that they tend to be confined more to the single plant, and that probably more experiments with regional, company-wide, and even industry-wide bargaining involving multi-employer units would have occurred, in the absence of the bias of the law."⁵ The bias results, firstly, from the preference of labour boards for certifying unions on a single-establishment basis. In most jurisdictions, an establishment is considered a natural bargaining constituency.⁶ Newly certified unions are small, consequently, averaging fewer than forty persons in Ontario.⁷

Multi-employer certification, possible in Ontario under the 1948 statute, has been precluded since 1950.⁸ And single-employer, multi-establishment units, though legally possible, are rare: the "single-employer, single-location, single-plant unit is the cornerstone of the OLRB's policy."⁹ Multi-establishment units are created only when the Labour Relations Board is convinced that employees at two (or more) locations have a day-to-day working relationship. But, generally, this is not the case. In one case, a union's request for a multi-establishment certificate was turned down because even though the workers at all

3 See R.J. Davies, "The Structure of Collective Bargaining in Canada," in W.C. Riddell, ed., *Canadian Labour Relations* (Toronto: University of Toronto Press, 1986) at 212-214, citing data for collective agreements covering 200 or more workers in 1982.

4 *Ibid.*, at 211.

5 H.D. Woods, *Labour Policy in Canada*, Second Edition (Toronto: Macmillan of Canada, 1973) at 362.

6 G.W. Adams, *Canadian Labour Law* (Aurora: Canada Law Book Inc., 1985) at 322-31. British Columbia is an important exception.

7 Ontario Labour Relations Board, *Annual Report, 1986-86* (Toronto: The Board, 1987) at 100.

8 J. Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworths, 1973) at 60.

9 A. Bromke, *The Labour Relations Board in Ontario* (Montreal: McGill University Industrial Relations Centre, 1961) at 80.

three (close) establishments had similar skills, performed similar work, were paid similar wages, and laboured under similar conditions, their community of interest was judged to be "more local": the absence of transfers between sites meant that employees would "not see work at the other plants as part of any promotional opportunity and may well feel threatened by anything more than plant-wide collective agreement administration."¹⁰

Retailing was one notable exception to this policy. Because terms and conditions of employment were often standardized across a chain of stores, the Board felt that one bargaining unit covering all the locations in the municipality would serve the interests of employees and employers alike.¹¹ More recently, however, the realities of organizing in the tertiary sector have caused the Board to conclude that multi-establishment units are an obstacle to organizing. In the retail, finance, and food service industries, therefore, single-establishment certificates are now common.¹²

The bias towards decentralized bargaining units results, as well, from the fragmentation of responsibility for labour law and policy even among eleven jurisdictions. Thus, negotiating units¹³ which span more than one province are "extra-legal", to use Craig's¹⁴ terminology, and beyond the capability of any one labour relations board to create (or defend). The evolution of centralized structures is further obstructed by provincial control over conciliation, still compulsory before a strike or lock-out under most labour codes in Canada.¹⁵ And while this constraint can be circumvented by an agreement to permit one conciliation

10 *Magna International*, [1981] O.L.R.B. Rep. 1260 at 1264.

11 *Goodyear Service Stores* (1964), 65 C.L.L.C. 16,018.

12 Recognizing the right of self-determination as a primary theme of the *Labour Relations Act*, the Ontario Board now says it will "lean towards the bargaining structure which best facilitates organization" in industries where collective bargaining has not gained a foothold (*K Mart Canada Limited*, [1981] O.L.R.B. Rep. 1250 at 1258). However, in *National Trust* ([1986] O.L.R.B. Rep. 250), the union requested and was awarded a single bargaining unit combining several branches in Toronto. In addition to common terms and conditions of employment, the important ingredient in this case was a history of moving employees between branches.

13 A.R. Weber, "Stability and Change in the Structure of Collective Bargaining," in L. Ulman, ed., *Challenge to Collective Bargaining* (Englewood Cliffs, New Jersey, 1967) at 14. Weber distinguished among the election unit (in Canadian terminology, the appropriate bargaining unit) and the negotiating unit: the former is the unit for which a union is certified as the exclusive bargaining agent; the latter is the unit covered by a single collective agreement.

14 A.W.J. Craig, *The System of Industrial Relations in Canada* (Scarborough: Prentice-Hall Canada Inc., 1983) at 153.

15 A.W.J. Craig, *The System of Industrial Relations In Canada*, Second Edition (Scarborough: Prentice-Hall Canada, Inc., 1986) at 139.

board to draw in establishments in other jurisdictions,¹⁶ in general, "it is practically impossible for a union to strike several plants of one company at the same time because of the necessity for independent conciliation in each dispute situation. Each conflict is related to a particular bargaining unit and the legal bargaining unit is also the legal conciliation unit".¹⁷

The gap between the law and bargaining reality has been widened and hardened by the Ontario Labour Relations Board in its *Burns Meats*¹⁸ decision. For almost forty years, national bargaining had prevailed in the meat-packing industry, but in 1984 Burns refused to participate in centralized negotiations and demanded plant-by-plant bargaining. When the union resisted, the company laid a complaint of bargaining in bad faith. And the OLRB agreed.

II. NATIONAL BARGAINING IN THE MEAT-PACKING INDUSTRY

SINCE 1947, the largest meat-packing firms – Canada Packers, Burns and Swift Canadian¹⁹ – have bargained nationally. The practice was to meet the United Food and Commercial Workers²⁰ in Toronto, at the same hotel but at separate tables, for negotiations. Representing each of the firms were corporate executives, plant superintendents and personnel officers from each location, while the union's bargaining committees were composed of delegates from each plant, chaired by an officer of the International Union. The result was three, virtually identical, collective agreements.

On "policy" issues – wages, pensions, overtime and so on – the union presented the companies with common demands formulated at a national bargaining conference. And although negotiations were company by company, a common strategy allowed the union to coordinate its committees' responses to the employers' proposals. If agreement proved difficult, one of the firms was chosen as the "strike target" and all efforts to negotiate an agreement were concentrated there. But no settlement could be accepted unless it was recommended by the

16 E.E. Herman, *Determination of the Appropriate Bargaining Unit* (Ottawa: Canada Department of Labour, 1966) at 26.

17 H.D. Woods and S. Ostry, *Labour Policy and Labour Economics in Canada* (Toronto: Macmillan of Canada, 1962) at 501-02.

18 *Supra*, note 2.

19 More recently, Intercontinental Packers was also involved in centralized bargaining.

20 Meat-packing workers were represented by the Canadian Food and Allied Workers prior to 1979 when that union merged with the Retail Clerks International Union to create the U.F.C.W. Before the C.F.A.W was created, they were represented by the United Packinghouse Workers of America.

union's bargaining committee's collectively and ratified by the membership as a whole. To ensure that the decision to accept or reject reflected the wishes of the members across the country, the ballots cast at all locations were pooled. And once a settlement was reached, it set the standard for the industry. The pattern thus established was picked up by the other national firms more or less automatically, then extended to the largest of the regional packers without much controversy.²¹

But in 1984, the forty-year pattern was broken. Negotiations with Burns were combative even before their start. In his New Year's message, the company's president predicted that a strike would be "useless". "Attention is now on retaining jobs, not on retaining wage rates," he warned.²² Burns's managers refused to attend negotiations in Toronto²³ and demanded a 40 per cent reduction in the \$11.99 base wage.²⁴ Justifying its demand for plant-by-plant bargaining, Burns's president claimed, "Every one of our plants is losing money,"²⁵ but as the company was privately held no one knew for sure.

In June, the Calgary plant was struck and promptly closed. Six hundred workers lost their jobs and the union was forced to take the company to court for severance pay of more than \$2 million.²⁶ Strikes at Lethbridge, Brandon, Winnipeg and Kitchener soon followed. Though it was unprecedented for a major company to operate during a strike, Burns took out a full-page ad in the *Winnipeg Sun* announcing its intention to re-open, with non-union workers if necessary. Only the intervention of the provincial government prevented a confrontation on the picket line.²⁷

Predominant in the dispute was Burns's determination to avoid centralized bargaining. When the UFCW resisted the break-up of its national agreement, Burns alleged that the union's insistence on retaining national bargaining constituted bargaining in bad faith and the OLRB agreed.²⁸

21 Collective bargaining practices in the meat-packing industry prior to 1984 were kindly described by Mr. Vern Derraugh of the U.F.C.W when interviewed on February 14, 1986.

22 *The Globe & Mail*, 27 October 1984.

23 J. Robertson, "Packing Up Jobs in the Meat Industry" in *Our Times*, November, 1984 at 21.

24 *The Globe & Mail*, 7 September 1984.

25 *The Financial Post*, 23 June 1984.

26 *The Globe & Mail* 14 July 1984.

27 *The Globe & Mail* 25 July 1984.

28 Burns also complained to the Manitoba and Alberta Labour Relations Boards. In both cases, the union was found to have breached its obligation to bargain in good faith,

Inter-provincial bargaining structures have no legislative underpinning, the Ontario Labour Relations Board observed. Consequently, national bargaining in the meat-packing industry functioned "without any statutory foundation, or perhaps more aptly, in spite of there being no statutory foundation for it". Absent a foundation in law, the bargaining relationship operated on the strength of a voluntary agreement: "Now the employer is insisting on altering the relationship and the respondents are insisting on maintaining it."²⁹

Although there was some confusion over the scope of the collective agreement – the International Union on behalf of its local unions was named as a local party while the locals appeared to be recognized as the bargaining agents at the plant level³⁰ – the Board ruled that even if the International Union had been clearly designated as the bargaining agent for all of Burns's employees, its representation rights were circumscribed by the boundaries of the OLRB's jurisdiction, and given that Burns had only one plant in Ontario, the union's bargaining rights were limited to the plant in Kitchener; otherwise, the result would be an agreement that was beyond the Board's ability to enforce as binding on the parties concerned.³¹ By refusing to bargain except in the context of a national agreement, therefore, the union wrongly sought to bargain beyond the limits of its legally recognized bargaining rights: conduct inconsistent with the scheme of the *Labour Relations Act*.³² Although the demand itself was not unlawful – national bargaining could be "raised and discussed", the Board decided – it could not be legally pressed to impasse.³³ Bargaining on a national scale was possible only if both parties agreed "voluntarily".

The decision in the *Burns* case³⁴ was important, certainly, because it rendered unlawful the union's insistence on retaining a voluntarily created inter-provincial bargaining structure of long standing. Of even greater significance, however, is the effect of the ruling on the creation of multi-establishment bargaining structures on any scale. Because the scope of a collective agreement was explicitly tied to the scope of the bargaining unit established for organizational purposes, bargaining structure is virtually fixed by the Labour Relations Board on certification:

but on the narrower grounds that to adopt an unyielding position on any issue is a violation of the law.

²⁹ *Burns Meats, Ltd.*, *supra*, note 2 at 1054 [O.L.R.B. Rep.].

³⁰ *Ibid.*, at 1051-52.

³¹ *Ibid.*, at 1055.

³² R.S.O. 1980, c.228, *as amended*.

³³ *Supra*, note 2 at 1057 [O.L.R.B. Rep.].

³⁴ *Ibid.*

The scheme of the Act is that collective bargaining shall take place with respect to employees for whom a trade union has the exclusive representation rights in collective bargaining. In order to be in a position to bargain for employees, a trade union must hold bargaining rights under a collective agreement within the meaning of section 1(1)(c)³⁵ of the Act, a certificate issued to it under the Act or voluntary recognition as contemplated by the Act.³⁶

Whether by design or by oversight, the Ontario Board ruled that a union has no right that two or more groups for which it already holds bargaining rights be combined to form a single negotiating unit. The effect of the decision, therefore, is to prevent a union, on its own initiative, from building negotiating structures more broadly based than the small, fragmented groups for which it is certified. And the bar is absolute: it applies within firms as well as between firms – an interpretation of the *Labour Relations Act*³⁷ subsequently affirmed by the Board when it agreed that Eaton's was entirely within its rights to insist upon negotiating separate, yet similar, collective agreements for each of six, newly organized stores.³⁸

With respect, the law of *Burns Meats*³⁹ is suspect. The two purposes of a bargaining unit have been improperly melded; the bargaining unit *qua* organizing unit has been confused with the bargaining unit *qua* negotiating unit. While the Labour Relations Board is clearly empowered to determine the bargaining unit for which a union is certified as the exclusive bargaining agent, its authority to shape bargaining structure is doubtful. The function is "not to establish a final structure for collective bargaining but, instead, to act as a catalyst for collective bargaining by requiring the employer to negotiate with the union."⁴⁰ The unit for which a union is certified as bargaining unit is no more than the "critical starting point" for collective bargaining;⁴¹ "the basic building block from which more complex structures may be erected by the bargaining parties."⁴² The parties are "not obliged to incorporate into their collective agreement the bargaining unit contained in the certificate contained in the certificate granted by the Board but may amend, alter, extend or abridge the bargaining rights contained in the certificate, provided that in so doing they do not breach the duty to

35 Presumably, the Board meant to reference s. 1(1)(e) of the Act.

36 *Supra*, note 2 at 1057 [O.L.R.B. Rep.].

37 *Supra*, note 32.

38 *T. Eaton Company Limited*, [1985] O.L.R.B. Rep. 491 at 502.

39 *Supra*, note 2.

40 Herman, *supra*, note 16 at 42.

41 *Supra*, note 2 at 1055 [O.L.R.B. Rep.].

42 Herman, *supra*, note 16 at 55.

bargain in good faith or the duty of fair representation."⁴³ And once a collective agreement has been negotiated, the Board's "certificate has served its purpose and is, for all practical purposes, spent."⁴⁴ For this reason, the OLRB has refused to certify a union which already had bargaining rights by virtue of its collective agreement: a certificate would have added nothing to what the union already possessed.⁴⁵

When a union has been certified, the bargaining unit designated by the Labour Relations Board establishes the group of employees that a union represents and for which the employer is obliged to recognize and bargain with a union. As a result, an employer may not insist on altering the boundaries of a bargaining unit; indeed, if the extent of a union's bargaining rights remained a negotiable issue, certification would be a pointless procedure. And the proposition is reversible: unless an employer agrees to recognize a union voluntarily, it must obtain bargaining rights through certification. For this reason, it was unlawful for the Carpenters Union to strike in support of its demand to bring non-union workers at unorganized sites under an existing collective agreement. The extension of a union's bargaining rights beyond its certificates is not an issue that can be taken to impasse, the Board ruled:

Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, must be removed from the bargaining table once a strike or lock-out is imminent, or in progress. If such demands are not removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith.⁴⁶

*Burns Meats*⁴⁷ is a dubious corollary of this principle. But the reasoning is not convincing. In the *Carpenters*⁴⁸ case, the complaint was grounded in the illegality of winning bargaining rights by threat of strike, a method of organizing which, quite logically, is inconsistent

43 J. Sack and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice* (Toronto: Butterworths, 1985) at 147.

44 *Beverage Dispensers and Culinary Workers Union, Local 835, et al. v. Terra Nova Motor Inn Ltd.* (1975), [1975] 2 S.C.R. 749 at 753, 50 D.L.R. 253 at 255, [1975] 1 W.W.R. 647 at 649.

45 Sack and Mitchell, *supra*, note 43 at 280.

46 *United Brotherhood of Carpenters & Joiners of America*, [1978] O.L.R.B. Rep. 776 at 784.

47 *Supra*, note 2.

48 *Supra*, note 46.

with the scheme of the *Labour Relations Act*.⁴⁹ But to apply this principle to prohibit a union from seeking by threat of strike to amalgamate two or more bargaining units for which it already holds bargaining rights into a single structure for negotiating a collective agreement is not self-evidently contrary to the duty to bargain in good faith.

The decision in *Burns Meats*⁵⁰ is an unwarranted interference with the development of collective bargaining. The Board has isolated bargaining structure from the bargaining process and in so doing introduced the American concept of "permissive" subjects of bargaining which, until recently, has had no resonance in Canadian labour law. And the result, that the bargaining unit specified by the OLRB in its certification order is, by definition, the negotiating unit and can be amended only if the parties agree "voluntarily", imposes an artificial constraint on the freedom of labour and management to pursue their legitimate self-interest. Not only does this reasoning distort the meaning of voluntarism, which in the context of industrial relations implies nothing except that an arrangement adopted by the parties lacks the force of law, it ignores the fact that bargaining structure is intimately linked with bargaining power. What the Board has failed to consider is how broader negotiating units can evolve at all if employers have the right to refuse to bargain on a multi-establishment basis and it is in their economic interest to do so.

III. BARGAINING STRUCTURE AND BARGAINING POWER

DECENTRALIZED BARGAINING is a particularly weak structure for unions in multi-establishment firms that both results from and adds to a union's vulnerability in negotiations.⁵¹ Divide-and-rule tactics such as whipsawing are much more effective when applied against single establishment unions. When bargaining is plant-by-plant, employers can blunt the effect of a strike in any one location by continuing production in another. Thus, even when workers are divided by local or sectional interests, unions resist breaking broad-based bargaining structures and seek to respond to representational problems by introducing procedural reforms. Rarely do they accede "voluntarily to the fragmentation of existing bargaining structures into independent negotiating units...[because]...such a step generally means a sharp reduction in

49 *Supra*, note 32.

50 *Supra*, note 2.

51 D.H. Greenberg, "The Structure of Collective Bargaining and Some of Its Determinants," in *Proceedings of the 9th Annual Meeting of the Industrial Relations Research Association* (Madison: The Association, 1966) at 350.

[their] bargaining power within the firm or industry."⁵² When multi-plant negotiating units are dissolved, it is more likely a sign of union weakness than an attempt to accommodate local or sectional interests.

Although the link between bargaining structure and bargaining power is virtually unmistakable, it is frequently overlooked by the industrial relations community in Canada. Woods, for example, spoke of the "natural evolution" of bargaining structures and the "most logical unit", that is, the unit that would stabilize labour-management relations over the widest area and eliminate, for both parties, the "insecurities, uncertainties, and extra expense of small-scale bargaining."⁵³ Likewise, Herman thought that broader-based bargaining would be the inevitable response to workers' demands for greater job security in the face of technological change.⁵⁴ And a similar assumption caused the Canada Labour Relations Board to dismiss a union's request for a revised unit embracing a number of bank branches.⁵⁵ The application was unnecessary, the CLRB reasoned, because both parties had an interest in avoiding chaos and in negotiating common terms and conditions of employment: "It is common labour relations experience that bargaining parties, in their mutual interests, do develop a bargaining structure that minimizes the incidents of bargaining and meets their respective responsibilities". Nor was the Board moved by the fact that it was the union's failure to achieve this objective that motivated its application for consolidation.⁵⁶

By giving employers the right to veto the creation of more extensive negotiating units, that is, a bargaining structure more advantageous to workers than the small, fragmented units for which unions are certified, the Ontario Labour Relations Board has entrenched a structural imbalance of power between labour and management: this is the critical importance of the *Burns Meats*⁵⁷ decision. The Board's intervention in this case is yet another twist in a legal regime that already constrains the bargaining power of unions far more effectively than that of employers. When added to the restrictions imposed on strikes and picketing, and the virtually total prohibition against sympathetic action already well-established by the law, the Board's rigid attitude on bargaining structure simply compounds the likelihood that narrowly-

52 Weber, *supra*, note 13 at 33.

53 Woods, *supra*, note 5 at 363-4.

54 Herman, *supra*, note 16 at 44-5.

55 The Canada Board's approach to the problem of redefining the scope of bargaining units is discussed by J.E. Dorsey, *Canada Labour Relations Board: Federal Law and Practice* (Toronto: Carswell Company Limited, 1983) at 141-5.

56 *Canadian Imperial Bank of Commerce*, [1977] 2 C.L.R.B.R. 99 at 125.

57 *Supra*, note 2.

based unions will find themselves in an unequal struggle with powerful national or multinational corporations.